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

From July 1, 1957 to June 30, 1958

COMMONWEALTH OF VIRGINIA
Division of Purchase and Printing
Richmond
1958
Letter of Transmittal

July 21, 1958

HONORABLE J. LINDSAY ALMOND, JR.
Governor of Virginia
Richmond, Virginia

My dear Governor Almond:

In accordance with Section 2-93 of the Code of Virginia, I herewith transmit to you the Annual Report of the Attorney General. This report covers the period beginning July 1, 1957 through June 30, 1958, and includes opinions rendered by you as Attorney General from July 1, 1957 to September 16, 1957, those of the Honorable Kenneth C. Patty, Attorney General from September 16, 1957 to January 13, 1958, and opinions written since my term of office commencing on January 13, 1958 to June 30, 1958.

Pursuant to the statutes, I have included in the Report such official opinions rendered by this office during the above-stated period as would seem to be of general interest or helpful in promoting uniformity in the construction of the laws of the State, together with the required statements of cases now pending and disposed of since the last Report issued by this office.

All of the opinions included in the Report went out over the signature of the Attorney General in office as of the date of rendition. In the interest of economy, the signatures, salutations and portions of the addresses have been omitted.

Respectfully submitted,

A. S. HARRISON, JR.,

Attorney General
<table>
<thead>
<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. S. Harrison, Jr.</td>
<td>Brunswick County</td>
<td>Attorney General</td>
</tr>
<tr>
<td>Kenneth C. Patty</td>
<td>Tazewell County</td>
<td>First Assistant</td>
</tr>
<tr>
<td>D. Gardiner Tyler</td>
<td>Charles City County</td>
<td>Assistant</td>
</tr>
<tr>
<td>Thomas M. Miller</td>
<td>Richmond City</td>
<td>Assistant</td>
</tr>
<tr>
<td>Francis C. Lee</td>
<td>Hanover County</td>
<td>Assistant</td>
</tr>
<tr>
<td>Clarence F. Hicks</td>
<td>Caroline County</td>
<td>Assistant</td>
</tr>
<tr>
<td>J. Eldred Hill, Jr.</td>
<td>Henry County</td>
<td>Assistant</td>
</tr>
<tr>
<td>Robert D. McIlwaine, III</td>
<td>Petersburg City</td>
<td>Assistant</td>
</tr>
<tr>
<td>John W. Knowles</td>
<td>Henrico County</td>
<td>Assistant</td>
</tr>
<tr>
<td>Reno S. Harp, III</td>
<td>Richmond City</td>
<td>Assