

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

*From July 1, 1956 to June 30, 1957*



COMMONWEALTH OF VIRGINIA  
Division of Purchase and Printing  
Richmond

1957



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## PERSONNEL OF THE OFFICE

(Postoffice Address, Richmond)

Name	City or County	Official Title
J. Lindsay Almond, Jr.	Roanoke City	Attorney General
D. Gardiner Tyler	Charles City County	Assistant
Kenneth C. Patty	Tazewell County	Assistant
Thomas M. Miller	Richmond City	Assistant
Francis C. Lee	Hanover County	Assistant
Clarence F. Hicks	Caroline County	Assistant
J. Eldred Hill, Jr.	Henry County	Assistant
Robert D. McIlwaine, III	Petersburg City	Assistant
John W. Knowles	Henrico County	Assistant
Reno S. Harp, III	Richmond City	Assistant
M. Ray Johnston	Richmond City	Special Assistant
Nerhea S. Evans	Charlotte County	Secretary
Louise W. Poore	Richmond City	Secretary
Eleanor W. Tilley	Smyth County	Secretary
Mabel G. Hurt	Tazewell County	Secretary
Madge V. Howell	Richmond City	Secretary
Agnes Reid Pickral	Pittsylvania County	Secretary
Margaret E. Bennett	Colonial Heights	File Clerk
Helen B. Bowles	Goochland County	Receptionist

## ATTORNEYS GENERAL OF VIRGINIA

From 1776 to 1957

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

*J. D. Hanks, Jr. ....	1918-1918
John R. Saunders .....	1918-1934
**Abram P. Staples .....	1934-1947
***Harvey B. Apperson .....	1947-1948
****J. Lindsay Almond, Jr. ....	1948-

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

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

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

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

### CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

1. *Dooley, James L. v. Commonwealth.* From Circuit Court of Caroline County. Constitutionality of Radar Speed Statute. Statute upheld in Supreme Court of Appeals of Virginia. Petition for appeal dismissed.
2. *Snider, Frank J. v. Commonwealth.* From Hustings Court of City of Roanoke. Statutory Rape. Write of error refused by Supreme Court of Appeals of Virginia. Petition for writ of certiorari denied, rehearing denied.

### CASES DECIDED IN THE SUPREME COURT OF APPEALS

1. *Allen, Charles v. Commonwealth.* From Corporation Court of the City of Lynchburg. Statutory burglary. Reversed and remanded.
2. *Almond v. Day.* Suit for Mandamus—Constitutionality of State Revenue Bond Act. Writ granted.
3. *Barker, Ralph and Herbert Garrett v. Commonwealth.* From the Circuit Court of Scott County. Rape. Reversed and dismissed.
4. *Boatright, Pat v. Commonwealth.* From Circuit Court of Wise County. Illegal sale of alcoholic beverages. Reversed and remanded for new trial.
5. *Caldwell, Frank Randolph, Jr. v. Commonwealth.* From the Corporation Court of the City of Norfolk, Part II. Violation of Virginia "hit and run" statute. Reversed.
6. *Catlett, Hampton v. Commonwealth.* From the Circuit Court of Fairfax County. Validity of *nunc pro tunc* order. Reversed.
7. *Council, Raymond Thomas v. Commonwealth.* From Circuit Court of Princess Anne County. *Nunc pro tunc* order. Affirmed.
8. *Dobie, Lloyd Junius, alias Lloyd James Fields, Lloyd Junius Fields, Lloyd James Doby and Dock Doby v. Commonwealth.* From the Circuit Court of Southampton County. Rape. Affirmed.
9. *Fout, William Ray, Jr., et al. v. Commonwealth.* From the Hustings Court of the City of Roanoke. Breaking and entering in the night time. Affirmed.
10. *Hall, Clarence Robert v. Commonwealth.* From the Hustings Court of the City of Roanoke. Breaking and entering in the night time. Reversed.
11. *Hardy, et al, composing the Virginia Alcoholic Beverage Control Board v. Chris Conavos.* From Circuit Court City of Richmond. Revocation of A.B.C. license. Dismissed as moot.
12. *Kiracofe, Gerald M. v. Commonwealth.* From the Circuit Court of Rockingham County. Rape. Affirmed.
13. *Lamb, C. H., Commissioner, etc., v. James Harris Butler.* From Hustings Court of the City of Richmond, Part II. Revocation of driver's license. Judgment of the trial court reversed; final judgment for the Commissioner.
14. *Lamb, C. H., Commissioner, etc., v. Clarence James Moxingo.* From Circuit Court of Westmoreland County. Suspension of driver's license. Judgment of the trial court reversed; Commissioner's action affirmed.
15. *Lamb, C. H., Commissioner, etc., v. Jack Rubin.* From Circuit Court of the City of Warwick. Suspension of driver's license. Judgment of the trial court reversed; action of the Commissioner sustained.
16. *Lamb, C. H., Commissioner, etc., v. Pierce Barnes Taylor, Jr.* From Circuit Court of Accomack County. Suspension of driver's license. Reversed the action of the Commissioner; sustained the finding of the lower court.
17. *Lebrick, Franklin v. Commonwealth.* From Corporation Court of the City of Lynchburg. Statutory burglary. Reversed and remanded.
18. *Moore, Clifford Lee v. Commonwealth.* Appeal from order of the State Corporation Commission. Certificate of convenience and necessity as a household goods carrier. Appeal dismissed.

19. *Parr, Robert S. v. Commonwealth*. From the Hustings Court of the City of Richmond. Aiding and abetting in the operation of a disorderly house. Affirmed.
20. *Rich, James E., Jr., v. Commonwealth*. From the Circuit Court of the City of Warwick. Violation of Section 18-329, Code of Virginia, prohibiting working or transacting certain business on Sunday. Reversed.
21. *Rothfuss, Charles A. v. Commonwealth*. From Circuit Court of Page County. Perjury. Reversed.
22. *Royals, Clyde R. v. Commonwealth of Virginia*. Two cases—one from Circuit Court of Halifax County and one from Circuit Court of Mecklenburg County. Sufficiency of evidence under radar speed statute. Both reversed and remanded.
23. *Smyth, W. Frank, Jr., Superintendent of the Virginia State Penitentiary, v. James Raymond Holland*. From the Hustings Court of the City of Richmond, Part II. Validity of previously completely served sentence and crediting such time served upon the present service for another entirely separate conviction, the validity of which is not questioned. Reversed.

### CASES PENDING IN THE SUPREME COURT OF APPEALS

1. *Allstate Insurance Co. v. Commonwealth*. From State Corporation Commission. Application for deviation of rates for automobile insurance.
2. *Bissell, Faith v. Commonwealth*. From Circuit Court of Arlington County. Constitutionality of statute requiring segregation at public assemblages.
3. *Carter, James v. Commonwealth*. From Circuit Court of Buckingham County. Breaking and entering.
4. *Childs, Tony v. Commonwealth*. From the Circuit Court of Brunswick County. Constitutionality of statute regulating picketing.
5. *Dougherty, E. R. Jr. v. Commonwealth*. From the Circuit Court of Brunswick County. Constitutionality of statute regulating picketing.
6. *Hardy, et al., Members of the Virginia Alcoholic Beverage Control Board v. Kocen*. From Circuit Court of City of Richmond. Denial of A.B.C. license. Dismissed as moot. Petition for rehearing filed by defendant in error.
7. *Kuckenbecker, James Wilson v. Commonwealth*. From Circuit Court of Princess Anne County. Voluntary manslaughter.
8. *Lamb, C. H., Commissioner, etc., v. Michael Banyer Clark*. From Corporation Court of the City of Alexandria. Appeal from Commissioner's action in suspending driver's license.
9. *McDaniel, Ralph Walter, et al., etc. v. Commonwealth*. From the State Corporation Commission. Transfer of household goods carrier certificate of convenience and necessity.
10. *Prillaman, Tillman Laurean v. Commonwealth of Virginia*. From Circuit Court of Henry County. Driving after license was suspended in violation of Section 46-347.2.
11. *Railway Express Agency v. Commonwealth*. From the State Corporation Commission. Constitutionality of franchise tax.
12. *Rogers Jewelry Corp. and Edward Einhorn, individually and trading as Rogers Jewelry Company v. Unemployment Compensation Commission of Virginia*. From Chancery Court of the City of Richmond. Liability status of employees under the U. C. C. Act.
13. *Safeway Stores v. State Milk Commission et al.* From Circuit Court of City of Richmond. Validity of a price-fixing order.
14. *Service Storage and Transfer Co. v. Commonwealth of Virginia*. From State Corporation Commission. Prosecution for operation as a common carrier by motor vehicle in intrastate commerce without a certificate of public convenience and necessity.

15. *Simpson, Fred F. v. Commonwealth.* From Circuit Court of Montgomery County. Illegal sale of alcoholic beverages.
16. *Swift, Clyde v. Commonwealth.* From Circuit Court of Washington County. Illegal sale of alcoholic beverages.

CASES TRIED OR PENDING IN THE UNITED STATES  
CIRCUIT COURT OF APPEALS

1. *Allen, Doris Marie, et al. v. School Board of City of Charlottesville, et al.* Segregation in schools. Order for Plaintiff.
2. *The School Board of the City of Newport News, et al. v. Jerome A. Atkins, et al.* Segregation in schools. Order for Plaintiff. Appeal pending in Supreme Court of United States.
3. *The School Board of the City of Norfolk, et al. v. Leola Pearl Beckett, et al.* Segregation in schools. Order for Plaintiff. Appeal pending in Supreme Court of United States.
4. *Thompson, Clarissa S., et al., v. County School Board of Arlington County, Virginia, et al.* Segregation in schools. Order for Plaintiff.

CASES TRIED OR PENDING IN THE UNITED STATES  
DISTRICT COURTS

1. *Allen, Doris Marie, et al. v. School Board of City of Charlottesville, et al.* Segregation in schools. Order for Plaintiff.
2. *Allen, Eva, Ida Allen and Ulysses Allen, infants, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.* Segregation in schools. Order for Defendant.
3. *Bradley, C. C. (Dock) v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Petition for writ of habeas corpus. Pending.
4. *Commonwealth v. L. W. Stiff.* Overweight violation. Convicted.
5. *Johns, Raleigh v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Petition for writ of habeas corpus. Pending.
6. *King, Claude H. v. Palmer and the Virginia Polytechnic Institute.* Action for damages for negligent injury. Pending.
7. *N. A. A. C. P. v. J. Lindsay Almond, Jr., et al.* Constitutionality of racial activities, registration and offenses against justice statutes. Pending.
8. *N. A. A. C. P. Legal and Defense Fund v. J. Lindsay Almond, Jr. et al.* Constitutionality of racial activities, registration and offenses against justice statutes. Pending.
9. *Shaffer, J. C. v. J. A. Anderson, State Highway Commissioner.* Civil claim arising from auto collision. Pending.
10. *Snider, Frank J. v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Petition for writ of habeas corpus. Pending.
11. *The School Board of the City of Norfolk, et al. v. Leola Pearl Beckett, et al.* Segregation in schools. Order for Plaintiff.
12. *The School Board of the City of Newport News, et al. v. Jerome A. Atkins, et al.* Segregation in schools. Order for Plaintiff.
13. *Thompson, Clarissa S., et al. v. County School Board of Arlington County, Virginia, et al.* Segregation in schools. Order for plaintiff.

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

1. *Allman, R. v. J. A. Anderson, State Highway Commissioner,* Circuit Court City of Richmond. Breach of contract. Pending.
2. *American Radiator, etc. Corporation v. Commonwealth.* In the Circuit Court of the City of Richmond. Petition for the correction of erroneous tax assessment. Pending.

3. *Ashburn, W. R., Receiver v. Commonwealth.* In the Circuit Court of the City of Norfolk. Petition for correction of erroneous tax assessment. Petition denied.
4. *Berger, Phillip v. Commonwealth of Virginia.* In the Court of Law and Chancery of the City of Norfolk. Petition for correction of erroneous income tax assessment. Assessment corrected.
5. *Byrd, Duncan M., Commonwealth's Attorney v. Compensation Board.* Circuit Court of Bath County. Appeal for increase in salary. Increase granted.
6. *Captivators Progressive Club, Inc. v. Virginia Alcoholic Beverage Control Board.* In the Circuit Court of the City of Richmond. Revocation of A.B.C. license.
7. *City of Hampton v. J. A. Anderson, State Highway Commissioner.* Circuit Court City of Hampton. Petition for declaratory judgment. Dismissed.
8. *Cockes, E. O., Sheriff v. Compensation Board.* Circuit Court of Surry County. Appeal for increase in salary for deputy. Partial increase granted.
9. *Commonwealth v. McNeal Edwards.* Circuit Court of the City of Richmond. Injunction. Failure to comply with State Water Control Law. Injunction granted.
10. *Commonwealth v. Johnston Nursing Home.* Circuit Court of the City of Richmond. Injunction. Failure to comply with State Fire Laws. Pending.
11. *Commonwealth v. School Board of Tazewell County.* Circuit Court of the City of Richmond. Writ of mandamus. Failure to comply with State Water Control Law. Pending.
12. *Commonwealth of Virginia, ex rel., Department of Agriculture and Immigration v. Stratford Packing Co., et al.* Circuit Court of City of Richmond. Bill for injunction. Agreed dismissal.
13. *Commonwealth of Virginia v. Tate Lumber Company.* In the Circuit Court of the City of Richmond. Breach of contract. Judgment for the defendant.
14. *Commonwealth v. Town of Richlands.* Circuit Court of the City of Richmond. Writ of mandamus. Failure to comply with State Water Control Law. Pending.
15. *Commonwealth v. Virginia Dyeing Co.* Circuit Court of the City of Richmond. Injunction. Failure to comply with Water Control Law. Consent decree entered.
16. *Cuddy, C. E., Commonwealth's Attorney v. Compensation Board.* Hustings Court of the City of Roanoke. Appeal for increase in salary. Increase granted.
17. *Davis, Charles Jr., Executor v. Commonwealth.* Circuit Court of the City of Richmond. Petition for correction of erroneous assessment of inheritance taxes. Petition granted. Rehearing pending.
18. *Davis, Max v. Commonwealth.* Circuit Court of Loudoun County. Petition for correction of merchant's license tax. Petition granted.
19. *Ewell, Harvey B. and Margaret R. v. Virginia Alcoholic Beverage Control Board.* In the Circuit Court of the City of Richmond. Denial of transfer of A.B.C. license. Demurrer sustained. Dismissed.
20. *Ewing, A. H. & Sons, Inc. v. Virginia Military Institute.* For balance alleged to be due on contract to build Scott Hall. Compromised and settled.
21. *First and Merchants National Bank v. Kirsch et al.* In the Chancery Court of the City of Richmond. Suit for the construction of the provisions of will. Will provisions construed.
22. *First and Merchants National Bank, etc. v. C. H. Morrisett, State Tax Commissioner.* Circuit Court of the City of Richmond. Petition for declaratory judgment for certificate of no further inheritance taxes due. Compromised and settled.
23. *High's of Richmond, Inc. v. State Milk Commission et al.* Law and Equity Court of the City of Richmond. Petition for declaratory judgment. Pending.
24. *High's Dairy Products Corp. v. State Milk Commission.* Circuit Court of the City of Richmond. Contesting validity of two price fixing orders. Pending.

25. *Hoffman, Harry L. v. Commonwealth.* In the Circuit Court of the City of Norfolk. Petition for declaratory judgment construing auctioneer's license tax statutes. Statutes construed.
26. *Hogan, Mary C. et al. v. Commonwealth.* In the Circuit Court of the City of Norfolk. Petition for the correction of erroneous tax assessments. Petition denied.
27. *Holland, R. E. v. Commonwealth.* In the Circuit Court of the City of Richmond. Application for correction of erroneous tax assessments. Pending.
28. *Hudson, W. M. v. Commonwealth.* Hustings Court, Part II, City of Richmond. Petition for correction of tax assessment. Assessment paid.
29. *Jester, Royston, III., Commonwealth's Attorney v. Compensation Board.* Corporation Court of the City of Lynchburg. Appeal for increase in salary. Partial increase granted.
30. *Koenig, Raymond A. v. Board of County Supervisors of Fairfax County.* In the Circuit Court of Fairfax County. Unauthorized practice of engineering. Pending.
31. *Kriete, Blanche M. v. Commonwealth.* In the Circuit Court of Essex County. Petition for correction of erroneous assessment of inheritance taxes. Petition denied.
32. *M. C. L. Corporation v. State Milk Commission.* Circuit Court of City of Richmond. Validity of the Charlottesville market order. Pending.
33. *Moore, Clyde L. v. Virginia Alcoholic Beverage Control Board.* In the Circuit Court of the City of Richmond. Suspension of A.B.C. license.
34. *Mustard, George N. v. Compensation Board.* Circuit Court of Tazewell County. Appeal for increase in salary. Partial increase granted.
35. *Richardson, Richard C., Commonwealth's Attorney v. Compensation Board.* Circuit Court of New Kent County. Appeal for increase in salary. Partial increase granted.
36. *Scott, W. W., et al. v. J. A. Anderson, State Highway Commissioner.* Circuit Court of Appomattox County. Petition to set aside abandonment of road. Dismissed.
37. *Sydnor, Charles W. v. Commonwealth.* In the Hustings Court of the City of Richmond, Part II. Application for correction of erroneous tax assessments. Pending.
38. *Tankard Nurseries v. Commonwealth.* In the Circuit Court of Northampton County, Virginia. Petition for correction of erroneous assessment of taxes on capital. Assessment corrected.
39. *Thompson's Dairy, Inc. v. Commonwealth.* Circuit Court of Arlington County. Petition for correction of erroneous assessment of peddler's license taxes. Dismissed.
40. *Thompson, E. A., Sheriff v. Compensation Board.* Circuit Court of Alleghany County. Appeal for increase in salary for deputies. Partial increase granted.
41. *Tribby, J. Derry, Executor and Trustee, Edward E. Nichols, Jr., Adm. c. t. a. of the Estate of Clifton Moore Warner, Deceased v. Mary Lois Broadbuss et als.* In the Circuit Court of Loudoun County. Creation of a charitable trust. Pending.
42. *Virginia Real Estate Commission of the Commonwealth of Virginia v. Leonard D. Hall, Jr., T/A Peoples Realty Company.* In the Circuit Court of the City of Richmond. Right to use subpoena *duces tecum* for investigative purposes. Pending.
43. *Winstead, Edgar L., City Sergeant v. Compensation Board.* Hustings Court of the City of Roanoke. Appeal for increase in salary. Increase granted.
44. *Yancey, J. P. v. Commonwealth.* In the Circuit Court for the City of Warwick. Petition for relief of erroneous tax assessments. Dismissed agreed.

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

1. *Adams, Clarence, et al v. Unemployment Compensation Commission of Virginia and Wise Coal and Coke Company.* Circuit Court of Wise County. Pending.
2. *Carpenter, Patsy R. v. Unemployment Compensation Commission of Virginia and Shenandoah Valley Apple, Cider & Vinegar Corporation.* Corporation Court of the City of Winchester. Pending.
3. *Coffelt, Helen L. v. Unemployment Compensation Commission of Virginia and Shenandoah Valley Apple, Cider & Vinegar Corporation.* Corporation Court of the City of Winchester. Pending.
4. *Cox, Glenn C., et als v. Unemployment Compensation Commission of Virginia and Banner Fuel Corporation.* Circuit Court of Wise County. Pending.
5. *Everly, Zela V. v. Unemployment Compensation Commission of Virginia and The Zeropack Company.* Corporation Court of the City of Winchester. Pending.
6. *Grapes, Edgar B. v. Unemployment Compensation Commission of Virginia and E. W. Barr Packing Shed.* Circuit Court of Frederick County. Pending.
7. *Jenkins, Silas, et al v. Unemployment Compensation Commission of Virginia and Norton Coal Company.* Circuit Court of Wise County. Pending.
8. *Jones, Isabelle J. v. Unemployment Compensation Commission of Virginia and Shenandoah Valley Apple, Cider & Vinegar Corporation.* Corporation Court of the City of Winchester. Pending.
9. *McAlexander, Nora v. Unemployment Compensation Commission of Virginia and The Zeropack Company.* Corporation Court of the City of Winchester. Pending.
10. *Martin, Everett J. v. Unemployment Compensation Commission of Virginia and William S. Newbill Roofing Company.* Hustings Court of the City of Portsmouth. Pending.
11. *Phum, Emma M. v. Unemployment Compensation Commission of Virginia and H. F. Byrd, Incorporated.* Circuit Court of Clarke County. Pending.
12. *Racey, Lucy T. v. Unemployment Compensation Commission of Virginia and National Fruit Product Company, Incorporated.* Corporation Court of the City of Winchester. Pending.
13. *Rogers Jewelry Corporation and Edward Einhorn, individually and trading as Rogers Jewelry Company v. Unemployment Compensation Commission of Virginia.* Chancery Court of the City of Richmond. In favor of the Commission.
14. *Sams, Earl K., et al v. Unemployment Compensation Commission of Virginia and Wise Coal and Coke Company.* Circuit Court of Wise County. Pending.
15. *Shade, Vivian L. v. Unemployment Compensation Commission of Virginia and Shenandoah Valley Apple, Cider & Vinegar Corporation.* Corporation Court of the City of Winchester. Pending.
16. *Unemployment Compensation Commission of Virginia v. James A. Bane, and 74 other similar suits.* Circuit Court of the City of Richmond. Pending.

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

1. *Auto Fleet Leasing v. C. H. Lamb, Commissioner, etc.* Declaratory judgment proceeding to construe Sections 46-154 and 46-155, licensing of U-Drive It vehicles. Judgment for the Commissioner.



2. *Barnes, Lindsay Robertson v. C. H. Lamb, Commissioner, etc.* Corporation Court of the City of Charlottesville. Appeal under Section 46-424, suspension of driver's license. Pending.
3. *Bingham Truck Service v. C. H. Lamb, Commissioner, etc.* Hustings Court, City of Richmond, Part II. Declaratory judgment proceeding to determine whether license under Section 46-168 is valid. Pending.
4. *Butler, Jacob v. C. H. Lamb, Commissioner, etc.* Circuit Court of Southampton County. Suspension of driver's license. Pending.
5. *Deale, William Henry v. C. H. Lamb, Commissioner, etc.* Southampton County Court. Suspension of driver's license. License restored.
6. *DeLevay, J. L. v. C. H. Lamb, Commissioner, etc.* Circuit Court of Spotsylvania County. Suspension of driver's license (Section 46-436.) Affirmed.
7. *Dawson, Willie Erastus v. C. H. Lamb, Commissioner, etc.* Circuit Court of Caroline County. Suspension of driver's license (Section 46-436). Pending.
8. *Eaton, William Alpheus v. C. H. Lamb, Commissioner, etc.* Circuit Court of the City of Richmond. Appeal from suspension of driver's license under Section 46-424. Action of the Commissioner sustained.
9. *Giles, Donald Lee v. C. H. Lamb, Commissioner, etc.* Circuit Court of Pulaski County. Revocation of driver's license (Section 46-420). Appeal withdrawn.
10. *Hewitt, A. Diggs, trading as Town & Country Motors v. C. H. Lamb, Commissioner, etc.* Circuit Court of the City of Norfolk. Action of Commissioner denying dealer's license under Section 46-522 affirmed.
11. *Johnson, Otis Lee v. C. H. Lamb, Commissioner, etc.* Circuit Court of Pittsylvania County. Suspension of driver's license (Section 46-357). Action of the Commissioner denying license sustained.
12. *Lewis, Julius Berul v. C. H. Lamb, Commissioner, etc.* Hustings Court of the City of Richmond, Part II. Proceeding to enjoin the Commissioner from revoking driver's license. Judgment for the Commissioner.
13. *Mills, James Edward v. C. H. Lamb, Commissioner, etc.* Hustings Court of the City of Roanoke. Suspending driver's license. License restored.
14. *Morris, James Howard v. C. H. Lamb, Commissioner, etc.* Hustings Court of the City of Richmond, Part II. Proceeding to enjoin the Commissioner from revoking driver's license. Judgment for the Commissioner.
15. *Ricks, Willie Henry v. C. H. Lamb, Commissioner, etc.* Circuit Court of Southampton County. Appeal from the action of the Commissioner in denying license (Section 46-360). Judgment for the Commissioner.
16. *Rozell, Gwendolyn Ann v. C. H. Lamb, Commissioner, etc.* Circuit Court of Caroline County. Suspension of license due to accident. Pending.
17. *Schloss, Bernard v. C. H. Lamb, Commissioner, etc.* Corporation Court of the City of Norfolk, Part I. Suspension of driver's license under Section 46-420. Action of the Commissioner affirmed.
18. *Seamon, Dominic Anthony v. C. H. Lamb, Commissioner, etc.* Circuit Court of Fairfax County. Suspension of license due to accident (Section 46-436). Action of the Commissioner affirmed.
19. *Stallings, Paul Lee v. C. H. Lamb, Commissioner, etc.* Corporation Court of the City of Norfolk. Suspension of license under Section 46-420. Action of the Commissioner affirmed.
20. *Stokes, Levi L. and Gladys L., v. Joan Hutchins, Elizabeth A. McAlpine and M. A. Owens and the Commissioner of the Division of Motor Vehicles.* Circuit Court of the City of Portsmouth. Suit to have judgment declared invalid and enjoin the Commissioner from acting under Section 46-428. Suit dismissed.
21. *Watkins, Edward Woodford v. C. H. Lamb, Commissioner, etc.* Circuit Court of Roanoke County. Appeal under Section 46-424 from action of Commissioner under Section 46-420. Appeal withdrawn.
22. *Whitman, John Edward v. C. H. Lamb, Commissioner, etc.* Circuit Court of Alleghany County. Revocation of license under Section 46-454. Pending.

### CASES TRIED OR PENDING BEFORE THE INDUSTRIAL COMMISSION OF VIRGINIA

*Maddox, Elizabeth P. v. Medical College of Virginia.* Petition for award from Industrial Commission. Petition denied.

### HABEAS CORPUS CASES

1. *Bryant, Royal v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Circuit Court of Culpeper County. Petition denied and case dismissed.
2. *Carson, Paul Alfred v. W. Frank Smyth, Jr., Supt. etc.* Circuit Court of Buckingham County. Petition denied and case dismissed.
3. *Holland, Beecher K. v. W. Frank Smyth, Jr., Supt. etc.* Circuit Court of Nansemond County. Pending.
4. *Lee, Earl v. W. Frank Smyth, Jr., Supt. etc.* Circuit Court of Goochland County. Petition denied and case dismissed.
5. *Newsom, Stuart W. v. W. Frank Smyth, Jr., Supt. etc.* Hustings Court City of Richmond, Part II. Petition dismissed and writ discharged.
6. *Owens, James C. v. W. Frank Smyth, Jr. etc.* Circuit Court of Accomack County. Petition dismissed and writ discharged.
7. *Reese, Thomas v. W. Frank Smyth, Jr., Supt. etc.* Circuit Court of Nansemond County. Pending.
8. *Robinson, Glenn L. v. W. Frank Smyth, Jr., etc.* Hustings Court of City of Richmond, Part II. Pending.

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

1956

July	27	James Russell
Aug.	2	Robert Burroway
Aug.	6	Guy Shufford
Aug.	7	Claude H. Blessard
Aug.	14	Jake Galloway
Sept.	5	Edward Brown
Sept.	6	Howard H. Russell
Sept	21	Milton G. Hurd
Oct.	2	Lewis L. Brautigan
Oct.	10	Jack Frost
Nov.	15	Edwin H. Brown
Dec.	13	Franklin Dillard Lewis

1957

Jan.	4	Hardy Alton Waddell
Jan.	4	James Whelchel
Jan.	4	Hardy Alton Waddell, Bobby Waddell, Judy Powell Waddell and Merle Lee Foster
Jan.	7	William Peterson
Jan.	11	Louis Smith
Jan.	14	Junius Franklin Dorsett
Jan.	16	Franklin Dillard Lewis
Jan.	24	William R. Bell

Feb.	14	Charles Dansler Herndon
March	5	Wilson Atwell
March	11	Russell R. Cooper
April	5	Leonard Nathan Hamrick
April	16	Jimmie Peters
April	17	Thomas Edward Alcox
April	17	Charles B. Hewitt
April	26	Harvey King, Albert Rollins and Dempsey Roy
May	2	Robert Junia Meeks
May	10	Willard Riggs
May	24	Lawrence Summers
June	24	Anthony Crish
June	27	Henderson Neeley



# OPINIONS

## **ADOPTIONS—Proceedings are a Chancery matter. (330)**

May 21, 1957.

HONORABLE M. H. TURNBULL, *Clerk*  
Circuit Court of Brunswick County

This is in reply to your letter of May 18, 1957, which reads as follows:

"There is some question in my mind whether or not Adoption Proceedings should be recorded in Chancery Order Book or Common Law Order Book. I have read 17-28 of 1950 Code of Virginia and am still unable to determine where Adoption Proceedings should go."

Sections 63-348 and 63-348.1 of the Code, as amended, prescribed that proceedings for adoption shall be instituted only by petition to a court of record having chancery jurisdiction. Therefore, it would seem that since this is a chancery proceeding, the order with respect thereto should be entered in the chancery order book.

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## **AGRICULTURE—Apple Commission—Tax Voluntarily Paid under Mistake of Law May Not be Refunded. (349)**

June 5, 1957.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of June 4, 1957, to which is attached a letter to you from John F. Watson which reads as follows:

"The firm of H. W. Butler & Bro., Inc. of Winchester, Virginia has provided The Virginia State Apple Commission with revised records of their apple packs in the years of 1955 and 1954 showing that they reported and paid the apple excise tax on apples grown in West Virginia in these years when the tax was not due on apples grown outside of Virginia even though they were packed in Virginia. This firm states that they were unaware that apples produced outside of Virginia and packed in Virginia were exempt from the tax.

"The Apple Commission is satisfied that the tax was not due and requested its Secretary to clear with you the legality of The Commission giving this firm a credit for \$564.30 to apply on future tax obligations."

You request my opinion as to whether the Apple Commission may credit H. W. Butler & Bro., Incorporated, with the amount of the alleged erroneous payment to apply on future tax obligations.

The tax in question was paid pursuant to the provisions of Article 2, Chapter 20 of Title 3 of the Virginia Code. It is provided by these provisions that the excise tax levied under Code § 3-517 "shall be paid to the Virginia State Apple Commission and by it promptly paid into the State Treasury to the credit of the Apple Merchandising Fund." The Apple Merchandising Fund is established by Code § 3-522.

Item 269 of the Appropriation Act contains an appropriation from this fund for the expenses authorized by § 3-522 of the Code.

The sections of the Code pertaining to the Virginia State Apple Commission and to the excise taxes collected thereunder fail to contain any provisions au-

thorizing the refund of taxes erroneously paid or authorizing adjustments of overpayments by applying such overpayments as credits against future taxes. Item 269 of the Appropriation Act also fails to make provision for refund or adjustment. An adjustment such as suggested in Mr. Watson's letter would be tantamount to a refund. The adjustment would accomplish the same end as a cash refund.

It is not necessary here to review the various taxing provisions of the Code wherein refunds and adjustments may be made upon proper application, timely presented to the proper authority. Such procedures, however, are established as the law and the policy of the State with respect to relief from erroneous payments of taxes and, in my opinion, no refund or adjustment can be made with respect to taxes except pursuant to statutory authority.

While the tax in question was paid under a misapprehension of the law, it was nevertheless voluntarily paid. It is well settled that where a party, of his own motion, pays a tax, such payment is voluntary, even though it may later be determined that the tax was illegal.

Our Supreme Court in the case of *Commonwealth v. Ferries Co.* 120 Va. p. 187, at page 830, has stated:

"The general rule is well settled that taxes voluntarily paid cannot be recovered back in the absence of a statute providing for their repayment."

You have requested my advice as to a proper method whereby a correction could be effected. The only way a refund or adjustment can be made is by act of the General Assembly. Such an act, of course, would have to be general and not specifically for the benefit of the taxpayer in question.

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**AGRICULTURE—Commercial Feeds—Inspection Tax—Manufacturer or Distributor May Not Shift Statutory Duty to Some One Else by Agreement.  
F-5 (180)**

December 18, 1956.

HONORABLE RODNEY C. BERRY  
Director and State Chemist

This is in reply to your letter of December 17, 1956, in which you ask the following question:

"Can a manufacturer or distributor be relieved of the responsibility of paying inspection taxes imposed by Law, by another person agreeing to be responsible for such taxes?"

Inasmuch as Section 3-627 of the Code, as amended, places upon the manufacturer or distributor of commercial feeds the responsibility for filing tonnage reports and paying inspection taxes on commercial feed that he sells, offers for sale or distribution in this State, with the exception that the inspection tax does not apply to sales of commercial feeds to manufacturers, and provided that the commercial feed so sold is used solely in the manufacture of a registered feed or is sold outside this state, it would appear that the intent of the legislature is stated quite clearly. Where a tax liability is imposed under Section 3-627 on a particular person or class of persons I am of the opinion that there is no statutory method whereby such liability may be shifted to another party who promises to be responsible for the payment of such taxes.

The proposed regulation reads in part as follows:

"Exemption from inspection tax. To obtain exemption under Section 3-628 of the Law for Commercial Feeds sold between manufacturers and used principally in a registered commercial feed subject to Inspection Tax, or in feeds sold outside the State,\*\*\*"

The regulation uses the words "used principally in a registered commercial feed". Section 3-628 uses the words "is used *solely* in the manufacture of a commercial feed". The regulation would appear to be invalid inasmuch as the legislature has provided for a tax exemption only when the feed is used *solely* in a registered commercial feed or sold outside the State.

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**AGRICULTURE—Commercial Feeds—Inspection Tax—Primary Responsibility for Tax and Reports on Manufacturer or Distributor. F-5 (179)**

December 18, 1956.

HONORABLE RODNEY C. BERRY  
Director and State Chemist

This is in reply to your letter of December 17, 1956, in which you discuss certain sections of Chapter 23, Title 3 of the Code pertaining to stock and poultry feeds, and in particular those relating to the inspection tax upon commercial feeds provided for in §§ 3-627, 3-628 and 3-629. You have presented the following question:

"Are we correct in our interpretation that under the first four paragraphs of Section 3-627 the manufacturer or distributor is responsible for filing tonnage reports and paying inspection taxes on all commercial feed he sells, offers for sale, or distributes in this State and that the fifth paragraph of Section 3-627 does not transfer this responsibility to the person who distributes the commercial feed to the ultimate consumer?"

Section 3-627 when considered in its entirety and along with § 3-629 must, in my opinion, be construed as placing the primary responsibility upon a manufacturer or distributor, as the case may be, whose products are subject to inspection, of filing the reports and payment of the fees imposed by § 3-627. I do not construe the terminal paragraph of this section as releasing such manufacturer or distributor of this primary obligation. The responsibility of the person, firm or corporation who distributes commercial feed to the ultimate consumer is, in my judgment, secondary and only occurs whenever the manufacturer or initial distributor has evaded his responsibility and has failed to pay the inspection fee.

Section 3-629 clearly relieves the seller to the ultimate consumer of any obligation with respect to the inspection tax in all cases where the manufacturer or distributor has complied with his obligations. The limited scope of the exemption created by this section manifestly demonstrates that the primary liability for the payment of the inspection tax falls upon the manufacturer or the distributor.

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**AGRICULTURE—Department of—Animal Remedies Law—No Provision as to Service of Process. F-5 (43)**

August 7, 1956.

MR. RODNEY C. BERRY  
Director and State Chemist  
Department of Agriculture and Immigration

This is in response to your letter of August 3, 1956, which reads in part as follows:

"The Virginia Fertilizer Law, Section 3-117. 8(g), The Virginia Canned Animal Food Law, Section 3-689.13(a) and The Virginia Commercial Feed Law, Section 3-621.1 all of the Code of Virginia require

non-resident persons desiring to distribute within Virginia any product covered by the above laws to file a written Power of Attorney designating the Secretary of the Commonwealth or a Resident Agent, as the agent of such non-resident person, upon whom service of process might be had, etc.

"Two non-resident manufacturers who plan to distribute commercial feed in Virginia after January 1, 1957, and who will be required to comply with the non-resident agent's Section of the Virginia Commercial Feed Law also plan to distribute animal remedies and human foods. These products will be subject to regulatory control under Virginia Laws that do not require filing of non-resident agents and have raised a question which we are presenting for your opinion.

"Under these circumstances would the Secretary of the Commonwealth or a resident agent designated by non-resident commercial feed manufacturer be subject to the service of process under the Virginia Animal Remedies Law, Virginia Food Laws or other laws which do not include a section requiring the filing of a resident agent?"

The Legislature has determined that parties operating under the Commercial Feed Law should be subject to service of process as set forth therein. Moreover, similar service of process requirements have not been placed in the Animal Remedies Act, Section 3-461.1 et seq., or other laws mentioned. Accordingly, I am of the opinion that parties distributing animal remedies are not subject to the service of process in the manner and under the requirements as contained in the Commercial Feed law for matters arising under the Animal Remedies Law, although the same party also happens to be carrying on business and subject to service of process under the Commercial Feed Law.

However, attention is directed to the fact that non-resident corporations doing business in the State of Virginia are subject to the service of process requirements set forth in the applicable sections of Virginia law, including Sections 8-60, 13-211 and 13-214.

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**AGRICULTURE—Department of—County Agents—Who Appoints—Supervisors and Extension Service Must Agree. F-155 (85)**

September 17, 1956.

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

This is in reply to your letter of September 6, 1956, in which you request my opinion as to how agricultural agents and assistant agricultural agents are appointed under the Board of Supervisors form of county government.

Section 3-40 of the Code of Virginia provides that:

"It shall be the duty of the Virginia Polytechnic Institute, in co-operation with the United States Department of Agriculture, to exercise great care in the selection of demonstrators or county agents qualified to do the work, and to supervise their work and see that it is properly done through the State and district agents, and the demonstrators or county agents may be authorized and required to assist farmers in every possible way by teaching and demonstrating to them improved agricultural methods, and advising them on agricultural methods, and all under such rules and regulations as may be adopted by the Virginia Polytechnic Institute in its co-operative relation to the United States Department of Agriculture."

Although it appears that such appointments are made by the Agricultural Extension Service of the Virginia Polytechnic Institute, I am informed that, if



the Board of Supervisors has objections to their recommendations, then they will not place such person in the county as an agricultural agent. I am also informed that, if the Director of Extension feels that some person recommended by the Board is not qualified or does not meet the specifications, he will not approve such person for the position of agricultural agent.

With respect to your question as to who has the final decision in the employment of such personnel, it would seem that the Agricultural Extension Service of V.P.I. and the Board of Supervisors of the County must be in agreement before a person can be employed. Either the Board or the Extension Service has the power to refuse to employ the type of personnel mentioned in the above quoted section of the Code.

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**AGRICULTURE—Department of—Feed Inspection—Regulation Concerning Tax Exemptions, Valid. F-5 (91)**

September 19, 1956.

HONORABLE RODNEY C. BERRY  
Director and State Chemist

This will acknowledge receipt of your letter of September 18, 1956, in which you request an opinion as to the legality of proposed Regulation 17 to be promulgated under the authority of Section 3-626 of the Code of Virginia (1950) as amended.

Proposed Regulation 17 reads as follows:

“Exemption from inspection tax.—To obtain exemption under Section 3-628 of the law for commercial feeds sold between manufacturers and used solely in the manufacture of a registered commercial feed subject to inspection tax, acceptable legal proof that such was the case shall be presented by the seller at the time the tonnage report is filled, accompanied by request for appropriate exemption from payment of inspection tax. An affidavit from the buyer will be acceptable. This affidavit shall include a statement of the name and address of the supplier, the name of each component commercial feed, the quantity in each shipment received, invoice dates, and quantity used in the previous quarter in the manufacture of registered commercial feeds subject to inspection tax. Even though exemption is claimed, the entire tonnage report must be made.”

You state that the purpose of this Regulation is “ \*\*\* to provide the legal mechanics for the inspection tax exemption of a commercial feed which enters as a component into a commercial feed which is registered, on which tonnage reports are made, and on which inspection tax is paid.”

I am of the opinion that this proposed Regulation 17 is within the scope of the Commissioner's power to adopt rules and standards as set out by Section 3-626. I am unable to find any part of the Regulation inconsistent with provisions of the Code relative to the inspection tax exemption of commercial feeds.

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**AGRICULTURE—Department of—Milk and Cream Law—No Requirements as to Milk Shakes. F-23 (36)**

August 2, 1956.

HONORABLE JOSEPH E. BLACKBURN  
Member House of Delegates

This is in reply to your letter of July 24, 1956, which reads as follows:

“I would like to have your opinion on a question which arises under Sections 3-451.1—3-451.17 of the Code of Virginia as amended by the 1956 General Assembly.

"A local dairy combines milk, milk solids, milk fat, flavoring, sweetening and possibly other ingredients and puts this mixture in containers and delivers it to a local restaurant.

"The operator of the restaurant pours this prepared mix into a machine which is so designed that a person can, by turning a lever, dispense a preparation closely resembling a 'milk shake'. This preparation is stirred and semi-frozen in the machine and sold as a 'milk shake'. To me a milk shake is a mixture of milk and ice cream which is richer, of course, in butterfat content than milk, but has less butterfat content than ice cream as defined by the Statute.

"In the case at hand, the prepared mix has a butterfat content of 8%.

"At no time does the restaurant operator advertise or sell this product as ice cream, milk sherbet, French ice cream, frozen custard, French custard ice cream, ice milk, sherbet, water ice, frozen sherbet confections or frozen ice confections. He does intend to sell this 'milk shake' under the name of 'Frosty'.

"Assuming that the dairy preparing the mix complies with Sections 3-451.14, etc., and labels the container holding the prepared mix in such manner that there can be no question about the ingredients therein and that the prepared mix when served to the customer is not adulterated or misbranded, can the restaurant operator be prohibited from selling the same to the public?"

With respect to the specific question propounded in the last paragraph of your letter, no definition of "milk shake" is contained in Article 6 of Chapter 17, Title 3, of the Code. Therefore, I am of the opinion that, in so far as the provisions of this article alone are applicable, a restaurant operator may not be prohibited from selling to the public prepared mixes that in all respects meet the requirements of said article.

In the preparation of milk shakes in the manner set forth in the third paragraph of your letter, the operator of the restaurant is, of course, subject to the provisions of Chapter 3, Title 35, of the Code, relating to sanitary conditions.

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**AGRICULTURE—Department of—Requirements for Nonresident Fertilizer and Feed Manufacturers to Appoint Virginia Agent. F-5 (33)**

July 30, 1956.

HONORABLE RODNEY C. BERRY, *Director*  
Division of Chemistry and Foods  
Department of Agriculture and Immigration

This is in reply to your letter of July 24, 1956, which reads as follows:

"The Virginia Fertilizer Law, Section 3-117.8(g) of the Code of Virginia, requires any nonresident person desiring to distribute within Virginia any commercial fertilizer in packages of only twenty-five pounds or less, or any soil amendment, to file a written power of attorney designating the Secretary of the Commonwealth or a resident agent as the agent of such nonresident upon whom service of process may be had in the event of any suit or action against such nonresident person; and such power of attorney shall be so prepared and in such form as to render effective the jurisdiction of the courts of Virginia over such nonresident person and make such person amenable to the jurisdiction of the courts of this State.

"The Virginia Canned Animal Food Law, Section 3-689.13(a) of the Code of Virginia, requires a similar power of attorney to be filed by any nonresident person desiring to distribute within Virginia any canned animal food.

"The Virginia Commercial Feed Law, Section 3-621.1 of the Code of Virginia, requires a similar power of attorney to be filed by any nonresident person desiring to distribute within Virginia any commercial feed.

"It is our understanding that other sections of the Code of Virginia require certain corporations to file a power of attorney designating a resident agent.

"Our questions are four-fold:

"1. (a) If a corporation has filed as mentioned in the paragraph immediately above, is it necessary for it to file again under any or all of the three laws cited above?

(b) Assuming that it is necessary to file again, would the corporation desiring to operate under all three laws cited have to file three times, or would one filing under any one of the three laws suffice?

"2. Assuming a person has not filed and wishes to operate under all three laws cited above, would it be necessary to file three times, once under each law, or would one filing under any one of the three laws suffice?

"3. What sections of the Code of Virginia of 1950 assures a corporation, which has filed, that it will be notified of process served on its resident agent? (Did the Acts of Assembly of 1956 change provisions covering notice of service?)

"4. What sections of the Code of Virginia of 1950 assures a non-corporate person, who has filed, that he will be notified of process served on his resident agent? (Did the Acts of Assembly of 1956 change provisions covering notice of service?)"

I shall reply to your questions in the order stated:

1. (a) In my opinion, no additional filing is necessary.

(b) See answer to (a).

2. One filing, in my judgment, would be sufficient.

3. Sections 13-215, 13-216 and 13-217.

The laws relating to corporations were amended at the 1956 session of the General Assembly. The new Act is designated as Title 13.1 of the Code and becomes effective January 1, 1957. This new Title should be examined at that time in order to comply with any changes that may have been made.

4. I have discussed this matter with the Secretary of the Commonwealth and she states that she will handle process served on individuals in the manner provided where service is made on a foreign corporation.

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**AGRICULTURE—Fertilizer—Distributor May Mix Two or More as it is Being Spread For Farmer. F-5 (162)**

November 23, 1956.

HONORABLE RODNEY C. BERRY

State Chemist

Department of Agriculture and Immigration

This is in reply to your letter of November 13, 1956, in which you request my opinion as to whether or not a Virginia fertilizer manufacturer and distributor may operate a new type of fertilizer spreader truck under the provision of Chapter 8.1 of Title 3 of the Code of Virginia. The method of operation briefly is as follows:

A farmer would order two or more unmixed plant food materials; these materials would be sold to the farmer and delivered to the farmer at his

premises by the fertilizer manufacturer; the farmer would then request the fertilizer manufacturer to spread these materials on his farm, which the manufacturer would do through the use of this special spreader truck for a certain fee per acre. This spreader truck is constructed so that as many as three different types of plant food or fertilizer may be transported separately at one time and then mixed while spreading so that all of the types being transported may be spread simultaneously.

I am of the opinion that, if the fertilizer manufacturer complies with § 3-117.4 of the Code, and has each one of the types of plant food or fertilizer separated and labeled separately at the time it reaches the premises of the farmer and bills the farmer for each type of fertilizer separately, then there is nothing to prohibit either the farmer from mixing the fertilizer before or at the time he spreads it, nor is there anything to prohibit the farmer from contracting with someone else to mix and spread the fertilizer after it has reached his premises.

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**AGRICULTURE—Fertilizer—Inspection Fees—Application for Refund Must be Made Within Ninety Days. F-5 (154)**

November 14, 1956.

HONORABLE RODNEY C. BERRY  
State Chemist

This is in reply to your letter of November 13, 1956, in which you request my opinion as to whether or not your office may issue or refuse to issue a requested refund of overpayment of fertilizer inspection fees by Merck & Company, Incorporated. These fees were paid to the State under the provisions of § 3-117.8 of the Code of Virginia. Section 3-117.28 of the Code provides as follows:

“Any person feeling himself aggrieved by any action of the Commissioner under the provisions of this chapter shall have the right within ninety days from the rendition of the decision of the Commissioner to appeal therefrom to the circuit or corporation court of the county or city in which the person resides.”

In view of the above-quoted provisions of the Code, I am of the opinion that any request for a refund would have to be initiated within ninety days from the time the Commissioner issued a receipt acknowledging the payment of the fertilizer inspection fees. Since the fees for which Merck & Company is requesting a refund were paid over ninety days ago, I am of the opinion that you cannot make any refund and that there is no avenue of redress open to Merck & Company, Incorporated.

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**AGRICULTURE—Milk and Cream Act—Milk Brought From Out of State and Sold to U. S. Government Installations When Act Applicable. F-23 (189)**

January 3, 1957.

DR. W. L. BENDIX  
State Veterinarian

This is in response to your recent letter pertaining to the importation of out of State milk for processing and sale to United States Government installations in the State of Virginia. You further state that the milk does not qualify under Section 3-398, Code of Virginia, requiring that the source of the milk be inspected.

You further state that the Department of Agriculture has taken the position that milk sold directly by out of State distributors to the United States installations in Virginia does not fall within the jurisdiction of the Virginia Milk and Cream Act. This office concurs in the position of the Department that such milk moving in interstate commerce from out of State distributors to Federal installations in Virginia does not come within the jurisdiction of the Virginia Milk and Cream Act.

You further state that Virginia distributors, in order to bid on government contracts, economically would have to secure such cheaper milk from out of State sources which have not qualified under Section 3-398, which requires such sources to meet approved standards. It is further stated that the Department has not declared an emergency to exist under Section 3-400.12. This office is in agreement with your view that milk imported from out of State sources by Virginia distributors for processing and sale in Virginia must qualify under Section 3-398, Code of Virginia. This appears all the more reasonable because you advise that in the continuing processing operation out of State Milk might be mixed to some extent with milk purchased from Virginia sources and processed at the same plant. In other words, there would be the possibility that some milk supply from out of State sources which have not met the requirements under the Virginia Act would be bottled and sold to Virginia citizens.

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**AIRPORTS—Joint Commission—No Obligation on Future Boards of Supervisors to Appropriate Funds For. F-49 (255)**

March 7, 1957.

HONORABLE FELIX E. EDMUNDS  
Member House of Delegates

This will reply to your letter of February 21, 1957, in which you inquire whether or not there could be any future liability, by assessment or otherwise, upon any one of the political subdivisions constituting the Shenandoah Valley Joint Airport Commission for the establishment, maintenance and operation of an airport pursuant to the provisions of Chapter 628 of the Acts of Assembly of 1956, and Title 5, Chapter 3, Article 2, of the Code of Virginia (1950).

Chapter 628 of the Acts of Assembly of 1956 constitutes the Shenandoah Valley Joint Airport Commission, established under the provisions of Title 5, Chapter 3, Article 2, of the Virginia Code, a political subdivision of the counties of Augusta and Rockingham and the cities of Harrisonburg and Staunton, and authorizes the Commission to exercise the power of eminent domain with respect to all property deemed necessary for the establishment, use, operation and maintenance of an airport. Generally speaking, Title 5, Chapter 3, Article 2, of the Virginia Code authorizes the various localities of the Commonwealth, or any two or more thereof jointly, to establish, maintain and operate airports. Pertinent to the question presented in your communication is Section 5-35 of the Virginia Code, which prescribes:

"The expenses of such construction, improvement, equipment, maintenance and operation shall be a charge upon such political subdivision, as the case may be, *subject to all applicable constitutional provisions.*"  
(Italics supplied).

To the extent that the above quoted statute applies to counties of the Commonwealth and purports to create a charge upon such counties, it must be read in connection with the provisions of Section 115a of the Virginia Constitution which, in part, prescribes:

"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 collection of the revenue of the said county, board or district for the then current year, or to redeem a previous liability, unless in the general law authorizing the same provision be made for the submission to the qualified voters of the proper county or district, for approval or rejection, by a majority vote of the qualified voters voting in an election, on the question of contracting such debt; and such approval shall be prerequisite to contracting such debt. \* \* \*

In *American-LaFrance v. Arlington County*, 164 Va. 1, the Supreme Court of Appeals of Virginia had occasion to interpret the provisions of this Constitutional prohibition and apply them to a situation involving the validity of a contract entered into by Arlington County for the purchase of fire fighting equipment, the deferred portion of the purchase price of such equipment being evidenced by notes payable to the seller one, two and three years from date. Holding that the contract and notes in question were void and that the seller could not recover thereon or upon an implied contract, the Court, commenting upon the provisions of Section 115a of the Virginia Constitution, observed:

"Both the Constitution and statutory law of this Commonwealth prohibit any and all boards of supervisors from incurring any debt for any purpose which is not payable out of current revenue, unless the question of the proposed expenditure is submitted to the qualified voters for their approval. The intent of the Constitution is unmistakable.

\* \* \* \*

"An approval by a majority of the citizens voting on the question properly submitted to them, is a prerequisite to the power of the board of supervisors to create an obligation for any purpose, payable at some future time beyond the termination of the current fiscal year. In no other way, directly or indirectly, can the board bind the county on any such obligation."

In light of the foregoing, I am of the opinion that any obligation of the Shenandoah Valley Joint Airport Commission which is not created in anticipation of the collection of the revenue of a county for the current year would be void, unless approved by a vote of the people as prescribed in Section 115a of the Virginia Constitution. True it is that Section 5-35 of the Virginia Code does not purport to authorize counties to contract any indebtedness; however, counties are authorized to incur expenses for the purpose of establishing, maintaining and operating airports (Section 5-29 et seq.) and Section 5-35 makes such expenses a charge upon the counties. The combined operation of these statutes would have the effect of authorizing the counties to contract an indebtedness not in anticipation of current revenues and without a vote of the people, were it not for the terminal phrase of Section 5-35. When this phrase is given effect by invocation of the limitations of Section 115a of the Constitution, I believe it is manifest that counties may not be obligated for the expenses of airport construction or maintenance beyond anticipated current revenues, without a vote of the people. In this connection, I think it not without significance that Section 5-33 of the Virginia Code makes provision for the issuance of bonds, following an election, should any county wish to incur long range indebtedness in connection with the acquisition of airports or landing fields.

I do not have available the terms upon which the several localities agree to participate in the project, but, as pointed out, the financial responsibility of each county is limited by its commitments as made from year to year in anticipation of the current revenue. While Section 115a is not applicable to the two cities participating in the project, I am inclined to the view that, since this is a bilateral undertaking between the cities and counties, the proportionate share of each unit

would be limited to the same extent unless by positive, affirmative action the cities would make commitments of a unilateral nature. I presume that the four localities involved will consider the budget requirements of the Commission on a fiscal year basis, and that the counties and cities will clearly state in any resolution relative to the adoption of the budget that such budget constitutes a limitation upon the obligations being incurred.

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**AIRPORTS—Joint Commission—Non Member City May Contribute to—  
Without Future Obligations. (235A)**

February 18, 1957.

HONORABLE FELIX E. EDMUNDS  
Member House of Delegates

This is in reply to your letter of February 14, 1957, which reads as follows:

"By Act of the 1956 regular Session of the General Assembly, Shenandoah Valley Joint Airport Commission was created, consisting of the Counties of Augusta and Rockingham and the Cities of Harrisonburg and Staunton. This Commission proceeded to raise certain funds for the purpose of constructing and operating an airport and while the City of Waynesboro is not a part of the Commission it has considered making a certain contribution to the Commission for purposes of establishing and operating the airport.

"The question has been raised and I desire to have the benefit of your opinion as to whether there would be any liability on the City of Waynesboro for any additional sums of money for operation and maintenance of the airport, either under the Act approved March 31, 1956, as Chapter 628 or under the general provisions of law as set forth in Title 5 of the Code of Virginia."

The counties of Rockingham and Augusta and the cities of Harrisonburg and Staunton under the procedure set out in Article 2, Chapter 3, Title 5 of the Code established the Shenandoah Valley Joint Airport Commission. Subsequently, by Chapter 628, Acts of 1956, the General Assembly created a political subdivision of the Commission as then constituted. I do not feel that the City of Waynesboro may now utilize the provisions of Article 2, Chapter 3, Title 5 of the Code as a means of becoming a member of the Commission, thus becoming a part of the political subdivision, unless Chapter 628, Acts of 1956, is amended so as to include the City of Waynesboro. This chapter appears to limit the scope of the general statutes in this instance.

If the City of Waynesboro should make a contribution to the airport project it would, I think, be in the nature of a donation and not because of any obligations incurred under Article 2, Chapter 3 of Title 5. In the absence of any valid contract between the City and the Commission whereby future liability would be assumed by the City, the mere making of a voluntary contribution would not, in my opinion, be sufficient to incur the liability contemplated by § 5-35 of the Code.

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**AIRPORTS—Woodrum Field—Sheriff and Medical Examiner of County  
Have Jurisdiction Over. F-136 (288)**

April 4, 1957.

HONORABLE H. W. CLARKE, *Sheriff*  
Roanoke County

This is in reply to your letter of April 1, 1957, in which you request my opinion as to whether or not the Sheriff's Office of the County of Roanoke

has police and investigative jurisdiction over Woodrum Field, the municipal airport of the City of Roanoke, which airport is located in Roanoke County.

I am of the opinion that your office does have jurisdiction over matters occurring at this airport, and I am also of the opinion that the Medical Examiner for the County of Roanoke has jurisdiction and authority over deaths occurring at the airport.

### ALCOHOLIC BEVERAGE CONTROL LAWS – Confiscation – Legal Whiskey Being Illegally Sold. (338)

May 24, 1957.

HONORABLE L. MELVIN GILES

Commonwealth's Attorney for Pittsylvania County

Receipt is acknowledged of your letter of May 20, 1957 in which you request an opinion on the following hypothetical set of facts:

"A, an undercover agent for the A. B. C. Board goes to the home of B and purchases a pint of ABC whiskey, paying B for the same. A then goes to a Justice of the Peace, swears out a criminal warrant charging B with the illegal sale and at the same time a search warrant is issued for a search of the residence of B.

"The local sheriff then goes to the residence of B to execute the criminal warrant and make the search. He finds in the residence of B, fifty pints of ABC whiskey all legally purchased. B is convicted of the sale. Are the fifty pints of legal whiskey discovered in the search subject to forfeiture as contraband under the A. B. C. Act?"

In my opinion whether the fifty pints of legal whiskey discovered in the search are contraband and therefore subject to forfeiture is a question of fact to be determined in each case. Section 4-53 of the Code of Virginia reads in pertinent part:

"All stills and distilling apparatus and materials for the manufacture of the same, *and all alcoholic beverages* and materials used in the manufacture thereof, and all containers in which alcoholic beverages may be found, which are kept, stored, possessed, or in any manner used in violation of the provisions of this chapter, shall be deemed contraband and shall be forfeited to the Commonwealth.

"Proceedings for the confiscation of the above property shall be in accordance with § 4-55 for all such property except motor vehicles."  
\* \* \*. [Italics supplied]

The question to be determined in each case is whether the beverages, having been legally acquired, are being "kept, stored, possessed, or in any manner used in violation of the provisions of [the A. B. C. Act]". For instance, if the officer making the "buy" should see the seller withdraw a bottle from a closet wherein the fifty pints are found during the search, such observation would certainly tend to show that the remaining fifty pints were being kept and intended to be used in violation of the prohibition against sale of such beverages contained in § 4-58 of the Code.

Again, a comparison of the A. B. C. Board stamp or receipt on the bottle which is purchased by the agent with the stamps or receipts on the bottles seized under the search warrant could provide such circumstantial evidence. The managers of the various A. B. C. stores should be qualified to interpret the code imprinted on the stamps and could testify as to whether the bottle sold was part of a multiple purchase and give further information pertaining to the date and place of the purchase and identify the clerk who actually made the sale in the store.



In other words, if the proof be that the entire quantity seized is but one lot of whiskey intended to be used and being used in violation of the A. B. C. Act, then the entire quantity seized would be subject to confiscation.

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**ALCOHOLIC BEVERAGE CONTROL LAWS—Distribution of Funds to Localities—Based on Preceding Decennial U. S. Census, Only. F-210 (282)**

March 25, 1957.

HONORABLE KOSSEN GREGORY  
Member House of Delegates

This is in reply to your letter of March 21, 1957, in which you quote from a letter to you written by Mr. Davis H. Elliott, President of the Roanoke Chamber of Commerce. Mr. Elliott refers to the statute relating to the distribution of A. B. C. profits to the various localities and presents the following question:

“The purpose of this letter is to request from you a ruling on whether or not any additional ABC funds might be distributed to the City of Roanoke if its population should be shown to be substantially increased over that reported in the decennial U.S. Census of 1950 by reason of an official interim census conducted by the U.S. Census Bureau or whether the intent of the act is to recognize only the U.S. decennial census (next due to be taken in 1960) as a basis for distribution of funds from ABC profits to the several counties, cities and towns.”

Section 4-22 of the Code provides as follows:

“The net profits derived under the provisions of this chapter shall, after deducting therefrom such sums as may be allowed the Board by the Governor for the creation of a reserve fund not exceeding the sum of one million dollars in connection with the administration of this chapter and to provide for the depreciation on the buildings, plant and equipment owned, held or operated by the Board, be transferred by the Comptroller to the general fund of the State treasury quarterly, within fifty days after the close of each quarter. When such moneys so transferred by the Comptroller to the general fund of the State treasury shall during any fiscal year exceed the sum of seven hundred and fifty thousand dollars, two-thirds of all moneys in excess of seven hundred and fifty thousand dollars so transferred and so paid into the general fund of the State treasury during such fiscal year shall be apportioned and distributed by the Treasurer of Virginia, upon warrants of the Comptroller, to the several counties, cities and towns of the Commonwealth, on the basis of the population of the respective counties, cities and towns, according to the last preceding United States census, for which purpose such portion of the moneys is hereby appropriated. If the population of any city or town shall have been increased through the annexation of any territory since the last preceding United States census, such increase shall, for the purpose of this chapter, be added to the population of such city or town as shown by the last preceding United States census and a proper reduction made in the population of the county or counties from which the annexed territory was acquired. The judge of the circuit court of the county in which the town or greater part thereof seeking an increase under the provisions of this chapter is located is hereby authorized and empowered to appoint two disinterested persons as commissioners, who shall proceed to determine the population of the territory annexed to the town as of the date of the last preceding United States census, and report their

findings to the court, and future distributions of the moneys allocated under the provisions of this chapter shall be made in accordance therewith.

"The term 'net profits' as used in this section shall mean the total of all moneys collected by the Board less all costs, expenses and charges authorized by § 4-23, other than capital expenditures for buildings, plants and equipment."

I am of the opinion that the phrase "last preceding United States census" refers to the regular United States census taken pursuant to the provisions of Section 2, Article I of the Constitution of the United States and the applicable statutes under which an enumeration of the population is made every ten years. The last regular census was made in 1950.

Section 4-22 of the Code contains only one exception, and under it provision is made to give credit during the ten-year interim for the population increase caused by annexation to any city or town, with a corresponding reduction of the population of the county affected by the annexation.

In the absence of an express statutory provision authorizing readjustments of allocations based on an interim census, I am of the opinion that such readjustment is not permitted.

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#### **ALCOHOLIC BEVERAGE CONTROL LAWS—Interdiction—Conviction of Possession Under § 4-61 of Code is Grounds For. F-210 (135)**

October 24, 1956.

HONORABLE A. L. PHILPOTT  
Commonwealth's Attorney for Henry County

You have asked the question whether a conviction of possession of alcoholic beverages under § 4-61 of the Code of Virginia is a conviction for "illegal possession" of alcoholic beverages within the provisions of § 4-52.

The present § 4-61 was originally enacted as § 41½ of the Alcoholic Beverage Control Act in Chapter 234, Acts of Assembly of 1936, approved March 23, 1936. In its original form the words "operating under a restaurant license as provided in the Tax Code of Virginia" were used where the statute now reads "of a restaurant, soda fountain or other place where food or refreshments of any kind are furnished for compensation", but the effect of the most recent amendment has been merely to broaden the field and to make the statute applicable to places which sell food or refreshments, but do not have a restaurant license.

Section 4-52 was enacted as § 35-a of the Alcoholic Beverage Control Act in almost exactly its present language as Chapter 177, Acts of Assembly of 1938, approved March 17, 1938. The only subsequent change in the language of § 4-52(a) has been the insertion therein of the words "or maintaining a common nuisance as defined in § 4-81" by the General Assembly in 1954.

It appears clear that at the time of the enactment of § 35-a, [present § 4-52] the General Assembly was aware of the provisions of the entire Alcoholic Beverage Control Act including § 41½ [present § 4-61] and that its use of the language "illegal possession" must necessarily be presumed to include not only possession of alcoholic beverages illegally acquired, but also any possession of alcoholic beverages which was forbidden by the terms of the Alcoholic Beverage Control Act at the time of the adoption of § 35-a.

It is my opinion, therefore, that a conviction of illegal possession under § 4-61 would be sufficient ground for the court, or the judge thereof, or the trial judge trying the case, to enter under the provisions of § 4-52(a), an order of interdiction against the person so convicted.

**ALCOHOLIC BEVERAGE CONTROL LAWS—Nuisance—House Where Large Quantity of Illegal Whiskey is Stored Constitutes. F-210 (140)**

October 29, 1956.

HONORABLE J. WILTON HOPE, JR.

Commonwealth's Attorney for the City of Hampton

This is to acknowledge receipt of your letter of October 24, 1956, in which you requested an opinion from this office as to whether § 4-81 of the Code of Virginia makes the habitual storage of illegal whiskey a nuisance.

You stated the situation as follows:

"A situation exists in this City in which there is a great amount of storage of illegal untaxed whiskey on certain premises. The same premises and persons have been caught at least three to four times in the last year and have been charged and convicted with possession of large quantities of illegal whiskey, in violation of Section 4-75 of the Code. It is the contention of this office that this is a violation of Section 4-81, maintaining a common nuisance in violation of the A. B. C. Act, which reads as follows:

"All houses . . . where alcoholic beverages are manufactured, stored, sold, dispensed, or given away contrary to law by any scheme whatever shall be deemed a common nuisance. . . ."

Of course, in considering your question §§ 4-81 and 4-82 of the Code must be read together in order to present the full picture of the remedies available to the Commonwealth.

In my opinion, the plain language of § 4-81 definitely makes the storage of illegal whiskey a common nuisance and renders the premises on which such illegal alcoholic beverages are stored or kept subject to injunction in accordance with § 4-82. The injunction authorized under § 4-82 is manifestly intended to be preventive rather than merely punitive [*McCarron v. Commonwealth*, 169 Va. 387, 395, 193 S.E. 509], for to allow the keeping or storing of illegal whiskey in any house or on any premises would certainly afford persons engaged in traffic in illegal alcoholic beverages a refuge from which to operate without fear of legal action until a sale is made.

Further, § 4-81 provides for padlocking, as contrasted with the injunction allowed under § 4-82, in the following language:

"\* \* \* and, in addition, after due notice and opportunity to be heard on the part of any owner or lessor not involved in the original offense, by a proceeding analogous to that provided in § 4-56 and upon proof of guilty knowledge, judgment may be given that such house, building, tent, boathouse, car or other place, or any room or part thereof, be closed up, \* \* \*".

I concur with your statement that there are no reported cases in Virginia expressly deciding that the "habitual storing of untaxed whiskey" is a nuisance, but I feel that the language of the statute does not indicate any possible interpretation contrary to the ordinary signification of the words used. You might consider the *McCarron* case, *supra*; *Pardue v. Commonwealth*, 183 Va. 277, 280, 32 S. E. 2d. 77; *Nicholas v. Commonwealth*, 186 Va. 315, 42 S. E. 2d. 306; and *Crowe v. Commonwealth*, 193 Va. 752, 71 S. E. 2d. 77, which cases throw some light on the amount of proof necessary under §§ 4-81 and 4-82.

**ALCOHOLIC BEVERAGE CONTROL LAWS—Search Warrant For Automobile Not Necessary Where Operator Willingly Discloses Liquor. F-210-a (102)**

October 2, 1956.

HONORABLE W. B. F. COLE  
Commonwealth's Attorney  
Fredericksburg, Virginia

This is in reply to your letter of September 25, in which you state that a certain automobile was seized while 80 pints of whiskey, purchased from the local A. B. C. store, were being transported therein.

The circumstances of the seizure as set out by you are as follows:

"A uniformed policeman, driving a police patrol car, received information that alcoholic beverages, purchased in quantities of one gallon each from the local A. B. C. store, were being loaded into a Plymouth automobile. Arriving as the Plymouth was being driven away from the vicinity of the store, the officer followed for some distance.

"The officer stopped the Plymouth and requested its driver, who also proved to be the owner, to open the trunk of the Plymouth, which the driver-owner willingly did. Eighty pints of 'legal' whiskey, so purchased from the A. B. C. store, were found in the trunk of the Plymouth automobile.

"The driver-owner was arrested and the Plymouth and the whiskey aforesaid were seized. No search warrant was ever obtained or issued."

As you have stated, the sections of the Code particularly involved are §§ 4-56, 4-53 and 4-55. Section 4-56 covers the case of the automobile, while § 4-56(k), § 4-53 and § 4-55 are applicable to the 80 pints of whiskey.

It is my opinion that the answers to both of your questions should be in the affirmative. I enclose a copy of an opinion given to the Honorable B. D. Peachy, under date of December 27, 1948, which may be found in the *Report of the Attorney General* for the years 1948-49, on page 134, covering the principal point in question as to the necessity for a search warrant. In particular, you will note that the principle is enunciated that no search warrant is necessary where there is no need for a search. Under the facts which you have stated it is apparent that the owner-driver of the vehicle willingly revealed the actual presence of the 80 pints and the officer was not required to do anything further in order to observe the whiskey. You might say that the owner-driver by his actions waived any right he might have against the search and seizure. See 79 C.J.S. §§ 62-68 and 112. The only *caveat* would be whether he was under sufficient compulsion or intimidation to offset the waiver. This is a question of fact to be determined by the Court.

For your information you might examine the opinion found in the *Report of the Attorney General*, 1948-49, at page 3, which discusses the purpose of the forfeiture statute, and you might likewise consider the following opinions which have some bearing on the point:

*Report of the Attorney General*, 1950-51, page 265, 267

*Report of the Attorney General*, 1949-50, page 3

I think that you would be justified in taking the position that the automobile and the whiskey in question are legally subject to confiscation and in bringing proceedings to effect the same. To require that a search warrant be first obtained when no actual search is necessary to reveal that a crime is being committed would be contrary to the general principles of law involved here.

The only case discovered in which the matter of the validity of confiscation where no search warrant had been obtained is *Ives v. Commonwealth*, 182 Va.

17, and you will note that although the lack of a warrant was considered by the trial court, the matter was dropped on appeal and not raised before the Supreme Court of Appeals, despite the fact that it had been an assignment of error.

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**APPROPRIATIONS ACT—Board of Dental Examiners—Appropriation  
Contingent Upon Receipt of Fees. F-198 (94)**

September 21, 1956.

HONORABLE B. A. BRANN

Member, Virginia State Board of Dental Examiners

This is in reply to your letter of September 18, 1956, in which you request my opinion as to whether or not the State Board of Dental Examiners could receive an annual appropriation of \$12,000 regardless of the amount of fees paid into the State Treasury by the Board of Dental Examiners.

Section 54-165 of the Code of Virginia provides as follows:

"All funds accruing under this chapter shall be paid into the State treasury. The expenses of maintaining the Board shall be paid from the State treasury, upon voucher signed by the president and secretary-treasurer of the Board, when properly approved in conformity to law, out of funds accruing to the State Treasurer under the provisions of this chapter, or such funds as are available for the payment of such accounts. All funds in excess of twenty thousand dollars remaining at the end of each biennium after the payment of all expenses ordered to be paid under the provisions of this chapter shall revert to the general fund of the State treasury."

Item 230 of Chapter 716 of the Acts of Assembly of 1956, the current Appropriation Act, makes the following appropriation:

"Virginia State Board of Dental Examiners

"For regulating the practice of dentistry first year \$12,565

"Second year \$12,565

"It is hereby provided that the total expenditure made under the provisions hereof shall not exceed the total amount of revenue paid into the general fund of the State Treasury by the Virginia State Board of Dental Examiners during the biennium ending June 30, 1958."

As you can see from the above quoted provision, the Virginia State Board of Dental Examiners shall receive their annual appropriation of \$12,565 only so long as the revenue from fees collected and paid into the general fund equals at least that amount.

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**APPROPRIATIONS ACT—Items For Agencies to Construct Blanton Building—Parking Lot Purchased with, to be For Use of Contributing Agencies. F-189 (219)**

February 5, 1957.

HONORABLE W. MARSHALL KING, *Chairman*  
State Corporation Commission

I am in receipt of the Commission's letter of January 28, 1957, signed by the individual members of the Commission, in which my attention is called to the provisions of Section 6 of the Appropriation Act of 1956, which provisions were formerly embodied in Section 8 of the Appropriation Acts of 1952 and 1954, re-

lating to the raising of funds for the construction of the Blanton Building. As set out in the Appropriation Act of 1956 (Acts of Assembly (1956), Chapter 716, page 1178), Section 6 prescribes:

"The State departments and agencies in Richmond which pay rentals for office and storage space, whether or not in State-owned buildings, may elect, with the consent of the Governor, as a means of eliminating such rentals, to contribute to the construction or purchase of a building or buildings to be owned by the State in which they shall be provided office and storage space without rental except for services provided. Such departments and agencies as elect, with the consent of the Governor, to make such contributions shall transfer from appropriate surplus special fund accounts to a special account in the Governor's Office a sum equivalent to the prorata share of the cost of such building or buildings. The prorata share shall be based upon the estimated minimum gross space requirements as approved by the Governor; for purposes of initial transfers the figures of \$20.00 per gross square foot for office space and \$10.00 per gross square foot for storage space shall be used. Any sums so transferred to the special account herein described shall be used solely for the planning and constructing or purchasing of office and storage space and of auxiliary building requirements for the use of the departments and agencies contributing.

"As applied to the State Corporation Commission, this section shall be construed as follows: the special funds mentioned in Item 99 (valuation), Item 100 (aviation), Item 101 (highway maintenance and construction), Item 102 (banking) and Item 103-104 (insurance), including any balances in the funds concerned, may be used for the planning, construction and equipment of a building, or part of a building, for the State Corporation Commission. Exact proration of the square feet occupied by the various members of the staff of the Commission engaged in activities supported by said special funds shall not be required; and for the use of office or storage space in such building no rental shall be charged the State Corporation Commission or any bureau or division thereof except for services."

Pursuant to the above quoted authority, various sums were transferred to the "special account in the Governor's Office" by or on behalf of certain State agencies. Out of the fund thus established, two parking lots in the vicinity of the Blanton Building were purchased and improved, and you request my opinion upon the following questions relating thereto:

"1. Was the purchase and improvement of the two parking lots a legal expenditure for 'auxiliary building requirements for the use of the departments and agencies contributing'?"

"2. May the two parking lots be legally used for purposes other than the purposes specified in the statute, namely, 'for the use of the departments and agencies contributing'?"

"3. Is it within the authority conferred on the Director of the Budget by Sec. 2-75.1 of the Code to permit other agencies to use the two parking lots?"

Considering the Commission's inquiries in the order stated, I am first of the opinion that the purchase and improvement of the two parking lots was a legal expenditure for "auxiliary building requirements" for the use of the departments and agencies contributing to the fund in question. While the scope of the phrase quoted in the preceding sentence may vary with the context in which it is employed and the particular project to which it relates, I believe that, in the present setting, it may appropriately be construed to embrace parking facilities deemed by the State Office Building Commission to be reasonably necessary for the efficient use of the Blanton Building.

As the terminal sentence of the initial paragraph of Section 6 specifically prescribes that the sums transferred to the special account shall be used "solely for the planning and constructing or purchasing of office and storage space and of auxiliary building requirements for the use of the departments and agencies contributing", I am of the opinion that such sums may not be used for any other purposes. Your second question must, therefore, be answered in the negative.

With respect to the final question posed in your communication, the pertinent portion of Section 2-75.1 of the Virginia Code prescribes:

"The Director is authorized, by and with the approval of the Governor, to utilize any vacant property owned by the State and located near the Capitol Square for the purpose of providing parking facilities for officers and employees of the State, and to allocate spaces therein and operate the same under such rules and regulations as he may prescribe. In the event any attendant is employed to supervise such parking of vehicles in any such lot utilized for parking purposes, the salary of such attendant shall be paid by the State officers and employees using such lot for parking purposes under such rules and regulations as the Director may prescribe."

In the present instance, I am constrained to believe that the provisions of this general statute, relating to the utilization and regulation of parking facilities for officers and employees of the State, should be read in connection with the special provisions of Section 6 of the Appropriation Act, which prescribe that the funds established thereby shall be used solely for the constructing or purchasing of auxiliary building requirements "for the use of the departments and agencies contributing" to the fund. When thus construed, I believe that the general authority conferred upon the Director by Section 2-75.1 of the Code is circumscribed with respect to parking facilities purchased with funds created by the provisions of Section 6 of the Appropriation Act, which parking facilities constitute auxiliary building requirements for the use of the departments and agencies contributing funds for the construction of the Blanton Building. I am, therefore, of the opinion that the Director may not authorize non-contributing agencies to use the parking lots under consideration.

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**ARCHITECTS, ENGINEERS, SURVEYORS—County Surveyor—Not Required to be Licensed Surveyor, but Cannot Do Work for Public. F-195 (155)**

November 15, 1956.

HONORABLE MARTIN F. CLARK  
Commonwealth's Attorney  
Patrick County

This is in reply to your letter of November 12, 1956, in which you request my opinion as to whether or not the Board of Supervisors may appoint a person as County Surveyor if that person is not a certified surveyor under the laws of Virginia.

Section 54-37 of the Code of Virginia relating to the certification of land surveyors provides, in part, as follows:

"The following shall be exempted from the provisions of this chapter:

"(7) Practice of professional engineering, architecture of land surveying solely as an employee of this State or any political subdivision thereof; provided that such employees as furnish advisory service for compensation to the public in connection with engineering, architec-

tural or land surveying matters other than in connection with such employment shall not be exempt from the provisions of this chapter."

In view of the above quoted provision, I am of the opinion that the Board of Supervisors may appoint someone who is not a licensed surveyor as county surveyor, however, he would only be able to practice the profession of surveying for the county and could not make any surveys for the public.

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**ARCHITECTS, ENGINEERS, SURVEYORS—County Surveyor—Does Not Have to be Licensed Surveyor. (336)**

May 23, 1957.

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

I acknowledge receipt of your letter of May 22, 1957, in which you ask whether a county surveyor appointed under § 15-527 may carry on a private practice of land surveying without first having obtained a certificate as required by Chapter 3, Title 54 of the Code.

Under § 54-27 of the Code it is declared unlawful for any person to practice or offer to practice the profession of 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 land surveyor, unless such person has been registered and certified by the State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors, unless such person comes within one of the exemptions set out in § 54-37 of the Code. This section provides, in part, as follows:

"The following shall be exempted from the provisions of this chapter:

"(7) Practice of professional engineering, architecture or land surveying solely as an employee of this State or any political subdivision thereof; provided, that such employees as furnish advisory service for compensation to the public in connection with engineering, architectural or land surveying matters other than in connection with such employment shall not be exempt from the provisions of this chapter."

It will be noted that in order for a land surveyor to come within the exemption, he must be practicing solely as an employee of the State or a political subdivision of the State. I am of the opinion that the term "employee" as used in this exemption includes a county surveyor appointed under § 15-527 of the Code, and that the exemption would not apply to a county surveyor who practices his profession or holds himself out as available for anyone except the county.

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**ARCHITECTS, ENGINEERS, SURVEYORS—May Not Incorporate as Corporation—Can Not Practice a Profession. F-195 (220)**

February 5, 1957.

HONORABLE CHARLES R. FENWICK  
Member, Senate of Virginia

I acknowledge receipt of your letter of February 1, 1957, in which you ask whether a group of engineers licensed under Chapter 3, Title 54 of the Code may incorporate in the name of the "Doe Engineering Corporation."

In making research in connection with this matter, I found a decision of the



State Corporation Commission reported in 2 Virginia Law Register, New Series, at page 772, in which the Commission refused to grant a corporate charter to a group who had applied for a charter in the name of Richmond Title and Abstract Company, Incorporated, on the ground that the corporation would be engaged in the practice of law. In that case the Commission stated:

"A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it, any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it."

Engineering is a profession licensed only to individuals. Sections 54-27, 54-28 and 54-29 of the Code. In my opinion the same principal would be applicable in the case of engineers as in the case of lawyers, doctors and dentists.

I made inquiry of Judge Marshall King of the State Corporation Commission and he states that the Commission adheres to the doctrine set forth in the opinion published in the Virginia Law Register and that the Commission has refused on several occasions to grant charters to engineers who have sought to incorporate. If such a charter should be granted, it seems that the corporation would not have the power to enforce its contracts, since it would be impossible for such a corporation to obtain a license. See *Retholz v. Commonwealth*, 184 Va. 339; *Clark v. Moore*, 196 Va. 878, and *Massie v. Dudley*, 173 Va. 42.

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#### ATHLETIC COMMISSION—Licenses—Expire One Year After Issuance—No Proration. F-7 (103)

October 2, 1956.

HONORABLE D. ANDREW WELCH, *Chairman*  
Virginia Athletic Commission

This is in response to your letter of September 27, 1956, inquiring as follows:

"In issuing the licenses required by law to those affected by the statute regulating Boxing and Wrestling is the expiration date one year from date of issuance, end of calendar year or end of fiscal year (June 30)?

"Is there any provision for pro-ration?\*"

Section 9-38 provides as follows:

"The Commission is authorized to grant licenses upon application and the payment of the fees herein prescribed to matchmakers, managers, referees, examining physicians, boxers, and seconds and trainers, which licenses shall expire one year after the dates on which issued, respectively. The fees to be paid per annum shall be as follows: Matchmakers in cities with a population of over one hundred fifty thousand, fifty dollars; matchmakers in other counties, cities and towns, twenty-five dollars; managers, fifteen dollars; referees, fifteen dollars; examining physicians, ten dollars; boxers, ten dollars; seconds and trainers, ten dollars; wrestlers, ten dollars. The Commission may revoke any such license upon such cause as it shall deem sufficient."

It is noted that the foregoing section authorizes the granting of licenses upon application and payment of fees, "which licenses shall expire one year after the dates on which issued, respectively".

No time for application is specified and expiration is fixed as one year after the dates on which issued, respectively, thereby inferring various termination dates. Moreover, it is stated that the fees are to be paid annually with no provision made for proration. While administration might be facilitated by the use of a fiscal or calendar year for license expiration, it is my opinion that the

Legislature has set no fixed time for application and has authorized such licenses to run for a year from the date of issuance.

With regard to proration, there appearing to be no provision therefor, it is my opinion that there is to be no proration of license fees paid by applicants.

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**BAIL AND RECOGNIZANCE—Forfeiture—Commonwealth's Attorney should  
Not be Appointed Attorney in Fact to Confess Judgment on. F-69 (187)**

January 2, 1957.

HONORABLE EDW. H. RICHARDSON

Commonwealth's Attorney for Roanoke County

This is in response to your letter of December 28, 1956, inquiring whether or not a Commonwealth's Attorney may be appointed Attorney in Fact in a bail bond for the purpose of confessing judgment in event of default in the obligation of the bond, and if so, whether or not the notice required by Section 8-362 of the 1950 Code of Virginia may be waived by the principal and surety in a bail bond at the time of executing the bond.

Kindly be advised that I am of the opinion that the Legislature has prescribed the procedures to be followed in event of default upon bail bonds pursuant to Section 19-101 et seq., Code of Virginia, thereby precluding procedures such as the appointment of Commonwealth's Attorneys as Attorneys in Fact. Moreover, where a Commonwealth's Attorney is appointed as Attorney in Fact in a bail bond, there might arise the problem of conflict of interest as an Attorney in Fact enjoys a *quasi* agency relationship with his principal. Accordingly, I am of the opinion that an Attorney for the Commonwealth should not be appointed Attorney in Fact in a bail bond for the purpose of confessing judgment.

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**BAIL AND RECOGNIZANCE—Time for Docketing Judgment on Default—  
Judgment must be Rendered by Court. F-164 (171)**

November 27, 1956.

HONORABLE THOMAS P. CHAPMAN, JR.

Clerk of the Circuit Court of Fairfax County

I am in receipt of your letter of November 16, in which you inquire whether or not the clerk of a circuit court should docket judgment upon a recognizance bond before a forfeiture of the recognizance has been declared by the Court.

Pertinent to the resolution of this question are the provisions of Sections 19-113, 19-116 and 19-118 of the Virginia Code, which, in part, provide:

"Sec. 19-113. Where default recorded; process on recognizance; when copy may be used.—When a person, under recognizance in a criminal case, either as party or witness, fails to perform the condition thereof, if it be to appear before a court of record, his *default* shall be *recorded* therein, and if it be to appear before a trial justice, his *default* shall be *entered* by such trial justice on the page of his *docket*, whereon the case is docketed, and he shall notify the attorney for the Commonwealth of the same. The *process* on any such forfeited recognizance shall be issued from the court before which the appearance was to be, and wherein such forfeiture was recorded or entered. Any such process issued by a trial justice when the penalty of the recognizance so forfeited is in excess of one thousand dollars shall be made returnable to the circuit court of his county, and when not in excess of one thousand dollars it shall be made returnable before, and tried by, such trial

justice, who shall promptly transmit to the clerk of the circuit court of his county an abstract of *such judgment as he may render thereon, which shall be forthwith docketed by such clerk.* \* \* \* (Italics supplied).

"Sec. 19-116. How penalty remitted.—When in an *action or scire facias on a recognizance* the penalty is adjudged to be forfeited *the court may* on an application of a defendant remit the penalty or any part of it and *render judgment* on such terms and conditions as it deems reasonable." (Italics supplied).

"Sec. 19-118. Docketing judgments on forfeited recognizances and bonds.—*Whenever a judgment is entered in any court of record in favor of the Commonwealth of Virginia upon a forfeited recognizance or bond,* the clerk of the court in which the judgment is rendered shall certify an abstract of the same to the clerk of the court wherein deeds are recorded in the county or city wherein the judgment debtor resides or in any city or county in which he may own real property, who shall *thereupon* enter the *abstract of judgment* upon his *judgment docket*, for which service he shall be allowed the sum of fifty cents, payable out of the State treasury." (Italics supplied).

When these statutes are read together, it is manifest, I believe, that upon the failure of an individual to perform the condition or conditions of his recognizance, his *default* is to be *recorded* in a court of record or *entered* by a trial justice upon his case docket. The recording or entering of such default has the effect of forfeiting the recognizance in question, which forfeiture is a condition precedent to the issuance of process to try the forfeited recognizance. See, *Lewis v. Commonwealth*, 106 Va. 20, 23. As indicated in Section 19-116 of the Virginia Code, upon trial of an action or *scire facias*, a defendant may make application and show cause why the penalty, or any part of it, should be remitted, whereupon the court may render "*judgment*" upon such terms and conditions as it deems reasonable. Moreover, as stated in Section 19-118, when a *judgment* is entered in a court of record in favor of the Commonwealth upon a forfeited recognizance or bond, an abstract of such judgment is to be certified to the clerk of the court wherein deeds are recorded in the county or city in which the judgment debtor resides or in which he may own real property, which clerk shall *thereupon* enter such abstract upon his judgment docket.

I think it is clear from the foregoing summary that no judgment on a forfeited recognizance may be docketed by the clerk of a circuit court until such judgment has been rendered by the court trying the forfeited recognizance after default has been noted and an action commenced or process of *scire facias* issued. This view is in accord with a prior decision of this office rendered on November 23, 1948, to the Honorable Jennings L. Looney, Clerk of the Circuit Court of Buchanan County, and is also consistent with the following observations of Judge Burks, speaking for a unanimous court in *Jordan v. Commonwealth*, 135 Va. 560, 567:

"In order to clearly understand and appreciate the language of the statute (Sec. 19-116), it is necessary to advert briefly to the mode of procedure in this class of cases. The recognizance fixes a day and place for the principal to appear, and at that time and place the principal is called, and if he fails to appear his default is recorded and the recognizance is said to be forfeited. Thereafter an action may be brought, or a *scire facias* may be sued out, on the recognizance. In response to either, the defendants may show cause why *judgment* should not be entered against them *on the recognizance*. This is the proceeding to which the statute applies. 'The penalty is adjudged to be forfeited,' when the default is recorded, and when 'an action of *scire facias* on the recognizance' is brought, 'the court may, on an application of a defendant,' in that action or *scire facias*, 'remit the penalty or any part of it and render judgment,' etc. The statute by plain intentment,

contemplates *the remission of the penalty*, in whole or in part, if at all, *before judgment*." (Italics supplied).

In conclusion, I find that on May 29, 1953, an opinion was rendered by this office to the effect that the forfeiture of a recognizance should be docketed against a defendant and his sureties at the time of default. See, Report of the Attorney General (1952-53) page 195. To the extent that the views expressed in that opinion are out of harmony with those enunciated herein, they are herewith disavowed.

### BAIL AND RECOGNIZANCE—to be Returned to Person Making Deposit if No Default, Not to be Kept For Fine. F-27 (111)

October 8, 1956.

HONORABLE HAROLD H. PURCELL  
Member House of Delegates

This is in reply to your letter of August 30, 1956, relating to the question of the disposition of money posted by a third party as cash bail when the accused appears in court for trial. The specific case presented involved a person who was convicted in a court not of record and appealed from a conviction in that court to a court of record. In lieu of the usual recognizance with surety, a friend of the accused posted a cash bond.

In addition to writing the letter referred to above, you conferred with a member of my staff with respect to the matter and requested that an opinion issued by this office on June 6, 1949 (Report of Attorney General 1948-49, page 5) be reviewed and reconsidered. By reference to that opinion, it is noted that this office was of the opinion that, even though the accused made a timely appearance for trial on appeal, if he was convicted at a trial at which he was present the cash bail so deposited by a third person could be used over the objection of or without the consent of such third person for the payment of any fine and costs that might be imposed. Upon review of that opinion, I have reached the conclusion that it is clearly wrong, and, for the reasons hereinafter set forth, the opinion of June 6, 1949 is overruled and reversed.

The disposition of the money so deposited is prescribed in § 19-108 of the Code. Such cash bonds, or cash bails, are posted pursuant to the provisions of § 19-106 of the Code. Under this section the condition of the bail is "for his (the accused) appearance before a court or trial justice (as the case may be) having jurisdiction of the case, for a hearing thereon." That is the only condition prescribed or permitted by the statute in such cases.

In the opinion heretofore rendered by this office, which is now overruled, it seems clear that it was erroneously concluded that the phrase "but if he be found guilty" referred to convictions in cases where the accused made a timely appearance and was present at his trial as well as to cases where the accused was tried in his absence. There was no justification for this conclusion, due to the fact that the section has reference to trials *in absentia* only and does not in any way relate to the disposition of cases where the accused is present when tried. This is plainly obvious by the language of the terminal paragraph of § 19-108.

Section 19-108 of the Code provides that a cash bond shall be disposed of as follows:

(1) If there is no default in the observance of the recognizance—that is, if the accused appears for trial—"the money so deposited shall be refunded to the person making such deposit, or upon his order."

(2) If there is default—that is if the accused fails to appear as required by the cash bail—and it is such "a case which may be tried in the absence of the defendant and he *is so tried*, and, if upon the trial of the case, the defendant be

found *not guilty*, the money so deposited shall be refunded to the person making such deposit, or upon his order."

(3) If *there is default* and the accused *is tried in his absence and is found guilty*, then, in that event, "the court or trial justice trying the case, shall apply the money, or so much thereof as may be necessary, to the payment of such fines and costs, or costs, as may be adjudged against the defendant, and the residue thereof, if any, shall be paid over to the person making such deposit, or upon his order."

(4) If *there be default* in such recognizance, and if the case *be not tried in the absence of the defendant* and the money is not disposed of as provided for in the first paragraph of the section, then there shall be a forfeiture and such forfeiture shall be noted of record and proceedings had thereon, as provided by law, and the money shall be held subject to the order of the court upon the final disposition of such proceedings.

Section 19-108 of the Code, in so far as it relates to disposition of the deposit, may be said to read as follows:

"If there *be no default* in the observance of the conditions of the recognizance, \* \* \* the money so deposited shall be refunded to the person making such deposit, or upon his order \* \* \*."

or

"If *there be default and* it *be* a case which may be tried in the absence of the defendant *and* he *is* so tried, *and*, if upon the trial of the case, the defendant *be found not guilty*, the money so deposited shall be refunded to the person making such deposit, or upon his order, but if the defendant *be found guilty*, the court or trial justice trying the case shall apply the money, or so much thereof as may be necessary to the payment of such fines and costs or costs, as may be adjudged against the defendant, and the residue thereof, if any, shall be paid over to the person making such deposit or upon his order; \* \* \*." (Italics supplied)

The statute, it will be observed, provides for only one disposition of the money in the event there is no default, and that is that the money be refunded to the person who made the deposit of the cash bail. Each other provision with respect to the disposition of the deposit is predicated upon a default of the recognizance—that is—the lack of appearance of the accused.

#### BOARD OF SUPERVISORS—Armory— May Support Out of General Levy— Cannot Make Special Levy For. F-33 (191)

January 7, 1957.

HONORABLE JULIUS GOODMAN

Commonwealth's Attorney for Montgomery County

This will reply to your letter of January 5, 1957, in which you state that the Board of Supervisors of Montgomery County has been asked to make an appropriation toward the cost of a National Guard Armory to be located in the Town of Christiansburg. You inquire whether or not it would be permissible for the Board of Supervisors to make a special levy confined to the Christiansburg Magisterial District to raise funds from which such an appropriation may be made. In response to your inquiry, permit me to call your attention to the provisions of Section 15-694 of the Virginia Code, which prescribe:

"The board of supervisors of any county may appropriate *out of the general levy*, except the school fund, and expend annually such sums of money as their judgment may warrant to aid and assist in the erection

and maintenance of suitable armories for companies of the Virginia National Guard, or other wise contribute towards the assistance and maintenance of such companies as may have their company stations and existence within the county limits, or within any incorporated town or city of the second class located within the geographical limits of the county." (Italics supplied).

In light of the above quoted statute, I am of the opinion that the Board of Supervisors is authorized to appropriate funds for the support of a National Guard Armory only out of the general levy and that no special district levy for such purpose would be permissible.

**BOARD OF SUPERVISORS—Assessment Basis of Machinery and Tools—  
No Authority Over—Contribution to Charitable Hospital—May Make.  
F-33 (301)**

April 18, 1957.

HONORABLE ROBERT D. BAUSERMAN  
Commonwealth's Attorney for Shenandoah County

I am in receipt of your letter of April 9, in which you state that the Commissioner of Revenue of Shenandoah County recently met with the Board of Supervisors of that county upon the matter of establishing an assessment basis for the taxation of machinery and tools. See, Section 58-412, Code of Virginia (1950) as amended. The basis of assessment resulting from this meeting and reflected in a resolution of the Board of Supervisors was subsequently protested by various interests in the county, and the Board of Supervisors requested the Commissioner of Revenue to consider this matter with representatives of such interests, with a view to establishing an equitable assessment basis for the tax in question. The Commissioner of Revenue complied with this request and a schedule of values for assessment purposes established in this manner was subsequently approved by a resolution of the Board of Supervisors. You inquire whether or not the Board of Supervisors has acted within its authority in passing the above mentioned resolutions.

Under the provisions of Section 58-864 of the Virginia Code, the authority for assessing "all the personal property not exempt from taxation and all subjects of taxation in his county" is reposed in the Commissioner of Revenue, and the Board of Supervisors of a county is not empowered to make such an assessment. Notwithstanding, I do not believe that it is inappropriate for a Commissioner of Revenue to consult with the Board of Supervisors in connection with establishing a basis for determining the amount of such assessments; however, as you indicate in your communication, any action taken by the Board of Supervisors indicating its approval of the assessment basis thus established can be considered as advisory only and neither adds to nor detracts from the validity of an assessment basis authorized by the Commissioner of Revenue. Thus, in the situation you present, if the schedule of values for determining the assessment basis for the imposition of the tax on machinery and tools is authorized by the Commissioner of Revenue, the resolutions passed by the Board of Supervisors in connection therewith would not affect its legality.

With respect to your further inquiry concerning the authority of the Board of Supervisors to make contributions for the support and maintenance of charitable hospitals located in the county, permit me to call your attention to the provisions of Section 15-16.1 and Section 32-134.1 of the Virginia Code, which, respectively, provided:

"The governing bodies of counties, cities and towns are authorized to make gifts and donations of property, real or personal, or money to

be appropriated from their respective treasuries, to any charitable institution or nonprofit or other organization conducting a hospital, and to any association or other organization furnishing voluntary fire fighting services, within or without the boundaries of the respective counties, cities and towns. Donations of property or money to any such charitable, nonprofit or other hospital, institution or organization may be made for construction purposes or for operating expenses, or both.

"All such gifts and donations made prior to March fifth, nineteen hundred forty-eight, are validated hereby."

"The governing bodies of the counties are authorized to appropriate moneys and to make other gifts of real or personal property to be used in the construction or operation, or both, of charitable or non-profit making hospitals."

In light of the above quoted statutes, I am of the opinion that the Board of Supervisors may properly make contributions to charitable hospitals located in Shenandoah County.

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**BOARD OF SUPERVISORS—Authority to—Expend Funds for Participation in Jamestown Festival—Publish County History—No Authority to Contribute to Association For Preservation of Virginia Antiquities. F-33 (257)**

March 8, 1957.

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

This is in reply to your letter of March 1, 1957, in which you request my opinion on several questions dealing with the participation of the Isle of Wight County in the coming Jamestown Festival.

I am of the opinion that the Board of Supervisors of your county has authority to expend funds from the general fund of the county in execution of its plans for participation in the Jamestown Festival, including a plaque or booth at Jamestown. Chapter 449 of the Acts of Assembly of 1954 contains the following provision:

"All agencies of the State and all political subdivisions are authorized to cooperate with the Commissioner and grant funds and property to it for the furtherance of such celebration."

I am of the opinion that this provision gives the Board of Supervisors authority to expend funds for this purpose. The Board may expend these funds itself or it may turn over such funds, or a part thereof, to the Jamestown Festival for the Isle of Wight County.

In answer to your question as to whether or not the Board of Supervisors may reprint the history of the county and distribute the history, I am of the opinion that this may be done by the Board under the provisions of § 15-12 of the Code of Virginia if the proposed history would be of value in advertising and giving publication to the resources and advantages of Isle of Wight County.

I am of the opinion that the Board of Supervisors does not have authority to make a donation to the Association for the Preservation of Virginia Antiquities, Incorporated, as I can find no statutory authority permitting such a donation.

**BOARD OF SUPERVISORS—Committee to Investigate Operation of Schools—May Appoint, But Committee Would Have No Special Power. F-33 (286)**

April 3, 1957.

HONORABLE S. PAGE HIGGINBOTHAM  
Commonwealth's Attorney  
Orange County

This is in reply to your letter of March 28, 1957, in which you request my opinion as to whether or not the Board of Supervisors has the power to appoint a committee of local citizens to investigate expenditures, curriculum and the operation of the public schools of your county and report back to the Board of Supervisors as to its findings, with recommendations.

I know of no provision of law which would prohibit the Board from appointing such a committee, however, the committee would have no legal authority or powers over and above those that any citizen of the county might have. The expenditures, curriculum and operation of the public schools of a county are vested by the Constitution and statutes of this State in the county school board and not in the board of supervisors of a county. By reason of this fact I can see nothing that could be accomplished by an advisory committee, such as is contemplated in your letter.

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**BOARD OF SUPERVISORS—Community Center—No Authority to Appropriate Funds for—Even Though Occasionally Used as Voting Precinct. F-33 (316)**

May 7, 1957.

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

This is in reply to your letter of May 3, 1957, which reads as follows:

"Some few days ago I discussed by telephone an agreement to be drawn between Norfolk County and the owners of a community center located therein. The Board of Supervisors desire to assist in the construction of the community center for reasons that it is needed as a voting place and because it otherwise would be an asset to the community. I, therefore, am enclosing a proposed lease agreement which I trust will be sufficient to permit the Board of Supervisors to spend public money on said building.

"Please examine the enclosed proposed lease and advise me if, in your opinion it is sufficient to allow the expenditure of public money in the construction of said building."

The lease submitted conveys to the Board of Supervisors for a term of fifty years certain premises known as "Joliff Community Civic Center" to be used as a voting place for all public elections and other occasions when requested by the Norfolk County Board of Supervisors and upon consent of the Trustees of the Joliff Community Center. The Board agrees to pay as rent for the said premises an initial sum not to exceed \$2500 and to make other necessary repairs to the building solely at the option of the Board during the term of the lease.

The lease further provides as follows:

"The 'Board' hereby agrees that it will not permit any acts of waste thereon while being used by the 'Board' under the terms of this lease and that it will be responsible for acts of damage thereon through negligence or willful acts of its employees, voters or invitees using the said building when the 'Board' is occupying the same under the term of this lease."



Under § 24-179 of the Code the governing body of a county "shall provide funds to enable the electoral board to make provisions at each voting place in such county for an adequate place or building in which elections may be held and conducted."

It is the responsibility of the Electoral Board to arrange for suitable voting quarters and, under the above section, it is the duty of the Board of Supervisors to provide for the payment of the necessary expense. Within these limits, the Board of Supervisors may expend the public funds.

I do not feel that the title acquired under the lease would justify the Board in concluding that the building would be a county building upon which funds could be expended for repairs as authorized by § 15-693 of the Code. Furthermore I am of the opinion that the expense would not be permitted under § 15-697 of the Code since it is obvious that no system of public recreation and playgrounds is established or contemplated within the purview of this section.

Except to the extent necessary to meet reasonable commitments *made by the Electoral Board* for voting premises only, I am of the opinion that the Board cannot expend public funds on the building included in the lease. The Board of Supervisors, in my opinion, does not have authority to expend public funds for the acquisition and maintenance of a community center merely on the ground that it may be needed as a voting place and would otherwise be an asset to the community.

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**BOARD OF SUPERVISORS—Compensation—Fixed by Board—Statutory Amount Mandatory. F-33 (53)**

August 15, 1956.

HONORABLE VALENTINE W. SOUTHAIR  
Commonwealth's Attorney  
Amelia County

This is in reply to your letter of July 31, 1956, which reads as follows:

"The Amelia Board of Supervisors is composed of three members. Each member has been receiving \$25.00 per month for his services. Recently they desired this monthly stipend to be increased to \$50.00. In examining the law at their request, in regard to the increase, it seems to me that Section 14-56, as amended in the 1956 Cumulative Supplement, removes the responsibility of fixing the salaries of the members of the Board from the Judge to the Board itself. It says, at the beginning of said Amendment, 'The—amount to be allowed as compensation—shall be fixed by the board—.' I take it that I am correct in this assumption.

"In examining further, I found that Section 14-57 has just been amended. Subsection 29 of that Section seems to be applicable to Amelia County since our population is practically 8000. That subsection says, for a County our size, '—the annual compensation of each member of the board of supervisors shall be \$1200.00.' Clearly, the Board of Supervisors of this County can raise the salaries of its individual members to \$1200.00 per year but, under this statute, is the same mandatory? The statute gives no maximum and minimum limits and says that the compensation 'shall be' and, consequently, it seems mandatory to me."

I concur in your conclusion that, under the provisions of § 14-56 of the Code, the Board of Supervisors and not the court, subject to the provisions of § 14-57, fixes the compensation of the members of the Board.

With respect to the provisions of subsection (29) of Code § 14-57, I am of the opinion that the compensation of each member of the Board is fixed at \$1200 per annum, assuming, of course, that your county comes within one of the population classifications set forth in subsection (29). The provisions of subsection (29) are mandatory—that is, each member of the Board may require the payment of \$1200 per annum for his service as a member of the Board.

**BOARD OF SUPERVISORS—Courthouse— No Authority to Permit Billboard Type Sign to be Placed on Lawn. F-33 (284)**

March 26, 1957.

HONORABLE D. W. LYNCH, *Vice Chairman*  
Board of Supervisors of Tazewell County

I acknowledge receipt of your letter of March 25, 1957, which reads as follows:

"In an attempt to assist in promotion of the Governor's Highway Safety Program, the Board of Supervisors has permitted the Lions Club to erect at its own expense a sign on the Court House lawn which has a red light that burns for 24 hours after a fatal accident and at all other times the sign has a green light that burns continuously, the cost of which is paid by the Lions Club. The sign also contains appropriate wording as to the dangers of the Highway.

"It now develops that a citizen has questioned the legality of the action of the Board of Supervisors in permitting the sign to be constructed on County property.

"Your opinion as to the legality of the Board in granting such permission will be appreciated."

Section 15-686 relates to the courthouse property. It will be noted that this section provides that so much of the land as may be necessary for the purpose shall be occupied with the courthouse clerk's office and jail and "the residue planted with trees and kept as a place for the people of the county \* \* \* to meet and confer together \* \* \*." This statute, and especially the portion specifically quoted has been in effect since the Code of 1849. Commenting on this section the Supreme Court of Virginia in the case of *Alleghany v. Parrish*, 93 Va. 615, at page 1619, stated:

"By this provision of the Code the County Courts were not only not expressly, nor impliedly authorized to make contracts by which other buildings than those specially named could be erected upon the courthouse lot or square, but it expressly provided the use to which the residue of the lot, not occupied by the court-house, clerk's office, and jail, should be put. It required that so much thereof as might be necessary 'shall be occupied with the court-house, clerk's office, and jail, and the residue planted with trees and kept as a place for the people of the county to meet and confer together.'

"The lot in so far as it was not occupied by the court-house, clerk's office, and jail, was required to be planted with trees, and kept as a place for the people to meet and confer. Not a portion of the residue was to be so used, but the whole of it. The uses to which the court was required to put the lot exhausted all the purposes for which it could be lawfully used. And in so far as the court authorized or permitted it to be used for other purposes, to that extent did it fail to perform the duty expressly imposed upon it by the statute.

"By act of April, 1879 (which was in force in 1885, when the order of the board of supervisors was made giving the appellee the right to make an addition to his office), it was provided that the board of supervisors of each county should have power 'To sell or exchange the corporate property of the county; to purchase any such real estate as may be necessary for the erection of all necessary county buildings, and to provide a suitable farm as a place of general reception for the poor of the county, and to make such orders concerning such corporate property as now exists or as hereafter may be acquired as they may deem expedient; provided that no sale of such corporate property shall be made except by public auction,' after notice given, and subject to the approval and ratification of the County Court. Acts 1878-'9, ch. 58, sec. 7, p. 300.

"There was nothing in the statute quoted placing the corporate property of the county under the control and management of the board of supervisors which, in our opinion, changed the uses which might be made of the court-house square. The provision quoted by the appellee to show that they had the power to make the order relied upon by him, is as follows: 'To make such orders as they may deem expedient concerning such corporate property as now exists or as may hereafter be acquired.' This provision of the statute must be construed with that contained in section 1, ch. 50 of the Code of 1849, quoted above, and in which no change has been made since its enactment except that the power given to and the duties imposed upon the County Court by it are now given to and imposed upon the board of supervisors. Sec. 925 Code of 1887. By it the board of supervisors were, in 1885, and are now, required, as was the County Court, to plant with trees the residue of the court-house lot not occupied with the court-house, clerk's office, and jail, and to keep it as a place for the people of the county to meet and confer together. The duties imposed by this provision upon the board of supervisors are not discretionary, but mandatory. They cannot make such use of the court-house square 'as they may deem expedient' when the Legislature has determined for what purposes, and for what purposes only, it shall be used; for, as we have seen above, using it for any other purpose than those provided for by the Legislature, withdraws it to that extent from the uses to which the Legislature has expressly dedicated it."

In the light of § 15-686 of the Code, and the holding of our Supreme Court of Appeals, I feel compelled to conclude and express the opinion that the Board of Supervisors exceeded its authority in granting the permit for the erection of the sign on the courthouse lawn.

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**BOARD OF SUPERVISORS—Creation of New Magisterial District—May Not Employ Attorney to Oppose. F-33 (17)**

July 13, 1956.

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

This is in reply to your letter of July 12, 1956, which reads as follows:

"I am writing to request your opinion on the following questions:

"A majority of the Board of Supervisors of Norfolk County passed a resolution to employ an attorney to oppose a petition filed in the Circuit Court by residents of certain magisterial districts of Norfolk County, praying for the creation of an additional magisterial district. Authority for employing special counsel is found in Section 15-9 of the Code of Virginia, which reads as follows:

"15-9. Protection of county property; employment of assistant counsel.—The board of supervisors of any county may represent the county and have the care of the county property and the management of the business and concerns of the county, in all cases in which no other provisions shall be made and, when necessary, may employ counsel to assist the attorney for the Commonwealth in any suit against the county or in any matter affecting county property when the board is of opinion that such counsel is needed."

"My questions are:

"First: Is the creation of an additional magisterial district a matter affecting county property within the meaning of Section 15-9, and do the supervisors have authority to employ an attorney to oppose

petitioners requesting a new magisterial district, and pay his fee from county funds?

"*Second*: Is there any other authority for employing special counsel in a matter of this kind for the aforementioned purpose?"

Answering your first question, I am of the opinion that the creation of a new magisterial district is not a matter that would come within the scope of Code § 15-9. Under a rearrangement of magisterial districts it does not appear that the property or area of the county would be either diminished or increased. Neither the county nor the board of supervisors are parties to the court proceedings provided for in § 15-56 of the Code. You will note that, under § 15-59 of the Code, any citizen may make himself a party defendant and may resist the petition, but I am not aware of any statutory provision authorizing the board of supervisors to become a party to the proceedings and officially resist the petition for rearrangement.

With respect to your second question, I do not know of any other statute that would authorize the Board to employ such counsel.

**BOARD OF SUPERVISORS—Installation of Street Lights—Although Resolution Authorized must Approve Warrant. (333)**

May 22, 1957.

HONORABLE S. L. ALEXANDER, *Clerk*  
Circuit Court of Stafford County

This is in reply to your letter of March 14, 1957, in which you request my opinion concerning a matter before the Board of Supervisors of your county involving the installation of some street lights. You state that, on March 13, 1957, a motion was duly made and seconded that the Board of Supervisors request the Power Company to install three street lights at Boswell's corner. There was a tie vote on the motion and a tiebreaker was called in to cast a vote to break the tie, and he requested thirty days to consider the motion. On April 10, 1957, a representative of the Power Company appeared before the Board and stated that, if three street lights were installed, one at the intersection and one on each street, there would have to be an installation charge of approximately \$100.00. The tie-breaker was informed of this installation charge and requested an additional thirty days to consider the matter. On May 8, 1957, the tiebreaker cast his vote in favor of the motion, thus causing the motion to be carried.

You, at the request of the Chairman of the Board of Supervisors, ask my opinion as to whether or not the motion as finally passed on May 8, 1957, would authorize the payment of the required installation charge for the three street lights.

I am of the opinion that a warrant to pay the cost and installation charge should be approved by the Board of Supervisors in accordance with § 15-253 of the Code of Virginia when the bill for installing the lights is presented to the County by the Power Company.

**BOARD OF SUPERVISORS—License Inspector—Authority to Employ. F-33 (276)**

March 21, 1957.

HONORABLE H. B. WALKER  
Commissioner of the Revenue  
Chesterfield County

This is in reply to your letter of March 15, 1957, which reads as follows:

"The Board of Supervisors of Chesterfield County, under authority of Chapter 57, Acts of Assembly, 1956, employed a License Inspector. I would appreciate your opinion as to the constitutionality of this Act. If unconstitutional, could the Board of Supervisors of Chesterfield

County employ such a License Inspector to enforce the provisions of its Business License Ordinance?"

Chapter 57 of the Acts of the General Assembly of 1956 reads as follows:

"The governing body of any county having a population of less than forty-one thousand and adjoining a city of more than two hundred thirty thousand population, may by resolution provide for the creation of a department of license inspection with a license inspector in charge of such department. The license inspector shall be appointed by the governing body of the county. The license inspector shall enforce the ordinances of the county with regard to licenses and license taxes, review any and all records of the commissioner of revenue, other than income tax returns, and examine and audit the books of all persons, firms and corporations whom he has reasonable cause to believe to be liable to payment of any license levied by the county. The license inspector shall be paid a salary for his services to be fixed by the governing body. The governing body of the county may employ any such persons as it deems necessary for the operation of such department. The governing body may make such rules and regulations as it deems expedient for the operation of such department."

The constitutionality of this act may be determined by considering the applicable provisions of Section 63 of the State Constitution which are as follows:

"The General Assembly shall not enact any local, special or private law in the following cases:

"5. For the assessment and collection of taxes, except as to animals which the General Assembly may deem dangerous to the farming interests."

It is noted that the act under consideration authorizes the governing body of any county having a population of less than forty-one thousand and adjoining a city of more than two hundred and thirty thousand population to provide for the creation of a department of license inspection with a license inspector in charge of such department. The duties of the license inspector are prescribed in the act. I do not construe the act as authorizing the governing body of the county to delegate to the license inspector the duty of assessing licenses or collecting the same, but merely to inspect the records of those who are subject to the various licenses imposed by the county upon businesses and professions, which have been assessed by the Commissioner of the Revenue and are to be collected by the Treasurer. Such inspection, or audit, would be a means of determining whether or not proper assessments have been made in each case.

Under this interpretation of the act in question, I am of the opinion that it is not repugnant to any of the provisions of the Constitution.

I have had an opportunity to examine the ordinance adopted by your Board of Supervisors on December 1, 1956, relating to license taxes and especially Section 16 thereof relating to a license inspector and his duties, and it would appear from the wording of this particular section that it has been promulgated in conformity with my interpretation of the act under consideration.

#### **BOARD OF SUPERVISORS—Livestock Killed by Rabid Foxes—No Authority to Pay For. F-50 (37)**

August 3, 1956.

HONORABLE WADE S. COATES

Commonwealth's Attorney for Tazewell County

In accordance with your request of August 2, I have considered the question of the authority of the Board of Supervisors to pay the claims of citizens for damage to livestock caused by being bitten by a fox afflicted with rabies.

Section 29-202 of the Code authorizes the payment of compensation for livestock killed or injured by dogs, such compensation to be paid out of the dog fund. I am not aware of any statute authorizing the payment of compensation for loss of livestock on account of being bitten by a rabid fox. In my opinion, the Board of Supervisors does not have the power to appropriate the public funds for that purpose.

In December, 1954, I rendered a closely related opinion to the Commonwealth's Attorney for Alleghany County, copy of which I am enclosing.

**BOARD OF SUPERVISORS—No Authority—To Grant Exclusive Franchise for Collection of Garbage. F-33 (64)**

August 27, 1956.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney for Montgomery County

This will acknowledge receipt of your letter of August 25, 1956, in which you ask if the Board of Supervisors of Montgomery County has the authority to grant an exclusive franchise to a person who would thereafter contract with people of the County to collect their garbage.

I am unable to find any statute which would give the Board of Supervisors such authority.

**BOARD OF SUPERVISORS—Need Express Statutory Authority to Participate in Federal Channel Project. F-33 (50)**

August 13, 1956.

HONORABLE WILLIAM E. FEARS  
Commonwealth's Attorney of Accomack County

This is in response to your letter of August 2, 1956, regarding the authority of a county to enact certain resolutions in conjunction with House Document No. 477, 81st Congress, 2nd Session, for the acquiring of land, etc., for the deepening of certain channels and providing for the assumption of responsibility for damages and responsibility for (acquiring) disposal areas.

It has been the uniform interpretation of this office based upon Virginia Supreme Court decisions that county boards may exercise such powers only as are expressly conferred upon them by the Constitution or the statutes of the State. This has been recognized by the 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 an opinion dated November 5, 1954, to the Honorable Hugh Marsh, Commonwealth's Attorney for Fairfax County, (1954-55 Report of the Attorney General, p. 23), it was held that the Board of Supervisors was without authority to purchase land and convey the same to the University of Virginia for the purpose of establishing an Extension Department. Moreover, several opinions pertaining to the limited authority of the County Board are contained in the same report. Moreover, this consistent interpretation has been rendered where such questions arose irrespective of the general welfare powers granted to the Boards, as mentioned in your letter. Accordingly, I am of the opinion that express authority would be required in order for a County Board to have authority to perform all the required acts set forth in your letter.

**BOARD OF SUPERVISORS—Ordinance Prohibiting Carrying Loaded Firearm on Highway—No Authority to Enact. F-71 (190)**

January 4, 1956.

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

This is in response to your letter of January 3, inquiring whether or not the Board of Supervisors has power to enact an ordinance prohibiting the carrying or possessing of a loaded firearm on a State Highway in the county. You state that you know of no enabling statute on the subject.

Kindly be advised that I am of the opinion that a county does not possess the power to enact such a statute, as the Legislature has enacted statutes dealing with the matter of the carrying of arms. Section 18-118, in part, provides that the carrying of firearms on Sunday without good and sufficient cause at any place other than on a person's own premises subjects such person to a fine of not less than \$25.00. The said section has been used by several trial justices to convict law breakers who carry loaded pistols in the glove compartments of their automobiles on Sunday.

As you know, hunting itself is prohibited on roadways. However, there must be evidence of actual hunting to convict under this last mentioned prohibition.

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**BOARD OF SUPERVISORS—Passage of Motion—Procedure and Necessary Vote. F-33 (293)**

April 11, 1957.

HONORABLE CHARLES J. ROSS, *Clerk*  
Board of Supervisors of Madison County

This is in reply to your letter of April 8, 1957, in which you ask two questions concerning the passage of a motion by the Board of Supervisors.

I should like to call your attention to § 15-245 of the Code of Virginia, which section prescribes the method by which questions submitted to the Board of Supervisors are determined. I am of the opinion that a motion by a member of the board of supervisors does not require a second to the motion prior to its being called for a vote.

In answer to your second question, I am of the opinion that, if a motion is made by a member of the board of supervisors and is then voted upon and one member voted for the motion, the two other members of the board of supervisors were present, but abstained from voting, the motion was carried. Section 15-245 of the Code provides that if the question receives a vote of the majority of the supervisors voting on the question, it shall be carried.

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**BOARD OF SUPERVISORS—Pledge of Future Appropriations—to Community Hospital—Such Pledge Would be Unconstitutional. F-33 (248)**

March 1, 1957.

HONORABLE A. ERWIN HACKLEY  
Commonwealth's Attorney for Page County

I acknowledge your letter of February 27, 1957, which reads as follows:

"The Page Memorial Hospital trustees and building committee are arranging the construction of a new hospital and have had application approved for Hill-Burton Funds. They have raised, by private contribution, sufficient funds and pledges to an amount required to match the funds except for the sum of approximately \$40,000.00, and they have requested the Board of Supervisors to pledge an amount to cover this \$40,000.00, to be paid equally over a period of three years.

"The Board of Supervisors would like to have your opinion as to whether or not, under Sections 15-16.1, 32-134.1 and 32-211.2, they can pledge an amount for which taxes must be assessed for the years succeeding the current year. In other words, can the present board at this time commit the board in succeeding years to compel an equal amount to be included in the budget for such succeeding years and levies assessed accordingly?"

I am of the opinion that the Board of Supervisors does not have authority to obligate the County in the manner proposed. Section 115-a of the Constitution of Virginia provides that:

"\* \* \* 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 collection of the revenue of said county \* \* \* for the then current year, \* \* \* unless in the general law authorizing the same provision be made for the submission to the qualified voters of the proper county \* \* \* for approval or rejection, by a majority vote of the qualified voters voting in an election, on the question of contracting such debt; and such approval shall be a prerequisite to contracting such debt."

The sections of the Code to which you refer must be read and interpreted in the light of the above constitutional provision.

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#### BOARD OF SUPERVISORS—Regulation of Sale of Greenery Along Highway—Authority to is Questionable. (371)

June 21, 1957.

HONORABLE BERNARD MAHON  
Commonwealth's Attorney for Caroline County

This is in reply to your letter of June 3, 1957 in which you present the following questions.

"... I would like to know whether under the provisions of the Virginia Code 15-8, the Board of Supervisors of Caroline County has the authority to pass an ordinance, making it unlawful to sell any tree, shrub, vine, plant, flower or turf on any highway right of way or within fifty feet thereof.

"Should duly licensed merchants who have an established place of business be exempted in such an ordinance?"

The power and duties of the Board of Supervisors are fixed by statute, and they have no other powers than those conferred expressly or by necessary implication. (*Supervisors of Nottoway County v. J. L. Powell & Town of Crewe*, 95 Va. 635.)

There is no express provision in the Code on this subject.

Section 15-8 of the 1950 Code of Virginia, as amended, sets forth the general powers of the Board of Supervisors. Sub-section (5) provides as follows:

"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."

While it may be arguable that the selling of shrubs along the highways may endanger the safety of persons traveling thereon due to the stopping of the traffic or the parking of the cars for the reason of purchase of the shrubs, this could be said of any legitimate licensed business along the highway.

It therefore appears that it is highly questionable that there is any authority which has been granted to the county to empower the Board of Supervisors to adopt such an ordinance.



**BOARD OF SUPERVISORS—Sanitary District—Loan to Must be Repaid in Current Fiscal Year—To Initiate Project. F-33 (134)**

October 24, 1956.

HONORABLE ERNEST P. GATES  
Commonwealth's Attorney  
Chesterfield County

This is in reply to your letter of October 17, 1956, in which you request my opinion as to whether or not, under the provisions of § 15-16.4 of the Code of Virginia, the Board of Supervisors of your county could advance the Ettrick Sanitary District \$20,000 from the general fund of the county to help defray the cost of the necessary facilities to connect the sewage system of the district to that of the City of Petersburg. You state that this loan would be repaid to the general fund by the Sanitary District over the next two or three years from service charges received from the users of the sewage system.

Section 15-16.4 of the Code 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."

I am of the opinion that this section does not provide for a loan, such as the one mentioned in your letter. The Board of Supervisors of Chesterfield County could advance funds to the Sanitary District out of the general fund to assist the Sanitary District to initiate this project, however, I feel that this loan would have to be repaid to the general fund within the current fiscal year in which the loan was made. This section does not permit the board of supervisors to make a loan for the completion of a project, the amount of the loan to be repaid over a period of several years.

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**BOARD OF SUPERVISORS—Sanitary District—May Advance County Funds to Pending Sale of Bonds. F-213a (45)**

August 7, 1956.

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

This is in reply to your letter of August 6, 1956, which reads, in part, as follows:

"One of our Sanitary Districts in the County has \$75,000 sewer bonds for sale but due to the bad bond market at the present time, we think if unwise to place these bonds on the market now.

"However, it is likely that the District will need funds before the Bond market will improve and my suggestion to the Board is that funds be advanced from the General County Fund to be repaid when the District bonds are sold. We think the general welfare will justify doing this because of the unfavorable market at the present time, but we would appreciate your counsel on whether you know any legal reason why the Board cannot advance funds from the General County Fund on loan to be repaid when the bonds are sold."

In my opinion the Board may advance the funds to the Sanitary District, if not specifically allocated or obligated, under the provisions of § 15-16.4 of the Code.

**BOARD OF SUPERVISORS—Special Meeting—Notice Required—Members and Commonwealth's Attorney May Waive—F-33 (222)**

February 6, 1957.

HONORABLE CHARLES J. ROSS, *Clerk*  
Circuit Court of Madison County

This is in reply to your letter of February 15, 1957, which reads as follows:

"The Board of Supervisors of Madison County consists of three members which constitute a full board.

"On January 16, 1957, the three members voluntarily convened in special session and dispatched several items of county business.

"Is business dispatched by such special meeting legal within the confines of a special meeting of the board?"

Section 15-243 of the Code reads as follows:

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

The notice required under this section may be waived with respect to any special meeting. See opinion of Attorney General reported on page 35, Reports of Attorney General 1950-51.

Since the above opinion was rendered the statute, (§ 15-243), has been amended so as to require notice to be given to the Commonwealth's Attorney. Therefore, in order for a special meeting to be valid without the statutory notice, the Commonwealth's Attorney and each member of the board must waive such notice. Attendance of all the members and the Commonwealth's Attorney at such a meeting would, in my opinion, constitute a waiver of notice. However, it would be well for the minutes to show that each of the parties entitled to notice waived the same.

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**BOARD OF SUPERVISORS—Temporary Loans—When and How May Enter into. F-33 (127)**

October 22, 1956.

HONORABLE G. M. WEEMS  
Treasurer of Hanover County

This is in reply to your letter of October 11, 1956, in which you request my opinion as to how Hanover County may borrow money under the provisions of § 15-250 of the Code of Virginia.

Under the provisions of that section I am of the opinion that the Board of Supervisors of Hanover County may borrow not earlier than June first of any year a sum of money not to exceed one-fourth the amount produced by the county levy laid in Hanover County for the year in which the money is borrowed,

and provided that such funds shall be repaid before the end of the current year. These loans would not have to be made at one time, but the Board of Supervisors could enter into successive loans so long as none of them were entered into prior to June first, and so long as the total amount of such loans would not at any time exceed one-fourth the amount of the county levy, and provided that all of these loans would be repaid before the end of the current year.

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**BOARD OF SUPERVISORS—Theft Insurance—May Purchase to Protect Funds of County Court. F-77 (113)**

October 10, 1956.

HONORABLE F. NELSON LIGHT, *Judge*  
Juvenile and Domestic Relations Court

This is in reply to your letter of October 8, 1956, in which you ask whether the County Board of Supervisors has the authority to pay the premiums on theft insurance to protect funds in the hands of clerks of county courts.

Section 15-9 of the Code reads as follows:

"The board of supervisors of any county may represent the county and have the care of the county property and the management of the business and concerns of the county, in all cases in which no other provisions shall be made and, when necessary, may employ counsel to assist the attorney for the Commonwealth in any suit against the county or in any matter affecting county property when the board is of opinion that such counsel is needed."

I am of the opinion that, under the above quoted section, the County Board of Supervisors has the authority to take out theft insurance to protect funds in *custodia legis* that are collected by and in the hands of the clerk of a county court.

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**BONDS—Public Employees Performance—Blanket Position Bond May be Used for County and Municipal Courts. F-181 (266)**

March 15, 1957.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of March 11, 1957, in which you request my opinion as to whether or not a public employee's faithful performance blanket position bond may be used as corporate bond for the judge, substitute judge, clerk, substitute clerk and clerical employees of county and municipal courts. These judges, clerks and employees are required to be bonded under the provisions of §§ 16.1-15 and 16.1-16 of the Code.

I am of the opinion that the bond submitted by the Maryland Casualty Company would comply and fulfill the requirements of these two sections of the Code. Section 2 of that bond contains the provision that the word "employee" or "employees" as used in the bond shall mean those officers and subordinates while in the employ of the insured "who are not required by law to furnish an individual bond to qualify for office."

Before entering into such a bond as this, I am of the opinion that a statement in writing should be obtained from some official of the Maryland Casualty Company, who has authority to make such statement, to the effect that the Company will pay any loss or losses caused to the insured by the judges, clerks and employees of the insured and will not raise the question or use as a defense the issue of whether or not these judges, clerks and employees are required by statute to furnish individual bonds to qualify for office.

**CIRCUIT COURTS—Judge is Not Employee of State. F-249 (22)**

July 16, 1956.

HONORABLE CARTER O. LOWANCE

Executive Secretary Governor's Office

This is in reply to your letter of July 13, 1956, which reads as follows:

"Chapter 311, Acts of 1956, relating to the Council of Higher Education, contains this sentence in Section 23-9.3(a):

"No officer, employee, trustee or member of the governing board of any institution of higher education, no employee of the Commonwealth or member of the General Assembly or member of the State Board of Education or a local school board shall be eligible for appointment to the Council except as hereinafter specified."

"In view of the above, is a Circuit or Corporation (or Hustings) Court Judge eligible for appointment to the Council?"

It will be observed that, in the first part of the statute quoted by you, both the terms "officer" and "employee" are used with respect to a governing body of any institution of higher education, but that in the phrase relating to the Commonwealth only the term "employee" is used. It would appear, therefore, that the General Assembly was making a distinction between "officer" and "employee". It is generally held that a judicial officer is not an "employee" and that the determining factor which distinguishes an officer from an employee is whether any sovereign function of the government is conferred upon the individual holding the office. A judge of a court of record in Virginia is invested by law with a portion of the sovereignty of the State and authorized to exercise functions of a judicial character, and, therefore, he is distinguished from an employee who does not have the power to exercise executive, legislative or judicial functions.

I am of the opinion, therefore, that judges of courts of record in this State are eligible to appointment to the Council of Higher Education.

**CITIES, TOWNS—Authority of Mayor—To Veto Appointment of Town Official Made by Council. F-60b (159)**

November 23, 1956.

HONORABLE THOMAS H. BLANTON

Member Senate of Virginia

This is in reply to your letter of November 15, 1956, in which you request my opinion as to whether or not the Mayor of the town of Bowling Green has the authority and power to veto an appointment of a town official which appointment has been made by the Council.

Section 20 of Article 3 of the charter of the town of Bowling Green (Chapter 177, Acts of Assembly, 1948) provides as follows:

"The council may appoint or select such other officers as may be necessary, including a business manager for the town, and fix their salaries and define their duties."

I am of the opinion that this provision of the charter confers upon the council the power to appoint or select a town attorney and to fix his salary and define his duties. I am also of the opinion that, in making such appointment, it is not necessary for the council to do so by an ordinance or resolution having the effect of an ordinance. An ordinance is in effect a legislative act, and the appointment of an official, such as this, would not, in my opinion, constitute a legislative act. The Mayor has authority under the provisions of the charter and under the law of Virginia to veto only ordinances or resolutions having the effect of an ordinance.

Therefore, I am of the opinion that the Mayor does not have the power or authority to veto an appointment by the town council. I can find no decision of the Supreme Court of Appeals of Virginia on this question; however, I am

supported in my conclusion by American Jurisprudence, § 147 on Municipal Corporations, and by the majority of the decisions rendered in other jurisdictions of this country.

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**CITIES, TOWNS—Charter of Portsmouth—Effect of Repeal of Provision as to Salary For Members of Council. F-60 (205)**

January 23, 1957.

HONORABLE WILLIAM B. SPONG, JR.  
Member of the Senate of Virginia

This is in reply to your letter of January 14, 1957, in which you call attention to various amendments to the Charter of the City of Portsmouth and in which you present the following question:

"The question which we should like to have your opinion on could be framed as follows: Did the inadvertent omission of the 1952 amendment to Section 4, Chapter 1, by the legislation of 1956, revive Chapter XI of the Charter as amended and re-enacted in 1942, or under Section 76 as amended and re-enacted in 1952 may the Council by ordinance fix its own compensation until such time as proper legislation might be passed?"

Without reviewing the legislative history of the Charter to the extent set forth in your letter, I will state that, in my opinion, the amendments contained in Chapter 44, Acts of 1952, had the effect (1) of repealing Chapter 11 which had been added to the Charter by Chapter 169, Acts of 1920, and amended by Chapter 253, Acts of 1942, and (2) of re-enacting (as amended) Section 76 of said Charter.

The Act (Chapter 2, Acts of 1956) repealed that portion of Section 4 of the Charter which, since the Act of 1952, had fixed the salaries of the councilmen at \$100.00 per month and that of the mayor at \$125.00 per month. This latter Act (Chapter 2, Acts of 1956) did not, however, repeal nor in any way affect Section 76 of the Charter.

Since the Charter no longer fixes the salaries of the council members, their compensation may be fixed by ordinance as provided by Section 76 of the Charter.

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**CITIES, TOWNS—Closing and Vacating Streets—Statutory Procedure for. F-203 (26)**

July 24, 1956.

MR. STUART MOORE  
Attorney for the School Board of Rockbridge County

This will reply to your letter of July 13, in which you state that the School Board of Rockbridge County wishes to have the Town Council of Glasgow, Virginia, vacate and abandon certain streets and alleys located within an area owned by the school board and proposed to be developed for public school purposes. You point out that Section 15-766 of the Virginia Code establishes a procedure whereby streets and alleys of cities and towns may be altered or vacated, noting that the initial sentence of that statute prescribes that the procedure therein authorized shall be:

"In addition to the powers contained in the charter of any city or town and any powers now had by such governing body under the common law *or by other provisions of law*, \* \*."

You inquire whether or not the phrase italicized above comprehends the provisions of Section 33-76.13 through 33-76.24 of the Virginia Code so as to authorize utilization by the school board of the method therein prescribed as an alternative to the institution of proceedings under Section 15-766.

The critical inquiry presented by your communication is whether or not Section 33-76.13 et seq. confers upon the governing bodies of incorporated towns the authority to abandon streets and alleys within the corporate limits of the town by means of the procedure therein prescribed, or whether the authority conferred is limited to the governing bodies of counties. I am constrained to believe that these provisions of the Virginia Code apply only to the governing bodies of counties. Not only are the statutes in question devoid of any reference to the governing bodies of towns, but Section 33-76.14 provides in effect that the phrase "governing body" as thereafter employed in the succeeding sections shall refer to the "governing body of the county" which shall deem that a section of a public road is no longer necessary for public use. While it is true that Section 33-76.13 prescribes that the term "road" shall include "streets and alleys", I believe this language refers to streets and alleys in unincorporated portions of the county, such as streets and alleys laid out by the governing body of a county pursuant to the provisions of the "Virginia Land Subdivision Act". Code of Virginia, Section 15-779 et seq. I am, therefore, of the opinion that the provisions of Section 33-76.13 through 33-76.24 confer no alternative or additional authority upon the councils of incorporated towns within the purview of the phrase "other provisions of law", contained in Section 15-766 of the Code.

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**CITIES, TOWNS—Councilmen—Former Member May be Employed by City Manager. (361)**

June 13, 1957.

HONORABLE G. GARLAND WILSON

Commonwealth's Attorney for the City of Radford

This is in response to your letter of May 28, 1957, inquiring if Section 121 of the Constitution of Virginia would preclude the appointment of a former member of the City Council who has resigned as such within one year to a position as an employee of the City, which position is filled by the appointment of the City Manager and held during his pleasure. You further cite Section 18 of the charter of the City of Radford pertaining to the separation of functions of the Council and City Manager and also state that the position in question is one not previously filled by the Council by election, appointment or otherwise.

Section 121 of the Constitution of Virginia provides as follows:

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

Inasmuch as the inhibition set forth in the constitutional provision above stated is applicable only to those officers elected or appointed by the Council, I am of the opinion that such provision does not preclude a former member of the Council being appointed to such office which is appointed by the City Manager. See, also, opinion dated August 24, 1954, contained in the 1954-55 Report of the Attorney General, page 57, to the Honorable William B. Spong, Jr.

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**CITIES, TOWNS—Councilmen—Vacate Office if Move Outside of Corporate Limits. F-60 (329)**

May 16, 1957.

HON. C. N. BOOTH, *Clerk*

Circuit Court of Washington County

This is in reply to your letter of May 14, 1957, which I quote below:

"Please advise me, at your earliest convenience, if a member of the Town Council of one of the towns of this county, who was duly elected as such at the last town election, who was at the time of election a resident of the corporate limits of said town and now has sold his town

property and is residing near the town but outside the corporate limits, is still eligible, under the laws of this Commonwealth, to serve as a member of the Town Council of said town."

This matter is governed by Sections 15-487 and 15-488 of the Code of Virginia. The terminal sentence of Section 15-487 reads as follows:

"\* \* \* Every city and town officer except members of the police and fire departments and town attorney shall, at the time of his election or appointment, have resided one year next preceding his election or appointment in such city or town unless otherwise specifically provided by charter."

Section 15-488 reads as follows:

"If any officer, required by the preceding section to be a resident at the time of his election or appointment of the county, city, district or town for which he is elected or appointed, or of the city wherein the courthouse of such county is, remove therefrom, except from the county to such city, or from such city to the county, or in case a non-resident who has been elected Commonwealth's attorney remove from the county or county seat of the county in which he resided when elected, except to the county in which he is elected, his office shall be deemed vacant."

I call to your attention the fact that the words "if any officer, required by the preceding section \* \* \*" contained in Section 15-488 make reference to Section 15-487 and not 15-487.1, for the reason that Section 15-487 was Section 2703 of the Code of 1919 and Section 15-488 was section 2704 of the Code of 1919.

It is manifest, under the factual situation set out by you, that the member of the Town Council in question has vacated his office, for the reason that he has moved outside of the corporate limits of the Town.

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**CITIES, TOWNS—Duties of Mayor and Town Manager—Bowling Green.  
F-83 (258)**

March 11, 1957.

HONORABLE PAUL W. MANNS  
Member House of Delegates

This is in reply to your letter of March 8, 1957, in which you enclosed a memorandum containing ten specific points relating to the government of the Town of Bowling Green. You request my opinion as to whether or not each one of these ten points is a correct statement. I will discuss the points in the order in which they are listed in the statement sent by you.

The statement made in Point 1, that the Town of Bowling Green has a Mayor-Council form of government, authorized by the General Assembly in conformity with State statutes, is correct. The mayor, in the form of government set up by the General Assembly for the Town of Bowling Green, is chosen by the electorate separately from the election of the seven council members. It is true, as pointed out in Point 2 of the statement, that he takes a different oath from that taken by the seven council members.

As stated in Point 3, the mayor and council members constitute the Council of the Town of Bowling Green.

The duties of the mayor as listed in Point 4 of the statement submitted to me are correct. The mayor is the chief executive officer of the town and, as such, "shall take care and see that the by-laws, ordinance, acts and resolution of the council are faithfully executed and obeyed, and shall have and exercise all power and authority conferred by general law on mayors of towns not inconsistent with this charter." (Charter of the Town of Bowling Green)

The statements made in Point 5 are correct. The town is required to have a clerk of the council and town treasurer and town sergeant. Their duties are

prescribed by the Charter of the Town of Bowling Green. The town clerk "shall attend the meetings of the council and keep its minutes and records and have charge of the corporate seal, and shall attest the same. He shall keep all papers required to be kept by the council, shall publish such reports and ordinances as are required to be published, and shall perform such other duties as the council may from time to time require."

The treasurer shall "receive all money belonging to the town, and keep correct accounts of all receipts from all sources and of all expenditures of all departments. He shall be responsible for the collection of all taxes, license fees, levies and charges due to the town, and shall disburse the monies of the town in the manner prescribed by council as it may by ordinance direct."

The town sergeant "shall also be chief of police; and shall hold this office for two years. His duties shall be such as the council prescribes. He shall be vested with the powers of a conservator of the peace."

As you can see from my opinion thus far, I agree with the statements made in Points 1, 2, 3, 4 and 5. I do not agree with the statements made in Point 6. That Point, as submitted with your letter, reads as follows:

"6. In the responsibilities of the Mayor as chief administrator and executive the Clerk, Treasurer, and Chief of Police become his principal assistants. A town Business Manager may be appointed to coordinate the Clerk's and Treasurer's office. He then becomes in charge of the administration of the municipality, and, like all officers, he is responsible to the Council,—which consists of the Mayor and the Councilmembers."

The Mayor is not the chief administrator of the Town of Bowling Green. He is the chief executive of the town. The Clerk, the Treasurer and Chief of Police are not the principal assistants of the Mayor. The duties of the Clerk, Treasurer, and Town Sergeant, acting as Chief of Police, are separate and apart from the responsibilities of the Mayor. The duties of these three officers are spelled out in the Charter of the Town of Bowling Green, and these three officers are primarily responsible to the council of the town for carrying out these duties. If the mayor has reason to believe that these three officers are not carrying out their duties as prescribed by the Charter and by the council, then it is incumbent upon him as chief executive officer of the town to report this to the council. He does not have the duty, or the authority to direct or supervise these officers in the performance of their duties. Nowhere in the Charter of the Town of Bowling Green, or in statutory law of Virginia, is it provided that the mayor of a town, such as Bowling Green, shall be the chief administrator of the town.

For the same reason, I must disagree with the statement made in Point 7 that "the Mayor is responsible for the over-all administration." This provision is not found in the Charter of the Town of Bowling Green, as the Charter provides that "all powers of the town and the administration and government thereof shall be vested in the council and such boards or officers as are hereafter mentioned and may be by law otherwise provided." Since there is no provision giving the Mayor the responsibility or duty for the administration of the town government, this duty and authority rests in the Council.

Section 20 of Article 3 of the Charter of the Town of Bowling Green provides that the council may appoint a business manager for the town and may fix his salary and define his duties. In addition to this provision in the Charter of the Town of Bowling Green, § 15-388 of the Code of Virginia provides that any town may employ a person to be known as the town manager, and "he shall, under the control of the council, have general charge and management of the administrative affairs and work of such city or town and shall perform such other duties as may be required of him." Pursuant to the Charter of the Town and § 15-388 of the Code, the Council for the Town of Bowling Green has appointed a Town Manager or Town Business Manager. By ordinance of the Town Council, duly enacted on December 6, 1956, by the Council, the Town Business Manager was given the following duties:



1. To be in charge of the administration of the municipal government and directly responsible to the Council.
2. To serve as Clerk for the Council, having the right to introduce and discuss any subject or business.
3. To serve as Town Treasurer and to perform such duties as are set forth in the charter for this officer.
4. To assist in the preparation of the annual budget.
5. To present adequate monthly financial reports.
6. To Perform such other duties as may be prescribed by the charter or by the general laws of the Commonwealth, or by the Council, which duties shall include, among others:
  - (a) The operation and maintenance of the Town water system.
  - (b) The operation and maintenance of the Town sewer system.
  - (c) The operation and maintenance of the Town Hall.
  - (d) The operation and maintenance of all other Town property, inc.
  - (e) Supervision of the garbage collection service. The dump.
  - (f) The maintenance of streets and alleys with the cooperation of the Virginia Department of Highways.
  - (g) Inspection and supervision of repairs to sidewalks and of new construction when approved by Council.
  - (h) Inspection and recommendations regarding street lighting.
  - (i) Issuance of building permits, subject to the approval of the Building Inspector and Council.
  - (j) Reporting on fire hazards and any problems regarding the Vol. fire Department.

In view of this action by the Town Council, which action is in accord with the Charter of the Town and general law of the State, the Town Business Manager is the chief administrative officer of the town. The Town Business Manager in the performance of his duties as set out above, is responsible directly to the Council and not to the Mayor. If the Town Business Manager is also appointed town treasurer and clerk, he is responsible in carrying out the duties of these two offices directly to the Town Council and not to the Mayor.

The statements made in Point 8 are substantially correct except where it infers that the mayor of a town, such as Bowling Green, has responsibility for administering the laws and ordinances of the town. As I have stated before, he is not responsible for the administration of the laws and ordinances of the town.

The provisions contained in Point 9 are substantially correct; however, in reading this Point 9, it must be remembered that the Mayor of the Town of Bowling Green is the chief executive officer, but he is not the chief administrative officer of the Town.

As to the last statement contained in Point 9 that the office of town manager is usually combined with that of town sergeant, this practice varies from town to town and I would say that, in the majority of towns, the offices of town manager and the town sergeant are held by different persons.

In Point 10 the statement is made that "the casual student of municipal government is apt to feel that by ordinance or resolution the council members may shift the responsibility placed by law upon the mayor to another individual." It is true that the Council for the Town of Bowling Green may not take the responsibilities and duties of the office of mayor away from the mayor and transfer them to someone else. These responsibilities and duties are those of chief executive officer of the town. The town council, by ordinance duly enacted, may place all administrative duties relating to town government on someone other than the mayor as neither the charter of the town nor the general law of the Commonwealth vests the office of mayor with the administrative duties of the town.

**CITIES, TOWNS—Elections—Council Must be Elected in June Charter Provisions Notwithstanding. F-100b (51)**

August 14, 1956.

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

This is in reply to your letter of August 8, 1956, in which you enclosed a letter from Mrs. Joseph Burlock, Secretary to the Town Manager of the Town of Poquoson, which letter reads, in part, as follows:

"Pursuant to our conversation of this date, this office would appreciate your assistance in clarifying the filing date for candidates for our Councilmanic election on November 6, 1956. It is not clear, at this point, whether the filing date is 60 or 90 days prior to the election.

"For your reference, may I quote from our Charter, Acts of Assembly, 1952, Chapter 238, Article III, Section 7:

"The Town councilman at large (mayor) shall be elected at the general election in November, nineteen hundred fifty-two. His term of office shall commence on the first day of January, nineteen hundred fifty-three, and he or his successor shall be elected each four years thereafter."

In addition to the question presented by Mrs. Burlock, you have stated that, in your opinion, the town election should have been held in June pursuant to the provisions of the general statutes relating to the election of town officers. You refer specifically to §§ 24-168 and 24-169 of the Code. In addition to these sections § 24-136 provides as follows:

"There shall be held throughout the State on the Tuesday after the first Monday in November in the counties and cities, and on the second Tuesday in June in the cities and towns, general elections for all officers required to be chosen at such elections respectively."

As pointed out by Mrs. Burlock, the charter of the Town of Poquoson (Acts of Assembly, 1952, Chapter 238) provides that the town officers shall be elected at the general election in November and the terms of office will commence on January 1, which is in conflict with § 24-169 of the Code where it is provided that the terms of office shall commence on the first day of September next succeeding the June election.

In answer to the specific question presented by Mrs. Burlock with respect to the filing date, it is clear under § 24-345.3 that, even if the charter provisions should be constitutional, the time has elapsed for the filing of notice of candidacy. Therefore, the local electoral board has no power to print the name of candidates on an official ballot.

There is grave doubt as to the constitutionality of the charter provision which fixes the date for the holding of town elections in November and the time for taking office as January first. In this connection, I wish to call attention to the provisions of § 63(11) of the Constitution which provides as follows:

"The General Assembly shall not enact any local, special or private law in the following cases:

"(11). For conducting elections or designating the places of voting."

Section 64 of the Constitution prescribes, in part, as follows:

"In all cases enumerated in the last section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws."

The General Assembly has, as pointed out herein, enacted general laws with respect to conducting of elections for town offices, which election under such general laws, shall be held on the second Tuesday in June, and the officers elected at that time shall take office on the first day of September next succeeding the June election. The charter provision, therefore, is in conflict with general law. In my opinion it is a local or special law respecting the conducting of an

election and, for that reason, invalid as being in violation of the constitutional provisions herein set forth.

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**CITIES, TOWNS—May Appropriate Money for Construction of Nonprofit Hospital—May Require Hospital to Provide Certain Services. F-83 (63)**

August 27, 1956.

HONORABLE E. RALPH JAMES  
Member House of Delegates

This is in reply to your letter of August 22, 1956, in which you ask if the City of Hampton may, under the provisions of § 15-16.1 of the Code of Virginia, appropriate the sum of \$150,000 to a nonprofit hospital within the City with the agreement that the money is to be returned should it not be used for this purpose and, with the further agreement that, if the money is used, the hospital shall render certain services to the City by way of providing free treatment for indigent patients of the City.

I am of the opinion that, under the provisions of § 15-16.1 of the Code of Virginia, the City can appropriate this money to the nonprofit hospital for construction purposes, and the City and hospital may also enter into an agreement whereby in consideration of this appropriation the hospital agrees to return the money should it not be used for this purpose and, further that, if it is used for this purpose, the hospital shall render certain services to the City.

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**CITIES, TOWNS—Mayor's Veto—Items of Appropriation of Less Than \$100.00—Authority to. F-60b (221)**

February 5, 1957.

HONORABLE BERNARD MAHON  
Commonwealth's Attorney  
Caroline County

This is in reply to your letter of February 1, 1957, in which you state that the Council of your town by a majority vote appropriated \$100.00 for the purpose of repairing an alley, and that this action was vetoed by the Mayor. You have requested my advice as to whether the Mayor has the power of veto in such instances. You present your question as follows:

"The Council of the Town of Bowling Green in its budget for the current year set up the sum of \$250.00 for the maintenance of three alleys or lanes in the Town of Bowling Green, including Chapin's alley.

"At a meeting of the Council by a majority vote of all members elected to the Council it authorized the expenditure of the sum of \$100.00 for repairs to Chapin's alley. The Mayor has vetoed this action.

"Please advise me whether, under the provisions of Section 123 of the Constitution and Sections 15-410, 15-411 and 14-412 of the Code, particularly the latter one, the Mayor has the right to veto this expenditure since it is not in the excess of \$100.00.

"Please also advise whether the adoption of a budget appropriates the money for the various items set forth therein, or whether the Council should by separate action appropriate the money for the various items set forth in the budget."

The Code sections to which you refer are applicable to cities only. No comparable or paralleling statutes have been enacted relating to towns.

Section 123 of the Constitution provides that:

"No ordinance or resolution appropriating money exceeding the sum of one hundred dollars \* \* \* shall be passed, except by a recorded affirmative vote of a majority of all the members elected to the council \* \* \*; and in case of the veto by the mayor of such ordinance or resolu-

tion it shall require a recorded affirmative vote of two-thirds of all the members elected to the council \* \* \* to pass the same over such veto in the manner provided in this section."

This section does not, in my opinion, imply that the Mayor may not veto an item of appropriation less than one hundred dollars. Section (9) of the Charter of Bowling Green (Acts of Assembly, 1948, at page 398) confers the veto power on the Mayor without regard to the amount involved in an appropriation. Section 8 of the Charter also confers the power of veto.

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**CITIES, TOWNS—Town May Make Temporary Loan For Sewage System—  
to be Paid Within Year from Proceeds of Bond Issue. F-213 (204)**

January 22, 1957.

HONORABLE BALDWIN LOCHER  
Member House of Delegates

This is in reply to your letter of January 16, 1957, in which you request my opinion as to whether or not the Town of Glasgow, Virginia, may borrow a sum of money not to exceed \$145,000.00 from one or more banking institutions, said loan to bear interest at a rate not to exceed three and one-half percentum per annum, and said loan to be paid on or before the first day of July, 1957. This money is to be used as interim financing for a town sewage system. The voters of the town have authorized general obligation bonds in the amount of \$250,000.00 to be issued for this purpose. These bonds will be sold on or before July 1, 1957, and the money borrowed in the interim period would be repaid at that time out of the proceeds of the sale of the bonds.

I am of the opinion that the town may borrow this money to be repaid on or before July 1, 1957. The notes evidencing such indebtedness should be signed by the Mayor of the Town of Glasgow and should be attested to by the Clerk or Recorder of the Town of Glasgow. If such interim financing is resorted to, the trust indenture covering the \$250,000.00 worth of obligation bonds should contain a provision that a portion of the money will be used to pay off the money borrowed in the interim.

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**CLERKS—Acceptance of Check for Fines—Personally Liable if Check Proves  
to be Worthless. F-263 (116)**

March 13, 1957.

HONORABLE JOHN V. FENTRESS, *Clerk*  
Circuit Court of Princess Anne County

This is in reply to your letter of February 20, 1957, which reads as follows:

"In May 1955, a check in the amount of \$561.75 was given to the Clerk of the Circuit Court covering fines and costs in Commonwealth's cases. An official receipt was written and held pending the check clearing the bank. The check was returned marked 'no account.' The Clerk then marked the official receipt 'void' and held same for the auditor, and proceeded to issue a capias pro fine and then enter a judgment on the books in favor of the Commonwealth.

"I desire an opinion as to whether the Clerk is liable for the returned check in light of the subsequent action taken in voiding and holding the original copy of the original receipt; the issuing of the capias pro fine; and, the entering of the judgment against the convicted in favor of the Commonwealth."

The check was given to you as Clerk in payment of the fine and costs imposed in seven cases. Each order, except as to the name of the defendants, was as follows:

"VIRGINIA: IN THE CIRCUIT COURT OF PRINCESS ANNE COUNTY ON THE 6TH DAY OF APRIL, 1955.

Commonwealth of Virginia	)	An appeal upon a charge of vio-
vs.	)	lation of Title 4, Sec. 58, 1950
Jane Williams	)	Code.

"This day came the Attorney for the Commonwealth, as well as the defendant and upon a plea of Guilty, and waiving trial by a jury, the Court heard and determined the case without the intervention of a jury, and finding the defendant guilty according to her said plea, doth fix her punishment at a fine of Fifty Dollars and six months in jail.

"Whereupon, it is considered by the Court that the said Jane Williams be fined the sum of Fifty Dollars to the use of the Commonwealth, and that she be confined in the jail of this County for the term of six months.

"And on recommendation of the enforcement officers, and concurred in by the Attorney for the Commonwealth, the Court doth suspend said jail sentence upon payment of said fine and costs."

Section 19-329 of the Code prescribes that fines shall be paid and collected only in lawful money of the United States. This section reads as follows:

"The proceeds of all fines collected for offenses committed against the State, and directed by section one hundred and thirty-four of the Constitution of Virginia to be set apart as a part of a perpetual and permanent literary fund, shall be paid and collected only in lawful money of the United States, and shall be paid into the State Treasury to the credit of the Literary Fund, and shall be used for no other purpose whatsoever."

While it is true that in this instance the official receipt was not delivered but held pending the payment of the check, yet I can see no escape from the conclusion that the check was delivered to the clerk in payment of the fines and costs incident to the seven cases for the purpose of making the suspension of the jail sentences effective.

I am of the opinion that the clerk is personally liable in the event he accepts a check that turns out to be worthless, especially where such check operates to meet a condition imposed in the order of court.

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**CLERK—Certificate of Qualification of Notary—May Certify Only to Records Found in Office. F-116 (308)**

April 29, 1957.

MRS. LUCY A. ALLEN, *Deputy Clerk*  
Circuit Court of Clarke County

This is in reply to your letter of April 23, 1957, in which you request my opinion as to whether or not a Clerk or Deputy Clerk has the authority to issue a certificate certifying the commission and qualification of a Notary when the Notary has qualified in a County other than that wherein he makes application for such certificate.

I am of the opinion that you may issue a certificate certifying only those records found or made in your office. If the Notary has qualified before the Clerk of another County, then you have no record in your Clerk's office upon which to base a certificate of qualification.

**CLERKS—Fees—For Certificate of Fine in Criminal Case to be Paid out of State Treasury. F-146 (116)**

October 31, 1956.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of October 24, 1956, in which you request my opinion as to whether or not the 25¢ clerk's fee provided for in § 19-312 of the Code may be taxed against the defendant as part of the costs in criminal cases. Section 19-312 of the Code provides as follows:

"The clerk shall enter all such certificates in a suitable book; and if the fine and costs have not been paid, he shall forthwith issue a writ of fieri facias therefor, and afterwards such other process, from time to time, as may be proper, in the same manner as if such fine had been imposed by the court of his county or city. For entering every such certificate the clerk shall receive a fee of twenty-five cents, payable out of the State treasury."

You can see from that section that it provides that the clerk shall receive a fee of 25¢ for entering every certificate of fine, which fee is payable out of the State treasury. Although these fines were imposed in connection with a criminal case, the recovery of fine and costs is in essence a civil matter. This fee of 25¢ is payable out of the State treasury to the clerk as compensation for his assistance to the Commonwealth in its effort to recover the fine and costs which have already been imposed in a criminal case. The statute clearly provides that it shall be paid to the State treasury, and I can find no other provision in the Code of Virginia which would permit this fee to be charged to the defendant in a criminal case as a part of the costs in that case.

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**CLERKS—Holidays—Offices May be Closed Only on Days Provided for by Statute. F-116 (166)**

November 28, 1956.

HONORABLE JULIAN UPDIKE, *Clerk*  
Warren County Circuit Court

This will acknowledge receipt of your letter of November 26, 1956, from which I quote as follows:

"I have noted that Governor Stanley has declared Christmas Eve, Monday, December 24th, an additional holiday in Virginia.

"I shall greatly appreciate it if you will advise me if this holiday may be observed by the Circuit Court Clerk's Office of Warren County."

Section 17-41 of the Code of Virginia, as amended, provides that the clerk's office shall be kept open every day except Sunday, Fourth of July, Thanksgiving Day and Christmas Day. Certain exceptions are granted wherein the clerk's office of certain courts may be closed on other days, but I am of the opinion that your office does not come within any of the exceptions therein set forth.

Therefore, I am of the opinion also that you may not close your office on Christmas Eve, Monday, December 24, 1956, even though the Governor of Virginia has declared it to be an additional holiday for State employees.

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**CLERKS—Legal Holidays Offices in Cities May be Closed on Armistice Day. F-116 (150)**

November 7, 1956.

MRS. EDITH H. PAXTON, *Clerk*  
Corporation Court City of Staunton

This will acknowledge receipt of your letter of November 6, 1956, which I quote as follows:

"In Section 17-41 (1) of the Code of Virginia, as amended, I find Armistice Day set forth as one of the days that Clerks' offices in cities may be closed; however, in Section 2-19 Armistice Day was deleted from the list of legal holidays by the 1954 amendment.

"My question is this: 'Is there still an Armistice Day in Virginia—November 11—and can my office be closed on November 12, or was Armistice Day taken from Section 17-41 (1) by implication?'"

I am of the opinion that Section 17-41 (1) of the Code of Virginia is not affected by Section 2-19 of the Code, as amended, relative to the closing of the offices of Clerks of Courts on Armistice Day, November 11. I am also of the opinion that you may close your office on Armistice Day, as provided by Section 17-41 (1).

I suggest, however, that you consult with your Judge, inasmuch as he might be inconvenienced by such closing.

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**CLERKS—Orderbook—Should be Signed by Judge After Orders Entered.**  
(325)

May 15, 1957.

HONORABLE H. B. BATTE, *Clerk*  
Circuit Court of Dinwiddie County

This is in reply to your letter of May 8, 1957, in which you state that the original chancery orders in your court are photostated and then the photostatic copy of the order is filed in the chancery order book. You further state that the original order is signed by the Judge before the photostatic copy is made and you request my opinion as to whether or not § 17-27 of the Code of Virginia requires the Judge to sign the order book after the orders have been entered.

I am of the opinion that § 17-27 of the Code of Virginia does contemplate and require that the order book be signed by the presiding judge after the orders have been entered therein. I know of no prohibition which would prevent the original chancery order from being photostated and the photostatic copy from being entered in the chancery order book; however, I feel that the order book must be signed by the presiding judge after the orders have been entered.

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**CLERKS—Recordation—Conditional Sales Contract for Furnace Attached to Realty—Should be in Deed Book. F-34 (265)**

March 14, 1957.

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

I acknowledge receipt of your letter of March 13, 1957, which reads as follows:

"Someone has presented a document to us for recordation and indexing in the Deed Book, and has tendered the proper recording fee. The document is properly acknowledged but it appears on its face to be a conditional sales contract of personal property, and has already been filed in this office as such pursuant to Section 55-88 of the Code of Virginia (1956 Supplement).

"The person presenting the document represents that the furnace described therein has been annexed to realty and takes the position that the document is included in Section 17-60 of the Code of Virginia as a contract 'in reference to real estate,' because the furnace has lost its identity as personal property, even though it is so described in the instrument, and that when the furnace became real property, the instrument became a lien on an interest in real estate.

"The document very clearly purports to be a conditional sales contract and we take the position that one cannot arbitrarily elect to record a writing in a certain book of his own choosing, otherwise the statutes with respect thereto would be meaningless and anyone searching the records, hopelessly confused. Will you please advise us."

I am of the opinion that you should record the instrument in question in the Deed Book, even though it has already been recorded under the provisions of § 55-88 of the Code. You state that the instrument submitted for recordation is properly acknowledged which would make it a proper instrument to be recorded in the Deed Book. Actually, under the *proviso* clause of § 17-61 of the Code, since it is felt by the beneficiary under the document that it relates to or affects both real and personal property, such document could have been recorded only in the Deed Book and a cross index appropriately made in the book of miscellaneous liens.

If the furnace is actually attached to and a part of the real estate, unless the lien securing the unpaid purchase price is recorded in the Deed Book, a purchaser of the real estate to which the furnace has become attached would not have constructive notice of the existence of the lien.

As stated in the outset, I do not feel that you should refuse to admit the writing to record in the Deed Book.

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**CLERKS—Recordation—Cost of Photostating Deeds, How Borne. F-116 (67)**

August 30, 1956.

HONORABLE HARRY P. ROWLETT  
Commonwealth's Attorney for Lee County

I am in receipt of your letter of August 21, in which you present the following situation and inquiry:

"In 1954 the Board of Supervisors purchased a photographing machine for the Clerk's Office of Lee County, Virginia to take pictures of the deeds where (sic) were presented for recordation which said machine replaced the old system of copying by typewriter and proof reading the deeds as presented. Prior to the purchase of this photographing machine it was the responsibility of the Clerk to pay the typist out of the fees which he collected. Since the purchase of the photographing machine this typist is no longer needed and has been discharged by the Clerk. There is, however, an expense connected with the developing of the films used by the photographing machine. The question posed by the Board of Supervisors is whether the expense of developing these films should be paid out of the General County Fund or should it be paid from the Clerk's Fees?"

I am of the opinion that the expenses incurred in developing the film used in the photographing machine in question should be paid by the clerk from the fees collected by him. In this connection, I have contacted officials of the State Compensation Board and am informed that a specific allowance to cover these costs is made by the Board to each clerk, which allowance is in lieu of that formerly permitted to defray the expenses of the typist or clerical assistant making typewritten copies of deeds filed for recordation prior to the installation of photographic equipment. The allowance now made covers only the cost of developing the film used, the cost of the paper on which photostatic copies are reproduced being defrayed by the locality.



**CLERK—Recordation—No Fee Charged Where Subdivision Plat Recorded Without Any Transfer of Ownership. F-58 (196)**

January 10, 1957.

HONORABLE W. CARY CRISMOND, *Clerk*  
Circuit Court of Spotsylvania County

I acknowledge receipt of your letter of January 9, 1957, which reads as follows:

"I have had recently a plat of a subdivision consisting of 450 lots presented for recordation and wish to ask what transfer fee or fees would be chargeable as the Commissioner of Revenue would have to list each lot separately on his land book."

There is no statutory provision under which a transfer fee may be charged in connection with the recordation of a plat showing a subdivision of property into lots, streets and alleys. Such fees may be charged and collected only for the services included in § 58-816 of the Code.

The fee chargeable by the clerk in such cases is prescribed in § 14-123 (2) (3) of the Code.

Sections 58-772 and 57-772.1 of the Code prescribe the procedure to be followed by a Commissioner of the Revenue in connection with the assessment of lots in a newly subdivided tract of land.

Transfer fees may be charged only when there has been a transfer of title. No title passes in a mere subdivision and recordation of a plat thereof, such as mentioned in your letter.

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**CLERKS—Town Officers—Duty to Furnish Secretary of Commonwealth Information—How Obtainable. F-116 (132)**

October 23, 1956.

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

I am in receipt of your letter of October 18, in which you call attention to an opinion of this office to the effect that the mayor and councilmen of a town may take their oath of office before any officer authorized by law to administer oaths (Report of the Attorney General (1954-55), page 65), and to the recent amendment of Section 17-54 of the Virginia Code, which requires the clerk of the circuit court of each county to send to the Secretary of the Commonwealth a list of all "incorporated town" officers together with information concerning their election, appointment, qualification and terms of office. You request to be advised how a clerk can furnish information relating to the qualification of mayors and councilmen when such officials do not take their oath of office before him.

Permit me to advise that, in those instances in which a mayor or councilman does not take his oath of office before the clerk of the circuit court so that the information specified in Section 17-54 of the Code is readily available to the clerk, it would be appropriate for the clerk to request the officer in question to furnish a certificate setting forth such information.

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**COLLEGES AND UNIVERSITIES—Approval of Governor Necessary Before Accepting Any Donations, Gifts or Federal Grants. F-268h (35)**

August 2, 1956.

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

This will reply to your letter of July 25, in which you request an interpretation of the provisions of Section 25 of the Appropriations Act of 1956. Chapter 716, Acts of Assembly (1956). You specifically inquire whether or not the Virginia Military Institute may accept donations without the prior written con-

sent and approval of the Governor, if the acceptance of such donations does not involve future expenditures of State funds.

Section 25 of the Appropriations Act provides:

"With the written consent and approval of the Governor first obtained, any department, institution or other agency of the State government may expend, in addition to the appropriation herein made to such department, institution or agency, any money, revenue or funds paid into the State treasury to the credit of said department, institution or agency, in excess of such appropriations as proceeds of donations, gifts or Federal grants, when later developments are believed to make such expenditure necessary, such expenditure to be in accordance with the purpose for which said gift, grant or donation was made. It is further provided that no donations, gifts or Federal grants *whether or not entailing commitments as to the expenditure, or subsequent request for appropriation or expenditure, from the general fund of the State treasury* shall be solicited or accepted by or on behalf of any department, institution or agency without the prior written consent and approval of the Governor." (Italics supplied).

Prior to 1948, various sections of the biennial Appropriation Acts embodied the provision contained in the first sentence of Section 25. The conditional prohibition enunciated in the second sentence of Section 25 first appeared in Section 22 of the Appropriations Act of 1948. Chapter 552, Acts of Assembly (1948). In view of the language of the terminal sentence of Section 25, especially that italicized above, it would appear that the prior written consent and approval of the Governor is required before any donation, gift or Federal grant may be either solicited or accepted by or on behalf of any department, institution or agency of the Commonwealth. While it may be reasonably contended that the donations, gifts or Federal grants to which reference is made in the terminal sentence of Section 25 contemplates money, revenue or funds "paid into the State treasury" to the credit of a department, institution or agency as specified in the initial sentence of the section under consideration, the concluding sentence contains no qualifying language which would limit its application to money or funds paid into the State treasury. As the language in question, when given its ordinary signification, is broad enough to include all donations, gifts or Federal grants, I would advise that the prior written consent and approval of the Governor be obtained before acceptance of any donations by the Virginia Military Institute.

#### COLLEGES AND UNIVERSITIES—Norfolk Division of William and Mary May Continue Four Year Program. (376)

June 28, 1957.

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

I am in receipt of your letter of June 24, 1957, in which you outline the circumstances surrounding the initiation in 1954 of a program involving the establishment of four-year curricula in business administration, elementary education and nursing at the Norfolk Division of the College of William and Mary, which curricula were essential to effectuate the educational program of the College of William and Mary in Virginia.

As stated in your communication, initiation of these curricula was conditioned upon a sufficient increase being made by the General Assembly in its appropriations to the College of William and Mary to enable the institution to meet the standards of the Southern Association of Colleges and Secondary Schools. Subsequently, general fund appropriations for the 1954-1956 biennium were increased to provide funds in support of the program in question, and this increase was maintained for the 1956-1958 biennium. See, Commonwealth of Virginia, Budget Analysis (1954-1956) Part I, page 12; Part II, page 196. As a result of the establish-

ment of this program, four-year curricula in the specified subjects have been conducted, and baccalaureate degrees were conferred upon students graduating from the Norfolk Division of the College of William and Mary in 1956 and 1957.

In light of the foregoing, and in view of the increase in appropriations made by the General Assembly of Virginia for the specific purpose of providing funds for the establishment of the curricula under consideration at the Norfolk Division of the College of William and Mary, I am of the opinion that the Board of Visitors of the College of William and Mary is authorized to continue the program initiated in 1954.

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**COLLEGES AND UNIVERSITIES—Veterans Administration Claim Against Norfolk Division of William and Mary. (363)**

June 18, 1957.

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

This is in reply to your letter of June 8, 1957, in which you request my opinion as to whether or not the Norfolk Division of the College of William and Mary is legally liable to the Veterans Administration for a claim asserted by the Veterans Administration in the amount of approximately \$41,000. The Veterans Administration contends that the Norfolk Division has charged students who were veterans higher tuition fees than non-veteran students. It is alleged that \$7,545 is due the Veterans Administration for excess tuition payments paid by the Veterans Administration under a contract with the Norfolk Division for the education of disabled veterans pursuant to Public Laws 16 and 346 of the 78th Congress. It is contended that \$8,040 is due veterans presently attending the College under Public Law 550, 82nd Congress, and \$26,177.50 is due to veterans who formerly attended the College under Public Law 550.

This claim has arisen in the following manner which I quote from your letter:

"The State Board of Education, through its Department of Trade and Industrial Education, gave financial assistance to certain schools to enable them to offer reduced rates to students and to reduce the cost of subsidy required of the school system. Prior to July, 1946, this aid was given without any consideration of the student's status as a veteran or non-veteran.

"With the veterans returning to school under the established policy of the Veterans Administration to pay 'the entire cost of educating veterans' it was felt that a change in State policy was necessary. All State colleges were permitted to charge the Veterans Administration the out-of-State fee even though they were not out-of-State students, the theory being that this fee represented the cost subsidy being provided a student by the State.

"When the financial assistance mentioned above was received from the Trade and Industrial Education Department of the State Board of Education, the funds were used to credit the accounts of only the nonveterans. If the student account was paid in full when these funds were received this caused an overpayment and the student was subsequently given a refund of the amount of the overpayment. This practice was clearly printed in the catalogue of the Technical Institute which is a part of the Norfolk Division of the College of William and Mary. The Veterans Administration was fully aware of the provisions of our catalogue as all contracts with the Veterans Administration include the college catalogue as a part of the contract. In addition, the Veterans Administration maintained careful inspection of the Norfolk Division to see that they complied with the regulations and requirements of the law. Many thorough inspections were made.

"On June 13, 1956, Mr. C. J. Necessary, Acting Chief, Vocational Rehabilitation and Education Division of the Veterans Administration, notified Mr. Webb, Director of the Norfolk Division, that in his opinion the provisions of Public Law 550, 80th Congress, and Public Laws 16 and 346, 17th Congress, did not permit educational institutions to charge a greater amount for tuition and fees to veterans than non-veterans are required to pay.

"The Veterans Administration subsequently claimed that the amount due the veterans and the Veterans Administration amounted to \$41,000. This amount consisted of approximately \$7,545 due the Veterans Administration for tuition payments for disabled veterans; \$8,040 due Public Law 550 veterans who are currently in training at the Norfolk Division; and \$26,177.50 due Public Law 550 veterans who are no longer in attendance at the institution. Also, the Veterans Administration is withholding payment on approximately \$16,000-worth of vouchers submitted by the Norfolk Division to the Veterans Administration."

The catalogue of the Norfolk Division of the College of William and Mary contained the following provision:

"Virginia residents eligible for State aid will receive credit toward their tuition at the end of the quarter in amount approximately equal to State aid received. In the past, this credit has been \$45.00 per quarter, and it is anticipated that it will continue at this rate. Students to be eligible for State aid shall be in attendance in good standing at the end of six weeks of classes in any quarter. Since State aid is not received for the training of veterans receiving Government assistance, they are not eligible for reimbursement."

In the contract entered into between the Veterans Administration and the Norfolk Division of the College of William and Mary for the education and training of disabled veterans pursuant to Public Laws 16 and 346, it was agreed that payment of fees for the veterans would not exceed the charges generally made to other regular students pursuing the same or similar courses of instruction, except where the Veterans Administration had agreed to pay adjusted tuition as fair and reasonable compensation for services rendered. If the Veterans Administration has not agreed to pay such adjusted tuition, then the Veterans Administration may have a possible valid claim for refund of tuition payments in the amount of approximately \$7,545, which payments were made pursuant to the contract.

There was no contract between the Norfolk Division and the Veterans Administration as to the education and training of the veterans who attended the College under the provisions of and with assistance received from Public Law 550. The Veterans Administration paid each veteran a certain monthly subsistence while he attended the College. The veteran in turn paid the College his tuition fee. He paid this to the College with the knowledge of and under the aforementioned quoted provision from the catalogue of the College. The only section I can find in Public Law 550 dealing with a situation such as that involved here is § 234 which reads as follows:

"Sec. 234. The Administrator may, if he finds that an institution has charged or received from any eligible veteran any amount in excess of the established charges for tuition and fees which the institution requires similarly circumstanced nonveterans enrolled in the same course to pay, disapprove such educational institution for the enrollment of any veteran not already enrolled therein, except that, in the case of a tax-supported public educational institution, which does not have established charges for tuition and fees which it requires nonveteran residents to pay, such institution may charge and receive from each eligible veteran who is a resident an amount equal to the estimated cost of teaching personnel

and supplies for instruction attributable to such veteran, but in no event to exceed the rate of \$10 per month for a full-time course."

I am of the opinion that the Veterans Administration has no legal claim against the Norfolk Division for any alleged overpayment of tuition fees by veterans attending college under Public law 550. The Administrator of the Veterans Administration may, if he finds that the College has charged a veteran an amount in excess of the tuition fees for nonveterans, disapprove the College for the enrollment of any veteran not already enrolled there.

I am of the opinion that the Veterans Administration has no authority or legal right to withhold payment to the College of any money which it is indebted to the College in excess of \$7,545, which amount it might possibly be entitled to as a refund under the provisions of the contract.

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### COLLEGES AND UNIVERSITIES—V.P.I.—Establishment of Undergraduate Curriculum in Home Economics. F-268q (324)

May 13, 1957.

HONORABLE WILLIAM S. MOFFETT, JR., *Judge*  
Eighteenth Judicial Circuit

I am writing in further connection with my letter of April 4, in response to your letter of March 25, concerning the establishment of a course in Home Economics Education at the Virginia Polytechnic Institute.

From your letter, it appears that the Board of Visitors of V. P. I. has been requested by the State Board of Education to establish an undergraduate curriculum in Home Economics Education at the Institute. You state that the Board of Visitors has given this matter thoughtful consideration, centered primarily upon the desirability of initiating such a course of study at the Institute in view of the circumstance that adoption of such a curriculum will probably entail the acceptance and housing on the campus of V. P. I. of some fifty to two hundred additional female students under twenty-one years of age. You now inquire whether or not, in light of the laws pertaining to the government of V. P. I. and effecting the consolidation with V. P. I. of the State Teachers College at Radford, the proposed course of study may properly be established at the Institute. See, Sections 23-114 through 23-155, Code of Virginia (1950) as amended.

Section 23-130 of the Virginia Code provides that the curriculum of the Virginia Polytechnic Institute "shall embrace such branches of learning as relate to agriculture and the mechanics arts, without excluding other scientific and classical studies, and including military tactics". The consolidation of the State Teachers College at Radford with V. P. I. was effected by Chapter 240 of the Acts of Assembly of 1944, codified as Sections 23-147 through 23-155 of the Virginia Code. By virtue of these statutes, the supervision, management and control of Radford College was vested in the Board of Visitors of Virginia Polytechnic Institute, and the President of the Institute became the Chancellor of Radford College and its principal administrative officer. Under the provisions of Section 23-151 of the Code, the Board of Visitors is charged with the responsibility of approving departments or fields of instruction to be offered by Radford College, subject to the qualification that "the work of teacher training in which the State Teachers College at Radford has been engaged shall be continued as part of any curriculum at the college and as an integral part of the State's program of teacher training . . .". Moreover, Section 23-154 of the Code provides:

"It shall be the duty of the board of visitors of the Virginia Polytechnic Institute to consolidate the College with the Institute in such manner and by such procedure as to incorporate positive ideas and plans which will promote technical and vocational educational opportunities for white women in Virginia, by the integration of the instructional staffs, the use of the laboratories, libraries and other facilities, and the

maintenance of the prestige, integrity and individual status of the two institutions so consolidated."

With regard to the residence of female students subsequent to consolidation, Section 23-152 of the Code provides:

"Within four years from June twenty-fourth, nineteen hundred and forty-four, the College shall serve as the woman's campus and all women under-graduate students of the Institute shall be domiciled in living quarters on the woman's campus, except that this provision shall not apply to mature women students, twenty-one years of age and over, and to women day students living at the homes of their parents or legal guardians; *and where the course of study pursued by an undergraduate woman under twenty-one years of age is such that to require her to reside on the campus of the College would, in the opinion of the board of visitors, result in undue hardship, the board by resolution may permit such student to reside on the campus of the Institute.* During the four year period above provided for any and all women students enrolled and living at the Institute shall be permitted to continue to attend the Institute and to live on its campus until graduated or finishing their courses, but no new women undergraduate students shall be permitted to enter at Virginia Polytechnic Institute and to live on its campus at Blacksburg except in accordance with the provisions of this Section." (Italics supplied).

Consonant with these provisions of the Virginia law, the Board of Visitors of the Virginia Polytechnic Institute, on May 14, 1953, adopted a resolution which, in paragraphs (4) and (5) thereof, proposed:

"That the Administration at V. P. I. shall develop, promote, and expand its technical and vocational training program to include women in all fields especially appropriate to its objectives as a Land Grant College.

"Pursuant to the decision of the Attorney General with reference to the compliance of this resolution with Chapter 11, Article V of Title 23 of the Code of Virginia, the Board directs the administrations at Radford College and V. P. I. to proceed at once with the implementation of this resolution and to submit to the Board from time to time for its approval, such rules, regulations, and procedures as conditions may require.

The opinion of the Attorney General to which reference is made in paragraph (5) of the resolution in question is that rendered on June 12, 1944, to the Honorable James P. Woods, Rector of the Board of Visitors of the Virginia Polytechnic Institute, by the Honorable Abram P. Staples, then Attorney General, in which Judge Staples ruled:

"The prohibition against these new undergraduate women students living on the V. P. I. Campus is subject to the exception that, where, due to the course of study pursued, in the opinion of the Board this prohibition would 'result in undue hardship', the Board may by resolution permit such students to reside on said campus. It is my view that, if in the opinion of the Board, due to the course of study pursued, it would work an undue hardship on young women, coming within any one of the categories outlined by you, to require their domicile at Radford, the Board is possessed of authority in its discretion to allow them to live in the Women's dormitory at V. P. I. Of Course, I know you will agree that the Board cannot abuse this discretion by taking purely arbitrary action. But if the Board after consideration determines that, due to the course of study pursued, 'undue hardship' would result in the cases you refer to from denying domicile at V. P. I., in my opinion it would be a proper exercise of its discretion to allow such women students to live there."

As you are aware, I had occasion on March 19, 1953, to adopt and confirm Judge Staples' opinion, with respect to the Board of Visitors resolution of May 14, 1953, which was then under consideration by the Board.

As the contemplated Home Economics Education curriculum primarily embraces technical studies in such subjects as rural housing, rural sociology, nutrition and dietetics, farm security, gardening, floriculture, poultry raising and other courses of similar character, it would appear that the Board of Visitors is fully empowered to inaugurate such a curriculum at the Institute. In considering whether or not to undertake the establishment of such a course of study, I am sure that the Board of Visitors will be cognizant of its obligation to continue, as a part of any curriculum at Radford College and as an integral part of the State's program of teacher training, the work of teacher training in which Radford College has been engaged, as well as to promote technical and vocational educational opportunities for white women in Virginia and the maintenance of the prestige, integrity and individual status of the Virginia Polytechnic Institute and Radford College. I am equally confident that ample considerations may be marshaled in support of the Board of Visitors' decision in this matter. Should the Board of Visitors decide to initiate a curriculum of Home Economics Education at the Institute, the provisions of Section 23-152 of the Virginia Code, as construed by Judge Staples, will then become operative in appropriate cases.

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**COMMISSIONERS OF REVENUE—Transfer of Property on Tax Books—  
When There is a Consolidation or Merger of Corporations. (337)**

May 23, 1957.

HONORABLE WILLIAM H. ROUNTREE

Commissioner of the Revenue of Nansemond County

I acknowledge receipt of your letter of May 22, 1957, which reads as follows:

"Several months ago the Chesapeake-Camp Corporation or Camp Manufacturing Company merged with the Union Bag Company and now goes under the name of Union Bag-Camp Paper Corporation.

"Of course, I do not know whether or not a new charter was secured and recorded in Isle of Wight County where the principal office is located.

"I am enclosing a letter for your consideration, which I would appreciate your returning to me asking that all items of real estate previously assessed in the name of either Chesapeake-Camp Corporation or Camp Manufacturing Company be changed on the tax books to Union Bag-Camp Paper Corporation.

"My inquiry is: does the Commissioner of the Revenue have the legal right to make these transfers without any instrument of writing from the old Corporation to the new Corporation?"

Section 13.1-74 of the Code, relating to merger of corporations, provides in paragraph (d) as follows:

"(d) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation."

Substantially, the same provision was contained in § 13-55 of the Code. Therefore, whether the merger became effective prior to January 1, 1957, the effective date of § 13.1-74, the title to real estate recorded in the names of the corporations that were merged was "transferred to and vested in the new corporation without further act or deed."

Ordinarily, transfers are made on your books from the list furnished by the Clerk pursuant to § 58-797 of the Code. This section does not cover a situation such as you have presented. By force of statute there has been a transfer and it would appear that, if you are satisfied that the merger was consummated not later than January 1, 1957, you should make the assessment in the name of the new owner in accordance with § 58-796 of the Code.

**COMMONWEALTH'S ATTORNEYS—Confiscation of Automobile—Proceedings Under A.B.C. Laws Part of Regular duties. (339)**

May 24, 1957.

HONORABLE A. A. RUCKER

Commonwealth's Attorney for Bedford County

Receipt is acknowledged of your letter of May 20, 1957 in which you inquire whether the prosecution of proceedings under the provisions of § 4-56 of the Code of Virginia "is a part of the duties of the Commonwealth's Attorney covered by his salary as such, or whether this is a matter over and above the normal duties of the Commonwealth's Attorney for which he is entitled to be paid out of the proceeds of the forfeited vehicle, the same to be taxed as a part of the costs."

Please be advised that in my opinion the conduct of proceedings pursuant to § 4-56 of the Code of Virginia, prescribing the steps to be taken in effectuating the forfeiture of a vehicle or conveyance which has been involved in the unlawful transportation of alcoholic beverages, is a part of the normal duties of the attorney for the Commonwealth for which he is compensated by his salary as such. The proceeding under this section is a proceeding *in rem* against the vehicle or conveyance [*Ives v. Commonwealth*, 182 Va. 17, 27 S.E. 2d, 906] and is similar to other civil matters which the officer handles on behalf of the Commonwealth.

Section 14-193 of the Code provides for a fee of \$5.00, if no higher fee be allowed, to be taxed by the clerk of the court wherein any party recovers costs, and § 14-67 of the Code requires the attorney for the Commonwealth or such official as may collect any such fees to pay over the fees to which attorneys for the Commonwealth are entitled for the performance of official duties, one-half into the treasury of the respective counties and cities, and the remaining one-half into the State treasury.

From the above it would appear that in no event could the attorney for the Commonwealth receive any such fee for his own use, since his annual salary provides his entire compensation in such cases.

**COMPENSATION—Sheriff of the City of Richmond—No Maximum, May Keep All Fees. (332)**

May 21, 1957.

HONORABLE JAMES H. YOUNG, *Sheriff*

City of Richmond

This is in reply to your letter of May 5, 1957, in which you request my opinion as to what the annual maximum compensation to the Sheriff of the City of Richmond should be. The Sheriff of the City of Richmond is still paid on the basis of fees collected by or on behalf of his office. In 1942 the maximum compensation out of these fees that the Sheriff could retain was fixed at \$7,500; however, since that time, that provision of law has been repealed



and at present I can find no statute which requires the Sheriff of the City of Richmond to turn in his excess fees to the Commonwealth of Virginia.

I am of the opinion, therefore, that the Sheriff of the City of Richmond may keep all the fees collected by or on behalf of his office, and he is not required to pay into the State Treasury any excess fees.

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**CONSERVATION AND DEVELOPMENT – Department—Divisions of  
Water Resources, Geology and Forestry may be Located in Richmond.  
F-21 (274)**

March 20, 1957.

HONORABLE THOMAS B. STANLEY  
Governor of Virginia

I acknowledge receipt of your letter of March 19, 1957, which reads as follows:

“I shall appreciate your advice on whether there is any legal barrier to the transfer from Charlottesville to Richmond, by order of the Governor, of the Division of Water Resources, Division of Forestry and Division of Geology.

“Thought is being given to the grouping of these agencies in Richmond in order to bring all of the divisions of the Department of Conservation and Development into proximity to one another.”

I am of the opinion that the three divisions of the Department of Conservation and Development may be stationed in Richmond. At one time there was a statutory requirement to the effect that the Virginia Geological Survey should be maintained at the University of Virginia. The functions of this agency, however, were transferred to and made a part of the Division of Geology under the Reorganization Act of 1948. Section 10-92.1 of the Code.

I am unable to find any statutory provision that would require either the Division of Water Resources or the Division of Forestry to be located outside of the City of Richmond.

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**CONTRACTORS—County Regulation as to Qualification—May Not Require  
Examination—State has Preempted Field. F-34 (289)**

April 8, 1957.

HONORABLE E. L. KUSTERER  
Executive Secretary  
State Registration Board for Contractors

This is in reply to your letter of March 13, 1957, which reads as follows:

“The question has been raised as to the right of the counties of Chesterfield and Henrico to require a contractor registered by this Board under the provisions of Title 54, Chapter 7, of the Virginia Code, to meet the registration requirements of those counties as provided for in County Ordinances before they may bid on or accept orders or contracts as defined in the ordinances. This has specific reference to Chapter 1, Section 1, of the Chesterfield County Ordinance on License Taxes and Rates, copy enclosed, and Henrico County Ordinance No. 80, Chapter 1, Section 5, copy also enclosed.

“The right of a county to levy taxes on work performed by such contractor in the county is not questioned. What is questioned is the Counties’ right to require registration before bidding or offering to accept orders or contracts and a qualifying examination from contractors who have qualified and are registered under the State law applying to jobs costing \$20,000 or more, as provided in Sections 54-113 and 54-129 of the Virginia Code.

Chapter 7 of Title 54 of the Code provides for the creation and operation of the State Registration Board for Contractors. It further provides for the examination, licensing and certification of contractors who shall bid upon or engage in the construction of a structure or the improvement of a structure costing \$20,000 or more.

The ordinances enacted by Henrico and Chesterfield Counties provide for the establishment and operation of a County Contractors' Registration Board. This Board will license and certify contractors to do work in the counties, but, as a prerequisite to the license or certificate, such contractor, although he is already licensed as a general contractor, may be required to take an examination similar to or more difficult than that given by the State Board.

It would appear that it was the intent of the Legislature that the State Registration Board for Contractors should be the sole Board to exercise such powers in the State. The doctrine of preemption would seem to apply in this situation.

In Antieau's Municipal Corporation Law, Section 5.22, it is said:

"The 'occupation of the field' concept, familiar in demarcating respective state-federal competences under paramount federal powers such as the commerce clause, is used in municipal corporations law to invalidate municipal power when courts conclude that a 'field' has been 'occupied' by state authority. \* \* \*"

In the case of *Horwith v. Fresno*, 168 Pac. 2d 767, a similar situation was discussed. The City of Fresno created a Contractors' Licensing Board when there was already such a Board established on the State level. The Court held that this was a matter which had been taken care of by legislation on the State level and, consequently, the Municipal Licensing Board was without power to act.

A second approach to this problem is that, if the subject matter is one that is of State-wide concern and not limited to any particular locality, and if the Legislature has acted in providing for the handling of the situation in question, then a municipal corporation is without power to enact ordinances relative to that particular subject. *Horwith v. City of Fresno, supra*.

I am of the opinion that the licensing of contractors is a State-wide problem and, inasmuch as the Legislature has seen fit to provide for the licensing and registration of contractors on a State-wide basis, then a political subdivision is without power, unless expressly given, to pass an ordinance in a matter which the Legislature has already specifically provided for.

Where a municipal corporation or county contemplates enacting an ordinance in a field where it is questionable that it has jurisdiction, then such action is subject to careful scrutiny. See *City of Winchester v. Redmond*, 93 Va. 711, where the Court said:

"A municipal corporation is a local and subordinate government, created by the sovereign authority of the State, primarily to regulate and administer the local and internal affairs of the city or town incorporated, in contradistinction to those matters which are common to and concern the people at large of the State. And it is only in regard to the local and internal affairs of the city or town that its Council, unless expressly authorized, has the right to legislate. To this end, specific powers are usually given in express words, and when a general and indefinite power, as the one under consideration, is superadded, it is to be confined in its exercise to the ordinary objects and purposes of municipal corporations, and not to be construed to comprehend a matter which is common to the State and affects its people at large."

The counties in question are vested with the powers of a city. Section 15-10 of the Code. The City of Richmond is not vested explicitly under its charter with the power to examine the qualifications of general contractors already licensed by the State Board. I am of the opinion, therefore, that, under the general powers, the Boards of Supervisors of such counties are not authorized to enforce an ordinance providing for such examinations.

**CONTRACTORS—Registration Board—Equipment Suppliers not Subject To Law. F-34 (148)**

November 2, 1956.

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

This will reply to your letter of October 25, in which you forwarded to this office a letter to you from Ezekiel and Weilman, Incorporated, concerning the registration of contractors under the provisions of Title 54, Chapter 7, of the Code of Virginia (1950) as amended, Sections 54-113 through 54-145.1 The precise question presented in your communication is whether or not persons conducting business of the type and in the manner outlined in the company's letter are required to register as contractors under the above mentioned law.

Pertinent to the resolution of this question is subparagraph (2) of Section 54-113 of the Virginia Code, which defines a general contractor or subcontractor in the following language:

"(2) 'General contractor' or 'subcontractor' shall mean any person, firm, association or corporation that for a fixed price, commission, fee or percentage, undertakes to bid upon, or accepts or offers to accept, orders or contracts for performing or superintending: (a) any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, or other metal or any other building material; (b) any paving, curbing or other work on sidewalks, streets, alleys or highways, on public or private property, using asphalt, brick, stone, cement, concrete, wood or any composition; (c) the excavating of earth, rock, or other material for foundation or any other purpose; (d) the construction of any sewer of stone, brick, terra cotta or other material; (e) any work involving the erecting, installing, altering or repairing, electric wiring, devices or appliances permanently connected to such wiring; or the erecting, repairing or maintaining of lines for the transmission or distributing of electric light and power; (f) any work involving the installing, altering or repairing of any plumbing, steam fitting or other piping, when the amount of the bid or cost of the undertaking, order, contract or subcontract is twenty thousand dollars or more; 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 twenty thousand dollars or more, shall be deemed to have engaged in the business of general contracting or subcontracting in this State."

As stated in its communication to you, the company in question is engaged in the food service equipment business and furnishes to its customers numerous articles for use in the preparation and serving of foods. Included in its products are such items as steam tables, dish washing equipment, cooks' tables, work tables, ranges, canopies, cafeteria counters, tables, chairs, chinaware, flatware, kitchen utensils, etc. A majority of its business is done with restaurants, hotels, schools and institutions, and merchandise varying from the smallest items to complete kitchen and dining room layouts may be sold.

At times, the company may agree to furnish a general contractor with such kitchen and dining room equipment as the contractor may need to fulfill his contract, and on these occasions the company's bid to the contractor may exceed \$20,000.00. In such instances, the greater portion of the equipment and supplies furnished are ordered from various factories in accordance with plans and specifications and are shipped to the job site. At this point, employees of the company uncrate the equipment, assemble it and set it in place in such condition that it is ready for service connections to be made, however, such service connections are not made by the company. The equipment sold by the company is not of a

type which is permanently installed in a building but may be, and often is, moved to other locations.

It would appear that companies of this character are in fact suppliers rather than contractors and that they are not engaged in installing devices permanently connected to electric wiring or installing, altering or repairing plumbing, steam fitting or other piping. On the whole, I am constrained to believe that the uncrating and assembling of its products at the job site and the setting of such equipment in place for service connections to be made is, in effect, the final stage in the delivery of a finished product and that such operations should be considered as incidental to the sale of the product.

In light of the foregoing, I am of the opinion that companies of the type under consideration should not be considered general contractors or subcontractors within the definition enunciated in Section 54-113(2) of the Virginia Code.

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**COSTS—Appeal to Circuit Court— Actions of Unlawful Detainer. (369)**

June 19, 1957.

HONORABLE W. CARY CRISMOND, *Clerk*  
Circuit Court of Spotsylvania County

This is in response to your letter of June 13, 1957, which I quote below:

"A Trustee for the Spotsylvania Holiness Camp Meeting Association filed 'In Unlawful Detainer' against a man who was living in a house on this property rent free. It seems that he at one time was given permission to live on the property, and now they want him to leave the premises and he will not do so.

"The County Court ruled that the plaintiff recover of the defendant possession of the Cottage, no rent, and \$3.00 for the Plaintiff's costs. This was appealed by the defendant.

"Please advise me what the appeal costs should be in this case."

It is apparent that this matter has been provided for by Section 16.1-112 of the Code of Virginia. This Section provides that, where there is an appeal taken from a county court, the appellant shall pay to the clerk of the court to which the appeal is taken the amount of the writ tax as fixed by law and costs as required by Sub-section (59) of Section 14-123 of the Code of Virginia.

Section 14-123, paragraph 59 of the Code provides as follows:

"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 action involving not more than five hundred dollars the fee shall be five dollars in lieu of any other fee."

If the damages are alleged to be not more than \$500.00, then the fee shall be \$5.00 in lieu of any other fee. If the damages alleged are more than \$500.00, the fee will be \$10.00.

It is, therefore, apparent that the appeal costs to be charged should include the aforementioned fee and the writ tax.

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**COSTS—Blood Test for Drunk Driving—Paid to Person Taking Blood Sample. F-6 (18)**

July 13, 1956.

HONORABLE RUTH O. WILLIAMS  
Judge of the County Court of Patrick County

This will reply to your letter of July 3, in which you request an opinion concerning the proper disposition of certain costs prescribed by Section 18-75.1, Code of Virginia (1950), as amended.

The initial paragraphs of the statute in question establish a procedure whereby one charged with driving under the influence of alcoholic intoxicants may obtain a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood. In general, the statute provides that, if the accused requests such a determination within two hours of his arrest, the arresting officer shall render assistance in obtaining such determination, that only a physician, nurse or laboratory technician shall withdraw the accused's blood, that the blood sample when taken and sealed as prescribed shall be forwarded to the Chief Medical Examiner for analysis, that the office of the Chief Medical Examiner shall execute a certificate containing the results of the analysis and other specified information and that, upon request, the results of such test shall be made available to the accused. The statute further prescribes:

"An amount not to exceed five dollars to cover the costs of taking blood and making an analysis thereof shall be taxed as a part of the costs of the case."

Specifically, you inquire what disposition is to be made of such amounts as are taxed as part of the costs of the case pursuant to the above quoted language.

Pertinent to the resolution of this question is Section 14-111 of the Virginia Code which relates to the disposition of costs in a criminal case and provides:

*"All costs in a criminal case, if there be a judgment for same against the defendant, or the prosecutor, other than the Commonwealth, shall, when collected, be paid by the officer collecting the same to the clerk of the court in which the judgment was rendered or to whom the trial justice has certified costs in cases in which costs are not paid the trial justice, and shall be paid by such clerk as follows: such of the costs as have been allowed and paid out of the State treasury shall be paid by such clerk into the State treasury, and such costs as have not been allowed and paid out of the State treasury shall be disbursed by the clerk to the several parties entitled thereto."*

*"A trial justice shall disburse costs collected by him to the parties entitled to the same."* (Italics supplied).

It is manifest from the language italicized above that the only costs collected from the defendant in a criminal case which may be remitted to the State treasury are those costs which "have been allowed and paid out of the State treasury". This provision of the Virginia law is consistent with the well settled principles governing the exaction of costs in a criminal case enunciated by the Supreme Court of Appeals of Virginia in *Anglea v. Commonwealth*, 51 Va. 696, 701 (reaffirmed in *Commonwealth v. McCure*, 109 Va. 302, 304) in the following language:

"They (costs) are exacted simply for the purpose of *reimbursing* to the public treasury the *precise amount* which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws. It is money paid, laid out and expended for the purpose of repairing the consequences of the defendant's wrong. \* \* \* The right to enforce payment of them is a mere incident to the conviction, and thereby vested in the commonwealth for the *sole purpose of replacing in the treasury the amount* which the defendant himself has caused to be *withdrawn* from it." (Italics supplied).

With respect to the instant situation, there is no provision in the Virginia law which permits the Chief Medical Examiner to charge a specific fee for making the blood analysis in question, nor does the statute under consideration authorize the court to allow the Chief Medical Examiner any "precise amount" for such service to be paid out of the State treasury. It thus appears that no monies will be paid out of the State treasury for blood analyses and that none of the amount permitted to be taxed as part of the costs of a prosecution under Section 18-75

of the Virginia Code or a similar ordinance of a county, city or town will be exacted for the purpose of reimbursing the State treasury in this regard. In such a situation the costs in a criminal case, when collected, are to be disbursed by the clerk of the court or the trial justice to the "parties entitled" thereto. Although no monies will have been withdrawn from the State treasury, the costs under discussion are also taxed to cover the cost of taking an accused's blood sample, and I am of the opinion that such costs should be disbursed entirely to the physician, nurse or laboratory technician rendering this service to an accused.

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**COSTS—Blood Test For Drunk Driving—Person Taking Sample May be Paid by State if Cost Not Recovered. F-6 (41)**

August 6, 1956.

HONORABLE A. A. RUCKER

Commonwealth's Attorney for Bedford County

This will reply to your letter of July 27, in which you request an opinion concerning the construction to be placed upon Section 18-75.1 of the Code of Virginia (1950), as amended. Specifically, you inquire whether or not a physician, nurse or laboratory technician who takes the blood sample of an individual charged with a violation of Section 18-75 of the Virginia Code—or a similar ordinance of any county, city or town—is entitled to be paid for such service out of the State treasury when the trial of the accused has resulted in an acquittal or the accused is unable to pay costs.

The initial paragraphs of Section 18-75.1 establish a procedure whereby one charged with driving under the influence of alcoholic intoxicants may obtain a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood. In general, the statute provides that, if the accused requests such a determination within two hours of his arrest, the arresting officer shall render assistance in obtaining such determination, that only a physician, nurse or laboratory technician shall withdraw the accused's blood, that the blood sample when taken and sealed as prescribed shall be forwarded to the Chief Medical Examiner for analysis, that the office of the Chief Medical Examiner shall execute a certificate containing the results of the analysis and other specified information and that, upon request, the results of such test shall be made available to the accused. The statute further prescribes:

"An amount not to exceed five dollars to cover the costs of taking blood and making an analysis thereof shall be taxed as a part of the costs of the case."

As you point out, this office has recently ruled that—as there is no provision in the Virginia law which permits the Chief Medical Examiner to charge a specific fee for making blood analyses or to be paid therefor out of the State treasury—the costs mentioned in the above quoted language should be disbursed entirely to the physician, nurse or laboratory technician taking the blood sample of an accused. While there is also no specific provision in the Virginia Code which directs the allowance of a particular fee to be paid out of the State treasury to a physician, nurse or laboratory technician drawing blood in accordance with the provisions of Section 18-75.1 I call your attention to Section 19-291 of the Virginia, Code, which in part prescribes:

"When in a criminal case an officer or any person renders any other service in the State for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service."

With respect to the question presented in your communication, it appears that no specific compensation is provided for the services rendered by a physician, nurse or laboratory technician under Section 18-75.1, the statute in question merely providing that an "amount not to exceed five dollars" for such service and the making of an analysis of an accused's blood "shall be taxed as a part of the costs of the case". Moreover, this office has frequently ruled that—because of the broad general nature of the quoted language of Section 19-291—the appropriation for criminal charges may be utilized to cover a variety of expenses such as the costs of printing and distributing uniform committal and release cards and uniform warrants in criminal cases, Report of the Attorney General (1940-41), p. 4; and the expenses incurred for the hospitalization, treatment and guarding of an accused injured while engaged in housebreaking or while resisting arrest at the scene of a robbery. See, Reports of the Attorney General (1945-46), p. 95; (1949-50), pp. 83, and 178. I am also of the opinion that the language of Section 19-291 is sufficiently broad to permit an allowance by a court of a reasonable amount to a physician, nurse or laboratory technician rendering services under Section 18-75.1.

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**COSTS—Notary Fee not Taxable as Part of. F-246 (38)**

August 6, 1956.

HONORABLE MARK D. WOODWARD, *Judge*  
Page County Court

This is in reply to your letter of August 3, 1956, in which you present the following question:

"Your opinion is requested as to whether the notary expense of the plaintiff, paid by the plaintiff, is properly taxable as costs, in the event of judgment for plaintiff. If such fee is properly taxable, is the amount 25¢ (Section 14-143(4)) and on the docket sheet and abstract does the Clerk show it as Notary fee paid by plaintiff?"

Prior to the statement of your question you call attention to § 14-109 of the Code as well as to §§ 14-110 and 14-133.

As stated in the second paragraph of your letter, the notary fee, about which you inquire, is the fee, if any, paid by a plaintiff who files an affidavit pursuant to § 8-721 of the Code in support of an account sued upon by notice of motion as provided by § 8-717 and the applicable rules of the Supreme Court.

I am of the opinion that such a notary fee is not taxable as part of the cost incident to the suit. Section 14-109 has reference to affidavits of witnesses and not to an affidavit in support of a notice of motion for judgment which is, in effect, a part of the plaintiff's original pleading.

I do not believe it has been the practice to include as taxable cost the amount paid out by a plaintiff to a notary for the service rendered under § 8-721.

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**COUNTIES, CITIES, TOWNS—Bond Referendum—Sewage System—Bonds May be Sold Privately—Defeat of No Defense Against Water Control Board. F-213 (126)**

October 22, 1956.

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

This is in reply to your letter of October 17, 1956, in which you request my opinion on several questions concerning a bond issue to raise funds to construct a sewage disposal plant.

In answer to your first question, I am of the opinion that should the voters of the town of Monterey approve a bond issue for this purpose, then the bonds may be sold on the open market, or the town could negotiate a loan from the local bank and execute a note or bond with the bank.

Under the provisions of Article 2 of Chapter 19 of Title 15 of the Code of Virginia, the only question to be put to the voters of the town of Monterey is, do they favor a bond issue in a certain specified amount, the funds from which bond issue will be used to construct a sewage disposal plant. There is no provision whereby three questions, such as you state in your letter, could be put on the ballot.

In answer to your last question, should the voters of the town of Monterey refuse to vote in favor of the bond issue, then I am of the opinion that this is not a defense for the town against any valid order of the State Water Control Board. This merely closes one avenue of financing a sewage disposal plant; it does not relieve the town of its obligation under the State Water Control Law and the orders of the State Water Control Board to construct a sewage disposal plant.

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**COUNTIES, CITIES, TOWNS—City Council—Considered to be Continuous Bodies Regardless of Personnel Changes. F-60 (97)**

September 26, 1956.

HONORABLE WILLARD J. MOODY  
Member House of Delegates

This will reply to your letter of September 21, in which you advise that a new city council recently took office in the City of Portsmouth, Virginia. You inquire whether or not this new city council may take action and pass upon a matter which was under consideration by the previous city council at its last meeting.

I am of the opinion that your question should be answered in the affirmative. City councils are generally regarded as continuous bodies regardless of changes in personnel. See, 4 McQuillin on Municipal Corporations 519, 3rd Ed., Section 13.40. The general rule with respect to the power of a municipal council to reconsider actions previously taken is laid down in 37 Am. Jur. 762, Municipal Corporations, Section 150, in the following language:

"It is a general rule, subject to certain qualifications hereinafter noted, that a municipal council has the right to reconsider its actions and adopt an ordinance or measure that has previously been defeated, or rescind one that has previously been adopted, at any time before the rights of third parties have vested."

Moreover, on the same subject the rule is stated in 4 McQuillin on Municipal Corporations 540, 3rd Ed., Section 13.48 as follows:

"Unless restrained by charter or statute applicable, the legislative body of a municipal corporation, like all deliberative bodies, possesses the undoubted right to vote and reconsider its vote upon measures before it, at its own pleasure, and to do and undo, consider and reconsider, as often as it may think proper, until by final vote or act, accepted as such by the body, a conclusion is reached. It is the result only which is important. 'A municipal council, like other legislative bodies, has a right to reconsider under parliamentary law, its vote and action upon questions rightfully pending before it and rescind its previous action.' \* \* \*

"A deliberative body may lawfully reconsider a vote previously taken at the same meeting, or at a prior meeting, \* \* \*."

In light of the foregoing, I am of the opinion that the new City Council of the City of Portsmouth may reconsider a matter under consideration by the previous council if no vested rights of third parties have intervened.



**COUNTIES, CITIES, TOWNS—Consolidation—May Terminate Terms of Certain offices and Provide for Jurisdiction of Courts. F-60 (173)**

December 10, 1956.

HONORABLE STUART E. HALLETT  
Thirty-second Senatorial District

This will acknowledge receipt of your letter of December 6, 1956, which reads as follows:

"During the Regular Session of the 1956 General Assembly I introduced Senate Bill Number 342 which was enacted by the General Assembly and approved by the Governor, and is Chapter 552 of the Acts of General Assembly of Virginia beginning at page 777. It is also known as Sections Number 15-231.4:1 through 15-231.4:78 of the Code of Virginia of 1950, as amended, and is therein known as the 'General Consolidation Charter of 1956.' Some of my friends have generously named it the 'Hallett Act.'

"Under this Act, petitions are now being circulated and are being signed by citizens of the cities of Warwick and Newport News, which petitions are addressed to Judges Conway H. Sheild, Jr. and Herbert G. Smith, respectively. These petitions ask for a referendum on the consolidation of the cities of Warwick and Newport News and copies of the petitions are attached.

"According to the local press the constitutionality of certain provisions of the Act has been questioned by Mr. Henry D. Garnett, Commonwealth Attorney of Warwick. A copy of a news clipping in the Newport News Times-Herald of December 5, 1956, is attached.

"Time is of the utmost importance. For the successful prosecution of these petitions it is essential that there be no delay.

"I respectfully request that you inform me as soon as it is humanly possible, as to the constitutionality of the 'Hallett Act' with special reference to the four sections specifically questioned by Mr. Garnett. All of my constituents and I will be profoundly grateful to you for your prompt opinion in this matter."

By reference to the newspaper clipping attached to your letter, I note that you desire my opinion with respect to four sections of Chapter 552 of the Acts of 1956. These sections are numbered as follows: Sections 15-231.4:6, 15-231.4:7, 15-231.4:16 and 15-231.4:24. I shall discuss these sections in the numerical order set forth above.

In my opinion Section 117 of the Constitution of Virginia places no limitations on the power of the General Assembly to enact statutes providing for the consolidation of cities in the manner set forth in Chapter 552 of the Acts of 1956. The question has arisen as to the constitutionality of § 15-231.4:6 in view of the fact that it provides that, upon the adoption of the consolidation of the cities, the terms of the office of Commonwealth's Attorney, Commissioner of the Revenue, Treasurer, Sheriff or Sergeant for each political subdivision involved in the consolidation shall be terminated. It is provided in Section 119 of the Constitution of Virginia that every city shall have one attorney for the Commonwealth who shall be elected for a term of four years, and one Commissioner of the Revenue who shall be elected for a term of four years. Section 120 of the Constitution provides that a city treasurer shall be elected for a term of four years and that a sergeant shall also be elected for a term of four years.

Section 117(d) of the Constitution provides as follows:

"Any laws or charters enacted pursuant to the provisions of this section shall be subject to the provisions of this Constitution relating expressly to judges and clerks of courts, attorneys for the Commonwealth, commissioners of revenue, city treasurers and city sergeants."

In my opinion this subsection (d) requires that any new charter shall provide for the election of the constitutional officers named above for the terms therein set forth.

Section 110 of the Constitution provides the method by which the form of county government may be changed. Acting under this provision the form of government for the County of Henrico was changed, resulting in the shortening of the terms of certain constitutional officers.

In the case of *Lipscomb v. Nuckols*, 161 Va. 936, the question was raised as to the constitutionality of Chapter 368 of the Acts of 1932 under which the County of Henrico proceeded to change its form of government. Under the principles laid down in this case I am of the opinion that the act, and especially § 15-231.4:6 under which the terms of the constitutional officers of the two cities involved may be terminated, is valid.

With respect to § 15-231.4:7, I am not aware of any constitutional provision prohibiting the fixing of jurisdiction of the courts established within the two cities.

I am unable to find any constitutional provision which is violated by the provisions of § 15-231.4:16. I think that the power to consolidate the two cities into one city necessarily carries with it the power to provide for a reasonable period of transition during which time the ordinances in effect prior to the consolidation shall remain effective until the new council has had an opportunity to enact general ordinances with respect to the new city.

With respect to § 15-231.4:24, attention is directed to Sections 168 and 170 of the State Constitution. Under Section 168 all property taxes must be uniform upon the same class of subjects. The phrase "The tax rate on all property of the same class within the city shall be uniform" complies with Section 168 of the Constitution. Section 170 of the Constitution provides, in part, that:

"No city or town or county having the right, under this section, to impose taxes or assessments for local improvements upon abutting property owners shall impose any tax or assessment upon abutting landowners for street or other public improvements, except for making and improving the walkways upon then existing street, and improving and paving then existing alleys, and for either the construction, or for the use of sewers; and the same when imposed, shall not be in excess of the peculiar benefits resulting therefrom to such abutting landowners. Except in cities and towns and counties having a population greater than five hundred inhabitants per square mile as shown by the United States census, no taxes or assessments, for local public improvements, shall be imposed on abutting landowners."

If the city should meet the population requirement, the council would have the power to levy special taxes and assessments against abutting property owners for the purposes set out in Section 170.

It will be noted that § 15-231.4:24 is permissive only.

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#### **COUNTIES, CITIES, TOWNS—County May Regulate Parking on Courthouse Grounds—Town Police May Enforce. F-60a (129)**

October 22, 1956.

HONORABLE W. EARLE CRANK

Commonwealth's Attorney for Louisa County

This is in reply to your letters of October 3 and October 18, 1956. You state in your letter of October 3 in part as follows:

"The Board of Supervisors of Louisa County is passing an ordinance regulating parking of vehicles on the Courthouse Grounds and providing a penalty for a violation of such ordinance."

Upon the assumption that such ordinance is valid you ask the following questions:

"1. Would the Town Sergeant of the Town of Louisa under the facts set forth above have authority to make an arrest on the Courthouse Grounds for violation of said Ordinance?"

"2. Would a Special Policeman appointed under the provisions of Section 15-562 of the Code of Virginia, 1950, have authority to make arrest on said Courthouse Grounds for a violation of said Ordinance?"

In answer to your first question, the Town Sergeant would have the authority, pursuant to Section 15-389 of the Code of Virginia, to apprehend violators of such an Ordinance.

With respect to your question relating to a Special Policeman appointed pursuant to Section 15-562, I am of the opinion that such officers do not have the authority to perform their official duties within the corporate limits of a town. Although the Courthouse property is owned by the County, the territorial jurisdiction thereof is within the corporate limits of the town and, as such, is not within the jurisdiction of such special policemen.

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**COUNTIES, CITIES, TOWNS—Special Policeman for County—May Also Serve as Town Policeman. F-136e (260)**

March 13, 1957.

HONORABLE PAUL CROCKETT  
Commonwealth's Attorney for York County

This is in response to your inquiry contained in your recent letter, the contents of which are hereinafter set forth:

"Sec. 15-562 of the Code provides for the appointment of special policemen by the Circuit Court or the Judge thereof in vacation and says that such Court or Judge '—may appoint special policemen for so much of such county as is not embraced within an incorporated town located in the county—'.

"The CHARTER OF THE TOWN OF POQUOSON, in York County empowers said town 'to exercise full police powers and establish and maintain a department of division of police'.

"Sec. 15-574 of the Code contains several special acts empowering counties and towns wholly or partly within such counties to maintain joint police forces. York County apparently is not included in such special acts.

"The question I desire a ruling on is:

"Can the Town of Poquoson in York County utilize the services of a special policeman appointed under authority of Sec. 15-562 for York County, either on full time or part time basis, and whether or not the Town Council of said town pays part of the compensation of such special policeman, in the absence of special legislation as is contained in Sec. 15-574 aforesaid?"

It is to be noted that Section 15-562 provides for the appointment of special policemen for so much of the county as is not embraced within an incorporated town. Moreover, Section 15-564 permits payment for such special policemen by the Board of Supervisors, and further contemplates that such employment as a special policeman may be incidental to other employment, thereby indicating that his duties as a special policeman may be part-time. Section 15-557, pertaining to the police force of towns, provides that such town policeman shall not receive any fee or other compensation out of the State treasury or treasury of the city or town other than the salary paid him by the city or town, etc. However, the foregoing section does not prohibit other employment, and in the matter at hand, there appears to be no question regarding compensation from the State treasury.

Attention is also directed to the fact that the special legislation referred to in Section 15-574 pertains to unusual situations and the appointment of special policemen by persons other than the circuit judge, etc.

In conclusion, I am of the opinion that a person may serve as a special policeman for so much of the county as is not embraced within an incorporated town

pursuant to Section 15-562 and may also be appointed to the separate office as town policeman under the provisions of law contained in the charter of the town and the provisions of law contained in Section 15-557. The compensation received by such person would be lawful so long as it is not received in violation of Sections 15-557 or 15-564.

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**COUNTIES, CITIES, TOWNS— Subsistence for Police Officers—Cities, Towns and Some Counties May Pay. F-33 (331)**

May 21, 1957.

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

This will acknowledge receipt of your letter of May 13, 1957, in which you request my opinion as to whether or not the Board of Supervisors of Norfolk County may pay the police officers of the county subsistence pay not to exceed \$5.00 per day. You state that the Board is contemplating reducing the salaries of police officers by the amount of approximately \$5.00 per day and in turn pay these officers \$5.00 per day for subsistence. You further state that no part of the salary or proposed subsistence pay to these officers is borne by the State.

I am of the opinion that counties generally do not have authority to pay subsistence to police officers, however, § 14-5.2 of the Code of Virginia provides that a city or town may reimburse its employees for travel on business for the city or town in any manner that the governing body of the city or town may provide. On the basis of this provision a city or town could pay its police officers subsistence. Section 15-10 of the Code provides that any county adjacent to a city having a population of 125,000 or more is vested with the same powers and authority as the councils of cities and towns by virtue of the construction of the State of Virginia or Acts of the General Assembly passed in pursuance thereof. This section of the Code gives the Board of Supervisors of the County of Norfolk the same power as the councils of cities and towns have, and, therefore, I am of the opinion that § 14-5.2 of the Code is applicable to Norfolk County. If no part of the cost of salaries or subsistence of county police officers is borne by the State, then the county may pay these police officers subsistence.

I should like to suggest that someone confer with the officials of the Department of Internal Revenue and ascertain from them what records that department would require of the individual police officers in order that all or any part of this subsistence is not taxable, and that each individual office be given this information. The State Tax Commissioner has ruled that subsistence is reportable and taxable as any other income in so far as State income tax laws are concerned.

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**COUNTIES, CITIES, TOWNS—Volunteer Rescue Squads—Contributions To. (341)**

May 27, 1957.

HONORABLE WM. F. STONE  
Member House of Delegates

This is in reply to your letter of May 23, 1957, which reads as follows:

"The Martinsville Life Saving Squad, which is a volunteer non-profit association, has requested the City of Martinsville, as a municipal corporation, to contribute to its support. This organization is very worthwhile, purely voluntary and I am told will furnish crutches, wheelchairs and oxygen to indigent patients free of cost.

"In view of Section 15-16 of the Code of Virginia, and Section 15-16.1 of the Code of Virginia, I do not believe that this volunteer association could be considered as a charitable organization but rather it is a civic betterment association. I am wondering if the City of Martinsville by

virtue of Section 15-16.2 is not prohibited from contributing more than \$10.00 for each rescue made by this association. I would greatly appreciate your opinion as to whether the City of Martinsville can make contributions to a volunteer life saving organization."

Section 15-16.2 of the Code is general legislation applicable only to volunteer rescue squads engaged in providing emergency service to persons injured by automobile accidents on the public highways. By enacting this section, the General Assembly seems to have deemed that there was no statute pursuant to which a locality could pay for that type of service. I am of the opinion that, due to the provisions of this section, the localities are authorized to make grants not in excess of \$10.00 for each rescue operation.

Under § 15-16 of the Code, subject to the proviso therein set forth, the local governing bodies may make appropriations to any charitable institution or association located within their respective limits. If it can be established that the Life Saving Squad of Martinsville is a charitable association, it would seem that the City Council could make appropriations in support of such association's undertakings which are carried on in addition to the rescue operations, and that grants to the association for the furnishing of crutches, wheel chairs and oxygen to indigent persons, free of cost to the patient, would be authorized by this section.

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**COUNTIES, CITIES, TOWNS—Water System—Method by Which May be Acquired From Private Owners. F-140 (295)**

April 15, 1957.

HONORABLE ROBERT C. FITZGERALD  
Commonwealth's Attorney  
Fairfax County

This is in reply to your letter of April 4, 1957, in which you request my opinion concerning the legality of a proposed method to be followed by Fairfax County in the purchase of a private water company. The Board of Supervisors is contemplating acquiring a private water company. One method proposed is that the County make a down payment out of available general funds and agree to pay the balance over a period of years solely from revenues derived from the operation of the water system. A second suggested method is that the County enter into a lease purchase agreement with the private water company for a term of years with the annual rental being paid solely from the revenues derived from the operation of the water system.

I am of the opinion that, under the decision of the Supreme Court of Appeals of Virginia, in the case of *Farquhar v. Board of Supervisors of Fairfax County*, 196 Va. 54, either of these methods would be legal and valid.

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**COUNTY COURTS—Bailiff—Sheriff of County with County Manager Should Furnish if Board of Supervisors Directs. F-136d (3)**

July 3, 1956.

HONORABLE WILLIAM J. HASSAN  
Attorney for the Commonwealth of Arlington County

This is in reply to your letter of June 29, in which you state that the Sheriff of Arlington County now furnishes and for some years past has furnished bailiffs for the County Court of Arlington County. In view of the recent enactment of Title 16.1 of the Virginia Code, you inquire whether or not the Sheriff of Arlington County should continue to furnish bailiffs for the operation of the County Court.

Title 16.1 of the Virginia Code (Chapter 555, Acts of Assembly 1956) undertakes a fundamental reorganization of courts not of record in the Commonwealth. With respect to Municipal Courts established or continued by Chapter 3 of that Title and Juvenile and Domestic Relations Courts established or continued

by Chapter 8 thereof, specific provision is made for the appointment by the judges of such courts of a bailiff, whose salary is to be fixed and paid by the local governing body and whose duties are defined by statute. See, Sections 16.1-60 and 16.1-62 (Municipal Courts); 16.1-45 and 16.1-47 (Juvenile and Domestic Relations Courts). However, no such specific provisions is made for the appointment of a bailiff by the judges of the County Courts continued or established under Chapter 2 of Title 16.1.

It appears that the Sheriff of Arlington County now furnishes bailiffs to the County Court pursuant to the provisions of Section 15-328 of the Virginia Code. This statute provides that the sheriff of a county having a county manager form of government shall—in addition to discharging those duties imposed upon sheriffs by general law—also “perform such other duties as may be imposed upon him by the board of county supervisors”. In view of the absence of any statutory provision empowering the judge of a County Court to appoint a bailiff, I am of the opinion that the Sheriff of Arlington County should continue to furnish such bailiffs when authorized to do so by the board of county supervisors.

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#### COUNTY COURTS—Burglary Insurance Premiums—State Can Not Pay—F-77 (98)

September 26, 1956.

HONORABLE C. P. MILLER, JR.  
Assistant Comptroller

This will reply to your letter of September 20, forwarding to this office a copy of a letter from the Honorable Ruth O. Williams, Judge of the County Court of Patrick County and the Juvenile and Domestic Relations Court of Patrick County, relating to the cost of insurance for the protection of public funds in the custody of clerks of the various County and Juvenile and Domestic Relations Courts of the Commonwealth. In light of Judge Williams' communication, you inquire whether or not the State may defray the cost of robbery and burglary insurance covering such funds.

I have been unable to discover any provision of the Virginia Code which permits the State to expend public funds to provide the clerks of such courts with insurance of the type in question. With respect to the obligation of the State Courts, Section 16.1-49 and 16.1-153, respectively, of the Virginia Code prescribe only that the State shall provide civil and criminal dockets and other books, stationery and supplies necessary for the efficient operation of all county and juvenile courts except those in counties having a density of population in excess of five thousand per square mile. Moreover, Sections 16.1-50 and 16.1-148 of the Virginia Code provide that the salaries of the judges, clerks and other officials and employees of the county and juvenile courts in all counties except those having a density of population in excess of five thousand per square mile shall be fixed and paid as provided in Article 5, Chapter 1, Title 14, of the Virginia Code, Section 14-50 et seq. Section 14-50 of the Code prescribes that the committee composed of three circuit court judges appointed by the Governor shall fix the *salaries* of trial justices, clerks, deputy clerks and clerical assistance. No provision of this statute authorizes the Committee in question to make an allowance for office expenses, which might permissibly include the cost of robbery and burglary insurance, and to this extent the statute differs from the provisions of Section 14-62 and Section 14-151, which latter sections authorize the State Compensation Board to make allowances for the office expenses of attorneys for the Commonwealth, city and county treasurers, commissioners of the revenue and other officials. In light of the foregoing, I am of the opinion that it would not be permissible for the State to assume the cost of robbery or burglary insurance protecting public funds in the custody of clerks of various county and juvenile courts.

**COUNTY COURTS—Cost of Telephone Service—To be Borne by the County. (348)**

June 4, 1957.

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

This is in reply to your letter of June 1, 1957, in which you request my opinion as to whether the Commonwealth of Virginia or the County of Nansemond should pay the cost of telephone service for the office of the County Court.

Section 16.1-48 of the Code provides that the county shall provide suitable quarters for the court and its clerk, and shall also provide all necessary furniture, filing cabinets and other equipment necessary for the efficient operation of the court. Section 16.1-49 of the Code provides that the State shall provide civil and criminal dockets and other books, stationery and supplies necessary for the efficient operation of all county courts.

I am of the opinion that telephone service fails to come within the category of books, stationery and supplies. This office has previously discussed (Opinions of Attorney General, 1954-55, page 242) the questions (1) what constitutes "suitable quarters," and (2) what is included in "supplies." This prior ruling is applicable to §§ 16.1-48 and 16.1-49 of the Code. I enclose a copy of this opinion.

A telephone, in my opinion, is equipment necessary for the efficient operation of the court and may not be considered in the category of "supplies." The expense incident to the maintenance of telephone service would, in my opinion, be a proper item for payment by the County, since it is incidental to the furnishing of suitable quarters and equipment of a county court.

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**COUNTY COURTS—Fees—Cases Instituted Before July 1, Heard After July 1. F-136a (9)**

July 10, 1956.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of July 5, 1956, in which you request my opinion as to what fees should be collected by a county for civil cases if warrants and other processes for which were issued prior to July 1st and the hearings are to be after July 1st.

I am of the opinion that, for any services performed by the county court or any of its officers prior to July 1st, the fees for these services which would be collectible under the old fee laws should be collected. For any services performed on or after July 1, 1956, the county court should collect those fees prescribed by new § 14-133 of the Code. Therefore, if warrants were issued and the case was docketed prior to July 1, 1956, then the fees prescribed by the old fee law would be collected for these services rather than the fees prescribed by the new § 14-133. If the hearing is held after July 1, then the court should collect the trial fees prescribed by new § 14-133 of the Code.

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**COUNTY COURTS—Fees—To be Paid by State in Cases for Collection of Income Taxes. F-262 (10)**

July 10, 1956.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of July 5, 1956, in which you request my opinion as to what fees should be collected by the county courts in civil actions brought by the Commonwealth of Virginia for the collection of delinquent State income taxes.

Since the judges and Clerks of the county courts are salaried officers, paid by the Commonwealth of Virginia, I am of the opinion that no fees may be paid out of the State Treasury to the county court for these civil tax cases. Therefore, the \$1.25 docketing fee prescribed by § 14-133 of the Code of Virginia is not to be paid; however, since the clerk of the circuit court is still a fee officer, the Commonwealth should pay the 25¢ fee for filing and indexing the papers in the clerk's office as prescribed by paragraph 11 of § 14-133. In any civil action brought by the Commonwealth for the collection of delinquent State income taxes the county court should collect only the 25¢ filing and indexing fee, which fee should be turned over to the clerk of the circuit court.

#### COUNTY COURTS—May Close on Saturdays. F-136a (1)

July 2, 1956.

HONORABLE O. B. OMOHUNDRO  
Trial Justice Court of Orange County

This will reply to your letter of June 26, in which you inquire whether or not it would be permissible for your court and its clerk's office to be closed on Saturdays, in accordance with the provisions of Section 16.1-31 of the Virginia Code. Your court was the Trial Justice Court of Orange County and become the County Court of Orange County on July first of this year, pursuant to the reorganization of courts not of record undertaken by Chapter 555 of the Acts of Assembly of 1956.

The statute in question provides:

"Except as otherwise provided by general law or by municipal charter or ordinance, municipal courts in cities of ten thousand or more, which exercise jurisdiction in criminal matters, except such courts which are jointly operated with county courts under Chapter 4 of this title, shall be open for the transaction of business every day of the year except Sundays and legal holidays. *Any other courts not of record and the clerk's offices thereof may, in the discretion of the respective judges of such courts, be closed on Saturdays.* (Italics supplied).

In view of the italicized portion of the above quoted language, I am of the opinion that it would be permissible for the County Court of Orange County and the clerk's office thereof to be closed on Saturdays.

#### COUNTY COURTS—Retirement—Associate Judge Eligible—May Not Withdraw Payments. (366)

June 18, 1957.

HONORABLE SIDNEY C. DAY, JR.  
Comptroller

This is in reply to your letter of June 12, 1957, in which you request my opinion with respect to the questions presented in a letter from the Secretary of the County Court of Arlington County to Honorable Charles H. Smith, Director of Virginia Supplemental Retirement System. This letter reads as follows:

"The question has recently been raised as to whether or not our Association Judge of the Arlington County Court is eligible for State Retirement, as are Judge Paul D. Brown, Judge of the County Court and Judge Hugh Reid of our Juvenile and Domestic Relations Court.

"Under the Uniform law affecting all County and Municipal Courts which went into effect last July 1st, Judge Thomas was appointed full time Associate Judge and the governing body of this County (the Arlington County Board) set his pay at \$9,500.00 per annum. It would,



therefore, seem that he would be eligible for State Retirement as are the other two Judges of the lower Court.

"In the event that your answer to my question is in the affirmative, may I go one step further in asking whether or not Judge Thomas could make payments retroactive to July 1, 1956, the original date of his appointment as Associate Judge, and also, whether or not—in the event he should resign this position—would he be able to withdraw funds in such amount as he might have had deducted for State Retirement?"

I am of the opinion that the provisions of Chapter 2.2, Title 51 of the Code of Virginia, provided for the payment of retirement compensation to associate county judges to the same extent as such compensation is payable to county judges. The associate county judge performs the duties and assumes the same responsibilities as the county judge. The qualifications of the judges of county courts, including those designated as associate judges, are the same. Code § 16-1.8. They are required to subscribe to the same oath and give the same bond. Code §§ 16.1-14 and 16.1-15. In the County of Arlington the term of office of an associate county judge is concurrent with that of the other judge.

The statute relating to retirement benefits are remedial in nature and should be construed liberally so as to achieve their manifest objectives.

With respect to the questions presented in the terminal paragraph of the letter quoted herein, namely, (1) whether coverage may be retroactive to July 1, 1956, and (2) whether in the event of resignation the associate county judge would be able to withdraw the funds deducted or paid in, I am of the opinion that, since the Associate Judge did not waive retirement coverage under § 51-29.14 of the Code, deductions should have been made from his salary in accordance with the schedules contained in Code § 51-29.12. Therefore, he should now return the amount that should have been deducted to the proper county authority to be forwarded to you, pursuant to § 51-29.17 of the Code. It does not appear that there is any provision pursuant to which a county judge, or an associate, may withdraw the payments made on his behalf in the event of his resignation.

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**CRIMINAL LAW—Drunk In Public—Being Drunk In Automobile on Public Highway Constitutes. F-353 (241)**

February 21, 1957.

MR. JOHN E. HOPKINS  
Sheriff of Giles County

This is to acknowledge receipt of your letter of February 19, 1957 in which you state:

"Will you please give an opinion on the following subject, an arrest was made, the subject was charged with driving under the influence of alcoholic beverages, (drunk). There was other persons in the vehicle under the influence of alcoholic beverages. Is it unlawful to place under arrest other occupants of said vehicle and charge them with being drunk in public?"

Section 18-114 of the Code reads in part as follows:

"If any person arrived at the age of discretion profanely curse or swear or get or be *drunk in public* he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one nor more than ten dollars. \* \* \*" (Italics supplied)

What constitutes being in public depends on the facts in each case. A public highway is certainly a public place, as public highways and streets are frequented by the public. If these people that you mentioned have reached the age of discretion and were found drunk in an automobile on the public highway, it would be proper to charge them with the violation of this section.

**CRIMINAL LAW—Giving False Report as to Commission of a Crime—  
What Constitutes Offense of. F-85 (29)**

July 26, 1956.

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

This will reply to your letter of July 13, in which you present the following inquiry:

"I am wondering whether under Section 18-335 of the Code of Virginia we can prosecute one for knowingly giving a false report to a Sheriff with intent to mislead when they are in fact involved themselves and are trying to mislead the Sheriff to save themselves.

"Suppose that the Sheriff raids a house and Mary Smith says the whiskey belongs to Richard Rowe, could she be prosecuted for misleading the Sheriff when the false information was given in response to the Sheriff's question."

Section 18-335 of the Virginia Code prescribes:

"It shall be unlawful for any person *knowingly to give a false report as to the commission of any crime* to any sheriff, deputy, member of the State Police, police officer or any other law enforcement official with intent to mislead. Violation of the provisions hereof shall be a misdemeanor and punishable as provided by law." (Italics supplied).

The critical language of the statute in question is contained in the italicized phrase "knowingly (gives) a false report as to the commission of any crime \* \* \*". In this connection, I believe that the word "report" does not merely comprehend a formal declaration made to one or more of the specified officers by an individual on his own initiative, but includes any statement made or information given to such officers either at the instance of an individual or in response to inquiries made by the officials. The false report statement or declaration must, however, relate to the "commission" of a crime, and I do not believe that a false report or statement give to officials in the course of any investigation of a crime would be sufficient to constitute a violation of the statute in question unless such false report concerned the actual *commission* of a crime. Finally, the false report as to the commission of a crime must be "knowingly" given. With respect to this element of the offense under consideration, I believe the statute requires a showing that an individual charged with a violation thereof gave a report to a law enforcement official knowing that such report was false and that it related to the commission of a crime.

With respect to the precise situation presented in your communication, I assume that the whiskey in question was illegal whiskey, the possession of which constitutes a crime under Virginia law. In light of what has been said above, I am of the opinion that Mary Smith's statement to the sheriff concerning the ownership of the whiskey in question would constitute a violation of Section 18-335 of the Virginia Code, if, at the time she made the statement, Mary Smith knew it to be false, knew that the possession of the whiskey constituted a crime, and made the statement with the intent to mislead.

**CRIMINAL LAW—Public Assemblage—Meeting of PTA Council is Not.  
F-354 (350)**

March 1, 1957.

HONORABLE WILLIAM J. HASSAN  
Attorney for the Commonwealth of Arlington County

This will reply to your letter of February 20th, in which you inquire whether or not a proposed meeting of the Arlington County Council of Parent Teacher Associations, to be held at a public school, would constitute a "public assemblage" within the purview of Section 18-327 of the Virginia Code. This statute requires

segregation of white and colored persons in any public hall, theater, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons.

From the collateral papers submitted with your communication it appears that the membership of the Arlington County Council is composed of various Parent Teacher Associations of Arlington County and other groups or organizations which subscribe to the objects of the National Congress of Parents and Teachers and the Council. The Council meets for the conduct of its business pursuant to an agenda which is sent by mail to each Delegate to the Council and to each member of the Council's Executive Committee. The meetings of the Council are open to members of the various Associations belonging to the Council, but the privilege of making motions, debating and voting is limited to members of the Executive Committee and the accredited representatives of member Associations. Although the local press at times carries a brief news item that a particular meeting is scheduled, a public invitation to attend the meetings is never extended.

All persons who may wish to attend a meeting are required to register in an anteroom before being granted access to the meeting room. The registration form requires each person to state his connection with the Council, if any, the basis of his representation and his right to participate in the business of the meeting. These signed forms are kept by the Secretary of the Council for one year after each meeting. In addition, with respect to the admission of members of various Parent Teacher Associations as observers of the meetings, the Executive Committee of the Council has ruled that such observers are to be assigned seats separate from the accredited representatives to the Council, so as to facilitate the conduct of the business of the Council. With the exception of invited speakers and representatives of the press, attendance at the meetings by persons other than those authorized to participate in the business of the Council is extremely small and, at most meetings, non-existent. Although a few members of certain Parent Teacher Associations, not accredited to the Council, attend these meetings, the general public is not invited to attend meetings of the Council.

On the basis of the foregoing summary I am constrained to believe that the contemplated meeting of the Arlington County Council would not constitute a "public assemblage" within the purview of Section 18-327 of the Virginia Code. In this connection it must be remembered that the statute in question, being criminal in nature, must be strictly construed, and I am of the opinion that a meeting, attendance at which is limited as described above and to which the general public is not invited, would not be subject to the requirements specified in the statute.

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**CRIMINAL LAW—Sale of Motor Vehicle which is Held Under a Conditional Sales Contract—Constitutes Larceny—Venue. 353 (238)**

February 19, 1957.

HONORABLE G. GARLAND WILSON  
Commonwealth's Attorney of the  
City of Radford

This is to acknowledge receipt of your letter of February 16, 1957 in which you state in part:

"Doe purchased a motor vehicle at his residence in Staunton, Virginia, under a conditional sales contract from the vendor, whose place of business is in Staunton, and the contract expressly provided that the title was to remain in the vendor until paid, and that the vehicle was not to be removed permanently from Doe's address in Staunton without the written consent of the vendor. When the title was issued to Doe, the Division of Motor Vehicles had, through error, omitted to show lien thereon for the deferred purchase price set forth in the conditional

sales contract. Thereafter, Doe sold the vehicle to a used car dealer in Radford, Virginia, without disclosing the terms under which he purchased the property, and Doe, subsequently, has absconded.

"I would like your opinion as to what offense Doe is guilty of, whether or not he has violated Section 18-178, and if so, would the venue for the prosecution be in Staunton or in Radford since the last known address of Doe was in Staunton."

Your attention is invited to Section 18-178 of the Code which reads as follows:

"Whenever any person is in possession of any personal property, including *motor vehicles*, in any capacity, the title or ownership of which he has agreed in writing shall be or remain in another, or on which he has given a lien, and such a person so in possession *shall fraudulently sell*, pledge, pawn or remove such property from the premises where it has been agreed that it shall remain, and refuse to disclose the location thereof, or otherwise dispose of the property or fraudulently remove the same from the State, without the written consent of the owner or lienor or the person in whom the title is, or, if such writing be a deed of trust, without the written consent of the trustee or beneficiary in such deed of trust, he shall be deemed guilty of the *larceny thereof*.

"In any prosecution hereunder, the fact that such person after demand therefor by the lienholder or person in whom the title or ownership of the property is, or his agent, shall fail or refuse to disclose to such claimant or his agent the location of the property, or to surrender the same, shall be prima facie evidence of the violation of the provisions of this section. *The venue of prosecutions against persons fraudulently removing any such property, including motor vehicles, from the State shall be the county or city in which such property or motor vehicle was purchased or in which the accused last had a legal residence.*

"This section shall not be construed to interfere with the rights of any innocent third party purchasing such property, unless such writing shall be docketed or recorded as provided by law." (Italics supplied)

I am of the opinion that Doe is guilty of larceny and that he has violated the above section.

In this instance the accused sold the car in Radford. He did not remove it from the State and, therefore, the language concerning the venue as mentioned in paragraph two of said section is not applicable. I am of the opinion that venue for the prosecution would be in the City of Radford.

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**CRIMINAL PROCEDURE—Alcohol Blood Test—Cost of, Individual Primarily Responsible—Effect of \$5.00 Cost Mentioned in Statute. F-6 (210)**  
January 29, 1957.

HONORABLE MARK D. WOODROW, *Judge*  
County Court of Page County

This will reply to your letter of January 18, in which you present a question concerning the responsibility for payment of the costs of taking a blood sample for chemical analysis in accordance with the provisions of Section 18-75.1 of the Virginia Code. The pertinent language of this statute prescribes that an amount "not to exceed \$5.00 to cover the costs of taking blood and making an analysis thereof shall be taxed as part of the costs of the case". You state it would be your view that, in cases resulting in the acquittal of an accused, such costs may not be taxed against the accused and that "the person taking the blood is left, as in my individual seeking to recover for services rendered, to recover the sum in a civil action against the person to whom the service was rendered".

Permit me to advise that I concur in the view you have expressed. Since the

statute in question was amended at the 1956 session of the General Assembly, this office has ruled that the primary responsibility for defraying the expenses incurred in obtaining a blood sample for alcoholic analysis rests with the individual making the request for the prescribed determination, that this is true regardless of the result of the analysis and that the Commonwealth incurs no liability therefore. We have also ruled that *if an individual be found guilty*, an amount not to exceed \$5.00 to cover the costs of taking blood is to be taxed as a part of the costs of the case and, when collected, distributed to the person withdrawing the blood sample. Should an individual be unable to pay for the service in question, we have further ruled that a court may allow a reasonable amount for this service out of the appropriation for criminal charges in accordance with the provisions of Section 19-291 of the Virginia Code.

I am, therefore, of the opinion that in those cases in which an accused is charged with driving under the influence of alcoholic intoxicants and acquitted, the person taking the blood sample must look to the individual to which such service was rendered for the recovery of the costs incurred, unless an allowance out of the appropriation for criminal charges is made by the court.

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**CRIMINAL PROCEDURE—Alcohol Blood Test—Form of Certificate to be Provided by Chief Medical Examiner. F-6 (182)**

December 21, 1956.

DR. GEOFFREY T. MANN  
Chief Medical Examiner

This will reply to your letter of December 18, in which you call my attention to Section 18-75.1 of the Code of Virginia (1950) as amended, which provides for the determination, by chemical analysis, of the amount of alcohol in blood in cases involving the operation of motor vehicles while under the influence of intoxicants and for the admissibility in evidence of the results of such determination. As further pointed out in your communication, this statute "makes it incumbent upon the Chief Medical Examiner, upon receipt of a blood sample taken in accordance with the Act, to examine it for alcoholic content and execute a certificate which shall indicate the name of the accused, the date, time and by whom the same was received and examined, and a statement that the container seal had not been broken or otherwise tampered with and a statement of the alcoholic content of the sample".

It appears that some question has arisen concerning the appropriate form of certificate which should be made available by your office to be introduced upon trial as evidence of the results of such blood analyses. In this connection, Section 18-75.2 of the Virginia Code, as amended by Acts of Assembly (1956) Ex. Sess., Chap. 45 provides:

"When any blood sample taken in accordance with the provisions of Section. 18-75.1 is forwarded for analysis to the Office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of such vial, tube or container, *the copy of such certificate as provided for in Sec. 18-75.1 shall, when duly attested by the Chief Medical Examiner or any Assistant Chief Medical Examiner*, be admissible in any court or proceeding as evidence of the facts therein stated and the results of the analysis of the blood of the accused." (Italics supplied).

In light of the language italicized above, I am of the opinion that your office should forward to one of the individuals specified in Section 18-75.1 a copy of the certificate prescribed therein, which copy has been duly attested in accordance with the provisions of Section 18-75.2.

**CRIMINAL PROCEDURE—Alcohol Blood Test—Information which Must be Placed on Label and Certificate. F-6 (283)**

March 26, 1957.

HONORABLE GEORGE HINSON PARKER, JR.

Commonwealth's Attorney for Southampton County

This will reply to your letter of March 19, in which you request an opinion upon the proper interpretation to be accorded certain language contained in Section 18-75.1 of the Code of Virginia (1950) as amended. In general, the statute in question makes provision for one accused of driving under the influence of alcoholic intoxicants to obtain a determination of the amount of alcohol in his blood as shown by a chemical analysis of a blood sample taken from the accused.

Specifically, your inquiry concerns the construction of the phrase "person making the test" as the quoted language is employed in the second paragraph of Section 18-75.1, which paragraph reads:

"Only a physician, nurse or laboratory technician, shall withdraw blood for the purpose of determining the alcoholic content therein. The blood sample shall be placed in a sealed container provided by the Chief Medical Examiner. Upon completion of taking of the sample, the container must be resealed in the presence of the accused after calling the fact to his attention. The container shall be especially equipped with a sealing device, sealed so as not to allow tampering, labelled and identified showing *the person making the test*, the name of the accused, *the date and time of taking*. The sample shall be delivered to the police officer for transporting or mailing to the Chief Medical Examiner. Upon receipt of the blood sample, the office of the Chief Medical Examiner shall examine it for alcoholic content. That office shall execute a certificate which certificate shall indicate the name of the accused, the date, time and *by whom the same was received and examined*, and a statement that the container seal had not been broken or otherwise tampered with and a statement of the alcoholic content of the sample. The certificate, attached to the container, shall be returned to either the police officer making the arrest, the department from which it came, or to the clerk of the court in which the matter will be heard." (Italics supplied).

I am of the opinion that the phrase in question should be construed to mean that the container, into which the blood sample of an accused is placed, should be labeled and identified showing the name of the physician, nurse or laboratory technician who withdrew the particular blood sample for the purpose of having the same analyzed by the office of the Chief Medical Examiner. When the statute under consideration is read as a whole—particularly the second paragraph thereof—I think it is manifest that the legislative concept of a blood test includes the taking of an accused's blood sample, the forwarding of it, properly labeled, to the office of the Chief Medical Examiner, the analysis of the sample and the execution of the prescribed certificate by that office and the return of the certificate and the container to one of the persons designated in the second paragraph of the statute. In this setting, I think it is equally clear that the legislative design contemplates that the container shall be labeled and identified at the "date and time of *taking*" and prior to its being delivered to the police officer for transporting or mailing to the Chief Medical Examiner.

At such time, the identity of the individual in the office of the Chief Medical Examiner who will perform the actual analysis of the blood sample is, of course, unknown to the person labeling and identifying the container. Construction of the statute to comprehend such identification would require clairvoyance of the person labeling the container and would render the statute incapable of performance. Such a construction is obviously to be avoided if any other construction effectuating the legislative intent is possible. The view that the

"person making the test", as that phrase is used in the second paragraph of the statute, should be construed to signify the person taking the blood sample is supported not only by the position of the phrase in the statute but also by the circumstance that provision is made for indication upon the certificate of the identity of the person by whom the blood sample is "received and examined". As the certificate and the container are both to be returned to one of the officials or departments designed in the statute, it seems unlikely that the Legislature intended that the name of the person performing the actual chemical analysis of the blood sample should appear on both the certificate and the container. I am, therefore, of the opinion that when a blood sample of an accused is taken, the container in which such sample is placed should be labeled and identified showing the person withdrawing the blood sample, the name of the accused and the date and time of taking.

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**CRIMINAL PROCEDURE—Arrest—Policeman May enter Private Dwelling  
If He Hears Breach of Peace Being Committed. F-129 (306)**

April 26, 1957.

HONORABLE ROYSTON JESTER, III  
Commonwealth's Attorney  
City of Lynchburg

This is in reply to your letters of April 17 and 24, 1957, in which you request my opinion concerning the authority and power of a city policeman to make an arrest in the following instance:

A policeman is upon the public streets of a city and hears a disturbance in the form of a breach of the peace being committed within a private dwelling, out of his vision but within his hearing. You ask if the officer may make an arrest if he gains entrance in the house by invitation of one of the occupants thereof, and you also ask if he has a right to break and enter into the dwelling should no occupant therein invite him in.

Under the common law a peace officer may arrest without a warrant for a breach of the peace committed in his presence. In the case of *Galliber v. Commonwealth*, 161 Va. 1014, at 1021, the Supreme Court of Appeals of Virginia held:

"An offense is committed within the presence of an officer, within the meaning of this rule, when he has direct personal knowledge, through his sight, hearing or other senses that it is then and there being committed."

I am of the opinion that in the instance outlined in your letter a breach is being committed within the presence of the police officer and, therefore, he may make an arrest without a warrant.

I can find no Virginia statutes or court decisions on the second part of your question concerning whether or not the officer may use force to enter the dwelling to make the arrest. The general accepted view of the majority of the courts of this country on this question is that a peace officer may make a forceable entrance to search any premises without a search warrant for the purpose of arresting one guilty of a breach of the peace or misdemeanor committed in his presence, provided he has reasonable and just cause to believe the person he seeks to arrest is on the premises. An officer may enter without invitation and without warrant into any place where the circumstances are such as to give him knowledge through the report of his senses that a breach is being committed. (5 A.L.R. 263, 26 A.L.R. 286, 4 Am. Jur. page 59.)

I am of the opinion, therefore, that while the question has not, to my knowledge, been settled by a court of competent jurisdiction in this State, a policeman may make a forceable entry into a private dwelling and make an arrest without a warrant where he has heard a breach of the peace being committed, although he may not have seen the breach of the peace being committed.

**CRIMINAL PROCEDURE—Campus Police At V.P.I.—May Arrest Without Warrant if Misdemeanor Committed in Presence. F-268g (213)**

January 29, 1957.

HONORABLE JULIUS GOODMAN

Commonwealth's Attorney for Montgomery County

This is in response to your letter of January 12, 1957, inquiring if V. P. I. campus officers would be within the law if they arrested without a warrant a person found actually soliciting (in their presence) for business purposes within a building in which a notice is posted prohibiting unapproved solicitations. It is further stated that a warrant for trespass would be secured immediately thereafter.

I am of the opinion that duly authorized campus officers could arrest for such misdemeanors committed in their presence. Moreover, Section 18-225, Code of Virginia, as amended, renders it unlawful to trespass after having been forbidden to do so by sign or signs posted on the premises at a place or places where they may be reasonably seen.

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**CRIMINAL PROCEDURE—Capias Pro fine—County Court May Issue—Sheriff May Arrest and Hold Person Under. F-136 (268)**

March 15, 1957.

HONORABLE CARLTON PENN, *Judge*

County Court of Loudoun County

This is in reply to your letter of March 11, 1957, in which you request my opinion as to whether or not a capias pro fine may be issued for a person who is unable to pay his fine and costs rather than entering an order committing this person to jail until the fine and costs have been paid.

I am of the opinion that a capias pro fine may be issued in an instance such as this, rather than entering a formal commitment order. The sheriff, under this capias, would hold the person in jail until the fine is paid, and if a capias pro fine has been issued, the sheriff may collect and receive the fine under the provisions of §19-328 of the Code of Virginia.

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**CRIMINAL PROCEDURE—Capias Pro Fine—Manner of Execution in Discretion of Sheriff—Question of Reimbursement of Jail Cost of Person Held Under. F-136 (300)**

April 18, 1957.

HONORABLE CARLETON PENN, *Judge*

County Court, Loudoun County

This is in further reply to your letter of March 11, 1957 and to my opinion to you of March 15, 1957, concerning the issuance of a capias pro fine for a person who is unable to pay his fine and costs rather than entering an order committing this person to jail until the fine and costs have been paid.

I am still of the opinion that a capias pro fine may be issued in a case such as this rather than entering a formal commitment order. However, if this capias is issued and placed in the hands of the sheriff it is then within the discretion and authority of the sheriff to determine the manner in which he shall execute the capias pro fine. There is not an immediate duty upon the sheriff to hold the person in jail until the fine is paid. His responsibility for executing a capias pro fine is found in § 19-323 of the Code of Virginia, which provides that he shall return the writ within ninety days. The sheriff may take the person in immediate custody under the writ until the fine is paid, or the sheriff may permit the person to return home in order to try and raise a sufficient sum of money to pay the fine and costs. If the sheriff does take the person in immediate custody and place him in jail under capias pro fine, there is a serious question in my mind as to



whether or not the county would be entitled to be reimbursed under the provisions of Chapter 386 of the Acts of Assembly of 1942 for the expenses incurred in housing such person in the county jail.

**CRIMINAL PROCEDURE—Cost—Jury—Tries Two or More Cases Same Day—Prorated by Number of Defendants. F-166 (236)**

February 19, 1957.

HONORABLE W. HOWARD ELLIFRITS, *Clerk*  
Shenandoah County Circuit Court

This is in response to your letter of February 14, 1957, inquiring as follows:

"When two or more jury cases are tried the same day and by the same jury and two or more defendants are found guilty should each defendant pay the full cost of the jury or should the cost of the jury be prorated in accordance with the number of defendants?"

Kindly be advised that I am of the opinion that the cost of the jury should be prorated where defendants in two or more jury cases are tried the same day and by the same jury. I have contacted Mr. Charles R. Purdy, Clerk of the Hustings Court, Part II, and he advises that the customary procedure which has been followed has been in accordance with the aforementioned schedule of charges.

**CRIMINAL PROCEDURE—Drunk In Public—Person Convicted of May be Tried for and Police Testimony Given on, Drunk Driving Charge Made by Private Citizen. F-353 (247)**

March 1, 1957.

HONORABLE G. GARLAND WILSON  
Commonwealth's Attorney for Montgomery County

This is in reply to your letter of February 27th, in which you request an opinion upon the following situation and inquiry:

"Doe, while driving his car along a public road, passed by Roe's house and knocked down some mail boxes and did not stop. Roe jumped into his car and followed him for approximately one-half mile when Doe hit some other mail boxes and came to a stop when he ran out of the road into a ditch. Roe saw him getting out of his car and at that time he was intoxicated. Approximately five to ten minutes later, police officers came by and saw Doe in a drunken condition in the public road, and arrested him for being drunk in public. He was then taken to police headquarters in the custody of the police officers, along with Roe, and the officers swore out a warrant charging Doe with public drunkenness, and Roe swore out a warrant charging him with driving an automobile under the influence of intoxicants. Doe then requested a blood alcohol test, which was immediately given, and which showed 0.28% alcohol. At the trial, Doe plead guilty to the warrant charging public drunkenness, and not guilty to the warrant charging driving under the influence.

"Question: Is the evidence and testimony, of the police officers, pertaining to Doe's public drunkenness at the time he was seen by them, admissible in evidence on the charge of driving under the influence of intoxicants, and is the blood alcohol test admissible, since the results thereof were also used as evidence against Doe, on the warrant charging public drunkenness?"

With regard to the first aspect of your question, I am of the opinion that the testimony of the police officers concerning Doe's intoxicated condition some five or ten minutes after he had been driving a motor vehicle would be admissible in a prosecution of Doe upon a charge of driving while under the influence of intoxicants. In this connection it is assumed that the testimony of Roe would be

utilized to establish that Doe was operating a motor vehicle and the manner in which he did so. The testimony of the police officers concerning Doe's condition shortly after he had ceased to operate the vehicle would have probative value upon the question of Doe's condition at the time he was actually driving and would tend to corroborate Roe's testimony.

With regard to the second aspect of your inquiry, I am of the opinion that evidence of the result of the blood alcohol test would also be admissible against Doe upon a prosecution for driving while under the influence of intoxicants. In this connection Section 18-75.2 of the Virginia Code prescribes that the certificate of the office of the Chief Medical Examiner, provided for in Section 18-75.1 of the Code, shall, when duly attested, be admissible "in any court or proceeding as evidence of the facts therein stated and the results of the analysis of the blood of the accused." I do not believe that the operation of this provision would be affected by the circumstance that the result of the blood test had also been used as evidence against Doe in his prosecution for public drunkenness.

Finally, I do not believe that the act of being drunk in public, which is proscribed by Section 18-114 of the Virginia Code, is the same act as operating a motor vehicle while under the influence of intoxicants, which is prohibited by Section 18-75 of the Virginia Code. I am, therefore, of the opinion that the provisions of Section 19-232 of the Virginia Code would not be applicable to the situation under consideration.

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**CRIMINAL PROCEDURE—Evidence in Possession of Commonwealth—  
Accused Not Entitled to Right of Inspection Prior to Trial. F-85 (20)**

July 16, 1956.

HONORABLE CARTER R. ALLEN  
Attorney for the Commonwealth

This is in response to your recent inquiry as to my views concerning requests by defense counsel in criminal matters for prior inspection or copies of documents necessary to the Commonwealth in the successful prosecution of criminal charges, such as confessions, medical reports and physical items of evidence, such as weapons, etc.

The case of *Abdell v. Commonwealth*, 173 Va. 458, sets forth the general rule that generally the accused is not as a matter of right entitled to evidence which is in the possession of the prosecution for inspection before trial. In that case the piece of evidence consisted of notes written by the accused and a diary kept by him which presented an even more extreme situation as they had been personal possessions of the accused.

While the general rule, as heretofore stated, does not require revealing of such evidence, there is, of course, the general policy followed by a number of Commonwealth's Attorneys in which they disclose all evidence in cases where there is prospect of a guilty plea and a recommended sentence.

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**CRIMINAL PROCEDURE—Filing and Returning Papers—For State Violations in Circuit Court—County Ordinances Remain in County Court. F-136a (317)**

May 8, 1957.

HONORABLE PAUL D. BROWN, *Judge*  
County Court of Arlington County

This is in reply to your letter of May 3, 1957, in which you request my opinion on several questions concerning the filing of criminal case papers in the Arlington County Court and the charging and disposition of certain fees in criminal cases in your court. You first inquire as to whether or not criminal case papers involving violation of county ordinances are required to be returned

to the clerk of the circuit court under the provisions of § 19-310 of the Code of Virginia.

I am of the opinion that you are not required to return these papers to the Clerk of the Circuit Court but that they may be retained in the County Court. All criminal papers involving violations of State laws must be returned to the Clerk of the Circuit Court pursuant to § 19-310 of the Code of Virginia.

I am enclosing copies of opinions of this office, one of which was rendered on October 24, 1952, to Honorable H. P. Scott, Clerk of the Circuit Court of Bedford County, and the other on November 29, 1946, to Honorable J. Gordon Bennett, Auditor of Public Accounts, which opinions deal with the filing of criminal papers in cases of violations of town ordinances. Because of the provisions of § 14-54 of the Code of Virginia, I am of the opinion that these prior opinions are applicable to criminal papers involving the violation of a county ordinance.

In cases involving the violation of State law, the County Court should collect and forward to the Clerk of the Circuit Court a fee of \$1.00 for remitting the fines to the State, and a fee of 25¢, pursuant to § 14-132(6) of the Code of Virginia, for filing said papers. In a criminal case involving the violation of a county ordinance I am of the opinion that the County Court is entitled to collect the 25¢ fee prescribed by § 14-132(6) of the Code, and, in the case of Arlington County, fees when collected would be paid to the County Treasurer, pursuant to § 16.1-51 of the Code of Virginia.

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**CRIMINAL PROCEDURE—Inspection of Bank and Tax Records—Police Officer Has No Authority to —May be Subpoenaed by Court. F-136 (223)**

February 7, 1957.

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

I acknowledge receipt of your letter of February 6, 1957, which reads as follows:

"The Sheriff of Appomattox County has asked me the opinion of your office on the following question: Is the sheriff of a county, while investigating a felony charge (such as larceny or embezzlement), entitled to examine and see the records of a bank concerning individual deposits and checking and savings accounts of suspects?

"Also, the Sheriff would like to know the opinion of your office if he is entitled, as Sheriff, to examine the income returns of suspects in the control and possession of the Commissioner of Revenue of the county?

"I might say that the Sheriff has occasioned difficulty with the banks in that the bank officials are of the opinion that they hold these records confidentially and that no one can see the individual accounts and records of their depositors without the consent of the depositor. The Commissioner of Revenue takes the same view.

"I will appreciate it if you will write me the opinion of your office and stating whether or not the Commissioner of Revenue or the bank or any bank officials would have any liability if they did make available to the Sheriff, while investigating felony charges, individual accounts."

The answer to the question presented in the first paragraph of your letter must, in my opinion, be in the negative. Section 6-128 of the Code. The records may be required to be produced before a grand jury or court under § 8-301 of the Code. Also, see § 8-296 of the Code.

The answer to the question presented in the second paragraph of your letter must likewise be in the negative. Section 58-93 of the Code. Under proper judicial order such records may be required.

With respect to the question presented in the last paragraph of your letter, I call attention to the provisions of § 6-139 of the Code making it a misdemeanor for any bank official or employee to violate any of the provisions of Chapter 2, Title 6 of the Code.

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**CRIMINAL PROCEDURE—Investigator for Special Grand Jury—Authorization of Payment. F-166 (267)**

March 15, 1957.

HONORABLE BYRUM P. GOAD  
Commonwealth's Attorney  
Carroll County

This is in reply to your letter of March 12, 1957, in which you state that a Special Grand Jury sworn in by the Judge of the Circuit Court of Carroll County at the December, 1956, term, secured the services of a former deputy sheriff for nine days to conduct an investigation at the request and direction of the Grand Jury. The Special Grand Jury fixed the compensation of this person at \$10.00 per day and 7¢ per mile for the use of his private automobile. You request my opinion as to whether this compensation and expenses may be paid out of public funds, and if so, how.

I am of the opinion that this compensation and expenses may be paid pursuant to § 19-291 of the Code of Virginia, provided the Judge of the Circuit Court of Carroll County gives his approval.

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**CRIMINAL PROCEDURE—Jury Panel—Defendant not Entitled to New Panel Merely Because Same Panel Has Tried Him For Similar Offense. F-166 (224)**

February 7, 1957.

HONORABLE G. GARLAND WILSON  
Commonwealth's Attorney  
City of Radford

This is in reply to your letter of February 4, 1957, in which you request my opinion as to whether or not a defendant who is charged with several misdemeanors for violations of the alcoholic beverage control laws is entitled to a new panel of jurors for the trial of each warrant. You state that it is your understanding that the same jury panel may be used to try the defendant on each warrant.

There is no provision in the Code of Virginia which provides that a person is entitled to a new panel of jurors if he is to be tried for more than one offense of violating the criminal statutes of this State. I am of the opinion that, should a defendant be brought to trial before a panel composed of jurors who had tried him for a similar offense, the provisions of § 8-199 of the Code of Virginia would be applicable and the defendant or the judge, on his own motion, could examine the jurors to ascertain if they would be prejudiced in the matter. The question of prejudice of a juror is one to be decided by the trial court upon voir dire. The defendant must challenge the juror on the ground of prejudice before the jury is sworn, otherwise any objections are waived.

It remains within the sound discretion of the trial court to dismiss or refuse to dismiss a juror or a whole panel on the assertion by the defendant that a juror, or panel of jurors are prejudiced.

**CRIMINAL PROCEDURE—Parole Supervision—Out of State—Includes U.S. Territories. F-84 (176)**

December 13, 1956

MR. CHARLES P. CHEW  
Official Administrator  
Interstate Compact  
Parole Board

This is in reply to your letter of December 11, 1956, in which you ask whether the word "state", which appears in the Uniform Act for Out-of-State Parolee Supervision (Section 53-288 through 53-290 of the Code) may be construed to include Alaska, Hawaii, Puerto Rico, the Virgin Islands and the District of Columbia.

Section 1-13.26 of the Code reads as follows:

"§1-13.26. State.—The word "state", when applied to a part of the United States, shall be construed to extend to and include the District of Columbia and the several territories so-called."

I am therefore of the opinion that "states" may be construed to include the above named territories.

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**CRIMINAL PROCEDURE—Slot Machines—Confiscation—Person Convicted of Illegal Possession—Separate Proceedings Must be Instituted. F-123 (249)**

March 1, 1957.

HONORABLE SHULER A. KIZER  
Commonwealth's Attorney  
City of Buena Vista

This is in reply to your letter of February 25, 1957, in which you request my opinion as to whether or not further court action is required on behalf of the Commonwealth to have certain slot machines destroyed and the money found therein forfeited to the Commonwealth. You state that these machines were seized in pursuance to a search warrant issued under § 18-294 of the Code of Virginia. At the same time that the machines were seized a person in possession of them was arrested under the provisions of § 18-291 of the Code. The person arrested and charged with being in possession of said slot machines has been tried and convicted of violating § 18-291 of the Code of Virginia.

I am of the opinion that forfeiture proceedings should be instituted in the court and a court order should be secured ordering the destruction of the machines and the forfeiture of the money found therein to the Commonwealth.

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**CRIMINAL PROCEDURE— Suspension of Sentence—Once Prisoner Committed to Penitentiary Judge Has no Authority Although Prisoner Still in Local Jail. (347)**

June 4, 1957

HONORABLE WILLIAM J. HASSAN  
Commonwealth's Attorney  
Arlington County

This is in reply to your letter of May 21, 1957, in which you request my opinion as to whether or not the Judge of the Circuit Court at this time has the authority to suspend the sentence of a person convicted of a felony and sentenced to the penitentiary, which sentence was imposed on April 19, 1957. You state that the man sentenced is still in the Arlington County jail.

On January 25, 1955, I rendered an opinion to Honorable Edward McC. Williams, Commonwealth's Attorney for Clarke County, in answer to a similar question, a copy of which I am enclosing. In that case the person had been trans-

ferred to the penitentiary. As you can see from reading that opinion, I stated that, if a person was convicted for a felony and a sentence actually imposed, the court does not have the power to suspend the unserved portion of the term. In 1956 § 53-272 of the Code of Virginia was amended so as to permit the judge of the circuit court to suspend the unserved portion of any jail sentence which had been imposed upon a person upon conviction of a felony, although the person had been committed to jail and was serving the sentence.

I am of the opinion that this amendment made in 1956 does not change the effect of this statute where a person has been convicted of a felony and sentenced to the penitentiary. Once the prisoner is committed to the penitentiary although he may not have been actually transferred by the local sheriff or sergeant from the jail to the penitentiary, I am of the opinion that the judge of the circuit court no longer has authority to suspend the sentence.

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**CRIMINAL PROCEDURE—Warrants Charging Violation of City Ordinance—Executed in Name of Commonwealth—Recognizances Always Payable to Commonwealth. F-381 (96)**

September 25, 1956.

HONORABLE G. GARLAND WILSON  
Commonwealth's Attorney  
City of Radford

This is in reply to your letter of September 24, 1956, in which you request my opinion as to whether a criminal warrant charging a violation of a city ordinance should be issued and executed in the name of the Commonwealth or in the name of the city.

All criminal warrants should be issued and executed in the name of the Commonwealth, regardless of whether they are charging a person with violation of a state law or a city ordinance.

In answer to your second question as to whether or not a city may be the payee in an appearance bond for the violation of a city ordinance, I am enclosing a copy of an opinion rendered by me on March 25, 1952 to Honorable J. Melvin Lovelace, Commonwealth's Attorney for the City of Suffolk. As you can see from that opinion, I am of the view that recognizances are always made payable to the Commonwealth.

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**DEPOSITS AND DEPOSITORY—Board of Supervisors Must Approve Actual Securities Pledge for Time Deposits. F-107 (30)**

July 26, 1956.

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

This is in reply to your letter of July 24, 1956, with respect to time deposits of county funds in which you state, in part, as follows:

"Your opinion is requested as to whether or not the Board of Supervisors of Henrico County in making time deposits pursuant to Section 58-943.2 of the Code may approve in advance the character or type of securities (instead of specific securities) which may be substituted for those originally pledged and deposited pursuant to Section 58-944 so long as the amount of such securities meets the requirements of Section 58-947 of the Code. Otherwise stated, may the Board of Supervisors authorize the depository to withdraw securities pledged and deposited pursuant to Section 58-944, without further authorization of such Board, if simultaneously with any withdrawal other securities described in Section 58-944 and meeting the requirements of Section 58-947 are

pledged and deposited by the said depository? In the event that you should consider that such a general authorization and advance approval were not permitted, would the statutory requirements be met if the character of the securities to be substituted is more specifically described, as for example 'bonds, treasury notes and other evidences of indebtedness of the United States.'"

It is provided in § 58-944 of the Code that:

"All securities offered by a depository shall have the approval of the county finance board."

While from a practical standpoint it might appear unnecessary for the finance board (in this case the Board of Supervisors) to cause to be submitted to it by the depository an exact description of the securities proposed to be substituted for those already escrowed, I am of the opinion that the statute contemplates that the Board shall satisfy itself that the securities being substituted actually meet the requirements of the statute. The Board cannot, in my judgment, escape its responsibility in the manner contemplated by the terminal paragraph of its proposed resolution.

In my opinion, whenever the depository desires to switch or substitute the collateral required by the statute, such depository must submit a description of the proposed securities to the Board and obtain the Board's specific approval of such securities. It occurs to me that the bank holding the original securities in escrow would hesitate to release them until it has received actual and specific approval of those securities being substituted.

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**DEPOSITS AND DEPOSITORIES—Federal Savings and Loan Associations—  
Not Banks, County Funds May Not Be Deposited in. F-77 (156)**

November 15, 1956.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of November 13, 1956, in which you request my opinion as to whether or not Federal Savings and Loan Associations may be classified as banks as the term is used in §§ 58-938 through 58-952 of the Code, and whether or not county funds may be deposited with these associations pursuant to the provisions of §§ 58-938 through 58-952 of the Code.

I am of the opinion that Federal Savings and Loan Associations may not be used as depositories for county funds. Funds are not deposited with a Federal Savings and Loan Association when money is placed with the Association; the person is actually buying a share in the Association. Persons placing money with the Association are actually shareholders rather than depositories.

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**DESCENT AND DISTRIBUTION—Executor Should Not Take His Own  
Bond for Surety Company. F-17 (172)**

December 6, 1956.

HONORABLE ROBERT M. OLDHAM  
Clerk of the Circuit Court of Accomack County

This will reply to your letter of December 1, in which you present the following situation:

"I would like to have your opinion in the matter of an Executor in a Will representing a surety company to take his own bond for said surety company, together with the Power of Attorney."

"In other words, if I am executor in an estate and I represent the surety company and take my own bond, would this be ethical, or would it be against the law?"

In response to your inquiry, permit me to advise that I have been unable to discover any provision of Virginia law which expressly prohibits an executor who is also a representative of a surety company from taking his own bond. However, I am constrained to believe that, as a general rule, there would be a definite conflict of interest between one having the status of an executor and attempting to obtain a sufficient bond at an appropriate premium and one occupying the position of representative for a surety company and attempting to procure acceptance of the bond written by his company. Moreover, in a possible suit to establish the liability of an executor on his bond, the conflict of interest might be heightened, particularly if a question arose concerning the scope of the authority of the surety company's representative or the extent of the coverage of the bond.

In light of the foregoing considerations, I am of the opinion that the practice concerning which you inquire would not be appropriate and should not be adopted.

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**DOG LAWS—Destruction of Dog Killing or Injuring Live Stock. Game Warden May without Court Order if Owner of Dog Gives His Consent. F-95 (198)**

January 14, 1957.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney  
Montgomery County

This is in reply to your letter of January 12, 1957, in which you request my opinion as to whether or not § 29-197 of the Code of Virginia requires a game warden to obtain a warrant from a county court and cause a hearing to be held before the county court before killing a dog if the game warden did not see the dog in the act of killing or injuring livestock. You state that, in this particular instance, the dog was seen by the owner of the sheep in the act of killing sheep and the owner of the dog gave his consent to the Game Warden to kill the dog.

Although § 29-197 of the Code does not contain any provision which would empower a game warden to destroy a dog without first having a hearing before the county court, except in the instance that he finds the dog in the act of killing or injuring livestock or worrying or chasing sheep, I am of the opinion that, if the owner of the dog gives his consent in writing to the Game Warden to kill the dog, there is no necessity for a hearing to be held. If the Game Warden kills a dog without holding such a hearing before the county court, the only person that could legally complain of the killing of the dog would be the owner, and, if the owner has already given his consent, he would be estopped from making such complaint.

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**ELECTIONS—Absentee Ballots—Information on Application Cannot be disclosed to Commissioner of Revenue. F-100h (195)**

January 9, 1957.

HONORABLE GEORGE D. FISCHER  
Commissioner of the Revenue  
Arlington County

This is in reply to your letter of January 2, 1957, in which you request my opinion as to whether or not election officials may furnish you with addresses of absentee voters who voted under the provisions of the War Voters Act so that you may use this information to collect State and local taxes from these voters.

Section 24-345.9 of the Code of Virginia provides as follows:

"The contents of applications for ballots, the names and addresses (both war time and Virginia addresses) of those for whom or from



whom ballot applications are received, and all other records of the Board in the administration of this chapter shall not be open to public inspection and shall not be made available to any person or persons, but shall be regarded as privileged, confidential records; provided, however, that any applicant shall have the right to obtain a certified copy of any and all records of the Board pertaining to that specific application; provided further that it shall be proper for the Board to make available to the public information from time to time pertaining to the number of applications received, and ballots returned, and the localities involved therein."

I am of the opinion that this section prohibits election officials from disclosing this information for the purpose desired by you.

### ELECTIONS—Absentee Ballots—Not Void for Sole Reason of Lack of Return Receipt. F-100a (117)

October 12, 1956.

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

This is in reply to your letter of October 12, 1956, with which you enclosed a letter to you from Mr. William A. Cooke, Secretary of the Electoral Board of Louisa County, which letter reads as follows:

"I am very sure we are going to receive a number of ballots by either certified or registered mail without a return receipt requested. Please advise if we should accept these at the Post Office, and if so are they to be considered as legally voted ballots?"

Mr. Cooke's question is prompted by the provisions contained in the concluding sentence of § 24-334 of the Code in which it is stated that the envelope directed to the electoral board containing the sealed ballot and voucher of an absentee voter "shall then and there be sealed, and shall be registered *or certified* and mailed, *with return receipt requested*, to the electoral board, or delivered personally by the voter to the electoral board."

The italicized language was placed in this section by an amendment contained in Chapter 525 of the Acts of 1956. This Act made similar amendments to §§ 24-327, 24-330 and 24-337. Prior to the amendments there was no provision in these sections with respect to a return receipt.

The return receipt in each instance can be only for the purpose of providing the electoral board or the voter, as the case may be, with assurance that the registered or certified letter was received through the mail by the party to whom it was addressed. It merely serves as a receipt and in no way, in my opinion, affects, or is intended to affect, the validity of the ballot.

Attention is directed to § 24-328 of the Code which reads as follows:

"Any ballot returned to the electoral board in any manner except by registered or certified mail or by the applicant in person shall be void. The board shall mark on each envelope whether it was returned by mail or in person by the voter."

This section, it will be observed, states that unless the ballot is returned by the voter to the electoral board "by registered *or certified* mail or by the applicant in person" it shall be void. The italicized language in this section was inserted in the same act in which the amendments to the other sections were made. It is significant that the General Assembly did not amend § 24-328 so as to include the phrase "with return receipt requested" which supports the conclusion that it did not intend to cause a ballot to be void in cases where no return receipt was requested by the voter, but the General Assembly, it would seem, deliberately omitted such requirement from § 24-328.

I am of the opinion, therefore, that an absentee ballot should not be rejected solely upon the ground that the voter did not request a return receipt when he mailed his ballot by registered or certified mail to the electoral board.

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**ELECTIONS—Absentee Ballots—Poll Taxes—Duty of Determining if Paid Upon Judges Not Registrar and Electoral Board. F-100a (114)**

October 16, 1956.

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

This is in reply to your letter of October 15, 1956, in which you enclosed a copy of a letter from Mr. Guy O. Townsend, Secretary of the Electoral Board of King William County, in which the Board desires an opinion as to whether it is the duty of the Electoral Board to pass upon the qualifications of applicants for absentee ballots with respect to poll tax payments.

I wish to call your attention to § 24-327 of the Code in which the duties of the registrar and the electoral board on receipt of an application for an absentee ballot are prescribed. It will be noted that, under this section, the registrar is required to determine whether or not the applicant is a registered voter at his precinct. The section further provides that:

“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 or certified mail, with return receipt requested, or deliver in person to him the following: \* \* \*”

This section does not place upon the electoral board any duty or obligation with respect to the determination of whether or not the applicant's poll taxes have been timely paid. It is the duty of the judges of election upon receipt of the absentee ballot to determine whether or not the voter has paid the necessary poll taxes in order to be eligible to vote. The electoral board does not have the authority to refuse to mail the absentee ballot to the applicant, even though the Board may be of the opinion that such person has not paid his poll taxes as required by law.

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**ELECTIONS—Absentee Ballots—Registrar Should Not Pass on Whether Poll Taxes Paid. F-100d (84)**

September 17, 1956.

MRS. LUCILLE TALLEY  
General Registrar  
City of Danville

This is in reply to your letter of September 11, 1956, in which you request my opinion as to whether or not under the provisions of § 24-327 of the Code of Virginia, the registrar should ascertain whether or not an applicant for an absentee ballot has paid the necessary poll taxes.

Section 24-327 of the Code imposes the following duty upon the registrar:

“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. \* \* \*”

It is my opinion that the registrar should not ascertain whether or not the necessary poll taxes have been paid. Under § 24-327 of the Code the registrar is required to certify that, in so far as the books in the registrar's custody show, the applicant is or is not duly registered. Under the provisions of § 24-341 of the Code the judges of election shall check and determine if the applicant is entitled to vote and has paid all necessary poll taxes.

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**ELECTIONS—Additional Voting Places—Special Southampton County Bill Does not Provide. F-2 (81)**

September 17, 1956.

HONORABLE S. E. POPE  
House of Delegates  
State Capitol

This is in reply to your letter of September 11, 1956, in which you enclosed a copy of House Bill No. 43. You request my opinion if, assuming that this bill is enacted into law, the electoral board would be empowered to establish additional voting places under this bill or would they have to proceed under § 24-46 of the Code of Virginia.

House Bill No. 43 would provide for additional election officials for Southampton County; however, this bill does not provide for additional voting places, election districts or precincts. Should it be desirable to create new election districts or precincts, then the procedure outlined in § 24-46 of the Code would have to be followed. Under House Bill No. 43, if enacted into law, the electoral board of Southampton County could appoint additional judges and clerks for any voting place in the County. The electoral board could not, under this bill, create additional voting places.

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**ELECTIONS—Bond Referendum—Tie Vote—Duty of Commissioners—Do Not Decide by Lot. F-100 (240)**

February 20, 1957.

HONORABLE S. H. ALLEN  
Commonwealth's Attorney  
Lunenburg County

This is in reply to your letter of this date in which you state that at a bond referendum conducted in the town of Kenbridge, pursuant to Article 5, Chapter 19, Title 15 of the Code of Virginia, 145 votes were cast in favor of the proposed bond issue and 145 votes were cast against said bond issue. You request my opinion as to whether or not under § 24-141 of the Code the provisions of § 24-277 are applicable in this instance.

The provision of § 24-141 to which you refer is as follows:

"The ballots shall be counted and returns made and canvassed as in other elections, and the results certified by the commissioners of election to the clerk of the court, or the court or judge or other authority calling or authorizing such election, as the case may be, who shall make such order or certification as may be proper to accomplish the purpose of such election or referendum."

Section 24-277, an election statute dealing with the canvass of votes by the election commission, provides, in part, as follows:

"If two or more persons have an equal number of votes for any county, city, town, or district office, and a higher number than any other person, the commissioners aforesaid shall proceed publicly to determine by lot which of the candidates shall be declared elected. \* \* \*"

I am of the opinion that this provision of § 24-277 is not applicable to a bond referendum conducted pursuant to Article 5, Chapter 19 of Title 15 of the Code. In a bond referendum the commissioners do not have the duty of declaring that the referendum has passed or has been defeated. Their duty in canvassing the ballots cast in a bond referendum, such as this, is to count the ballots and then certify the results to the clerk of the local circuit court who in turn shall certify the results to council of the town and to the judge of the court ordering the election. There is a distinction between certifying the results of an election and going one step farther and declaring someone elected. In this instance the results would have to be certified as a tie, 145 votes for and 145 votes against the proposed bond issue.

### **ELECTIONS—Candidate—May Be Elected Although Name Placed on Ballot By Error. (362)**

June 17, 1957.

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

I acknowledge receipt of your letter of June 13, 1957, which reads as follows:

"Town elections were held in the five towns of Prince William County this year, and my information is that some or probably all of the candidates in the respective towns did not file their declarations of candidacy with the State Board of Elections, confining their filings to the Clerk's Office of Prince William County.

"Some of the voters in the Town of Manassas Park, one of the towns in Prince William, have come to me calling for me to take action with regard to the Town of Manassas Park, but I am not sure there is any duty on me to represent any body in my official capacity as Commonwealth's Attorney in instituting any action of any kind to contest the election. I agree that if holding the election without filing with the State Board of Elections constitutes a violation of some criminal law the duty might rest on me to prosecute a criminal warrant if proper complaint is made. Frankly, I am in a quandary as to what, if any criminal law is involved and would greatly appreciate your help in this particular situation.

"Specifically, I would like your opinion as to whether the Town elections in the County are valid notwithstanding the failure to file with the State Board of Elections.

"Also, the Town of Manassas Park was created by court order which order prescribed for a first election on March 19, 1957, to elect a mayor and council. This order also provided that elections thereafter would be 'according to law.' A further question is: When would be the next election after March 19 'according to law?'"

Answering your last question first, I am of the opinion that the next election after the 19th of March, 1957, was the general election of June 11, 1957, provided for in §§ 24-136 and 24-168 of the Code.

With respect to your first question, § 24-345.3 of the Code provides that "the name of no candidate for any State or local office required by this section to be certified to the Board whose name is not so certified or whose notice of candidacy, if the filing of such notice is required by such chapter (Chapter 8 of Title 24) of the Code, is not filed within the time required by this section, shall be printed on any official ballot for said election."

While this provision should have prevented the local electoral board from printing the names of candidates on the official ballot, unless such candidates had filed with the State Board of Elections, I am of the opinion that the election of a

candidate whose name was erroneously placed on the ballot is not invalidated by reason of failure to comply with § 24-345.3. Such candidate, if he obtains sufficient votes, assuming the election is in all other respects legal, would not be disqualified from assuming and holding the office merely because his name was placed on the ballot through error.

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**ELECTIONS—Circulation of Platform of Certain Candidates Without Name of Person Causing Circulation. Has Criminal Statute Been Violated. (343)**

May 31, 1957.

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

I acknowledge receipt of your letter of May 27, 1957, enclosing a paper which is being circulated in the town of Windsor relating to a slate of candidates for Mayor and Council at the June election. You wish to know whether this paper violates § 24-456 of the Code.

The statute under consideration is penal in nature and, therefore, subject to strict interpretation. The paper seems to be in the nature of a platform setting forth the position of the candidates listed thereon with respect to matters presumably of public interest locally. The inference would seem to be that the candidates listed on the paper are responsible for its circulation.

Applying the rule of strict interpretation of criminal statutes, I am constrained to take the view that it is doubtful whether the statute under consideration has been violated.

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**ELECTIONS—Electoral Board—Member—May Not Be Paid Additional Compensation for Work Performed Other Than Statutory Duties. F-100g (168)**

December 4, 1956.

HONORABLE BRYAN F. HEPLER  
Chairman of Electoral Board  
City of Covington

This is in reply to your letter of November 28, 1956, which reads as follows:

"I am Chairman of the Electoral Board for the City of Covington, Virginia. Recently two new wards or precincts were added in the City of Covington, Virginia, and in place of the old registration books the McMillan Registration System was installed in all precincts.

"A member of the Electoral Board supervised this work and spent a great deal of time in securing bids for the equipment, checking boundary lines, residence of voters in the different precincts and securing voting places.

"I am familiar with Section 24-37 as amended permitting members of the Electoral Board \$7.50 for each day of actual service not exceeding \$150.00.

"I wish to ascertain whether or not it is legal for the City of Covington to pay to the Board member compensation for the above services in addition to any pay that he is entitled to under Section 24-37 as amended or would the payment of any additional sums other than that set out in Section 24-37 as amended be regarded as violating Section 15-508 of the Code of Virginia."

In my opinion the compensation allowed to members of electoral boards under the provisions of § 24-37 of the Code is for the purpose of providing payment for statutory services rendered by such members. The service rendered by the

member mentioned in your letter was, in my judgment, outside the scope of his statutory duties.

Members of electoral boards are officers within the meaning of that term as used in § 15-508 of the Code, and, under this section, the service performed by this member for the City of Covington would not be compensable out of City funds.

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**ELECTIONS—Electoral Board—of City—May Employ Additional Assistant Registrars—Compensation Fixed By City. F-100d (178)**

December 18, 1956.

HONORABLE WILMER L. O'FLAHERTY, *Secretary*  
City Electoral Board  
Richmond, Virginia

This is in reply to your letter of December 14, 1956, which reads as follows:

"The Richmond City Electoral Board is of the opinion that there is an immediate necessity for the employment of additional Assistant Registrars to meet an emergency which has arisen in the office of the General Registrar because of the fact that three experienced and well-trained persons have resigned within the past two and a half years to take better positions at increased salaries.

"The budget for the present fiscal year for the City of Richmond for the General Registrar's office provides only for the payment of the present personnel employed in the General Registrar's office.

"Under this situation, can the City of Richmond, Virginia, be required to pay the salaries for such additional Registrars as may be employed by the General Registrar subject to the approval of the City Electoral Board to meet the present emergency?"

Sections 24-57 and 24-58 of the Code seem to be applicable to the City of Richmond. Under § 24-58 the General Registrar, with the approval of the Electoral Board, may appoint such assistants as may be necessary for the proper performance of the duties of his office. Under this section the compensation of such assistants shall be fixed and paid as the compensation and salaries of other City officers are fixed and paid. It does not appear that, under this section, the Electoral Board would have the power to fix the amount of compensation, but that the compensation would be fixed by the City Council.

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**ELECTIONS—Party Committeemen—How Voting Machines May Be Utilized—Cost of May Not Be at Public Expense. F-100b (298)**

April 17, 1957.

HONORABLE CHARLES R. FENWICK  
State Senator

This is in reply to your letter of April 10, 1957, in which you request my opinion on two questions concerning the election of members of the Democratic Committee of Arlington County. Your first question reads as follows:

"If the political party holding an election of the Democratic Committee in connection with that party's primary authorized the Electoral Board to add the names of the candidates for the Democratic Committee from each precinct to the primary instruction ballot, can it be done without the necessity of including the committee candidates as a part of the printed instruction ballot?"

I am of the opinion that should the voting machine be utilized for the purpose of electing Democratic Committeemen, then there must be a sample ballot on

the voting machine. The type of sample ballot for the election of Democratic Committeemen is not prescribed by law and, therefore, it is left to the discretion of the Electoral Board.

I should like to call to your attention an opinion which I rendered to Honorable J. Maynard Magruder on May 5, 1955, in which opinion I held that a paper ballot may be used for the election of a party committeeman, although the county has voting machines. I am enclosing a copy of that opinion.

Your second question reads as follows:

"Can the Electoral Board require the Democratic Committee to pay for the printing of the instruction ballot, or any part thereof, as provided for in Section 24-298, or any other expense, when said Committee decides under Section 24-364 to elect its committee, using the machinery of the Democratic primary, which has been duly called?"

On March 8, 1955, I rendered an opinion to Honorable Harrison Mann in answer to a similar question. I feel that this opinion is still applicable, and I am enclosing a copy.

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**ELECTIONS—Person Convicted of Felony—May Not Register and Vote until Disabilities Removed by Governor. (345)**

June 3, 1957.

HONORABLE J. D. HAGOOD  
Member of the Senate of Virginia

This is in reply to your letter of June 1, 1957, which reads as follows:

"One of the Registrars in my County has requested me to obtain an opinion from you on the case which I will undertake to outline.

"A man made application to this Registrar to register. On questioning by the Registrar if he had ever been convicted of any crime, he replied that he had and had served a year in the penitentiary of this State approximately twenty years ago. The Registrar informed him that it was his opinion that he could not legally register; the applicant replied that he had been informed by his organization that inasmuch as it had been twenty years that this clause in the law did not apply.

"For your information the records at the Court House show that this man was convicted on May 4, 1937 and sentenced to the penitentiary for two years."

Under Section 23 of the State Constitution and § 24-18 of the Code of Virginia, any person convicted of a felony is disqualified from registering and voting. However, the disabilities due to such a conviction may be removed by the Governor under the powers conferred on him by Section 73 of the Constitution. If such disabilities are removed by the Governor, then, under § 24-69 of the Code, such person would be entitled to register, if otherwise qualified.

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**ELECTIONS—Poll Taxes—What Taxes Assessable if Former Resident Moves Back to State. F-100c (152)**

November 9, 1956.

MRS. ANNE H. MILLER  
Treasurer for Washington County

This is in reply to your letter of November 7, 1956, in which you request my opinion as to what years' capitation taxes must be paid in order for a person to vote if such person had been a resident of Virginia until 1950, but had moved out of Virginia in that year and did not return to this State until 1954.

Taxes are assessable on January 1 of each year against all residents of Virginia who are 21 years of age or older. If a person was a resident of Virginia on

January 1, 1950, the taxes would be assessable for that year, but if he then removed his residence from Virginia, there would be no taxes assessable for the years 1951, 1952 and 1953. If this person moved back to Virginia after January 1, 1954, there would be no capitation tax assessable for that year either. Therefore, if the said person offered to vote in the November, 1956, election, the only capitation taxes due to have been paid on or before that date would be those for the year 1955. Capitation taxes for the year 1956 are not due until December of this year. I am of the opinion that in the case of the person discussed in your letter the only capitation tax which he must have paid in order to vote on November 6, 1956, was that for the year 1955. The fact that he was or was not a registered voter in Virginia before he moved, and the fact that he did or did not vote in the State to which he moved do not affect the situation.

**ELECTIONS—Registrars—Regular Registration Day—Not Required to Hold in April if no City Election to Be Held. F-100d (299)**

April 17, 1957.

HONORABLE GEORGE G. GRATFAN, III  
General Registrar, City of Harrisonburg

This is in reply to your letter of April 16, 1957, in which you request my opinion as to whether or not you are required to hold a regular registration day thirty days prior to June 11, 1957 for the City of Harrisonburg. You state that there is no general city election to be held in the City of Harrisonburg this year.

Section 24-74 of the Code of Virginia provides that each registrar in the cities of this State shall annually thirty days before the day fixed by law for every regular primary election and every general election to be held *therein* proceed to register the names of all qualified voters within his city who shall apply to be registered.

I am of the opinion that if there is no general city election fixed by law to be held in the City of Harrisonburg this June, then you are not required to hold a regular registration day thirty days prior to June 11, 1957. I am enclosing a copy of an opinion rendered to Honorable L. Waverley Hudgins, General Registrar for the City of Portsmouth, dated May 11, 1955, in answer to a closely related question.

**ELECTIONS—Registration—Printed Forms Are Not to Be Used. F-100d (56)**

August 20, 1956.

MISS SUE D. KUCZKO  
General Registrar  
Norton, Virginia

This is in reply to your letter of August 11, 1956, in which you request my opinion as to whether printed forms similar to the one submitted in your letter may be used to register applicants to vote in view of the provisions of § 20 of the Constitution of Virginia.

Section 20 of the Constitution of Virginia reads, in part, as follows:

"Second. That, unless physically unable, he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officer, stating therein his name, age, date and place of birth, residence and occupation at the time and for the one year next preceding, and whether he has previously voted, and, if so, the State, county and precinct in which he voted last; and."



As you can see from this provision of § 20 of the Constitution, a person must make application to register without aid, suggestion or memorandum. The use of a printed form similar to that enclosed in your letter would mean that an applicant to register would only have to fill in a few blanks. I am of the opinion that the use of a printed form such as the one submitted in your letter is contrary to the provisions of § 20 of the Constitution, and therefore, that you are entirely proper and right in refusing to comply with the directive of the electoral board, and I am of the further opinion that refusal to use such printed applications would not constitute a failure to discharge the duties of your office according to law as is contemplated by § 24-36 of the Code of Virginia.

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**ELECTIONS—Residence—Those Residing in Recently Annexed Territory  
May Vote in Town Election—F-100d (197)**

January 11, 1957.

HONORABLE C. A. SINCLAIR, *Treasurer*  
Prince William County

This is in reply to your letter of January 10, 1957, which reads as follows:

"Please accept my appreciation of your very prompt reply to my letter of January 7th. I note from the copy of your letter to Mr. Fuller, and the opinion expressed therein, that those persons, otherwise qualified to vote, who reside in the recently annexed area of the Town of Manassas will have a right to vote in the Town election on June 8th.

"I anticipate some arguments on this question and will thank you to let me know what application, if any, the provision of Sec. 18 of Article 2 of the Virginia Constitution has to the right of persons residing in the annexed territory to vote."

The opinion expressed in my letter of January 9, as well as the opinion enclosed therewith, is in harmony with the provision contained in § 18 of the Constitution requiring residence in a town for six months in order to be qualified to vote. You will note that § 15-152.24 of the Code provides that:

"All electors residing in the annexed territory shall be entitled to transfers to the proper poll books in the city or town without again registering therein. Any person residing in the territory who has not registered shall be entitled to register in the city or town if he would have been entitled to register and vote at the next succeeding election in the county."

Any person who, on regular election day in June, 1957, has been a resident of the territory annexed for six months will be deemed to have been a resident of the town for six months as required by Section 18 of the Constitution.

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**ELECTIONS—Town Council—Candidates Must File Notices with State  
Board. F-100b (304)**

April 25, 1957.

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

This is in reply to your letter of April 24, 1957, relating to the filing requirements of candidates for town offices. You state as follows:

"The question has come up concerning persons who filed for mayor and town council in the Town of Smithfield. A number of candidates

for town council filed their notices of candidacy with both the clerk and with this Board in proper time but two of said candidates failed to file their notices with this Board on or before April 12, 1957. They did, however, file their notice of candidacy with the clerk within the proper time.

"Therefore, the question is 'Are those persons who failed to file their notices with this Board as required under Section 24-345.3 of the Code of Virginia within the prescribed time entitled to have their names printed on the official ballots for said June election, and how shall I inform the local board as to which candidates are and which candidates are not to be printed on the official ballots?'"

Section 24-170 of the Code 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 24-131 of the Code reads as follows:

"Any person who intends to be a candidate for any office not embraced in the foregoing section, at any election, shall give notice at least sixty days before the election if it be a general election, and at least thirty days before the election if it be a special election, or within five days after the issuance of any writ of election or order calling a special election to be held less than thirty-five days after the issuance of the writ or order, to the county clerk or clerks of the county or counties, and to the clerk or clerks of the corporation courts of the city or cities whose electors vote for such office, which notice shall in all respects be in the same form as that described by the preceding section and required to be given to the State Board of Elections."

Those two sections contain the general requirements for filing for town officers. These requirements are supplemented, however, by the provisions of § 24-345.3 of the Code relating to absent voters in the armed services which was amended by Chapter 523, Acts of 1954, so as to be applicable to towns, as well as to counties, cities, the State at large and senatorial and legislative districts. To the extent that this section is applicable to the general election to be held in June of each year in towns for officers of such political subdivisions, it would seem that the section is as follows:

"All candidates for said offices other than party nominees shall file their notices of candidacy and petitions, if same are required by Chapter 8 of this Title \*\*\* within ten days after the first Tuesday in April \*\*\* with the Board (meaning State Board of Elections) and also with the clerk or other officer, when the same is required by law. The name of no candidate for any \*\*\* local office required by this section to be certified to the Board whose name is not so certified, or whose notice of candidacy, if the filing of such notice is required by such chapter (8 of Title 24) of the Code, is not filed within the time required by this section, shall be printed on any official ballot for said election."

Sections 24-131 and 24-170 of the Code require the filing of a notice of candidacy by such candidates and § 24-131 is contained in Chapter 8 of Title 24.

I can see no escape from the conclusion that, by reason of the amendment of 1954 to § 24-345.3, it is mandatory for candidates for town offices to file their notices of candidacy with the State Board of Elections within ten days after the first Tuesday in April in order to have their names placed upon the official ballot.

**ELECTIONS—Write in Votes—Person Elected by Although Not Qualified to Vote—When May Qualify for Office. F-100b (259)**

March 13, 1957.

HONORABLE OTIS B. CROWDER, *Treasurer*  
Mecklenburg County

This is in reply to your letter of March 8, 1957, which reads as follows:

"If possible, I would thank your office to furnish me with a ruling as to whether or not a person may hold an office as mayor of a municipality without having paid the required poll tax six months prior to the election. My chief concern is whether or not a person who has failed to pay this tax may be elected to office by a write-in vote.

"I am seeking this information as I have had a request for an answer to this problem from a person who failed to pay his taxes prior to December 11, 1956, which would be the six months before the election date, and several people have advised this person they felt he could be elected by a write-in vote."

Section 24-132 of the Code reads as follows:

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

This section, it will be noted, prohibits the Electoral Board from printing the name of a candidate upon an official ballot unless such candidate is qualified to vote in the election in which he offers as a candidate. Under the provisions of Section 21 of the Constitution of Virginia the individual mentioned in your letter is not qualified to vote in the general election to be held in June, 1957.

Section 32 of the Constitution of Virginia provides, in part, that "Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other subdivision of the State wherein he resides, except as otherwise provided in this Constitution \*\*\*"

Section 24-132 of the Code does not purport to prevent a person who may be elected by a write-in vote from qualifying and holding the office to which he has been elected. Whether or not such person will be eligible to qualify for the office will depend upon his status as a qualified voter at the time he offers to qualify. If he is qualified to vote at the time his term of office begins, he will, in my opinion, be eligible to hold the office if he meets the other eligibility conditions, such as residence requirement, and is not disqualified to hold such office for some other valid reason.

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**EMBALMERS AND FUNERAL DIRECTORS—Application for Registration as Apprentice to Be Accompanied by Affidavits Concerning Character. F-91 (315)**

May 6, 1957.

HONORABLE FRANK A. BLILEY, *Secretary*  
Virginia Board of Directors and Embalmers

This is in reply to your letter of May 2, in which you enclosed three letters submitted pursuant to Section 54-260.35 of the Code of Virginia, which you state purport to be in compliance with that portion of this section requiring the application for registration as an apprentice to have attached thereto the affidavits of three citizens of Virginia that the applicant is personally known to them and that he is of good moral character.

The letters submitted are not in affidavit form, since they fail to contain a certificate of the justice of the peace, who merely signed them, giving his title.

In order for the affidavit requirement to be met, the certificate should be substantially as follows:

"Subscribed and sworn to by ..... before me, in  
my county (or city) this the ..... day of ....., 19....

"Signed \_\_\_\_\_

Justice of the Peace or  
Notary Public for the  
County (or City) of  
....., in the  
State of Virginia."

The letters, in addition to certifying as to the applicant's character, should, it would seem, contain a statement by the affiant that he is a citizen of Virginia.

### **EMBALMERS AND FUNERAL DIRECTORS—State Board of—Statutory Provisions Governing Reciprocity. F-91 (32)**

June 30, 1956.

HONORABLE H. STUART CARTER  
Member of the House of Delegates

This is in reply to your letter of July 20, 1956, which reads as follows:

"I have called to the attention of the Secretary of the State Board of Embalmers and Funeral Directors the enactment by the 1956 General Assembly of § 54-260.5 of the Code of Virginia, which permits the State Board of Embalmers and Funeral Directors to recognize to such extent as it may deem to be in the public interest, licenses issued to funeral directors and embalmers of other states. I have been advised that the State Board of Embalmers and Funeral Directors does not issue reciprocal license, and does not plan to do so in the near future. I shall greatly appreciate your rendering an opinion as to whether or not, in view of this section, the State Board can arbitrarily refuse to recognize all licenses issued by other states."

When the statute in question is read as a whole, it would appear that the General Assembly envisioned that it might be in the public interest for licensed funeral directors and embalmers of other States to be recognized by the Virginia Board so long as such nonresident practitioners did not undertake to engage in the business of funeral directing or the practice of embalming in Virginia. With respect to the District of Columbia and those States whose boundaries—or a part thereof—are contiguous with those of the Commonwealth, such recognition may be extended under an agreement entered into by the Virginia Board and the licensing authorities of the District of Columbia and contiguous States, which agreement grants special privileges to nonresident funeral directors and embalmers who are duly licensed as such in their State or the District of Columbia. Such agreement may confer upon such nonresident funeral directors and embalmers the privileges of making interments in and removing bodies from the Commonwealth, and embalming bodies and arranging funerals within the State.

In my opinion, the statute does not authorize the Virginia Board to grant licenses to nonresident practitioners to engage generally in the business of funeral directing or embalming in Virginia. The statute, in my judgment, contemplates that the Board—in the exercise of a sound discretion as to whether or not it is in the public interest—may grant special privileges to nonresident, duly licensed practitioners, so long as such practitioners do not establish a place of business or engage generally in the business of funeral direction and embalming in the Commonwealth. In this latter connection, I feel the statute imposes upon the members of the Board the duty of making a reasonable exercise of the discretion reposed in the Board and of determining in each case whether or not the public interest will be served by the granting of such special privileges. I am of the opinion that

the statute contemplates that such discretion will be reasonably exercised, and I do not think that the Board may completely disregard the provisions of the statute or ignore the public interest by an arbitrary exercise of the discretion vested in it.

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**EXECUTIONS—Duty of Sheriff or Sergeant—Proper Bonds—Tax Warrants.  
F-136 (133)**

October 23, 1956.

HONORABLE JAMES H. YOUNG  
Sheriff of the City of Richmond

I acknowledge receipt of your letter of October 16, 1956, in which you ask the following questions:

"1. When I execute a Writ of Fieri Facias, without indemnifying bond, by levying on personal property, am I required by law to take possession of the property levied upon?

"2. When indemnifying bond is given in the above situation, am I required by law to take possession of the personal property levied upon?

"3. In either case, what liability, if any, do I incur by reason of failure to take possession of the personal property levied upon in the event the property levied upon is not thereafter available for satisfaction of the lien?

"4. When I execute a Tax Warrant upon real property, do I follow the procedure prescribed in statutes relating to Fieri Facias generally or that prescribed in 8-759 through 8-788 dealing with recovery of debts due the State?"

These questions will be answered in the order set forth above.

1. In answer to this question, I refer you to § 8-450 of the Code. It will be noted that, under this section, the officer may allow the property to remain in the possession of the debtor provided a forthcoming bond has been executed and delivered to the officer. In your question you refer to an indemnifying bond which is distinguishable from a forthcoming bond. Section 8-229 of the Code sets forth the conditions upon which an indemnifying bond may be required.

Your question No. 2 is closely related to question No. 1. If an indemnifying bond is given, in my opinion the officer is required to take possession of the property. You will note that an indemnifying bond is given only under the above section when the officer is in doubt as to whether or not the property is liable to the levy proposed to be made. Such a doubt could arise in a case where a third party and not the person in possession of the article claims to be the owner. If the officer is not in doubt, he should make the levy and assume possession of the property without benefit of an indemnifying bond.

With respect to your third question, if an officer for any reason does not take possession of the property and fails to protect himself with a forthcoming or suspending bond (see §§ 8-450 and 8-232 of the Code), it seems that he will be liable for any loss that may result to the judgment creditor in case the property is disposed of by the debtor. It is stated in Burks Pleading and Practice, 4th Edition, at page 690 that "If after levy the officer permits the goods to remain in the possession of the debtor, he does so at his own risk, and is liable for resulting loss."

Sections 8-759 through 8-788 of the Code, referred to in your question No. 4, prescribe the procedure to be followed in suits by the State and these sections do not set forth and prescribe the procedure for the execution of tax warrants.

Commencing at page 676 of Burks Pleading and Practice (4th Edition, Chapter 45) you will find a clear exposition of the fundamentals governing the issuance and procedure to be followed in connection with executions. I believe you would find this chapter beneficial to you.

**EXECUTIONS—Judgments Rendered in County Court—When Execution May Be Issued by County Court and When by Circuit Court. F-72 (208)**

January 25, 1957.

HONORABLE AUSTIN EMBREY, *Clerk*  
Circuit Court of Nelson County

This is in reply to your letter of January 24, 1957, which reads as follows:

"When a judgment has been rendered in our County Court and the judgment duly docketed in our Circuit Court, is it proper for an execution to be issued in the Circuit Court prior to the time the papers in the case are filed in the Circuit Court as provided by Section 16.1-115 (1) of the Code of Virginia?"

I believe that the answer to the question presented by you is found in §16.1-116 of the Code, which reads as follows:

"When a judgment has been rendered in a civil action in a court not of record and the papers in the action have been returned to the clerk of the circuit or corporation court for filing and preserving, executions upon and abstracts of the judgment may be issued by the clerk of such circuit or corporation court. However, for a period of two years from the date of any such judgment, the judge or clerk of the court not of record may also issue executions upon the abstracts of the judgment."

Under this section it is clear that the clerk of a court of record does not have authority to issue an execution upon a judgment obtained in a county court until the papers in such case have been filed in the circuit court clerk's office.

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**FEES—Clerks—Entitled to 25 Cents for Filing Criminal Warrants. F-116 (25)**

July 20, 1956.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in further reference to your letter of July 12, 1956, and my opinion of July 13, 1956, in reply thereto, concerning whether or not a 25¢ fee may be collected for the clerks of courts of record for the filing and indexing of criminal warrants, which filing is required by § 19-310 of the Code of Virginia.

It is true, as stated in your letter and in my opinion, that § 16-78 of the Code, which section provided that a 25¢ fee should be collected and given to the clerks of courts of record for their services in filing and indexing criminal warrants, was repealed by the 1956 session of the General Assembly. However, on further consideration of the question, I am of the opinion that the clerk of courts of record are entitled to this 25¢ fee under the provisions of § 19-312 of the Code. That section reads as follows:

"The clerk shall enter all such certificates in a suitable book; and if the fine and costs have not been paid, he shall forthwith issue a writ of fieri facias therefor, and afterwards such other process, from time to time, as may be proper, in the same manner as if such fine had been imposed by the court of his county or city. For entering every such certificate the clerk shall receive a fee of twenty-five cents, payable out of the State treasury."

Section 19-310, prior to 1948, provided that the trial justices should return to the clerk of the courts of record a certificate of each criminal case disposed of by the trial justice courts. In 1948 this section was amended to provide that the trial justices should return the criminal warrants to the clerks of the courts of record in place of the certificates. The warrants which are returned take the place of the certificates which were returned prior to 1948, and in returning the warrants the county and municipal courts are in effect certifying to the clerks of the courts of record that they have disposed of the matters as shown on the criminal

warrants. Therefore, I am of the opinion that in so far as § 19-312 speaks of certificate, it means criminal warrant, and the clerks of the courts of record are entitled to a fee of 25¢ for entering each criminal warrant returned to them by the county and municipal courts. This 25¢ fee should be taxed as a part of the cost of the case and, if costs are recovered from the accused, paid to the clerk of the court of record. If no costs are recovered, or the accused is acquitted, this fee should be paid to the clerk of the court of record out of the State treasury.

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**FEES—Commonwealth's Attorney—Prosecuting Violation of Town Ordinance—Not Taxed as Part of Cost. F-190 (83)**

September 17, 1956.

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

This is in reply to a letter from your office dated September 12, 1956, in which my opinion is requested as to whether or not the clerk of the circuit court should tax an attorney's fee against the defendant in a case whereupon an appeal has been taken from a conviction of a violation of a town ordinance in the Mayor's Court of a town. It is stated that the town retains the Commonwealth's Attorney of the County to prosecute said cases in the circuit court and pay said Commonwealth's Attorney for his services.

I know of no statute providing for an attorney's fee to be taxed against the defendant in cases such as this. I am of the opinion that § 14-130, which provides for the taxing of fees of Commonwealth Attorneys, is inapplicable in this case, since the Commonwealth's Attorney is not appearing in his official capacity of Commonwealth's Attorney, but rather he is an attorney employed by the town to prosecute such cases. This office has repeatedly held that there is no mandatory duty upon Commonwealth attorneys to represent a town in such cases. Therefore, he is appearing as a private attorney for the town, and the fees provided by § 14-130 of the Code are not to be taxed.

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**FEES—Commonwealth's Attorney—When Should be Taxed in Criminal Case. F-69 (294)**

April 15, 1957.

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

This is in reply to your letter of April 11, 1957, in which you request my opinion concerning the taxing of fees for Commonwealth's Attorneys in criminal cases.

In answer to your first question as to whether the Commonwealth's Attorneys' fee of \$5.00 should be taxed in an appeal case from the County Court when the defendant pays the fine and costs prior to the time of trial in the Circuit Court, I am of the opinion that no fee should be collected unless it is a violation of law wherein the Commonwealth's Attorney is expressly required to appear in the County Court. See § 14-130 of the Code of Virginia, which section provides that fees are chargeable for the Commonwealth's Attorney in a misdemeanor case in the circuit court for each person tried or prosecuted. If the defendant pays his fine and costs before the case goes to trial in the circuit court, then no fee is chargeable.

In answer to your second question, I am enclosing a copy of an opinion rendered on September 17, 1956, to Honorable Emory E. Friend, Clerk of the Circuit Court of Pittsylvania County. I think this opinion is applicable to the question raised by you.

**FEES—County and Municipal Courts—Docketing Fee—To Be Transmitted Direct to Court by Person Collecting—Any Refund of to be Made by Court. F-136a (42)**

August 7, 1956.

HONORABLE WILLIS V. FENTRESS, *Judge*  
Civil Justice Court of the City of Norfolk

I acknowledge receipt of your letter of August 3, 1956, in which you refer to the provision of § 14-133(3) of the Code as amended at the 1956 session of the General Assembly, and in which you ask the following question:

"Would it be possible under Title 16.1-25, as a reasonable rule of practice, for the Court to direct the High Constable or other service officer to return this fee and the process, 'Not Found' to the justice of the peace or counsel for the litigant to be returned to 'the person by whom the proceeding was instituted?'"

You state that, under local practice, the \$1.25 docketing fee provided for in § 14-133(3) is paid to the High Constable when the warrant or notice is delivered for service, and that this fee is transmitted to the court with the constable's return. I do not feel that the docketing fee should be turned over to the constable in cases where the warrant is issued by a justice of the peace. I think that, under this section, there is a duty upon the justice of the peace to transmit the docketing fee to the court to which the warrant is returnable. Of course, if the warrant is issued by the clerk of the court, it would not be proper for the docketing fee to be turned over to the officer to whom the warrant is delivered for service. Under this section I am of the opinion that it is contemplated that the docketing fee shall come into the custody of the court, regardless of whether or not service of the warrant is made. If no service of process is had, I am of the opinion that the court is required to return the docketing fee to the person by whom the proceeding was instituted, or to his attorney of record.

Section 16.1-25 of the Code to which you refer in the question presented by you reads as follows:

"The judge of a court not of record may make and enforce such reasonable rules of practice for his court as are not in conflict with law."

In view of the comments made herein with respect to the lack of authority to deliver the docketing fee to the constable in any event, I am of the opinion that the court would not have the power to direct the constable or other service officer to return the fee to the justice of the peace or counsel for the litigant to be returned to "the person by whom the proceeding was instituted." Moreover, I am of the opinion that § 16.1-25 has no relation to the handling of funds in the custody of the court, but its application is limited to the rules involving the procedure in the handling of cases in the court.

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**FEES—County and Municipal Courts—None for Providing Copies of Criminal Records—F-136c (65)**

August 27, 1956.

HONORABLE H. B. GILLIAM, *Judge*  
Municipal Court  
City of Petersburg

This is in reply to your letter of August 22, 1956, in which you request my opinion as to whether or not there is any provision of the Code of Virginia which requires or provides that a court not of record shall charge a fee for copies or certificates of criminal proceedings and records.

I can find no provision in the Code of Virginia which requires or provides for the collecting of a fee by a court not of record for abstracts, copies or certificates of proceedings or records in criminal cases.



**FEES—County and Municipal Courts—Civil Cases Interest and Attorney's Fee Not Included in Determining Amount. F-136a (14)**

July 11, 1956.

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

This is in reply to your letter of July 10, 1956, in which you request my opinion concerning the amount of trial fee that shall be charged for certain civil cases by the county court. You ask specifically if an action is instituted in a county on an account or note for the amount of \$198.00 with accrued interest thereon for six months, should there be a \$1.00 trial fee charged in addition to the \$1.25 docketing fee.

In this case the amount of the claim, plus interest, would amount to \$203.94. Although paragraphs 3 and 4 of § 14-133 of the Code of Virginia do not provide that the trial fees shall be determined by the amount involved exclusive of interest, I am of the opinion that when that section speaks of the amount of the claim or the amount involved, it is speaking of the principal amount of the claim and is to be taken exclusive of interest and attorney's fees. Otherwise, you could have a case where the claim plus interest and attorney's fees would exceed \$2,000 and, under the section dealing with jurisdiction, § 16.1-77, the county court would have jurisdiction, but there would be no provision as to the amount of trial fee, since the maximum amount of trial fee prescribed by this section is an additional \$2.00 for claims which exceed \$1,000 and do not exceed \$2,000. I am, therefore, of the opinion that, in the hypothetical case stated by you, only the \$1.25 docketing fee would be charged, and the additional \$1.00 fee would not be charged since the principal amount of the claim does not exceed \$200.00.

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**FEES—Distress Warrants—For Issuing, Serving and Levying. F-381 (269)**

March 18, 1957.

HONORABLE GEORGE W. HALSTEAD, JR., *Clerk*  
Princess Anne County Court

This is in reply to your letter of March 8, 1957, in which you request my opinion as to the proper fees for issuing, serving and levying distress warrants.

The County Court should collect a fee of \$1.00 for issuing a distress warrant, pursuant to § 14-133(1) of the Code of Virginia, and should also collect a fee of 25¢ for taking the affidavit required by this warrant, pursuant to § 14-133(10) of the Code.

The sheriff is entitled to a fee of \$1.50 if he makes a levy under the distress warrant and makes a return thereupon, pursuant to § 14-116(18) of the Code. If the sheriff returns the distress warrant with the return thereon "not found," he is entitled to a fee only in the amount of 75¢, pursuant to the provisions of § 14-107 of the Code. If he serves the distress warrant and does not make a levy, he is entitled to a fee of 75¢, pursuant to § 14-116(1) of the Code. If the sheriff takes a bond from the person having the distress warrant served, he is entitled to collect a fee of \$1.00, pursuant to § 14-116(10) of the Code.

In addition to any fees mentioned above, if the sheriff conducts a sale or collects any money after making a levy, he is entitled to the commissions prescribed by § 14-120 of the Code, or if, after making the levy, he does not conduct a sale or receive any money, he is entitled to the fee prescribed by § 14-106 of the Code.

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**FEES—Flat Fee in Chancery Case Is Optional with Clerk—But Covers Everything. F-116 (2)**

July 2, 1956.

HONORABLE LEWIS H. VADEN, *Clerk*  
Circuit Court of Chesterfield County

This is in reply to your letter of June 20, 1956, which reads, in part, as follows:

"I respectfully request your opinion as to the proper interpretation to be placed on Paragraph (a) of Section 14-124 of the 1950 Code of Virginia as amended, which said paragraph is 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.'

"I might mention that it has been the practice of clerks of courts of record in the Richmond area to construe the above referred paragraph as defraying all costs in a chancery case, accruing to the plaintiff or complainant, and if a defendant or group of defendants elected to file a cross-bill in a pending chancery suit, that cost would accrue to said defendants in proportion to the amount of litigation necessary to pursue said cross-bill to its conclusion.

"The writer, being a member of the Advisory and Legislative Committee of the Virginia Court Clerks Association, and therefore having some small part in proposing to the legislature in 1954 for its consideration Paragraph (a) of Section 14-124, is certain that it was the intent of the Clerks Association to have a flat fee which would defray all of the cost applicable to the plaintiff only, to be paid by said plaintiff at the time of instituting a suit.

"Some several days ago an attorney practicing in the City of Petersburg questioned the validity of being charged any fee by my office upon his filing a cross-bill for the defendants in a chancery case."

The fee of \$15.00 for a clerk's services in chancery cases is optional. A clerk may charge the specific fees set forth in paragraphs (1) through (8) of Code § 14-124 or, at his option, require the plaintiff at the time of instituting the suit to pay a flat fee of \$15.00. The fees fixed and allowed in some of the paragraphs (1) through (8) are for services to the defendant side of the case as well as to the plaintiff side. This is, it would appear, clear from the wording of paragraphs (4) and (5).

That part of § 14-124 relating to the charge of \$15.00 reads as follows:

"In lieu of the fees hereinabove set forth:

"(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."

I am of the opinion that the language quoted above limits a clerk's fee to \$15.00 if he elects to require such amount instead of charging the item fees set forth in paragraphs (1) through (8). This charge of \$15.00 may be required of the plaintiff by a clerk even though the item charges against both the plaintiff and the defendant would amount to a total of less than \$15.00. Such charge of \$15.00, however, must be required of the plaintiff at the time the suit is instituted—that is, the basis upon which a clerk will make his charges for services in connection with a chancery case must be selected when the suit is commenced.

#### FEES—Garnishments—Clerk Should Charge as Any Other Action at Law. F-116 (95)

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

September 21, 1956.

This is in reply to your letter of September 19, 1956, in which you request my opinion concerning the docketing of judgments filed in your office by the county court and the issuance of garnishments thereon. Your first question is as follows:

"Is it necessary that a judgment filed in the Clerk's Office rendered by the Trial Justice or the County Judge be docketed on the lien docket in the Clerk's Office before the Clerk can issue a fieri facias or garnishment thereon?"

On March 14, 1956, I rendered an opinion to Honorable John H. Powell, Clerk of the Circuit Court of Nansemond County, which opinion I feel answers your first question. I am enclosing a copy of that opinion.

In answer to your second question, I am of the opinion that when a garnishment is issued by you, this should be classified as an action at law, and the proper clerk's fees are to be charged under the provisions of § 14-123(59) of the Code of Virginia.

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**FEES—Qualification as Administrator—To Bring Suit for Wrongful Death no Other Estate—Amount of Fee and Tax. F-17 (307)**

April 29, 1957.

HON. WILLIAM S. HOLLAND, *Clerk*  
Circuit Court of City of Suffolk

This is in reply to your letter of April 25, 1957, in which you state that a person makes application to qualify as administrator of an estate only for the purpose of bringing legal action against a third party for damages for the wrongful death of a person caused by the negligent acts of the third party. You request my opinion as to the amount of the Clerk's fee under Section 14-123 (6) of the Code of Virginia.

At the time this person qualifies the value of the estate is less than \$100.00 and, therefore, no charge shall be made. While it is true that a recovery up to \$25,000 could be made on behalf of the estate should the administrator be successful in the legal action, still at the time of qualification this has not become a reality and, therefore, cannot be considered in determining the value of the estate.

You ask also as to the amount of tax on qualification under the provisions of Section 58-66 of the Code of Virginia.

Again we have the estate at a present value of less than \$100.00; therefore, no tax shall be imposed. Should at some additional time the administrator make a recovery in an amount to exceed \$100.00, then a tax should be collected under the provisions of Section 58-70 of the Code of Virginia.

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**FEES—Recordation of Subdivision—No Transfer Fee until Lots Transferred to New Owner. F-90a (297)**

April 16, 1957.

HON. W. CARY CRISMOND, *Clerk*  
Circuit Court of Spotsylvania County

This is in reply to your letter of April 10, 1957, in which you state that a subdivision plat has been submitted for recordation along with a deed of dedication for eighteen lots. You ask what transfer fee should be charged.

I am unable to find any provision in the Code of Virginia which provides for the payment of a transfer fee in a situation such as this. In actuality this is a mere recordation of a plat of a subdivision and there is no transfer involved. It would appear, therefore, that no transfer fee could be charged until the land is sold or in some way transferred to another party.

**FIREWORKS—Confiscation of—Person Convicted of Illegal Possession—Court May Order. F-66 (244)**

February 26, 1957.

HONORABLE KENNETH P. ASBURY  
Commonwealth's Attorney for Wise County

This is in reply to your letter of February 22, 1957, in which I quote below:

"Section 59-214 of the Code of Virginia provides that it is unlawful to store firecrackers and other fireworks.

"When a person is fined for the storing of fireworks under this Section and does not appeal same, does the County Court have the authority to order the confiscation of the fireworks? If not, what procedure should be followed in confiscating the fireworks and what procedure should be followed in destroying said fireworks?"

I assume that the fireworks in question were seized as evidence under a search warrant issued pursuant to Section 19-29 (7) of the Code of Virginia, as amended. A search warrant is issued in this instance when there is reason to believe that a merchant or vendor is in possession of fireworks and that such possession is made unlawful by a local ordinance. Section 19-32 of the Code, as amended, provides that the things mentioned in Section 19-29 may be burnt or otherwise destroyed as soon as there is no further need for them as evidence, unless it is otherwise expressly provided for by law. I am therefore of the opinion that if the fireworks were seized for violation of a local ordinance as outlined above that they may be burnt or otherwise destroyed, as I am unable to find any other express provision contained in the Code relating to their disposition.

If the person was convicted for violation of Section 59-214, then it would appear in my opinion addressed to the Honorable W. Carrington Thompson, Commonwealth's Attorney for Pittsylvania County on January 22, 1952, would be applicable. I am enclosing a copy thereof for your information.

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**FISHERIES—Commission May Use Funds for Repletion of Oyster Beds for Planting Shells in Potomac River. F-104 (5)**

July 5, 1956.

HONORABLE CHARLES M. LANKFORD, JR., *Commissioner*  
Commission of Fisheries

This is in reply to your letter of June 25, 1956, in which you request my opinion as to whether one-half of the \$30,000 per year funds appropriated for the repletion and restoration of oyster beds by Item 477a of the Appropriation Act of 1956 may be expended for the planting of oyster shells in the Potomac River.

Since all of the laws of the Commonwealth of Virginia concerning oyster rights in the Potomac River contemplate that the Commission of Fisheries of the Commonwealth of Virginia has concurrent jurisdiction with the State of Maryland over this river as to oysters, I am of the opinion that the Commission of Fisheries may use any portion of this appropriation for planting oyster shells in the Potomac River.

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**GAME AND INLAND FISHERIES—Bear and Deer Stamps—When Required—Residents of City. F-233 (115)**

October 12, 1956.

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

This is in response to your letter of October 5, 1956, in which you set forth the three following questions:

"1. Can a resident of a city, the limits of which are wholly within the county where the licenses are applied for, be required to purchase a special stamp for the hunting of bear and deer in said county if he purchases a state hunting license according to Section 29-58?

"2. Does Section 29-122 of the Code of Virginia require a resident of the county under the age of 21 years or otherwise disqualified to vote because of requirements of Section 24-18, such as persons convicted of petit larceny, felony, treason, bribery, obtaining money or property under false pretenses, embezzlement, forgery or perjury, or have not registered or paid their poll taxes, to obtain a special stamp to hunt bear or deer?

"3. If Section 29-122 of the Code of Virginia taxes or requires a special license for one set of residents of the Commonwealth and not another because of the place where they live, or because of their age, or because of the requirements of Section 24-18 of the Code of Virginia, or because of poll tax payments, or because of registration requirements necessary to become legal voters; or if it discriminates between residents of the Commonwealth because of the location of the residents, would it be unlawful discrimination and would it be unconstitutional?"

In response to Question No. 1, reference is made to the opinion of this office dated May 29, 1956, to the Clerk of the Corporation Court of the City of Staunton, holding that residents of cities, the limits of which are wholly within the counties, are required by Section 29-122 to purchase a special stamp for the hunting of bear and deer in said county, together with the county hunting license. I am of the opinion that such special stamp is required where such resident purchases a State hunting license as distinguished from a county license. Section 29-122, exempting the requirement of a special stamp for specified persons does not appear to be based upon whether or not a State or county license is held but upon the affiliation of such persons to such county.

In response to Question No. 2, I am of the opinion that a county resident under twenty-one or otherwise disqualified to vote is exempt from obtaining a special stamp under the provisions of Section 29-122 of the Code of Virginia. The person referred to in the second question is a resident of and is located within the county and thereby comes within the exemption of Section 29-122.

In response to Question No. 3, I am of the opinion that Section 29-122 would be deemed to be constitutional under general principles of constitutional law. There is, of course, a strong presumption of constitutionality of duly enacted statutes. Moreover, it appears that the Legislature has sought to exempt those persons who are more or less permanently located within the county. In view of the limited quantity of game in certain areas, there are certain conservation features involved.

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**GAME AND INLAND FISHERIES—Big Game Stamp Funds—May Be Used for Bounty on Foxes if Killing of Foxes Would Conserve Wild Life. F-233 (237)**

February 19, 1957.

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

This is in response to your letter of February 15, inquiring whether or not a county board of supervisors may authorize that a bounty "can be paid on foxes out of the so-called 'Big-Game Surplus Fund'." It is noted that Section 15-20, Code of Virginia, provides for the paying of bounties on foxes and that the Acts of Assembly of 1950, Chapter 484, page 950, provide for the surplus in the "Big Game Fund" in Bland and Giles Counties to be used for the conservation of wild life in the counties under the direction of the Board of Supervisors. You further state that you conclude that the killing of foxes, some of which in Giles County

are rabid, would effect a conservation of wild life.

Kindly be advised that I am of the opinion that Chapter 484, as aforesaid, authorizes the County Board to use the surplus funds for the conservation of wild life. The question of whether or not the killing of foxes would conserve wild life is a factual one, which is not within the province of this office to determine. However, if it is determined that as a matter of fact the killing of foxes would effect a conservation of wildlife, then I am of the opinion that the Board of Supervisor could authorize the payment of bounties out of the said Surplus Fund in the amounts as prescribed by Section 15-20.

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**GAME AND INLAND FISHERIES—Commission—Employment of Persons for Predatory Control Work. (353)**

June 10, 1957.

HONORABLE I. T. QUINN, *Executive Director*  
Commission of Game and Inland Fisheries

This is in reply to your letter of May 28, 1957, inquiring if the Commission is authorized to employ in predatory control work pursuant to Section 29-15, Code of Virginia, more than one person qualified to do predatory animal control work. The legislation in question reads as follows:

“The Commission shall employ, and make available to local governing bodies on request, a person skilled in predatory control of all wild animals recognized as carriers of rabies.”

Kindly be advised that this office is of the opinion that the Commission would be authorized to employ sufficient persons to carry out the mandate of Section 29-15. However, the section should be carefully read in determining its intent. It is noted that the statute provides that such person be made “available to local governing bodies on request”. Accordingly, the only demands that the Department would have are the requests from the local governing bodies. In this connection, if the requests can be handled by one man, then the Commission would not be authorized to employ more than one person.

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**GAME AND INLAND FISHERIES—Dogs—Commission Can Regulate Running at Large of on State Forest Only as Provided by Statute.**

May 16, 1957.

HONORABLE I. T. QUINN, *Executive Director*  
Commissioner of Game and Inland Fisheries

This is in response to your letter inquiring if the Commission of Game and Inland Fisheries has authority to prohibit dogs from running at large on the State Forest and in and about the State Game Farm by regulation of the Commission. It is stated that from time to time marauding dogs who have free run of the forest get into turkey pens and injure the breeders.

There are a number of considerations involved in the situation which you present.

While the important work of the State Game Farm should be protected as fully as possible, the various statutes and cases pertaining to the subject of marauding dogs must be given full consideration. Section 29-194 permits the county governing body to prohibit dogs from running at large. Also, it provides for a penalty for the owner of such dog who violates any such ordinance. Moreover, Section 29-197 provides for situations where dogs injure or worry livestock or poultry. Specific reference is made to the case of *Willeroy v. Commonwealth*, 181 Va. 779, to the effect that where there was every prospect that the dog was about to injure poultry; that it was not necessary to wait until the dog had bitten a chicken before killing it. This case should be carefully read and this office will

be happy to discuss this case further, should it be desired. In addition, Section 29-199 provides for the killing of unlicensed dogs under certain circumstances.

While the statutes pertaining to the Commission give it broad authority, and while Section 29-171 renders it unlawful for any person to permit his dog to hunt upon a State Game sanctuary or refuge operated by the Commission, it is necessary that all aspects of the matter be considered. It would appear that the provisions of Section 29-171 might be applicable if the area in question falls into the category of a game refuge operated by the Commission, and a specific penalty is provided in that section. It does not appear that the Commission has regulatory authority other than the provisions of law contained in the specific statutes referring to the running of dogs, etc. In accordance with the principles of statutory construction where the Legislature has entered a field and enacted statutes relating thereto, such statutes may not be superseded or their effect altered by regulations of a State agency unless such agency is given specific authority to enact additional statutes relating to the same matter.

#### **GAME AND INLAND FISHERIES—Duck Blinds—County Licenses or Stamps—Effect of. F-233 (123)**

October 17, 1956.

HONORABLE BAXLEY T. TANKARD  
Commonwealth's Attorney for Northampton County

This is in response to your letter of October 15, 1956, making the following inquiry:

"The Board of Supervisors of Northampton County provided for the issuing of duck blind stamps within the county as authorized by Chapter 680 of the Acts of Assembly of 1956.

"I would now like to know if Section 29-90 of the Code of Virginia as amended now applies to any duck blinds for which licenses are purchased from the Clerk of the Circuit Court of Northampton County, Virginia, under authority of said Chapter 680 so that others hunting ducks within five hundred yards of such licensed blinds may be prosecuted for same."

Chapter 680 aforesaid provides:

"The governing bodies of the counties of Accomack and Northampton, respectively, may provide for the issuance of a duck blind stamp within the counties. The cost of such stamp shall be five dollars per year. No person shall be required to obtain any such stamp. The clerk shall receive a fee of twenty-five cents for each stamp issued. The proceeds received from the sale of any such stamp shall be employed for the propagation of wild-life within the county in which the stamp is sold.

"Any person having a duck blind in the county in which any such stamp is for sale may, if he desires, purchase such a stamp and affix the same upon any duck blind over which he has control. Thereafter, the provisions of Sections 29-166 and 29-167 of the Code of Virginia shall apply to such blind and to such stamp as well as to persons using such blind without the consent of the person having control thereof."

It is noted that pursuant to the provisions of Chapter 680 aforesaid, the duck blind stamp is not required under State law and that the proceeds shall be employed for the propagation of wild life within the county. Moreover, the chapter provides that the provisions of Sections 29-166 and 29-167 shall apply to such blind. These statutes pertain to trespass on posted property and the destruction of posted signs. No reference is made to Section 29-90 under the provisions of Chapter 680. Accordingly, it is my opinion that Section 29-90 does not apply to duck blinds having stamps affixed which have been obtained under said Chapter 680, as Section 29-90 is related to the water fowl blind licenses which are entirely different.

**GAME AND INLAND FISHERIES—Hunting Laws—Antlerless Deer—Law Governing. F-233 (52)**

August 14, 1956.

HONORABLE I. T. QUINN, *Executive Director*  
Commission of Game and Inland Fisheries

This is in response to your letter of August 3, 1956, which reads in part as follows:

"In recent years the deer population has grown in some areas so rapidly that the population exceeds the food supply. In order to properly and adequately manage the herd of deer in a given area by reducing the deer population by killing off a number of doe deer, the Commission, by regulation, has provided that deer of either sex may be taken in those areas during the open season. In those areas where the Commission has provided for the killing of either sex, it is impossible for the hunter to determine the sex of antlerless deer. Under Section 29-125 of the Code, is not the Commission given authority to so amend the statute as to provide for the killing of deer of either sex, regardless of the length of the antlers of a male deer?"

Reference is made to Section 29-162, Code of Virginia (as amended), prohibiting the killing of a deer, the antlers of which are not visible above the hair at least two inches, and Section 26-144, prohibiting the killing of male deer unless such deer shall have antlers visible above the hair.

It appears that the Legislature has specifically provided for the hunting and killing of antlerless deer pursuant to Section 29-145.2, Code of Virginia, which reads as follows:

"(1) Under such conditions and within such dates and areas as may be determined and prescribed by the Commission of Game and Inland Fisheries, for the purpose of selective population control, a special permit in addition to other licenses and stamps required, may be issued to authorize the holder thereof to hunt and kill antlerless deer.

"(2) For the purpose of carrying out the provisions of this section, the Commission shall print or cause to be printed special permits in suitable design and place the same in the hands of clerks and agents authorized to sell hunting licenses.

"(3) The applicant for a permit as provided herein shall pay to the clerk or agent issuing such permit a fee of two dollars, twenty cents of which shall constitute the fee of the clerk or agent, and the remainder thereof shall be deposited in the county treasury of the county in which issued and shall be deposited to the credit of a special fund in the said county to be used, subject to the approval of the Commission, for the benefit of game restoration in the county."

I am, therefore, of the opinion that the foregoing is the most recent expression by the Legislature and sets forth the authority of the Commission and the provisions for the killing of antlerless deer. Therefore, the provisions of this section are the provisions now obtaining in the State of Virginia pertaining to the subject.

In accordance with the foregoing, it is unnecessary to interpret Section 29-125, Code of Virginia, and it will suffice to state that Section 29-145.2 is the most recent expression upon the subject and appears to specifically cover the subject.

**GAME AND INLAND FISHERIES—Hunting Laws—Male Deer Must Have at Least 2 Inch Antler. F-233 (99)**

September 28, 1956.

HONORABLE I. T. QUINN, *Executive Director*  
Commission of Game and Inland Fisheries

This is in response to your letter of September 26, 1956, inquiring as to the penalty for the killing of male deer with horns not visible above the hair. Ref-



erence is made to Section 29-144, Code of Virginia, as amended in 1952, and Section 29-162, as amended in 1956.

Section 29-144 provides:

"It shall be unlawful to kill male deer in any county of this State unless such deer shall have antlers visible above the hair."

Section 29-162, which has been amended on several occasions and is the latest expression of the Legislature, states:

"Any person killing an elk which does not have horns visible above the hair, or who exceeds the bag limit for elk, or who kills an elk during the closed season, and any person killing a deer which does not have horns visible at least two inches above the hair, or who exceeds the bag limit for deer, or who kills a deer during the closed season shall be guilty of a misdemeanor, and upon conviction shall be punished accordingly. Provided, that the fine for killing an elk which does not have horns visible above the hair, or a deer which does not have horns visible two inches above the hair, during the open season shall be twenty-five dollars for such elk and ten dollars for such deer if such person immediately delivers the complete carcass to the game warden of the county in which killed, whereupon it shall be confiscated and disposed of by the warden as otherwise provided."

Under the established principles of statutory construction, all provisions of statutes must be given their full meaning, and where conflicts arise between two statutes, the full provisions of the last one enacted are controlling. Accordingly, the provisions of Section 29-144 as amended in 1952, to the contrary notwithstanding, it is my opinion that the Legislature through its 1956 amendment to Section 29-162 has rendered it an offense for any person to kill a deer which does not have horns visible at least two inches above the hair, and has stated that such violator shall be guilty of a misdemeanor and upon conviction shall be punished accordingly. An additional provision contained in said Section 29-162 states that if such deer is killed during open season, the fine shall be \$10.00 if such person immediately delivers the complete carcass to the Game Warden.

#### **GAME AND INLAND FISHERIES—Jurisdiction of Commonwealth. Have None Over Game at Camp Peary. F-163 (273)**

March 20, 1957.

HON. I. T. QUINN, *Executive Director*  
Commission of Game and Inland Fisheries

This is in response to your request for my opinion as to the jurisdiction of the Commonwealth of Virginia over the lands of Camp Peary so far as the enforcement of the Game Laws of Virginia are concerned.

On December 10, 1951, the United States of America, through Dan A. Kimball, Secretary of the Navy, accepted exclusive jurisdiction, with certain exceptions, over the lands of Camp Peary. This deed of cession was entered into by the Governor and Attorney General of Virginia pursuant to Section 7-24 of the Code of Virginia.

I find in the deed of cession no clause reserving the right of the Commonwealth to enforce any criminal laws on lands of Camp Peary. The Commonwealth has reserved the right to serve both criminal or civil process thereon, but this does not include the enforcement of criminal laws. I am therefore of the opinion that with the few exceptions contained in the deed of cession the Commonwealth is without the power to enforce the Game Laws on the 9,860 acres of Camp Peary over which jurisdiction has been ceded to the United States of America.

**GAME AND INLAND FISHERIES—Quail Raised in Captivity Is Poultry for Purposes of Criminal Laws. F-95 (171)**

December 5, 1956.

HONORABLE R. H. PETTUS

Commonwealth Attorney for Charlotte County

This is in response to your inquiry of December 4, 1956, "as to whether or not quail hatched in an incubator and raised in captivity for sale and from which eggs and meat are used for domestic purposes are considered poultry under Section 18-165" (pertaining to larceny of poultry).

Kindly be advised that I concur in your opinion that quail raised and used under the above circumstances would come under the definition of "poultry". Section 29-183(b) states that it is for the purpose of the chapter pertaining to dog laws and may not be helpful for reason that it mentions domestic fowls and game birds raised in captivity, thereby placing them in somewhat different categories.

33 Words and Phrases, Cumulative Pocket Part 24, refers to *State v. Willers*, 130 S. W. (2) 256, holding that "domesticated pidgins bred and raised in farmers lofts for table consumption are classified as 'poultry'". Moreover, the large Webster's New International Dictionary, Second Edition, defines poultry as "any domesticated birds which serve as a source of food, either eggs or meat. In order of their importance to man, poultry includes chickens, turkeys, ducks, geese, guinea fowl, pidgens and pheasants." It would appear that quail would have approximately the same domestic characteristics as pheasants. Accordingly, I am of the opinion that quail hatched and raised in captivity for the purpose of serving as a source of food should come under the definition of "poultry".

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**GAME AND INLAND FISHERIES—Regulations Paralleling Federal Ones on Waterfowl—Not Valid Unless Adopted in Accordance with Code. F-157 (233)**

November 19, 1956.

HONORABLE EMORY L. CARLTON

Commonwealth's Attorney

Essex County

This is in reply to your letter of November 19, 1956, in which you request my opinion as to whether or not a person should be prosecuted in the State courts for violating regulations of the United States Government concerning migratory water fowl, which regulations were adopted by the Commission of Game and Inland Fisheries as their own regulations.

It appears that, at a recent meeting of the Commission of Game and Inland Fisheries, they adopted the season bag limit regulations of the United States Government, however, they did not follow the procedure prescribed by §§ 29-126, 29-127 and 29-128 of the Code. Therefore, I am of the opinion that these regulations are not valid regulations of the Commission of Game and Inland Fisheries of Virginia and no violator of these regulations should be prosecuted in the courts of the Commonwealth of Virginia.

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**GAME AND INLAND FISHERIES—Squirrel Season in Certain Counties. F-233 (4)**

July 3, 1956.

HONORABLE I. T. QUINN, *Executive Director*

Commission of Game and Inland Fisheries

This is in reply to your letter of July 2, 1956, in which you enclosed copies of five different Acts of the General Assembly of 1956, each act of which purports to amend and re-enact either § 1 or § 2 of Chapter 202 of the Acts of

Assembly of 1950, which chapter regulates the squirrel season in certain counties. In view of these numerous acts amending and re-enacting these two sections of Chapter 202 of the Acts of Assembly of 1950, you request my opinion as to what is the squirrel season for each of the following counties: Carroll, Floyd, Franklin, Giles, Grayson, Henry, Patrick, Pittsylvania and Scott.

Since Chapters 171, 496, 550 and 551 of the Acts of Assembly of 1956 each amended and re-enacted § 1 of Chapter 202 of the Acts of Assembly of 1950, I am of the opinion that the last one of these four chapters actually approved by the Governor takes precedence over the other three chapters and is the law. The last chapter which was approved by the Governor apparently is Chapter 551. This chapter provides that in the counties of Grayson and Giles the squirrel season shall be from September 15 through October 15, and then again from the third Monday in November through January first. In the counties of Patrick, Floyd, Carroll, Henry and Franklin the squirrel season shall be from September 1 through January 20.

Chapter 205 of the Acts of Assembly of 1956 amends and re-enacts § 2 of Chapter 202 of the Acts of Assembly of 1950. This chapter provides that in the county of Scott, the squirrel season shall be from September 15 through September 30, and again from the third Monday in November through January 5. Although Chapter 550 of the Acts of Assembly of 1956, which chapter was approved after Chapter 205, contains a § 2 and § 3 for Chapter 202 of the Acts of Assembly of 1950, in my opinion these two sections, 2 and 3, are not valid laws, because both the title to the act and the enacting clause of the act provided that this act was amending and re-enacting only § 1 of Chapter 202 of the Acts of Assembly of 1950.

In the enactment of four separate acts amending and re-enacting § 1 of Chapter 202 of the Acts of Assembly of 1950, apparently the County of Pittsylvania was dropped completely from the list of counties having a special squirrel season, since Chapter 551 of the Acts of Assembly of 1956 did not refer to Pittsylvania County. Therefore, Pittsylvania County has no special squirrel season, and the regular hunting season beginning on the third Monday in November and ending on January 20 would be applicable for squirrels in that county.

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**GAME AND INLAND FISHERIES—Violators—License Revoked After Second Conviction—May be of Regulation—Bond Requirement Does Not Apply to Violations of Regulations. F-233 (104)**

October 2, 1956.

HONORABLE J. AUBREY MATTHEWS  
Commonwealth's Attorney for Smyth County

This is in response to your letter of September 19, 1956, inquiring as to the interpretations of Sections 29-77 and 29-182, Code of Virginia, in a situation where a person is convicted under two separate regulations of the Commission of Game and Inland Fisheries on different dates within the same year. Inquiry is made whether or not Section 29-77 applies to convictions under the regulations of the Commission and whether or not Section 29-182 requires that a bond be given where there has been a second conviction under regulations of the Commission.

Section 29-77 provides as follows:

"Revocation of license.—If any person be found guilty of violating any of the provisions of the hunting, trapping or inland fish laws a second time, the license issued to such person shall be revoked by the court trying the case and he shall not apply for a new license until twelve months succeeding date of conviction. If found hunting, trapping or fishing during such prohibited period, such person shall pay a fine of not less than fifty dollars nor more than one hundred dollars. Licenses revoked shall be sent to the Commission."

It is noted that Section 29-125 under certain circumstances authorizes the Commission by regulation to extend provisions of law pertaining to hunting, etc. It is my opinion that since Section 29-77 authorizes revocation of license when guilty of violating any of the provisions of hunting, etc., law's a second time, this broad language would embrace violations of regulations which constitute hunting laws through legislative authorization for their adoption. Accordingly, I am of the view that Section 29-77 applies to convictions under valid regulations of the Commission.

Section 29-182, pertaining to the posting of a bond upon a second conviction, provides as follows:

"Proceedings when convicted a second time.—If a person be convicted a second time of any offense mentioned in this title, the trial justice rendering judgment therefor shall require him to give a bond for not less than one hundred dollars, with sufficient surety, for his good behavior for a year and if he fails to give such bond, commit him to jail for one month, unless he sooner gives it. The bond shall be deemed to be forfeited if the person commit such other offense within the time specified in the bond."

It is to be noted that the language contained in Section 29-182 refers to "any offense mentioned in this title". The foregoing language would appear to limit the applicability of Section 29-182 to specific offenses mentioned in Title 29. Moreover, in accordance with the principle that penal statutes are to be construed strictly, I am of the opinion that Section 29-182 does not apply to convictions under regulations of the Commission but is limited to convictions under specific offenses mentioned in Title 29.

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#### **GARNISHMENT—Jurisdiction of Between County and Circuit Court—Matter Under \$300. F-145 (207)**

January 25, 1957.

HONORABLE AUSTIN EMBREY, *Clerk*  
Circuit Court of Nelson County

This is in reply to your letter of January 24, 1957, which reads as follows:

"The question has arisen locally whether the provisions of Section 16.1-77 of the Code of Virginia, which gives exclusive original jurisdiction to courts not of record over certain civil matters involving \$300.00 or less, apply to garnishment proceedings under Section 8-442. For example, could garnishment proceedings be brought in either our County Court or Circuit Court if the amount of the judgment was \$100.00 and a proper execution had been secured?"

In my opinion § 16.1-77 of the Code does not have the effect of repealing or modifying the provisions of Article 7, Chapter 19, of Title 8 of the Code which provisions pertain to the institution and conduct of garnishee proceedings. The exclusive jurisdiction granted in § 16.1-77 to county courts is, in my opinion, limited to suits in the initial instance and not to supplemental proceedings, such as garnishee, which are based on a judgment previously obtained.

There must be an outstanding execution as a basis for the issuance of a summons in garnishment. The clerk of the circuit court by reasons of § 16.1-116 may not issue an execution based upon a judgment obtained in a county court until the papers in the case have been filed with such clerk. Until such papers have been so filed, the execution and garnishee summons would have to originate in the county court. After such filing and during the two year period prescribed in the last sentence of § 16.1-116, I am of the opinion the jurisdiction to issue an execution and summons in garnishment would be concurrent. Subsequent to the two year period, it would seem that executions and garnishments may be issued only by the clerk of the court of record in whose office the papers have been filed.

**GENERAL ASSEMBLY—Appropriation Act—What Constitutes Majority of “All Members Elected to Each House.” F-82 (88)**

September 18, 1956.

HONORABLE A. E. S. STEPHENS  
Lieutenant Governor

In recent conference with you our discussion related to the provision of section 50 of our Constitution dealing with the enactment of laws, which provides, in so far as here material, as follows:

“No bill \* \* \*” which “makes \* \* \* any appropriation of public \* \* \* money \* \* \* shall be passed except by the affirmative vote of a majority of all the members elected to each house, \* \* \*.”

The full membership complement of the Senate is forty members. Due to the death of a member, a vacancy exists reducing the complement of membership in that body to thirty-nine. The question, therefore, arises as to whether a majority of all the members elected would require twenty or twenty-one votes.

No person can be a member of either house except that status be attained through the process of election. When that is accomplished, he is a member elected and remains so for his term, unless his status as a member is removed by resignation, death, or loss of qualifications of citizenship. The vacancy existing arising by the death of a member elected removes that person from the status of member.

It is my opinion that the only reasonable and logical construction to be placed on this provision of our Constitution is that the total members elected to the legislative body is reduced by the death of a member, and a vote of a majority of the remaining members would comply with this requirement of our Constitution.

**GENERAL ASSEMBLY—Members—May Serve as Counsel for Officer of Agency or Political Subdivision Created by General Assembly. F-249 (100)**

September 28, 1956.

HONORABLE WILLIAM B. SPONG, JR.  
State Senator

This is in reply to your letter of September 26, 1956, in which you request my opinion as to whether or not there is any legal bar or legal conflict which would prevent a member of the General Assembly from serving as counsel for a State created agency or authority.

There is nothing, in my opinion, in the statute laws of Virginia, or in the canons of legal ethics, which would prevent or prohibit a member of the General Assembly from serving as counsel, or officer, or director of an agency, authority or political subdivision created by the General Assembly. I think that, if you will reflect on the situation for a moment, you will see that there are a number of authorities and agencies of the State that have members of the General Assembly as counsel or officers or directors thereof.

**GENERAL ASSEMBLY—Members—Who Are Lawyers—Thirty Days for Filing Legal Matters Measured from Adjournment of Constructive Session. F-82 (101)**

October 2, 1956.

HONORABLE C. STUART WHEATLEY  
Member House of Delegates

I acknowledge receipt of your letter of October 1, 1956, which reads as follows:

“The undersigned is counsel in one or more law suits in which an order has been entered extending the time for filing the pleadings, etc..

until thirty days after the adjournment of the Special Session of the General Assembly which commenced August 27, 1956 and was recessed September 21, 1956 to reconvene September 29, 1956 in Constructive Session, at which time the General Assembly adjourned.

"Please give me your opinion as to the date from which the thirty days succeeding the adjournment of the Special Session should run, that is to say, whether the thirty days begins to run from September 21, 1956, or September 29, 1956, bearing in mind that a Special Session can not last more than thirty days unless it should be extended for a period not exceeding thirty days pursuant to Section 46 of the Virginia Constitution."

According to the Journal of the House of Delegates the following resolution was adopted on September 21, 1956:

"Resolved by the House of Delegates, the Senate concurring, That when the two houses adjourn today, they adjourn to meet September 29, 1956, at 9:00 A. M."

On September 29, 1956, a resolution was adopted adjourning sine die. This resolution reads as follows:

"Resolved by the House of Delegates, the Senate concurring, That a committee of three on the part of the House and three on the part of the Senate, be appointed by the presiding officers, to inform the Governor that the General Assembly is ready to adjourn sine die, and to inquire if he has any communication to make."

In view of these resolutions, it is my opinion that the General Assembly did not adjourn until September 29, 1956, and that the thirty-day period after adjournment commenced to run on September 30, 1956. The date September 30 is used in view of the provisions of § 1-13(3) of the Code.

#### GENERAL ASSEMBLY—Schools—May Define by Law What Is an Efficient System. F-2 (87)

September 18, 1956.

HONORABLE EUGENE B. SYDNOR, JR.  
Senate Chamber

This will acknowledge receipt of your letter of September 17 referring to my letter of September 7, in which I replied to your letter of September 6 inquiring as to the validity of Senate Bills Nos. 1 and 2 under the Virginia and United States Constitutions.

You resubmit question No. 1 of your earlier letter, to which reference is made. You point out that my former reply dealt with the applicability of section 129 to these bills. You now wish an expression of an opinion from me as to whether Senate Bill No. 1 is valid under sections 11 and 135 of the State Constitution, "particularly in view of the questions raised on these points in the recent public hearings." The questions raised in the recent public hearings were so many, varied, and conflicting, that it would be impossible to catalogue them.

Section 11 of our Constitution provides in so far as here material: "That no person shall be deprived of his property without due process of law; \* \* \*."

I can think of no concept of due process which is invaded by Senate Bill No. 1. This bill is general in operation upon the subjects to which it relates. It bears a reasonable relation to what the General Assembly deems to be a proper governmental purpose. It deprives no person of life, liberty or property. It relates to no mode or method of judicial proceeding. The term "due process" and the office of "due process" does not comprehend the power of the General Assembly to appropriate or not appropriate public funds, or to appropriate for a purpose deemed by it to be in the public interest. The Constitution commands the General Assembly to establish and maintain an efficient system of schools. In the light

of experience and knowledge, the General Assembly is within its province in defining what constitutes an efficient system and to appropriate public funds in the light of such determination. In my opinion, the concept of due process is in no wise thereby violated.

Section 135 of our Constitution requires the General Assembly to apply funds segregated thereunder and a minimum amount to be derived from a specified tax to schools of the primary and grammar grades for the equal benefit of all of the people of the State to be apportioned on a basis of school population.

The limitations embraced by the italicized portions of Item 143 of this bill do not apply to Item 135 of the bill, which has special reference to section 135 of the Constitution, it does not apply to Item 136 of the bill relating to proceeds of interest payment to the literary fund, nor to many other Items appropriating funds for the use of the public school system.

It is a well recognized and settled principle of law that the courts will not reach a constitutional question if the act under consideration can be given a reasonable and proper interpretation without doing so; in other words, the rule is that the law will be construed so as to avoid a constitutional question if by doing so the law may be given valid effect manifested by its intent.

Further in this connection, I subscribe to the view that the people of Virginia, under Article IX of their Constitution, commanded the General Assembly to establish and maintain an efficient segregated system of public free schools. When the Supreme Court of the United States struck down section 140 of the Virginia Constitution, which provided that "White and colored children shall not be taught in the same school," it changed the constitutional mandate upon the General Assembly as to every section of Article IX dealing with the public school system. If the General Assembly finds, therefore, that an efficient integrated system cannot in its legislative judgment be maintained, it is well within its province to appropriate public funds to that system which it deems to be efficient. The mandate of section 135 is no more imperative today than the mandate of section 129.

My answer, therefore, is twofold: First, Senate Bill No. 1 is susceptible to a reasonable and proper interpretation so as to avoid the constitutional question ever being reached, and, second, section 135 would have to be read in the light of the remaining provisions of the State Constitution and the legislative construction of "efficiency."

#### HEALTH—Swimming Pools—Those at Motor Courts Subject to Regulation by State Department and Local Departments. F-224 (262)

March 13, 1957.

DR. MACK I. SHANHOLTZ, *Commissioner*  
State Department of Health

This is in reply to your letter of March 7, 1957, relative to the regulation of swimming pools as defined by Section 35-16.1 of the Code of Virginia, 1950, as amended. I quote your letter below:

"Section 35-16.1 of the Code of Virginia imposes upon the State Health Commissioner responsibility for issuing permits for swimming pools to be constructed at transient lodging establishments, after a review of plans to determine whether 'adequate sanitation provisions are included therein to promote the public health and safety.'

"These small pools are provided principally at motor courts for the exclusive use of guests. There is no charge to the guest for the use of the pool; the only requirement being that the user be a registered guest. Rules and regulations currently being drafted under authority of Section 35-16.1, after a testing period, confine application as follows: 'Bathing place shall be construed to mean any swimming pool, wading pool

or spray pool entirely of artificial construction for use by the guest of any transient lodging establishment.'

"The governing bodies of several communities have either recently adopted sanitary regulations, or are about to do so, applying to *public swimming pools*, since the State law leaves *public pools* unregulated. These local regulations define bathing places in the following language: 'Bathing places shall be construed to mean any swimming pool, wading pool or spray pool entirely of artificial construction for use by the general public or the occupants or members of any institution, school, association or group.' The ordinance in question specifically exempts bathing places 'provided by an individual solely for the use of his family or friends.'

"The provisions required of public pools are, in many respects, not applicable or feasible for use at pools provided at transient lodging places. Examples: dressing rooms, showers, drinking fountains, toilet facilities, lavatories, restrictions on the consumption of food or drink within twenty feet of the pool and restrictions on spectators.

"The possibility that, ultimately, the *local public swimming pool requirements* may be enforced at *motor court pools* is creating unrest and doubts in the minds of motor court people as well as in local enforcement officials. It would be appreciated, therefore, if you would let us have your opinion as to whether

"(1) Swimming pools under Section 35-16.1 are

"a. public, or

"b. Private pools

"(2) Would the language of this local ordinance exclude them from its application since there is a specific regulation, uniformly enforced Statewide, drafted with the peculiar conditions and needs of a specific type of pool in mind."

In the case of *Alpaugh v. Wolverton*, 184 Va. 943, the Court, quoting from 28 American Jurisprudence, Innkeepers, Sec. 46, p. 568, said:

"An innkeeper holds out his house as a public place to which travelers may resort, and, of course, surrenders some of the rights which he would otherwise have over it."

In view of this statement, it is apparent that a motor court is a public place to the extent that it is subject to valid regulations pertaining to sanitation requirements in that it is a more modern type of inn. Consequently, inasmuch as the swimming pools are operated in conjunction with and as an added attraction to these motor courts, it is manifest that these swimming pools are public swimming pools, limited, of course, to the clientele of the establishment.

In answer to your second question, it is quite clear that the Department of Health is vested with the authority to pass upon the plans and specifications of swimming pools operated by the establishments mentioned in Section 35-15 for the purpose of promoting the public health and safety (§ 35-16.1) as well as the adoption of rules and regulations for the continued operation of these swimming pools (§ 35-15 et seq.).

I am of the opinion that the cities, counties and towns may enact *reasonable* local ordinances regulating the sanitary conditions of such public swimming pools. Local ordinances, in my judgment, could provide reasonable sanitation requirements broader in scope than those promulgated by your Department. Such ordinances could, of course, except from their effect transient lodging establishments which are meeting the requirements of the State Board of Health under its regulations with respect to sanitation.

Whether or not there are any cities or towns which are vested with authority to pass upon the construction plans and specifications of such pools, I cannot determine without access to charter provisions purporting to grant such power.



**HIGHWAYS—Allocation of Funds to Secondary System—Effect of National System of Interstate Highways. F-192 (201)**

January 17, 1957.

GENERAL J. A. ANDERSON  
State Highway Commissioner

This is in reply to your letter of January 14, 1957, in which you make two inquiries concerning the interpretation of the statutory provisions relating to allocation of highway funds to the Secondary System of Highways.

Your first inquiry is whether the provision of Section 33-49 of the Code of Virginia requiring allocation to the Secondary System of at least thirty per centum of funds available to the State Highway Commission in any one fiscal year for both the primary and secondary systems is applicable to funds available to the State Highway Commission for the National System of Interstate and Defense Highways as provided by the Federal-Aid Highway Act of 1956.

The statutory provision here involved was enacted by the General Assembly of 1942, at a time when there existed no other system of state highways than the primary and secondary systems. Consequently, all funds heretofore available to the State Highway Commission, including the funds contributed by the Federal-Aid program for these systems, were considered as being available to the primary or secondary systems of highways at the time of allocating thirty per centum of all such funds to the Secondary System.

It is significant that the Federal-Aid Highway Act of 1956, which again amended the original Act of 1916, sets the National System of Interstate and Defense Highways apart from the primary and secondary systems of highways. Separate appropriation, more stringent standards and specifications, and a different formula for apportionment of federal funds to participating states are definite characteristics which would classify the Interstate System as a distinct system of highways.

In view of the foregoing, I am of the opinion that the provisions of Section 33-49 of the Code of Virginia of 1950 have no application to the funds available to the State Highway Commission under the Federal-Aid Highway Act of 1956 for the construction of the Interstate System of Highways.

Your second inquiry is as follows:

"In setting aside 30% of the funds available to the State Highway Commission in any one fiscal year for maintenance and improvement, including construction and reconstruction for both Primary and Secondary Systems, is it proper to include therein the sum of \$2,500,000.00 which is required by § 33-48.1 of the Code of Virginia of 1950, as amended, to be expended in each fiscal year on the roads in the Secondary System?"

The law relating to expenditures on the Secondary System of Highways has been somewhat confused by the various statutory enactments over the years since the inception of that system. Due to provisions in certain statutory enactments for various amounts to be expended on this system, without having expressly repealed prior provisions for conflicting specified amounts, ambiguity has arisen in those statutory enactments, now codified primarily as Sections 33-48.1 and 33-49 of the Code of Virginia of 1950.

Section 4 of Chapter 415, Acts of Assembly of 1932, originally provided the formula for the distribution of highway funds to the Secondary System. At that time a minimum amount of two million dollars was required to be utilized on this system.

In 1942, by Chapter 153 of the Acts of Assembly, the General Assembly enacted a provision for the expenditure on the Secondary System of not less than thirty per centum of all funds available for both the primary and secondary systems of highways. A new minimum expenditure in the amount of five million dollars for each fiscal year was provided even though the previous requirement for expending a minimum of two million dollars on the system was not repealed.

In 1946, a one cent increase in the gasoline tax was imposed by the General Assembly. To insure that a portion of this increase would be utilized on the Secondary System, another specified sum of two and one-half million dollars was directed to be allocated to the Secondary System in addition to the amount already appropriated by the Appropriation Act of 1946. This can only be interpreted to indicate that the General Assembly intended that this amount be expended in addition to the thirty per centum of all available funds already allocated to the Secondary System. In addition thereto, the previous five million dollar minimum provided in Chapter 153 of the 1942 Acts of Assembly was increased to eight and one-half million dollars. These enactments were embodied in Chapter 196 of the Acts of 1946. Here again, the two million dollar minimum contained in the 1932 Act was not repealed.

In recodifying the Code of Virginia in 1950, the provision of Chapter 196 of the Acts of 1946 relating to the additional sum of two and one-half million dollars, mentioned above, was omitted by the recodifiers from Section 33-49, apparently on the assumption that the provision was effective only for the biennial 1946-47. The 1950 session of the General Assembly restored that provision to the Code by the enactment of Section 33-48.1 of the Code.

In construing ambiguous statutes, it is necessary to so interpret them as to give meaning to all provisions if reasonably possible. The primary objective is to give expression to intent of the General Assembly if such intent can be determined.

By construing all the foregoing provisions together, I am of the opinion that the intent of the General Assembly can reasonably be given effect to the maximum extent by allocating to the Secondary System not less than thirty per centum of all funds available for the primary and secondary systems, together with an additional sum of two and one-half million dollars each fiscal year, the total being expended not to be less than eight and one-half million dollars each fiscal year.

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**HIGHWAYS—Certificate of Commissioner and State Treasurer—Signatures Must Be Acknowledged to Be Recorded. F-192 (24)**

July 19, 1956.

HONORABLE ARNOLD MOTLEY, *Clerk*  
Circuit Court of Essex County

This is in reply to your letter of July 14, 1956, which I quote in full for sake of clarity.

"Under date of July 13, 1956 I have received a letter from the Right of Way Engineer, State Department of Highways, a copy of which is enclosed; a Certificate which is numbered, shows the amount of money, a full description of the land involved, a plat attached; and also another plat earmarked for the State Highway Plat Book.

"Under Title 33, Article 5 referred to in the letter I can only locate one Section, Sect. 33-47 (amended by 1956 Acts) which refers to certificates and this states 'when *filed* with the court or courts.'

"The Certificate in question is signed by a Deputy State Highway Commissioner and countersigned by a Deputy Treasurer of Virginia and an Assistant Comptroller. None of these signatures are notarized.

"The certificate in question has been filed under the date of July 14, 1956. All former certificates received have been also filed in this Office until requested to be returned to the Highway Department.

"Will you kindly inform me if the Certificate in question is recordable, and if so where should it be recorded?

"The State Highway Plat Book in use in this office does not have a separate index, but cross reference to each plat is indicated on the deed books' margins. If the certificate is not to be recorded, but filed, I can see that any plat inserted in the Plat Book would be lost so far as future references is involved. Where should plats be kept?"

Your attention is invited to Chapter 565 of the Acts of Assembly of 1956 which, among other amendments to Section 33-70 of the Code of Virginia of 1950, as amended, provides for recordation of the certificates of the State Highway Commissioner which are filed with the courts as provided in Section 33-74 of the Code. Upon such recordation title to the land therein affected is to vest in the Commonwealth.

The certificate in question is not recordable, in my opinion, due to the absence of acknowledgment to the signatures thereon. I am of the opinion that such statutory requirement will be met by acknowledgment to the signatures of the State Highway Commissioner and the State Treasurer, or their authorized agents, inasmuch as Section 33-74 of the Code requires those signatures only and not that of the State Comptroller.

It is my suggestion that the certificate and plat be recorded in the current deed book and indexed in the same manner as are deeds. By following this procedure, you may then make cross reference to the additional plat that is filed in the State Highway Plat Book on the deed books' margins as is your usual custom.

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**HIGHWAYS—Condemnation Suits—Commissioner Not Required to Break Down Payment When Placing Money in Escrow. F-144 (309)**

April 29, 1957.

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

This is in reply to your letter of April 24, 1957, in which you asked to be advised whether a landowner is entitled to be apprised of the various items constituting the sum paid into court by the State Highway Commissioner as his estimate of the fair value of land taken and damage done, pursuant to Section 33-70 of the Code of Virginia.

There is no requirement in Section 33-70 of the Code that the State Highway Commissioner make any effort to purchase land taken for construction purposes prior to the payment into court of the amount which he estimates for the value of land taken and damage which will result by the construction. It would thus appear manifest that there is no obligation upon the Highway Commissioner to apprise the landowner of the various items considered by him in making the estimate.

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**HIGHWAYS—Department of—May Acquire Property from County and Re-convey Portion to Civic Club. F-144 (40)**

August 6, 1956.

HONORABLE GEORGE H. PARKER, JR.  
Commonwealth's Attorney for Southampton County

This is in reply to your letter of July 27, 1956, in which you ask whether the State Department of Highways could buy a tract of land from the Board of Supervisors of Southampton County by private sale and then resell a small portion of such land to the Woman's Club which is presently occupying such portion.

From your statements relating to the chain of title to the four-acre tract in question, it appears that the last deed of record is one wherein the land was conveyed to the Berlin-Ivor District of Southampton County, there being no deeds on record for the transfers to the Berlin-Ivor School District nor the County Board of Supervisors.

I presume you have already examined the possibility that the land in question passed to the Department of Highways at the time of passage of the Byrd Road Act in 1932.

Assuming the Board of Supervisors to have marketable title, there is no legal prohibition against a private sale of such property to the State Department of Highways if that Department deems it necessary to acquire the same. While there is some doubt in my mind as to whether the Department of Highways would then reconvey a small portion of the land to the Woman's Club of the community, there is statutory authority for such a conveyance in Sections 33-76.6 and 33-76.11 of the Code of Virginia of 1950, as amended, if the Highway Commissioner deems the parcel no longer necessary for State highway purposes.

### **HIGHWAYS—Maintenance of Railroad Bridge—One at Potomac Yards Covered by Agreement. (374)**

June 27, 1957.

HONORABLE JAMES M. THOMSON  
Member of House of Delegates

This is in reply to your letter of June 5, 1957 in which you request my opinion relative to the obligations for maintenance and repair of the overhead railroad bridge at the Potomac Yards in the city of Alexandria. You are particularly interested in knowing whether the agreement between the R. F. and P. Railroad Company and the Virginia Department of Highways in 1936 has been superseded by an act of the General Assembly of Virginia relative to maintenance.

At the time of the construction project in question, the statutory law of Virginia, insofar as here germane, provided that the maintenance of railroad overhead grade separation structures was to be the obligation of the railroad companies, except for the surface of the roadway. (See Acts of Assembly of 1924, Chapter 120; 1926, Chapter 214; 1930, Chapter 62; 1934, Chapter 179.)

In 1948 the General Assembly materially changed the law relative to grade separation structures in the State Highway System. (Synonymous with primary system.) Chapter 497, Acts of Assembly of 1948, (now embodied in provisions of Section 56-368.1 of the Code of Virginia of 1950, as amended) provides in part as follows:

" \* \* \*

"After such work has been done, the maintenance, including drainage, of any underpass hereafter so constructed, except the pavement thereof, shall be the sole responsibility of the railroad company and the maintenance of any overhead structure hereafter so constructed shall be the sole responsibility of the highway department; \* \* \* and further provided, that the provisions herein as to maintenance of overhead and underpasses shall also be construed as applicable in the case of those structures previously built on the primary system under agreement between the railroad company and the highway department."

The probative question here is whether the overhead crossing at Potomac Yards in Alexandria is a crossing within the purview of the 1948 Act of Assembly, or put in another manner, does this city street crossing the R. F. and P. Railroad Company tracks constitute a portion of the primary system of State Highways?

I am of the opinion that the question must be answered in the negative.

The statutory definition of the "primary system of State highways" concededly is rather vague. (See Section 33-23 of the Code.) There are, however, several provisions in the Code which are persuasive in the view that streets within the corporate limits of cities having a population of 3500 or more are not embraced in the primary system of State highways, even though some of such streets may be utilized as connecting links or extensions for the primary system.

Sections 33-23 and 33-24 of the Code provide for the construction and maintenance of all roads in the primary system by the State, under the direction and supervision of the State Highway Commissioner. Thus, an inference is drawn that those highways which are not so constructed and maintained must be in some system other than the State Highway System.

It is impressive that Section 33-35 expressly provides a method for the State Highway Commission to construct or improve highways for connections or extensions of the primary system inside cities and towns, but provides that cities and towns of 3500 inhabitants or more must bear one-half the cost of such construction or improvement, and then take over the maintenance responsibility. Apparently the General Assembly felt that this authority was necessary to authorize the State Highway Commission to construct highways inside cities and towns, beyond the authority already vested in the Commission to construct and maintain the State Highway System.

The conclusion that the State Highway Commission has no jurisdiction over streets inside the corporate limits of cities or towns of 3500 population, or more, hence not in the primary system, is further borne out by the provisions of Sections 33-113 and 33-113.1 of the Code. In the former section, the State Highway Commissioner is obligated to select streets in cities and towns to best handle traffic in such cities and towns, from and to any road in the State Highway System. For each mile of streets so selected, the State Highway Commissioner must cause to be paid to the city or town a specified sum, so long as the streets are maintained up to the standard of maintenance of the State Highway System adjoining such city or town.

In Section 33-113.1 of the Code the State Highway Commission is given permission to incorporate into the State Highway System such streets as may be best for handling traffic through cities and towns having a population of 3500 inhabitants or less.

It is noteworthy that the streets selected pursuant to Section 33-113 are under the control of the cities and towns, but those selected pursuant to Section 33-113.1 are parts of the State Highway System, under the control of the State Highway Commissioner. Since this section expressly refers to cities and towns having a population of less than 3500, it becomes manifestly clear that the State Highway Commission cannot incorporate into the primary system the streets of cities and towns exceeding 3500 in population.

The overhead crossing of the R. F. & P. Railroad lines at Potomac Yards within the city of Alexandria was undertaken as a Federal-aid project as provided in the Federal-Aid Road Act of 1921 and supplementary acts thereto. Under this form of federal participation the Bureau of Public Roads will not deal with the municipality for the construction project, but rather requires the project to be supervised by the State Department of Highways. The authority for the construction under the supervision of the State Highway Commission is contained in Section 33-12 (5) and Section 33-114 of the Code of Virginia of 1950. Project agreements between the Bureau of Public Roads and the State Highway Commissioner, as well as the R. F. and P. Railroad Company and the State Highway Commissioner provided the basis for the construction and maintenance of this structure. The agreement between the State Highway Commissioner and the R. F. and P. Railroad Company provided that the maintenance obligation would be borne by the Railroad Company.

I am of the opinion that this grade separation structure is not in the primary system of State highways and hence not affected by Chapter 497, Acts of Assembly of 1948. This, of course, means that the agreement between the State Highway Commission and the R. F. and P. Railroad Company is still in effect as to the maintenance of this structure.

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**HIGHWAYS—Weight Laws—Liquidated Damages—To Be Sent to State Treasury by County Court. F-119 (13)**

July 11, 1956.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

I acknowledge receipt of your letter of July 10, 1956, which reads as follows:

"Please refer to your letter to me dated September 26, 1955, con-

cerning the remitting of fines collected under Section 46-388.1 of the Code.

"The aforementioned section of the Code was repealed by Chapter 215 of the Acts of Assembly of 1956 and Section 46-338.2 was enacted. This section provides for assessment and collection of liquidated damages as prescribed therein. The act further provides for such sums to be forwarded to the State treasurer and allocated to the fund appropriated for the construction and maintenance of State highways.

"I should appreciate your opinion as to whether the liquidated damages in question should be paid by the judge of the county court to the clerk of the circuit court or directly to the State treasurer."

Due to the fact that the statute has been amended in the manner set forth in your letter, my opinion of September 26, 1955, is not applicable to collections of liquidated damages made pursuant to the provisions of § 46-338.2 of the Code. This section provides that the sums collected on account of liquidated damages "shall be forwarded to the State Treasurer and allocated to the fund appropriated for the construction and maintenance of State highways." Since § 14-54 of the Code, referred to in my opinion of September 26, 1955, is not applicable to liquidated damages, I am of the opinion that the Judge of the County Court should forward such sums direct to the State Treasurer.

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#### **HIGHWAYS—Weight Laws—Liquidated Damages—When May Be Recovered —Highway Posted Under Maximum Limit for State. F-119 (287)**

April 3, 1957.

HONORABLE F. NELSON LIGHT, *Judge*  
Pittsylvania County Court

This is to acknowledge receipt of your letter of March 30 in which you ask whether or not liquidated damages for violation of weight limits, as provided for in Section 46-338.2 can be assessed against a person who has been found guilty of violation of Section 46-340 of the Code by driving a vehicle with a load which exceeds the weight limit as prescribed by the State Highway Commission; that is, to say whether these two statutes are in conflict.

Under the provisions of Section 46-340 of the Code, the State Highway Commission may when necessary for the protection of any highway or to promote the safety of travel thereon, prescribe a weight which is less than that prescribed elsewhere in Title 46 for vehicles moving over any section or part of the highway. The last paragraph of that section reads as follows:

"Any violation of any weight, width, length or speed restriction prescribed by the State Highway Commission and indicated by signs properly erected by the State Highway Commission or of any ordinances or regulations passed by local authorities and indicated by signs erected as required in the preceding paragraph shall constitute a misdemeanor and shall in either case be subject to the same punishment provided by § 46-18 whether the prosecution be for a violation of a properly posted sign of the State Highway Commission or a rule and regulation or ordinance of the authorities of a city, town, or county."

Section 46-338.2 reads in part as follows:

"Upon conviction of any person, firm or corporation for violation of any weight limit as provided in this chapter the court shall assess and collect from the owner or operator of such overweight vehicle liquidated damages in the amount of two cents per pound for each pound of excess gross weight over the prescribed limit when the excess is five thousand pounds or less, and five cents per pound for each pound of excess gross weight over the prescribed limit when such excess is more

than five thousand pounds. Such sums shall be forwarded to the State Treasurer and allocated to the fund appropriated for the construction and maintenance of State highways."

These statutes are remedial as they seek to stamp out the practice pursued by some truckers in violating the "overweight laws" which are designed to protect the highways. (*Joyner v. Matthews* 193 Va. 10) Therefore, these statutes should be liberally construed to carry out the intent of the legislature. I believe that the term "any weight limit provided in this Chapter" and the term "prescribed weight" as referred to in Section 46-338.2, include the weights prescribed by the Highway Commission under the authority of Section 46-340. These sections are found in Chapter 4, Title 46.

I am, therefore, of the opinion that the last paragraph of Section 46-340 and Section 46-338.2 are not in conflict and a person who is convicted under the former statute is liable for the damages assessed under the latter.

#### **HIGHWAYS—Weight Laws—Truck Carrying Over Amount Registered for, but Under Maximum Limit—What Offense Committed. F-119 (235)**

February 18, 1957.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney of Montgomery County

This is to acknowledge receipt of your letter of February 14, 1957 in which you state in part:

"A warrant was issued by a State Trooper against a driver of a truck, charging violation of Section 46-334 of the 1950 Code of Virginia, as amended, being over gross weight as called for on registration card of 50,000 pounds. The gross weight of the truck at the time of the arrest of the driver being 56,800.

"What I would like to be advised under this violation would the owner of the truck be subject to liquidated damages for violation of the weight limits as provided for in Section 46-338.2 as amended or should he be found guilty of improper registration?

"Also, under the above circumstances regardless of whether the owner had the certificate as required to operate under the old weight law in effect January 1st, 1956, as called for under Section 46-334, subsection 4-b, would he be in violation of over gross weight or merely improper registration?"

As I understand the situation, the accused was driving a vehicle at the time of his arrest which had a gross weight of 56,800 pounds, therefore, he was not in violation of Section 46-334, if his vehicle met the requirements of that section. Under said section the load on any one axle should not exceed eighteen thousand pounds and with a load 56,800 pounds, the distance in feet between the extremes of any group of axles must be 35. I would suggest that you have the arresting officer furnish you with a full and proper description of the vehicle so that it can be ascertained whether or not the vehicle could be lawfully operated without being in violation of Section 46-334.

The fact that he has his vehicle registered for fifty thousand pounds and has driven it upon the highways with a load in excess of the gross weight on the basis on which it was registered, to-wit: fifty thousand, indicates that he is in violation of Section 46-167 of the Code which reads in part:

"It shall be unlawful for any person to operate or permit the operation of any motor vehicle, \* \* \* on any highway of this State, under any of the following circumstances:

\* \* \*

(3) If, at the time of any such operation, the gross weight of the vehicle or of the combination of vehicles of which it is a part, is in excess of the gross weight on the basis of which it is registered and licensed.

\* \* \*

From the facts stated, I am of the opinion that this driver is in violation of the registration statute rather than the gross weight statute, that is, he could be prosecuted under Section 46-167 of the Code.

### HIGHWAYS—Weight Laws—Trucks Had Option to Continue to Operate Under Old Law or Register to Operate Under New—Operating Under Old and Over Weight. F-119 (253)

March 4, 1957.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney  
Montgomery County

This is to acknowledge receipt of your letter of February 22, 1957, in which you refer to my letter of February 18 and request my opinion on the question asked in the last paragraph of your letter of February 14, which is as follows:

"Also, under the above circumstances regardless of whether the owner had the certificate as required to operate under the old weight law in effect January 1st, 1956, as called for under Section 46-334, subsection 4-b, would he be in violation of over gross weight or merely improper registration?"

Section 46-334 reads, in part, as follows:

"Provided, however, that motor vehicles which are registered in this State prior to July first, nineteen hundred and fifty-six may be permitted to operate under (a) the preceding paragraphs of this section in conformity therewith or (b) *under the provisions of the statutes of this State in force on January first, nineteen hundred and fifty-six but such operation shall only be permissible during the period in which the motor vehicle remains in operating condition.* When such vehicle ceases to be operable the option to operate under this provision shall terminate. All vehicles, operation of which is desired under the provisions of subsection (b) of this paragraph, shall be registered with the State Department of Highways and obtain a permit, without cost, so to do." (Underscoring supplied)

The purpose of this proviso is to permit the owners of vehicles registered prior to July 1, 1956, to exercise the option to operate their vehicles under the weight law in force on January 1, 1956. The maximum load permissible under § 46-336 (repealed 1956) was 50,000 pounds on a four axle vehicle combinations with a permissible axle load of 18,000 pounds. Section 46-334 (as amended 1956) will permit this same vehicle to carry 56,800 pounds provided it has an axle spacing of 35 feet between the front and rear axle, but the axle weight on the tandem axles has been reduced from 36,000 to 32,000 pounds. The owner of the vehicle having exercised his option under the Grandfather Clause is not bound by the axle spacing requirements of § 46-334 (as amended 1956), and may haul only 50,000 pounds; may have a tandem axle weight of 36,000 pounds and can only license the combination for 50,000 pounds.

Once the owner elected to obtain a permit from the Highway Department (under the provisions of § 46-334(4)(b)) he was bound by the provisions of § 46-336 that were in effect on January 1, 1956, and the gross weight in excess



of the maximum of 50,000 pounds should be considered as an overweight violation subject to prosecution under §§ 46-335.1 and 46-338.2 of the Code.

As stated in my letter to you of February 18, this man could also be prosecuted for the violation of § 46-167, that is, for operating a vehicle in excess of the gross weight for which the vehicle is licensed.

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**HIGHWAYS—Weight Laws—When and How Resident Engineer May Lower on a Route. F-119 (310)**

April 29, 1957.

HONORABLE F. NELSON LIGHT, *Judge*  
Pittsylvania County Court

This is in reply to your letter of April 5, 1957, in which you request my opinion as to whether the steps followed by the Resident Engineer of the Department of Highways, in lowering the gross weight limits on State Route 703, are in compliance with Section 46-340 of the Code of Virginia. A copy of the Resident Engineer's letter to you dated April 3, 1957, has been read.

From the letter of Mr. L. R. Treat, Jr., Resident Engineer for the Department of Highways, it appears that he posted various secondary roads in Pittsylvania County for a maximum gross weight limit of eight tons, pursuant to instructions contained in the Manual of Instruction for Construction and Maintenance prepared by the State Highway Commission. His procedure, in essence, was to observe evidence of breakup or distress which was critically endangering certain secondary roads, and then to post the roads so endangered at the reduced weight limit prescribed in the Manual. He then communicated notice of his action to the District Engineer for the Department of Highways, who in turn notified the Central Highway Office at Richmond.

Upon review of the action of the Resident Engineer, it appears manifest that such was carried out pursuant to law, but I seriously question whether the applicable authority for so doing is embodied in Section 46-340 of the Code of Virginia.

Section 46-340 of the Code authorizes the State Highway Commission to prescribe weights, widths, heights, lengths, or speeds, on certain highways, less than those prescribed for highways generally in Section 46-334 of the Code. The Highways upon which the lesser weights, etc., may be prescribed are those of a general class, width, description or specification, which, in the judgment of the Commission, would promote safety of travel or should be protected from undue danger or strain.

This section appears to confer a power upon the State Highway Commission for which there is no necessity for delegation to subordinate administrative agents. The weights, etc., are prescribed by the State Highway Commission, and the only act remaining to be performed is the ministerial act of posting such roads for the reductions prescribed.

Section 46-341 of the Code is quite similar in the nature of power conferred upon the State Highway Commission as is provided in Section 46-340, with particular regard to weight limits, except there is no requirement that the weights prescribed be for a general class, width, description or specification of highways. The reduction here contemplated appears to be applicable to any road, bridge, etc., regardless of the weight limit already established pursuant to Section 46-334 or Section 46-340 of the Code.

Since it would be impossible for the State Highway Commission to ascertain when it is desirable or essential to reduce such weight limits, necessitated by undue breakup or distress, it is logical that the State Highway Commission could delegate to subordinate agents in the various localities the authority to reduce the weight limits to a prescribed maximum, when evidence exists of factors causing a deterioration or undue distress of highways or sections thereof. Such reductions should be in accordance with the limits prescribed by the State Highway Commission for roads under such circumstances.

The limits thus reduced from the normal weight limits would not apply to those vehicles where the journey originates or is to terminate on that road for which reduced weight limits have been posted. Of course, this exception does not apply on bridges and culverts where the weight limit has been reduced.

Inasmuch as the State Highway Commission's Manual of Instructions for use of its agents prescribes the conditions under which gross weight limits are to be reduced to a maximum of eight tons, I am of the opinion that the action of the Resident Engineer, in posting the roads in question at a limit of eight tons maximum gross weight, upon his determination that the conditions prescribed for so doing existed, was a lawful exercise of the power conferred upon the State Highway Commission under Section 46-341 of the Code.

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**HIGHWAYS—Weight Laws—When Truck Can Exceed Limits on Highway with Weight Limit of Less Than 56,800 Pounds. F-119 (278)**

March 21, 1957.

HONORABLE C. E. REAMS, JR., *Judge*  
Culpeper County Court

This is to acknowledge receipt of your letter of March 18 in which you ask my opinion on the following question:

"Tucker Brown goes to the place of business of one Jones and picks up a load for transportation. Jones' place is located on a highway which has been designated and marked by the State Highway Commission with 35,000 road limit signs. The load Brown takes on makes his gross weight 46,000 pounds. Brown then proceeds on a 35,000 pound road to get to a 50,000 pound road. The question is, 'Is Brown's road limit governed by Section 46-334 or is it governed by Section 43-341, especially paragraph 4 of this Section?'"

As you know Section 46-334 was amended extensively in 1956 providing among other things, a permissible gross weight of 56,800, maximum axle weight and axle spacing. However, the Highway Commission under the authority vested in it under Section 46-341 may decrease the maximum allowable weights for the purpose of protecting any particular highway.

Paragraph 4 of Section 46-341 reads as follows:

"This section shall not be construed to apply, except in cases of bridges and culverts, when it is proven by the person accused of the violation thereof that the journey upon which such motor vehicle or combination of vehicles was then engaged originated or was intended to terminate upon the section of highway upon which it was then traveling and upon which the maximum weight had been lessened under the provisions of this section and that such person had no other public road free of such restrictions upon which he might have operated such motor vehicle or combination of vehicles from the point of origin of the journey or to the destination, as the case may be."

It would seem from what you state that Tucker Brown would come under the exception of this section provided there was no other public road free of such restrictions upon which he might have operated his vehicle to get to Jones' place. Under these circumstances he could lawfully haul his load of 46,000 pounds over this section of the 35,000 pound road, provided his axle load does not exceed that provided for in Section 46-334 and the axles on his vehicle are spaced in accordance with that Section.

With the provisos expressed above, I am of the opinion that Brown's load limit would be governed by Section 46-341, paragraph 4.

**HOSPITALS—Maternity—Facilities Used for Deliveries Is a Maternity Hospital—Must Have Permit from Health Department. F-83 (232)**

February 14, 1957.

HONORABLE MACK I. SHANHOLTZ  
State Health Commissioner

This is in reply to your letter of February 12, 1957, in which you request my opinion as to whether the Whitehead Clinic in Chatham which offers as one of its functions an office delivery service should be classified as a maternity hospital within the scope of Article 1, Chapter 10, Title 32 of the Code of Virginia in which the term "maternity hospital" is defined and pursuant to which such hospitals are required to obtain permits from the State Board of Health.

The term "maternity hospital" is defined in § 32-147 of the Code as follows:

"'Maternity hospital' means any place or establishment operated or maintained by any person for the care or treatment of women during pregnancy, *or for delivery* or for care or treatment within ten days after delivery, whether the place or establishment so maintained be a general hospital, a hospital devoted exclusively to maternity cases, a maternity home or lying-in-asylum, or a private home." (Italics supplied)

You state that you made a personal inspection of the facility which showed the following:

"'An inspection of the facility showed that it was housed in a brick building. The first floor is used for general offices; the second as quarters for Dr. Whitehead's family; and, the basement for delivery service. An inside stairway leads from the first floor to the basement. There is one outside entrance to the basement. Hot air heat is provided by an oil furnace. Ventilation of two rooms, without windows, is provided by forced air to the outside. The rooms and equipment are clean and well kept. A dehumidifier is used when indicated. The area is partly below ground level.

"'Provision for the delivery service showed that there are three labor rooms with one bed each, one delivery room, one scrub room, one clean-up and sterilizing room, one doctor's lounge, two toilets and one hallway. In addition, there was sufficient equipment for normal deliveries. There is no kitchen. Fluids only are served to the patients. A 24-hour nursing service is provided by shifts of three registered nurses who provide general nursing services to various clinic services, as well as delivery nursing service.

"'The 22 records of deliveries for December 1956 were examined and the records for October and November 1956 were spot checked, all of which showed that all patients were discharged within 24 hours following a stay averaging less than 12 hours. There is no per diem charge for care in the facility, but a fee of \$50.00 is charged for the delivery service whether the patient is at home or at the above location. There were no patients in the obstetric department at the time of my visit.'"

The facility does not come within the exemptions contained in § 32-161 of the Code.

From the facts presented, it does not appear that there can be any doubt that the facility is a place or establishment operated or maintained "for delivery." The establishment is equipped for such service and, in fact, that is the service being furnished. The General Assembly, in order that there could be no doubt as to the scope of the statute in this instance, specifically defined what constitutes a maternity hospital and included in the definition various categories, all of which are in the disjunctive so that the inclusion of an establishment within the definition may not be escaped by the limitation of the service to a single type. The operation of a service "for delivery," in my opinion, brings the

establishment within the definition of a maternity hospital, and makes it subject to all the provisions of Article 1, Chapter 10, Title 32 of the Code, which require that a permit, but not a license, shall be obtained.

The provisions of Chapter 16 of Title 32, designated as "Virginia Hospital Licensing and Inspection Law" do not appear to apply to "maternity hospitals." It will be noted that in the definition of "hospital" found in § 32-298 of the Code, maternity hospitals coming within the scope of the provisions of Chapter 10, Title 32, are excluded. Therefore, the licenses required under Chapter 16 may not be imposed against a maternity hospital as defined in § 32-147. The General Assembly has distinguished between a "hospital" and a "maternity hospital." A "maternity hospital" does not come within the statutory definition of "hospital." Whether or not the zoning regulation of the Town of Chatham would include a maternity hospital, as distinguished from a hospital as defined in the Code, is a matter for the local authorities of the Town to determine.

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### HOSPITALS—Public Facilities May Not Be Sold by Commission Governing It. F-83 (106)

October 3, 1956.

HONORABLE H. R. WEBBER  
Member House of Delegates

This will reply to your inquiry of recent date concerning whether or not a hospital established under the provisions of Chapter 14, Title 32, of the Virginia Code, may be leased or sold to private interests. Chapter 14, Title 32, of the Virginia Code, (Section 32-276 et seq.) makes provisions for the establishment of hospital or health center commissions in the various counties, cities, towns or combinations thereof whenever the governing bodies of such political subdivisions shall find that the public health and welfare, including the health and welfare of persons of low income in such subdivisions and surrounding areas, require public hospital facilities. Section 32-276 provides that such hospital or health center commissions shall be public bodies corporate and shall have "such public and corporate powers as are set forth in" Chapter 14. In addition to specific provisions relating to the exercise of the right of eminent domain and the issuance of bonds, the powers of the various commissions thus established are set forth in Section 32-280. Under this section of the Code, such commissions are invested with all powers necessary or convenient to carry out the general purposes of Chapter 14, including particular powers enumerated in subsections (1) through (10) of Section 32-280.

I am unable to find any language in the above mentioned subsections which authorize a hospital or health center commission to sell or lease hospital facilities acquired or established by the commission, and I am constrained to believe that such authority would not be included in the general language granting a commission established under Chapter 14 all powers necessary or convenient to carry out the general purposes of that chapter. I am, therefore, of the opinion that, in the absence of a provision specifically authorizing the sale or lease of hospital facilities to private interests, a commission established under Chapter 14 of Title 32 is without authority to do so.

Although a *commission* does not have statutory authority to dispose of the property, I suggest that the governing bodies of the localities interested in the project might explore the possibility of having the Court appoint a *receiver* for the hospital under the provisions of Code Sections 8-735 et seq., and have an ultimate sale or lease of the property made pursuant to an order of court. This office has not explored this procedure sufficiently to come to a definite conclusion, but we feel that a court of equity would have broad powers in connection with the matter.

**HOUSING AUTHORITIES—May Not Deposit Funds in Bank of Which a Commissioner Is Officer. F-156 (160)**

November 23, 1956.

HONORABLE GEORGE H. HILL  
Member House of Delegates

This is in reply to your letter of November 19, 1956, in which you request my opinion as to whether or not it would be legally permissible for the Regional Redevelopment and Housing Authority for Hampton and Warwick to deposit funds with a bank, the president of which is a Commissioner of the Housing Authority.

Section 36-46 of the Code of Virginia provides that regional housing authorities, such as the one for Hampton and Warwick, shall have the same limitations provided for housing authorities in general. Section 36-16 of the Code provides as follows:

"No commissioner, officer, agent or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project."

I am of the opinion that, if funds are deposited in a bank, the bank is in effect rendering a service to the housing authority, and the depositing of such funds constitutes a contract for services to be furnished or used in connection with the housing authority; therefore, I must conclude that funds of the Housing Authority may not legally be deposited in a bank, the president of which is a Commissioner of the Authority.

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**INSANE AND MENTALLY ILL—Commitment—Physicians on Commission Must Be Licensed in Virginia. (356)**

June 11, 1957.

DR. HIRAM W. DAVIS, *Commissioner*  
Department of Mental Hygiene and Hospitals

I am in receipt of your request of June 4, 1957, for an opinion upon a question presented to you by Dr. Joseph E. Barrett, Superintendent of Eastern State Hospital. In his letter, Dr. Barrett points out that there are numerous military establishments in the area served by Eastern State Hospital and that medical officers on duty at these establishments furnish professional services to families of enlisted personnel living in the vicinity. Dr. Barrett inquires whether or not these medical officers in the Army, Navy, Coast Guard, Marine Corps, Public Health Service or Marine Hospital Service may legally participate in the commitment of persons to Eastern State Hospital in accordance with the provisions of Sections 37-62, 37-99 and 37-103 of the Virginia Code.

The above mentioned statutes relate to the commitment or admission of persons to the various State hospitals or colonies and respectively provide:

"The judge or trial justice mentioned in Sec. 37-61 or the special justice mentioned in Sec. 37-61.2 shall summon two *licensed* and reputable *physicians*. One of the physicians shall, when practicable, be the physician of the person who is alleged to be mentally-ill, epileptic, mentally-deficient, or inebriate, and neither shall in any manner be related to him or have an interest in his estate. The judge and the two physicians, or the justice or special justice and the two physicians, shall constitute a commission to inquire whether such person is mentally-ill, epileptic, mentally-deficient or inebriate and a suitable subject for a hospital or colony for the care and treatment of mentally-ill, epileptic, mentally-

deficient, or inebriate persons, and for that purpose the judge, justice or special justice shall summon witnesses to testify under oath as to the condition of such person." (Italics supplied).

"The judge of any circuit or corporation court, or any trial justice upon written request of any respectable citizen accompanied by the certification of a *duly licensed physician*, who shall if practicable be the person's family physician, upon forms prescribed by the State Hospital Board, commit to any State hospital or colony for observation as to his mental condition, any suitable person who is a legal resident of the State and not an inebriate or drug addict." (Italics supplied).

"The superintendent of any State hospital or colony for the care and treatment of the mentally-ill may, without an order of a judge or justice, receive into his custody and detain temporarily in the hospital or colony for the care and treatment of the mentally-ill, a person whose case is certified by two *licensed physicians*, neither of whom is in any manner related to or connected by marriage with him or has any interest in his estate, after careful personal examination and inquiry, whose mental condition is found to be such that it would be for his safety and benefit to receive proper hospital care and treatment, and upon a written petition to the superintendent of the hospital or institution made by some responsible person or persons." (Italics supplied).

I am of the opinion that the phrases "licensed physicians" and "duly licensed physician" utilized in the statutes quoted above should be construed to include only those physicians who have been licensed to practice in this Commonwealth by the agency created by the Legislature for this purpose. Cf., *State v. Fouquette*, 221 P. (2d) 404, 420, 421; *Commonwealth v. Cohen*, 15 A. (2d) 730, 732; *Brown v. Elwell*, 60 N. Y. 249. In light of this interpretation, only those physicians who have been licensed by the Board of Medical Examiners for the State of Virginia would be legally qualified under the statutes in question to participate in the commitment or admission of persons to State hospitals or colonies.

I do not think that the validity of this view is altered by Section 54-276.6 of the Virginia Code which prescribes that nothing in Chapter 12 of Title 54 of the Virginia Code (commonly called the Medical Practice Act) shall be construed "to affect or interfere with the performance of the duties of any commissioned or contract medical officer in active service in the Army, Navy, Coast Guard, Marine Corps, Air Force, Public Health Service or Marine Hospital Service of the United States while so commissioned and serving". I am constrained to believe that this statute was intended to relieve medical officers in the service of the United States from the licensing requirements of the Medical Practice Act and has no effect upon the various provisions of Title 37 of the Virginia Code requiring the participation or certification of licensed or duly licensed physicians in connection with commitments or admissions to State hospitals or colonies.

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#### INSANE AND MENTALLY ILL—Criminally Insane—Committing Justice Does Not Have Authority to Transfer to Veteran's Hospital—Governor Cannot Conditionally Pardon. F-148 (296)

April 15, 1957.

MISS MARTHA BELL CONWAY  
Secretary of the Commonwealth

This is in response to your letter of April 3, 1957, in which the following inquiry is made:

"Does the convicting and sentencing Judge have the authority to effect the transfer from Southwestern State Hospital to the Veterans Facility?  
Does the Governor's office have the authority to pardon and release

a man from Southwestern State Hospital who has not recovered? If your answer to this last question is "Yes", may the pardon contain the provision that he shall not be released from the Veterans Facility until he has served the entire sentence?"

Kindly be advised that I am of the opinion that, in the absence of statutory authority, the sentencing judge does not have authority to transfer a person committed to the department for criminally insane of a State Hospital to the Veterans Facility which operates outside the scope of State control. I further doubt that the Governor has authority to release by conditional pardon a man detained pursuant to Section 19-209, Code of Virginia. The foregoing section is specific in stating that the person shall be there kept until restored to sanity. Moreover, Section 37-135, Code of Virginia, provides that no person committed to the department of the Commonwealth for the criminally ill shall be furloughed. As mentioned in your letter, Section 37-73 of the Code provides that persons committed to a State Hospital under certain conditions may be transferred to the Veterans Facility. However, it is significant that Section 37-73 makes no provision or mention of persons detained as being criminally insane. Accordingly, Section 19-209, which is specific, would appear to control.

In conclusion, I am of the view that the Legislature has made provision for such cases and that it would be contrary to the intent of such legislation to issue conditional pardons which would, in effect, attempt to circumvent the expression of the Legislature.

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**INSANE AND MENTALLY ILL—Fees and Expenses of Committing Person  
—Who Borne By—Person in State Hospital at Time. F-305 (148)**

April 25, 1957.

HONORABLE B. HUNTER BARROW, *Judge*  
Dinwiddie County Court

I acknowledge receipt of your letter of April 24, 1957, in which you state that a person was committed to Central State Hospital as mentally ill on January 14, 1957; that he had been transferred to that hospital on November 27, 1956. The question presented is whether the fees and expenses of commitment shall be borne by the county in which the person committed was a legal resident at the time of the commitment, or whether such fees and expenses shall be borne by the State.

If it is an established fact that the person committed was in the custody of and confined in Central State Hospital at the time of the commitment, then it would seem, in my opinion, that the fees and expenses incident to the formal commitment are required by § 37-75 of the Virginia Code to be paid by the State. As stated in my opinion of August 4, 1950, to Honorable Richard W. Copeland, Director, Department of Welfare and Institutions, (Report of Attorney General, 1950-51, at page 191) "The object of the amendment (Chapter 585 of the Acts of 1950) was to require the State to pay the cost of the commission whenever a person had been committed to the State and was there being supported at the expense of the State." Section 37-75 in prescribing how such expenses shall be borne contains the proviso "that if any such person, at the time of commitment, be confined in any State supported institution, such fee shall be paid by the State."

Since it appears that this person was confined in Central State Hospital from November 27, 1956 to January 14, 1957, the date of the formal commitment resulting in the fees and expenses in question, I am of the opinion that the charges are properly payable out of State funds.

**INSURANCE—Company Qualifying to Do Business in Virginia—Must Deposit Securities—Cannot Give Bond in Lieu of. (367)**

June 18, 1957.

HONORABLE WM. M. McCLenny  
Commonwealth's Attorney  
Amherst County

I acknowledge receipt of your letter of June 10, 1957, which reads as follows:

"Please let me have your opinion on the following legal question. Va. Code 38.1-72 provides that no charter shall be granted to any Insurance Company until the incorporators shall present to the Commission a certificate of said treasurer that bonds or other securities mentioned in Section 38.1-108 have been deposited with a State Treasurer.

"Section 38.1-108 provides for the deposit of securities that are legal investments under the law of the Commonwealth or in lieu thereof the party may enter into a bond with surety approved by the commission.

"A new insurance corporation would have to deposit security by and through its incorporators and the question I wish an opinion on is, would a proper surety bond executed by the incorporators for such new insurance corporation be sufficient in lieu of a deposit of securities by such incorporators?"

Section 38.1-72 provides:

"No charter shall be granted to any such company, except as otherwise expressly provided in this title, until the incorporators shall present to the Commission a certificate of the State Treasurer that bonds or other securities to the amount and of the description mentioned in § 38.1-108 have been deposited with him to be held under the provisions and upon the terms and conditions set out in this chapter."

Section 38.1-108 referred to in Section 38.1-72 provides that before a license may be issued to an insurance company it is required to deposit certain securities with the State Treasurer, or in lieu thereof, it may enter into bond with approved surety an amount not less than \$10,000.

You will note that Section 38.1-72 refers to the deposit required of incorporators of an insurance company before a charter may be issued, whereas Section 38.1-108 refers to the deposit of security which the insurance company must give before it may be licensed by the Commission. It is my opinion that incorporators may not use a surety bond, rather than securities, to meet the requirements of Section 38.1-72. This section states that the incorporators shall present a certificate of the State Treasurer that bonds or other securities have been deposited. On the other hand, Section 38.1-108 says that an insurance company in lieu of the deposit of securities may enter into bond. Under such circumstances it is my opinion that there is no authorization in these statutes for incorporators of an insurance company to substitute a surety bond for a deposit of securities.

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**JAILS AND PRISONERS—Parole—Violator Who Has Been Recommitted—Determining New Eligibility Date. F-84 (321)**

May 9, 1957.

MAJOR R. M. YOUELL, *Director*  
Division of Corrections

This is in response to your inquiry of May 6, 1957, regarding whether or not the new parole eligibility date for a person who has been paroled and subsequently had a revocation of such parole is calculated upon one-fourth of the time remaining to be served from his original sentence plus the appropriate time from a new sentence, or should the appropriate time of the new sentence be merely added to his old eligibility date plus the length of time he was out on parole



before he violated his original parole. You refer to Section 53-251, Code of Virginia.

Kindly be advised that Section 53-251 provides for eligibility for parole "except as herein otherwise provided", and Section 53-252 provides for the time for the Parole Board to review cases. It is further noted in Section 53-252 that the Parole Board "shall review the case of each prisoner as he becomes eligible for parole and at least annually thereafter until he is released on parole" and may review any prisoner eligible at any other time.

Attention is further directed to Section 53-261 outlining the procedure on return of parolee to institution. Moreover, Section 53-262 provides for the revocation of parole, further confinement, etc. It appears significant that said Section 53-262 states that the Parole Board shall consider the case upon recommitment and may revoke the parole and order the reincarceration of the prisoner for the unserved portion originally imposed or it may reinstate the parolee under such terms and conditions as were originally prescribed or may be prescribed in addition thereto or in lieu thereof.

In reconciling the aforementioned statutes, it appears that Sections 53-251 and 53-252 apply to the prisoner "until he is released on parole", but that Section 53-262 comes into operation when such parolee has been recommitted, etc. It is significant that Section 53-262 contains no requirement that the Parole Board further review the case of each prisoner at specified dates other than at the time of his recommitment. However, I am advised that it is the established practice of the Parole Board to review the case of each prisoner at various intervals after such recommitment and revocation of parole.

Without attempting to go into the authority of the Parole Board in cases where paroles have been revoked, I am of the opinion that the prisoner has no legally fixed eligibility date after he has once been released on parole and such parole has been revoked after the initial consideration of the case by the Parole Board at the time of such recommitment.

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### **JAILS AND PRISONERS—State Convict Road Camp—Convict Breaking and Causing Damage to Guilty of Felony Relating to Penitentiary. F-75 (314)**

May 3, 1957.

HONORABLE D. CARLETON MAYES

Commonwealth's Attorney for Dinwiddie County

This is in response to your letter of April 30, 1957, inquiring if a convict placed by the penitentiary in a road camp and who breaks and injures one of the camp buildings could be indicted under Section 53-291, Code of Virginia. You point out that the said section uses the word "penitentiary" rather than the words "State Convict Camp".

Section 53-291 provides as follows:

"A convict confined in the penitentiary, or in custody of an officer thereof, shall be deemed guilty of felony if he kill, wound, or inflict other bodily injury upon an officer or guard of the penitentiary; or escape from the penitentiary or such custody; or break, cut, or injure any building, fixture, or fastening of the penitentiary, or any part thereof, for the purpose of escaping or aiding any other convict to escape therefrom, or rendering the penitentiary less secure as a place of confinement; or make, procure, secrete, or have in his possession, any instrument, tool, or thing for such purpose, or with intent to kill, wound, or inflict bodily injury as aforesaid; or resist the lawful authority of an officer or guard of the penitentiary for such purpose, or with such intent."

It is noted that said Section 53-291 is a part of and is placed at the end of the title pertaining to prisons and other methods of correction. Moreover, it is noted that Section 53-132 provides for the establishment of additional convict

camps. In addition, Section 53-114 provides that all pertinent provisions of Title 53 governing the prisoners in the penitentiary shall be applicable to the State Convict Road Force and to the prisoners comprising the same. Accordingly, by reference, it would appear that the provisions of Section 53-291 have been broadened by said Section 53-114. It is also noted that Section 53-20 makes reference to the property attached to the penitentiary. However, this latter section appears to be used for other purposes than the purposes provided for in Section 53-291. In addition, Section 53-291 uses the term "the penitentiary" in a general sense and without capital letters, which tends to indicate that the use of this term in Section 53-291 is not limited to "the penitentiary" in Richmond but would cover the penitentiary system. This interpretation is somewhat borne out in the annotated case of *Ruffin v. Commonwealth*, 62 Va. 790.

In conclusion, while it is not free from doubt, I am of the view that Section 53-291 would be applicable in a situation where a penitentiary prisoner breaks and injures one of the road camp buildings which is an integral part of the penal system.

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**JUDGMENTS—Execution on Forfeited Bond—No Limitations as to Commonwealth. F-72 (54)**

August 16, 1956.

HONORABLE WILLIAM M. McCLENNY  
Commonwealth's Attorney for Amherst County

This is in response to your letter of August 9, 1956, relative to the authority of the Commonwealth to enforce execution upon a judgment for default of an appearance bond in a whiskey case, which judgment was docketed in 1926 and execution issued thereon in 1926 and 1929, with returns thereon of no effects.

Your letter notes that Section 8-937, Code of Virginia, was amended in 1956 deleting a savings clause in favor of the Commonwealth. However, the amendment contains no express limitation applying to the Commonwealth.

Reference is made to an opinion dated November 27, 1953, to the Honorable G. H. Parker, Jr., Commonwealth's Attorney for Southampton County, contained in the 1953-54 opinion book at page 200, dealing with an almost identical situation. The said opinion, after quoting Section 8-35 and Section 8-397 as it read prior to the 1956 amendment, concluded that the sections contained no express terms which apply to the Commonwealth as a bar to actions for the recovery of a judgment (upon a forfeited bond). The said opinion went on to point out that Section 8-397 expressly excluded the Commonwealth from the time limitation. In the instant situation the same circumstances obtain except that all reference to the Commonwealth is deleted from Section 8-397. I am of the opinion that the same basic conclusion as determined in the aforesaid opinion would govern in the instant case. Accordingly, I am of the opinion that there are no express terms which apply to the Commonwealth as a bar to actions for the recovery of a judgment based upon a forfeited bond, and that the provisions of Section 8-35 would control the instant case. It is, therefore, my conclusion that the Commonwealth is not barred from execution of judgment which was obtained upon a forfeited bond.

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**JUSTICE OF THE PEACE—Committing Justice of Town Has Some Authority as. F-129 (174)**

December 11, 1956.

HON. CHARLES M. NOWLIN  
Committing Justice  
Pocahontas, Virginia

This is in reply to your letter of November 4, 1956, in which you state that you have been appointed Committing Justice for the Town of Pocahontas, and

you ask whether or not you have the authority to make an arrest under Section 18-9 of the Code of Virginia.

Assuming that you were appointed pursuant to the provisions of Paragraph 33 of Chapter 161 of the Acts of the General Assembly of 1918, which is the Charter of the Town of Pocahontas, you have the same jurisdiction as that of a Justice of the Peace and, therefore, I am of the opinion that you are vested with the authority to make an arrest pursuant to Section 18-9 of the Code.

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**JUSTICES OF THE PEACE—May Punish for Contempt Committed in Presence at Judicial Proceeding. F-136b (122)**

October 16, 1956.

HONORABLE LOUIS L. FINKS  
Justice of the Peace  
Alexandria, Virginia

This will acknowledge receipt of your letter of October 12, 1956.

You state that, on September 30, 1956, a subject was brought before you at the Fairfax County Police Substation by a State trooper charged with speeding and that, after a warrant had been written and read to him, he abused both you and the State trooper using vile and obscene language.

You ask whether you had the power to sentence this person for contempt, pursuant to § 18-256 of the Code of Virginia. You state that some question has been raised as to whether or not this section of the Code has been affected by laws subsequently enacted.

Section 18-256 of the Code has not been affected by any subsequent legislation and is still in force. I am, therefore, of the opinion that, under the state of facts presented by you, the alleged act of contempt was committed in your presence in a judicial proceeding, and, therefore, you had jurisdiction to impose a summary punishment for contempt.

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**JUSTICES OF THE PEACE—Should Not Be a Bondsman. F-136b (23)**

July 18, 1956.

HONORABLE CARLETON PENN, II  
Judge of the Juvenile and Domestic Courts  
for Loudoun County

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

"The question has arisen in this jurisdiction as to whether or not a Justice of the Peace may also be a professional bondsman. Section 16-1 of the Code provides that a Justice of the Peace, who holds an incompatible office, shall vacate the office of Justice of the Peace. Being a bondsman, technically, is not holding an office, and yet I can appreciate the fact that a most objectionable situation might arise from the same person holding the office of Justice of the Peace and also being a bondsman.

"Will you be good enough to advise whether or not there has been a ruling by your office on this point, and if not, whether being a bondsman would be construed as holding an office incompatible with that of Justice of the Peace?"

I am unable to find any rulings of this office with respect to the question presented by you. Section 16-1 of the Virginia Code to which you refer was repealed by Chapter 555, Acts of Assembly (1956), which repealed Title 16 in its entirety and enacted Title 16.1 in its stead.

Although there is no statute which expressly prohibits a justice of the peace from acting as a professional bondsman, I am of the opinion that a clear conflict of interests would exist in such a situation. The justice of peace in the regular discharge of the duties of his office, fixes bail for those accused of violations of law, and the amount at which such bail is fixed ordinarily determines the fee to be charged by the bondsman acting as surety on the bond of the accused. The duty to fix bail in the individual case at an amount which is reasonable in light of the attendant circumstances is one which should, I believe, be executed by a justice of the peace unencumbered by personal pecuniary considerations. As a bondsman is not a public officer, the situation under discussion does not present a question of "incompatibility of offices" in the strict sense of that phrase. However, in view of the possible deleterious effect upon the impartiality required of a justice of the peace inherent in the duality of functions under consideration, I am of the opinion that a justice of the peace may not with propriety also serve as a professional bondsman.

### JUVENILE AND DOMESTIC RELATIONS COURTS—Appeal of Case to Court of Record—Juvenile May—Court May or May Not Remand to Juvenile Court. (375)

June 28, 1957.

HONORABLE WILLIAM E. FEARS  
Commonwealth's Attorney of Accomack County

This will reply to your letter of June 20, 1957, in which you inquire whether or not a juvenile whose case has been adjudicated adversely to him in a juvenile court may appeal to the circuit court of a county, and if so, whether or not such circuit court may make disposition of the matter without remanding the case to the juvenile court. Pertinent to the resolution of your inquiries are the provisions of Sections 16.1-214 and 16.1-215 of the Virginia Code, which in part prescribe:

"From any final order or judgment of the juvenile court affecting the rights or interests of any person under the age of eighteen years coming within its jurisdiction, an appeal may be taken within ten days by any person aggrieved to the circuit, corporation, or hustings court having equity jurisdiction of such city or county. \* \* \*

"Upon the rendition of final judgment upon an appeal from the juvenile and domestic relations court, the appellate court shall cause a copy of its judgment to be filed with the juvenile court, which shall thereupon become the judgment of the juvenile court. In the event such appellate court does not dismiss the proceedings or discharge such child or adult person, the appellate court *may in its discretion* remand the child or adult person to the jurisdiction of the juvenile court for its supervision and care, under the terms of its order or judgment, and thereafter such child or adult person shall be and remain under the jurisdiction of the juvenile court in the same manner as if such court had rendered the judgment in the first instance." (*Italics supplied*).

In light of the initial statute set out above, I am of the opinion that a juvenile whose rights or interests have been affected by a final order or judgment of a juvenile court may appeal from such order or judgment to the circuit court having equity jurisdiction of the county in which the juvenile court is situated. In view of the language of Section 16.1-215 of the Code italicized above, I am further of the opinion that the appellate court may remand the juvenile to the jurisdiction of the juvenile court for supervision and care or may make disposition of the matter itself without remanding the juvenile to the jurisdiction of the juvenile court.

**JUVENILE AND DOMESTIC RELATIONS COURTS—Applicable Provisions Relating to Trial, Transfer and Disposition of Cases. F-239 (47)**

August 9, 1956.

HONORABLE HUGH REID, *Judge*  
Juvenile and Domestic Relations Court  
Arlington, Virginia

This will reply to your letter of July 20, in which you request an opinion concerning the effectiveness of Chapter 537 of the Acts of Assembly of 1956, in view of the subsequent passage and approval of Chapter 555, Acts of Assembly (1956). Specifically, you inquire whether or not Chapter 537 should be considered to have been repealed by Chapter 555.

Chapter 537 amends and reenacts Sections 16-172.41, 16-172.42 and 16-172.43 of the Virginia Code and adds a new section numbered 16-172.42:1. The above mentioned provisions are embodied in the Juvenile and Domestic Relations Court Law and relate generally to the trial, transfer and disposition of cases involving individuals subject to the provisions of that law. In providing for such amendments, reference is made in Chapter 537 to applicable provisions as they were numbered in the 1950 Code of Virginia, as amended, in which Code they appeared as individual provisions of Sections 16-172.1 through 16-172.84, which sections comprised the Juvenile and Domestic Relations Court Law. Chapter 555, which was later in passage and approval, expressly repeals Title 16 of the 1950 Code of Virginia, including Sections 16-172.1 through 16-172.84, and reenacts the Juvenile and Domestic Relations Court Law as Sections 16.1-139 through 16.1-217. As reenacted by Chapter 555, the particular sections in question appear in substantially the same form as they existed in the 1950 Code, although numbered anew as Sections 16.1-175 through 16.1-177.1.

Various well settled rules governing the construction and interpretation of statutes lend themselves to the resolution of the question presented in your communication. Chapter 537 and Chapter 555 relate to the same general subject matter and are *in pari materia*. Such statutes, although in apparent conflict, are to be construed in harmony with each other so far as is reasonably possible. Moreover, both statutes were passed at the 1956 session of the General Assembly and the rule that statutes *in pari materia* should be construed together applies with singular force to enactments passed at the same session of the Legislature. Sutherland, *Statutory Construction* (3rd Ed.), Sections 5201, 5202. As stated in Sutherland, *supra*, at 483, Section 2020:

"The enactment by a legislative assembly of two or more acts upon the same subject matter creates a presumption that the acts which were born of the same legislative mind were actuated with the same policy, and were intended to coexist to attain by their mutual operation the object of the legislation."

In addition, it is manifest that Chapter 537 is a special enactment dealing with only one aspect of the Juvenile and Domestic Relations Court Law—that relating to the trial, transfer and disposition of cases involving juveniles; while Chapter 555 is a general enactment covering the entire subject of courts not of record including the various Juvenile and Domestic Relations courts. Pertinent in this connection is the rule governing construction of special and general statutes, well stated in Sutherland, *supra*, at 486, Section 2021:

"The enactment of a general law broad enough in its scope and application to cover the field of operation of a special or local statute will generally not repeal a statute which limits its operation to a particular phase of the subject covered by the general law, or to a particular locality within the jurisdictional scope of the general statute. An implied repeal of prior statutes will be restricted to statutes of the same general nature, since the legislature is presumed to have known of the existence of prior special or particular legislation, and to have

contemplated only a general treatment of the subject matter by the general enactment."

In situations where the above mentioned principles apply, a repeal of former statutes by subsequent enactments will not be considered to occur unless there is such a positive inconsistency or irreconcilable repugnancy between the two that they cannot be harmonized. Such inconsistency must be more than a mere difference in the terms and provisions of the statutes; there must be "such a positive repugnancy between the provisions of the old and the new statutes that they cannot be reconciled and made stand together". Crawford, *Statutory Construction*, Section 311, page 631.

Viewed in the light of these principles, I am of the opinion that there is no such irreconcilable inconsistency between the provisions of Chapter 537 and those of Chapter 555 which compels the conclusion that the former enactment was repealed by the latter. The amendment to former Section 16-172.41 prescribed by Chapter 537 differs from the provisions of its counterpart, Section 16.1-175 of Chapter 555, only in the specification that a court of record shall exercise its discretion concerning the retention of a case involving a juvenile, only after an investigation of the personality and social condition of the juvenile and the circumstances surrounding the violation of law with which such juvenile is charged. The amendments to Section 16-172.42 prescribed by Chapter 537 differ from the provisions of Section 16.1-176 of Chapter 555 only in particularizing what is contemplated by the phrase "full investigation and hearing" used in the latter enactment and in making additional provisions concerning the appropriate persons who may conduct such investigations and for the transfer of the results thereof from one court to another to prevent duplication of effort. Section 16-172.42:1 of Chapter 537 is substantially identical to its counterpart, Section 16.1-177 of Chapter 555, while the provisions of Section 16-172.43 of Chapter 537, coupled with the amendments prescribed by Chapter 121 of the Acts of Assembly (1956), find appropriate expression in Section 16.1-177.1 of Chapter 555.

In light of the foregoing, I am of the opinion that Chapter 537 of the Acts of Assembly (1956) should not be considered to have been repealed by Chapter 555. In this connection, I note that the Virginia Code Commission has taken this view and has incorporated into the pertinent provisions of Chapter 555 the amendments to the applicable pre-existing provisions of Title 16 set out in Chapter 537. I feel that, in so doing, the Virginia Code Commission has appropriately harmonized the two enactments in question and given proper effect to the intention of the Legislature in this regard.

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#### JUVENILE AND DOMESTIC RELATIONS COURTS—Appointment of Judges for Cities—Governed by General Law Unless Provided for in Charter. F-239 (228)

February 12, 1957.

HONORABLE C. E. MORAN, *Clerk*  
Corporation Court of the City of Charlottesville

This will reply to your letter of February 5, in which you request an opinion concerning the method by which a judge of the Juvenile and Domestic Relations Court of the City of Charlottesville should be appointed or elected.

As you are aware, Title 16 of the Virginia Code, relating to courts not of record in the Commonwealth, was repealed at the last session of the General Assembly and new Title 16.1 was enacted in its stead, effective July 1, 1956. Chapter 8 of Title 16.1 now contains the existing Juvenile and Domestic Relations Court Law, and Section 16.1-143 thereof makes provision for juvenile and domestic relations courts in the various counties and cities of the Commonwealth and for the judges thereof. Moreover, Section 16.1-7 of the Virginia Code prescribes that every judge of a court not of record who is in office on July 1, 1956, shall continue therein until the expiration of the term for which he was

appointed or elected, and that, upon the expiration of his term and of each successive term thereafter, a successor shall be appointed or elected for the term and in the manner following:

"\* \* \*

"(2) In cities and towns each judge, associate judge, assistant or substitute judge shall be appointed or elected for such term and in such manner as is prescribed by the charter of the city or town in which he serves; but, in the event such charter does not prescribe the term and manner of appointment or election, then for such term and in such manner as was prescribed by general law immediately prior to the effective date of this title."

In accordance with the above quoted language, a judge of the Juvenile and Domestic Relations Court of the City of Charlottesville would be appointed or elected as prescribed in the charter of the City of Charlottesville; but if that charter does not prescribe the term and manner of appointment, then such judge would be elected or appointed for the term and in the manner which was prescribed by general law immediately prior to the effective date of Title 16.1 of the Virginia Code.

In this connection, it appears from your communication that Article II, Section 11, of the charter of the City of Charlottesville prescribes:

"The judge of the juvenile and domestic relations court of the city shall be appointed at such time, and in such manner and for such term of office and by such authority as is or may be provided for by the laws of the State of Virginia."

Essentially, this language merely provides that all matters relating to the appointment of a judge of the Juvenile and Domestic Relations Court of the City of Charlottesville shall be controlled by general law, and it does not prescribe the term or manner of appointment or election of such judge as contemplated in Section 16.1-7(2) of the Virginia Code. Therefore, under the proviso contained in Section 16.1-7(2), a judge of the Juvenile and Domestic Relations Court of the City of Charlottesville would be appointed or elected for such term and in such manner as was prescribed by the general law immediately prior to the effective date (July 1, 1956) of Title 16.1 of the Virginia Code.

The general law relating to the appointment or election of judges of juvenile and domestic relations courts immediately prior to the effective date of Title 16.1 was embodied in Section 16-172.4 of the Code of Virginia (1950) as amended. Formerly, as indicated in your letter, this subject was treated in Section 16-130 of the Virginia Code; however, this statute was expressly repealed by Chapter 383 of the Acts of Assembly of 1950, which Chapter enacted the modern Juvenile and Domestic Relations Court Law and became Sections 16-172.1 through 16-172.84 of the Virginia Code. Superseding Section 16-130 was Section 16-172.4 of the Virginia Code which, in its amended form, was in effect immediately prior to the effective date of Title 16.1 and in pertinent part prescribed:

"In every county and in every city of the State there shall be a juvenile and domestic relations court. \* \* \* In the cities the judge of such court shall be appointed by the judge of the hustings or corporation court, and in all other counties by the judge of the circuit court of the judicial circuit within which such county is situated, for a term of six years; or if there be two or more courts of record in such city then by a majority vote of all the judges of the courts of record therein; provided, however, that when the qualification and appointment of any such judge is provided for by charter prior to January one, nineteen hundred fifty-two, of any city, such judge may take office under the provisions of such charter, in the discretion of the governing body of such city. In the case of a tie vote then the appointment shall be made by the Governor. \* \* \*"

In light of the above quoted language and the absence of an express provision governing the election or appointment of judges of the Juvenile and Domestic Relations Court of the City of Charlottesville in the city charter prior to 1952. I am of the opinion that a judge of such Court would be appointed by the judges of the courts of record of the City of Charlottesville in accordance with the provisions of Section 16-172.4 of the Virginia Code.

**JUVENILE AND DOMESTIC RELATIONS COURTS—Clerk—Has No Authority to Issue Immediate Detention Orders. F-239 (302)**

April 22, 1957.

HONORABLE KERMIT V. ROOKE

Associate Judge

Juvenile and Domestic Relations Court

I am in receipt of your letter of April 17, 1957, in which you inquire whether or not the clerk of a Juvenile and Domestic Relations Court has the authority to issue process directing that a juvenile be taken into immediate custody. Your inquiry is prompted by the provisions of Sections 16.1-166, 16.1-194(1) and 16.1-146 of the Code of Virginia (1950) as amended. In pertinent part, these statutes, respectively, prescribe:

“\* \* \*

“If it appears that the child is in such condition or surroundings that his welfare requires or there is other good reason that his custody be immediately assumed by the court, the judge may order by endorsement upon the summons or other process issued that the officer serving or executing the same shall at once take the child into custody.”

“No child may be taken into immediate custody except:

“(1) With a summons endorsed by the judge of the juvenile court in accordance with the provisions of this law or with a warrant; \* \* \*.”

“The clerk of the juvenile court shall be conservator of the peace within the territory for which the judge of the court is appointed. Such clerk, and each deputy clerk when authorized by the judge, may issue any of the warrants, attachments, petitions, writs or other processes of the court, including warrants of arrest and search warrants in criminal cases, may issue subpoenas for witnesses, take affidavits, and administer oaths and affirmations. When authorized by the judge the clerk may dismiss charges pending against persons before the court. The clerk and the deputy clerk shall have such other powers and perform such other duties as are conferred or imposed upon them by law. The clerk shall keep the court docket and accounts, and shall perform such other duties as the judge of the court prescribes.”

The question presented in your communication was previously considered by this office in the light of corresponding provisions of the Juvenile and Domestic Relations Court Law existing prior to the effective date of the above quoted statutes. See, Report of the Attorney General (1955-56), page 115. On that occasion, the position was taken that Section 16-172.58 of the Virginia Code—which related to the power of judges, clerks and deputy clerks of the Juvenile and Domestic Relations Courts to issue warrants and other processes—should not be construed to confer upon the clerk of a Juvenile and Domestic Relations Court the authority to issue orders for the immediate detention of juveniles.

The powers and duties of the clerks and deputy clerks of Juvenile and Domestic Relations Courts are now set forth in Section 16.1-146 of the Virginia Code, a provision which enlarges the powers formerly conferred by Section 16-172.58 of the Virginia Code. Although the statute now in effect authorizes the clerk of a Juvenile and Domestic Relations Court to *issue* any of the warrants, attachments, petitions, writs or other processes of the Court, it does not authorize



the clerk to *order by endorsement* upon such process that a child be taken into immediate custody. As pointed out in the previous ruling of this office, the power to order a child to be taken into custody is conditioned upon an assessment of the facts and circumstances relating to the condition or surroundings of the particular child in question and contemplates the exercise of judicial discretion in each instance. It is the exercise of this power, reflected by endorsement upon "the summons or other process issued" which alone authorizes the taking of a child into immediate custody, except in those cases in which a warrant is obtained.

I am, therefore, of the opinion that a clear distinction exists between the issuing of process and the endorsing of an order for immediate detention upon such process; that the endorsing of an order for immediate detention is a judicial function not conferred by statute upon the clerks of Juvenile and Domestic Relations Courts; and that, except in those cases in which a warrant is obtained, the clerk of a Juvenile and Domestic Relations Court has no authority to issue immediate detention orders.

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**JUVENILE AND DOMESTIC RELATIONS COURTS—Hearings Must Be Closed to Public—No Exceptions. F-239 (93)**

September 21, 1956.

HONORABLE MARK D. WOODWARD, *Judge*  
Page County Court

I am in receipt of your letter of September 14, in which you present certain inquiries concerning an opinion of this office relating to the hearing and disposition of juvenile cases under Section 16-172.28 of the Virginia Code.

In response to your request, I am forwarding to you a copy of the opinion in question, which was rendered on February 6 of this year to the Honorable John W. Snead, Trial Justice of Chesterfield County.

As you point out, Section 16-172.28, which was in effect at the time the original opinion was rendered, is now, in substantially the same language, Section 16.1-162 of the Virginia Code.

Moreover, as you will observe, cognizance was taken of the exceptions contained in Sections 16-172.29 and 16-172.30 (now Sections 16.1-163 and 16.1-164) of the Code when the original ruling was made. Despite these exceptions, I was of the opinion that it would not be permissible to create by interpretation a similar exception to the mandate of Section 16-172.28, and I am of the opinion that it would be equally inappropriate to do so with respect to the almost identical prescription of what is now Section 16.1-162. If such an exception is to be made, I feel that provision for it must be made by the Legislature.

With respect to the administrative difficulties which the instant law may present, I call your attention to the terminal paragraph of the original opinion, which points out that certain of these troublesome aspects, especially those relating to closed hearings, may be alleviated by deferring juvenile cases which have been set for a particular day until disposition has been made of all other cases set for that day.

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**JUVENILE AND DOMESTIC RELATIONS COURTS—Juvenile Offenders  
—Propriety of Officers Disclosing Information to Public. F-239a (158)**

November 19, 1956.

HONORABLE JOSEPH E. BLACKBURN  
Member House of Delegates

I am writing in further connection with my letter of November 16, in response to your communication of October 31, in which you requested my opinion concerning the propriety of certain public officials' disclosing information relating to the trial of cases involving juveniles.

In addition to the general statement of the purposes and intent of the Juvenile and Domestic Relations Court Law, contained in Section 16.1-140 of the Virginia Code, to the effect that the various juvenile courts of the Commonwealth shall, in hearing and disposing of cases involving juveniles, proceed upon the theory that the welfare of the child is the paramount concern of the State, Sections 16.1-162 and 16.1-163 of the Virginia Code prescribe:

"Sec. 16.1-162. Dockets and order books; hearings and records private.—Every juvenile court shall keep a separate docket, order book or file for the entries of its orders in cases arising under this law, and the trial of all such cases shall be held at a different time from the hearing of other cases in the court. The general public shall be excluded from all juvenile court hearings and only such persons admitted as the judge shall deem proper. The presence of the child in court may be waived by the judge at any stage of the proceedings. The records of all such cases, excepting those involving adults, shall be withheld from public inspection but they shall be open to the child's parents and attorney and to such other persons as the judge in his discretion decides have a direct interest therein."

"Sec. 16.1-163. Records of police departments and Divisions of Motor Vehicles.—The police departments of the cities of the State, and the police departments or sheriffs of the counties, as the case may be, shall keep separate records as to violations of law committed by juveniles, and the Division of Motor Vehicles shall keep separate records as to violations of the motor vehicle law committed by juveniles, and such records shall be withheld from public inspection and shall be exhibited only to persons having a legal interest therein and with the express approval of the judge; provided, however, that records of violations of the motor vehicle laws with reference to the operation of such motor vehicles by juveniles shall be open to public inspection."

I have previously had occasion to comment upon the above quoted provisions in the form in which they appeared prior to the repeal of Title 16 of the Virginia Code, i.e., as Section 16-172.28 and 16-172.29 of the Code of Virginia (1950) as amended. In an opinion to the Honorable Ligon L. Jones, Commonwealth's Attorney for the City of Hopewell, dated March 6, 1951, I observed:

"It is my opinion that the clear purpose of these sections is to prevent the publication of details of proceedings in the juvenile and domestic relations court for the obvious purpose of protecting children who come within the purview of the law from the stigma which naturally attaches to one involved in such proceedings."

See, Report of the Attorney General (1950-51) page 186. On two subsequent occasions I have reaffirmed the view expressed above; once in an opinion to the Honorable Louis F. Jordan, Judge of the Juvenile and Domestic Relations Court of the City of Waynesboro, dated June 15, 1951, and again in an opinion to the Honorable Raymond O. Cundiff, Judge of the Juvenile and Domestic Relations Court for the City of Lynchburg, dated October 2, 1951. See, Report of the Attorney General (1950-51) pages 186-187; Report of the Attorney General (1951-52) page 96.

With respect to the precise question of the release of information by officials involved in the disposition of cases before the various juvenile and domestic relations courts of the Commonwealth, neither of the statutes quoted above contains any language which expressly forbids this action on the part of such officials; however, it is clear that any widespread adoption of this practice would completely subvert what I conceive to be the manifest purpose of the statutes in question. In this connection, I noted in my opinion to Judge Cundiff that such release of information would be, in practical effect, tantamount to a disclosure of the records of juvenile cases, and in my opinion to Judge Jordan I took the position that the discretion of the trial judge should be controlling with respect to the extent to which releases of information were to be permitted.

In conclusion, I point out that the provisions of what is now Section 16.1-162 of the Virginia Code have been relaxed (by amendment in 1954) to permit public inspection of records of violations by juveniles of the motor vehicle laws of the Commonwealth with reference to the operation of motor vehicles.

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**JUVENILE AND DOMESTIC RELATIONS COURTS—May Not Sentence a Child to the Penitentiary. F-239 (44)**

August 7, 1956.

HONORABLE RALPH P. ZEHLER, JR.  
Commonwealth's Attorney for Fluvanna County

This is in response to your letter of July 26, 1956, which reads as follows:

"Please advise if under Section 16.1-176, Code of Virginia (1950) as amended, the Judge of the Juvenile and Domestic Relations Court has authority to sentence a child fourteen years of age or over to a term in the penitentiary. Although I know of no case where a Court not of record has this authority, it appears that the above mentioned section contemplates such in cases where the Court, in its discretion, retains jurisdiction of felony cases.

"Section 16.1-158, (7) and (8), indicate that the Judge's authority in felony cases is limited to that of an examining magistrate. If that is the case, please advise what punishment the Court can impose in felony cases retained by it."

It is noted that Section 16.1-177.1 provides that a child over fourteen charged with a misdemeanor may receive a penalty authorized to be imposed upon adults for such violations, but no such authorization is granted with regard to felonies. Moreover, Section 16.1-178 sets forth the decrees that may be entered by Juvenile and Domestic Relations Court, but no provision for sentence to the penitentiary is contained therein. As set forth in your letter, Section 16.1-176 makes provision for the retention of jurisdiction in felony cases by the Juvenile Court with certain other provisions.

It is the view of this office, concurred in by Mr. J. Luther Glass, of the State Department of Welfare and Institutions, who is cognizant of the purpose and intent of the recent legislation, that a juvenile and domestic relations court does not have authority to sentence a child fourteen years of age or over to the penitentiary, and that the punishment the court may impose in felony cases retained by it is set forth within the provisions of Section 16.1-178, which generally provides for commitment as set forth within this section.

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**JUVENILE AND DOMESTIC RELATIONS COURTS—Procedure for Handling and Committing Child between 7 and 14 Years Old. F-239a (58)**

August 21, 1956.

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

This will acknowledge receipt of your letter of August 17, 1956, from which I quote as follows:

"\*\*\* If a child between 7 and 14 years is so incorrigible that its parents cannot control the juvenile; and added to this, the said juvenile commits acts which in an adult would be larceny, and housebreaking, would it be your considered opinion that I, as a juvenile judge, have the power to commit such a juvenile to the State Department of Welfare and Institutions, and have the delinquent held in a detention home until the State authorities find it possible to send for the juvenile thus committed?"

Section 16.1-158 of the Code, as amended, states that:

"\*\*\* each juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, and within one mile beyond the corporate limits of said city, concurrent jurisdiction with the juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving:

"(1) The custody, support, control or disposition of a child:

\* \* \* \* \*

"(g) who deserts or is a fugitive from his home, or who is habitually disobedient or beyond the control of his parents or other custodian, or is incorrigible;

\* \* \* \* \*

"(i) who violates any State or federal law, or any municipal or county ordinance; provided, however, that in violations of federal law jurisdiction in such cases shall be concurrent and shall be assumed only if waived by the federal court;"

Section 16.1-178 of the Code, as amended, reads in part as follows:

"If the court shall find that the child or minor is within the purview of this law it shall so decree and by order duly entered proceed as follows:

\* \* \* \* \*

"(4) Take custody and commit the child or minor coming within the provisions of paragraphs (g), (h) and (i) of subsection (1) of § 16.1-158 of this law to the guardianship and custody of the State Board of Welfare and Institutions if the child's or minor's behavior is such that the court deems it cannot be satisfactorily 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."

I am, therefore, of the opinion that you have the authority to commit such a juvenile to the State Department of Welfare and Institutions. You are quite right in stating that a child between the ages of 7 and 14 years must not be kept in jail under any circumstances, but should be cared for in a detention home or institution. Section 16.1-199 of the Code, as amended.

It is my opinion that the intention of Section 16.1-199 is that under the circumstances outlined in your letter a juvenile must be committed to a detention home, and that you have the power to do so.

## JUVENILE AND DOMESTIC RELATIONS COURTS—Revocation of Suspended Sentence—When May Do. F-383 (124)

October 18, 1956.

HONORABLE JAMES H. MONTGOMERY, JR., *Judge*  
Juvenile and Domestic Relations Court

This will reply to your letter of October 2, in which you advise that in certain cases involving convictions for non-support, your Court has been suspending sentences for more than one year and that in some of these cases the defendant is placed on probation, but that in others he is not. You inquire whether or not it is proper in such a case to suspend the sentence of a convicted persons for more than one year and, in the event of a violation of the conditions of suspension, to revoke the suspension even though such violation may have occurred more than one year from the date of the original conviction but within the suspension period.

With regard to the trial of other than juvenile cases, Section 16.1-187 of the Virginia Code provides that a Juvenile and Domestic Relations Court may, upon a plea of guilty or upon conviction, impose such sentences as the law provides or may suspend the imposition or execution of sentence, and may also place the defendant on probation during good behavior for such time and under such conditions as the Court may determine. Section 16.1-188 further provides:

"If any person under a *suspended sentence or on probation* be found guilty after notice and hearing to have violated the conditions of such *suspended sentence or probation*, the court may revoke the *suspension of sentence or probation*. In such case the court shall cause the defendant to be arrested on a show cause order, and the defendant may be brought before the court for trial thereon at any time within the *probation period or the period of suspension*; or if no probation period or period of suspension has been prescribed, then within the maximum period for which the defendant might originally have been sentenced to be imprisoned; whereupon, in case the imposition of sentence has been suspended, the court may pronounce whatever sentence might have been originally imposed; \* \* \*." (Italics supplied).

When these sections of the Virginia Code are read together, it would appear that they contemplate that a Juvenile and Domestic Relations Court may, in lieu of the imposition of sentence, either (1) suspend the imposition or execution of sentence without more or (2) suspend the imposition or execution of sentence and place the convicted person on probation. Moreover, it seems manifest that if the Court utilizes the first alternative, it may prescribe a definite period of suspension, and if the Court adopt the second alternative, it may prescribe a definite period of probation. Should the Court specify such definite period of suspension or period of probation, individuals violating the conditions of the suspension or probation may be brought before the Court for trial at any time during the prescribed suspension or probation period. However, should the Court fail to specify a definite period of suspension or probation, the power of the Court to revoke its suspension or probation is subject to the limitation that the convicted person may be brought before the Court for trial of an alleged violation of the conditions of suspension or probation only within the maximum period for which the defendant might originally have been sentenced.

While Section 16.1-188 of the Code clearly authorizes the trial of an individual at any time within the period of suspension or period of probation specified in his case, it is admittedly not equally clear that the violation of suspension or probation conditions for which he is authorized to be tried may occur at any time within the suspension or probation period. However, I am constrained to believe the statute contemplates that whenever a definite period of suspension or probation is prescribed, a Court may revoke its suspension or probation at any time within the specified period for a violation of conditions occurring within that period. While the question is not entirely free from doubt, I believe that the statutes in question are susceptible to such construction, and it is well settled that probation statutes are highly remedial and should be liberally construed. As the Supreme Court of Appeals of Virginia observed in *Dyke v. Commonwealth*, 193 Va. 478, 484:

"They (probation statutes) afford to trial courts a valuable means of bringing about the rehabilitation of offenders against the criminal laws. They have been and are being effectively used by the courts for that purpose. In order that the effective use of probation be not impaired it is important that those to whom it is granted shall know that its terms and conditions are to be strictly observed; and it is likewise important that the power of the court to revoke for breach of its terms and conditions be not restricted beyond the limitations required by the statutes." (Italics supplied).

**LABOR LAWS—Apprenticeship Council—Standards and Local Committees—Questions of Policy. F-143 (322)**

May 9, 1957.

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

This is in reply to your letter of April 30, 1957, in which you request my opinion as to whether or not the Virginia Apprenticeship Council should lower its standards for training and whether or not said Council should approve more than one apprenticeship committee for the same trade in a particular locality.

I am of the opinion that these two questions are questions of policy rather than legal, which policy the Virginia Apprenticeship Council has full authority to establish within the powers conferred upon it by Chapter 6 of Title 40 of the Code of Virginia.

**LABOR LAWS—Children—Employment Certificate—Procedure to Be Followed. F-56 (76)**

September 10, 1956.

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

This will reply to your letter of August 30, in which you inquire whether or not the Department of Labor and Industry has properly construed Section 40-100.6 of the Code of Virginia (1950), as amended. The interpretation accorded this statute by the Department is stated in your communication as follows:

“When a division superintendent of schools finds it in the best interest of a student 14 or 15 years of age to attend school part-time and work part-time a School Part-time Employment Certificate can be issued, allowing such child to work during the hours that public schools are in session but not adverse to the hours regulation as provided in Section 40-97; also, that a School Part-time Employment Certificate can not be issued unless all ‘proof for employment certificate’, as provided in Section 40-102, has been submitted and the Issuing Officer has found the occupation of the minor legal for his or her age.”

Section 40-100.6 of the Virginia Code was enacted at the 1956 session of the General Assembly as a part of Chapter 567, Acts of Assembly (1956), and prescribes:

“A part-time employment certificate shall be issued, which shall permit the employment of a child between fourteen and sixteen years of age when the division superintendent of schools shall find it in the best interests of the child to follow a program of part-time school attendance and part-time employment. Such employment shall be under the supervision of the division superintendent of schools.”

By the same enactment, that portion of Section 40-96 of the Code which, with certain exceptions, prohibits the employment of children under 16 years of age during school hours, was also amended to make permissible the employment during school hours of children under 16 years of age who have been issued a school part-time employment certificate under Section 40-100.6. In pertinent part, Section 40-96 now prescribes:

“No child under sixteen years of age shall be employed, permitted or suffered to work in, about or in connection with any gainful occupation *during school hours*, unless he has completed high school, or unless he has reached the age of fourteen and a provisional employment certificate has been issued for his employment as provided in Section 40-100.5, or unless he has reached the age of fourteen and is enrolled in a regular

school work-training program and a work-training certificate has been issued for his employment as provided in Section 40-100.4 *or unless a part-time employment certificate has been issued as provided in Section 40-100.6*" (italics supplied).

The various types of employment certificates to which reference is made in the statute quoted immediately above are provided for by Section 40-100.1 et seq. of the Virginia Code. Section 40-100.1 declares that employment certificates shall be of four kinds: A general employment certificate for the employment of children between 16 and 18 years of age who have completed high school (40-100.2); a vacation part-time employment certificate for the employment of children between 14 and 18 years of age during school vacation periods or outside of school hours (40-100.3); a work-training certificate for the employment of children between 14 and 18 years of age during school hours when such children are enrolled in a regular school work-training program (40-100.4); and a provisional employment certificate for the employment of children between 14 and 16 years of age who have been found to be incapable of profiting from further school attendance, such certificate to be issued only to those children who have been or who will be released from school (40-100.5). This well established group of certificate types has now been supplemented by a new form of certificate—the school part-time employment certificate—which permits the employment of children under 16 years of age during school hours, even though not enrolled in a regular school work-training program, when the division superintendent of schools finds it in the best interests of a child to follow a program of part-time school attendance and part-time employment.

While the Child Labor laws of the Commonwealth permit the employment of children under 18 years of age who have been issued one of the above described certificates, Section 40-109 of the Virginia Code prohibits the employment of children in certain occupations specified therein. In view of the unqualified prohibition enunciated in Section 40-109 with respect to these particular forms of employment, no certificate of any kind may be issued authorizing the employment of children in such occupations. I understand it to have been the uniform administrative interpretation of the Department of Labor and Industry that the provisions of Section 40-100.1 through 40-100.5 are qualified by the prohibitions of Section 40-109 of the Code, with the result that employment certificates may not be issued authorizing the employment of children in any occupation prohibited by the latter statute. Moreover, it has been the uniform administrative practice of the Department to consider the provisions of Section 40-100.1 through 40-100.5 to be subject to the limitations of Section 40-97 and the requirements of Section 40-102 of the Code. In essence, the Department proposes to accord the same interpretation to the recently enacted provisions of Section 40-100.6.

I am constrained to believe that the statute in question does no more than make provision for the issuance of a new type of employment certificate to meet a situation not heretofore comprehended by the Child Labor laws, and, for the first time since the enactment of these laws in the Commonwealth, to permit the employment of children under 16 years of age during school hours on a part-time employment basis, even though such children are not enrolled in a regular school work-training program. I do not believe that by enacting this section of the Code the Legislature intended to make any change in the substantive law relating to those occupations which are absolutely prohibited, the limitations upon the hours of labor, or the requirements of proof for an employment certificate. Had the Legislature intended the provisions of Section 40-100.6 to supersede these fundamental provisions of the Child Labor laws of the Commonwealth, it could very easily and very clearly have made provision to that effect, and I do not feel that a simple provision authorizing a new kind of employment certificate in addition to those types already in existence should be construed to infringe the basic prohibitions and requirements of the Child Labor laws. In part, I am confirmed in this belief by the language of Section 40-96 which, although authorizing the employment of children under 16 years of age during school hours

when provisional, work-training, or school part-time employment certificates have been issued, also prescribes that "nothing in this \*\* section shall be construed as qualifying the provisions of Sections 40-109, 40-110 or 40-111".

I am, therefore, of the opinion that your Department has correctly interpreted the provisions of the statute in question and I concur in this interpretation.

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**LABOR LAWS—City Firemen—Right to Join Union. (357)**

June 11, 1957.

HONORABLE WILLARD J. MOODY  
Member of the House of Delegates

This is in response to your letter of June 10, 1957, in which you request my opinion as to whether or not the City of Norfolk can prohibit city firemen from joining a labor union.

This question has been passed upon by the Courts of this State and by the Supreme Court of the United States.

I am enclosing a copy of a statement of the action taken by the Courts of Virginia in the case of *Verbaagen vs. Reeder*, along with a copy of the Order of the Supreme Court of the United States in this matter.

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**LABOR LAWS—Women—May Not Work More Than 9 Hours in Any Day of 24 Hours. (364)**

June 18, 1957.

HONORABLE JAMES W. ROBERTS  
Member House of Delegates

This will reply to your letter of June 17, 1957, in which you inquire whether or not an employer engaged in the retail drug business in Virginia may maintain a "staggered system" of working hours for certain female employees who serve as drug clerks, cosmeticians and check-out clerks in various retail drug outlets. Under such a schedule, the female employees in question would, on occasion, be permitted to work almost two complete eight-hour shifts in one twenty-four hour period.

With respect to the question presented in your communication, Section 40-34 of the Virginia Code provides:

"No female shall be employed, suffered or permitted to work in any factory, workshop, laundry, restaurant, mercantile or manufacturing establishment in this State more than forty-eight hours in any one week, *nor more than nine hours in any one day of twenty-four hours*. All contracts for the employment of any female in any factory, workshop, laundry, restaurant mercantile or manufacturing establishment to work more than forty-eight hours in any one week, or nine hours in any one day of twenty-four hours, shall be deemed to be void." (Italics supplied).

In light of the statute quoted above, I am of the opinion that it would not be permissible for an employer to establish or maintain the staggered schedule of working hours under consideration. I have carefully examined the exceptions to Section 40-34 which are set out in Section 40-35 of the Code, and I am further of the opinion that the situation you present would not fall within the purview of any exception specified therein.



**LAND SUBDIVISION ACT—No Authority for Charging of Fees for Service of Commissioner of Revenue. F-136 (271)**

March 19, 1957.

HONORABLE JOSHUA PRETLOW  
Commonwealth's Attorney  
Nansemond County

This is in reply to your letter of March 15, 1957, in which you request my opinion as to whether or not the Board of Supervisors may enact an ordinance requiring persons submitting plats of subdivisions for approval to the Deputy Commissioner of Revenue to pay certain fees to the Deputy Commissioner of Revenue for the service performed by the deputy in studying and approving the plats. You state that your subdivision ordinance was adopted pursuant to the Virginia Land Subdivision Act.

I can find no provision in that act or in any other section of the Code of Virginia which gives the Board of Supervisors of Nansemond County the authority to charge a fee for this service. Assuming that you can find authority for the Board of Supervisors to charge a fee such as this, then I am of the opinion that said fees would be payable to the general fund of the county, rather than to a deputy commissioner of the revenue in his individual capacity. If you desire to have additional compensation for this deputy, then the salary of the deputy should be increased in the manner provided by law under the provisions of Article 8 of Chapter 1 of Title 14 of the Code of Virginia.

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**LAND SUBDIVISION ACT—Notice to County or Municipality Adjacent to Area to Be Regulated. F-60 (151)**

November 7, 1956.

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

This will reply to your letter of November 3, in which you request an opinion concerning the appropriate interpretation of Sections 15-786 and 15-787 of the Code of Virginia (1950) as amended, with respect to the notification of the governing body of an incorporated town by the governing body of a county of proposed regulations adopted pursuant to the provisions of the Virginia Land Subdivision Act.

In pertinent part, the statutes in question provide:

"Sec. 15-786.—The governing body of any city or incorporated town, as described below, may adopt subdivision regulations which shall be effective both within its corporate limits and beyond within the distance therefrom set out below:

"(1) Within a distance of five miles from the corporate limits of cities having a population of one hundred thousand or more, provided that this shall not apply beyond the territorial limits of counties touching any such city;

"(2) Within a distance of three miles from the corporate limits of cities having a population of less than one hundred thousand; and

"(3) Within a distance of two miles from the corporate limits of incorporated towns;

"Except that where the corporate limits of two municipalities are closer together than the sum of the distances from their respective corporate limits as above set forth, the dividing line of jurisdiction shall be halfway between the limits of the overlapping boundaries.

"No such regulations shall be finally adopted by any such municipality until the governing body of the county in which such area is located shall have been duly notified in writing by the governing body of the

municipality or its designated agent of such proposed regulations, and requested to review and approve or disapprove the same; and if such county fails to notify the governing body of such municipality of its disapproval of such plan within forty-five days after the giving of such notice, such plan shall be considered approved." (Italics supplied).

"Sec. 15-787.—The governing body of any county may adopt regulations for subdivisions in the unincorporated area of the county, provided that whenever the governing body of a county desires to adopt subdivision regulations *in the county area of municipal jurisdiction located within in the county*, then such county may proceed to adopt subdivision regulations in such area, except that no such regulations shall be finally adopted for such area by such county until the governing body of the municipality *adjoining the same* shall have been notified in writing of such proposed regulations, and requested to review and approve or disapprove the same, and if such municipality fails to notify the governing body of such county of its disapproval of such regulations within forty-five days after the giving of such notice, the same shall be considered approved." (Italics supplied).

I think it is clear that the former statute authorizes the governing body of an incorporated town to adopt subdivision regulations which may be effective in an area of the county beyond the corporate limits of the town (but within two miles thereof) upon condition that the proposed regulations shall not become effective in such area until the governing body of the county has been notified of the proposed regulations and requested to review and approve or disapprove the same. The pertinent provisions of the latter statute prescribe that, whenever the governing body of a county wishes to adopt subdivision regulations "in the county area of municipal jurisdiction located within the county", it may proceed to do so, except that such regulations shall not be finally adopted "for such area," until the governing body of the municipality "adjoining the same" shall have been notified of the proposed regulations and requested to review and approve or disapprove the same. In situations involving incorporated towns, I am constrained to believe that the phrase "the county area of municipal jurisdiction located within the county" refers to the two mile area within the county beyond the corporate limits of a town to which reference is made in Section 15-786 and within which municipal subdivision regulations may be made effective with the approval of the county. I believe this view to be supported by the circumstance that the area contemplated in Section 15-787 is designated as the area which a municipality *adjoins* rather than an area located *within* the municipality. On the whole, I am of the opinion that, in situations involving incorporated towns, the governing bodies of both the town and the county exercise, in effect, a concurrent jurisdiction over that area located in the county within two miles of the corporate limits of a town, and that in this area no subdivision regulations of either governing body may become effective without the prescribed notification and request for review and approval or disapproval.

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#### LAND SUBDIVISION ACT—Publication of Notice for Adoption—Requirements. F-60a (139)

October 26, 1956.

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

I am in receipt of your letter of October 19, in which you advise that the Board of Supervisors of Prince William County proposes to adopt certain subdivision regulations in accordance with the provisions of the Virginia Land Subdivision Act. Section 15-779 et seq., Code of Virginia (1950) as amended. You point out that Section 15-782 of the Code requires that notice of intention to adopt or amend such regulations be published once a week for two successive

weeks in some newspaper published, or having general circulation, in the county, but does not require publication of the regulations in full after adoption as is required of ordinances and by-laws under Section 15-8 of the Code. You inquire whether or not such subdivision regulations must be published after adoption in accordance with the latter statute.

In my opinion, it is not necessary for subdivision regulations authorized by the Virginia Land Subdivision Act to be published after adoption in conformity with the requirements of Section 15-8 of the Virginia Code. Section 15-8 relates to the general powers of the boards of supervisors of the various counties to enact ordinances and by-laws designed to further the health, safety and general welfare of the inhabitants of the counties, and it prescribes the requirements of publication with respect to the passage of ordinances and by-laws carrying into effect these and other powers of the boards of supervisors. However, the Virginia Land Subdivision Act deals specifically with the authority of the governing bodies of both counties and municipalities to adopt regulations designed to assure the orderly subdivision of land and its developments, and the requirements of publication with respect to the adoption of such regulations are specifically prescribed in Section 15-782 of the Code. I am, therefore, of the opinion that, so long as there has been compliance with the requirements of Section 15-782, publication of subdivision regulations after adoption in conformity with Section 15-8 of the Virginia Code is not required.

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#### **LIBRARIES—County—Payment of Expenses—By Whom and How. (359)**

June 12, 1957.

HONORABLE G. H. PARKER, JR.  
Commonwealth's Attorney for Southampton County

This is in reply to your letter of June 10, 1957, relating to the Walter Cecil Rawls Library and Museum.

You state that there is included in the current budget an assessment calculated to produce sufficient revenue from which to pay the expenses authorized under Section 42-10 of the Code, but that this fund will not be available until taxes are collected. You present two questions, as follows:

"(1) My question is how and by whom shall these funds be paid out and how can they be supplied and paid out before being actually collected?"

"(2) I understand the law provides that funds may be transferred by the County Treasurer, by order of the Supervisors, to take care of current expenses. Must the Supervisors approve the numerous bills for current expenses?"

With respect to question (1), I adhere to the opinion of Honorable Abram P. Staples, to which you have referred. Under this opinion the Treasurer of the County would have custody of the expense fund, and he could pay the bills on orders of the Board of Trustees of the Library.

With respect to the second point presented in (1), if there are sufficient funds in the general fund of the County to justify the temporary transfer, I feel that it would be proper for the Board of Supervisors to adopt a resolution directing the Treasurer of the County to transfer from the general fund to the Library expense or operating fund an amount sufficient to meet the expenses to a date not later than December 15, 1957. This resolution should direct the Treasurer to reimburse the general fund out of the revenue collected for library operating expenses.

Should there not be sufficient surplus in the general fund to justify the temporary transfer, then a loan may be made pursuant to Sections 15-250 and 15-251 of the Code.

With respect to question (2), I have answered the first part of the question. I am of the opinion that it would not be necessary for the Board of Supervisors to approve the bills, but that the Treasurer would have authority to pay them upon warrants issued by the Trustees for the Library.

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**LIBRARIES—State Library—Authority to Provide Scholarships for Training Librarians. F-217 (290)**

April 11, 1957.

HONORABLE RANDOLPH W. CHURCH  
State Librarian

This is in reply to your letter of April 9, 1957, in which you request my opinion as to whether or not the Virginia State Library has basic authority in State law for providing scholarships for training librarians to work in rural libraries. Section 42-26 of the Code of Virginia provides, in part, as follows:

"In order to encourage the maintenance and development of proper standards, including personnel standards, and the combination of library systems or libraries into larger and more economical units of service, grants of State aid may be made by the Board to any qualifying library system or qualifying library, \*\*\*."

I am of the opinion that this authority is broad enough to permit the Virginia State Library to provide scholarships for librarians.

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**LIBRARIES—State Library—Is an Institution. F-217 (292)**

April 11, 1957.

HONORABLE RANDOLPH W. CHURCH  
State Librarian

This is in reply to your letter of April 9, 1957, in which you request my opinion as to whether or not the Virginia State Library is an institution.

I am of the opinion that the Virginia State Library is an institution of the Commonwealth of Virginia. The Library provides educational facilities and resources, an extension service and conducts research projects, all of which activities are those activities customarily associated with an institution. Webster's Dictionary, Unabridged Edition, gives as one of the definitions of a library that it is an institution.

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**LIBRARIES—State Library—Trust and Agency Funds Handled by—Do Not Have to Be in State Treasury—Subject to State Audit. F-217 (291)**

April 11, 1957.

HONORABLE RANDOLPH W. CHURCH  
State Librarian

This is in reply to your letter of April 9, 1957, in which you state that the Council on Library Resources is interested in undertaking a study of the stabilization of book papers. The Council proposes to make the Virginia State Library its agent in directing and carrying out this study. The question has been raised as to whether the sponsorship of such a project as agent falls within the terms and conditions of Section 25 of the Appropriations Act of 1956-58, and whether the approval of the Governor is necessary before sponsorship of such question is undertaken, and whether the funds entailed can be handled otherwise than through the State Treasury.

I am of the opinion that these funds received from the Council on Library Resources for conducting this study would be a type of fund known in account-

ing practices as trust and agency funds. I am of the opinion that trust and agency funds do not come within the scope of Section 25 of the Appropriation Act of 1956-58. I am of the opinion, however, that, while these funds can be handled in a separate bank account and do not have to be handled through the State Treasurer, they are subject to audit by the State Auditor.

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**Lotteries—Newspaper Promotion Based on Serial Number of Dollar Bill Constitutes. F-123 (60)**

August 24, 1956.

HONORABLE W. T. LEARY, *Member*  
House of Delegates

This will reply to your letter of August 15, 1956, in which you outline the particulars of a "Happy Bucks" contest being conducted by a newspaper which recently commenced operations in the City of Portsmouth and Norfolk County. You inquire whether or not this contest constitutes a lottery under Virginia law.

As set out in your communication, the contest is operated essentially as follows:

"A member of the staff of the paper records the serial number of a one dollar bill and then goes out to some place of business in the city or county and places the bill in circulation by making a purchase with it. The place of business is not advised that the particular bill has been selected for the 'Happy Bucks'. The next day the recorded number is published in the paper and for a period of one week anyone who has possession of the bill and can identify it by number may take it to the office of the newspaper whereupon he or she may exchange it for a one hundred dollar bill. \* \* \*

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 lottery laws of Virginia are remedial in character and should be liberally construed. *Abdulla v. Commonwealth*, 174 Va. 450. In light of these principles, I am of the opinion that the venture under consideration would constitute a lottery. Unquestionably, the elements of price and chance are present in this undertaking; in addition, the requirement that the holder of the particular bill selected for the "Happy Bucks" contest present the same at the newspaper's office during normal business hours within one week from the date of publication of the serial number of the bill would constitute sufficient consideration within the definition of a lottery, despite the fact that it is not necessary for the holder to buy a copy of the newspaper in question in order to qualify for the award. I am, therefore, of the opinion that the venture under discussion falls within the prohibition of the Virginia lottery statutes.

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**MARRIAGE—Issuance of License—Where Female Usually Resides—May Be Place Where She Is Living While Attending School. F-223 (175)**

December 12, 1956.

MRS. EVA W. MAUPIN, *Clerk*  
Circuit Court of Albemarle County

This is in reply to your letter of December 11, 1956, from which I quote in part as follows:

"Girls in our nursing school at the University of Virginia, whose home is in some remote County in Virginia, and whose parents live in that County, apply to me for a marriage license, saying they are residents of Albemarle by reason of attending this school; shall I issue this license?"

Section 20-14 of the Code of Virginia provides in part:

"Every license for a marriage shall be issued by the Clerk of the Circuit Court of the County, or of the Corporation Court of the City in which the female to be married usually resides, or his deputy; \* \* \*."

I do not believe that this section contemplates that the female must be a permanent resident or a domiciliary of the County or City in which she applies for a marriage license. The statute quite clearly requires only that the female "usually resides" in the County or City, and, therefore, I am of the opinion that you may properly issue marriage licenses to females who are residing in Charlottesville for the purpose of attending school.

**MARRIAGE—Issuance of License—and Performance of Ceremony for Non-Residents. Must Be in Same City or County—If County Court House in City—May Be Performed at the Court House. F-223 (177)**

December 17, 1956.

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

This is in reply to your letter of December 14, 1956, from which I quote, in part, as follows:

"I am running into difficulty and would like your opinion on the following question: The Nansemond County Courthouse, as you know, is located in the City of Suffolk, and Suffolk is located within Nansemond County. In your opinion, if a non-resident obtains a marriage license from my office, can the couple be married in the City of Suffolk, or at the Courthouse, which is located within the City, or is it necessary that the person performing the ceremony actually marry the couple some place in Nansemond County?"

Section 20-14 of the Code of Virginia reads, in part, as follows:

"Every license for a marriage shall be issued by the clerk of the circuit court of the county, or of the corporation court of the city in which the female to be married usually resides, or his deputy; and in case she is not a resident of the State, then by the clerk of the circuit court of the county or of the corporation court of the city in which the marriage is to be solemnized, or his deputy; \* \* \*."

When a nonresident purchases a marriage license from your office, the ceremony must be performed somewhere in Nansemond County. Although the Courthouse is located within the physical confines of the City of Suffolk, I believe it is on county property and, consequently, is within the County of Nansemond and, therefore, a marriage ceremony may be performed in the County Courthouse pursuant to a license issued by your office. (See Chapters 328 and 330 of the Acts of 1956). I am also of the opinion that a marriage may not be performed within the City of Suffolk (outside the County Courthouse) pursuant to a license issued by your office.

**MARRIAGE—Person Appointed to Perform Ceremony—If for City Has No Authority to Perform in County or in County Court House. F-223 (231)**

February 13, 1957.

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

This will reply to your letter of February 8, 1957, in which you advise that no resident of Nansemond County has been appointed by the Circuit Court of

Nansemond County to perform marriages in that county pursuant to the provisions of Section 20-25 of the Virginia Code, but that a resident of the City of Suffolk has been so appointed by the Circuit Court of the City of Suffolk pursuant to such statute. You inquire whether or not it would be permissible for the resident of the City of Suffolk, who has been appointed to perform marriages, to celebrate the rites of marriage in the Nansemond County Court House located in the City of Suffolk, upon the authority of a marriage license issued to non-residents by the Clerk of the Circuit Court of Nansemond County.

As stated in my letter of December 17, 1956, to which you refer, prospective parties to a marriage who are not residents of this State must obtain their marriage license from the clerk of the appropriate court located in the county or city "in which the marriage is to be solemnized", Code of Virginia (1950), Section 20-14, and a marriage pursuant to a marriage license issued to non-residents by the Clerk of the Circuit Court of Nansemond County may be performed in the Nansemond County Court House. However, Section 20-25 of the Virginia Code, pursuant to which residents are appointed to perform marriage ceremonies, prescribes:

"The circuit and corporation courts of this State, the clerks of which are authorized to issue marriage licenses, shall appoint one or more persons, resident in the county or city for which such court is held, to celebrate the rites of marriage *within the same* and upon any person, so appointed, giving such bond as is required of an ordained minister, shall make a like order as provided in Sec. 20-23 authorizing him to celebrate the rites of marriage *in such county or city, as the case may be*. Any order made under this section may be rescinded at any time by the court or by the judge thereof in vacation." (Italics supplied).

In light of the language italicized above, it would appear that a resident person appointed to celebrate the rites of marriage pursuant to the provisions of Section 20-25 of the Virginia Code may exercise this authority only in the county or city for which the court appointing him is held. I am, therefore, of the opinion that the resident of the City of Suffolk appointed pursuant to the statute under consideration would have no authority to perform marriage ceremonies in Nansemond County or in the Nansemond County Court House.

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#### MENTAL HYGIENE AND HOSPITALS—Authority to Collect \$65.00 Per Month from Person Legally Liable for Support of Patient. F. 383 (212)

January 29, 1957.

HONORABLE ALFRED E. H. RUTH, *Director*  
Division of Mental Hospitals

This is in response to your letter of January 24, 1957, inquiring whether the present statutory charge of \$65.00 per month may be assessed against a person legally liable for the support of an inmate who is financially able to pay \$65.00 per month and has failed to sign a contract to pay \$65.00 per month, but who has agreed to pay \$40.00 per month by affixing "Yes" to Item 10 of a 201 Form signed in 1949. It is noted that Form 201 is entitled "Questionnaire" and carries a notation on the back thereof "Do not make payment until you receive initial bill. Contract will be mailed at a later date." It is noted that Section 37-125.1, Code of Virginia, was amended by the General Assembly in 1956 requiring legally liable persons to pay \$65.00 per month instead of \$40.00 per month, as required by the law prior to its amendment.

It appears that Form 201 is a questionnaire rather than a contract, as it is so entitled, and makes reference to a contract that will be mailed at a later date. Your letter contains no copy of any subsequent contract signed by the legally liable person. Moreover, it is noted that there is no specified time limit contained

in Item 10 of the said Form. Accordingly, I am of the opinion that a legally liable person who appears to have only filled in Questionnaire Form 201 would be liable for the payment of \$65.00 per month under the law as amended, provided such person has financial ability to pay the increased amount as disclosed by an investigation made by the Department of Mental Hygiene and Hospitals.

**MENTAL HYGIENE AND HOSPITALS—Board May Enter into Agreement with Turnpike Authority as to Fill Dirt and Temporary Use of Land. F-248 (281)**

March 25, 1957.

HON. HIRAM W. DAVIS, M.D., *Commissioner*  
Department of Mental Hygiene and Hospitals

This will reply to your letter of March 19, 1957, in which you state that the Richmond-Petersburg Turnpike Authority has a force working on the grounds of the Central State Hospital and is in need of a quantity of fill to be used in the construction of the Richmond-Petersburg Turnpike, as well as an additional sixty foot area upon which to construct a garage for servicing machines employed in the construction work under discussion. The State Hospital Board is of the opinion that the hospital in question has the necessary fill to meet the request of the Authority and contemplates making the same available to the Authority. In exchange therefore, the State Hospital Board proposes to have certain grading and road construction, needed on the hospital grounds, performed by the Authority's construction force now at work upon the State Central Hospital premises. With respect to the additional sixty foot area required for the construction of the garage, it appears that the structure in question will be of a temporary nature and will ultimately be removed from the hospital grounds as it would be of no use to the hospital. If I have correctly assessed the import of your communication, it would seem that no difficulties are anticipated in reaching an agreement upon these matters, and you inquire whether or not the State Hospital Board may properly conclude such an arrangement.

In response to your inquiry, permit me to call your attention to the following provisions of Section 33-255.29 (a) and (g) and Section 33-255.42 of the Virginia Code, Acts of Assembly (1954), Chapter 705:

§ 33-255.29. (a) \* \* \* "All counties, cities, towns and other political subdivisions and, *with the approval of the Governor*, all public agencies and commissions of the Commonwealth, notwithstanding any contrary provision of law, are hereby authorized and empowered to lease, lend, grant or convey to the Authority at its request *upon such terms and conditions as the proper authorities* of such counties, cities, towns, political subdivisions, *agencies or commissions of the Commonwealth may deem reasonable and fair* and without the necessity for any advertisement, order of court or other action or formality, other than the regular and formal action of the authorities concerned, any real property which may be necessary or convenient to the effectuation of the authorized purposes of the Authority, including public highways and other real property already devoted to public use.

\* \* \* \* \*

"(g) The Commonwealth hereby consents, *subject to the approval of the Governor*, to the use of any other lands or *property owned by the Commonwealth*, including lands lying under water, which are deemed by the Authority to be necessary for the construction or operation of the project.

\* \* \* \* \*

§ 33-255.42. "This article, being necessary for the promotion of public safety, welfare, health, convenience and prosperity of the inhabitants



of the Commonwealth, shall be liberally construed to effectuate the purposes hereof, and the foregoing sections of this article shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby, and shall be regarded as supplemental and additional to powers conferred by other laws; \* \* \*." (Italics supplied.)

When the above quoted provisions of Section 33-255.29 of the Virginia Code are construed in accordance with the mandate enunciated in Section 33-255.42 of the Virginia Code, I am of the opinion that they confer sufficient authority upon the State Hospital Board, with the approval of the Governor, to consummate the proposals outlined in your communication. In this connection it would appear that the Richmond-Petersburg Turnpike Authority and the Commonwealth of Virginia, State Hospital Board, should enter into an agreement to the effect that the latter will make available to the Authority a specified amount of fill, in return for which the Authority agrees to cause certain road grading and construction to be performed on the grounds of Central State Hospital and that, in addition, the State Hospital Board will permit the erection of a temporary garage upon the premises of the hospital in question in return for which the Authority agrees to remove the structure upon completion of its work on the hospital premises. Upon obtaining the Governor's approval of such an agreement, the State Hospital Board would be authorized to proceed in accordance with the terms thereof.

#### MENTAL HYGIENE AND HOSPITALS—Clinic—May Not Operate Outside of State. F-248 (311)

April 30, 1957.

HONORABLE HIRAM W. DAVIS, *Commissioner*  
Department of Mental Hygiene and Hospitals

I acknowledge your letter of April 25, 1957, in which you state, in part, as follows:

"The Bristol Mental Health Clinic was recently organized. It is the purpose of the Clinic to serve Sullivan County and Bristol in the State of Tennessee and Washington County and Bristol in the State of Virginia.

"The governing bodies of each of the counties and cities have agreed to furnish \$3,000. In addition approximately \$5,000 has been raised by individuals. Because of the purpose of the Clinic to serve individuals located in both Virginia and Tennessee there must be an understanding and cooperation between both States in order to provide services to the citizens of both States.

"Specifically the question has been raised—can the above organization operate as a Clinic under the Department of Mental Hygiene and Hospitals of Virginia if the Clinic's quarters are located in the State of Tennessee, and serves both residents of Virginia and residents of Tennessee? An Act of the Tennessee Legislature of 1957 specifically authorized the use of Tennessee funds to be used in carrying out contractual agreements with other States on behalf of the mentally ill. Is there a similar statute for Virginia which would authorize the expenditure of Virginia funds to be used in a contractual agreement on behalf of the mentally ill?"

Section 37-38 of the Code of Virginia provides as follows:

"The Board is authorized to establish and maintain, in connection with the hospitals and colonies under its control, outpatient mental hygiene clinics, to be conducted at the institutions and elsewhere within their respective hospital districts, for the purpose of advising, counseling,

directing, and otherwise treating patients on furlough or parole from the hospitals and colonies. It may extend its clinic services to such former patients as may make application therefor and to such other persons in need of psychiatric advice, counsel and guidance as may be referred to it by a physician or by any public health or welfare agency."

I am of the opinion that under this section the territorial jurisdiction of the Board for the establishment and maintenance of outpatient clinics is restricted to this State. The section, it will be observed, provides that the services are "to be conducted at the institutions and *elsewhere within their respective hospital districts.*" I am not aware of any provision that would justify the conclusion that a hospital district could extend beyond the borders of the State. The provisions of the Appropriation Act relating to these clinics do not purport to authorize the expenditure of the funds except within the scope of the statute providing for such clinics.

In the absence of enabling legislation, I am of the opinion that the question presented by you must be answered in the negative.

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#### MENTAL HYGIENE AND HOSPITALS—Contracts for Charge for Support of Patients—New Statute of Limitations. F-248 (11)

July 10, 1956.

MR. H. M. BURROUGHS  
Supervisor of Reimbursement and Settlement  
Department of Mental Hygiene and Hospitals

This is in reply to your letter of July 5, 1956, which reads as follows:

"Section 37-125.1 of the Code was amended in two respects by the General Assembly of 1956.

"(1) The charge for the support of patients in our mental institutions was increased from forty to \$65.00 per month, effective July 1, 1956.

"(2) The time for recovery was extended from three to five years.

"We had as of July, 1956, approximately 1,700 \$40.00 accounts on our books. It is our purpose to mail each contractor, now paying \$40.00 a month, a new contract requesting that he sign and return to us agreeing to pay \$65.00 per month from July 1, 1956. These 1,700 contracts include persons who are legally liable and persons who have voluntarily agreed to pay \$40.00 per month. In the event those persons who are legally liable refuse to increase their payments from \$40.00 to \$65.00 per month they are required under Section 37-125.15 to furnish us with a financial statement in order that we may evaluate their ability to pay the statutory charge as of July 1, 1956.

"We should like a ruling from you as to whether or not this is the proper way to proceed in this matter in view of the fact we have 1,700 persons who have signed contracts to pay \$40.00 per month and now we are asking them to pay \$65.00 per month.

"In those cases where a fiduciary has agreed to pay \$40.00 per month for the support of his ward, and where it was found the estate was adequate to pay retroactive from date of admission, or for a period not to exceed three years back from a given date, fiduciaries have been requested, and have agreed to pay on the basis as outlined above. The writer discussed this matter with Mr. Tom Miller before calling on fiduciaries to make payments retroactive for three years back. And I am sure he will tell you it was, and I assume still is, his opinion that we are proceeding properly in this matter.

"Now that the period of recovery has been increased from three to five years, may we continue to request fiduciaries to make payments retroactive to date of admission, or for a period not to exceed five years

back from a given date? Your usual prompt and cheerful cooperation will be greatly appreciated."

I have examined the questionnaire which you submitted as a supplement to your letter. I understand that this form, when executed, constitutes the contract contemplated by § 37-125.5 of the Code. I can find nothing in this commitment which would prevent your department from requiring a revision of the monthly payments as of July 1st, 1956, in accordance with the amendment to § 37-125.1 raising the maximum charge for expenses from \$40.00 per month to \$65.00 per month. Therefore, I do not see any objection to the procedure outlined in your letter.

With respect to your second question, I am of the opinion that a fiduciary, with the approval of the court, may agree to pay the expense for the care, treatment and maintenance for any fixed retroactive period. However, up to June 29, 1956, such fiduciaries could not be required to pay such expenses that were more than three years past due. The amendment to § 37-125.1 increases the period of limitation for recovery to five years from the due date. This amendment, however, is prospective and not retrospective, since it contains no language indicating a contrary intent. *Duffy v. Hartsock*, 187 Va. 406; *American Jurisprudence*, Vol. 34, Article 29, at page 35. Therefore, any amounts that were past due for a period of three years at the time the amendment to § 37-125.1 became effective may not be recovered—that is, you cannot collect for any account which existed prior to June 29, 1953. Those accounts that were not past due for a period of three years on the effective date of the amendment may now be recovered within five years from the past due date. No monthly payments in excess of \$40.00 may be demanded for any month prior to the month of July, 1956.

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**MENTAL HYGIENE AND HOSPITALS—Duty to and Procedure for Transporting Patients to Hospital. F-148 (21)**

July 16, 1956.

HONORABLE ALFRED E. H. RUTH, *Director*  
Division of Mental Hospitals

This is in reply to your letter of July 12, 1956, in which you request my opinion as to the procedure to be followed in taking an indigent person committed to a State mental institution into custody and transporting such person to the State institution and how the cost and expenses connected with the same should be paid.

Under the provisions of Article 1 of Chapter 3 of Title 37, and particularly §§ 37-72 through 37-87 of the Code of Virginia, I am of the opinion that as soon as possible after a person is committed to a State mental institution he shall be taken into custody by the sheriff of the county or sergeant of the city wherein he is a legal resident, and then the sheriff or sergeant shall keep him in custody until he is turned over to the State mental institution or its duly authorized agent. The State mental institution is immediately notified under the provisions of § 37-69 of the Code of such commitment. It is then the duty of the State mental institution to, as soon as practically possible, send its agent to the sheriff or sergeant to take custody of the committed person and bring such person to said institution. Should it be impractical or impossible for the State institution to send its agent for the committed person, then the State institution should request and authorize the sheriff or sergeant to bring the committed person to the institution. The sheriff or sergeant would be entitled to reimbursement for the travel expenses incurred in conveying the committed person to the institution under the provisions of § 37-89.

In my opinion the Code of Virginia places this duty of transportation for committed persons to the State mental institutions upon the institution or, at its directive and request, upon the sheriff or sergeant who has custody of the committed person. I am of the further opinion that this procedure is applicable for all types of committed persons except those committed to the department for the criminal mentally ill.

**MENTAL HYGIENE AND HOSPITALS—House Conveyed to William and Mary College—How May Be Disposed of. F-248b (192)**

January 8, 1957.

HONORABLE THOMAS B. STANLEY  
Governor of Virginia

This is in reply to your letter of December 21, 1956, in which you refer to the deed executed by the State Hospital Board conveying certain property to the College of William and Mary, pursuant to the provisions of Chapter 248 of the Acts of 1944. You state that the property now occupied by the Commissioner of Mental Hygiene and Hospitals is located on the property conveyed by this deed.

You have asked my advice as to whether or not the State Hospital Board has the authority to dispose of the house now occupied by the Commissioner of Mental Hygiene and Hospitals in case the house should no longer be used for its present purpose or for other hospital purposes.

I have today received from President Chandler a copy of this deed and I find that it contains the following provision:

"The conveyance of the property hereinbefore described is subject to the right of the Eastern State Hospital to retain the possession and use of any part thereof, so long as the same may be needed for the purposes of the said hospital, and possession of, and the right to use, such part or parts of the said property as may not, in the judgment of the State Hospital Board, be needed for the purposes of the said hospital shall be given to the grantee herein from time to time by notice to the said grantee of the surrender of any rights herein retained with respect to any such part or parts of the said property as may not be so needed."

In my opinion the fee simple title to the property in question is vested in the College of William and Mary subject only to the provisions contained in the deed and quoted above. Therefore, the State Hospital Board does not have authority to sell, lease or otherwise dispose of the property.

In your letter of December 21, you stated: "If the Board does not have such authority, I shall appreciate your further advice as to what action would be necessary, by the General Assembly or otherwise, to permit disposition of the property without it reverting to the College of William and Mary."

I am not aware of any statute that would authorize the College of William and Mary to sell this property. It would appear, therefore, that if the College of William and Mary desires to dispose of the property it would first have to have an enabling act specifically authorizing such transaction.

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**MENTAL HYGIENE AND HOSPITALS—Judgment Against Patient—When Commonwealth's Attorney Should Bring Creditors Suit. F-72 (211)**

January 29, 1957.

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

This will reply to your letter of January 11, in which you advise that you have obtained a judgment on behalf of the Commonwealth of Virginia, Department of Mental Hygiene and Hospitals, against the estate of a patient in one of the State hospitals and his committee, pursuant to the provisions of Section 37-125.6 et seq. of the Virginia Code. You further advise that the committee, who is the Sheriff of Frederick County, has no funds in his hands as committee of the patient in question, and that there are many lien creditors of the incompetent debtor whose liens attached prior to his commitment to the State hospital.

You inquire whether or not it would be proper for you to bring a creditor's suit to enforce the judgment due the Commonwealth, praying that the real estate of the debtor be sold to satisfy the same, or should the Sheriff of Frederick County proceed to take and sell the property of the incompetent under a *fiery facias* in accordance with the provisions of Section 8-764 et seq. of the Virginia Code.

In response to your inquiry, I am of the opinion that it would be proper for you to undertake to enforce the lien of the judgment in question by instituting appropriate proceedings in a court of equity in accordance with the initial suggestion outlined in your communication. Were the Sheriff of Frederick County to attempt the sale of the incompetent debtor's property pursuant to Section 8-764 et seq. of the Virginia Code, it appears that a conflict of interests would result in the discharge by the sheriff of his duties as committee for the incompetent debtor and his duties as sheriff levying execution and selling the real estate of the debtor on behalf of the latter's creditors. I would, therefore, think it advisable for you to pursue the former course to enforce the judgment in question. Moreover, as there are many lien creditors of the incompetent whose liens attached prior to that of the Commonwealth, it would also seem advisable for you to determine, prior to the institution of any proceedings in a court of equity, whether or not there is sufficient real estate of the incompetent debtor to satisfy the judgment of the Commonwealth after prior liens have been discharged.

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**MENTAL HYGIENE AND HOSPITALS—Treatment Center for Children—  
Board May Purchase Land for. (355)**

June 11, 1957.

HONORABLE L. M. KUHN  
Special Assistant to the Governor

This is in response to your letter of June 7, 1957, in which you request my opinion of the proper interpretation to be given to a provision found in Chapter 60 of the Acts of Assembly of 1956.

This provision reads as follows:

"The Center shall be known as the Virginia Treatment Center for Children and shall be located on State-owned property within the vicinity of a State-supported medical teaching center."

You ask if the property must be owned by the State at the time of the enactment of the Act or whether the State Hospital Board has the authority to purchase property for the State upon which the Center will be constructed.

I am of the opinion that the term "State-owned property" as used in the Act means property owned by the State at the time the Center is constructed. Therefore, I feel that the State Hospital Board has authority to purchase property for this purpose.

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**MOTOR VEHICLES—Blood Test for Alcohol—Duty of Arresting Officer—  
Effect of Failure of Officer to Perform Duty. F-6 (69)**

August 31, 1956.

HONORABLE CARTER R. ALLEN  
Commonwealth's Attorney for the City of Waynesboro

This will reply to your letter of August 2, 1956, supplemented by that of August 25, 1956, in which you request an opinion involving the construction of Section 18-75.1 of the Code of Virginia (1950), as amended. This section of the Code provides as follows:

"In any criminal prosecution under Sec. 18-75, or similar ordinance of any county, city or town, no person shall be required to submit to

a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood, breath, or other bodily substance; however, any person arrested for a violation of Sec. 18-75 or similar ordinance of any county, city or town shall be entitled to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood or breath, provided the request for such determination is made within two hours of his arrest. Any such person shall, at the time of his arrest, be informed by the arresting authorities of his right to such determination, and if he makes such request, *the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness.*

"Only a physician, nurse or laboratory technician, shall withdraw blood for the purpose of determining the alcoholic content therein. The blood sample shall be placed in a sealed container provided by the Chief Medical Examiner. Upon completion of taking of the sample, the container must be resealed in the presence of the accused after calling the fact to his attention. The container shall be especially equipped with a sealing device, sealed so as not to allow tampering, labelled and identified showing the person making the test, the name of the accused, the date and time of taking. The sample shall be delivered to the police officer for transporting or mailing to the Chief Medical Examiner. Upon receipt of the blood sample, the office of the Chief Medical Examiner shall examine it for alcoholic content. That office shall execute a certificate which certificate shall indicate the name of the accused, the date, time and by whom the same was received and examined, and a statement that the container seal had not been broken or otherwise tampered with and a statement of the alcoholic content of the sample. The certificate, attached to the container shall be returned to either the police officer making the arrest, the department from which it came, or to the clerk of the court in which the matter will be heard.

"Upon the request of the person who was given a chemical test of blood or breath, the results of such test shall be made available to him.

"An amount not to exceed five dollars to cover the costs of taking blood and making an analysis thereof shall be taxed as part of the costs of the case.

"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 failure of the accused to request such a determination is not evidence and shall not be subject to comment in the trial of the case." (*Italics supplied*).

Specifically, you present the following questions in connection with the above quoted statute:

"1. If the accused signs a written statement at the time of his arrest to the fact that he does not desire a determination of the alcohol in his blood can he then change his mind within two hours of his arrest and demand that he be provided with such determination? This would appear to enable the accused to have a sobering-up time before the blood is withdrawn.

"2. If the accused makes a request for a chemical analysis, to what extent is the officer required by the Code Section to render full assistance?

"3. If as a result of some oversight by the officer the specific directives of Code Section 18-75.1 are not completely complied with does this defeat the Commonwealth in prosecuting the charge?"

Considering your inquiries in the order stated, I am of the opinion that if an accused requests a determination of the amount of alcohol in his blood within two hours of his arrest, he is entitled to the full assistance of the arresting authorities

in obtaining it, and I do not believe that an accused's right in this regard is affected by his prior indication that he did not wish such a determination. While the postponement of his request until the prescribed two hour period has almost lapsed may serve to increase the sobriety of an accused, it would appear that the Legislature was aware of this circumstance and refrained from placing the arresting authorities under any duty to render full assistance in connection with a long delayed request; however, it would also appear that the Legislature has determined that a delay of not more than two hours in making such requests will not materially influence the accuracy of a blood sample analysis in determining the amount of alcohol in an accused's blood at the time of the alleged offense.

The extent to which an officer is required by the statute in question to render "full assistance" in obtaining a determination of the amount of alcohol in the blood of an accused with reasonable promptness depends upon the circumstances of the particular case. While I believe it is manifest that the Legislature intended that a serious effort be made on behalf of an accused in this regard, I think it is equally clear that the provision in question does not require the arresting authorities to obtain such a determination at all costs, and I am, therefore, of the opinion that it is incumbent upon law enforcement officials in such instances to render all reasonable assistance in light of the circumstances and conditions prevailing at the time the accused's request is made. While no dispositive rule applicable to all situations may be enunciated, I believe that, generally speaking, "full assistance" would comprehend an attempt on the part of the arresting authorities to contact physicians, nurses or laboratory technicians in the vicinity who ordinarily engage in the practice of taking blood samples, an attempt to contact established laboratories or hospitals in the area having personnel qualified to draw blood, and an attempt to contact any physician, nurse or technician designated by the accused who is reasonably available. When arrangements for the taking of a blood sample have been made, I believe the authorities are under a further duty to escort an accused to the office, hospital, laboratory or other place where the blood taking service may be performed.

With respect to the effect which a failure of the arresting authorities to follow the specific directives of Section 18-75.1 would have upon an ensuing criminal trial, I am of the opinion that if such failure has the effect of depriving an accused of admissible evidence which would or might have been in his favor, a judgment of conviction could not stand and the prosecution would be dismissed. See, *Winston v. Commonwealth*, 188 Va. 386, 49 S. E. (2d) 611. On the other hand, in those instances in which it could be established that the evidence of which an accused claims to have been deprived would not have been in the accused's favor, a different question is presented. The critical consideration with respect to this latter question is whether or not a showing of specific prejudice is necessary before an accused is entitled to a ruling in his favor on a motion to dismiss the prosecution upon the ground that the accused has been deprived of his right to call for evidence in his favor. Constitution of Virginia, Section 8. This consideration was left open by the Supreme Court of Appeals of Virginia in the *Winston* case, the Court being of the opinion that, as the evidence of the results of a blood analysis in that case might have supported the accused's claim of innocence, such prejudice was manifest. See, *Winston v. Commonwealth*, *supra*, at 396, 49 S.E. (2d) at 616.

However, in *McHone v. Commonwealth*, 190 Va. 435, 57 S. E. (2d) 109, the Court held that the failure of the arresting authorities to take an accused before a judicial officer without unnecessary delay did not deprive the accused of the right to call for evidence in his favor in violation of Section 8 of the Virginia Constitution, as the evidence in that case tended to show that the defendant would not have attempted to obtain an analysis of his blood and thus had not been deprived of material evidence in his favor. I am constrained to believe that the decision in the *McHone* case lends some support to the view that if the Commonwealth can establish that the accused has not been prejudiced by a failure of an official to properly perform his statutory duty, such failure would not have

the effect of defeating the prosecution. As the Court observed in the *McHone* case, *supra*, at 444, 57 S. E. (2d) at 114:

"The conviction of a defendant does not lack due process of law merely because the Commonwealth's officer has failed to perform his legal duty in dealing with him after his arrest. \* \* \* His wrongful act should not deprive the Commonwealth of its right to enforce its penal laws *unless it is made reasonably clear that such wrongful act has in fact invaded the defendant's constitutional rights and deprived him of evidence material in his defense* which he would otherwise have obtained. The rights of the public, represented by the Commonwealth, and the rights of the citizen or both to be regarded and, if possible, kept in balance. \* \* \*

"In this case we hold that it has not been shown that the officers' acts *deprived the defendant of material evidence*, \* \* \*."

In view of the question reserved in the *Winston* case, I am unable to furnish a dispositive response to your concluding question. However, I am of the opinion that if it can be established that the failure of an official to perform his duties has not deprived an accused of evidence material to his defense which he would otherwise have obtained, such failure to act would not have the effect of defeating the Commonwealth's prosecution.

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**MOTOR VEHICLE—Blood Test for Alcohol—Duty upon Arresting Officer to Help Accused Secure. F-6 (68)**

August 30, 1956.

HONORABLE LIGON L. JONES

Commonwealth's Attorney for the City of Hopewell

This will reply to your letter of August 22, 1956, in which you request an opinion concerning the duties imposed upon law enforcement officials by the provisions of Section 18-75.1 of the Virginia Code with respect to their rendering full assistance in obtaining an analysis of the blood of one accused of a violation of Sections 18-75 of the Virginia Code, or a similar ordinance of any county, city or town. Specifically, you inquire whether or not such officials are required to make a physician, nurse or laboratory technician available to an accused free of charge to him at the time the sample is taken, and what effect a failure to obtain the accused's blood sample for analysis will have upon the ensuing criminal trial.

The initial sentence of Section 18-75.1 provides that any person arrested for a violation of Section 18-75 of the Virginia Code, or a similar ordinance of any city, county or town prohibiting the operation of motor vehicles by one who is under the influence of alcoholic intoxicants, shall be entitled to a determination of the amount of alcohol intoxicants, shall be entitled to a determination of the amount of alcohol in his blood at the time of the alleged offense, if a request for such determination is made within two hours of his arrest. The statute further provides:

"Any such person shall, at the time of his arrest, be informed by the arresting authorities of his right to such determination, and if he makes such request, *the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness.*" (Italics supplied).

Whether or not arresting authorities have rendered "full assistance" in obtaining a determination of the amount of alcohol in the blood of an accused with reasonable promptness depends upon the circumstances of the particular case. While I believe it is manifest that the Legislature intended that a serious effort



be made on behalf of an accused in this regard, I think it is equally clear that the provision in question does not require the arresting authorities to obtain such a determination at all costs, and I am, therefore, of the opinion that it is incumbent upon law enforcement officials in such instances to render all reasonable assistance in light of the circumstances and conditions prevailing at the time the accused's request is made. With respect to the costs of obtaining the blood sample of an accused for analysis, the Commonwealth incurs no liability therefor. Such costs are the primary responsibility of the individual making the request for a determination. However, the fourth paragraph of Section 18-75.1 provides that an amount not to exceed \$5.00 to cover the costs of taking blood and making an analysis thereof shall be taxed as part of the costs of the case, and this office has ruled that such costs, when collected, should be disbursed entirely to the physician, nurse or laboratory technician who took the accused's blood sample. I have also expressed the opinion that the court in which an accused is subsequently tried may allow a reasonable amount to such physician, nurse or laboratory technician out of the appropriation for criminal charges pursuant to Section 19-291 of the Virginia Code. A copy of each of these opinions is enclosed.

With regard to the second question presented in your communication, I am of the opinion that if the authorities have rendered full assistance in obtaining a determination of the blood alcohol content of an accused, but such determination has not been secured, no rights of the accused have been violated and the subsequent criminal trial would proceed upon such other relevant evidence as may be available to the respective parties. On the other hand, where an accused has requested an analysis of his blood to secure material evidence which might support his claim of innocence and the failure to obtain such an analysis is occasioned by the failure of the arresting authorities to properly perform their duty to render full assistance to an accused in this particular, it would appear that the prosecution should be dismissed. As the Supreme Court of Appeals of Virginia observed in *Winston v. Commonwealth*, 188 Va. 386, 396-397, 49 S. E. (2d) 611, 616, reversing a judgment of conviction and dismissing a prosecution for operating a motor vehicle while under the influence of intoxicants:

"It is true, as the Attorney General says, that the mere fact that an arresting officer fails to perform the statutory duty to bring the arrested person promptly before a judicial officer, to be dealt with according to law, or that the opportunity for applying for bail was improperly denied him, does not necessarily invalidate his subsequent conviction. *But where, as here, the effect of the failure of the arresting officer and of the custodian of the arrested person to perform their respective duties is such as to deprive a person of the constitutional right to call for evidence in his favor, his subsequent conviction lacks the required due process of law and cannot stand.*" (Italics supplied).

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**MOTOR VEHICLES—Blood Test for Alcohol—Effect of Sample Being Destroyed in Mails. F-6 (118)**

October 15, 1956.

HONORABLE GEORGE F. WHITLEY, JR., Judge  
Isle of Wight County Court

I am in receipt of your letter of October 11, in which you request an opinion upon the following situation:

"A person is arrested for violation of Sec. 18-75 (drunken driving), and, within two hours after his arrest, he requests a chemical analysis of his blood. A blood sample is taken in accordance with the statute and properly mailed to the Chief Medical Examiner, but the container is broken in the mail, and, for this reason, the Examiner is unable to

make any chemical analysis of the blood. Would the fact that the Defendant is unable to have the benefit of the analysis be a defense to the charge brought against him?"

I am of the opinion that your question should be answered in the negative. Where the failure to obtain the results of a blood analysis is occasioned by the failure of the Commonwealth's officers properly to perform the duties enjoined upon them by statute, the Commonwealth may be deprived of its right to proceed with the prosecution of an accused, where such defalcation on the part of the officials has the effect of depriving the accused of the right secured to him by Section 8 of the Constitution of Virginia to call for evidence in his favor. This question, together with others relating to the interpretation of Section 18-75.1 of the Virginia Code, has been recently considered by this office in an opinion to the Honorable Carter R. Allen, Commonwealth's Attorney for the City of Waynesboro, a copy of which is enclosed.

However, in the situation you present, it appears that all the requirements of Section 18-75.1 have been met and that the failure to obtain an analysis of the accused's blood was not the result of any departure from the statutory mandate on the part of the arresting authorities, but was occasioned solely by the breaking of the blood sample container after it was mailed to the office of the Chief Medical Examiner as required by law. As you will note from the enclosed opinion, Section 18-75.1 does not place upon the arresting officials the unqualified responsibility to obtain a blood sample analysis "at all costs", and as the instant situation involves no failure on the part of the arresting authorities to perform their legal duties in connection with the accused's arrest, I am of the opinion that no question of a violation of constitutional right is presented and that the inability of the accused to have the benefit of a blood analysis would not constitute a defense to the charge against him.

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**MOTOR VEHICLES—Blood Test for Alcohol—Results of Admissible Evidence in Civil Suit. (342)**

May 28, 1957.

HONORABLE L. H. SHRADER, *Judge*  
Amherst County Court

I am in receipt of your letter of May 25, in which you call my attention to the provisions of Sections 18-75.1 and 18-75.2 of the Virginia Code, which relate to the securing of a determination of the amount of alcohol in the blood of an individual charged with the offense of driving under the influence of alcoholic intoxicants. You specifically point out the terminal provision of Section 18-75.2 of the Code which provides that, upon proper identification of a vial, tube or container as being that in which the blood of an accused was placed, a copy of the Medical Examiner's certificate showing the results of the analysis of such blood sample "shall . . . be admissible in any court or proceeding as evidence of the facts therein stated and the results of the analysis of the blood of the accused". In light of this statutory provision, you state:

"I would like to know whether or not where a blood test has been made according to the provisions of 18-75.1, and a proper certificate has been issued upon the results of same, and the accused has been convicted in the criminal court of driving under the influence of alcohol, if in a civil proceeding growing out of an accident in which the accused was involved at the time he was driving drunk, the certificate showing the amount of alcohol in the blood of the accused who is the defendant in the civil case, can be introduced in evidence in the civil case?"

I am of the opinion that your inquiry should be answered in the affirmative. Following the decision of the Supreme Court of Appeals of Virginia in *Rodgers v. Commonwealth*, 197 Va. 527, in which case evidence of the results of a blood

alcohol analysis was held improperly admitted in the trial court for want of sufficient identification of the blood sample analyzed as being the blood taken from the accused, the General Assembly of Virginia amended Section 18-75.1 of the Virginia Code to insure the integrity of blood samples and their analyses by establishing a precise statutory procedure to be followed in connection with the taking of the blood sample of an accused, the labeling of such sample, the transporting of it to the Office of the Chief Medical Examiner, the execution by the Office of the Chief Medical Examiner of a certificate showing the results of the analysis of the sample and the returning to the proper party of such certificate attached to the container in which the accused's blood sample was originally placed. Having thus protected the rights of an accused against any prejudice which might arise by reason of any mishandling of his blood sample by those charged with the duty of obtaining a blood alcohol determination, the Legislature prescribed in Section 18-75.2 that the certificate showing the results of the analysis should, when duly attested by the Chief Medical Examiner, be admissible "in any court or proceeding" as evidence of the facts stated in the certificate and the results of the analysis of the blood of the accused. I am of the opinion that the above quoted phrase is sufficiently broad to authorize the admission of the Medical Examiners certificate in the situation you present.

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**MOTOR VEHICLES—Common Carrier—As Used in § 46-2 Means by Motor Vehicle. F-119 (8)**

July 10, 1956.

HONORABLE KOSSEN GREGORY  
Member of the House of Delegates

This is to acknowledge receipt of your letter of July 2 in which you request an opinion as to the applicability of Section 46-2 of the Code. In your letter you state in part:

"Does Section 46-2 necessarily mean that the common carrier referred to is a motor common carrier, or can Section 46-2 be construed to mean any common carrier, either railroad or motor?"

"The point in question is this: Are motor contract carriers of property bound by the rates and charges of motor common carriers of property as a minima, or can the rates and charges of either motor common carrier or rail common carrier be observed as minima under the provisions of Section 46-2?"

Section 46-2 reads as follows:

"Unlawful to transport for hire at less than rates fixed. It shall be unlawful for any person, firm or corporation, after receiving a license from the Commissioner as herein provided to transport any commodity in any territory at a less freight rate or charge than that fixed by the State Corporation Commission for a common carrier for the same commodity in the same territory." (Underscoring supplied)

This section was first enacted as Section 33½ of Chapter 342, Acts of 1932 commonly known as the Motor Vehicle Code of Virginia. Motor vehicles transporting persons and property for compensation have been long regulated by the State Corporation Commission; the first regulatory act being Chapter 161 Acts of 1923. On the same day that the Motor Vehicle Code was enacted (March 26, 1932) there was likewise enacted Chapter 359 (superseded by Chapter 129, Acts of 1936 and now Chapter 12, Title 56, Code of Virginia of 1950), and Chapter 360 regulating and imposing a tax on common carriers by motor vehicles.

Section 3 of Chapter 359 vested the State Corporation Commission with the power to fix rates, fares and charges for the use of motor vehicle carriers. In Section 5 of that chapter, we find the following language:

"All rates, fares, charges and classifications made by any motor vehicle carrier and/or prescribed, fixed and approved by the Commission shall comply with the provisions of this Act." (Underscoring supplied)

It is significant that the terms "fix and fixed" are used in this chapter and not in Section 56-35 of the Code, which places upon the State Corporation Commission the power to prescribe rates for transportation companies (including railroads).

It should be noted here that the act of which Section 46-2 was originally a part consolidated into one Code, the various statutes concerning motor vehicles. No reference in this act (Motor Vehicle Code) was made to the statutes regulating public service companies including railroads.

In ascertaining the meaning of the term "a common carrier for the same commodity in the same territory" as used in Section 46-2, the provisions of Chapters 359 and 360 of the Acts of 1932 must be read. The term "common carrier" in these two acts mean common carrier by motor vehicle.

Obviously the term "common carrier" in Section 46-2 could not apply to all types of common carriers. Necessarily the rates applicable to these different common carriers vary. Hence, the term "common carrier" in this section applies to one type of operation. Certainly the legislature intended that it (the term "common carrier") apply only to common carrier by motor vehicle. Otherwise it would be impossible to enforce this section. In the early days, the common carrier by motor vehicle primarily served territories not served by railroads and this is largely true today. There is nothing to indicate that Section 46-2 was placed in the statute as a benefit to the railroad companies. Whereas it is logical to believe that it was placed there to protect the enfranchised common carrier by motor vehicle from competition from an unfranchised carrier by motor vehicle that could compete with the licensed carrier on the same routes in the same location. Had the legislature intended that the term "common carrier" apply to railroads in this statute, I believe that it would have spelled the term out in a more definite fashion.

For the foregoing reasons, it is the opinion of this office that the term "common carrier" in Section 46-2 of the Code means common carrier by motor vehicle and; therefore, contract carriers by motor vehicle are bound by the rates or tariffs published and accepted by the State Corporation Commission for common carriers by motor vehicles under the provisions of Section 56-316 of the Code of Virginia of 1950.

#### MOTOR VEHICLES—Driving with Improper Brakes—What Person Should Be Charged with. F-353 (323)

May 10, 1957.

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

This is to acknowledge receipt of your letter of May 2 in which you ask my opinion on two questions which will be answered seriatim.

- (1) Please advise me whether a motorist who operates a motor vehicle on a highway in violation of § 46-283 of the Code would automatically violate § 46-200, paragraph 1 and thereby be guilty of reckless driving.

Section 46-209 reads in part as follows:

"A person shall be guilty of reckless driving who shall: (1) Drive a vehicle when not under proper control or with inadequate or improperly adjusted brakes upon any highway of this state; \* \* \*

Section 46-283 reads as follows:

*"Brakes.—Every motor vehicle when operated upon a highway shall be equipped with brakes adequate to control the movements of and to stop such vehicle, and such brakes shall be maintained in good working order and shall conform to regulations provided in the three succeeding sections."*

Although the wording of these statutes are very similar, I do not believe that violation of Section 46-283 would constitute an automatic violation of Section 46-209. Section 46-283 provides that a motor vehicle operated must be equipped with brakes of a certain standard of efficiency. The standards are outlined in three succeeding sections. If the brakes are not maintained at such a standard, the person operating the vehicle is guilty of Section 46-180, the penalty of which is that of a misdemeanor. Whereas a person who violates the provisions of Section 46-209 by driving a vehicle with inadequate or improperly adjusted brakes is guilty of reckless driving, but the penalty therefor is set forth in Section 46-210 greater than that prescribed for a simple misdemeanor.

- (2) I am particularly interested in knowing whether or not a police officer may charge a motorist with violating § 46-283 of the Code, if he feels the brakes are not in compliance with §§ 46-284, 46-285 and 46-286, or should he charge every motorist who operates a motor vehicle with defective brakes, with reckless driving.

It is my opinion that an officer should charge a motorist with violating Section 46-283 if he believes that the brakes are not in compliance with Sections 46-284, 46-285 and 46-286 and he should not charge every motorist who operates a motor vehicle with defective brakes with reckless driving. It is contemplated that the reckless driving charge should be made where the offense is of greater gravity than the offense of driving vehicles in violation of Section 46-283. The line of demarcation is very difficult to prescribe. It must be largely determined by considering the facts and circumstances of each case.

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### MOTOR VEHICLES—Drunk Driving—Conviction of Does Not Deprive Person Right to Operate Equipment off Highways and Private Roads. F-353 (62)

August 24, 1956.

HONORABLE J. ADAIR MOORE  
Substitute Judge of the Warren County Court

Mr. Lamb, Commissioner of the Division of Motor Vehicles, has referred to me your letter of August 20 and requested my opinion on the question raised therein.

As I understand the question you raise is whether a person who has been convicted of drunken driving under the provisions of Section 18-75 of the Code, is thereby deprived of his right to operate certain types of motor equipment, off the public highways or on private roads.

Your attention is invited to Section 18-77 which reads in part as follows:

*"The judgment of conviction if for a first offense 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 the judgement of conviction thereof." (Under-scoring supplied)*

Section 18-75, which was a part of the original act along with Section 18-77, provides that:

"No person shall drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol \* \* \* \*"

Hence, the term "any such vehicle" as used in Section 18-77 would therefore mean those vehicles enumerated in Section 18-75. The words "engine or train" appear in both sections. The word "conveyance" appears only in Section 18-77 and the words "car, truck, automobile and other motor vehicle" appear only in Section 18-75. This office has heretofore ruled that the driving of a farm tractor under the influence of alcohol is in violation of Section 18-75 (Opinion of the Attorney General 1952-1953, Page 148) and that a person can commit the offense of drunk driving by operating an automobile on private property (off the public highways) (Opinion of the Attorney General 1950-1951, Page 198). To apply the literal meaning to these sections, a person would be deprived of his right to operate any type of engine, even a stationary engine. It is obvious that the term engine means locomotive and certainly does not mean a stationary engine. A reasonable rather than a literal interpretation must be given this statute. The purpose of this statute is to protect persons from using the highways and public transportation facilities propelled by mechanical means.

The deprivation of the right to drive or operate such vehicles is to deny the person convicted the right to operate same upon the public highways and upon private roads which are open to the public. This statute does not mean that after a person has been convicted of drunken driving that he could not lawfully operate a tractor in his fields or a bulldozer, shovel, crane or other device. As long as he does not drive or propel the same on public highways or private ways normally frequented by vehicular traffic he is not violating the statute.

It is, therefore, my opinion that the conviction under Section 18-75 of the Code of Virginia of 1950 does not deprive the person convicted of his right to operate those types of motor driven equipment that have no relevancy to transportation and where the operation is confined to areas off the public highways and private ways (not normally used by vehicular traffic).

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### **MOTOR VEHICLES—Farm Equipment Being Transported Exempt from Width and Length Limits. F-192 (131)**

October 23, 1956.

HONORABLE JOHN PAUL CAUSEY  
Commonwealth's Attorney for King William County

This is to acknowledge receipt of your letter of October 17th in regard to Section 46-326 of the Code, 1950.

I shall answer your question seriatim.

QUESTION 1, quoting from your letter:

"The question has arisen in my mind with respect to construction of this statute as to whether it is broad enough to relieve from the restrictions as to width farm machinery which is being transported upon the highway from a distributor to a retailer or a retailer to a customer or whether it should be properly construed to relate to farm machinery in use which is required to be brought upon the highway temporarily."

ANSWER:

Section 46-326 of the Code reads as follows:

"No vehicle shall exceed a total outside width, including any load thereon, but excluding the mirror required by § 46-294, in excess of ninety-six inches, excepting that a farm tractor shall not exceed one

hundred and eight inches and excepting, further, that the limitations as to size of vehicles stated in this section and §§46-327 to 46-330 shall not apply to implements of husbandry temporarily propelled or moved upon the highway nor to fire fighting equipment of any county, city, town, or fire fighting company or association. Provided, however, that upon application by the board of supervisors or other governing body of any county having a population of more than five thousand inhabitants per square mile, the State Highway Commission may, by general or special order, which may be amended or rescinded from time to time, permit the operation of passenger buses in excess of ninety-six inches but not exceeding one hundred and two inches on certain highways or parts thereof designated by the Commission in such county and 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 pursuant to § 46-198. The Commissioner of the Division of Motor Vehicles is hereby authorized to register and license such buses." (Underscoring supplied)

This section is designed to promote safety on the highways and is found in Chapter 4, Title 46, which chapter deals with the regulation of traffic. There is no relevancy between it and Section 46-45 as the latter section provides for the exemption from registration and is found in Chapter 3, Title 46, which chapter deals with registration and licensing of motor vehicles. In this section there is no limitation as to the type of use to which the implements of husbandry are made when they are being propelled or moved on the highway. The exemption embraces such implements which are being propelled by their own power and also those that are being transported in other vehicles or being towed. To limit the use of the highways to move such equipment while it is being employed strictly in farming operations would virtually render impossible the delivery of same to the user (vendee).

I am, therefore, of the opinion that the language found in Section 46-326 exempting the implements of husbandry from the limitation as to size of vehicles stated in that section and in the four succeeding sections include implements of husbandry which are being transported from the highway to a retailer or a retailer to a customer.

QUESTION 2, quoting from your letter:

"The other question to be considered is construction of the word 'temporarily.' Can this be construed from any standpoint as a limitation on distance or time of such movement?"

ANSWER:

As you state, nothing moving on the highway merely moves temporarily. However, I think the term "temporarily" here is used in counter-distinction to the terms "regular," "customary" and "permanent." In other words, when a vehicle which is registered and licensed and is used constantly on the highways such a use is not temporary within the meaning of this statute. I think the term "occasionally" would have been more adequate to express the obvious legislative intention of the statute. There is nothing in the statute to indicate any limitation as to distance.

I am, therefore, of the opinion that the term "temporary" used in the statute cannot be construed as a limitation of distance or time of such movement.

**MOTOR VEHICLES—Local Licenses—Locality May Require All Personal Property Taxes Assessed Against Vehicle to Be Paid before Issuance. F-149 (226)**

February 7, 1957.

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

I am in receipt of your letter of February 1, 1957, in which you state that the Board of Supervisors of King George County have enacted a county motor vehicle license tax ordinance. You inquire whether or not the Board of Supervisors has the power to provide "that before obtaining such local auto license any past due personal property taxes must be paid".

In response to your inquiry, permit me to call your attention to the terminal paragraph of Section 46-64 of the Code of Virginia (1950), as amended. The first three paragraphs of this statute authorize counties, incorporated cities and towns to charge license fees and taxes upon certain vehicles and imposes certain limitations upon the power therein conferred. At the 1956 session of the General Assembly, an unnumbered paragraph was appended to this section of the Code by Chapter 570 of the Acts of Assembly (1956), which paragraph prescribes:

"In addition to the powers hereinabove conferred, any such towns, city, or county may require that no vehicle so taxable shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the vehicle to be licensed, which personal property taxes have been assessed or are assessable against such applicant, have been paid."

In light of the above quoted language, I am of the opinion that the Board of Supervisors of King George County may appropriately condition the issuance of county motor vehicle licenses upon a satisfactory showing that personal property taxes assessed or assessable upon the vehicle to be licensed have been paid.

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**MOTOR VEHICLES—Local Licenses—Portion of Revenue Collected May Be Placed in School Fund. (344)**

May 31, 1957.

HONORABLE CURTIS A. SUMPTER  
Commonwealth's Attorney  
Floyd County

This is in reply to your letter of May 29, 1957, which reads as follows:

"Reference is made to Section 46-64, current Code of Virginia (the county motor vehicle licensing authority), and the following language therein contained: 'The revenue derived from all county license taxes and fees imposed under the authority of this section shall be applied to general county purposes, \*\*\*.'

"In the event a county adopts such an ordinance and deposits the license taxes and fees collected thereunder in the general county fund, may the Board of Supervisors subsequent thereto order an equivalent amount of money transferred from the general county fund to the school fund, or to any fund?"

The section referred to in your letter prescribes that the revenue derived thereunder by a county "shall be applied to general county purposes." Section 22-127 of the Code, in addition to authorizing the local governing body of a county to make a general appropriation from the general fund in lieu of making a school levy under § 22-126 of the Code, authorizes such governing body to "appropriate, either tentatively or finally, *from any funds available*, such sums as in its judg-



ment may be necessary or expedient for the establishment, maintenance and operation of the public schools in the county \*\*\*.”

In view of this provision, I am of the opinion that such funds could be appropriated by the Board of Supervisors for school purposes.

Of course, an appropriation could be made out of this fund for any purpose for which appropriations may be made for general county purposes.

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**MOTOR VEHICLES—Local Licenses—Portion of Revenue Derived from County Licenses Can Not Be Given to Town. F-149 (209)**

January 29, 1957.

HONORABLE R. H. PETTUS  
Commonwealth's Attorney  
Charlotte County

This is in reply to your letter of January 23, 1957, which reads as follows:

“The Board of Supervisors of Charlotte County have requested that I write you and obtain your opinion concerning the laying of a tax on motor vehicles in Charlotte County, and to give your opinion particularly on the following question:

“In your opinion, is it proper for the Board of Supervisors of this county to lay a tax on all motor vehicles in the county and to reimburse the several incorporated towns a certain percentage of the tax derived from the sale of licenses to the residents within the several incorporated towns?

“It appeared to me that it would be improper for the county board to levy a tax for money which would be partly spent by a municipality.”

The provisions of § 46-64 of the Code provide the answer to your inquiry. You will note that it is provided in paragraph (3) that:

“The revenue derived from all county license taxes and fees imposed under the authority of this section shall be applied to general county purposes \* \* \*.”

Under this language it would seem that the Board of Supervisors would not have authority to allocate a percentage of the revenue thus obtained to the towns. Since the statute prescribes that the revenue shall be applied to the general county purposes, such funds would go into the general fund of the county and be expended for general county purposes only.

You, of course, will advise the Board that it cannot impose such tax on residents of towns who are required by the town to purchase town tags.

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**MOTOR VEHICLES—Local Licenses—Publication of Notice—Required if Truck Licenses Are to Be Reduced. F-60a (256)**

March 7, 1957.

HONORABLE W. EARLE CRANK  
Commonwealth's Attorney  
Louisa County

This is in reply to your letter on March 6, 1957, which reads as follows:

“The Board of Supervisors of Louisa County has an ordinance requiring County license on motor vehicles. Under the ordinance as passed, the amount of the license for trucks is graduated and determined by the capacity of the truck. The Board now desires to make the County

license uniform at \$10.00 on all trucks and desires to amend the original ordinance in this respect by passing a resolution making the license tax \$10.00 on all trucks and thereby amending the present ordinance.

"This would mean a reduction in the price of the truck license.

"I am writing to ask if, in your opinion, it will be necessary to publish the proposed amendment before and after its adoption in order to make it legally effective."

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

"The above provisions of this section shall apply to ordinances other than those hereinafter set forth. No county governing body shall adopt or amend any ordinance imposing a county capitation tax, county motor vehicle license tax, county license tax on professions or businesses, including wholesale merchants, or county tax on amusements, except under the conditions hereinafter set forth, and any such ordinance adopted without compliance with such conditions shall be void and of no effect:

"(a) Any such ordinance may only be introduced at a regular meeting of the board and may not be adopted prior to the second regular meeting following introduction and only then if not less than sixty days have elapsed between introduction and adoption;

"(b) The proposed ordinance shall be published once a week for four successive weeks in a newspaper published in the county, or if there be none such, in a newspaper having general circulation in the county; and

"(2) The proposed ordinance shall be posted at the front door of the county courthouse and at each post office in the county."

I am assuming that your county does not come within the provisions of § 15-10 of the Code and, therefore, the provisions of § 15-8, quoted above, would apply.

I am of the opinion that in order for the proposed ordinance to be valid, the requirements of paragraphs (a), (b) and (c) should be followed strictly. Under these provisions, I am of the opinion that one publication of the proposed ordinance for four successive weeks is required. The proposed ordinance will, of course, have to be posted at the front door of the courthouse and at each post office in the county. You will note that the statute refers to *proposed* ordinance. Therefore, I think the statute contemplated that the ordinance be published and posted as required by this section after its introduction and before its adoption.

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#### **MOTOR VEHICLES—Local Licenses—Revenue Collected Must Be for General County Purposes—Portion May Not Be Given Towns. F-149 (351)**

March 4, 1957.

HONORABLE E. GARNETT MERCER, JR.  
Commonwealth's Attorney  
Lancaster County

I acknowledge receipt of your letter of February 28, 1957, in which you refer to § 46-64 of the Code and state that there are three incorporated towns in your county in which a motor vehicle license tax of \$3.00 is being imposed. You state that these towns are willing to abandon this source of revenue so that the county can assess a license tax of \$10.00 on all vehicles in the county (including the towns) provided the county will return to each incorporated community a sum of money equivalent to \$3.00 for each vehicle owned within the respective towns.

You state, in part, as follows:

"The question now presented is whether or not the County Board of Supervisors can legally pay over from revenue realized from such a

tax on motor vehicles a sum equivalent to \$3.00 for each motor vehicle owned within the three towns."

Section 46-64, in so far as applicable to your county, provides that "The revenue derived from all county license taxes and fees imposed under the authority of this section shall be applied to general county purposes \* \* \*." This language, in my opinion, is a prohibition against the plan suggested by your Board. Such an appropriation by the Board would not, in my judgment, be for "general county purposes."

I am of the opinion that no such authority may be implied by the provisions of either § 15-8 or § 15-778 of the Code, and I am unaware of any method by which the plan may be carried out.

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**MOTOR VEHICLES—Local Licenses—Tribal Indians Living on Reservation—Not Subject to. (372)**

June 26, 1957.

HONORABLE JOHN PAUL CAUSEY  
Commonwealth's Attorney of King William County

This is to acknowledge receipt of your letter of June 6 in which you request my opinion on certain questions which will be answered seriatim.

Are tribal Indians resident upon these two reservations (Pamunkey and Mattaponi) required to have a County motor vehicle license under the ordinance adopted by the Board of Supervisors of King William County requiring such licenses for motor vehicles owned and operated by residents of King William County?

The Indians who live on the Pamunkey and Mattaponi Indian Reservations are remnants of a tribe in the dominions of Powhatan (*The Cradle of the Republic* by Lyon G. Tyler, pp 16, 18 & 19). As early as 1658 these Indian lands were confirmed to them by the Governor, the Council, and the Grand Assembly of Virginia. I find in Henning's Statutes at Large 1657-1658, Volume 1, pages 467 and 468 the following act relative to the confirmation of Indian land:

"Where ase manie complaints have bin brought to this assemlie touching wrong done to the Indans, in taking away their land and forcing them into such narrow streights and places that they cannot subsist either by planting or hunting, and for that it may be feared they may be justly driven to despaire and to attempt some desperate course for themselves which inconveniences though they have bin endeavored to be remedied by former Acts of Assemlie made to the same purpose, yet not withstanding manie English doe still intrench upon the said Indians' land which this Assemlie conceiving to be contrary to justice and the true intent "of the English plantations in this country, whereby the Indians might by all just and faire waies, be reduced to civillity and the true worship of God, *have therefore thought fitt to ordeine and enact and bee it hereby ordained and enacted*, that all the Indians of this collonie shall and may hold and keep those seates of land which they now have and that no person or persons whatsoever be suffered to intrench or plant upon such places as said Indians claime or desire until full leave from the Governour and Councill or Com'rs. for the place; yet this act not to be extended to prejudice those English which and now seated with the Indians' former consent vules, vppon further examination before the Grand Assemlie cause shall be found for so doing and the said Com'rs shall be accomptable before the Governour and Councill and the Grand Assemlie if any wrong or injurie be done to the Indians contrary to the intent of the act. And be it further enacted, that the Indians as either now or hereafter shall want seates to live on, or shall

desire to remove to any places void or vntaken vpp they shall be assisted therein, and order granted them, for confirmation thereof, and no Indians to sell their lands but at quarter courtes. And those English which are lately gone to seate neare the Pamunkie and the Chickomoninyes on the north side of Pamunkie river shall be recalled and such English to choose other seates else where, and that the Indians as by a former act was granted them, shall have free liberty of hunting in the woods without the English fenced plantations, these places excepted between York river and James river and between the Black water and Manakin towne and James river, and no pattent shall be adjudged valid which hath lately passed or shall pass contrary to the sense of this act. Nor none to be of force which shall intrench vppon the Indians' land to their discontent without expresse order for the same."

The legislature of Virginia has frequently appointed trustees to lease the surplus lands of these tribes and empowered the trustees to prosecute actions against persons trespassing thereon. Henning's Statutes at Large 1756-57, Volume 7, Page 298; Henning's Statutes at Large, Volume 8, Page 433; Volume 12, page 406. As late as March 8, 1894 the legislation appointed trustees for the Mattaponi tribe, Acts 1893-94, page 973 and by Acts of 1895-96, page 847, an appropriation for the benefit of the Indians who sustained losses due to an epidemic of smallpox.

Chapter 25, Code of 1819 (from an Act of December 24, 1792) provides in part:

\* \* \*

"3. The Indians tributary to this government shall be well secured and defended in their persons, goods and properties; and whosoever shall defraud or take from them their goods, or do hurt or injury to their persons, shall make satisfaction and be punished for the same according to law, as if the Indian sufferer had been a citizen of the Commonwealth."

This office has held the members of the tribes of the Pamunkey and Mattaponi Indians are exempt from all taxes, state, local and otherwise (Annual Report of the Attorney General 1917, page 160; for 1918, page 86).

The general law on the question of taxing Indians is found in 42 Corpus Juris Secundum, Page 819:

"Although Indians maintaining tribal relations within the Indian country *cannot be taxed by a state*, yet, where a reservation within a state has been extinguished and the Indians have taken allotments of land in fee simple and become citizens, their personal property is subject to taxation." (Underscoring supplied)

In the case of *George F. Custalow v. Commonwealth*, the Circuit Court of King William County decided October 10, 1919 (Recorded E. F. 20) and held that an Indian residing on the reservation of the Mattaponi Tribe was not subject to taxation either by the County of King William or the Commonwealth of Virginia, but that the personal property owned by an Indian off the reservation was liable to taxation.

These Indians are citizens of Virginia as Section 1-18 of the Code of 1950 provides and among other things that all persons born in this State are citizens thereof. The same provision appeared in Section 62 of the Code of 1919 and in the Code of 1887 as Section 39. Indians are now citizens of the United States (Sec. 201, Act of October 14, 1940 (54 Stat. 1138) 8 U.S.C. 601). By Sections 4968 Code of 1919, Section 4090, Code of 1887 they were made subject to the criminal laws of the Commonwealth. (Omitted from the Code of 1950.)

Of course, these Indians, as conquered people, are subject to any restrictions or conditions imposed by the conqueror. However, the Commonwealth of Virginia has always recognized the rights of these people as Indians and prohibited their molestation. The fact that the Commonwealth now has bestowed citizenship

upon them does not divest them of the rights reserved unto them under the early acts of the General Assembly. The Commonwealth has never taxed them. In the *Custalow case, supra*, Custalow was an Indian, operating a store on the reservation. The State had assessed him with a mercantile license tax. Manifestly most of his trade was with the people on the reservation, but his store was apparently open to the general public as well. This tax was for the privilege of operating a mercantile business. I believe there is an analogy between this merchants license tax which was required of all persons operating a mercantile business and the county motor vehicle license tax which is required now to be paid by all residents of King William County. Are these Indians who reside on these reservations residents of King William County within the meaning of the tax law? If the Commonwealth (as decided by the Circuit Court in the *Custalow case, supra*) cannot require the Indians who live on these reservations to pay State license taxes or personal property tax on the property located thereon, what authority would the County have to exact of them a license tax on their motor vehicles garaged (kept) on said reservations?

A person is civilly liable for a license tax and his property may be distrained for the collection thereof. Hence, a forced collection of this license tax from one of these Indians would cause an entry by public officers on the reservation and the sale of such property on the reservation as may be owned by the offending Indian. This would necessarily result in an infringement upon their person and "an intrenchment upon the Indians' land to their discontent" which is contrary to the spirit if not the letter of the early acts of the General Assembly of Virginia. Until the General Assembly has specifically authorized that they (tribal Indians) be taxed no attempt should be made to collect taxes from them.

You state that the proceeds of the County motor vehicle license tax is used for general county purposes and there is no specific appropriation made by the Board of Supervisors for the benefit of these Indians living on the reservation.

It is, therefore, the opinion of this office that the members of the Pamunkey and Mattaponi Indian tribe who maintain homes and residences upon such reservations are not liable for the license tax required under the County Ordinance on motor vehicles so long as such motor vehicles are garaged (kept) on said reservations, although such vehicles may be driven on the public highways of King William County.

Would it constitute an unlawful discrimination to amend the ordinance so as to exempt from its provisions vehicles owned and operated by tribal Indians resident on one of these two reservations, even though such vehicles were operated on the public highways of the state and county outside the geographic limits of the reservation.

I am of the opinion that the ordinance could be amended in such a manner. This would not be an unlawful discrimination as it would be a re-affirmation of the general policy of the Commonwealth not to tax the tribal Indians. As a matter of fact, I think it would be a very good idea that the exemption be spelled out in the ordinance.

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**MOTOR VEHICLES—Local License—Validity Period of Initial Issuance Less Than 12 Months—Amount Must Be Proportionately Less Than State License—County May Appoint Agents to Sell Outside of County. F-60a (234)**

February 15, 1957.

HONORABLE J. ALFRED TYLER

Commonwealth's Attorney of Charles City County

This is to acknowledge receipt of your letter of February 12 in which you request my opinion concerning the validity of certain provisions of an ordinance imposing a license tax on motor vehicles which the Board of Supervisors of Charles City is contemplating adopting.

I will answer the questions raised seriatim:

First, it has been suggested that the ordinance be made effective on July 1, 1957, with a license tax then payable on automobiles of \$10, being the maximum yearly tax allowed by statute, for the year commencing April 1st and terminating March 31st each year.

Your attention is invited to Section 46-64 of the Code which reads in part as follows:

"\* \* \* Such license fees and taxes shall be charged, imposed and assessed in such manner, on such basis, and for such periods, as the proper authorities of such counties, incorporated towns and cities may determine, and subject to proration for fractional periods of years in the same manner as prescribed in § 46-176, but the amount of the license fees and taxes imposed by any such county, city or town on any class of vehicles shall not be greater than the amount of license tax imposed by the State on vehicles of like class. \* \* \*" (Underscoring supplied)

As the Board of Supervisors has the authority to determine the periods in which the taxes may be imposed they could fix the time that the tax year commences and the time the tax year ends, but under no circumstances can the tax on any class of vehicles be greater than the tax imposed by the state on the vehicles of a like class. Therefore, if the ordinance requires the payment of a \$10 license (on privately owned passenger automobiles) on July 1, 1957 and the validity of the license terminates on March 31, 1958 then the Board would in effect be charging a greater fee than that charged by the State.

I am, therefore, of the opinion that the ordinance in the form suggested would be invalid.

However, I see no reason why the Board could not adopt as the tax year a period beginning July 1 and ending June 30. In any event, the ordinance must be drawn in such a way as to prorate the license fee in the same manner as prescribed in Section 44-176.

It is my opinion that if the ordinance became effective July 1, 1957, the greatest amount that could be imposed as a license tax on privately owned passenger vehicles for the period commencing July 1, 1957 and ending March 31, 1958 would be \$7.50.

Second, it has been proposed that no license be obtainable for a vehicle until applicant produces satisfactory evidence of payment of personal property taxes upon such vehicle assessed or assessable against him, as provided in the 1956 amendment.

Section 46-64 also provides in part:

\* \* \*

"In addition to the powers hereinabove conferred, any such town, city, or county may require that no vehicle so taxable shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the vehicle to be licensed, which personal property taxes have been assessed or are assessable against such applicant, have been paid."

In view of this language in the statute. I am of the opinion that it would be proper to include in the ordinance appropriate language which would require the applicant to produce satisfactory evidence that he has paid his personal property tax on the vehicle, as a prerequisite, obtaining the county license therefor.

Third, is that under the rules for the administration of the ordinance the Treasurer be authorized to designate an agent outside the County as well as agents in the County for the convenience of the public in securing the tags.

I can see no reason the ordinance could not provide that the Treasurer be authorized to designate an agent outside the county as well as agents in the county as long as such a practice would be for the convenience of the public.

**MOTOR VEHICLES—Local Licenses—Where Paid—Owner Lives in County Business in City—Automobiles Used by Salesmen. F-149 (215)**

January 30, 1957.

HONORABLE EDW. H. RICHARDSON  
Commonwealth's Attorney of Roanoke County

This is to acknowledge receipt of your letter of January 25 in which you state in part:

"Mr. A is exclusive owner and operates a business known as the B Company. His office is located in the City of Roanoke. His home is in Roanoke County. He owns six automobiles which he supplies his salesmen for the purpose of soliciting business over the State of Virginia and portions of West Virginia. The certificates of title to these automobiles are in the name of B Company, R.F.D. 4, Roanoke, Virginia (which is in Roanoke County), and the automobiles are assessed for taxation on the personal property books of Roanoke County.

"These automobiles are not used for the purpose of delivering any merchandise, but are used only by the salesmen to carry samples and catalogs for the purpose of making sales.

"Under these circumstances, should Mr. A be required to purchase local automobile tags from the City of Roanoke or the County of Roanoke?"

As you know, Section 46-64 of the Code of Virginia of 1950, authorizes the counties, cities and towns to charge license fees upon motor vehicles. Section 46-65 places limitations upon the imposition of such fees. That section states in part as follows:

"No such county, city or town shall impose any taxes or license fees upon any vehicle on which similar taxes or fees are imposed by the county, city or town of which the owner of such vehicle is a resident; nor shall more "than one county, city or town impose any such license fee or tax on the same vehicle. Nor shall any such county, city or town impose taxes or license fees upon any vehicle belonging to any person who is not a resident of such county, city or town, when used exclusively for pleasure or personal transportation and not for hire, or for transporting into and within such county, city or town, for sale in person or by his employees of wood, meats poultry, fruits, flowers, vegetables, milk, butter, cream or eggs produced or grown by him, and not purchased by him for sale, or for both such purposes, provided that such vehicle is not used in said county, city or town in the conduct of any business or occupation other than those herein set out." (Underscoring supplied)

The first sentence of the above quoted section precludes a city or county from imposing a fee upon an owner who is a nonresident thereof and has licensed his vehicle in another locality. The next sentence which sets forth further prohibition in regard to imposing the license tax, only applies in those cases where the person who is not a resident of the city or county which imposes the license tax and is a resident of a county, city or town which does *not* require that the license fee be paid. I think that this sentence means that where a nonresident of a city or county engages in business in that county or city, but resides in another city or county, which *does not* require the *license fee*, then the city or county in which the business is operated can exact from such an owner of a vehicle a license tax.

I am, therefore, of the opinion that the vehicles owned by Mr. A, who is a resident of Roanoke County, should be licensed in that county and if this is done, then no other city or county in which the vehicles are used to operate the business of Mr. A can exact from him the license fees of these vehicles.

**MOTOR VEHICLE—Operator's Licenses—Revocation—Mandatory if Person  
Convicted of Driving in Excess of 75 m.p.h. F-149 (233)**

February 15, 1957.

HONORABLE FRANK N. WATKINS  
Commonwealth's Attorney of Prince Edward County

This is to acknowledge receipt of your letter of February 9 in which you request my opinion as to whether action of the court in suspending operator or chauffeur licenses under Section 46-209.1 is discretionary or mandatory.

Section 46-209.1 reads as follows:

"A person shall be guilty of reckless driving if he operates a motor vehicle in this State at a speed in excess of seventy-five miles per hour. When any person shall be convicted of reckless driving under this section, then in addition to any other penalties provided by law, except in those cases for which revocation of license is provided under § 46-416 of the Code, the operator's or chauffeur's license of such person shall be suspended by the court or judge for a period of not less than sixty days nor more than six months. In case of conviction the court or judge shall order the surrender of the license to the court where it shall be disposed of in accordance with the provisions of § 46-195.1." (Underlining supplied)

It is noted that the word "shall" is used in this statute rather than the word "may." The language contained in this section is very similar to the language in Sections 46-416, 46-416.1 and 46-416.2. These sections empower the Commissioner of the Division of Motor Vehicles to revoke driving licenses and it has long been considered that the action of the Commissioner in these statutes is mandatory. Section 46-215.1 also empowers the court to suspend the driving license on a second conviction of speeding. This office has held that such action of the court under that section is mandatory. (Opinion in letter to the Honorable John H. Powell dated August 9, 1954, Report of the Attorney General 1954-1955, Page 162.) (Also see opinion in letter to the Honorable William M. McClenney dated October 8, 1952, Report of the Attorney General 1952-1953, Page 248.) The same reasoning would apply here.

Now Section 46-210 authorizes the court to suspend driving licenses of persons convicted of reckless driving up to a period of six months. In that section, the word "may" is used and it has been the consistent practice of the courts for over many years to consider this power as discretionary. Hence, if the legislature had intended that the suspension authorized in Section 46-209.1 should be discretionary upon the courts, I believe different language would have been used. The use of the word "shall" rather than "may" implies that the legislature intended that such action of the court be mandatory.

I am, therefore, of the opinion that where a person is convicted under Section 46-209.1 that it is the mandatory duty of the court to suspend the license of such person for a period of at least sixty days, and direct the person so convicted then and there to surrender his driving license to the court.

**MOTOR VEHICLES—Ordinances—Authority for and Provisions of County  
Paralleling Reckless and Drunk Driving. F-60a (142)**

October 30, 1956.

HONORABLE ROBERT C. GOAD  
Commonwealth's Attorney of Nelson County

This is to acknowledge receipt of your letter of October 27 in which you state that the Board of Supervisors of Nelson County desire to pass an ordinance prohibiting the driving under the influence of intoxicants, pursuant to Section 15-553 of the Code and also to pass a reckless driving ordinance permitted under the provisions of Section 46-204 (3) of the Code.



I shall answer your questions seriatim:

(1) Can both of the above be passed in the same ordinance, or will two ordinances be necessary?

ANSWER: The Board of Supervisors have the authority under Section 15-8 (5) of the Code to adopt such ordinances. The provisions of Section 15-553 simply complements the provisions of Section 15-8 in that respect. Section 46-204 is a definite prohibition against the counties from adopting ordinances concerning matters covered by that section of the Motor Vehicle Code regulating traffic. There has been added to this section from time to time exceptions to this prohibition. One of these exceptions was inserted in 1956 which you have reference. I see no reason why a single ordinance could not be adopted to cover both of these matters. In fact, I understand the cities and larger counties have adopted traffic codes including all such matters. Be that as it may, I would advise the adoption of two separate ordinances for the sake of clarity.

(2) In the case of the penalty to be prescribed in the ordinance to be passed under Section 46-204 (3), can the Board prescribe all of the penalties set forth in Section 46-210 of the Code, and if not, which of these penalties can the Board prescribe?

ANSWER: Section 46-204, as amended and re-enacted by the Acts of 1956, reads as follows:

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

"But nothing in this section shall apply to the authorities or the ordinances, rules and regulations adopted by the authorities of any county which adjoins a city within or without this State having a population of one hundred and twenty-five thousand or more, provided such county has a trial justice; provided that nothing in this section shall apply to the authorities or the ordinances, rules and regulations adopted by the governing body of any county which adjoins two cities of the first class and within the boundaries of which said county is located any United States military camp, and provided, further, that the fines collected for the violation of such ordinances shall be paid to the State when the arrest is made by an officer of any division of the State government. Nor shall this section be construed as prohibiting the governing body of any county, by ordinance duly adopted, from prohibiting any or all of the following acts on the highways in such county outside the limits of any incorporated town wherein traffic is regulated by town ordinances:

"(1) Backing a vehicle unless such movement can be made with safety and without interfering with other traffic; or

"(2) Operating any vehicle upon the highways in such county without giving his full time and attention to the operation of said vehicle; or

"(3) Operating any vehicle upon the highways in such county and failing to keep the vehicle under proper control at all times.

"No ordinance so adopted shall impose any penalty in excess of the penalty prescribed in this chapter for reckless driving." (Underscoring supplied).

The last two sentences of this statute were added in 1956.

So long as the penalties fixed by the Board of Supervisors do not exceed those as outlined in Section 46-210 the same are valid. It is discretionary on the Board of

Supervisors to determine the extent or quantum of such penalties.

(3) Can the violation of the ordinance to be passed under Section 46-204 (3) of the Code be classified as reckless driving in the ordinance?

ANSWER: Reckless driving is defined in Sections 46-208, 46-209, 46-209.1 and 46-209.2 of the Code. The examination of these sections does not disclose that any of the offenses which are listed in Section 46-204 constitute reckless driving.

I am, therefore, of the opinion that regardless of how the ordinances of the Board of Supervisors may be framed, the offenses could not be classified as reckless driving.

(4) Does Section 46-204 authorize the Board of Supervisors of Nelson County to pass an ordinance prohibiting the acts set forth in subsections 1, 2 and 3 therein, and providing for the fines received from convictions thereunder to be paid into the county treasury, in cases handled by the sheriff's office?

ANSWER: The 1956 amendment added another exception to this section which excluded from the operation of the section, county ordinances bearing on the topics enumerated in subsections 1, 2 and 3 thereof. Such ordinances, if adopted, would not be applicable within the corporate limits of incorporated towns which have adopted ordinances regulating traffic. The section further provides "that the fines collected for the violation of such ordinances shall be paid to the State when the arrest is made by an officer from any division of the State government." The sheriff and his deputies are county officers. Although, they have the authority and the duty to enforce state law, I do not believe they are officers of any division of the State government within the meaning of this section. Therefore, the fees that are imposed and collected as result of the violation under such ordinances adopted by the Board of Supervisors should be paid into the County Treasury.

(5) To what extent does Section 46-204 repeal Section 46-198?

ANSWER: The two sections are not in conflict. Section 46-198 is a grant of power to cities and towns empowering them to adopt ordinances regulating traffic not in conflict with Chapter 4 of the Motor Vehicle Code (Title 46). Section 46-204 is a limitation on the power of the county authorities which prohibits them from adopting ordinances concerning matters covered by Chapter 4 of the Motor Vehicle Code. Since the original enactment of this section, there have been exceptions added, of which the 1956 amendment is one.

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#### **MOTOR VEHICLES—Reckless Driving—Suspension of License and Punishment. (352)**

June 10, 1957.

HONORABLE MARK D. WOODWARD, *Judge*  
Page County Court

This is to acknowledge receipt of your letter of June 4. I shall answer your inquiries seriatim.

"Is it your opinion that upon conviction of reckless driving under sections 46-209.1 and 46-209.2 of the Code that the use of the word 'shall' with respect to suspension is mandatory and the Court must order suspension?"

It is my opinion that it is the mandatory duty of the Court to suspend driving licenses of persons that are convicted of the violations of these two sections. Furthermore, the court must require the surrender of the licenses forthwith by the defendant in accordance with the provisions of Section 46-195.1 of the Code.

"Upon conviction under the provisions of either of the above sections, am I correct that the punishment, other than suspension of license, is

found in section 46-18 and not 46-210, as the latter specifically refers to convictions 'of reckless driving under section 46-208 or section 46-209'."

It is my opinion that the punishment prescribed in Section 46-18 should be applied when the defendant has been found guilty of the violation of Section 46-209.1 or 46-209.2.

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**MOTOR VEHICLES—Registration—Trucks Hauling Coal—How Licensed.**  
(335)

May 22, 1957.

HONORABLE C. H. COMBS, *Judge*  
Buchanan County Court

This is to acknowledge receipt of your letter of May 16, 1957 in which you inquire whether or not owners of trucks that haul coal should be licensed on a for-hire basis or on a private basis.

The two questions which you raised will be answered seriatim. I quote from your letter:

First: "In one such case an employee of Turner Brothers Construction Company was given a summons for operating a truck owned by Turner Brothers on a road construction job for the State contracted to Turner Brothers, and the truck has never been used by anyone other than Turner Brothers."

The truck is owned by the partnership and used for partnership purposes on a construction job and is not operated for compensation. I take it that the vehicle is registered in the name of Turner Brothers. This operation in my opinion does not require the vehicle to be licensed as a "for-hire carrier" (Section 46-162 of the Code.) In any event, if the vehicle has three or more axles then it must be registered with the State Corporation Commission and the owner must obtain from the authority a registration card and a marker. This however is effected at a nominal cost.

Second: "The main question in my mind is where two partners operate a mine, and one partner owns a truck which hauls partnership coal for which he is paid on a tonnage basis by the partnership.

"Since each of the partners own half the coal would the partner be required to have for hire tags to haul this coal of the partnership."

It would seem from what you state that the truck is owned by one partner *individually* and he uses the truck to transport partnership property, to-wit: coal, for which he is paid compensation from partnership funds. If you will examine Section 46-152 of the Code, you will note that the presence on a motor vehicle of property which is not owned by the owner of a vehicle or operator is *prima facie* evidence of the truck being operated for compensation. Therefore, if the vehicle is not owned by the partnership and the owner thereof transports coal for which he receives compensation, he is transporting the coal for compensation and *must pay* the "for-hire license" fees as set forth in Section 46-162. If the vehicle is registered in the name of the partnership, then the carrying of coal for the partnership does not constitute transportation for compensation. The vehicle must be registered in the name of the owner (Section 46-42). I believe that the registration of the vehicle has a definite bearing on this question. The individual who may be a partner is a separate and distinct entity from the partnership while he uses his own vehicle to transport coal for the partnership for which he is paid compensation. Of course, if the vehicle is owned and registered in the name of the partnership and is used to transport coal owned by the partnership then it is not being used for compensation. Under the circumstances you narrated, I am of the opinion that the truck must be licensed as a "for hire carrier" under the provisions of Section 46-162 of the Code of Virginia as amended by the Acts of Virginia of 1956.

**MOTOR VEHICLES—Revocation of License—Whether Person May Drive Pending Appeal from Judgment of County Court. F-149 (202)**

January 17, 1957.

HONORABLE MARTIN F. CLARK  
Commonwealth's Attorney of  
Patrick County

This is to acknowledge receipt of your letter of January 10, 1957 in which you call my attention to the apparent conflicts in two opinions rendered by this office on the question of whether a person may be prosecuted for driving during the period of suspension under Section 46-347.1 of the Code when he drives a vehicle during the ten day period in which he is permitted to note an appeal from the judgment of a county court.

You point out that my opinion dated March 23, 1956 is in conflict with the opinion issued December 1, 1955. You ask me whether the opinion of March 23, 1956 supercedes the opinion of December 1, 1955 or whether the language of the statutes involved causes a different result to be reached. I beg to advise that it was my intention that the opinion of March 23, 1956 supercede the earlier opinion. It is unfortunate that a reference to that effect was not included in said letter.

In view of the language of Section 46-195.1 of the Code (enacted in 1952), apparently the suspension of the driving license by the court remains in full force and effect until an appeal is perfected to the circuit or corporation court. After such an appeal is perfected and where the time of suspension does not coincide with the appeal time then thereafter the person may lawfully drive on the highways and cannot be convicted under the provisions of Section 46-347.1.

**MOTOR VEHICLES—School Zone—City May Adopt Ordinance Paralleling State Statute. F-60a (279)**

March 22, 1957.

HONORABLE JAMES M. THOMSON  
Member House of Delegates

This is in reply to your letter of March 21, 1957, in which you request my opinion as to whether or not the City of Alexandria may create a fifteen mile per hour school zone speed limit on a city street in front of a private school.

Section 46-198 of the Code of Virginia provides that the councils of cities and towns may adopt ordinances to regulate the operation of motor vehicles in such cities and towns not in conflict with the provisions of Title 46 of the Code of Virginia.

Section 46-212 provides, in part, as follows:

"Any person who shall \* \* \*

"(2) Drive upon any highway in this State any motor vehicle at a speed in excess of;

"(a) Fifteen miles an hour when passing a school during recess or while children are going or are leaving school, provided that markers be placed on the highways so as to indicate the location of such school; \* \* \* shall be guilty of a misdemeanor and upon conviction shall be punished in accordance with the provisions of § 46-18."

I am of the opinion that the City of Alexandria may adopt an ordinance paralleling the above quoted statute and, as you can see from the above provisions of the Code of Virginia, no distinction is made as to whether the school is a public school or a private school. I am of the opinion that an ordinance paralleling this statute should make no distinction as to whether the school is public or private.

**MOTOR VEHICLES—Violations—Over 75 m.p.h. Constitutes Reckless Driving—Punished Accordingly. F-353 (136)**

October 24, 1956.

HONORABLE CHARLES E. EARMAN, JR.  
Commonwealth's Attorney of Rockingham County

This is to acknowledge receipt of your letter of October 19 in which you request my opinion on the following question:

"Whether Section 46-209.1 of the 1950 Code of Virginia, as amended, provides any punishment other than the suspensions of the operator's or chauffeur's license as Section 46-210 makes no reference to said Section?"

Section 46-209.1 is a part of Chapter 4, Title 46 which provides that operating motor vehicles at a speed in excess of seventy-five miles per hour constitutes reckless driving. This section does not provide any specific penalty nor is there any reference therein to Section 46-209 which defines "reckless driving" nor to Section 46-210 which prescribes the penalty for reckless driving.

Section 46-18 provides 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 a fine of not less than five dollars nor more than one hundred dollars, or by imprisonment in jail for not less than one nor more than ten days, or by both such fine and imprisonment; for a second such conviction within one year such person shall be punished by a fine of not less than ten dollars nor more than two hundred dollars or by imprisonment in jail for not less than one nor more than twenty days, or by both such fine and imprisonment; for a third or subsequent conviction within one year such person shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars or by imprisonment in jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

(Underscoring supplied)

I believe that this section (46-18) is applicable to Chapter 4. The word "to" is not necessarily an exclusive term and has been defined to mean "through," 86 Corpus Juris Secundum, Page 910. Also note 50 on Page 814 *ibid*. It may be a word of inclusion (Black's Law Dictionary, Third Edition, Page 1735).

It is, therefore, my opinion that where a person is convicted of reckless driving in violation of Section 46-209.1 the penalties provided in Section 46-18 are applicable.

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**MOTOR VEHICLES—Violations—Procedure Followed by Town Officers in Making Arrest. F. 353 (66)**

August 28, 1956.

HONORABLE PAUL A. HOLSTEIN  
Mayor and Trial Justice

This is to acknowledge receipt of your letter of August 22, 1956 in which you state in part:

"The Police Department of the Town of Lexington follows the following procedure in the case of motor vehicle accidents:

"If an officer of the department is not a witness to an accident, and receives competent information from a person who witnessed the accident, he issues a summons which is served

on the operators of the respective vehicles. If the persons involved are residents, the officer does not place them under arrest, but subsequently a warrant is issued and the case is heard on the warrant.

"Recently, this procedure has been challenged."

Your attention is invited to Section 46-193 of the Code which reads in part as follows:

*"Arrest for misdemeanor; release on summons and promise to appear; admitting to bail; violations.*—Whenever any person is arrested for a violation of any provision of this title punishable as a misdemeanor the arresting officer shall, except as otherwise provided in § 46-194, take the name and address of such person and the license number of his motor vehicle and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice, such time to be at least five days after such arrest unless the person arrested shall demand an earlier hearing, and such person shall, if he so desires, have a right to an immediate hearing or a hearing within twenty-four hours at a convenient hour, and before a court having jurisdiction under this title within the city, town or county wherein such offense was committed. Such officer shall thereupon and upon the giving by such person of his written promise to appear at such time and place forthwith release him from custody.

"Any person refusing to give such written promise to appear shall be taken immediately by the arresting or other police officer before the nearest or most accessible judicial officer or other person qualified to admit to bail having jurisdiction under this title."

I assume that there is a Town Ordinance which substantially parallels this section of the Code and your Police Department follows the procedure outlined therein. In the practice that you outlined, the investigating officer does in fact arrest the party by detaining him. I see nothing in the act that would require that the arresting officer be an actual eye witness to the accident. He is a witness, however, because he observes certain facts as a result of his investigation. Inasmuch as he is the arresting officer, he has the authority to issue a summons in accordance with the statute. This is the procedure that is followed throughout the Commonwealth in motor vehicle accident cases. I understand that a practice has been adopted by the State Police that where a non-resident is involved that a summons is not issued, but the accused is then and there taken before a Justice of the Peace and dealt with according to law.

Section 46-194 of the Code outlines certain instances where the issuing of a summons is not mandatory, namely, where there is injury or death resulting from the accident, where the person is charged with reckless driving, and where the arresting officer has good cause to believe that the person has committed a felony, and lastly, where the arresting officer believes that the person may disregard the summons.

It is my opinion that the procedure that your police officers follow is in substantial compliance with the statute and it is therefore proper and legal.

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**MUNICIPAL COURTS—Police and Civil Justice Courts in Cities between 10,000 and 45,000 Population May Use Either New or Old Name for Court. F-136c (214)**

January 30, 1957.

HONORABLE H. B. GILLIAM  
Civil and Police Justice  
Petersburg, Virginia

This will reply to your letter of January 28, 1957, in which you inquire whether you may designate your court as the Municipal Court of the City of Petersburg

under the applicable provisions of Title 16.1, Chapter 3, of the Virginia Code, or whether former police courts and civil justice courts in cities having a population of 10,000 or more but less than 45,000 are merely referred to as municipal courts for the purposes of this new law, which was passed at the last session of the General Assembly of Virginia and undertakes a fundamental reorganization of courts not of record in the Commonwealth.

Pertinent in connection with the inquiries presented in your communication are Sections 16.1-52 and 16.1-55 of the Virginia Code which, respectively, prescribe:

"Sec. 16.1-52. Municipal courts in cities of ten thousand to forty-five thousand.—In each city having a population of ten thousand or more but less than forty-five thousand there shall be a municipal court which *may* be called the civil and police court of such city, and for each such court there shall be a judge who shall be called the judge of such court. Such judge shall at the time of his appointment have practiced law in this State for at least five years." (Italics supplied).

"Sec. 16.1-55. Municipal courts in cities and towns continued; the judges thereof; how courts designated.—With the exception of certain courts of limited jurisdiction hereinafter mentioned and the juvenile and domestic relations courts, the courts below the jurisdictional level of courts of record existing in cities and towns on July 1, 1956, are continued as *municipal courts of the respective cities and towns*, and the judge or justice presiding over each such court shall thereafter be known as the judge thereof. However, any such court existing on that day *may* continue to use the name or designation under which it is operating, but the provisions of this title with respect to municipal courts shall be applicable thereto. Courts below the jurisdictional level of courts of record hereafter created and given general jurisdiction in cities and towns shall likewise be classified as municipal courts, and shall be subject to the applicable provisions of this title." (Italics supplied).

In light of the language italicized above, I believe it would be appropriate for you to designate your court as the Municipal Court of the City of Petersburg. Although the statutes relating to municipal courts do not contain an express provision (similar to Section 16.1-36 of the Code relating to county courts) that such courts shall be called Municipal Courts, I am constrained to believe that the provision in Section 16.1-55 continuing courts below the jurisdictional level of courts of record in existence on January 1, 1956, as municipal courts of the respective cities and towns, coupled with the authorization for such courts to continue to use the designation under which it is operating on that date, may fairly be interpreted to mean that the courts in question are permitted to continue their former designation but may also be denominated as Municipal Courts from and after the effective date of the new law.

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**NATIONAL GUARD—Armories—Local Police Officers Have Jurisdiction Over. F-225-a (272)**

March 19, 1957.

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

This is in reply to your letter of March 15, 1957, in which you request my opinion as to whether or not the police officers of the Town of Bedford have authority to police the Bedford National Guard Armory.

The police officials of the Town of Bedford have jurisdiction over this property, and the Department of Military Affairs of the Commonwealth of Virginia are desirous that they exercise this jurisdiction, provide police protection for the property and police functions conducted thereon.

**NATIONAL GUARD ARMORIES—Municipally Owned—State Funds May Be Used to Repair under 1956 Appropriations Act. F-225 (165)**

November 28, 1956.

BRIGADIER GENERAL SHEPPARD CRUMP  
Adjutant General of Virginia

This is in response to your letter of November 20, 1956, inquiring whether or not funds listed (in Item 522) of the 1956 Appropriation Act of the General Assembly of Virginia "For construction and renovation of municipally owned armories" \$50,000 may be expended for the renovation and repair of armories owned exclusively by the cities of the State with the Department of Military Affairs having no interest in either the buildings or the grounds on which they are erected.

Kindly refer to my letter of August 25, 1955, to Major General Waller, pertaining to the same subject under Item 760 of the 1954 Appropriation Act, providing "for construction of armories with Federal aid" and concluding that the then existing legislation, including Section 44-126, Code of Virginia, appeared to preclude the expending of funds for repair, rehabilitation and expansion of such armories exclusively owned and controlled by the cities.

It is deemed significant that the 1954 Appropriation Act made no mention of municipal ownership and that the 1955 opinion was rendered after the enactment of such legislation, and that thereafter the corresponding item enacted in the 1956 Appropriation Act specifically provided that the appropriation was "For construction and renovation of *municipally owned* armories". (Underscoring added). Accordingly, I am of the opinion that the 1956 Appropriation Act—Item 522—gives authority for the expenditure of the sum in question for armories owned exclusively by the cities and in which the Department has no financial interest.

**NATIONAL GUARD—Courts Martial—Authority to Enter Private Property and Compel Attendance of Accused. (258A)**

March 12, 1957.

BRIGADIER GENERAL SHEPPARD CRUMP  
The Adjutant General of Virginia

This is to acknowledge receipt of your letter of February 27, 1957 in which you ask whether officers or enlisted men of the National Guard of Virginia acting under orders of courts-martial may enter upon private property and force the attendance of an accused person before the court-martial. I assume that the "accused person" is a member of the National Guard.

Please be advised that § 44-50 of the Code of Virginia controls in these cases. You have referred to § 44-47 which gives to the presidents of general and special courts-martial and to summary court officers the power to issue warrants to arrest accused persons and bring them before the court for trial as well as certain other powers spelled out in that section. §§ 44-49, 44-50, 44-51 and 44-53 further implement the grant of power embodied in § 44-47. In particular, § 44-50 prescribes the method by which the processes and sentences of the military courts shall be executed.

In my opinion, the procedures prescribed in § 44-50 will apply except when the particular unit involved is called to active duty. Although the president of the court issues the warrant of arrest, the warrant "shall be executed by any sheriff, deputy sheriff, sergeant or police officer into whose hands the same may be placed for service or execution \* \* \*". It would appear that the answer to your question must be in the negative and that officers or enlisted men acting under the order of a court-martial cannot enter upon private property and force the attendance of an accused person before the court, but rather this function must be performed by one of the named civilian law enforcement officials. Of course,



when the unit is at summer camp or on active duty for training at its armory or elsewhere, the usual military procedures for apprehension of an individual member of the Guard without a warrant would apply where such apprehension may be made at or near the designated post or place of duty.

**NATIONAL GUARD—Prerequisites for Person before Placed on Retired List. F-225a (143)**

October 30, 1956.

BRIGADIER GENERAL SHEPPARD CRUMP  
The Adjutant General of Virginia

This will acknowledge receipt of your letter of October 26, 1956, which I quote as follows:

"Enclosed is a copy of the Military Laws of Virginia, and attention is invited to Article 13, Section 44-119—Retired list of officers and enlisted men of the Virginia National Guard—page 27, which provides that: \* \* \* Officers shall be commissioned on the retired list of the Virginia Militia, unorganized, in their respective grade, or the highest grade held by them in the military service of the State or United States, except in the case of officers who have to their credit fifteen years or more of service. Such officers may, in the discretion of the Commander-in-Chief, be retired with commission in their respective grade or the next higher service grade to the highest rank held by them in the military service of the State or United States. \* \* \*

"The question has arisen as to whether an officer retired from the Armed Forces of the United States (Army, Navy, Marine Corps, or Air Force) with the grade of Colonel or higher, who has not been a member of the Virginia National Guard since he was an enlisted man or junior officer, and most of whose service has been in the Armed Forces of the United States rather than the Virginia National Guard, is entitled under the provisions of this law to be placed on the retired list of the Virginia National Guard with advanced rank above that held in the Regular Service but not in the Virginia National Guard.

"The opinion of the Attorney General would be appreciated."

Section 44-119 of the Code of Virginia provides also:

"\* \* \* or any officer or enlisted man in the Virginia national guard who shall have served for at least ten years as an active member in the Virginia national guard, or ten years computing the period served in the Virginia national guard and the period in which he shall have served in the active service of the army, navy or marine corps of the United States, may, upon his own application through the regular military channels to the commander-in-chief be placed upon the retired list of the Virginia national guard; provided, that any officer or enlisted man who may have received an honorable discharge from the services of the Virginia national guard, after having served at least ten years therein, computing as a part of such service any active service rendered as a member of the army, navy or marine corps of the United States, may, upon his application, in like manner, be placed upon the retired list."

I am of the opinion that, in order to be placed on the retired list of the Virginia National Guard under the above conditions as set out by you, an officer must be a member in the Virginia National Guard. The mere fact that an officer retired from the service of the United States has been at one time a member of the Virginia National Guard does not make him eligible to be placed on the retirement list of the Virginia National Guard upon his honorable discharge from the service of the United States.

**NATIONAL GUARD—Warrant of Court Martial—Duty of Sheriff or Sergeant. F-136 (116)**

October 12, 1956.

HONORABLE EDGAR L. WINSTEAD  
City Sergeant  
Roanoke, Virginia

This is in reply to your letter of October 11, 1956.

You state that, pursuant to a warrant issued by Andrew H. Thompson, Major, 116th Infantry, Virginia National Guard, you arrested and placed in jail a citizen of Roanoke in order that he might be tried by a summary court-martial. You ask whether you are required to deliver a citizen arrested under such a warrant to a court-martial trial held in the Armory Building of the National Guard of Roanoke.

Section 44-47 of the Code of Virginia authorizes the issuance of such warrants by presidents of courts-martial and summary court officers.

Section 44-50 of the Code reads as follows:

"All processes and sentences of any of the military courts of this State shall be executed by any sheriff, deputy sheriff, sergeant, or police officer into whose hands the same may be placed for service or execution, and such officer shall make return thereof to the officer issuing or imposing the same. Such service or execution of process or sentence shall be made by such officer without tender or advancement of fee therefor, but all costs in such cases shall be paid from funds appropriated for military purposes. The actual necessary expenses of conveying a prisoner from one county in the State to another, when the same is authorized and directed by the Adjutant General of the State, shall be paid from the military fund of the State upon a warrant approved by the Adjutant General."

I am of the opinion that pursuant to this section you are required to deliver up a prisoner arrested under such a warrant as stated above to the proper authority for trial by court-martial. I call to your attention, however, the fact that all costs in such cases are paid from funds appropriated for military purposes.

I might suggest that you could call upon the officer issuing the warrant and request that he designate members of the National Guard as Military Police for the purpose of transporting such persons to a court-martial trial, or that he might request Military Police of the regular Army to do the same.

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**NUISANCES—Removal of Sand so as to Harm Another May Constitute. F-247 (225)**

February 7, 1957.

HONORABLE WM. CLARK COULBOURN  
Commonwealth's Attorney  
Mathews County

This is in reply to your letter of February 4, 1957, in which you state that several private owners of beach property on the shore of the Chesapeake Bay are disposing of such large quantities of sand from their property that they are destroying the natural barriers formed by the beaches against the tidal flow of the water, thus permitting the tidal waters to overflow onto the property of other land owners farther inland. You request my opinion as to whether or not there is any law under which the removal of sand, which results in the condition outlined above, is prohibited as a criminal offense.

The only possible criminal statutes which this might be prosecuted under is Chapter 1 of Title 48 of the Code of Virginia. This chapter concerns the

creation and existence of a public or common nuisance. To my knowledge, the removal of sand in this manner has never been held to constitute a public or common nuisance in this State. I think it could be strongly argued that removal of sand to such an extent that it harms the property of others could constitute a public or common nuisance. However, this is a question that would have to be passed upon by the special grand jury and by the circuit court of the county.

### OPTOMETRIST—Payment of Rental by—Based on Percentage of Sales of Optical Supplies and Goods. F-207 (313)

May 3, 1957.

DR. CARL A. KAUFFMAN

Secretary-Treasurer

State Board of Examiners in Optometry

I am in receipt of your letter of April 18, 1957, in which you request an opinion upon the legality of a contract for the operation of an optometry and optical service on the Concourse of the Pentagon Building, proposed to be entered into by the United States of America, Department of Defense Concessions Committee, and an optometrist licensed by the Virginia State Board of Examiners in Optometry. Specifically, you inquire whether or not the contemplated agreement would be violative of the provisions of Sections 54-388 (2)(i) and 54-397.1 of the Virginia Code. In pertinent part, these statutes provide:

*Sec. 54-388.*

"The Board shall revoke or suspend a certificate of registration or exemption, or censure the holder of such certificate, for any of the following causes:

"2. Unprofessional conduct.—The following acts shall be deemed unprofessional conduct on the part of the holder of a certificate of registration to practice optometry:

"(i) The splitting or dividing of a fee with any person or persons other than with a duly registered optometrist who is a legal partner."

*Sec. 54-397.1.*

"It shall be unlawful for any optometrist to practice his profession as a lessee of any commercial or mercantile establishment, or to advertise, either in person or through any commercial or mercantile establishment, that he is a duly registered practitioner and is practicing or will practice optometry as a lessee of any such commercial or mercantile establishment. \* \* \*

Under the terms of the contract in question, the United States of America, Department of Defense Concessions Committee, grants to the contracting optometrist the authority "to operate an optometry and optical service" on the Concourse of the Pentagon Building, at a place on such Concourse to be designated by the Committee. In turn, the optometrist agrees to abide by the terms of a series of provisions customary in concession agreements to which a governmental agency is a party, and he further agrees to:

"Pay to the office of the Committee, for deposit into the funds of the Committee, in consideration of this agreement, the sum of Six Thousand (\$6,000.00) Dollars yearly, for the right to occupy the space allotted by the Committee. This sum shall be payable on the first day of each month in twelve (12) equal monthly installments of Five Hundred (\$500.00) Dollars each. In addition, the Concessionaire shall pay fifteen (15%) per cent of gross monthly sales of optical supplies, including all cash and all charge sales."

Considering your questions in the inverse order of presentation, I am first of the opinion that the agreement under consideration would not violate the provisions

of Section 54-397.1 of the Virginia Code. It is manifest from the provisions of the contract that the optometrist will be the lessee of the United States of America, Department of Defense Concessions Committee, and that he will not, therefore, practice his profession as the "lessee of any commercial or mercantile establishment \* \*". Moreover, it would appear that the Department of Defense Concessions Committee proposes to allocate to the optometrist separate premises on the Concourse of the Pentagon Building, disassociated from the premises of any commercial or mercantile establishment which may also be located on the Concourse.

With respect to your second question, I am further of the opinion that the proposed agreement would not infringe the provisions of Section 54-388(2) (i) of the Virginia Code. I am constrained to believe that the prohibition against an optometrist's splitting or dividing a fee with any person or persons, other than a duly registered optometrist who is not a legal partner, forbids the dividing of fees charged by an optometrist for professional services rendered to a patient, and I do not believe that the prohibition extends to or embraces the amount charged for ophthalmic materials or optical supplies sold by the optometrist. Under the terms of the pertinent provision of the contract quoted above, the optometrist in the instant situation does not agree to pay to the Department of Defense Concessions Committee 15% of his income derived both from professional fees and the sale of optical supplies; on the contrary, the percentage payment is based upon and limited to the "gross monthly sales of optical supplies" and does not include a percentage of the optometrist's professional fees. I am, therefore, of the opinion that consummation of the agreement under consideration would not constitute unprofessional conduct within the purview of Section 54-388(2) (i) of the Virginia Code.

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**PINE TREE SEED LAW—Applicable to Timber Cut for Mining Purposes.  
F-220 (153)**

HONORABLE GEORGE W. DEAN  
State Forester

November 14, 1956.

This will acknowledge receipt of your letter of November 7, inquiring if the Virginia Seed Tree Law, as embodied in Title 10, Article 6, Code of Virginia, applies in the following situations:

"1. When a company owns both surface and mineral rights in those cases where the company contracts with a timber operator to cut, process and deliver a part or all of the processed timber to the mine for use as various mine timbers and repair of company mining property, all of which is a necessary part of the production of coal for sale on the commercial market?

"2. Where a land holding company leases mineral rights to a coal operating company where the mineral lease contains a provision granting the operating company the right of using a part or all of the surface timber in various processed forms in the mines to produce coal which is sold on a commercial market?"

You further state that the main question in each situation is whether or not the timber "is cut for commercial" purposes so as to render applicable the provisions of the law. Additional information reveals that considerable quantities of timber may be involved in these situations and that contracts between land owners and lessors of such properties are now drafted to cover such timber rights, thereby indicating the important conservation and economic factors involved.

Section 10-74.1, Code of Virginia setting forth the purposes of the law, provides as follows:

"The preservation of the forests and the conservation of the forest resources for the equal and guaranteed use of present and future generations, and the protection and perpetuation of forest resources by means of continuous growth of timber on lands suitable therefor, are declared to be the public policy of the Commonwealth of Virginia. In declaring this policy it is recognized that continuous timber growth of commercially valuable species is in the public interest, and can be attained to a considerable degree by prescribing certain rules of forest practice to be observed in the growing and harvesting of timber."

Section 10-76, Code of Virginia, provides as follows:

"Every landowner who cuts, or permits to be cut, or any person who is responsible for cutting, or actually cuts or any person who procures another to cut, or any person who owns the timber at the time of cutting and knowingly and wilfully allows to be cut, for commercial purposes, timber from one acre or more of land on any acre on which loblolly pine (*Pinus taeda*), shortleaf pine (*Pinus echinata*), pond pine (*Pinus serotina*), or white pine (*Pinus strobus*), singly or together, occur and constitute ten per cent or more of the live trees on each acre or acres, shall reserve and leave uncut and uninjured not less than four cone-bearing loblolly, shortleaf, pond or white pine trees fourteen inches or larger in diameter on each acre thus cut and upon each acre on which loblolly, shortleaf, pond or white pine, singly or together, occur as aforesaid; provided that where there are not present four cone-bearing loblolly, shortleaf, pond or white pine trees fourteen inches or larger in diameter on any particular acre, there shall be left uncut and uninjured in place of each cone-bearing loblolly, shortleaf, pond or white pine tree of this required diameter class not present two such cone-bearing pine trees of the largest diameter present less than fourteen inches in diameter. Such pine trees shall be left uncut for the purpose of reseeding the land and shall be healthy, windfirm, and of well developed crowns, evidencing seed bearing ability by the presence of cones in the crowns."

It is plain that the clear public policy of the Commonwealth is to preserve and conserve the forest resources, as set forth in Section 10-74.1. Moreover, Section 10-76 applies to persons cutting such timber "for commercial purposes". This latter section used the broad term "for commercial purposes" which may be deemed synonymous with "for business purposes", as distinguished from private or personal uses. It would appear that the policy of the act and the broad language used render the act applicable to timber which is cut for commercial or business uses. It is to be noted that the paper making companies which use timber cut from their own lands as a raw material in their own plants, acknowledge the applicability of the act. It would appear to follow that where the owner uses a large quantity of timber in direct connection with the carrying on of a commercial activity, the timber is cut for "commercial purposes". The fact that the owner would have to purchase large quantities of timber from outside sources if he did not use that standing on his own property appears to further substantiate the commercial application of the timber. Accordingly, I am of the opinion, in response to Question No. 1, that the provisions of the act apply to an owner of land who cuts his own timber for use as various mine timbers and repair of his mining property where such operation is a necessary and integral part of the production of coal for sale on the commercial market.

I am of the further opinion, in response to Question No. 2, that an even stronger case is made out for the applicability of the act where the land owner leases mineral and timber rights to a mine owner in order to facilitate the production of coal which is sold for commercial purposes. In this latter case, a commercial transaction is clearly involved as the owner does not use the timber himself but contracts away his right to the use of such timber.

**PINE TREE SEED LAW—Cutting Rights Acquired Prior to Effective Date of New Act. F-220 (57)**

August 21, 1956.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney  
Montgomery County

This is in reply to your letter of August 11, 1956, in which you request my opinion as to whether or not a contract of purchase and sale for certain timber land entered into on May 21, 1956, would constitute timber cutting rights acquired prior to July 1, 1956, under the provisions of § 10-74.2 of the Code of Virginia. The contract for purchase and sale contained the following provisions:

"But, excepting and reserving from all the above described land all standing timber and other trees of every description, except cherry, apple and peach trees, and also excluding from this contract all timber that has been severed from the land."

"The reservation of all standing timber and other trees of every description upon the said land except peach, apple and cherry trees and all timber that has been severed from the land, \* \* \* 'That the full right to Vendors, those contracting with them and the agents and employees of the Vendors and such contractors for the period of three years from date hereof, to go upon the said land, cut, sever, and saw the said timber and trees, and remove the same from the land; to set up, keep, maintain and operate, at locations selected by them, upon said land, saw mills and other equipment used in connection with severing and sawing said timber and trees \* \* \* and further that at the end of said three year period all standing timber and cut timber left upon the land by the aforesaid Vendors, shall be and become the property of said Purchasers.'"

I am of the opinion that the vendors and their agents under this contract of purchase and sale have acquired timber cutting rights on this property prior to July 1, 1956, and, therefore, they may cut pond pine, white pine and tulip poplar trees on this property at any time during the next three years, and they are not required to comply with the provisions of §§ 10-74.1 through 10-76.1 of the Code of Virginia relating to the leaving of pond pine, white pine and tulip poplar seed trees upon this land.

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**POLITICAL SUBDIVISIONS—List of What Authorities and Commissions Constitute. F-68 (230)**

February 13, 1957.

MISS MARTHA BELL CONWAY  
Secretary of the Commonwealth

I am in receipt of your letter of January 30, in which you forwarded to this office a form prepared for use in administering the provisions of Section 2-62.1 of the Virginia Code, which requires various political subdivisions to file certain information with your office. I have examined this form and believe that it satisfactorily conforms to the statute in question.

With respect to the list of various types of authorities, commissions, districts and agencies set out in the second paragraph of your letter and those listed on pages 33-45 of the Report of the Secretary of the Commonwealth for 1955-56, the following, so far as I have been able to ascertain, would constitute political subdivisions within the purview of Section 2-62.1 of the Virginia Code:

Hospital Authorities (created by Title 32, Chapter 13, of the Virginia Code).

Sanitation Commissions (created by Title 21, Chapter 3, of the Virginia Code).

Housing and Redevelopment Authorities.

Marketing and Produce Authorities.

Elizabeth River Tunnel Commission.

Hampton Roads Sanitation Commission.

Richmond Produce Market Authority.

Old Dominion Turnpike Authority.

Richmond-Petersburg Turnpike Authority.

Coastal Turnpike Authority.

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**PUBLIC FUNDS—Responsibility of Officials in Case of Theft or Other Loss.**  
**F-77 (79)**

September 12, 1956.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This will reply to your letter of July 30, in which you state that you have been advised by the Clerk of the County Court of Alleghany County that a forced entry was made into his office and \$197.00 in currency stolen. Of this amount, \$50.00 represented a payment made to the clerk by a husband pursuant to a court order entered against him in a domestic relations controversy. You inquire what procedure should be followed in providing for the loss of funds occasioned by the theft in question. Essentially, your inquiry is one relating to the liability of the clerk for the funds in his custody.

The question of liability of a public officer for public funds lost without negligence or fraud on the part of the officer was presented to the Supreme Court of Appeals of Virginia for the first time in the case of *Mecklenburg v. Beales*, 111 Va. 691. In that case the loss of public funds resulted from the failure of the bank in which a county treasurer had deposited funds coming into his hands—a situation admittedly involving no negligence or fraud on the part of the treasurer. Although acknowledging that in the case of an officer handling public moneys “much may be said in favor of limiting his liability where he acts in good faith and without negligence”, the Court, nevertheless, adopted the rule of “strict liability” with respect to public officials handling public funds, observing in this connection:

“\* \* \* the weight of argument upon general principles and in the light of public policy, as we think, as well as the preponderance of authority is in favor of the rule of strict liability, which requires a public official to assume all risks of loss, and imposes upon him the duty to account for the public funds which go into his hands, except in cases where the loss results from the act of God or the public enemy, or possibly from some other overruling necessity. \* \* \*” (111 Va. at 697).

This principle was reaffirmed in *Leachman v. Board of Supervisors*, 124 Va. 616. In that case, holding a county treasurer liable for public funds paid out by him pursuant to an apparently valid, but in fact void, warrant of the County Board of Supervisors, the Court pointed out:

“For reasons of public policy, fiscal officers are held to a very strict liability for public funds entrusted to their care. They have been held liable for losses resulting from fire, theft, robbery, burglary, failure of banks in which money was deposited, and, in fact, losses sustained by almost every course except the act of God or a public enemy. See cases collected in notes 22 R. C. L., sec 140, p. 470. In *Mecklenburg v. Beales*, 111 Va. 691, 69 S. E. 1032, 36 L. R. A. (N. S.) 285, it was said that the court favored the rule of strict liability which required a

public official to assume all risk of loss, and imposes upon him the duty to account for the public funds which go into his hands." (124 Va. at 622, 623).

Finally, in *Camp v. Birchett*, 143 Va. 686, a City Treasurer was held accountable for public funds lost by reason of the failure of a bank in which he had deposited such funds pursuant to a resolution of the City Council directing that such deposit be made. The Court there pointed out that the question of the liability of treasurers and other custodians of public funds was "no longer open in this jurisdiction", citing the *Mecklenburg* case, *supra*.

It is true, of course, that the stringency of the rule of strict liability enunciated in the above cited cases has been relaxed by the Legislature in the case of loss resulting from the financial failure of banking institutions, both with respect to county treasurers and clerks of courts. Section 58-952 and Section 14-112 of the Code of Virginia (1950). However, I have been unable to discover any statute granting similar immunity from liability in cases of the loss of public funds resulting from theft. I am, therefore, of the opinion that the rule of strict liability still obtains in this regard and that the clerk of a court would be responsible for the loss of public funds stolen from his office.

However, I do not believe that the rule of strict liability would be applicable in the situation presented by the loss of the \$50.00 paid to the clerk by a husband pursuant to a court order entered against him in a domestic relations matter. It appears that this money was paid in compliance with an order of support entered in favor of a wife and/or children who were parties to the litigation. As such, it would not constitute public funds or "public moneys" as defined by the Supreme Court of Appeals of Virginia in *Beckner v. Commonwealth*, 174 Va. 454. In that case, holding that funds in the hands of a public official collected under execution for the benefit of private individuals were not public moneys, the Court declared:

"\* \* \* Public funds are those moneys belonging to the State or to any city, county or political subdivision of the State,—or more specifically, taxes, customs and moneys raised by the operation of law for the support of the government or for the discharge of its obligations. 22 R. C. L. Public Funds, page 222; 50 C. J. page 854; *Smyer et al v. United States*, 273 U. S. 333, 47 S. Ct. 375, 71 L. Ed. 667, 51 A. L. R. 780.

"Money in the hands of a constable, collected under execution awaiting distribution to private owners, does not belong to the public. It represents funds held in trust for individual litigants, and not for the State or its political subdivisions. The character of the money is determined by its ownership rather than by the manner and means of its collection." (174 Va. at 459).

With respect to the liability of a public officer for the loss of private funds, I am of the opinion that the general rule relating to duty of fiduciaries would be applicable. As stated in the *Mecklenburg* case, *supra*, it is the established rule applicable to such fiduciaries:

"\* \* in handling private funds, he is not responsible for the loss resulting, where he has acted in good faith and in the exercise of fair discretion, and in the same manner as he probably would have acted if the subject had been his own property and not held in trust." (111 Va. at 693).

I am, therefore, of the opinion that the liability of the clerk of the court with respect to the \$50.00 in question would depend upon the circumstances of the case within the general rule stated above.



**PUBLIC FUNDS—U. S. Treasury Short Term Certificates—May Be Invested in. F-130 (161)**

November 23, 1956.

HONORABLE JAMES E. DURANT, *Treasurer*  
City of Falls Church

I am in receipt of your letter of November 16, in which you state that it has been brought to your attention that various local treasurers of the Commonwealth have been purchasing United States Treasury short term certificates. You inquire concerning the authority of such public officials to make purchases of this type.

In response to your inquiry, permit me to advise that Section 15-22 of the Virginia Code formerly authorized the governing bodies of cities and towns to direct the treasurer or other custodian or manager of any sinking fund to purchase, out of monies available in certain specified funds, bonds or other evidences of debt of the United States, the amount of such purchases to be prescribed by resolution or ordinance.

At the last session of the General Assembly of Virginia, the above mentioned statute was repealed by Chapter 184 of the Acts of Assembly of 1956. In addition, this latter enactment amended the Code of Virginia, by adding in Title 2 thereof, a new chapter numbered 17, entitled "Investment of Public Funds" and comprising Sections 2-297 and 2-298 of the Virginia Code. As you will note, Section 2-297(2) authorizes the Commonwealth, all public officers, municipal corporations, political subdivisions and all public bodies of the Commonwealth to invest sinking funds belonging to them or within their control in bonds, notes and other obligations of the United States and securities unconditionally guaranteed as to the payment of principal and interest by the United States or any agency thereof. Similarly, Section 2-298 authorizes investment of any and all monies or other funds, other than sinking funds, belonging to or within the control of the individuals and entities specified above in securities that are legal investments for fiduciaries under the provisions of clauses (1), (2), (3), (4), (5) and (24) of Section 26-40 of the Code of Virginia as amended. In this latter connection, Section 26-40(2) empowers fiduciaries to invest funds held by them in a fiduciary capacity in stocks, bonds, treasury notes and other evidences of indebtedness of the United States, and those unconditionally guaranteed as to the payment of principal and interest by the United States.

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**PUBLIC OFFICERS—Commission on Human Values—Members of Not Officers or Agents of City. F-162 (242)**

February 26, 1957.

HONORABLE WILLIAM F. STONE  
Member House of Delegates

This is in reply to your letter of February 16, 1957, in which you request my opinion as to whether or not members of the Commission on Human Values of the City of Martinsville may solicit and sell insurance to the City of Martinsville.

I am of the opinion that § 15-508 of the Code of Virginia does not prohibit or bar the members of the Commission on Human Values from contracting with the City of Martinsville. The members of this Commission are not officers or agents of the City, nor are they members of a committee constituted for management, regulation or control of corporate property of this City.

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**PUBLIC OFFICERS—Compatibility—Commissioner of Revenue of City May Not Be Deputy Clerk of City or County. F-249 (188)**

January 3, 1957.

HONORABLE J. B. COWLES, JR.  
Commonwealth's Attorney  
James City County

This is in reply to your letter of December 31, 1956, in which you request my

opinion as to whether or not the Commissioner of Revenue for the City of Williamsburg may also hold the office of Deputy Clerk of the Circuit Court of James City County and the City of Williamsburg. This office has rendered several opinions in recent years holding that a deputy of a county treasurer, sheriff, Commonwealth's attorney, clerk or commissioner of revenue is an officer who holds a county office. Section 15-486 of the Code of Virginia provides, in part, as follows:

"If any person shall be elected or appointed to two or more offices except as herein provided, his qualification in one of them shall be a bar to his right to qualify in any of the offices enumerated, and if any person while holding any of such offices shall be appointed or elected to any other office, his qualification in such office shall thereby vacate any of the above offices he then holds, except as provided above."

I am enclosing copies of opinions relating to this question which we have rendered to the Commonwealth's Attorney for Floyd County on March 16, 1956; the Commonwealth's Attorney for Isle of Wight County on December 27, 1955, and the Commonwealth's Attorney for Appomattox County on September 10, 1951. I am of the opinion that § 15-486 of the Code of Virginia would prohibit a deputy clerk of a county from holding any other offices other than those specifically permitted under the provisions of § 15-486. There is nothing in § 15-486 which would permit him to hold the office of Commissioner of the Revenue of a city.

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**PUBLIC OFFICERS—May Not Qualify for until Political Disabilities Removed by Governor—May Be Elected Before. F-60 (7)**

July 6, 1956.

HONORABLE BYRUM P. GOAD  
Commonwealth's Attorney for Carroll County

This is in reply to your letter of July 3, 1956, which reads as follows:

"As an attorney for the Town of Hillsville, I am requesting your opinion as to the qualification of a person who was recently elected as a member of the town Council.

"This man was convicted of perjury in 1948, and had not had his citizenship restored, or his disability removed by the Governor.

"This man announced himself as a candidate for councilman for the Laurelfork Ward of the town of Hillsville, and the Electoral Board placed his name upon the official ballot to be voted in the town election held on June 12, 1956. He was elected as a member of the town Council on June 12, 1956.

"He has recently circulated a petition addressed to the Governor of Virginia asking that his citizenship be restored, and probably the Governor has the petition in his office at this time.

"Under the statute this man was ineligible to vote in the town election.

"The question is: Can this man qualify and serve on the town Council?

"Should the Governor restore his citizenship, then can he serve as a town councilman?"

Section 32 of the Virginia Constitution provides, in part, as follows:

"Every person qualified to vote shall be eligible to any office of the State or of any county, city, town or other subdivision of the State, wherein he resides \* \* \*."

While it is true that the person in question was not a qualified voter in the town election held on June 12, 1956, yet, since his name was placed on the ballot without objection, and he received sufficient votes to be elected, I am of

the opinion that his election is valid. However, so long as such person is not eligible to vote, under the above provision of the Constitution he is not eligible to hold the office to which he has been elected.

Under § 73 of the Virginia Constitution the Governor has the power to remove the political disabilities of this person. In case the Governor exercises this power prior to the time the persons elected to the Town Council are required to qualify, then, in my opinion, the gentleman in question may qualify and hold the office to which he has been elected.

In considering this question I am mindful of § 18-239 of the Code. To the extent that this section would forever bar a person from holding office, it would seem to be in conflict with the State Constitution.

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### PUBLIC OFFICERS—Tenure of Office—Definition of. (326)

May 15, 1957.

HONORABLE G. GARLAND WILSON  
Commonwealth's Attorney for the City of Radford

This will reply to your letter of May 9, in which you request an opinion concerning the appropriate interpretation to be accorded the phrase "tenure of office" as that phrase is utilized in the second paragraph of Section 121 of the Virginia Constitution, which prescribes that no member of a city council "shall be eligible, during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council by election or appointment". Specifically, you present the following inquiry:

"In the event a council member would resign during the term for which he was elected prior to the expiration thereof, would the one year period begin to run from the date of his resignation or from the date of the expiration of his term of office in the event that he is a candidate for an office to be filled by the city council?"

In construing the phrase "tenure of office", as utilized as Section 121 of the Virginia Constitution. I believe that distinction must be drawn between the *tenure* of an officer and the *term* of his office. "Term" and "tenure" are not synonymous. The phrase "term of office" is generally used to signify the fixed period of time for which an office may be held, i.e., the period designated by law as the time during which the office may be held, rather than the time an individual actually holds the office; while the phrase "tenure of office" generally refers to the right to hold office subject to termination by some contingency such as resignation, death or removal. See, 67 C.J.S., 195, 196, Officers: Section 42; *Recall Bennett Committee v. Bennett*, 249 Pac. (2d) 479; *People ex rel Bagshaw v. Thompson*, 130 Pac. (2d) 237; *State v. Johnson*, 57 N.W. (2d) 531; *Arthur v. Hubbard*, 70 A. (2d) 925.

With respect to the specific question presented in your communication, I am of the opinion that the phrase "tenure of office" in Section 121 of the Virginia Constitution should be construed to mean that period of time during which an individual actually holds office as a member of the city council. I think this view is supported by the language "as such member", which appears in Section 121 of the Constitution following the phrase under consideration. It would not seem that a member of a city council could hold "tenure of office *as such member*" after he has ceased to be a member of the city council by reason of an effective resignation from that office. I am, therefore, of the opinion that the one year period prescribed in Section 121 of the Virginia Constitution begins to run from the date upon which an effective resignation from the city council is achieved by a member thereof, rather than the date of the expiration of the term of office to which he was elected.

**PUBLIC WELFARE—Local Board—Member May Serve on Town Council.  
F-249 (49)**

August 10, 1956.

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

I am in receipt of your letter of August 7, 1956, in which you ask whether or not a member of the Town Council of the Town of Windsor, located in Isle of Wight County, can legally, at the same time, also be a member of the Public Welfare Board of Isle of Wight County.

So far as I have been able to find, there is nothing in the Code which would prohibit a member of the Town Council from being also a member of the County Welfare Board.

**PUBLIC WELFARE—Local Board—Only One Member to Be Member of  
Board of Supervisors. F-249 (137)**

October 24, 1956.

HONORABLE CLAUDE B. HELDRETH, *Chairman*  
Wythe County Welfare Board

I am in receipt of your letter of October 17, in which you inquire whether or not two members of a board of supervisors may serve on a five member local welfare board.

Prior to its amendment in 1956, Section 63-52 of the Virginia Code provided that the local board of public welfare in each county (with one exception not here material) should consist of three members, residents of the county, to be appointed by the judge of the circuit court of such county. As amended, Acts of Assembly (1956), Chapter 126, page 130, the statute in question now prescribes that the local welfare board of each county shall consist of five members, residents of the county, to be appointed by the judge of the circuit court of such county, unless the governing body of the county, by resolution, should limit the membership of the local welfare board to three members.

With respect to the exercise of the appointing power, Section 63-54 of the Virginia Code provides:

"The judge in making appointments shall so arrange the membership that at all times one member of the local board of each county shall also be a member of the board of supervisors, except in those instances where the board of supervisors has determined otherwise, in which case one member of the local board of public welfare shall be selected from a list of three persons submitted by the board of supervisors."

Although the membership of the local welfare boards in the various counties of the Commonwealth was increased from three to five members at the last session of the General Assembly, no change was made in the above quoted statute, and the appointing power of the judge of the circuit court of a county would be no broader with respect to a five member local welfare board than a three member local welfare board. While admittedly open to the interpretation that—in requiring the appointing power to insure that at all times one member of the local welfare board is also a member of the board of supervisors—the statute does not thereby limit the appointing power to selecting only one member of the latter board for service on the former, I believe the language in question is equally susceptible to the construction that the Legislature has made provision for the appointment of only one member of the board of supervisors to the local welfare board and has not authorized more than one should be appointed.

While the determination of the scope of his appointing power under Section 63-54 will rest with the individual jurist exercising that power, I would be inclined to the view that—since the authority to appoint one member of the board

of supervisors to the local board of welfare is clear, while the authority to appoint more than one is doubtful—the doubt should be resolved against the existence of the latter power, with the result that only one member of the board of supervisors should be appointed to the board of public welfare.

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**PUBLIC WELFARE—Local Board—Only One Supervisor May Serve on.**  
(365)

June 18, 1957.

MISS MARY M. LEE, *Superintendent*  
Department of Public Welfare  
Wythe County

This is in reply to your letter of June 12, 1957, in which you request my opinion as to whether or not more than one member of the Board of Supervisors may serve on the Welfare Board at the same time.

Section 63-54 of the Code of Virginia provides that "The Judge in making appointments shall so arrange the membership that at all times one member of the local board in each county shall also be a member of the board of supervisors." When this statute dealing with local boards of public welfare was enacted in 1938 (Chapter 379 of the Acts of Assembly of 1938) the statute contained the following provision:

"In the discretion of the judge making the appointment, one member of the local board of any county may be a member of the board of supervisors \* \* \*."

When this statute was re-enacted in Chapter 212 of the Acts of Assembly of 1942, the above quoted provision was changed to read as follows:

"One member of the local board of each county shall be a member of the board of supervisors \* \* \*."

I am of the opinion that, in light of the legislative history of § 63-54 of the Code of Virginia, this section provides that only one member of the local board of welfare shall also be a member of the Board of Supervisors.

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**PUBLIC WELFARE—Old Age Assistance—Lien on Recipient's Property—Amount of Hospital and Medical Bills Which Take Priority. F-231 (74)**

September 7, 1956.

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

This will reply to your letter of September 6, 1956, in which you request an opinion concerning the interpretation of Section 63-127 of the Code of Virginia (1950), as amended. In your communication you present a situation involving the administration of the estate of a deceased recipient of public assistance, and you inquire how the funds of such an estate should be distributed in payment of hospital bills, doctors' bills and medical expenses when the estate is of such value that no funds will be available to satisfy the claims of general creditors.

Section 63-127 of the Virginia Code provides for a lien in favor of a local board of public welfare upon the real property of a recipient of public assistance and for the recovery from the estate of a recipient of sums advanced to him in the form of public assistance payments. In pertinent part, the statute provides:

"The filing of such notice shall create a lien against the estate, both real and personal, of such recipient, prior to all other claims except prior liens and funeral expenses not in excess of two hundred dollars, and except hospital bills, doctors' bills and medical expenses not in excess of one hundred and fifty dollars."

Initially, I am of the opinion that as the estate in question is that of a deceased recipient of public assistance, the distribution of the assets of the estate would be governed by the provisions of Section 63-127 rather than Section 64-147 of the Virginia Code. Further in this connection, I am of the opinion that the total amount which may be allowed as a preferred sum for hospital bills, doctors' bills and medical expenses under this statute is one hundred and fifty dollars. If this sum is sufficient to pay the items specified above, each claimant will, of course, be paid the amount of his claim. Should the total amount of the hospital bills, doctors' bills and medical expenses exceed the statutory maximum, I believe that the one hundred and fifty dollars should be distributed pro-rata to the various claimants. Finally, although the statute is silent upon the point, I am of the opinion that the hospital bills, doctors' bills and medical expenses contemplated in the above quoted statute are those incurred during the last illness of a recipient of public assistance.

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**PUBLIC WELFARE—Old Age Assistance—Lien on Recipient's Property—  
Funeral Expenses Are Prior to. F-231 (46)**

August 7, 1956.

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

This will reply to your letter of August 2, in which you state that an individual who had previously executed a deed of trust on certain of his property to secure a debt, thereafter became eligible for Old Age Assistance and received payments therefor from the local board of public welfare. Following the death of the recipient, the local board filed notice of its lien pursuant to the provisions of Section 63-127 of the Virginia Code and foreclosure of the deed of trust resulted in a residue of \$148.35. You inquire whether or not this residue should be paid to the local board in satisfaction of the lien in its favor provided in Section 63-127 or should be paid to an undertaker under the provisions of Section 64-147 of the Code.

In this connection, I call your attention to the following language of Section 63-127 of the Code, which prescribes:

"Upon death of any recipient, the local board of welfare having reason to believe that such recipient died possessed of property, either real or personal, from which reimbursement may be had, shall file notice with the clerk of the court as hereinabove provided. The filing of such notice shall create a lien against the estate, both real and personal, of such recipient, prior to all other claims except prior liens and *except funeral expenses not in excess of two hundred dollars*, and except hospital bills, doctors' bills and medical expenses not in excess of one hundred and fifty dollars." (Italics supplied).

In light of this provision, I am of the opinion that so much of the residue in question as is necessary to defray the funeral expenses of the recipient should be paid to the undertaker and the balance, if any, applied to the satisfaction of the lien of the local board, should there be no prior liens, doctors' bills or medical expenses.

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**PUBLIC WELFARE—Old Age Assistance—Lien on Recipient's Property—  
What Constitutes Notice to Purchaser. F-231 (80)**

September 14, 1956.

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

This will reply to your letter of August 8, in which you request an opinion upon a situation involving the appropriate construction to be accorded Section 63-127 of the Code of Virginia (1950) as amended.

In your communication you state that a resident of Giles County, who owned a tract of land in that county, received old age assistance through the local board of public welfare beginning October 1, 1949. On August 16, 1954, the local board filed a notice in the Circuit Court of Giles County pursuant to the provisions of Section 63-127 of the Virginia Code, as amended, showing monthly payments of \$19.00 to the recipient beginning July 1, 1954. On February 5, 1955, the recipient conveyed the above mentioned tract of land to a nephew and a niece, reserving to herself a life estate in the premises. The recipient died intestate on July 17, 1955, and on August 11 of that year the local board filed an additional notice as provided by Section 63-127 of the Code, as amended, showing payments made to the deceased recipient from October 1, 1949. You inquire whether or not the real estate in question is subject to a lien for the entire amount of assistance paid to the recipient or only for those payments made on and after July 1, 1954.

Prior to its amendment in 1954, Section 63-127 of the Code provided that upon the death of a recipient of assistance, the total amount paid to the recipient as assistance should be allowed as a claim against his estate prior to all other claims except prior liens and specified amounts for funeral, hospital and medical expenses. The statute made provision for the filing of a notice showing such claim within one year of the death of the recipient, which notice had the effect of a memorandum of *lis pendens* in a creditors' suit, but no provision was made for the filing of a notice prior to the death of the recipient which would create a *lien upon the property* of the recipient. In effect, Section 63-127, prior to its amendment, merely made provision for the allowance of a *claim against the estate* of a recipient for assistance advanced, which claim was entitled to a preferred status.

In 1954 the statute in question was amended to read 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. *In the event a portion or all of the assistance theretofore received by the recipient shall be repaid, the local board shall prepare, acknowledge and file in the same court a notice, showing the name of recipient, the total of assistance theretofore received by the recipient and not repaid, the date of the first payment thereafter, and the rate of the grant and intervals of payment from that date.* 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. The filing of a notice under the provisions of this section shall create a *lien against all real property* of the recipient lying within the county or city wherein the notice is filed in favor of the local board; provided, however, that no such lien shall be enforced so long as such recipient is eligible for assistance. Upon death of any recipient, the local board of welfare having reason to believe that such recipient died possessed of property, either real or personal, from which reimbursement may be

had, shall file notice with the clerk of the court as hereinabove provided. The filing of such notice shall create a *lien against the estate, both real and personal*, of such recipient, prior to all other claims except prior liens and except funeral expenses not in excess of two hundred dollars, and except hospital bills, doctors' bills and medical expenses not in excess of one hundred and fifty dollars. Nothing contained herein shall affect the operation of Sec. 63-128.

*"No lien which attached prior to June 30, 1954, shall be impaired by operation of the 1954 amendment, nor shall its priority be affected."* (Italics supplied).

In its amended form, Section 63-127 of the Code for the first time provided for a lien in favor of the local board for amounts paid as assistance to a recipient. The amended statute prescribes that each local board shall, for each recipient who has theretofore been approved for assistance or who is thereafter approved as of January 1, 1954, prepare and file the prescribed notice, which notice shall show, *inter alia*, the date of the *first* payment. In my opinion the phrase "date of the first payment" comprehends the date upon which assistance payments were first made to a recipient, whether the recipient was approved for assistance prior or subsequent to July 1, 1954. I believe this view to be supported by other language contained in the statute. Although the lien prescribed by the statute becomes effective only upon the filing of the required notice, and although the earliest date upon which a notice could be filed was July 1, 1954, the third sentence of the statute prescribes that should a portion or *all* of the assistance "*theretofore* received by the recipient" be repaid, the local board should prepare, acknowledge and file a new notice showing the "*total* of assistance *theretofore* received by the recipient and not repaid", and the date of the first payment thereafter. This additional notice is required to be docketed and indexed and supersedes the original notice filed. There would appear to be no reason for the filing, docketing and indexing of such additional notice showing the *total* of assistance *theretofore* received unless such assistance payments were included in the lien of the local board. Moreover, there would appear to be no reason for the terminal provision of the statute which declares that no lien which attached prior to July 30, 1954, should be impaired by the operation of the 1954 amendment nor its priority affected, if the lien of the local board secured only payments made after July 1, 1954. The lien created by the filing of notice prior to the death of the recipient is a lien against "*all real property*" of the recipient lying within the county or city wherein the notice is filed; the lien created by the filing of notice upon the death of a recipient is a lien upon the "*estate, both real and personal*", of the recipient.

In light of the foregoing, I am of the opinion that if the notice filed by the local board in the situation you present had shown October 1, 1949, as the date of the first payment, the real estate in question would have been subject to a lien for the entire amount of assistance paid to the recipient. However, as the notice filed by the local board designated July 1, 1954, as the date of the first payment, I am of the opinion that the purchaser in the instant case took the real estate in question subject to the lien of the local board only for the amount of payments made on and after July 1, 1954.

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**PUBLIC WELFARE—Old Age Assistance—Lien on Recipient's Property—  
Proceeds of Sale Must Be Used to Satisfy—F-231 (34)**

August 1, 1956.

HONORABLE ALONZO BEAUCHAMP  
Commonwealth's Attorney for Russell County

This will reply to your letter of July 20, in which you state that a former recipient of Old Age Assistance under the provisions of Title 63, Chapter 6, of the Virginia Code owns a small farm in Russell County, Virginia, against which there is



a lien in favor of the local board of public welfare for assistance payments, amounting to some \$2,000.00, made to the recipient. You further advise that an offer has been made to the recipient for the purchase of about two acres of his farm at a price of \$800.00, and you inquire whether or not the local board may accept a part of the amount to be paid for the real estate in question, which is less than the amount of the board's lien, and release its lien against such property, permitting the remainder of the purchase price to be retained by the recipient.

In my opinion your question must be answered in the negative. Section 63-138 of the Virginia Code provides that it shall be unlawful for any recipient of Old Age Assistance to sell or dispose of **his real property** without the consent of the local board or the Commissioner. At the 1956 session of the General Assembly, the Virginia Code was amended by Chapter 667, Acts of Assembly (1956), which enactment added Section 63-138.1 relating to the disposition of the proceeds arising from a sale of real property of a recipient of Old Age Assistance. This statute prescribes:

"Whenever a sale of real property of a recipient of public assistance under this chapter is made or whenever any such real property is taken by the exercise of the power of eminent domain, *the proceeds of such sale* or from such taking payable to the recipient after satisfying all prior liens and rights of others in said property *shall be used to satisfy the lien provided by Section 63-127*, as amended, and *the balance, if any, of such proceeds* shall be paid to any person entitled thereto. The local board shall upon satisfaction of such lien reimburse the source or sources of the public assistance granted to such recipient in the manner provided by Section 63-129." (Italics supplied).

It is clear from the language italicized above that "the proceeds" of a sale of the property of a recipient of Old Age Assistance are to be used to satisfy the lien of the local board and that only "the balance, if any, of such proceeds" remaining after satisfaction of such lien may be remitted to the recipient. No provision is made for the local board to apply only a portion of the proceeds to the satisfaction of its lien and permit the recipient to retain the balance when the lien of the local board has not been satisfied. I am, therefore, of the opinion that it would not be permissible for the local board to adopt such a course of action in the situation you present.

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**PUBLIC WELFARE—Superintendents—Bond Covering Broad Enough to Cover Probation Duties. F-231 (72)**

September 6, 1956.

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

This will acknowledge receipt of your letter of August 29, 1956. I quote from that letter as follows:

"I would appreciate very much your opinion as to whether or not the bond required of superintendents of public welfare under Section 63-81 of the Code of Virginia is broad enough to cover activities of the superintendents of public welfare acting as probation officers under the provisions of Section 16.1-208 of the Code."

You enclosed a copy of a memorandum dated July 16, 1956, prepared by the Honorable J. Gordon Bennett, Auditor of Public Accounts, in which he states in part:

"Section 16.1-205 of Chapter 555 of Acts of Assembly 1956 sets forth the procedures for obtaining probation service by the juvenile and domestic relations courts. The section provides that, if a special pro-

bation officer is not appointed by the court, the local superintendent of public welfare shall serve as probation officer for this court. The last paragraph of Section 16.1-208 of the same act states *the judge of the juvenile court in any county may, in his discretion, provide that support payments be made to and disbursed by the chief probation officer, when bonded as provided by par. 16.1-16, who shall in that event keep the accounts relating to such support payments.*"

It is my opinion that the bond requirement of Section 63-81 of the Code is broad enough to cover activities of the Superintendent of Public Welfare when acting as probation officer under the provisions set out in Section 16.1-208. However, the bond must be of an amount not less than \$2,000 as required by Section 16.1-16.

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**PURCHASE AND PRINTING—State Policy as to State Produced Goods and Services, Does Not Apply to Insurance. F. 162 (39)**

August 6, 1956.

HONORABLE ALFRED E. H. RUTH  
Director of Mental Hospitals

This is in reply to your letter of July 23, 1956, which reads, in part, as follows:

"I am enclosing herewith copy of Senate Joint Resolution No. 33 'Declaring the public policy of the State as to purchase of supplies and materials' which was agreed to by the House of Delegates on March 9, 1956 and by the Senate on March 6, 1956.

"This resolution raises the following questions in my mind and I would appreciate your opinion on them:

"(1) Would an idemnity contract (insurance) be included within the meaning of this resolution, and if so,

"(2) Would the intent of the resolution extend only to the agent with whom the insurance is placed, or does it extend to the underwriters who stand behind the agent?"

In my opinion the answer to question No. 1 must be in the negative. In my judgment Senate Joint Resolution No. 33 is applicable to the purchase of tangible goods, supplies and materials and to personal services. I do not feel that the resolution was broad enough to include indemnifying contracts.

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**REAL ESTATE—Brokers—Licenses—Commission Has No Authority to Adopt Regulation Requiring Year's Experience as Salesman. F-341 (252)**

March 4, 1957.

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

This will reply to your letter of February 26, 1957, in which you inquire whether or not the Virginia Real Estate Commission has the authority to promulgate a rule or regulation requiring each applicant for a real estate broker's license to have served an apprenticeship of one year as a real estate salesman before being granted such license by the Commission. You state that the reason for such requirement is that the members of the Commission are of the opinion that persons being licensed as real estate brokers, without first having served such apprenticeship, are not competent to perform the duties of real estate brokers in such manner as to safeguard the interests of the public.

The general rule-making power of the Virginia Real Estate Commission is contained in Section 54-740 of the Virginia Code, which authorizes the Commission to do all things necessary and convenient for carrying into effect the provisions

of Title 54, Chapter 18, and to promulgate necessary rules and regulations. With respect to the qualifications for licensure by the Virginia Real Estate Commission, Section 54-750 of the Code prescribes:

"A license shall be granted only to persons who bear a good reputation for honesty, truthfulness and fair dealing and are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of the public. No license shall be issued hereunder to any person:

"(1) Who is unable to read, write and understand the English language;

"(2) Whose application for a license as a real estate broker or real estate salesman has within six months prior to the date of his application hereunder been rejected in Virginia, in any other State or in the District of Columbia;

"(3) Whose license as a real estate broker or real estate salesman has within one year prior to the date of his application hereunder been revoked in Virginia, in any other State or in the District of Columbia;

"(4) Who is not a citizen of the United States; or who, if an alien, has not filed his intention as provided by law to become a citizen, or

"(5) Who has been convicted, within the past five years, in a court of competent jurisdiction of this or any other State, or the District of Columbia, or of the United States, of forgery, embezzlement, obtaining money under false pretenses, extortion, conspiracy to defraud, bribery, or other like offense or offenses, or plead guilty or nolo contendere to any of such offenses, there being no appeal pending therefrom or the time therefore having elapsed.

"Nor shall any license as a real estate broker be issued hereunder to any person who has not attained the age of twenty-one years."

From the above quoted statute it appears that the Legislature has prescribed the affirmative requirements which individuals must meet to secure a real estate broker's license, and, in addition, has specified in detail certain classes of individuals who may not be granted a license. In this connection the Legislature has not required an apprenticeship of one year as a real estate salesman of those wishing to obtain a real estate broker's license, nor has it forbidden the issuance of a license to those who have not served such an apprenticeship. Moreover, I believe it is manifest that Section 54-750 et seq. of the Virginia Code contemplate that the competency of each applicant shall be determined upon an individual basis within the limitations imposed therein. I am, therefore, constrained to believe that the general rule-making authority of the Commission is not sufficiently broad to confer upon the Commission the power to prescribe additional substantive qualifications for licensure, applicable to all candidates, which the Legislature has not seen fit to require.

I am not unmindful of the provisions of Section 54-751 of the Virginia Code, which specifies the information to be set out in an application for a real estate broker's or a real estate salesman's license, nor of the language of the terminal paragraph of that statute which declares:

"The Commission may require such other proof as shall be deemed desirable, with due regard to the paramount interests of the public, as to the honesty, truthfulness, integrity and competency of the applicant. The Commission is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this chapter."

However, I am of the opinion that the rule-making power conferred by the above quoted language relates solely to the formulation of regulations "connected with the *application* for any license" and does not authorize the Commission to impose additional elements of *qualification* for licensure upon candidates generally.

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**REAL ESTATE—Brokers—Must Pay State Revenue License if Hold License as. (327)**

May 15, 1957.

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

This is in reply to your letter of May 13, 1957, in which you request my opinion as to the proper interpretation to be given to the second paragraph of § 54-758 of the Code of Virginia, which reads as follows:

"Provided that no renewal license as a real estate broker shall be issued by the Commission until the applicant therefor certifies to the Commission in such form as the Commission may prescribe, that his State revenue license as a real estate broker for the previous year has been paid."

You state that your office has received numerous requests from real estate brokers who hold current real estate brokers' licenses issued by the Virginia Real Estate Commission requesting that they be issued renewal licenses by the Commission, and they state that they did not secure a State revenue license as a real estate broker in the localities in which their places of business are located due to the fact that they were inactive in the real estate brokerage business during the previous license year.

I am of the opinion that, before the Virginia Real Estate Commission may renew the license of a broker, the broker must certify to the Commission that his State revenue license as a real estate broker for the previous year has been paid. I should like to call your attention to § 58-398 of the Code of Virginia. This section imposes a State revenue license upon real estate brokers. That section contains this provision: "The revenue license tax provided for in this section shall be applicable to all persons who hold current real estate brokers' licenses issued by the Virginia Real Estate Commission." If the person was a licensed real estate broker by your Commission the previous year, he is required by the tax statute to pay a revenue license for that year, even though he may not be actively engaged in the real estate brokerage business for that year.

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**REAL ESTATE—Non-Residents Selling Virginia Real Estate without License. F-341 (303)**

April 24, 1957.

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

This is in response to your letter of March 21, inquiring whether or not Section 54-749, which prohibits persons from selling real estate without a license, would be applicable in a situation where a non-resident, who is unlicensed in Virginia and who has no place of business in Virginia, but performs the acts set forth in Section 54-732 and signs papers, etc., in such person's office outside this State or within this State. It is further stated that such non-resident advertises in Virginia newspapers and comes into Virginia for the purpose of contacting buyers and sellers of realty and personally shows the property in Virginia. Moreover, such non-resident may carry offers to the Virginia seller but may execute the various papers and make closings outside the State of Virginia.

Kindly be advised that this office is of the opinion that such non-resident who is unlicensed in Virginia but lists Virginia property in Virginia papers, shows

such Virginia property to clients in Virginia and carries on such other acts connected with the selling of real estate in Virginia is within the provisions of Section 54-749, although certain incidents of the sale may take place outside Virginia.

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**SANITARY DISTRICTS—May Not Contract with Corporation in which Commissioner of Revenue Owns Stock. F-213a (48)**

August 10, 1956.

HONORABLE C. E. GNADT  
Commissioner of the Revenue  
Prince William County

This is in response to your letter of July 30, stating in part as follows:

"With reference to Section 15-504 of the Code of Virginia, I own stock in a corporation which is engaged in the trash and refuse collection. If a Sanitary District of our county decides to handle the trash and refuse collection by inviting bids from private contractors, would the firm in which I hold stock be permitted to bid."

Section 15-504, Code of Virginia, reads in part:

"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, trial justice, sheriff or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency thereof, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county."

In pursuance with the applicable provision of Article 1, Chapter 2, Title 21, Sanitary Districts are integral subdivisions of a county and under the authority of the governing body of the county. Accordingly, under the strict limitations contained in Section 15-504, I am of the opinion that a firm in which the Commissioner of Revenue holds stock would not be permitted to bid upon a proposed trash removal service contract with a Sanitary District of the same county. Stock ownership would constitute an interest.

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**SANITARY DISTRICTS—Smaller District May Not Be Created within District Organized Pursuant to Chap. 2 of Title 21 of Code. F-213a (246)**

February 28, 1957.

HONORABLE WM. M. MCCLenny  
Commonwealth's Attorney  
Amherst County

This is in reply to your letter of February 26, 1957, in which you request my opinion as to whether or not a smaller sanitary district may be created within a larger sanitary district, which larger sanitary district was organized pursuant to Chapter 2 of Title 21 of the Code of Virginia.

I am of the opinion that a smaller sanitary district may not be created within the confines of a larger sanitary district organized pursuant to Chapter 2 of Title 21 of the Code of Virginia, as that chapter does not contain any provision that would authorize the creation of such smaller district.

**SCHOOLS—Appropriations Condition Attached Relating to Efficient Schools Is Constitutional. F-2 (73)**

September 7, 1956.

HONORABLE EUGENE B. SYDNOR, JR.  
The Senate Chamber  
State Capitol

This is in reply to your letter of September 6, 1956, in which you request my opinion in answer to the following two questions:

"1. Is the condition attached to the appropriation of state school funds to the localities as set forth in the italicized portions of Item 143 of Senate Bill No. 1, found on pages 29 and 30, valid under the Virginia and United States Constitutions? If not valid, what are the effects and consequences of the invalidity?

"2. If State funds are cut off from a school system because of integration of the races, even under the compulsion of a Federal court decree, and the funds, under Senate Bill No. 2, become available for tuition grants, may such grants be used to pay tuition in non-sectarian private schools operated on a racially integrated basis?"

In my opinion the condition attached to the appropriation of State school funds to the localities as set forth in the italicized portions of Item 143 of Senate Bill No. 1 are valid under the Constitution of Virginia. Section 129 of that Constitution provides: "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." Through Senate Bill No. 1 the General Assembly would establish a criterion which must be met in order for a public school system to be efficient. The General Assembly, in obedience to the mandate of Section 129, unquestionably has the power to determine and define what is and what is not an efficient public school system. The requirement is that it maintain an efficient system however, when forces over which the General Assembly has no control intervene to prohibit the General Assembly from operating what it deems to be an efficient public school system, there is no duty upon the General Assembly to appropriate funds for or maintain, or condone the maintenance of an inefficient system of public schools.

In my opinion Senate Bill No. 1 does not violate any provision of the Constitution of the United States. At the present time I am not advised as to how an attack predicated upon a Federal question could be made and sustained upon the power of the General Assembly to appropriate or not appropriate the public funds of this Commonwealth.

In answer to your second question, there is nothing contained in either Senate Bill No. 1 or No. 2 which would prohibit tuition grants made under Senate Bill No. 2 from being used to pay tuition in nonsectarian private schools operated on racially integrated basis.

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**SCHOOLS—Board—District Supervisor of Soil Conservation District May Be Member. F-249 (285)**

March 29, 1957.

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

This is in reply to your letter of March 21, 1957, in which you request my opinion as to whether or not there is any statute which would prohibit a district supervisor of a soil conservation district from holding the office of member of the school board of a county.

Section 22-69 of the Code of Virginia provides that no State or county officer may serve as a member of the county school board. The supervisor of a soil con-

servation district is an officer of that district, which district is a separate political subdivision of the State. I am of the opinion that, as officer of this separate political subdivision, he is neither a State nor county officer and, therefore, I can find no statute which would prohibit said officer from serving on the county school board.

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**SCHOOLS—Board May Pay Its Share of Cost of Sewage System to Sanitary District in Advance of Construction. F-203 (107)**

October 3, 1956.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

I acknowledge receipt of your letter of October 1, 1956, in which you request my opinion with respect to the question presented by the Division Superintendent of Schools of Bath County, as follows:

"It has always been my understanding that it was not legal for public boards to pay for goods or services until after these have been received so we have always operated on that basis.

"Here at Warm Springs a sewage disposal system to be used and financed jointly by the Board of Supervisors, the School Board, and the village of Warm Springs, is about to be constructed. The division of cost among the three has been agreed upon with the School Board contributing an amount approximately equal to what it would cost to install a system of its own.

"In normal operations, I have understood that School Boards would pay for construction as construction progressed and upon certified certificates by the architect. The School Board has been requested by the Warm Springs Sanitary Commission to advance its share of the total cost of this project at a rate faster than construction. Is this legal or should we advance our share of the cost only upon presentation of authorized certificates of construction progress."

I am unaware of any statute that would prohibit the School Board from complying with the request of the Warm Springs' Sanitary Commission. The School Board should require the Commission to present a claim in writing for the amount of the Board's contribution which claim should be handled in the manner prescribed for other claims of like nature.

As a matter of precaution, I believe it would be advisable for the School Board and the other participating governmental units to suggest to the Sanitary Commission that it require a satisfactory performance bond of the contractor so as to protect the Commission and the contributing units from possible loss.

The request made by the Sanitary Commission is understandable, since it, in all probability, does not have a reserve of funds for capital outlay such as would be expected in the case of a contractor engaged generally in construction work.

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**SCHOOLS—Board—May Not Prohibit Pupil from Bringing Soft Drinks to School. F-203 (119)**

October 15, 1956.

HONORABLE WILLIAM C. COULBOURN  
Commonwealth's Attorney  
Mathews County

This is in reply to your letter of October 13, 1956, which reads as follows:

"On October 8, 1956, the School Board of Mathews County adopted the following resolution applicable to all elementary schools in the County of Mathews: 'No soft drinks are to be brought on or consumed

on the school grounds by children during school hours.'

"The enclosed mimeographed letter explaining the purpose of the resolution was sent by the Superintendent of Schools to the parents of all the children concerned.

"There has been considerable comment about the resolution and in at least one instance a child has been suspended because a soft drink was found in his lunch box which he brought from home.

"The Superintendent of Schools has asked me to seek your opinion as to whether or not the resolution meets the test of reasonableness essential to all regulations promulgated by a school board or similar administrative body."

Section 22-72(2) of the Code of Virginia authorizes local school boards to make rules for conduct and discipline. This provision is as follows:

"(2) *Rules for conduct and discipline.*—To make local regulations for the conduct of the schools and for the proper discipline of the students, which shall include their conduct going to and returning from school, but such local rules and regulations shall be in harmony with the general rules of the State Board and the statutes of this State."

I have contacted the State Board of Education and am advised that the Board has not promulgated any rule similar to the rule adopted by the School Board of your county. A search of the statutes relating to the powers vested in local school boards fails to reveal any provision which, in my judgment, would authorize a local school board to enforce a regulation such as you have brought to my attention. I feel that it would be appropriate for a local board to prohibit the sale of soft drinks on the school premises, but, in my opinion, it does not have statutory power to deny a pupil or teacher the privilege of carrying such drinks to school for consumption during lunch hour or other recess period. This, in my opinion, is an unreasonable attempt to exercise supervisory power over the student body and teachers.

There can, of course, be no objection to the school board fostering an educational program designed to encourage the children in methods of improving their health, so long as there is no unreasonable interference with the right of the parents to decide what a child's lunch may include.

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**SCHOOLS—Board—Members—Not Entitled to Reimbursement for Legal Fees if Suit Filed Against Them in Individual Capacity. F-203 (82)**

September 17, 1956.

HONORABLE R. TURNER JONES  
Commonwealth's Attorney  
Highland County

This is in reply to your letter of September 13, 1956, in which you state that, under the provisions of § 22-206 of the Code of Virginia, a suit was instituted against the members of the County School Board of Highland County. You state that the members of the school board retained a private attorney and the suit was demurred to and dismissed. You request my opinion as to whether or not the school board members should be reimbursed the expenses which they incurred in defending this suit.

Section 22-206 of the Code provides, in part, as follows:

" \* \* \* If the school board violates this provision the individual members thereof shall be personally liable to refund to the local treasurer any amounts paid in violation of this law and such funds shall be recovered from members by action or suit in the name of the Commonwealth at the relation of the attorney for the Commonwealth. \* \* \*"



I am of the opinion that this section contemplates that any suit filed against the school board members shall be against them as individuals rather than in their official capacity as members of the school board. If they incur any expenses in defending such suit, they are not entitled to be reimbursed for such expenses, since the statute does not contemplate that these are expenses arising out of the discharge of their official duties as members of the school board.

**SCHOOLS—Board—of City—May Not Contract with Firm Employing Member of Council. F-203 (141)**

October 30, 1956.

HONORABLE JOHN A. MACKENZIE  
Member House of Delegates

This is in reply to your letter of October 24, 1956, in which you request my opinion as to whether or not the School Board of the City of Portsmouth could contract for the construction of school buildings with a general contractor located in the City, which general contractor employs on a salary basis a member of the City Council of Portsmouth as office manager.

This question is resolved by § 15-508 of the Code. Section 15-508 of the Code is for the city the same as § 15-504 of the Code is for counties. On July 21, 1953, I rendered an opinion to Honorable F. L. Wyche, Commonwealth's Attorney of Prince George County, in which I held that the School Board of Prince George County could not contract for insurance with a local insurance company which company employed on a salaried basis a member of the Board of Supervisors. I am enclosing a copy of that opinion.

I am of the opinion that § 15-508 of the Code prohibits the School Board of the City or any other agency of the City from contracting with a firm which employs a member of the City Council, for the member of the City Council would then at least be indirectly interested in such contract, since part of the profits realized by the firm on the contract would be used to pay his salary.

**SCHOOLS—Bonds—Expenditure of Funds from—Once Proceeds from Received by Treasurer—School Board Has Control Over Not Supervisors. F-103 (319)**

May 8, 1957.

HONORABLE DAVIS Y. PASCHALL  
Superintendent of Public Instruction

This is in reply to your letter of May 8, 1957, which reads as follows:

"On July 17, 1956, the citizens of Fluvanna County voted favorably on a \$750,000 bond issue for school construction. Bonds have been sold and the money deposited in the bank to the credit of the County Treasurer, earmarked for school construction.

"I am advised that the School Board has paid the bonding company for its services, received plans and specifications from the architect and, in accordance with provisions of the Code, requested, received, and opened bids for the project. The local school board has thirty days from May 2 in which to accept or reject the lowest bid."

You request my opinion on the following two questions:

"1. Does the School Board have full authority to award the contract, and authorize properly chargeable expenditures against this fund so earmarked for school construction?"

"2. Does the Board of Supervisors have authority to direct the County Treasurer not to honor warrants drawn by the School Board against

this school construction fund in accordance with the contract terms, and/or warrants drawn by the School Board against this fund for other properly chargeable items of expenditure?"

From a study of the wording of the question submitted to the qualified voters of Fluvanna County in the School Bond Referendum held on July 17, 1956, I am assuming that the referendum was conducted and the bonds were issued, pursuant to Article 2 of Chapter 9 of Title 22 of the Code of Virginia. This opinion is written in accordance with that assumption.

I am of the opinion that if a bond issue has been approved by the qualified voters of a county, the circuit court has entered an order accordingly, pursuant to § 22-173 of the Code of Virginia, and thirty days has elapsed after the entry of the order, then the school board has full and complete authority to issue the bonds and award a contract within the limits approved by the voters. See §§ 22-176 and 22-177 of the Code of Virginia which I feel support this authority of the school board and which sections do not reserve any authority for the board of supervisors over this matter.

Sections 22-73 through 22-78 of the Code prescribe the procedure to be followed by the school board in issuing warrants and by the treasurer in honoring their warrants. None of these sections of the Code give the board of supervisors any authority over the issuance of the warrants and the payment thereof, so long as the warrants are issued for valid school purposes and functions, and so long as the treasurer has sufficient school funds on deposit to honor the payment of the warrants. Section 15-253 of the Code provides, in part, as follows:

"The board of supervisors shall receive and audit all claims against the county, except those required to be received and audited by the county school board, \* \* \*."

Warrants for school construction drawn on funds raised by a school construction bond issue are not subject to being received, audited, or in any way controlled by the board of supervisors. I am of the opinion, therefore, that the Board of Supervisors does not have authority to direct the County Treasurer not to honor warrants drawn by the School Board against this school construction fund in accordance with the terms of the bond referendum and drawn in accordance with the terms of the contract entered into for school purposes.

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**SCHOOLS—Bonds—Expenditure of Funds—Public Borrowing Law of 1952—  
Once Proceeds from Received by Treasurer—School Board Has Control  
Over Not Supervisors. (319)**

May 22, 1957.

HONORABLE R. P. ZEHLER, JR.  
Commonwealth's Attorney  
Fluvanna County

This is in reply to your letter of May 13, 1957, in which you state that, pursuant to the Public Borrowing Law of 1952, Article 3.1, Chapter 19, Title 15 of the Code of Virginia, Fluvanna County recently issued and sold bonds in the amount of \$750,000.00. These bonds were issued for the sole purpose of school construction. You further state that, on May 10, 1957, the Board of Supervisors adopted a resolution that these funds should be deposited at three per cent in a Charlottesville bank and that, until further resolution of the Board, no further disbursements should be made from the proceeds from the sale of the bonds. You state that this action was taken by the Board of Supervisors because of a recent statement made by a member of the State Corporation Commission that the Commission was contemplating changing its method of determining the assessed valuation of property of public service corporations and that such a change could result in a large loss of tax revenues for Fluvanna County. You request my opinion in answer to the following two questions:

"1. Under the Public Borrowing Law of 1952, as cited above, does the Board of Supervisors have authority to delay the school construction plans, and to invest the bond proceeds with the aforesaid Bank for a period not to exceed eighteen months, pending application of the proceeds to the purposes for which said bonds were authorized?"

"2. Are the proceeds from the said bond issue exclusively under the control of the Board of Supervisors, and has that Board the authority to instruct the County Treasurer that no disbursements shall be made from said proceeds except by a duly and properly signed check by the Board of Supervisors?"

When I rendered my opinion to the Honorable Davis Y. Paschall, Superintendent of Public Instruction, on May 8, 1957, concerning this matter, I stated that the opinion was predicated upon the assumption that the bonds for school construction were issued pursuant to Article 2, Chapter 9, Title 22 of the Code of Virginia, and, therefore, that opinion is not controlling in this case, since the bonds were in fact issued pursuant to Article 3.1, Chapter 19, Title 15 of the Code of Virginia, the Public Borrowing Law of 1952.

The question submitted to the voters of Fluvanna County in the referendum held on July 17, 1956, read as follows:

"Shall debt be contracted and bonds of the aggregate principal amount of \$750,000 be issued by Fluvanna County for the purpose of purchasing sites for school buildings or additions to school buildings, constructing new school buildings or additions to existing school buildings, furnishing and equipping school buildings or additions to school buildings, and erecting and equipping buildings for storage, care and repair of school busses, such bonds to be payable at such time, not exceeding thirty years after their date, as the Board of Supervisors shall prescribe?"

The issuance of the bonds as voted on by the people in the questions stated on the ballot was not predicated on any one source of tax revenues, nor was it predicated on there being no increase in property taxes in the county. Section 15-605.12 of the Code of Virginia provides as follows:

"The governing body of any county issuing bonds under the provisions of this article shall levy and collect annually, at the same time and in the same manner as other county taxes as assessed, levied and collected, a tax upon all taxable property in the county subject to local taxation, sufficient to provide for the payment of the principal of and the interest upon such bonds as the same respectively become due."

The Board of Supervisors, as well as the electorate, had constructive notice of and were bound by this section. Therefore, the possibility of a decrease in tax revenues from public service corporations cannot be given any consideration in the legal questions involved.

Sections 15-605.4, 15-605.5 and 15-605.6 of the Code provide how the bond referendum may be held and the results ascertained. I am assuming that all of these provisions were complied with. Section 15-605.7 provides how the bonds are issued and, before the bonds may be issued, if for school purposes as these bonds were, there must be a resolution of the school board requesting their issuance and a resolution of the board of supervisors authorizing the issuance of the bonds. This provision has been complied with, and the bonds have been issued.

Section 15-605.9 authorizes the board of supervisors to sell the bonds in such manner and for such price as it may deem in the best interest of the county, with certain limitations. These bonds have been sold and the proceeds have been received by the County. Section 15-605.10 provides that, pending the application of these proceeds to the purpose for which authorized, all or any part of such proceeds may be invested by the board of supervisors. That section further provides:

"Any security so purchased as investment of the proceeds of such bonds shall be deemed at all times to be part of such proceeds, and the

interest accruing thereon and any profit realized from such investment shall be credited to such proceeds. Any security so purchased shall be held by the treasurer of the county as custodian thereof and shall be sold by the county treasurer upon resolution of the governing board of the county directing such sale, at the best price obtainable, or presented for redemption, whenever it shall be necessary, as determined by such resolution, so to do in order to provide moneys to meet the purposes for which the bonds of the county shall have been authorized."

The proceeds have been received by the County and they may be invested within the limitations of this section until they are needed for the project which was authorized by the voters at the bond referendum. I am of the opinion that the last sentence of the above-quoted section of the Code is purely a ministerial provision regulating the sale or the redemption of the investments. This provision is intended to be a control on the treasurer, preventing him from selling or redeeming the investments until such time as the board of supervisors authorizes him to dispose of them. This provision does not give the board of supervisors authority to refuse to dispose of the investments if the funds are needed for school construction purposes as authorized by the voters.

Section 22-72 of the Code of Virginia provides, in part, as follows:

"The school board shall have the following powers and duties:

"(6) School buildings and equipment—to provide for the erecting, furnishing, and equipping of necessary school buildings and appurtenances and the maintenance thereof."

Sections 22-73 through 22-78 of the Code prescribe the procedure to be followed by the school board in issuing warrants and by the treasurer in honoring such warrants. None of these sections of the Code gives the board of supervisors any authority over the issuance of the warrants and the payment thereof, so long as the warrants are issued for valid school purposes and functions, and so long as the treasurer has sufficient school funds on deposit to honor the payment of the warrants. Section 15-253 of the Code provides, in part, as follows:

"The board of supervisors shall receive and audit all claims against the county, except those required to be received and audited by the county school board, \* \* \*"

In answer to your first question, I am of the opinion that, under the Public Borrowing Law of 1952, if bonds have been authorized by the voters, issued, sold and the proceeds received by the county for school construction purposes, the board of supervisors has authority to invest the bond proceeds until said proceeds are needed to cover the cost of the school construction project, but the board of supervisors does not have authority to delay the school construction plans, once the proceeds of the bond issue have been received. The school board then has control over the execution of the school construction program and only they may delay said program.

In answer to your second question, I am of the opinion that, once the proceeds from bonds for school construction have been received by the County, the only control that the Board of Supervisors has over the proceeds is that they may invest them pursuant to the provisions of § 15-605.10 of the Code until such time as the proceeds are needed for school construction, and the School Board, not the Board of Supervisors, determines when they are needed for school construction. The School Board issues and signs the checks or warrants drawn against these funds. The Board of Supervisors does not have authority to draw against these funds, nor does the Board of Supervisors have authority to prohibit the School Board from drawing checks or warrants against these funds, or to instruct the treasurer not to honor these checks or warrants.

**SCHOOLS—Bonds—Proceeds May Be Used Only for Projects Listed on Referendum Ballots. (358)**

June 12, 1957.

HONORABLE REGINALD H. PETTUS  
Commonwealth's Attorney for Charlotte County

This is in response to your letters of June 7 and 10, 1957, in which you request my opinion as to whether or not part of the funds of the recent bond issue by Charlotte County for constructing two school buildings may be used to construct an addition to a presently existing school building.

The question submitted to the voters of Charlotte County in the School Bond Referendum reads as follows:

"Shall the Board of Supervisors of Charlotte County issue bonds for construction of two elementary school buildings in Charlotte County for the maximum amount of \$500,000.00?"

I am of the opinion that these funds may be used only for the construction of the two elementary school buildings specified in the question submitted to the voters.

It is true that under the provisions of the Code of Virginia the question submitted to the voters could have been worded in the broad general term "for school construction". However, the question submitted to the voters was worded specifically, "for construction of two elementary school buildings". I am of the opinion that the Board of Supervisors of Charlotte County are bound by this wordage and, therefore, may not use any of the funds on a third school building.

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**SCHOOLS—Bonds—Different Methods Which May Be Followed. F-103 (28)**

July 26, 1956.

HONORABLE ROBERT D. BAUSERMAN  
Commonwealth's Attorney  
Shenandoah County

I acknowledge receipt of your letter of July 24, 1956, which reads as follows:

"We have a bond referendum petition to be presented to the court in this county which was instituted by resolution of the Shenandoah County School Board to the Shenandoah County Board of Supervisors and there seems to be a conflict between Section 15-601 and Section 22-171 as to the time the election shall be held after the court order is entered. My question is: shall the court order set the date for the referendum thirty days after the court order as provided in Section 15-601 or shall it be set not more than twenty days after the date of such order as provided in Section 22-171. My personal opinion is that the procedure prescribed in 22-171 is to apply when a petition of qualified voters institute such a proceeding as mentioned in Section 22-168 and does not apply when the referendum is instituted by resolution of the school board, however, I am not sure which to follow and, as the time element in these sections is irreconcilable, I would like for you to advise me whether to set the date of the referendum in not less than thirty days from the date of the order as provided in Section 15-601 of the Code or to follow the time limit prescribed in Section 22-171 by setting the date not more than twenty days after the date of such order."

I am enclosing a copy of an opinion furnished Honorable J. Gordon Bennett, Auditor of Public Accounts, under date of October 18, 1951, and published in the Reports of the Attorney General for 1951-52 at page 26, in which is discussed two methods by which bonds may be issued for school purposes. Since the pro-

ceedings in this instance were initiated by the County School Board, I am of the opinion that the provisions of § 22-167 of the Code should be followed, which would require following the procedure set out in §§ 15-601 of the Code, et seq.

In this connection I wish to call your attention to the provisions of §§ 15-605.1 through 15-605.13 wherein additional or supplemental powers and methods of issuing bonds are set forth.

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**SCHOOLS—Bonds—Operating Funds May Not Be Borrowed from Funds Raised by. F-197 (15)**

July 12, 1956.

HONORABLE H. B. HUBER  
Treasurer of Campbell County

This is in reply to your letter of July 11, 1956, in which you request my opinion as to whether or not the County School Operating Fund may borrow money for operating purposes from the County School Construction Fund, which fund was raised by selling a \$2,000,000 school building bond issue.

I know of no authority whereby school operating funds may be borrowed from this fund raised by this bond issue, nor do I know of any way that money may be temporarily transferred from the fund raised by this bond issue to the school operating fund. To use any portion of the funds raised by this bond issue for school operations, even though it is only a temporary loan or transfer, would, in my opinion, constitute a violation of the provisions of the bond referendum and the indenture covering the bond issue.

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**SCHOOLS—Bonds—Warrants Drawn by School Board for Payment Out of These Funds Do Not Have to Be Approved by Board of Supervisors—No Duty to Raise Additional Funds for Project if Funds Insufficient to Construct All Rooms Desired. F-103 (243)**

February 26, 1957.

HONORABLE RICHARD C. RICHARDSON  
Commonwealth's Attorney for New Kent County

This is in reply to your letter of February 21, 1957, in which you request my opinion on two questions relating to the bond referendum for school construction which was recently held in New Kent County. Your first question concerns the method of handling funds received from the sale of bonds.

I am of the opinion that the School Board should provide by resolution for the drawing of special warrants on the County Treasurer payable out of these funds for payment of contracts for the school construction, pursuant to § 22-78 of the Code of Virginia. I am of the opinion that the Board of Supervisors is not required to approve each individual warrant drawn on these funds.

The resolution of the Board of Supervisors authorizing the bond referendum contained the provision that the funds would be used to provide ten additional school rooms for the George W. Watkins' School. You state that, due to increased construction costs, funds raised through the bond issue may be sufficient to provide only nine additional school rooms. You request my opinion as to whether or not the Board of Supervisors must in some other manner raise the additional funds necessary to construct the tenth school room, or whether they may construct just nine additional rooms.

Section 15-605.4 of the Code requires the board of supervisors, in its resolution requesting the bond referendum, to state in brief and general terms the purpose or purposes of the bond issue. It was not necessary for the Board of Supervisors to state the number of additional rooms which they propose to construct in order to comply with these provisions of § 15-605.4. I am of the opinion that the

Board of Supervisors must use all of the funds for construction of additional facilities at the George W. Watkins School; however, should the funds raised by the bond issue not be sufficient to construct ten additional school rooms, then I am of the opinion that the Board should use the money to construct as many rooms as possible. However, there is no duty upon them to raise funds by other means to construct ten additional rooms.

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**SCHOOLS—Buses—State Board Has No Authority Over Qualifications of Drivers. F-201 (121)**

October 16, 1956.

HONORABLE CLAIBORNE D. GREGORY  
Member of the House of Delegates

I acknowledge your letter of October 16, 1956, which reads as follows:

"For the past twenty-seven years there has been employed here in Hanover County a school bus driver, Mr. Robert Berkley Harris. During this time, Mr. Harris has operated his bus without accident and to the complete satisfaction of both the school officials of the county and the patrons whom he served.

"At the age of seven Mr. Harris stepped into a field mower and lost his right foot, necessitating the use of an artificial limb. Inasmuch as this defect has existed for practically his entire life, he has adapted himself to the artificial foot in a remarkable manner.

"To indicate the degree of excellence with which Mr. Harris has performed his duties, I would like to point out that last year he received the second highest safety award given in the State for school bus drivers, and had it not been for the fact that there is another driver in the State who has driven for forty years without accident, he would have been number one.

"The State Board of Education has adopted a regulation with respect to the qualifications of school bus drivers, a copy of which is attached. This rule governing the employment of one-armed, one-legged or one-eyed persons, which I understand was adopted in 1941, twelve years after the employment of Mr. Harris, has been invoked this year to terminate his employment.

"I would appreciate your opinion with respect to the authority of the State Board of Education to determine the qualifications of drivers of school buses, especially in view of the provisions of Section 22-278 of the Code of Virginia."

I have made a careful examination of the Regulation adopted by the State Board of Education relating to school bus operators, and especially § 3 thereof, which is as follows:

"3. No person shall be employed to operate a school bus who has any of the following known physical defects: one arm, one leg, one eye, epilepsy, a serious heart condition, or any form of paralysis or any other physical defects that would affect the safe operation of a school bus."

The power of the State Board to adopt regulations pertaining to buses is prescribed by § 22-276 of the Code, which section is 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."

This section must be considered along with § 22-278 which relates to the qualifications of bus drivers, and is as follows:

"No person shall drive any school bus upon a highway in this State unless such person has had a reasonable amount of experience in driving motor vehicles, and shall have satisfactorily passed a rigid examination pertaining to the ability of such person to operate a school bus with safety to the school children thereon and to other persons using the highways. The Division of Motor Vehicles of this State shall adopt such rules and regulations as may be necessary and proper to provide for the examination of persons desiring to drive such buses in this State, and for the granting of permits to qualified applicants."

In view of this latter section, I am of the opinion that the State Board of Education does not have the authority to judge or pass upon the driving qualifications of persons employed by local school authorities to drive school buses. By statute this power is vested exclusively in the Division of Motor Vehicles, which is authorized and is under the duty to pass upon the qualifications of all persons applying for permits to drive motor vehicles.

In so far as the regulation adopted by the State Board of Education attempts to assume the responsibility placed upon the Division of Motor Vehicles for the examination of applicants and the granting of permits to persons desiring to drive school buses, such regulation is void.

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#### **SCHOOLS—Cherokee Indians—Classified as White. F. 254 (78)**

September 11, 1956.

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

This is in reply to your letter of September 6, 1956, in which you request my opinion as to whether or not Cherokee Indian children residing in your county should be enrolled in the white schools or the colored schools of the county. You state that the birth certificates of these children show that they are Cherokee Indians.

If these children have a traceable amount of Negro blood they are to be classified as colored children. However, if they have no traceable amount of Negro blood they are not colored children and, therefore, would be entitled to attend the white schools.

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#### **SCHOOLS—Contracts with Teachers—Not Required to Have 30 Day Termination Clause—Funds Cut Off—Effect of—Funds May Be Paid to Unemployed Teachers. F-203 (216)**

January 30, 1957.

HONORABLE A. ERWIN HACKLEY  
Commonwealth's Attorney for Page County

This is in reply to your letter of January 24, 1957, in which you request my opinion as to whether or not a local school board is required by State law to include a thirty-day termination clause in their contracts with teachers. You ask also as to whether or not State funds would be paid to the locality for at least a period of one year if schools were closed because of integration.

There is no provision in the laws of the State of Virginia which make it mandatory that a local school board include a thirty-day termination clause in their contract with teachers. Should schools in a county be closed because of integration, then State funds which would have gone to that county for the



operation of public schools are still earmarked for that county and cannot be diverted to any other county in the State. Should the schools be closed because of integration, then the State funds under the provisions of Chapter 56 of the Acts of Assembly, Special Session of 1956, and Item 143 of Chapter 71 of the Acts of Assembly, Special Session of 1956, may be used for the payment of salaries and wages of unemployed teachers and other public school employees who are under contract until the end of the school year.

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**SCHOOLS—Construction of Segregated Facilities—Not Affected by Supreme Court Decision. (320)**

May 9, 1957.

HONORABLE WILLIAM A. JONES  
Commonwealth's Attorney  
Richmond County

This is in reply to your letter of May 7, 1957, in which you state that the Board of Supervisors of Richmond County contemplates borrowing \$110,000 from the Literary Fund and utilizing \$50,000 from the Battle Fund for the construction of a consolidated Negro grade school for Richmond County. You request my opinion as to whether or not an expenditure of public funds for the construction of a consolidated Negro grade school would constitute an ultra vires and illegal act because of the decision of the Supreme Court of the United States in *Brown v. Board of Education*, 347 U. S. 483.

I am of the opinion that expenditures of public funds for this purpose would be a valid expenditure and would not constitute an ultra vires and illegal act. I feel that the ruling of the Supreme Court of Appeals of Virginia in *School Board v. Shelton*, 198 Va. 226, supports my opinion on this matter, and, as of this time, the United States Supreme Court decision has no place in the determination of the validity of the expenditure of public funds for school construction.

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**SCHOOLS—Exclusion of Pupils—Pregnant Pupils Could Be Detrimental to School. F-203 (55)**

August 17, 1956.

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

This is in reply to your letter of August 16, 1956, in which you request my opinion as to whether or not the Loudoun County School Board has a legal right to exclude from school:

- (a) Pupils who are married
- (b) Pregnant married pupils
- (c) Pregnant unmarried pupils

I am enclosing a copy of opinion rendered on August 3, 1954, to Honorable J. E. Pointer, Jr., Commonwealth's Attorney for Gloucester County, in which I state that I could find no authority given to a school board to exclude pupils who are married from school.

Section 22-231 of the Code provides:

"It shall be the duty of the school board to suspend or expel pupils when the welfare and efficiency of the schools make it necessary."

It would appear, therefore, that in a proper case the school board could refuse to admit a pupil on the ground that such would be detrimental to the welfare and efficiency of the school, and this in itself would be equivalent to an

expulsion. Therefore, if the school board should consider that the presence of a pregnant married or unmarried pupil would be detrimental to the welfare and efficiency of the school, it might take such action as outlined above.

I am enclosing a copy of an opinion rendered on September 26, 1950, to the Honorable Dowell J. Howard, Superintendent of Public Instruction, which is pertinent to this question.

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**SCHOOLS—Expulsion or Suspension of Pupil—Authority of Principal to Suspend for Fixed Time—Action Reviewable by School Board—No Duty to Call Special Meeting. F-203 (254)**

March 5, 1957.

HONORABLE SAMUEL H. ALLEN  
Commonwealth's Attorney  
Lunenburg County

This is in reply to your letter of February 21, 1957, in which you request my opinion concerning the authority and duty of principals, teachers and school boards to suspend and/or expel a pupil under the provisions of §§ 22-230 and 22-331 of the Code of Virginia. These two sections read as follows:

"The principal, or the teacher where there is no principal, may, for sufficient cause, suspend pupils from attending the school until the case is decided by the school board, which shall be with as little delay as possible, provided that in such cases of suspension the principal or teacher shall report the facts in writing at once to the division superintendent and the parent or the guardian of the child suspended.

"It shall be the duty of the school board to suspend or expel pupils when the welfare and efficiency of the schools make it necessary."

You ask first if a principal can suspend a pupil for a fixed period of time in view of the two statutes quoted above. I am of the opinion that a principal may, for sufficient cause, suspend a pupil for a fixed period of time. This suspension is subject to review by the school board, and the school board may affirm the action of the principal or it may order that the suspension be terminated prior to the time fixed by the principal and that the pupil be permitted to attend school.

In your second question you ask if there is a duty upon the school board to call a special meeting to rule on the suspension of a pupil by the principal of a school. I am of the opinion that § 22-230 of the Code requires the school board to review and decide the case of suspension at the first school board meeting held after the action of the principal; however, I am of the opinion that there is no duty or requirement upon the school board to call a special meeting to pass upon the matter.

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**SCHOOLS—Federal Lunch and Milk Funds—Excluded from Minimum Education Program Fund. (354)**

June 11, 1957.

HONORABLE DAVIS Y. PASCHALL  
Superintendent of Public Instruction

This is in response to your letter of May 21, 1957, inquiring if Federal School Lunch and Milk Funds, which are merely cleared through the local school board books for the specific use for school lunches and/or school milk, would be excluded in the construction of the words "Federal Funds" from the minimum education program fund set forth in Item 138 of the Appropriation Act (1956). I am further informed that there are no Virginia counterparts to these Federal food funds which have ever been included in determining the sum mentioned in Item 138.

Kindly be advised that I am of the opinion that by the nature, purpose and use of these food funds, they would be excluded under the construction of the term "Federal Funds" and would not constitute a factor in the distribution of the Minimum Education Program Fund. I am further of the view that a determination by the State Board that these Federal food funds are not so included would strengthen such an interpretation by the principals of administrative interpretation.

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**SCHOOLS—Funds Cut Off Provision of Appropriation Act—Expiration of—  
No Effect on Bonds and Constitutional School Funds. F-197 (184)**

December 28, 1956.

HONORABLE H. STUART CARTER  
Member House of Delegates

I acknowledge receipt of your letter of December 27, 1956, which reads as follows:

"It will be greatly appreciated if you will render an opinion upon the following subjects:

"(1) The General Assembly of Virginia at its Extra Session in 1956 adopted the policy of withholding state funds from schools where white and colored children are taught together. (1956 Acts of Assembly, Extra Session, Page 106). Will this policy of withholding funds expire on July 1, 1958 in the event the 1958 Regular Session of the General Assembly does not reenact legislation adopting this policy?

"(2) In the event it becomes necessary for the state to withhold funds from a locality because children of both races are required to be taught in the same school, and that locality becomes in default in its bonds or notes for a period of over sixty days, can such bond holders or note holders still avail themselves of the provisions of §§ 15-659 and 15-660 of the Code of Virginia?

"(3) In the event state funds are withheld from a locality under the withholding provisions of the Acts of Assembly 1956 Extra Session, can the state include in the funds withheld from the locality its share of literary fund interest and capitation taxes provided for distribution to the localities by § 135 of the Constitution of Virginia?"

I shall answer your questions in the order presented.

1. Chapter 71 of the Acts of the Extra Session of 1956 is an amendment to the Appropriation Act of 1956 (Chapter 716, Regular Session) and, therefore, the provisions of this Chapter will cease to be effective at the end of June, 1958.

2. The legislation enacted at the Extra Session of 1956 does not in any manner alter the provisions of §§ 15-659 and 15-660 of the Code. Therefore, holders of bonds of the type described in the sections may avail themselves of the provisions of these statutes to the same extent as prior to the enactment of the laws contained in the Acts of Assembly, Extra Session 1956.

3. The amendments to the Appropriation Act of 1956 do not purport to withhold any of the funds to which the localities are entitled under the provisions of Section 135 of the Constitution. It will be noted that Items 135 and 136 of the General Appropriations Act were not amended by Chapter 71, Acts of Extra Session of 1956.

**SCHOOLS—Funds May Not Be Borrowed from or Deposited in Bank Where Supervisor Is Officer and School Board Member Director. F-103 (194)**

January 9, 1957.

HONORABLE W. B. LAY, *Clerk*  
Circuit Court of Wise County

This is in reply to your letter of January 4, 1957, in which you request my opinion as to whether or not a bank which has a member of the School Board as a director and a member of the Board of Supervisors as an officer may purchase school improvement bonds under the provisions of the resolution adopted by the Board of Supervisors on December 11, 1956. It is contemplated that, if any banks in the State of Virginia should purchase any of these bonds, any or all receipts from the sale of the bonds to said bank would be deposited in the bank until such time as the funds are needed.

Section 15-504 of the Code of Virginia provides that no supervisor or officer of the county shall become interested directly or indirectly in any contract made with the county or the county school board. Paragraph 4 of that section contains the following provision:

"The term 'contract' as herein used, shall not be held to include the depositing of county or town funds in, or the borrowing of funds from, local banks in which members of the board of supervisors, members of the school board, or other county officers herein named may have a stock interest; nor shall it include the granting of franchises to or purchase of services from public service corporations. Provided, further, that the term 'contract' as herein used, shall not be held to include any deposit of county funds heretofore or hereafter made, or the borrowing of funds from local banks in which any member of the board of supervisors may be a director or stockholder."

As you can see from the above-quoted provision, the term "contract" as herein used, shall not be held to include the deposit of county funds or borrowing of funds from a local bank in which any member of the Board of Supervisors is a director or stockholder. However, in the situation in Wise County, the member of the Board of Supervisors is a cashier in the bank and, therefore, is an officer of the bank. Furthermore, there is no exemption provided in this section should a county officer other than a member of the board of supervisors be a director of a bank. If a bank purchases any county bonds, then there is a contract between that bank and the county, as the county has agreed on the face of the bond to pay to bearer certain principal and interest. This fact is the same whether the bank purchases the bonds at the initial sale or whether they purchase the bonds from another bank.

Section 15-504 of the Code contains a very broad prohibition against supervisors and officers of the county becoming interested in contracts with the county. The General Assembly has provided a number of exceptions to this prohibition; however, none of these exceptions, in my opinion, cover the problem raised in your County.

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**SCHOOLS—Joint Educational Facilities—How Members of Board Appointed. F-203 (280)**

March 22, 1957.

HON. C. HARRISON MANN, JR.  
Member of the House of Delegates

This is in reply to your letter of March 18, 1957, in which you make reference to Section 15-692.2 of the Code of Virginia. This section provides that any two or more counties and cities, or combinations thereof, may acquire property for educational purposes to be used jointly by them. It is also provided that the control of such property shall be under a board chosen in the manner and for

the term provided for by Section 22-100.3. You ask the following questions, which I quote below:

"Is it necessary to appoint permanent members 60 days prior to the first of July?

"In view of the silence of the statute on the subject, shall the terms of the two members be for four years each?

"Since it appears that the intention of the statute is that membership on the board should be of a staggered nature, would one member be named for a period of two years and another for a period of four years?"

The answer to your first question will depend upon when there is established a division school board as provided for in Section 22-100.3. If this board is established prior to 60 days before the first day of July, 1957, then the permanent board, whose members will assume office on July 1, 1957, must be appointed by the respective governing bodies sixty days before July 1, 1957. If the board is established prior to the first of July but during the 60 day period immediately preceding the first of July, then I am of the opinion that the members who are to assume office on July 1, 1957, may be appointed during that 60 day period for the reason that the members of the board first appointed may serve only " \* \* \* until the first day of July next following the creation of such division."

You state that it is the intention of the cities of Alexandria and Falls Church and the counties of Arlington and Fairfax to join together in the creation of this division school board. Section 22-100.3 provides that the board shall consist of not less than 6 nor more than 9 members. Therefore, each of the governing bodies of the above mentioned political subdivisions will, as pointed out by you, appoint two members to serve on this division school board.

In answer to your second question, I am of the opinion that Section 22-100.3 contemplates that unless each governmental unit joining in the venture is represented by more than two members, then all the members representing each unit shall be appointed for a four year term. It is only in cases where a governmental unit is represented by three or more members, that the terms, in the first instance, shall be staggered.

In view of my answer to your second question, it is not necessary to discuss your third question.

I call to your attention the fact that the governing bodies concerned shall jointly select for a term of four years one person who shall be a member of such division school board only for the purpose of voting in case of a tie vote on any question. This person is known as a tie-breaker.

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### SCHOOLS—Management of Joint Schools—Proposed Special Law for Washington County of Doubtful Validity. F-2 (86)

September 18, 1956.

HONORABLE FRED C. BUCK  
Member House of Delegates

This will reply to your inquiry of recent date, in which you request an opinion upon the validity of House Bill No. 48, offered on September 4, 1956, at the Special Session of the General Assembly of Virginia.

House Bill No. 48 authorizes the Central School Board of the Town of Abingdon and the County School Board of Washington County to establish joint schools for the use of the Town of Abingdon and the Abingdon Magisterial District of Washington County. Although the power to condemn land and the right to hold title thereto is vested jointly in the town and county school boards, the *management, operation and control* of such joint schools is reposed in a Committee of Control to be composed of three resident qualified voters of the Town of Abingdon, appointed by the Council of the Town of Abingdon from

the membership of the town school board, and three resident qualified voters of the Abingdon Magisterial District, one of whom must be the Abingdon Magisterial District School Trustee on the Washington County School Board. In addition, the area comprising the Town of Abingdon and the Abingdon Magisterial District is designated a separate attendance area for the proposed joint schools, and no pupil living outside the specified attendance area may attend such joint schools without the consent of the Committee of Control, subject to the payment of such tuition and other rules or regulations as the Committee of Control may prescribe.

With respect to the formation of joint schools generally, Section 22-7 of the Code of Virginia (1950) as amended, provides:

"The *school boards* of counties or of counties and cities, or of counties and towns operating as separate special school districts, may, with the consent of the State Board, establish joint schools for the use of such counties or of such counties and cities or of counties and towns operating as separate special school districts, and may purchase, take, hold, lease, convey and condemn, jointly, property, both real and personal, for such joint schools. Such *school boards, acting jointly*, shall have the same power of condemnation as county school boards except that such land so condemned shall not be in excess of thirty acres in a county or city for the use of any one joint school. The title of all such property acquired for such purposes shall vest *jointly in such school boards* of the counties or counties and cities or counties and towns operating as separate special school districts in such respective proportions as such school boards may determine, and *such schools shall be managed and controlled by the boards jointly*, in accordance with such rules and regulations as are promulgated by the State Board. However, such rules and regulations in force at the time of the adoption of a plan for the operation of a joint school shall not be changed for such joint school by the State Board without the approval of the *local school boards*." (Italics supplied).

As is manifest from the above quoted language, this section of the Virginia Code vests in the *school boards* of the counties, cities or towns constituting separate special school districts the management and control of joint schools formed pursuant to the statute. Thus, the management of the schools in the county, city or town school districts still reposes in the school boards of the counties, cities and towns concerned. In this respect, the statute is consistent with the mandate of Section 133 of the Constitution of Virginia which declares that the "supervision of schools in each county \* \* shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law." While it is true that the various Committees of Control have been established in accordance with rules and regulations of the State Board of Education to facilitate the management of joint schools, such Committees of Control act merely as administrative agencies of the school boards concerned and are subordinate to such school boards. The supervision of joint schools, therefore, is ultimately vested in the school boards rather than the Committees of Control without infringing the provisions of Section 133 of the Virginia Constitution.

In contrast to the foregoing general law, House Bill No. 48 purports to vest the management, operation and control of the contemplated joint schools for the Town of Abingdon and the Abingdon Magisterial District in a Committee of Control which is independent of the County School Board of Washington County or the Central School Board of the Town of Abingdon. House Bill No. 48, page 1, lines 25-27. This is especially true with respect to the assignment of pupils to attend such joint schools. The practical effect of House Bill No. 48 in this respect is to deprive the school boards of the county and the town of this aspect of the supervision of the joint schools and repose such supervision in the independent Committee of Control. House Bill No. 48, page 2, lines 5-7. In this re-

gard, the supervision of the joint schools is removed from the school boards and, to the extent that the proposed bill removes such supervision of joint schools in Washington County from the Washington County School Board, it would, I believe, contravene the mandate of Section 133 of the Constitution of Virginia.

Moreover, it is manifest that the Legislature has made provision for the formation of joint schools by enactment of a general law on the subject applicable throughout the Commonwealth. Section 22-7, *supra*. By the terms of this statute, as pointed out above, the management and control of joint schools formed in accordance with its terms is vested jointly in the school boards concerned. It is, therefore, manifest that the subject of joint schools is one which the Legislature has determined may be provided for by general law and, in the absence of some demonstrably rational and practical necessity for treating joint schools in Washington County in a different manner, it would appear that House Bill No. 48 is subject to criticism as a special law in contravention of Section 64 of the Virginia Constitution, which prohibits enactment of special, private or local laws.

For the foregoing reasons, I am of the opinion that House Bill No. 48 is of doubtful constitutional validity.

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**SCHOOLS—Property—School Board and County May Take Title Together.  
F-83 (277)**

March 21, 1957.

HONORABLE EDW. H. RICHARDSON  
Commonwealth's Attorney  
Roanoke County

This is in reply to your letter of March 19, 1957, in which you request my opinion as to whether or not the County of Roanoke and the School Board of Roanoke County can legally hold title to real estate jointly. You state that this real estate would be used for offices of the County School Board and other departments of the county.

I am of the opinion that, if the property is to be used for the purpose of housing offices of the School Board and offices of other agencies of the county, the property may be owned by the County School Board and by the county. Should this property or any portion of it ever be used for schools, then I am of the opinion that title to that portion of the property which is to be used for schools should be vested solely in the School Board of Roanoke County.

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**SCHOOLS—Residence—Children Not Entitled to Attend School in County  
Other Than Where They Reside Although Parents Have Mistakenly Paid  
Taxes to Wrong County. F-203 (186)**

December 31, 1956.

HONORABLE WADE S. COATES  
Commonwealth's Attorney  
Tazewell County

This is in reply to your letter of December 19, 1956, in which you request my opinion on the following matter:

"Mill Creek forms the boundary line between Tazewell and Russell Counties near Raven, Virginia. Many years ago a tract of land lying in both Tazewell and Russell Counties was sub-divided. Some of the deeds to land lying entirely in Russell County were recorded in Tazewell County, and were accordingly assessed for taxation in Tazewell County. The children of the owners of these properties have attended Tazewell County Schools. When this situation was brought to the attention of the Tazewell County School Board the parents were directed

to send their children to Russell County Schools. The parents contend that inasmuch as they are still taxed in Tazewell County their children should be allowed the privilege of attending Tazewell Schools without fees or tuition."

I am of the opinion that these children are not entitled to attend schools in Tazewell County if they reside in Russell County although their parents have been paying property taxes in Tazewell County for a number of years in the belief that their property was located in Tazewell County rather than Russell County. I feel, however, that, in view of the fact that a mutual mistake has been made by all parties concerned with respect to the location of this property, some consideration should be given these children and permit them to finish the current school year in the schools of Tazewell County and not force them to transfer from the schools of Tazewell County to those of Russell County in the middle of a school year.

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**SCHOOLS—Teacher—Sister-in-Law of Member of Town Board May Teach in County. (350)**

June 7, 1957.

HONORABLE LEONARD F. JONES  
Commonwealth's Attorney  
Campbell County

This is in reply to your letter of June 5, 1957, in which you request my opinion as to whether or not the School Board of Campbell County may employ as a teacher the sister-in-law of a member of the Town School Board of a town in the county which constitutes a special school district. Section 22-206 of the Code of Virginia provides, in part, as follows:

"It shall not be lawful for the school board of any county, city or of any town constituting a separate school district to employ or pay any teacher or other school board employee from the public funds if such teacher or other employee is the father, mother, brother, sister, wife, son, daughter, son-in-law or daughter-in-law, sister-in-law or brother-in-law of the superintendent or of any member of the school board. \* \* \*

I am of the opinion that the School Board of Campbell County may employ a sister-in-law of a member of a town school board if the sister-in-law is to teach in the county and is not to be paid from any funds under the control of the town school board. This opinion is based on the fact that the town school board member in question is not a member of the county school board.

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**SCHOOLS—Temporary Loans—May Borrow Two or More Successive Years. F-203 (130)**

October 22, 1956.

HONORABLE DOWELL J. HOWARD  
Superintendent of Public Instruction

This will reply to your letter of October 10, in which you advise that you have received a request from the Grayson County School Board for an opinion concerning the provisions of Section 22-120 of the Virginia Code, relating to temporary loans to county or city school boards. The question presented is stated by the Superintendent of Schools of Grayson County in the following language:



"In making an application for a loan from one of the banks in Galax, the chairman of the loan committee states that he is not sure that a county could borrow temporary money unless provisions were made to pay the entire amount back at the end of the year. I had stated to him that this amount would be paid back but that we would probably have to borrow again for another year an amount probably smaller. Am I correct in assuming that as long as a temporary loan is paid back we can still reborrow for the next year?"

In pertinent part, Section 22-120 of the Virginia Code provides:

"The school board of any county or the school board of any city, which may find it necessary to make a temporary loan, or loans, is hereby authorized to borrow a sum, or sums, of money not to exceed in the aggregate one-half of the amount produced by the county school levy laid in such county or city for the year in which such money is so borrowed, or one-half of the amount of the cash appropriation made for schools in such county or city for the preceding year. Such loans shall be evidenced by notes or bonds negotiable or non-negotiable, as the board determines. Such loans shall bear interest at a rate not exceeding six per centum per annum, and shall be repaid within one year of their date. No such loans shall be negotiated by a county or city school board without the approval of the tax levying body."

In light of the above quoted language, I am of the opinion that the instant question should be answered in the affirmative. From the communication of the Superintendent of Schools of Grayson County, it appears that the money proposed to be borrowed by the School Board on temporary loan will be repaid within one year of the date of the loans as required by the statute, and I find nothing in this section of the Code which prohibits a school board from borrowing on temporary loan for two or more successive years. I am, therefore, of the opinion that the possibility of the Grayson County School Board's having to secure another temporary loan after discharge of the proposed indebtedness would not preclude the School Board from obtaining the loan in question.

In this connection, I am forwarding to you a copy of a former opinion of this office rendered on January 23, 1951, to Mrs. Mark Regan, Chairman of the School Board for the City of Falls Church, in which a proposal to obtain funds on temporary loan for school construction and to reduce such indebtedness by a series of temporary loans in diminishing amounts for successive years was approved by this office. See, Report of the Attorney General (1950-51), page 260.

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**SCHOOLS—Title to Property—Board May Acquire by Adverse Possession.**  
(373)

June 27, 1957.

MR. STUART MOORE  
Attorney for Rockbridge County School Board

This is in response to your letter of June 24, inquiring if a public body corporate such as a county school board may acquire title by adverse possession. You also state that there is some question as to whether or not a good title has been perfected by adverse possession.

Your question appears to be answered in the affirmative in the case of *Lee v. County School Board*, 146 Va. 804, which holds that a county school board may perfect title by adverse possession. However, it appears that a suit would be necessary to actually establish the fact that title had been so acquired if the matter is to be made completely free of doubt.

**SCHOOLS—Workmen's Compensation Act—Board Is Employer Under. (346)**

June 4, 1957.

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

This is in reply to your letter of May 29, 1957, in which you request my opinion as to whether or not the County School Board would be liable for injuries that are sustained by an employee of the Board engaged in the construction of a school building.

I am of the opinion that the County School Board comes within the definition of an employer as found in Title 65 of the Code of Virginia, the Virginia Workmen's Compensation Act. If such employee is injured while engaged in this construction, the School Board would be liable for workmen's compensation as provided for in the Act.

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**SEGREGATION—Political Forum Held at Public School Open to Public Is Public Assemblage. F-354 (120)**

October 16, 1956.

HONORABLE WILLIAM J. HASSAN  
Commonwealth's Attorney  
Arlington County

This is in reply to your letter of October 9, 1956, which reads, in part, as follows:

"Several citizens of Arlington County have inquired as to the legality of certain activities connected with the current political campaign. They have requested that I seek an opinion from the Attorney General in connection with this problem, which opinion I am happy to request.

"In Arlington County, the League of Women Voters for the past several years, has sponsored a program which has been known as 'Neighborhood Candidates Meetings.' The objective of the League of Women Voters was to consolidate the number of appearances a candidate would have to make at all of our citizens' associations into six or seven area meetings. The League of Women Voters invited citizens' associations and other organizations to participate in this program by making donations to finance advertising, printing, and the mailing of questionnaires to candidates and material to the participating organization, and for the hire of halls in which the meetings are held.

"At the present time, all meetings are held in public school buildings. It is anticipated that at some of these meetings, as in the past, there will be some colored attendance, and the question involved is whether Title 18, Sections 327 and 328 require the segregation of the races at such a meeting. I have given them my opinion based upon a series of segregation cases concerned with schools in Arlington in recent years, and upon the opinion of the Three-Judge Court of the Eastern District of Virginia, in the case of *NAACP vs. The City of Richmond*, decided September 24, 1951.

"As I see the question, it is whether the phrase 'public assemblage' applies to this type of meeting. The meeting is a presentation by each of two candidates of a main speech of 15 minutes and a rebuttal of 5 minutes, and a question period. The meetings are for the purpose of making voters of an area familiar with the candidates, their qualifications and their platforms and are, of course, open to all who seek to attend.

"It is my opinion that such a meeting does not require segregation of the races as provided in Title 18, Section 327. However, it is your

opinion that is desired, and I would appreciate it if you gave such an opinion without regard to anything I may have said in connection with my opinion."

Section 18-327 of the Code of Virginia is as follows:

"Every person, firm, institution or corporation operating, maintaining, keeping, conducting, sponsoring or permitting any public hall, theatre, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons shall separate the white race and the colored race and shall set apart and designate in each such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage certain seats therein to be occupied by white persons and a portion thereof, or certain seats therein, to be occupied by colored persons and any such person, firm, institution or corporation that shall fail, refuse or neglect to comply with the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense."

Based upon the facts presented by you, I am of the opinion that the type of meeting described is a public assemblage. It is, therefore, the duty of the local school board as a condition precedent to granting a permit for such meetings, to require that, when such meetings are attended by both white and colored persons, they shall be seated in spaces or seats designated for members of the respective races. The responsibility for the designation of such spaces or seats is upon the school board that has the control of the building in which the meeting is to take place. In the event any such public assemblage is held in a building by permission of a private owner, the same responsibility rests upon such owner.

Persons who attend such meetings and refuse to take the space assigned for members of their race would be subject to the enforcement provisions of § 18-328 of the Code.

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**SHERIFFS—Fees, Forthcoming, and in Indemnifying Bonds—For Making Executions, Levies, and Attachments. F-136 (264)**

March 14, 1957.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of February 25, 1957, in which you request my opinion as to the amount of sheriff's fees and commissions which the sheriff should collect in several specified types of transactions. Your first question concerns the amount of the sheriff's fee for an attachment.

Section 14-116(18) of the Code provides that the sheriff's fee shall be \$1.50 for levying an attachment. If, after the attachment is levied, the defendant and plaintiff settle the claim between themselves, I am of the opinion that § 14-106 of the Code is applicable. That section provides that where, after distraining or levying on tangible property, the officer neither sells nor receives payment and either takes no forthcoming bond or takes one which is not forfeited, he shall, in addition to the \$1.50 levy fee, have a fee of \$3.00, unless this is more than one-half of what his commission would have amounted to if he had received payment, in which case he shall have a fee of at least \$1.00 and so much more as is necessary to make such half. If a sale is made under attachment, I am of the opinion that the sheriff is entitled to the commission provided for in § 14-120 of the Code—that is 10% of the first \$100.00, 5% on the next \$400.00 and 2% on the residue.

In answer to your next question concerning the time of payment of the sheriff's fees for execution of fieri facias, this office rendered an opinion on June 22, 1944, to the Sheriff of Culpeper County (Opinions of the Attorney General 1943-

44, page 174) in which the Honorable Abram P. Staples, then Attorney General, ruled that the sheriff may not require the judgment creditor to pay a fee for an execution in advance. I am of the view that this ruling is still applicable.

If the execution is returned "no effects," the sheriff is entitled to a fee of 50¢ for making the return, § 14-104 of the Code. He is not entitled to a fee for making a levy since no levy was made. In the event that the \$1.50 fee is advanced to the sheriff when the fieri facias is placed in his hands for execution and the return is made "no effects," the sheriff is entitled to a fee only in the amount of 50¢ for making the return and the remainder in the amount of \$1.00 should be refunded or returned to the creditor who advanced the \$1.50. If a levy is made and the plaintiff and defendant settle the matter without the sheriff ever receiving any money or conducting a sale, then the sheriff is entitled to the fee prescribed by § 14-106 of the Code, which fee I have set out above in reference to attachments. Provided, however, if the property has been advertised for sale prior to the time of notice to the sheriff of the settlement, then he is entitled to recover from the party from whom the services were performed the expenses incurred by said sheriff in and about the advertisement of the proposed sale of the property. If a levy is made and then the defendant pays the sheriff or sergeant, and no sale is conducted, I am of the opinion that the sheriff or sergeant is entitled to collect the commission specified in § 14-120 of the Code, that is 10% of the first \$100.00 of the money paid, 5% of the next \$400.00 and 2% on the residue.

I can find no provision of the Code which would relieve a sheriff or sergeant from the duty of serving a writ issued by a court of competent jurisdiction for the reason that the fees chargeable by the sheriff or sergeant had not been advanced.

In answer to your question concerning the bond, the sheriff may make a levy in an attachment case without an indemnifying bond (§ 8-537 of the Code), but he is not required to take possession of the property until the indemnifying bond provided for in § 8-538 has been given. The officer shall, if the bond has been furnished under § 8-538, require a forthcoming bond before releasing the attached property to the owner. The attachment bonds provided for in §§ 8-537, 8-538, 8-539 and 8-540 are provisions that all levying officers shall be familiar with, since they are designed for the purpose of protecting such officers from personal liability in attachment cases.

When an officer has in his hands a fieri facias and makes a levy upon tangible personal property and doubt arises whether such property is liable to such levy, he may require an indemnifying bond by complying with § 8-229 of the Code. If such bond be not given within a reasonable time after notice to do so, the officer may refuse to make the levy or, if levy has been made, restore the property to the person from whose possession it was given.

The sale of property levied upon under an execution may be suspended at the instance of the claimant of the property by giving the suspending bond provided for in § 8-232. If such person desires to regain possession of the property, he may execute a forthcoming bond provided by § 8-233 of the Code. If the judgment debtor in the case of fieri facias desires to retain custody of property levied upon, he may do so by furnishing the forthcoming bond provided for in § 8-450 of the Code. Section 8-455 of the Code sets forth those cases in which no forthcoming bond may be taken.

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#### **SHERIFFS—Sale of Property to Satisfy Judgement—Payment of Other Liens. (368)**

June 19, 1957.

HONORABLE W. B. CHITTUM  
Sheriff of Rockbridge County

I acknowledge receipt of your letter of June 17, 1957, which reads as follows:

"I am attaching a letter received from Earl L. Valentine, Esq. I feel that Mr. Valentine's letter is self-explanatory.

"But would also like an opinion if property is sold with a lien and does not bring sufficient amount to cover the first lien who would be responsible for balance of lien and costs?"

Under § 8-413 of the Code, unless the prior lien is due and payable at the time of the sale, you are required to sell the property levied on subject to the prior lien.

If the prior lien is due and payable, you are required to sell the property free of liens, in which event, regardless of the sale price, the lien is extinguished and you are required to distribute the proceeds (1) of the satisfaction of the first lien and (2) to the satisfaction of the *feri facias* under which the sale is made. Of course, your proper costs and fees are payable out of the proceeds prior to the satisfaction of either lien.

If the property fails to bring a sufficient amount to pay the costs and the first lien, you will, of course, apply the net proceeds to the satisfaction of as much of the first lien as there are funds available. If there is a balance due on the first lien obligation the holder thereof will have to look to the obligors on the debt secured by the lien for such balance. There would be no obligation on you or the purchaser for such balance.

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**SHERIFFS—Service of Process—In City or Part Thereof Which Was formerly in His County. F-136 (239)**

February 20, 1957.

HONORABLE CHARLES R. PURDY, *Clerk*  
Hustings Court, Part II

I have your letter of February 15, 1957, relating to § 8-50 of the Code of Virginia in which you state that some of the attorneys contend that this section authorizes the Sheriff of Henrico County or the Sheriff of Chesterfield County to serve processes in the City of Richmond. Your position is that this provision applies to county sheriffs where there is a city entirely within the confines of a county, such as the City of Williamsburg. You state that Richmond City is in no wise situated within the counties of Henrico or Chesterfield.

Technically, of course, no city of the State is within a county, since cities and counties are separate, independent political subdivisions of the State, even though the area of a county may touch the borders of a city at all points.

Section 8-50 of the Code reads as follows:

"The sheriff of any county in which is situated a city, or any part thereof, may execute in such city or part, any process which he might execute in any other portion of his county."

This section was placed in the Code of 1919 (§ 6057) by the Revisors and became law upon the adoption of the Code of 1919, pursuant to an Act approved March 7, 1918. The Revisors are presumed to have known that some of the cities of the Commonwealth were not in areas entirely surrounded by a single county, having been established from territory previously included in more than one county. This must be true, otherwise there would be no reason for the phrase "or any part thereof."

The statute, in my opinion, may be construed to mean that when a sheriff has a process that he might execute in his county, he may execute such process in that portion of the city included in the area that was a part of his county prior to becoming a part of the city. I do not construe the statute as authorizing the sheriff of Chesterfield to execute process in that part of the City of Richmond formerly a part of Henrico County. Similarly, I do not construe the statute as authorizing the sheriff of Henrico County to execute process in that part of Richmond contained in an area that was formerly a part of the County of Chesterfield.

**SHERIFFS—Supplies for Office and Jail—May Be Purchased Through County Central Purchasing. F-136 (77)**

September 11, 1956.

HONORABLE TURNER D. WHEELING  
Sheriff for Prince William County

This is in reply to your letter of August 31, 1956, in which you request my opinion as to whether or not supplies for the Sheriff's office and for the county jail, the cost of which will be borne in part or in whole by the Commonwealth, should be shipped and billed directly to the Sheriff's office and the county jail.

There is no requirement of statute that makes it mandatory that these supplies should be shipped and billed directly to the Sheriff's office and the county jail. If a county has a central purchasing plan in operation, I know of no reason why these supplies should not be purchased through the central purchasing officer or agent of the county and this office or agent then bill the Sheriff's office or the county jail for those supplies which are delivered to the Sheriff's office or county jail.

The State Compensation Board has approved this procedure and will honor statements from such central purchasing officer or agent. There is nothing in the provisions of § 14-87 or § 14-88 of the Code of Virginia which would prohibit such a procedure from being followed.

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**SLOT MACHINES—Gambling Device with Remote Coin Slot, or with Button Pushed by Someone, Is. F-123 (200)**

January 16, 1957.

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

Receipt is acknowledged of your letter of January 10, 1957, with which you forwarded a brochure describing a device or machine called "Buckley's Kentucky Derby" and a letter to you from Mr. Oscar K. Shell, Jr., who represents the distributor of these machines.

Examination of the material contained in the brochure reveals that the device is apparently an electrically operated game in which each player selects a number representing a particular horse in a simulated seven-horse race, a button is pushed to start a spinner revolving, the spinner lights up numbers on a board and the number lighted when the spinner comes to rest designates the winning number, or horse, of that race. While the spinner is revolving, another device selects the odds, or score, at which the winning number or horse has run, the winning player then receiving a number of "free games" corresponding to said score.

The device is initially activated by a "remote recorder" which is attached to the game cabinet by a cable and is intended to be operated at some distance from such cabinet. This "remote recorder" is set by an attendant who, after receiving the consideration necessary to purchase the number of games the player desires, then presses one or more buttons which register this number in both the remote recorder and the game cabinet. Apparently the number of free games the player wins is automatically registered after each such win.

You have requested the opinion of this office as to the legality of the operation of this machine under Virginia law.

While there is some possibility of doubt, which can be resolved only by expert testimony, I am of the opinion that "Buckley's Kentucky Derby" is a type of machine, apparatus or device which falls within the provisions of § 18-291 of the Code of Virginia prohibiting the possession, etc., of any slot machine or similar device. It would appear that this particular machine may be readily converted into a machine or device that is adapted for use in such a way that it may be operated as a result of the insertion of a coin or other object in either

the "remote recorder" or in the machine itself. As such, it is susceptible of definition as a slot machine under § 18-292 of the Code. However, this is a question of fact that would have to be determined by a jury.

There can be little question that the elements of prize, chance and consideration are present in its operation as proposed. Further, § 18-278 of the Code provides a penalty for any person "who shall bet, wager or *play* at any game for money or *other thing of value* \* \* \*" [Italics supplied], and § 18-290 forbids the keeping or exhibiting for use of any slot machine or other device which operates on the nickel-in-the-slot principle in the operation of which any element of chance whatever may enter.

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**STATE OFFICES—Building—Operation of Restaurant. F-189 (16)**

July 12, 1956.

HONORABLE J. H. BRADFORD  
Director of the Budget

This is in reply to your letter of July 11, 1956, which reads as follows:

"The new State office building provides space for a small restaurant or lunch room, with facilities for cooking and preparing food. It has been estimated that equipment for the proposed installation will cost in excess of \$10,000.

"We are not certain whether Section 63-204.14 of the Code of Virginia would require that this lunch room be operated by the blind. Your opinion on this question would be much appreciated."

Section 63-204.14 of the Code, to which you refer, reads as follows:

"When any vending stand and other business enterprise operated in a public building becomes vacant for any reason whatsoever such vacancy shall be filled by employment of the blind, provided this shall not apply to the lunch counter in the State Capitol which counter shall be subject to the control of the Clerk of the House of Delegates."

It would appear from your letter that the proposed space will be occupied by a business enterprise as distinguished from a vending stand. In § 63-204.1 the term "business enterprise" is defined in subsection (e) thereof as follows:

"(e) '*Business enterprise*' means any business, other than a vending stand, wherein the initial installation cost does not exceed three thousand dollars."

Inasmuch as the cost of the installation of the project will exceed \$3,000, I am of the opinion that § 63-204.14 is not applicable and that there is no statutory requirement that the lunch room be operated by the employment of the blind.

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**STATE OFFICES—Telephone System—Capital Fund May Be Set Up for Expenditures. F-189 (112)**

October 10, 1956.

HONORABLE J. H. BRADFORD  
Director of the Budget

This is in reply to your letter of October 3, 1956, in which you request my opinion as to whether or not a working capital fund may be set up under the provisions of § 2-128 of the Code of Virginia to handle the expenditures involved in the operation of the telephone system for State offices. Section 2-128 of the Code provides, in part, as follows:

"As to the operation of farms, laundries, merchandising activities, dining halls and cafeterias for which charges are made, and any other type of activity which, if conducted privately, would be operated for profit, the system of accounting thereof shall be designed to reflect

all charges properly allocable thereto to the end that the net profit or loss therefrom shall be reflected; provided that in the furtherance of this objective the joint Auditing Committee of the General Assembly on the recommendation of the Auditor of Public Accounts, may authorize the Director of Accounts and Purchases to establish working capital fund accounts on his books and record therein the receipts and expenditures of these several functions; and provided further that the said director shall provide the agencies responsible for the operations of these functions with revolving funds with which to finance the operations."

I am of the opinion that a State operated telephone system is a type of activity which, if conducted privately, would be operated for profit. Therefore, I feel that working capital fund may be established under § 2-128 of the Code of Virginia to handle the expenditures and receipts of such system.

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**STATE SEAL AND FLAG—Specifications for Flag as Recommended Meet Statutory Specifications. F-167 (183)**

December 27, 1956.

HONORABLE THOMAS B. STANLEY  
Governor of Virginia

This is in reply to your letter of December 21, 1956, in which you ask whether the specifications recommended by the Art Commission, pursuant to § 7-34.1 of the Code of Virginia, as amended, relative to the flag of the Commonwealth of Virginia meet the legal requirements of §§ 7-26 and 7-33 of the Code of Virginia.

I am of the opinion that these specifications meet the legal requirements imposed by statute.

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**SUPPORT ACT—Uniform Reciprocal Enforcement—Local Official Responsible for in Court Case. F-383 (75)**

September 7, 1956.

HONORABLE BAXLEY T. TANKARD  
Commonwealth's Attorney for Northampton County

This will reply to your letter of September 4, 1956, in which you inquire as to the identity of "the official charged with the duty of carrying on" proceedings under the Uniform Reciprocal Enforcement of Support Act when Virginia is the responding State and a case arising under the Act is referred to a Juvenile and Domestic Relations Court or a court of record for disposition. The phrase quoted above is contained in Section 20-88.23 of the Virginia Code which relates to the duty of a court of the Commonwealth when Virginia is the responding State. This statute provides:

"When the court of this State receives from the court of an initiating state the aforesaid copies, it shall (1) docket the cause, (2) notify the official charged with the duty of carrying on the proceedings and (3) set a time and place for a hearing."

Permit me to advise that the Uniform Reciprocal Enforcement of Support Act of Virginia does not charge any particular official of the Commonwealth with the duty of carrying on proceedings instituted under the Act. I am informed by officials of the State Board of Welfare that in many instances the judge of the particular court to which a case is referred will handle the matter himself without the intervention of an official; however, despite the absence of a statutory designation, it is not unusual for a judge to call upon the local Commonwealth's Attorney for assistance in such cases.



**TAXATION—Arbitrary Assessment—Error Because Non-Resident of County Purchased Automobile Licenses in County—Duty on Commissioner of Revenue. F-261 (275)**

March 21, 1957.

HONORABLE PHILIP P. BURKS  
Treasurer of Bedford County

I acknowledge receipt of your letter of March 19, 1957, which reads as follows:

"On February 8, 1957, the Commissioner of the Revenue for Bedford County delivered to the Treasurer of Bedford County certain supplemental assessments for the year 1956 for state capitation taxes and personal property taxes. On supplemental assessment page 81, at line 24, there is an assessment as follows:

"Brown, James Lue, Blue Ridge, Va. Route 1, State Capitation, \$1.50; Tangible Personal Property Value \$40.00; Tax, \$1.14; Penalty, \$0.06; Total County Levies, \$1.20.

"On March 16, 1957, James Lue Brown advised me that he has been living in Botetourt County since 1908 and that he has had no personal property in Bedford County.

"From the best information I can obtain, the Commissioner of the Revenue for Bedford County made an arbitrary assessment under Section 58-838 of the Code of Virginia, as amended, against the said Brown for the reason that the records of the Motor Vehicle Department show that the said Brown purchased a state license tag for his automobile from the agent for the Commissioner of Motor Vehicles at Bedford, Virginia. (See Code Sections 58-860 and 58-864).

"Recently I have had several other instances of similar erroneous assessments. In several instances in past years involving such erroneous assessments, the persons so erroneously assessed have stated that they were going to sue Bedford County if I, as County Treasurer, garnisheed their employer in an effort to collect such erroneously assessed taxes.

"Please advise me as follows:

"1. Is it the duty of the Commissioner of the Revenue for Bedford County under the law of Virginia to make an assessment for personal property against a person for an automobile irrespective of the bona fide residence of the owner of such personal property on January 1st of the assessment year when the state automobile license for such year is purchased from an agent of the Commissioner of Motor Vehicles in Bedford County?

"2. When the Commissioner of the Revenue for Bedford County erroneously assesses a person with taxes under the circumstances outlined in question No. 1, is there any civil liability on Bedford County or on the Treasurer of Bedford County for causing such a person to lose his job by being discharged by his employer because a notice of tax lien is served on his employer by the Treasurer of Bedford County under the provisions of Section 58-1010 of the Code of Virginia?"

The answer to both questions presented by you is no.

The Commissioner of the Revenue would be without jurisdiction to make an arbitrary assessment under the circumstances outlined in your question (1) and any such assessment would, of course, be void. Whenever the Commissioner discovers that such an assessment has been made, he may correct the same under his authority to do so as provided in §§ 58-1141 et seq., of the Code.

The place where a person purchases a license plate for his car is not necessarily the locality in which such person is liable for local taxation with respect to his personal property. A resident of Bedford County might purchase his license plate in Roanoke, or Lynchburg, or Richmond, but this would not vest the Commissioner of the Revenue of such city with power to arbitrarily assess the personal property of such person. Any such assessment would be void.

I suggest that in cases where you feel that a tax ticket in your office has been assessed under § 58-838 against a resident of another jurisdiction and on property located outside of your county, you should bring the matter to the attention of the Commissioner of the Revenue of your county who, I feel sure, will be glad to look into the matter and, if the facts are as you see them, will be glad to make a correction.

**TAXATION—Assessment—Statute Providing for Cannot Be Special—Unreasonable Population Classification Unconstitutional. F-261 (218)**

February 5, 1957.

HONORABLE C. H. MORRISSETT  
State Tax Commissioner

I am writing in further connection with your inquiry concerning the constitutionality of the provisions of Chapter 383 of the Acts of Assembly of 1956. This act was approved on March 14, 1956, incorporated by reference into the Virginia Code as Section 58-769.1(3) thereof, and in pertinent part provides:

"The governing body of any county having a population of more than twenty-two thousand but less than twenty-three thousand, may, by resolution duly adopted, in lieu of the method now prescribed by law, provide for the annual assessment and equalization of real estate for local taxation by the commissioner of the revenue. All real estate shall thereafter be assessed as of January first of each year and taxes for each year on such real estate shall be extended by the commissioner of the revenue on the basis of the last assessment made prior to such year. Any person aggrieved by any such assessment may apply for relief to the board of equalization and from action thereon to the circuit court of the county as provided by law. \* \*"

You inquire whether or not the act in question is repugnant to Section 63(5) of the Virginia Constitution which, with certain exceptions not here material, prohibits the General Assembly from enacting any special law for the assessment and collection of taxes, and Section 171 of the Virginia Constitution which prescribes that all real estate and tangible personal property, except the rolling stock of public service corporations, shall be assessed or reassessed for local taxation in such manner and at such times as the General Assembly has or may prescribe by general laws. The critical inquiry thus presented is whether or not the act in question is a constitutionally forbidden special law.

The principles governing the disposition of this question have been established by a long line of decisions of the Supreme Court of Appeals of Virginia. See, *Ex Parte Settle*, 114 Va. 715; *Martin v. Commonwealth*, 126 Va. 603; *Newport News v. Elizabeth City Co.*, 189 Va. 825; *Green v. County Board*, 193 Va. 284. A law is "special" in a constitutional sense when by force of an inherent limitation it arbitrarily separates some persons, places or things from those which but for such separation it would operate. While constitutional injunctions against the enactment of special legislation do not prohibit classification by the Legislature, such classification must not be purely arbitrary but must be natural and reasonable and appropriate to the occasion. As stated in *Green v. County Board*, *supra*, at 287:

"The test of reasonableness of classification is said to be whether it embraces all of the classes to which it relates. The basis of the classification involved must have a *direct relation* to the purpose of the law, and must present a distinction which renders one class, *in truth*, distinct or different from another class. \* \* \*

"Laws may be said to apply to a class only and that class may be in point of fact a small one, provided the classification itself be a rea-

sonable and not an arbitrary one, and the law be made to apply to all of the persons belonging to the class without distinction." (Italics supplied).

With respect to classification upon the basis of population, the applicable general rule was well stated in *Martin v. Commonwealth*, *supra*, at 617, in the following language:

"The true principle would seem in all cases to be that the classification by population must not be *merely* a circuitous and disingenuous means of designating and legislating for particular localities. As stated by Judge Dillon (Vol. 1, *supra*, sec. 152): 'The principle involved is that it must appear from the terms of the statute that the classification is formed in good faith, and that there is such a *substantial difference* in population between cities included within the operation of the statute and cities not included that the court *can fairly say that classification is intended*, and not merely designation of a particular locality. If it appears from an examination of the statute that the classification is intended to operate merely as a designation of the locality, the statute is not saved from condemnation merely by the fact that it is framed in general form.'" (Italics supplied).

In each instance application of these principles must be made to the particular act in question to determine whether or not it makes an arbitrary separation of persons, places or things in contravention of constitutional prohibitions.

With respect to the instant question, the general statutes now governing the assessment or reassessment of real estate originated as Chapter 561 of the Acts of Assembly of 1956, which was an act to amend and reenact Sections 58-780, 58-782, 58-783, 58-784 and 58-785 of the Virginia Code; to add to the Code a new section numbered 58-795.1; and to repeal Sections 58-777, 58-778, 58-779, and 58-784.1 of the Virginia Code. Under the provisions of the terminal paragraph of Section 58-784 of the Code as thus amended (now Section 58-784.3 of the Code) provision was made for a general reassessment of real estate in any county in any year if the governing body of the county, by a majority of all the members thereof, so directed, which general reassessment would be made by such person or persons, or officer or officers as might be designated for the purpose by the circuit court of the county or the judge thereof in vacation pursuant to Section 58-787 of the Code.

By contrast, the enactment under consideration provides that in any county having a population of more than 22,000 but less than 23,000, the governing body may, in lieu of the above prescribed method, provide for the annual assessment and equalization of real estate for local taxation by the commissioner of the revenue. It would appear that the only county in the State falling within the above specified classification is Prince William County, which had the population of 22,612 according to the 1950 census.

There is nothing on the face of the enactment which distinguishes the circumstances, position or problems of a county having a population of more than 22,000 but less than 23,000 from those of counties having populations of less than 22,000 or more than 23,000. In this connection, it appears that there are some twelve counties of this Commonwealth having a population of more than 20,000 but less than 25,000, which counties are none the less excluded from the provisions of Chapter 383. These counties are Alleghany, Amherst, Brunswick, Dickenson, Fauquier, Franklin, Grayson, Hanover, Loudoun, Rockbridge, Shenandoah and Wythe. While classification based on population differences have been sustained in a number of cases by the Supreme Court of Appeals of Virginia as justified by the difference in local public service, tax systems and governmental organization, I am not apprised that any such differences exist in the amount or character of the public services, tax systems and governmental organizations of the twelve counties listed above as would justify their being placed

in a classification different from those counties having more than 22,000 but less than 23,000 and thus excluded from the provisions of the act in question.

On the whole, I am constrained to believe that the classification on the basis of population set out in Chapter 383 is utilized not for the purpose of classification as such, but merely as a means of designating and legislating for a particular locality. As such, I am of the opinion that it falls within the condemnation of a special statute enunciated in the case of *Martin v. Commonwealth, supra*, and would be prohibited by Section 63(5) and Section 171 of the Virginia Constitution.

**TAXATION—Banks—May Deduct Assessed Valuation of Property by Town Rather Than County from its Capital and Surplus. F-261 (227)**

February 7, 1957.

HONORABLE FRED C. BUCK  
Member House of Delegates

This is in reply to your letter of February 6, 1957, in which you refer to Chapter 219, Acts of the General Assembly of 1956, which amended §§ 58-793, 58-794 and 58-795 of the Code of Virginia, which relate to the general reassessments of real estate so as to make said sections applicable to towns. You state that, under this chapter, the town of Abingdon has assessed the real estate of a local bank at \$39,940, whereas the assessed valuation of the same property has been fixed by the County of Washington at a lesser amount, viz. \$8,480.

You ask whether the bank in determining the value of its shares of stock under § 58-471 of the Code shall deduct from the aggregate of its capital, surplus and undivided profits the \$39,940 assessed valuation made by the town or the \$8,480 assessed valuation made by the county. In my opinion the bank would be entitled to deduct the valuation of \$39,940 fixed by the town assessment.

You point out that the bank has already filed its return and desire to know whether such return may be amended. I inquired about this matter from the Department of Taxation and was advised that an amended return may be filed.

**TAXATION—Capitation Tax—Assessable Against Alien Who Is a Resident. F-100c (163)**

November 23, 1956.

MISS ELSA B. ROWE  
Treasurer for Northumberland County

This is in reply to your letter of November 19, 1956, from which I quote in part as follows:

"A resident of the County raises the question as to whether or not he is assessable with State capitation tax since he is not a naturalized citizen of the United States."

Section 173 of the Constitution of Virginia provides in part that:

"The General Assembly shall levy a State capitation tax of and not exceeding one dollar and fifty cents per annum on every resident of the State not less than twenty-one years of age \* \* \*."

Pursuant to the above, the General Assembly enacted Section 58-49 of the Code of Virginia of 1950, which levies a State capitation tax of \$1.50 per annum on every resident of the State not less than 21 years of age.

Inasmuch as you state that this person, who is not a naturalized citizen of the United States, is a resident of the County, I am of the opinion that he is assessable with the State capitation tax.

**TAXATION—Correction of Erroneous Assessment—Can Not Be Made Under Code § 58-1142 after One Year Old. F-270 (92)**

September 19, 1956.

HONORABLE C. E. GNADT  
Commissioner of the Revenue  
Prince William County

I acknowledge receipt of your letter of September 17, 1956, which reads as follows:

"In 1946 a building was erroneously assessed on a lot for which taxes have been paid. Referring to Section 58-1141 and Section 58-1142 of the Code of Virginia, there is a doubt in my mind whether I can request the Board of Supervisors to direct the Treasurer to refund the excessive taxes under Section 58-1142."

Your authority to make the correction under the provisions of § 58-1142 of the Code is limited to those cases where the tax has not been paid and where the application for correction is made within one year from the 31st day of December in which such assessment was made. Therefore, since the assessment was made in 1946, it is now too late for the assessment to be corrected under said section.

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**TAXATION—Delinquent Personal Property—Timber May Be Distrained Upon and Sold to Pay. F-90 (262)**

September 18, 1956.

HONORABLE REGINALD H. PETTUS  
Commonwealth's Attorney  
Charlotte County

This is in reply to your letter of September 13, 1956, in which you request my opinion as to whether or not it would be proper under the provisions of § 58-1002 of the Code of Virginia to distrain and sell timber growing upon land owned by a person against whom there are assessed and delinquent personal property taxes.

Section 58-1002 of the Code provides as follows:

"Any timber or wood growing on the land belonging to the person or estate assessed with taxes or levies may be distrained and sold, so far as necessary, to pay the amount of such taxes and levies and expense of sale and shall be sold standing in the manner prescribed for the sale of goods and chattels, other than horses, mules and oxen, under distress or levy for taxes; and the purchase shall have the right to cut and carry away such wood or timber within twelve months after the purchase of the same, with the right of ingress and egress for this purpose, but shall not haul the same over any lands occupied at the time by growing crops."

I am of the opinion that this timber may be distrained and sold so far as necessary to pay the amount of taxes and levies owed by a person who has complete title to the property. It is not necessary that these taxes and levies be against the real estate upon which the timber is growing for the timber to be distrained and sold. It may be distrained and sold for taxes on personal property.

**TAXATION—Delinquent Property—May Not Be Sold by Treasurer until One Year after Listing as Delinquent. F-273 (110)**

October 8, 1956.

Miss ELSA B. ROWE, *Treasurer*  
County of Northumberland

This is in reply to your letter of October 5, 1956, from which I quote in part as follows:

"Please advise me when real estate assessed for year 1954 as an omitted assessment on March 10, 1956 and listed as delinquent June 30, 1956, should be advertised and sold for taxes for the year 1954. Should it be included with the 1954 sales this December or should it be sold in 1957?"

I refer you to Section 58-1029 of the Code of Virginia (1950), which reads as follows:

"On the second Monday in December in the year next after the year in which the treasurers submit their lists of delinquent real estate to the boards of supervisors of their counties and the councils of their cities, as required by Sec. 58-983, each such treasurer shall sell, as hereinafter provided, all the real estate embraced in his list of delinquent real estate, on which the levies for which the same was returned delinquent, or any part thereof, may remain unpaid on the day of sale."

Inasmuch as this real estate was not listed as delinquent until June 30, 1956, under the above quoted section it may not be sold until one year following such listing and consequently cannot be advertised and sold until that time.

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**TAXATION—Delinquent Real Estate—Sale by Clerk—How Can Sell Less Than Entire Tract. F-167 (262)**

December 3, 1956.

Miss ELSA B. ROWE, *Treasurer*  
Northumberland County

This is in reply to your letter of November 30, 1956, from which I quote, in part, as follows:

"In the sale of land by the treasurer for delinquent taxes the question arises as to how the sale should be conducted when there are several interested bidders for the same tract who are not interested in purchasing less than the full tract of land.

"In years gone by we sold to the highest bidder but a number of years ago we were advised by the Department of Taxation that this was not a proper procedure. Since then we have sold to the first bidder if there was more than one but there is always the possibility that this cannot be determined."

You have referred to § 58-1033 of the Code. Under this section I think it is the duty of the treasurer to accept the first offer of purchase sufficient in amount to satisfy the taxes, interest, costs and other charges. If the offer is for the entire tract, then such sale should be reported as a sale of all the property against which the taxes have been assessed. If the purchase, however, is for a part of the tract, then a survey will have to be made at the purchaser's expense. This survey is provided for in §§ 58-1048 through 58-1050 of the Code. The report required to be made by the treasurer is provided for in §§ 58-1036 et seq., of the Code.

**TAXATION—Exemptions—Building Owned by American Legion—That Portion Used as Business Property Subject to Tax. F-266 (193)**

January 9, 1957.

HONORABLE RICHARD C. RICHARDSON  
Commonwealth's Attorney  
New Kent County

This is in reply to your letter of January 8, 1957, which reads, in part as follows:

"I wish to advise that I have just received the following inquiry from Mr. C. L. Williams, Chairman, Board of Real Estate Assessors of New Kent County.

"On March 29, 1956 the Trustees of the James Whitfield Timberlake Post, No. 178, American Legion, purchased from Willis W. Bohannon et als, Trustees, the "Providence Forge Hotel Tract" located in Cumberland District, New Kent County. Since its purchase the American Legion Post has elected to operate a portion of this property as a hotel. The balance of said property is used by the "Legion" itself exclusively for their own purposes.

"Would you kindly advise me as Chairman of the New Kent County Board of Real Estate Assessors whether in your opinion this property is subject to partial taxation or fully exempt?"

"I might add to this that I am reliably informed that all of the revenue received by the Providence Forge American Legion Post is and will continue to be used for the purpose of improving the property in order that it might eventually be used as both an American Legion Post and as a Community Center."

Section 183 of the Constitution of Virginia, subsection (g), exempts from taxation:

"Property of \* \* \* the posts of the American Legion \* \* \*.

"Except as to class (a) above, general laws may be enacted restricting but not extending the above exemptions.

\* \* \* \*

"Whenever any building or land, or part thereof, mentioned in this section, and not belonging to the State, shall be leased or shall otherwise be a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town. But the General Assembly may provide for the partial taxation of property not exclusively used for the purposes herein named."

Sections 58-12, 58-14 and 58-16 of the Code implement Section 183 of the Constitution, and, under § 58-14, that portion of the building under consideration being operated as a hotel or otherwise as a source of profit or revenue, and not used as Legion meeting quarters would, in my opinion, be subject to taxation.

Section 58-16 of the Code prescribes the method, or formula, for determining the assessed value of that portion of the property that is not exempt.

**TAXATION—Exemptions—Medical Center Leased to Private Physician Not Exempt. F-266 (170)**

December 4, 1956.

HONORABLE E. F. JONES  
Commissioner of Revenue for Nelson County

This is in response to your inquiry of November 28, 1956, as to whether or not a lot of land and building thereon owned by the Rockfish Valley Medical Center, Incorporated, a non-profit, non-stock corporation, is exempt from real estate taxation when the property is leased to a physician and used for his (private) office and residence.

Kindly be advised that the leased premises under the above facts do not appear to fall within the exemption contained within Section 183 of the Constitution of Virginia. Moreover, as stated in *Commonwealth v. Hampton Inst.*, 106 Va. 614, it is the use to which property is put and not the use to which profits which are realized from such property are put which determines whether or not it shall be exempt or not.

Accordingly, I am of the opinion that the said property leased to and used by a doctor for his office and living quarters is not exempt from taxation under Sec. 183 of the Constitution.

### TAXATION—Exemptions—Property of Women's Club—Depends on Use of Property as Park or Playground. F-273 (229)

February 12, 1957.

HONORABLE A. BURKE HERTZ

Commissioner of Revenue of City of Falls Church

I acknowledge receipt of your letter of February 8, 1957, which reads as follows:

"I am writing to you for the purpose of requesting a legal opinion regarding the taxation of a parcel of land located in the City of Falls Church owned by the Falls Church Women's Club, an unincorporated body.

"The Falls Church Women's Club acquired a piece of property in the City of Falls Church which they intend to use for general community purposes and not for profit. I have been requested by the Falls Church Women's Club to exempt their property from real estate taxes on the basis of language contained in the last sentence of Sec. 58-12, paragraph 5 of the Code of Virginia.

"Kindly let me have your opinion as to whether this organization may be exempt under the above section of the Code."

The General Assembly, at the 1956 Session, amended § 58-12(5) of the Virginia Code so as to include an exemption of "property whether real or personal, owned by any community club or association or its trustees, when said property is used or operated exclusively for general and community purposes and not profit."

This amendment must be considered along with Section 183 of the Virginia Constitution which provides, in part, that:

"Unless otherwise provided in this Constitution the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

"(g) Property of the Association for the Preservation of Virginia Antiquities, the Confederate Memorial Literary Society, the Mount Vernon Ladies Association of the Union, the Virginia Historical Society, the Thomas Jefferson Memorial Foundation, Incorporated, the posts of the American Legion and such other similar organizations or societies as may be prescribed by law.

"Except as to class (a) above, general laws may be enacted restricting but not extending the above exemptions."

The property included in class (a) is property owned by the Commonwealth and its political subdivisions.

Aside from the question as to whether or not the Women's Club referred to is a community club within the meaning of the amendment to the statute and would otherwise qualify for the exemption, the question of the constitutionality of the amendment is presented. The organizations mentioned in (g) of the constitutional provisions are historical and patriotic. Property used or operated exclusively for general and community purposes could not, in my opinion, be considered as having any similarity to the historical and patriotic organizations set forth in subsection



(g). I recognize the well established rule of statutory construction that there is a presumption in favor of the constitutionality of a statute, but such a presumption loses its weight when there is a clear violation of the plain language of the Constitution.

The expression contained in the 1956 amendment to § 58-12, viz., "for general and community purposes" is, in my opinion, an attempt to extend the scope of the exemptions beyond that permitted by any of the provisions of Section 183 of the Constitution.

Subsection (e) of Section 183 of the Constitution does exempt "parks or playgrounds held by trustees for the perpetual use of the general public." If the property in question comes within such classification it would be exempt. This is a factual matter to be determined by you as Commissioner of the Revenue.

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**TAXATION—Exemptions—Property Owned by Conference of Seventh-Day Adventists for Religious Purposes. F-90a (318)**

May 8, 1957.

HONORABLE AUSTIN EMBREY, *Clerk*  
Circuit Court of Nelson County

This is in reply to your letter of May 3, 1957, in which you state that you have a deed for recordation in which the grantee is Potomac Conference Corporation of Seventh-Day Adventists, a corporation of the District of Columbia. This corporation is non-profit and acts as a holding organization for all real estate of the Seventh-Day Adventists Church. You state that the real estate in question is to be used as an educational camp by the Seventh-Day Adventists Church. You request my opinion as to whether or not this deed is subject to recordation tax and whether or not this real estate would be exempt from property taxes.

I am of the opinion that, under the provisions of § 58-64 of the Code of Virginia, this deed is exempt from the State recordation tax as it in effect conveys property to a religious body and the property is to be used for educational purposes and not as a source of revenue or profit.

In answer to your second question, I am enclosing a copy of an opinion rendered on January 26, 1954, to Honorable Lowell A. Miller, Commissioner of the Revenue of Rockingham County, in which opinion I held that certain property owned by the Massanetta Bible Conference was exempt from real estate taxes. I am of the view that this opinion is applicable to the property acquired by the Seventh-Day Adventists Church in Nelson County to be used as an educational camp.

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**TAXATION—Exemptions—Town May Not Exempt Agricultural Lands, Buildings, and Equipment. F-266 (217)**

January 30, 1957.

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

This will reply to your letter of January 17, in which you state that the Town of Leesburg proposes to annex certain land surrounding the town. The area proposed to be annexed contains farm land and you request an opinion upon the following propositions:

"1. Whether or not an ordinance of the town, wholly exempting from town taxes real and personal property of farmers located within the area to be annexed, would be valid.

"2. Whether or not an ordinance, exempting from taxation farm buildings, such as barns, dairy houses, tenant houses occupied by em-

ployees of the said farm, and personal property used for agricultural purposes, such as farm produce, hay, feed, ensilage, farm machinery and equipment, and livestock such as cows, horses, pigs, would be valid."

With respect to the exemption of property from taxation, State and local, Section 183 of the Virginia Constitution prescribes, in part:

"Unless otherwise provided in this Constitution, the following property *and no other* shall be exempt from taxation, State and local, including inheritance taxes: \* \*" (Italics supplied).

The remainder of this section specifies certain classes of property which are exempt from taxation reserving to the Legislature the right to enact general laws restricting, but not extending, these exemptions.

In *Bristol v. Dominion National Bank*, 153 Va. 71, the Supreme Court of Appeals of Virginia held that a contract, entered into by the City of Bristol and certain real estate developers, which purported to exempt certain real estate from taxation by the City of Bristol for a period of ten years beginning with the year 1926, would be violative of the provisions of Section 183 of the Constitution to the extent that it was a contract for tax exemption. Commenting upon the effect of Section 183, the Court observed, 153 Va. at 76:

"It is there declared that no property shall be exempted from taxation save that mentioned in said section or elsewhere in the Constitution as entitled to such privilege, and it is not contended that this land comes within any exempted class."

As no exemption for farm lands or property is contained in Section 183 or any other provision of the Virginia Constitution, I am of the opinion that your inquiries must be answered in the negative and that ordinances of the type outlined in your communication would contravene the provisions of Section 183 of the Virginia Constitution and would, therefore, be invalid.

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#### **TAXATION—Exemptions—"Word of Faith Hour Broadcast, Inc." Not Entitled to from Property Taxes. F-266 (185)**

December 31, 1956.

HONORABLE C. E. GNADT  
Commissioner of the Revenue  
Prince William County

This is in reply to your letter of December 17, 1955, in which you request my opinion as to whether or not property recorded in the name of the "Word of Faith Hour Broadcast, Incorporated" would be exempt from local property taxes.

I am of the opinion that this property is subject to local property taxes. The Corporation does not come within any of the exemptions specified in Section 183 of the Constitution of Virginia. It is not a church or religious body, and I am of the opinion that it is not a religious association similar to The Young Men's Christian Association. Therefore, I know of no way that this property could be exempt from taxation.

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#### **TAXATION—Licenses—Carpenter Working by Hour or Day Is Not Subject to as Contractor. F-34 (70)**

September 4, 1956.

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

This will acknowledge receipt of your letter of August 30, 1956, in which the following factual situation is set forth:

"A carpenter works for a person who is erecting or repairing a building, called the owner. Carpenter uses his hand tools, but supplies no other equipment, materials or machinery in the operation. Carpenter is paid only for his skilled labor as such on the basis of so much per hour per day. Owner furnishes all materials and may hire and fire the carpenter as he sees fit. Owner does not have a Federal Employer's Account Number and pays no Social Security taxes on carpenter."

You ask whether such a person comes within the purview of Sections 58-297 and 58-298 of the Code of Virginia and would, therefore, be required to purchase a contractor's license.

I enclose for your information copy of an opinion rendered by this office under date of June 7, 1950, to the Honorable J. E. Drumheller, Commissioner of the Revenue for Waynesboro, which I believe will be helpful to you.

From the factual situation which you set out, it would appear that such a person (carpenter) would not be an independent contractor and, therefore, would not be liable under Sections 58-297 and 58-298 of the Code and, consequently, would not have to purchase a contractor's license.

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**TAXATION—Licenses—Local on Contractors—When City May or May Not Tax First \$25,000 of Business. F-34 (12)**

July 11, 1956.

HONORABLE WILLIAM F. STONE  
Member of General Assembly

I am in receipt of your letter of July 2, in which you request an opinion upon the proper interpretation to be accorded Section 58-299 of the Virginia Code in connection with a situation outlined in your communication as follows:

"Our problem is that a contractor, whom we shall designate as 'A', has his place of business in Henry County, Virginia, but does business in the City of Martinsville for an amount which does not aggregate \$25,000.00 in any one year. He of course has a state contractors' license, but the County of Henry does not require contractors' license, therefore, the only license that he has to do business is a state license. The City of Martinsville levies a gross receipts tax of 42¢ per \$100.00 on all contractors doing business in the City of Martinsville. It is the contention of the Commissioner of Revenue, which I am informed is concurred by the State Department of Taxation, that by virtue of Section 58-299 if the County of Henry levied a local license tax on contractors, then Contractor 'A' would be allowed to come into the City of Martinsville and do business up to an including \$25,000.00 in any one year without having a city license tax. However, in view of the fact that the County of Henry does not have a local license tax on contractors, Contractor 'A' has no local license from either the City of Martinsville or the County, and he is therefore liable to the gross receipts tax of the City of Martinsville for all business that he does in the City."

Section 58-299 of the Virginia Code provides:

"When a contractor, electrical contractor or a plumbing and steam fitting contractor shall have *paid* the aforesaid State license *and any local license required by the city, town or county in which his principal office and any branch office or offices may be located*, no further license shall be required by the State or other city, town or county for conducting any such business within the confines of this State, except where the amount of business done by any such contractor in any other city, town or county exceeds the sum of twenty-five thousand dollars in any year such other city, town or county may require of such contractor a local license, and the amount of business done in such other

city, town or county in which a license tax is paid may be deducted by the contractor from the gross revenue reported to the city, town or county in which the principal office or any branch office of the contractor is located, and except further that qualification under Sec. 32-61 may be required of contractors doing plumbing business." (Italics supplied).

In light of the language italicized above, I am of the opinion that the position of the Commissioner of Revenue and the State Department of Taxation is well taken. Prior to the 1952 amendments to the statute in question—which, *inter alia*, added the exception to the prohibition against further license exactions in those instances in which a contractor does business in excess of \$25,000.00 per year in a city, town or county other than those in which his principal office or any branch office or offices may be located—this office had occasion to consider an analogous situation involving the amenability of a contractor whose place of business was located in a city which did not require a local license to a license tax imposed by another city in which such contractor was doing business. In an opinion to the Honorable J. E. Drumheller, Commissioner of Revenue for the City of Waynesboro, rendered May 30, 1950, it was ruled that the statute in question afforded an exemption from taxation and was to be strictly construed. On that occasion the following interpretation was placed upon the statute under consideration:

"\* \* since the purpose of the statute was to prevent a duplication of local license taxes when the contractor has paid a license to the locality in which he maintains his office, it is my opinion that, if that locality does not require a license, he may be required to take out a license by another locality where he conducts business. In such a case the contractor has not *paid* a local license to the city or town where he maintains an office. The fact that he has not done so is not altered just because none was required." (Report of the Attorney General, 1949-1950, page 159).

Consistent with the above quoted ruling, I am of the opinion that—since the contractor in question has not *paid* a local license to Henry County in which his place of business is located—he does not come within the purview of the exemption from further licenses imposed by other localities in which the contractor is doing business, that the exception provision based upon an amount of business in excess of \$25,000.00 per year is inapplicable, and that the contractor in question is properly subject to the City of Martinsville's contractors' license tax for all business done by such contractor in that city.

#### **TAXATION—Licenses—Of County, May Be Imposed upon Businesses in a Town. F-60a (105)**

October 3, 1956.

HONORABLE ROBERT C. FITZGERALD  
Commonwealth's Attorney  
Fairfax County

I acknowledge receipt of your letter of October 1, 1956, which reads as follows:

"The County of Fairfax is considering the adoption of a license tax ordinance under the authority of Section 58-266.3, as amended.

"The question has arisen as to whether or not such a license tax could be applicable to businesses and practitioners of professions whose places of business or offices are located within an incorporated town within the County. The last sentence of said Section, which states 'any license tax hereunder shall be in addition to any license tax imposed by the State or any town in such County,' would appear to answer the question in the affirmative, however, the following Section of the Code (Sirus for Local License Taxation) creates a doubt in my mind."

In my opinion, under § 58-266.3 of the Code, the County of Fairfax has authority to impose a license tax within the limits therein prescribed upon businesses and professions, and such tax may be imposed by the County on such businesses and professions whose offices and places of business are located in the incorporated town within the County.

Under § 58-266.4 of the Code, the situs for county taxation would be the county, even though it might also be in a town located in the county.

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**TAXATION—Licenses—Peddler—When Necessary—Not Open Regular Business Hours. F-218 (138)**

October 25, 1956.

HONORABLE A. D. JOHNSON

Commonwealth's Attorney for Isle of Wight County

This is in response to your letter of October 22, 1956, inquiring whether or not a retail merchant's license or peddler's license under Section 58-340, Code of Virginia, should be required under circumstances where a person contemplates the selling of hosiery at a vacant service station lot rented by the month on two week nights and on Sundays.

Section 58-340, Code of Virginia, provides as follows:

"Any person who shall carry from place to place any goods, wares or merchandise and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler.

"All persons who do not keep a regular place of business, whether it be a house or a vacant lot or elsewhere, open at all times in regular business hours and at the same place, who shall offer for sale goods, wares and merchandise, shall be deemed peddlers under this article. All persons who keep a regular place of business, open at all times in regular business hours and at the same place, who shall, elsewhere than at such regular place of business, personally or through their agents, offer for sale or sell and, at the time of such offering for sale, deliver goods, wares and merchandise shall also be deemed peddlers as above, but this article shall not apply to those who sell or offer for sale in person or by their employees ice, wood, charcoal, meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits or other family supplies of a perishable nature or farm products grown or produced by them and not purchased by them for sale. But a dairyman who uses upon the streets of any city one or more wagons may sell and deliver from his wagons milk, butter, cream and eggs in such city without procuring a peddler's license.

"The license taxes imposed by this article shall not apply to any peddler who is covered by article 10 of this chapter, and who sells to licensed dealers or retailers only."

It is noted from the foregoing section that persons who do not keep a regular place of business open at all times in regular business hours shall be deemed peddlers. As the facts indicate that the business will not be open at all times in regular business hours, I am of the opinion that a peddler's license would be required under Section 58-340.

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**TAXATION—Licenses—State and Local Printing Business—Not Considered Manufacturing Operation. F-227 (27)**

July 24, 1956.

HONORABLE WILLIAM M. MCCLENNY

Commonwealth's Attorney for Amherst County

This is in response to your inquiry as to whether or not a municipality has the power to require a license for a job printing business operated in conjunction

with a newspaper, where the only stock of goods kept at hand is a small amount of material consisting of paper to be printed into job printing products. You further inquire as to whether or not this would come under the classification of a manufacturer and be taxed pursuant to Section 58-317, Code of Virginia, or under Section 58-266.1.

Kindly be advised that inquiries have been made of the State Department of Taxation and of the Commissioner of Revenue of the City of Richmond but no similar situations have come to light.

It would appear that job printing would more nearly be defined as a service business than a manufacturing operation. Moreover, printing establishments are generally referred to as printing businesses rather than manufacturing concerns. It would be my opinion that the situation which you present would more appropriately fall under the provisions of the first paragraph of Section 58-266.1, Code of Virginia, as amended. Moreover, there appearing to be no State license requirement for a printing business, it does not appear that the municipality could avail itself of its privilege to require a license in addition to that which the State might have required.

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**TAXATION—Priority of Liens on Merchandise of Retail Store—Capitol Tax. F-221 (19)**

July 16, 1956.

HONORABLE G. H. PARKER  
Commonwealth's Attorney  
Southampton County

This is in reply to your letter of July 13, 1956, which reads as follows:

"My Treasurer, Mr. V. S. Pittman, has requested that I inquire from you whether he has a prior lien for taxes under the following circumstances: Judgment was obtained by creditor, execution issued and levy made on personal property of a grocery concern, said property consisting of merchandise purchased for sale. The Treasurer obtained a lien on the property subsequently for merchant's capital tax which had been unpaid by the debtor. Would the Treasurer's lien prevail?"

I am unable to find any statute under which the lien for merchant's capital tax would have priority over a prior levy made pursuant to a valid execution.

In this connection I refer you to the case of *Chambers v. Higgins*, 169 Va. 345, at page 352, in which the Court reviewed the earlier case of *Drewry v. Baugh & Sons*, 150 Va. 394, and stated:

"The State has no lien for taxes but such as is given to it by statute, and since it had no lien on Gillette's personal property for general taxes due until the levy of January 10th, that lien was junior to the lien of an execution acquired on January 3rd.

"It is true that in the collection of taxes the provisions of the statute must be followed. *Marye v. Diggs*, 98 Va. 749, 37 S. E. 315, 51 L. R. A. 902. It is also true that the State must be able to put its finger upon the statute. *Commonwealth v. P. Lorillard Co., Inc.*, 129 Va. 74, 105 S. E. 683.

"The State could put its finger on no statute which subordinated the lien of an execution creditor to the lien of a tax levy thereafter acquired. \* \* \*"

Assuming that the execution lien is proper and valid in all respects, I am of the opinion that it is prior to the subsequent levy made for merchant's capital tax.

**TAXATION—Real Property—Federal Government Buildings on Private Land Not Subject to. F-163 (128)**

October 22, 1956.

HONORABLE ROBERT C. FITZGERALD  
Commonwealth's Attorney for Fairfax County

This is in further connection with my letter of October 10, in reply to your communication of September 26, in which you state that a large tract of privately owned land, located in Fairfax County, has been leased to an agency of the Federal Government. Upon a portion of this property the Federal Government has erected six metal buildings which are affixed to the realty in a permanent manner. Under the terms of the lease, however, these buildings are the property of the Federal Government and may be removed by it at any time.

You further advise that the local Director of Assessments has considered the above mentioned buildings as part of the realty and has increased the assessment of the real property accordingly. You request an opinion upon the propriety of this action.

As the Supreme Court of Appeals has pointed out it is a fundamental principle that a State and its subdivisions are without power, in the absence of express consent of Congress, to tax property owned by the United States, and such consent, being in derogation of the sovereign power of the Federal Government, is to be found only when Congress has spoken in the clearest language. See, *Prince William v. Thomason Park*, 197 Va. 861, 864. Cited by the Virginia Supreme Court in support of this principle was the case of *United States v. Alleghany County*, 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209. This case involved the validity of a local ad valorem tax imposed upon certain real estate owned by a private company, the tax in question being based in part upon the value of certain machinery owned by the Federal Government, leased by it to the private company, and bolted on concrete foundations in the company's plant. These machines were held by the company as a bailee for mutual benefit, and the assessors in that case, while making no claim that the temporary presence of the government's machinery actually increased the market or use value of the company's land, added the value of the government's machinery to the value of the company's land for the purposes of the ad valorem property tax. Pointing out that there was little theoretical and no practical difference between this method of taxation and actually taxing the machinery in form, the United States Supreme Court held that the property of the Federal Government, to the full extent of the Government's interest therein, was immune from taxation, either as against the government itself or against one who held that property as a bailee.

The decision in the *Alleghany* case was deemed by the Supreme Court of Ohio to be controlling in *Guckenburger v. Toledo and C. R. Company*, 60 N. E. (2d) 163, in which case a situation strikingly similar to that outlined in your communication was considered. The question there presented was whether or not a guard's tower, cyclone fencing, sidewalks and floodlights erected by the Federal Government upon land occupied by it for military purposes, under a lease with the railroad company by the terms of which such structures remained the property of the Government and might be removed at the expiration of the lease, were exempt from taxation. Although the auditor in the *Guckenburger* case relied upon the claim that the structures in question were fixtures and, therefore, taxable to the railroad company as a part of the real property, the Court pointed out that, under the terms of the lease, the ownership of the specified structures was in the Federal Government, and held that such property was legally exempt from taxation upon the decisive authority of *United States v. Alleghany County*, *supra*. In addition, the Supreme Court of Ohio observed that the situation there presented was more favorable to the lessor railroad company than the bailee company in the *Alleghany County* case, as in the latter case

the company was a bailee for mutual benefit of the government's property, while the lessor railroad company in the case under consideration had no title to, interest in, control of, or authority over the structures involved.

In light of the foregoing cases, I am of the opinion that the six metal buildings owned by an agency of the Federal Government in the instant situation would not be taxable to the Government or to its lessor unless Congress has expressly consented to such taxation.

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**TAXATION—Real Property—May Not Permit County Vehicle License Tax to Be Credit Against. F-273 (144)**

October 30, 1956.

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

This will reply to your letter of October 15, in which you present the following inquiry:

"Will you kindly state in your opinion whether or not it is constitutional to permit a county vehicle license tax to be a credit against a real estate tax. In other words, both taxes will be set up independently, but when the taxpayer pays his real estate tax, any vehicle license tax assessed by the county will be a credit applied to his real estate tax."

I am of the opinion that your question should be answered in the negative. Local real estate assessments, levies and collections are made pursuant to various provisions of Title 58 of the Virginia Code, particularly Chapters 15, 17 and 20 thereof. I have been unable to discover any provision in Title 58 which permits local governing bodies to allow a credit of the type mentioned in your communication, and I am of the opinion that such governing bodies would be without authority to do so in the absence of specific legislative authorization. Furthermore, Section 171 of the Virginia Constitution prescribes that all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general law. As indicated above, I am aware of no general law which authorizes localities to allow amounts paid as local vehicle license taxes to be applied as a credit against local real estate taxes. I am, therefore, of the opinion that it would not be permissible for a locality to authorize this practice.

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**TAXATION—Real Property—Should be Assessed in Name of Widow Who Is Life Tenant. F-261 (89)**

September 18, 1956.

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

This is in reply to your letter of September 15, 1956, in which you request my opinion as to whether or not, under the provisions of § 58-771 of the Code of Virginia, real property of a person dying intestate should be assessed for taxes in the name of the widow who receives a life estate through the provisions of § 64-27 of the Code of Virginia.

"When an owner dies intestate, the commissioner may ascertain who are the heirs of the intestate and charge the land to such heirs or he may charge the land to the decedent's estate until a transfer thereof; and all assessments of real estate heretofore made against a decedent's estate are hereby validated in otherwise valid \* \* \*." (§ 58-771)



The widow receiving the life estate is an heir, and, under the holding of the Supreme Court of Appeals in the Case of *Richmond v. McKenny*, 194 Va. 427, the burden of paying taxes is upon the life tenant rather than upon the remainderman, and, therefore, the property should be assessed in the name of the widow who is a life tenant.

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**TAXATION—Recordation—Deed from Husband to Himself and Wife as Joint Tenants—Tax Based on One-Half Value of Property. F-90a (203)**

January 21, 1957.

HONORABLE JESSE D. CLIFT, *Clerk*  
City of Martinsville

This is in reply to your letter of January 18, 1957, which reads as follows:

"For a long period of time there has been a question in my mind as to the correct amount of recordation tax to be charged in cases where a husband is conveying to his wife and himself real property with the right of survivorship. I have noted your opinions of June 6, 1952 addressed to Honorable Robert D. Huffman, Clerk, Page County, and of October 31, 1952 addressed to Honorable C. E. Moran, Clerk, Charlottesville. However, in neither of these cases do your opinions indicate whether or not the tax should be based on the full value of the property being so transferred or on one-half of the value.

"It appears to me in assessing recordation taxes on transactions of this kind if the tax is assessed on the full value we would be naturally assuming that the party of the first part would not be the survivor, consequently, by the same token should the grantor survive in transactions of this kind no benefit would be derived. In your opinion would it be proper to base the tax on the full or one-half of the value of the property being transferred?"

Under such a conveyance the husband and wife will become equally interested in the real estate—that is, each will own an undivided one-half interest in the property. Thus, it would appear that title to only one-half of the property passes under the deed. I am of the opinion, therefore, that the recordation tax should be based upon half of the actual value of the real estate considered as a whole. If the actual value of the property is \$10,000.00 the tax should be charged upon a valuation of \$5,000.00.

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**TAXATION—Recordation—Deed of Trust Securing Loan by Local Bank. Small Business Administration Participating—When Taxable. F-90a (206)**

January 24, 1957.

HONORABLE JULIAN UPDIKE, *Clerk*  
Warren County Circuit Court

I acknowledge receipt of your letter of January 22 1957, which reads as follows:

"The question has been raised in my office as to the liability for the payment of State recording taxes upon a deed of trust for the sum of \$110,000.00, representing a loan of the amount made by one of our local banks, in which the Small Business Administration, a Federal Government Agency, participates to the extent of seventy (70) percent, with the local bank putting up the remaining thirty (30) percent.

"The note itself is payable to the local bank, but the bank executes what is called a Participation Agreement, and the SBA puts up 70% of the money loaned.

"I will appreciate it very much if you will advise me as to the proper charge for State recording tax upon the instrument above described."

This office has previously ruled in connection with R.F.C. loans (Attorney General Report 1937-38, page 165) that the instrument securing the loan is not subject to the recordation tax. It is my understanding that the Small Business Administration is, with respect to State taxation, of the same status as the Reconstruction Finance Corporation, the Small Business Administration under a federal reorganization statute being a successor to the R.F.C. Therefore, it would appear that instruments securing the Small Business Administration for a loan made by it would not be subject to the recordation tax.

In addition to the facts presented in your letter, you have in a telephone conversation that the deed of trust offered for recordation does not show that the loan or any part thereof is being made by SBA. The SBA may, or may not, participate in the loan by purchasing an interest in the note. The deed of trust indicates that it secures a note payable to the local bank for a loan made by it.

Under such circumstances, I am of the opinion that the Clerk should require the payment of a recordation tax upon the entire amount secured by the deed of trust.

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**TAXATION—Recordation—Exemptions—Veterans Organizations Are Not.  
F-90-a (270)**

March 19, 1957.

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

This is in reply to your letter of March 15, 1957, in which you request my opinion as to whether or not a deed conveying real estate to a local post of the Veterans of Foreign Wars may be recorded without the payment of recordation tax, along with a deed of trust from the trustees of the same organization to secure a loan on the property transferred by the deed.

A recordation tax is not a tax on property and, as such, does not come within the provisions of Section 183 of the Constitution. Section 58-64 of the Code of Virginia lists the exemptions of State recordation tax. This list of exemptions does not include the American Legion, Veterans of Foreign Wars or any other similar veterans' organization. Therefore, I am of the opinion that the deed and deed of trust are subject to the recordation tax.

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**TAXATION—Recordation—Lease, Assignment, Deed of Trust—Assignment  
Not Taxable if Merely Additional Security. (370)**

June 20, 1957.

HONORABLE H. B. BATTE, *Clerk*  
Circuit Court of Dinwiddie County

I acknowledge receipt of your letter of June 18, 1957, which reads as follows:

"Recently a lease, assignment and deed of trust were presented in this office for recording and the question has arisen as to whether there is a tax on the assignment. I am enclosing a copy of the assignment and will appreciate you letting me know if I should charge recording tax on this instrument.

"I am also enclosing a letter from Hon. J. Segar Gravatt, the Attorney representing the lessors, calling my attention to Sections 58-55, 58-58 and 58-59."

I have examined the assignment submitted along with your letter, as well as the letter to you from Mr. Gravatt. Mr. Gravatt takes the position that this assignment comes within the exceptions set forth in § 58-60 of the Code. As I understand the matter, Gralove Corporation has executed a deed of trust to

secure a loan obtained from Atlantic Life Insurance Company, which deed of trust has been admitted to record and the recordation tax based on the amount secured by such deed of trust has been paid. The assignment is solely for the purpose of providing additional security for the payment of the debt secured by the deed of trust.

Under these circumstances, I am of the opinion that the assignment comes within the exceptions contained in Code § 58-60. I am returning Mr. Gravat's letter to you.

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**TAXATION—Trading Stamps—Local License on Distributor—Only One Locality May Levy. F. 123 (109)**

October 8, 1956.

HONORABLE WILLIAM F. STONE  
Member of the House of Delegates

This is in reply to your letter of October 5, 1956, in which you refer to Chapter 677 of the Acts of the General Assembly and more specifically to Section 4 thereof. Section 4 reads in part as follows:

"When a person subject to the tax hereby imposed shall have paid such license tax and any local license tax imposed by the City, town or county in which is located an established place of business of such person, no further license or license tax shall be required or imposed by this State or any other city, town or county for the conduct of the business of furnishing or supplying premium stamps or the redemption thereof or the transfer of cash, goods, merchandise, commodities or other property therefor."

I quote from your letter in part as follows:

"It is my understanding that one of the distributors of stamps in this State has its office in the City of Roanoke, and if I construe the quoted language above correctly, it will prohibit the City of Martinsville from levying a license tax on such a stamp distributor after January 1, 1957. I would greatly appreciate your advising me if your office concurs with my thinking on this matter."

It would appear that your interpretation of Section 4, Chapter 677, of the Acts of Assembly of 1956 is correct and that only one city, town or county may levy a license tax on a stamp distributor.

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**TREASURERS—County Warrants—Duty to Determine Validity or Legality of before Honoring—Does Not Have to Check Budgets. F-130 (149)**

November 7, 1956.

HONORABLE W. A. HOWLETT  
Treasurer of Carroll County

This is in reply to your letter of November 5, 1956, in which you request my opinion as to whether or not the county treasurer is required to pay any and all warrants issued by the board of supervisors regardless of whether or not such amounts were included in the county budget, and you ask further if there is any duty upon the treasurer to ascertain the validity or legality of warrants drawn by the board of supervisors.

In my opinion there is a duty and responsibility upon the county treasurer to ascertain the validity or legality of county warrants placed before him for his signature or to be paid by him out of county funds. This duty is outlined in §§ 15-253 through 15-257 of the Code of Virginia. If there are insufficient funds

on hand to pay the warrant, or if there is a question in the treasurer's mind as to whether the warrant has been properly signed or countersigned, he should refuse to honor the warrant.

I am of the opinion, however, that if there are sufficient funds on hand and a warrant which has been properly signed and countersigned by the chairman of the board of supervisors and the clerk has been presented to the treasurer, he should honor the warrant, although it is for an item which was not included in the budget. The board of supervisors may, if there is a surplus of funds, appropriate money and expend money for items which are not included in the county budget. The county budget is provided as a guide to the board of supervisors in determining the amount of taxes to be levied for the current fiscal year. It does not stop them from appropriating money for items which are not listed in the budget if there is a surplus of funds in the general county fund.

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**VIRGINIA MUSEUM OF FINE ARTS—Disposition if Works of Art Not Desired to Be Kept. F-40 (199)**

January 15, 1957.

MR. GEORGE D. GIBSON  
Vice-President and Counsel  
Virginia Museum of Fine Arts

I am in receipt of your letter of December 21, 1956 in which you state that in a number of instances objects given to the Virginia Museum of Fine Arts are found to lack the authenticity and quality required for Museum purposes. You advise that the Museum is accordingly considering the disposition of such objects, and you inquire whether or not the consent of the Governor to the proposed disposition is required by Virginia law.

In pertinent part, Section 9-81 of the Virginia Code prescribes that the Trustees of the Virginia Museum of Fine Arts:

"... are vested with full authority . . . (5) to determine what paintings, statutory and works of art, may be kept, housed or exhibited in the Museum; (6) to acquire by purchase, gift, loan or otherwise, paintings, statuary and works of art and to exchange or sell the same if not inconsistent with the terms of the purchase, gift, loan or other acquisition thereof; . . . and (11) to receive and administer on behalf of the Commonwealth gifts, bequests and devises of real and personal property for the endowment of the Museum or for any special purpose designated by the donor. And the Trustees are hereby authorized to change from time to time the form of investment of any funds, securities, or other property real or personal, provided the same be not inconsistent with the terms of the instrument under which the same was acquired, and to that end may sell, grant and convey any such property by and with the written consent of the Governor."

In response to your inquiry, permit me to advise that I concur in the interpretation you have placed upon the above quoted statute in your communication, and I am in accord with your conclusion that, in the situation under consideration, the consent of the Governor would not be required. Clauses (5) and (6) of the statute specifically relate to "paintings, statuary and works of art", and full authority for the management and disposition of items of this character, if not inconsistent with the terms of acquisition, is reposed in the Board of Trustees without restriction. By contrast, Clause (11) relates to "gifts, bequests and devises of real and personal property" for the endowment of the Museum or other special purposes, while the provision immediately following Clause (11) relates

to the investment of "funds, securities or other property" and authorizes the Board of Trustees to "sell, grant or convey" such property with the written consent of the Governor.

In view of the provisions relating specifically to paintings, statuary and works of art, I am of the opinion that such objects should not be deemed to be included in those properties for the disposition of which the consent of the Governor is required.

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**VIRGINIA MUSEUM OF FINE ARTS—Melchers Memorial—Duty upon Commonwealth—How New Trustees May Be Appointed. (360)**

June 13, 1957.

MR. GEORGE D. GIBSON  
President and Counsel  
Virginia Museum of Fine Arts

I am in receipt of your letter of May 22, in which you summarize the circumstances surrounding the conveyance to the Commonwealth by Mrs. Corinne Lawton Melchers of her residence at "Belmont", near Fredericksburg, Virginia, to be held and maintained by the Commonwealth as a perpetual Memorial to her late husband, the distinguished artist, Gari Melchers.

The effective operation of the deed accomplishing the conveyance in question was conditioned upon its approval and acceptance by the Commonwealth subject to certain terms and conditions specified in the instrument. In 1942, by an Act of the General Assembly, Mrs. Melchers' deed of gift was approved and accepted by the Commonwealth. Acts of Assembly (1942), Chapter 437, page 699. One of the terms and conditions to which the conveyance was made subject provides:

"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."

Consonant with this provision of the deed, Section 2, of Paragraph 1 of the Act of the General Assembly accepting the gift, prescribes:

"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."

From your communication, it appears that it has now proved impracticable for the Trustees of the Virginia Museum of Fine Arts to establish the Memorial for the purposes contemplated and that those purposes may be more effectively achieved if the establishment and operation of the Memorial under consideration is confided to the administration of Mary Washington College at Fredericksburg, Virginia. In light of the foregoing, you inquire whether or not the General Assembly of Virginia may "adopt an amendatory act designating the administration of Mary Washington College as 'the successor' to the Trustees of the Virginia Museum for the Establishment and operation of the Memorial".

On June 2, 1955, I had occasion to render an opinion to the Honorable Thomas B. Stanley, Governor of Virginia, upon the question of whether or not the Commonwealth had authority, in view of its acceptance of Mrs. Melcher's gift in 1942, to dispose of the property in question by sale or gift. During the course

of my opinion, in which I concluded that the Commonwealth might not, either with or without legislative action, so dispose of the property, I made the following observations:

"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.* \* \* \*

"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.*" (Italics supplied).

I am constrained to believe that these principles are applicable to all the terms and conditions of the gift under consideration, including the provision that the Memorial shall be managed, controlled, operated and maintained by the Trustees of the Virginia Museum of Fine Arts or their successor or successors, under the same power as is conferred upon the Trustees in the management of the Virginia Museum of Fine Arts. Further in this connection, I am of the opinion that so long as the Trustees of the Virginia Museum of Fine Arts continue to discharge the powers and duties conferred and imposed upon them by Section 9-78 et seq. of the Virginia Code, they can have no successor within the meaning of the phrase "their successor or successors" as utilized in the second condition stipulated by Mrs. Melchers in her deed of gift. Thus, I do not believe that the Commonwealth, purporting to appoint a successor to the Trustees of the Virginia Museum of Fine Arts, may, in reality, appoint an alternate trustee in contravention of the express terms upon which the trust was established by the donor and accepted by the Commonwealth.

True it is, as you point out, that equity will not permit a trust to fail for want of a competent trustee. In my former opinion to Governor Stanley, I expressed the view that the trust established by Mrs. Melchers was "amenable to the law applicable to charitable trusts generally", and I concluded my opinion to His Excellency with this statement:

"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."

Consistent with this expression, I am of the opinion that it would be proper for a court of equity—upon an appropriate showing of the impossibility of performance by the existing trustees of the duties imposed upon them by the terms of the trust in question—to appoint a competent substitute trustee to manage, operate and maintain the Memorial. However, I do not believe that the Commonwealth of Virginia, having accepted Mrs. Melchers' gift subject to the terms and conditions stated by the donor, may undertake to depart from such terms and conditions without approbation and authorization from a court of competent equitable jurisdiction.

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### **VIRGINIA STATE PORTS AUTHORITY—Does Not Have Power Formerly Vested in Department of Conservation if Statute Has Been Repealed. F-97 (71)**

September 6, 1956.

MR. CHARLES R. SEAL  
General Counsel  
Virginia State Ports Authority

This is in reply to your letter of August 29, 1956, in which you request my opinion as to whether or not the powers and duties vested in the Department of Conservation and Development by § 62-114, paragraph 6, of the Code of Virginia

prior to 1952 have been transferred to the Virginia State Ports Authority by the provisions of § 62-106.1 of the Code of Virginia.

Paragraph 6 of § 62-114 of the Code of Virginia formerly provided:

“(6) The Board shall have the right to adopt and promulgate proper rules and regulations with respect to the construction, extension, and alteration of terminal facilities within the port. And no construction, alteration, extension, improvement or removal of any wharves, piers, bulkheads or piling shall be made within the port area before obtaining the consent of the Director. All plans and specifications for the erection of any structures in or upon or over the navigable waters of the port shall be submitted to the Director and approved by him before such work shall be begun. Applications for permits for such work shall be filed with the Director, and such permits shall be issued or refused, as the circumstances and conditions justify. Should the Director refuse to issue such permit application therefor may be filed with the Board, which may order or refuse to order the Director to issue the same. Reasonable fees, to be fixed by the Director, may be charged for the issuance of all permits for work of the character mentioned in this subsection. Any rules and regulations adopted with reference to any matter referred to in this subsection, and the exercise of the rights herein granted, shall conform to all lawful regulations of the United States government.”

This section of the Code was repealed by Chapter 62 of the Acts of Assembly of 1952. While § 62-106.1 of the Code of Virginia provides that the powers and duties of the Department and Director of Conservation and Development and the Division of Ports, Board of Conservation and Development, in so far as they relate to the Ports, are transferred to and vested in the Virginia State Ports Authority, I do not feel that this provision can transfer powers and duties which have been expressly repealed by the General Assembly. Therefore, I am of the opinion that the power and duty formerly conferred upon the Department of Conservation and Development by § 62-114, paragraph 6, has not been vested in the Virginia State Ports Authority, as this section has been repealed and, unless there is some provision in the law elsewhere, the Virginia State Ports Authority would not be able to require a permit for the construction of a second tunnel under the Elizabeth River.

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#### **VIRGINIA STATE PORTS AUTHORITY—Funds Donated to Constitute Public Funds. F-97 (169)**

December 4, 1956.

HONORABLE CHARLES R. SEAL, *General Counsel*  
Virginia State Ports Authority

This will reply to your letter of November 23, 1956, in which you call my attention to the definition of “public funds” enunciated by the Supreme Court of Appeals of Virginia in *Beckner v. Commonwealth*, 174 Va. 454, 459, in the following language:

“Public funds are those moneys belonging to the State or to any city, county or political subdivision of the State,—or more specifically, taxes, customs and moneys raised by the operation of law for the support of the government or for the discharge of its obligations. 22 R. C. L. Public Funds, page 222; 50 C. J. page 854; *Smyer et al. v. United States*, 273 U.S. 333, 47 S. Ct. 375, 71 L. Ed. 667, 51 A. L. R. 780.

“Money in the hands of a constable, collected under execution awaiting distribution to private owners, does not belong to the public. It represents funds held in trust for individual litigants, and not for the

State or its political subdivisions. The character of the money is determined by its ownership rather than by the manner and means of its collection."

This definition was cited in an opinion of this office, rendered on September 12, 1956, to the Honorable J. Gordon Bennett, Auditor of Public Accounts, to the effect that the rule of strict liability was applicable to public officials with respect to the loss of theft of public funds coming into their hands, but that the more liberal rule (which relieves a fiduciary of responsibility for loss where he has acted in good faith and in the exercise of fair discretion) was applicable to instances of the loss or theft of private funds of which a public official might be custodian.

You further point out that Section 62-106.7(f) of the Code of Virginia (1950) as amended authorizes the Virginia State Ports Authority:

"To accept funds and property from persons, counties, cities and towns, and to use the same in such manner, within the purposes of the Authority, as shall be stipulated by the grantor, and to act as agent or instrumentality for any of such persons, counties, cities or towns in any matter coming within the general purposes of such Authority; counties, cities and towns are hereby authorized to make grants to the Authority for its purposes and to appoint it as agent."

In light of the foregoing, you inquire whether or not funds donated to and accepted by the Authority pursuant to the above quoted statute should be regarded as public funds or private funds in so far as the liability of the officer of the Authority in responsible possession of them is concerned.

With respect to funds contributed to the Authority by counties, cities and towns, I think it is manifest that such donations constitute public funds. Such funds would belong to the State or the political subdivision in question, would be raised by operation of law for the support of the government and would be held in trust for the State or the locality. Moreover, as the character of particular moneys "is determined by its ownership rather than by the manner and means of its collection", I am constrained to believe that donations to the Authority from private persons would also constitute public funds as above defined. Under the provisions of Section 62-106.7(f) of the Virginia Code, the Authority is authorized to act as agent or instrumentality for persons donating funds or property to it with respect to "any matter coming within the general purposes" of the Authority, and to use the funds or property donated in such manner "within the purposes of the Authority" as shall be stipulated by the grantor. It would thus appear that when contributions have been made to the Authority by private individuals, such funds would be held by the Authority in trust for the benefit of the State to be expended in furtherance of the public purposes for which the Authority was established. I am, therefore, of the opinion that contributions accepted by the Authority pursuant to the statute in question should be considered public funds within the scope of my opinion to the Auditor of Public Accounts.

#### **VIRGINIA STATE PORTS AUTHORITY—Workman's Compensation— Employees Out of Country—May Provide. F-97 (125)**

October 18, 1956.

HONORABLE J. H. BRADFORD  
Director of the Budget

This is in response to your letter of October 4, 1956, with enclosure, inquiring whether or not the Virginia State Ports Authority can legally expend out of its appropriation the cost of providing Workmen's Compensation Insurance Coverage with a private company for coverage of an employee who is in charge of its Brussels, Belgium office. It is indicated that the Authority would not be liable for personal injury, etc., which might occur to this employee residing outside



the United States. Reference is also made to Section 65-58 of the Code of Virginia. It is further stated that insurance has been provided other employees located elsewhere in the United States but that the coverage for a foreign employee would be more expensive than the domestic rate.

Under the provisions of the Virginia State Ports Authority contained in Sections 62-106.1 through 62-106.19, Code of Virginia, the Authority is authorized to employ agents and employees and to fix and pay the compensation of employees without regard to their residence or citizenship. The question appears to be one of policy rather than legality. In my opinion the authorization to employ and pay persons thereby gives the same latitude as a private employer under similar circumstances. If it is the normal practice, there would not appear to be legal objections to the providing of such insurance coverage. However, as previously stated, it appears to be a question of policy rather than a question of law.

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**VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—State Police  
Killed in Line of Duty—Method of Determining Benefits of Widow. F-243a  
(108)**

October 4, 1956.

HONORABLE CHARLES H. SMITH, *Director*  
Virginia Supplemental Retirement System

This will reply to your letter of September 24, in which you advise that a State police officer was recently killed in service, that his death resulted from a cause determined to be compensable under the Virginia Workmen's Compensation Act, and that an award of \$27.00 per week for three hundred weeks has been made. The deceased was struck by an automobile and, as an action has been brought against the driver of the vehicle in question, the above mentioned award has not been accepted.

You further advise that the deceased officer was survived by a widow and a child under eighteen years of age. The widow and, until he attains the age of eighteen years, the child are entitled to a survivor's benefit under the Old Age and Survivor's Insurance provision of the Federal Social Security Act.

In light of the foregoing summary, you present the following questions:

(1) What effect, if any, would a refusal of the award made under the Virginia Workmen's Compensation Act have upon the right of survivor of the deceased officer to receive benefits under Section 51-136.1 of the Virginia Code?

(2) Would the benefits payable to the deceased officer's widow under Section 51-136.1 of the Virginia Code be reduced only by the amount of payments made to the widow under the Federal Social Security Act or by the amount of the payments made both to the widow and the child under the Federal Social Security Act?

Section 51-136.1 of the Virginia Code makes provision for the payment of death benefits to the qualifying survivor of a member of the State Police Officers' Retirement System when such member dies in service from a cause compensable under the Virginia Workmen's Compensation Act. Specifically, Section 51-136.1 provides:

"If a member hereafter dies in service at any time before retirement from a cause compensable under the Virginia Workmen's Compensation Act, there shall be paid, an annual allowance payable monthly to the widow of such member during her widowhood, if he leaves a widow, equal to one-half of the member's average final compensation. If he leaves no widow or the widow dies or remarries then such child or children, if any, of the deceased member, under the age of eighteen years shall be paid such allowance until such child or children die or attain the age of eighteen years, whichever shall first occur. If more than

one child survives the deceased member, the allowance shall be divided among them in such manner as the Board may determine. If the deceased member leaves neither widow nor child or children under the age of eighteen years, then such allowance shall be paid to his parent or parents wholly dependent upon him for support, divided in such manner as the Board may determine, during the life or lives of such parent or parents; provided, however, the amount of any allowance payable under this paragraph shall be reduced by the amount of any Social Security benefits arising from coverage of the member under the Federal Social Security Act to which any such widow, child or parent may become entitled under the Federal Social Security Act in effect at the member's death. The compensation finally awarded under the Virginia Workmen's Compensation Act for the death of such member shall be deducted from the benefit provided for in this section, and the excess of the benefit, if any, shall be paid to the person or persons herein specified. When the time for which payment of the compensation finally awarded under that act has elapsed, such person or persons shall thereafter receive the full amount of the benefit payable subject to the reduction of the Federal Social Security Act benefit, if any."

Considering your questions in the inverse order of their presentation, I am of the opinion that the death benefits payable to the deceased officer's widow under the above quoted statute would be reduced only by the amount of payments made to the widow under the Federal Social Security Act and not by the amount of payments made both to the widow and child under the provisions of that Act. Section 51-136.1 establishes three separate and distinct classes of beneficiaries comprised of survivors of a deceased member of the State Police Officer's Retirement System. These classes are accorded a descending order of dignity, the member or members of a preferred classes receiving death benefits of a deceased member of the retirement system to the exclusion of the member or members of a subordinate class. The unmarried widow of a deceased member of the retirement system is the sole occupant of the first class. Should there be no surviving widow, or should such widow die or remarry, *then* the child or children (under eighteen years of age) of a deceased member of the retirement system receive death benefits until such child or children die or attain the age of eighteen years, whichever first occurs. Such child or children constitute the members of the second class of beneficiaries. If there be no unmarried widow, child or children, i.e., no qualified members of the first or second class, *then* death benefits are received by the parent or parents wholly dependent for support upon a deceased member of the retirement system. Such parent or parents constitute the members of the third class of beneficiaries and receive payments during their lives.

Having established the foregoing classifications, the statute in question prescribes:

"\* \* \* provided, however, the amount of any allowance payable under this paragraph shall be reduced by the amount of any Social Security benefits arising from coverage of the member under the Federal Social Security Act to which any *such widow, child or parent* may become entitled under the Federal Social Security Act in effect at the member's death. \* \* \*" (Italics supplied).

Particularly significant with respect to your first question is the use of the qualifying adjective "such" before the phrase "widow, child or parent", together with the circumstances that the above mentioned phrase is framed in the disjunctive rather than the conjunctive. When this language of the proviso is read in light of the statutory classes established in the preceding sentences and with the realization that the member or members of each class receive death benefits under Section 51-136.1 to the exclusion of the members of a subordinate class, I am constrained to believe that the proviso should be construed to mean that the amount of any allowance payable under the statute to a widow, child

or parent, as the case may be, shall be reduced by the amount of Social Security payments to which such widow, child or parent who is receiving death benefits under the Virginia statute may become entitled under the Federal Social Security Act.

Pertinent to the resolution of the second question presented are the terminal sentences of the statute under consideration, which prescribe:

"The compensation finally *awarded* under the Virginia Workmen's Compensation Act for the death of such member shall be deducted from the benefit provided for in this section, and the excess of the benefit, if any, shall be paid to the person or persons herein specified. When the time for which payment of the compensation finally *awarded* under that act has elapsed, such person or persons shall thereafter receive the full amount of the benefits payable subject to the reduction of the Federal Social Security Act benefit, if any." (Italics supplied).

In light of the language italicized above, I am of the opinion that, once a final award has been made under the Virginia Workmen's Compensation Act, the amount of such award must be deducted from the death benefits payable under Section 51-136.1 of the Code. The mandate that the "compensation finally *awarded*" under the Virginia Workmen's Compensation Act shall be deducted from the death benefits payable under Section 51-136.1 is not conditioned upon the acceptance or non-acceptance of the award. I believe it is reasonably manifest that this provision was inserted in the statute to preclude the possibility of double payments being made to a beneficiary. If an award under the Virginia Workmen's Compensation Act is accepted, then the amount of the payments thus awarded are to be deducted from the retirement system death benefits, and I believe that no different results should follow if an award be rejected because the executor or administrator of a deceased's estate chooses to look to the wrongdoer for damages rather than claim the benefits of the Virginia Workmen's Compensation Act. I am, therefore, of the opinion that the acceptance or refusal of an award made under the Virginia Workmen's Compensation Act would have no effect upon the right of a beneficiary of a member of the State Police Officers' Retirement System, and that the amount of the Workmen's Compensation award in the instant case should be deducted from the benefits payable to the survivor of the deceased officer under Section 51-136.1 of the Virginia Code.

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**WATER—Impoundment Structure Law—Provisions Not Mandatory—For Protection of Pond Owner. F-93 (59)**

August 23, 1956.

HONORABLE JOHN H. DANIEL  
Member House of Delegates

This is in reply to your letter of today in which you request my opinion as to the proper legal interpretation to be given to Chapter 632 of the Acts of Assembly of 1956, Chapter 5.1 of Title 62 of the Code of Virginia. You ask what is the penalty, if any, if a landowner constructs an impoundment structure without first obtaining a permit.

The law makes no provisions for a penalty in the event that a land owner should construct an impoundment structure across a well defined water course without first obtaining a permit as provided for in Chapter 5.1 of Title 62 of the Code. In my opinion a property owner has the same right to construct an impoundment structure since the enactment of this law as he had before the enactment of the law under the riparian doctrine at common law. If a landowner constructs a pond without first obtaining a permit, no action could be taken against him by any State agency, however, he would be subject to complaints by downstream riparian owners in the same manner that he was subject to these complaints before the enactment of the law.

The law is not mandatory; its provisions are for the protection of the landowner should he comply with the law. Under the riparian doctrine at common law, which doctrine would still be in effect if a landowner constructed a pond and did not first obtain a permit, he may impound or remove from the stream only that amount of water which is reasonable for the enjoyment of his property. If he removes any more water or impounds any more water than this amount, he could be compelled by a downstream riparian owner to cease removing or impounding the amount of water in excess of this. Under the provisions of Chapter 5.1 of Title 62 of the Code of Virginia a landowner may obtain a permit and then impound any part or all of that amount of the flow of the stream which exceeds the average flow of the stream. If he has this permit a downstream riparian owner cannot stop him from impounding and storing this water, although it may exceed the reasonable amount for the enjoyment of his property under riparian doctrine at common law.

**WATER—Public Supply—Drain Field of Septic Tank May Not Be Constructed within 200 Feet of Lake. F-224 (6)**

July 5, 1956.

HONORABLE MACK I. SHANHOLTZ, *Commissioner*  
Department of Health

This is in reply to your letter of June 25, 1956, in which you request my opinion as to whether § 62-43 of the Code of Virginia prohibits the installation of a septic tank and/or tile drain field for such septic tank within 200 feet of any lake from which a public water supply is drawn.

Section 62-43 of the Code prohibits the endangering of a public water supply by constructing or maintaining any privy-vault or cesspool, or by storing manure or other soluble fertilizer of an offensive character, or by disposing of the carcass of any animal, or any foul, noxious, or putrescible substance, whether solid or fluid, and whether the same be buried or not within two hundred feet of any watercourse, canal, pond, or lake aforesaid, which is liable to contamination by the washing thereof or percolation therefrom; \* \* \* I am of the opinion that the substance which normally is discharged into the ground by septic tanks and the tile fields thereof would come within the classification of a "foul, noxious or putrescible substance" and, therefore, a septic tank and/or tile drain field may not be constructed within 200 feet of a lake from which a public water supply is drawn.

**WEAPONS—Dangerous—Carrying of Pistol Which Looks Like Tire Gauge—When It Is Concealed. (340)**

May 27, 1957.

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

This will reply to your letter of May 13, 1957, in which you present certain questions concerning the licensing for sale and the carrying of a weapon of the type hereinafter described.

The weapon in question is a .32 caliber pistol designed to fire ordinary pistol projectiles of such size. It is made of metal, is some six inches in length and weighs several ounces. It possesses no stock, trigger or sight, having the appearance of a tire gauge or a small tubular flashlight, and is fitted with an external clip for attachment to the carrier's shirt or suit pocket in the manner of a fountain pen. At one end is a threaded nipple which may be removed for the insertion of a cartridge, while at the other end there is a spring plunger which may be pulled back with one hand while the weapon is held in the other. Release of this plunger activates the firing pin which explodes the cartridge and discharges the projectile.

You initially inquire whether or not there is any legal means by which a Commissioner of the Revenue can refuse to issue a license for the sale of such weapon. As I am aware of no provision of Virginia law which prohibits the sale of pistols of the type described above, I am of the opinion that there would be no legal ground upon which the issuance of a pistol dealer's license required by Section 58-394 of the Virginia Code could be refused.

You further inquire whether or not the carrying of such a weapon, clipped to an individual's shirt pocket in such a manner as to conceal all but the plunger thereof, would constitute a violation of Section 18-146 of the Virginia Code. In pertinent part, this statute prescribes:

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

As stated by the Supreme Court of Appeals of Virginia in *Sutherland v. Commonwealth*, 109 Va. 834, 835, the above quoted statute was designed "to interdict the practice of carrying a deadly weapon about the person, concealed, and yet so accessible as to afford prompt and immediate use". Although there has been some difference of judicial opinion upon the question of whether or not the carrying of a weapon which is partially exposed to view constitutes a violation of the statutes of the various States forbidding the carrying of concealed weapons, it appears to be the general rule that absolute invisibility of a weapon to other persons is not indispensable to concealment, that a weapon need not be carried in such a manner as to give absolutely no notice of its presence to constitute a violation of such statutes and that a weapon is concealed from ordinary observation if it is carried in such a manner that it would not be observed by other persons making ordinary contact with the carrier in the every day walks of life. A comprehensive analysis of cases arising in various jurisdictions is contained in the annotation set forth in 43 A. L. R. (2d) 492.

Unfortunately, the Supreme Court of Appeals of Virginia has had no occasion to construe the phrase "hid from common observation" as utilized in Section 18-146 of the Virginia Code and there is, therefore, no guiding precedent on this point in this jurisdiction. However, despite the fact that penal statutes must be strictly construed against the Commonwealth and in favor of the liberty of its citizens, I am constrained to believe that the carrying of a pistol of type under consideration in such a manner that all but a small portion of its length is concealed—and that portion which is visible would not upon inspection disclose the nature of the instrument—would constitute a violation of Section 18-146 of the Virginia Code.

#### WELFARE AND INSTITUTIONS—Children Committed—Handling of Federal and Other Funds Received for Benefit of. F-231 (145)

October 31, 1956.

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

I am in receipt of your letter of October 19, in which you call my attention to the provisions of Section 63-293.2 of the Virginia Code, which was enacted at the

last session of the General Assembly and which authorizes the State Board of Welfare and Institutions to accept and expend, for the benefit of any child committed to the State Board or for reimbursement purposes, any funds made available from any source, solely for the current maintenance and support of such child. The statute also prescribes that sums accepted thereunder shall not exceed the costs to the State Board of supporting such child. You state that funds which may be accepted by the State Board pursuant to the provisions of the above mentioned statute will generally be made available by the Veterans Administration, as insurance benefits, or the Social Security Administration, representing old age and survivors' insurance benefits, and that the cost to the State Board for the support of a child committed to it will always exceed the monthly payments which the State Board anticipates will be received from such sources.

You also advise that since July 1, 1954, local boards of public welfare have been accepting payments made by the Veterans Administration and the Social Security Administration representing veterans or old age and survivors' insurance benefits. Authorization for the acceptance of such funds by the various boards of public welfare is contained in Section 63-73.1 of the Virginia Code, which in pertinent part provides:

"Any local board of public welfare is authorized and empowered to accept and expend on behalf of and for the benefit of any child or children committed or entrusted to its care under Sec. 63-73, when no guardian has been appointed, funds or money paid or tendered as pension, compensation, insurance or other benefit from the Veterans' Administration, or under the Railroad Retirement Act or the old-age and survivors' insurance provisions of the Federal Social Security Act, as amended, or funds contributed or paid by parents or other persons for the support of such child, and the local board may, from any such funds received, provide for the current or future maintenance of such child.

"When the child attains eighteen years or is emancipated the local board shall deliver and pay to him all the estate and money in its possession, or with which it is chargeable, on his account and shall account to him for all funds or money received or paid by the local board on behalf of the child, provided, however, that the amount held for the child and to be paid directly to him does not exceed the sum of three hundred dollars."

It further appears from your communication that various local boards of public welfare continued to receive the above mentioned benefits after children initially committed to their care had been subsequently committed to the State Board of Welfare and Institutions. These payments have been accumulated by the various local boards for some time, and you inquire what disposition may be made of them in view of the provisions of Section 63-293.2 which now authorizes the State Board to accept such funds.

Section 63-73, to which reference is made in Section 63-73.1, authorizes local boards of public welfare to receive, for placement in suitable family homes or institutions, persons under eighteen years of age who may be entrusted to the local board by parents, guardians or others or committed to the local board by a court of competent jurisdiction. When the provisions of this section are read in conjunction with those of Section 63-73.1, I am constrained to believe that the local boards are authorized to receive funds from the specified sources only so long as the children to whom or for whose benefit such funds are paid remain in the custody of the local board. In light of this view, it follows that those local boards which continued to receive funds from the Veterans Administration or the Social Security Administration after the children for whose benefits such payments were made had been removed from their custody, did so without statutory authorization. In this situation, I would suggest that such local boards be advised to contact the Federal agencies in question, apprise them of the circumstances, and inform such agencies that the local boards are holding

such funds to be returned or disposed of in accordance with the directions of the Federal agency concerned. In this connection, I believe it would be appropriate for the local boards to advise the Federal agencies that the Board of Welfare and Institutions is now authorized to receive such payments under the provisions of Section 63-293.2 of the Virginia Code.

With respect to the disposition of payments which may be received by the State Board under Section 63-293.2, I am of the opinion that the State Board is empowered to use such funds to reimburse departmental expenditures made for the current maintenance and support of the children for whose benefit such payments are made and received. In conclusion, I believe it would be the better practice to deposit such funds in the State Treasury to the credit of your department rather than commingle them with other funds which the State Board may have on deposit in bank accounts currently maintained by it.

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**WELFARE AND INSTITUTIONS—Damage to Local Juvenile Detention Home—May Pay for if Committed by Ward of State. (351)**

June 7, 1957.

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

This is in reply to your letter of May 31, 1957, in which you request my opinion as to whether or not State funds may be used to reimburse the Newport News Juvenile Detention Home for damages inflicted at the Home by a juvenile who was being held at the Home as a ward of the State pending transfer of the juvenile to either the State Department of Welfare and Institutions or the Lynchburg Colony and Hospital.

I am of the opinion that State funds may be used to cover the cost of the repairs of the damage done by this ward of the State under the provisions of § 16.1-201 of the Code of Virginia.

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**WELFARE AND INSTITUTIONS—State Industrial Farm for Women—May Not Be Used to House Women Awaiting Trial. F-183 (245)**

February 27, 1957.

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

This is in reply to your letter of February 19, 1957, in which you state that the Department of Welfare and Institutions has agreed, subject to the approval of this office, to the following:

“The Board approves the confinement of female prisoners committed to the City of Richmond Jail at the State Industrial Farm for Women during the period when the present Richmond City Jail is being replaced. This arrangement is to continue in effect for a term not to exceed one year from the date of its beginning.

“This approval is contingent upon facilities being available at the State Industrial Farm for Women and the number of prisoners held for the City of Richmond at all times will be necessarily limited to the space and facilities available for them. A charge will be made to the City of Richmond for all prisoners held on all charges before trial and for all prisoners held for the City after conviction on violations of City ordinances at a daily rate equal to the daily per capita cost of maintaining prisoners at the State Industrial Farm for Women during the preceding fiscal year.”

The proposed arrangement with the City of Richmond contemplates that women who have not been convicted but are being held by the City pending trial would

be placed in the State Industrial Farm for Women. Section 53-128 of the Code provides that females convicted of a felony and given a penitentiary sentence may be committed by the court to this place of confinement.

This section reads as follows:

"All females convicted of felony and given a penitentiary sentence may be committed by the court to the Industrial Farm for Women instead of the penitentiary at Richmond, as previously provided by law, it being the purpose of this chapter to remove female prisoners from the penitentiary at Richmond, and from the jails as far as practicable, to the Industrial Farm for Women, where they may be properly segregated, given necessary medical attention, employment and discipline.

"The Director may, with the approval of the Governor, transfer to the farm any female prisoners now held or hereafter committed to the penitentiary; and all adult female prisoners in county and city jails, whose sentences are final, may be transferred thereto in the manner provided in § 53-135.1 for transfer of jail prisoners to State, city and county farms."

The second paragraph of this section when considered along with § 53-135.1 would, it seems, permit the use of this Farm for detention of women who have been finally convicted of a misdemeanor and sentenced to serve a term in jail.

I am unable to find any statutory provision authorizing the use of this facility for detention of women who have not been convicted and sentenced. Section 53-91 does not, in my opinion, apply to the point under consideration. Section 18-94 is likewise inapplicable.

The Industrial Farm for Women may be used only for the purposes prescribed by statute. Since there does not appear to be any statute authorizing the use of the facility for the purposes contemplated by the resolution, I am of the opinion that your Department may not enter into the proposed arrangement.

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**WORKMEN'S COMPENSATION—Failure of Employer to File Reports—  
Court Does Not Have Authority to Enter Summary Judgement for Five.  
F-110 (312)**

May 1, 1957.

HONORABLE M. E. EVANS, *Commissioner*  
Industrial Commission of Virginia

I acknowledge your letter of April 30, 1957, in which you state that the Industrial Commission imposed a fine against an employer in accordance with Section 65-118 of the Code for a violation of Section 65-115. The Commission forwarded a certified copy of the order imposing the fine to the Corporation Court of the City in which the employer resides, with the request that judgment be entered by the Court and an execution issued thereon pursuant to the provisions of Section 65-96 of the Code.

The Court has refused to enter the judgment until such time as your Department obtains a ruling from this office with respect to whether or not Section 65-96 authorizes the entry of such judgments in cases where a fine has been imposed for failure to make and file the report required by Section 65-115. You have requested my opinion concerning this matter.

Section 65-96 is contained in Chapter 9 of Title 65, which chapter relates to procedure in connection with awards. This chapter, in my opinion, deals with the rights of claimants, and Section 65-96 provides an effective method whereby an award in favor of a claimant may be reduced to judgment and execution issued thereon. Our Supreme Court of Appeals in considering this section stated in *Richmond Cedar Works v. Harper*, 129 Va. 489:

"Section 62 (now 65-96) was clearly enacted for the purpose of providing a means not only of *enforcing an award* which had been



affirmed on such appeal, but also all other *final awards* of the Commission from which there had been no appeal, as well as agreements between the parties approved by the Commission. \* \* \* There is neither necessity nor reason for the procedure under Section 62, unless the defendants fail to pay the amounts *awarded* the claimants. At that time all of the rights of the parties having been previously litigated and determined, the Court is required to render judgment in accordance either with (a) the agreement of the parties, which has been approved by the Commission, (b) an award of the Commission which has not been appealed from, or (c) an award of the Commission which has been previously affirmed upon appeal." (Italics supplied)

The Court in this case, as well as in *Parrigen v. Long*, 145 Va. 637, points out that the section of the Code involved *relates to awards* in favor of claimants under the Workmen's Compensation Act.

Section 65-115 relates to the filing of reports and provides a penalty against the employer for failure to file such reports. Section 65-118 prescribes the amount of penalty which may be made in the nature of an assessment against the employer. This assessment, in my opinion, must be distinguished from an award to a claimant.

The Court, in entering a judgment under Section 65-96, exercises a mere ministerial function in carrying out a method provided by the General Assembly for enforcing the collection of an award of benefits by the Commission. In my opinion, it does not provide for the summary entry of a judgment upon a penalty assessed against an employer for violation of Section 65-115.

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#### WORKMEN'S COMPENSATION—Sheriffs and Deputies—Deemed by Statute to Be County Employees—State Does Not Pay Part of Compensation Award. F-110 (181)

December 19, 1956.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney for Montgomery County

This will reply to your letter of December 14, in which you state that an award of some \$1400.00 was made by the Industrial Commission in favor of two deputy sheriffs of Montgomery County, Virginia, who were injured in an automobile accident in the course of their duties. In view of the fact that two-thirds of the salaries of the deputies in question is paid by the Commonwealth, you inquire whether or not the Commonwealth should participate in the satisfaction of this award to the extent of two-thirds of the total amount thereof.

Pertinent to the resolution of this question are the provisions of Section 65-4 of the Code of Virginia (1950) as amended, in which the term "employee" is defined and which, in part, prescribes:

"Policemen and firemen, except policemen and firemen in cities containing more than two hundred thirty thousand inhabitants, and *sheriffs and their deputies*, town and city sergeants and town and city deputy sergeants, city commissioners of the revenue, their deputies and employees, *shall be deemed to be employees of the respective cities, counties or towns in which their services are employed and by whom their salaries are paid.*" (Italics supplied).

The definition of the term "employee" as used in the Virginia Workmen's Compensation Act was extended by amendment of 1954 to include, *inter alia*, sheriffs and their deputies. Acts of Assembly (1954) Ch. 246, page 312. For some ten years prior to the enactment of this amendment to Section 65-4, the Commonwealth had been paying two-thirds of the salaries of sheriffs and their deputies the fee system for the compensation of such officers having been abolished as of June 1, 1943, Acts of Assembly (1942) Ch. 386, page 611; Code of Virginia

(1942) Section 3487(1) et seq.; Code of Virginia (1950) Section 14-81 et seq. Notwithstanding these statutes providing for the payment by the Commonwealth of two-thirds of the salaries of sheriffs and their deputies—of which statute the Legislature is presumed to have been aware—provision was made by the 1954 amendment to Section 65-4 that sheriffs and their deputies “shall be deemed” to be employees of the localities in which their services are employed and by whom their salaries are paid. In light of this express language of the Virginia Code, I am of the opinion that sheriffs and their deputies should not be considered to be in the joint service of the locality and the Commonwealth within the meaning of the Virginia Workmen’s Compensation Act and that the Commonwealth, in the absence of any provision specifically obligating the State for such an expense, would not be required to participate in the satisfaction of the award under consideration.

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**ZONING—Board of Supervisors—May Make Amendments to Proposed Ordinance without Readvertising. F-60a (147)**

October 31, 1956.

HONORABLE STIRLING M. HARRISON  
Commonwealth’s Attorney  
Loudoun County

This is in reply to your letter of October 23, 1956, in which you request my opinion concerning the procedure to be followed for enacting a zoning ordinance pursuant to § 15-846 of the Code of Virginia, and also for enacting a land subdivision ordinance pursuant to § 15-782 of the Code. You ask specifically if the Board of Supervisors advertises the proposed ordinance and holds a meeting as advertised and, after hearing the views and statements of the persons appearing at the meeting, decides to make certain changes, amendments or alterations to the proposed ordinance, is it necessary to readvertise the ordinance and hold a second meeting?

I am of the opinion that, after holding the public meeting as required by law, the Board of Supervisors may make certain alterations, amendments or other changes in the proposed zoning or subdivision ordinance without advertising and holding a second meeting. The purpose of the meeting required by law is to give the people of the county an opportunity to be heard on the proposed ordinance and to enable the supervisors to make those alterations, amendments and changes in the proposed ordinance so that the ordinance will best represent the views and opinions of the people of the county.

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**Zoning—Law Applicable to Fairfax County—If Two Laws Apply May Choose Between. F-60a (61)**

August 24, 1956.

HONORABLE ROBERT C. FITZGERALD  
Commonwealth’s Attorney  
Fairfax County

This is in reply to your letter of August 14, 1956, in which you request my opinion concerning the zoning laws of Virginia which would be applicable to Fairfax County.

The laws to which you refer in particular are Articles 2 and 3 of Chapter 24 of Title 15 of the Code of Virginia. I will answer the five questions propounded in your letter in the order in which they are presented:

1. Although Article 3 of Chapter 24 of Title 15 is now applicable to Fairfax County, I am of the opinion that the county may proceed under either Article 2 or Article 3 since, at the time the county originally enacted its zoning ordinance, Article 3 was not applicable.

2. I am of the opinion that the county may abolish its Planning Commission without invalidating its zoning ordinance if the county changes its zoning ordinances and its zoning procedure from that listed under Article 2 to that provided for under Article 3.

3. It is possible for Fairfax County to readopt its zoning ordinances under the authority granted to certain counties in Article 3 of Chapter 24 of Title 15 of the Code without jeopardizing the continuity of its zoning ordinances. In order to do this the Board of Supervisors must provide for the creation of a zoning commission as specified in § 16-862 of the Code of Virginia.

4. If Fairfax County should change its zoning ordinance and procedures from those provided for in Article 2 to those provided for in Article 3, I am of the opinion that the ordinance will continue to be valid, even if at some time in the future Fairfax County no longer falls within any of the categories set forth in § 15-855 of the Code, provided Fairfax County was within one of these categories at the time the zoning ordinance was enacted.

5. In my opinion category 6 of § 15-855 is special legislation, however, it is not that type of special law or legislation such as is prohibited by § 63 of the Constitution of Virginia. Special legislation such as § 15-855 is permitted under the provisions of § 65 of the Constitution of Virginia.

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#### **ZONING—Procedure for Rezoning—Functions of Zoning Commission and Planning Commission—Henrico County. F-60a (31)**

July 27, 1956.

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

This is in reply to your letter of July 25, 1956, in which you ask seven questions concerning zoning in Henrico County and request my opinion in answer to these questions. I will discuss these questions in the order in which they appear in your letter.

In answer to your first question, I am of the opinion that should Henrico fall within the classification listed in § 15-855 of the Code of Virginia, and if the county wishes to proceed under the provisions of Article 3 of Chapter 24 of Title 15 of the Code of Virginia, then it is mandatory for the Board of Supervisors to appoint a zoning commission as required by § 15-862 of the Code of Virginia.

In answer to your second question, if the county is proceeding under Article 23 of Chapter 24 of Title 15, then it is proper for the Zoning Commission to adopt a plan in accord with the purposes set forth in §§ 15-855 through 15-858 of the Code of Virginia, exclusive of any such master plan referred to in Article 3 of Chapter 25 of Title 15.

I am of the opinion, in answer to your third question, that the Board of Supervisors may compensate the members of the Zoning Commission created pursuant to § 15-852 for their services at these public hearings and commission meetings which may be necessary to accomplish the work of the Commission.

I am of the opinion that the Board of Supervisors may designate the Zoning Commission as its "designated agent" under the provisions of §§ 15-789 and 15-793 of the Code for the purpose of approving and vacating plats pursuant to the provisions of the Virginia Land Subdivision Act.

In answer to your fifth question, I am of the opinion that, after the Zoning Commission has completed its work of zoning or rezoning the county, then the Board of Supervisors may abolish the Zoning Commission and may appoint any or all of the members of the former zoning commission to be members of the Planning Commission contemplated by § 15-926.1 of the Code of Virginia.

I am of the opinion, in answer to your sixth question that, if your county does not have a planning commission at the present time, the county may still partici-

pate in a regional planning commission created pursuant to Article 1 of Chapter 25 of Title 15 of the Code of Virginia. Under the provisions of § 15-892, if there is no planning commission in the county, then a member of the Zoning Commission is eligible to serve as a member of the Regional Planning Commission.

I am of the opinion, in answer to your seventh question, that, in the current administration of the existing zoning ordinance, there is nothing to prohibit the Board of Supervisors from referring proposed changes in zoning classifications to the Zoning Commission for its review and recommendation.

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**ZONING—Size of Lots in County—Type of Water Supply Available May Be Used to Determine. F-83 (261)**

March 13, 1957.

HONORABLE WILLIAM F. PARKERSON, JR.  
Commonwealth's Attorney  
Henrico County

This is in reply to your letter of March 7, 1957, in which you request my opinion as to whether or not the County of Henrico, under the provisions of § 15-886 of the Code of Virginia, may establish different requirements as to the size, frontage, depth and area of residential lots depending solely upon whether or not (1) a public water supply is available, or (2) a community water supply is available, or (3) a private individual water supply is contemplated.

I am of the opinion that § 15-886 of the Code gives the County of Henrico authority to establish these requirements for residential lots depending solely upon which of the three types of water supply is available.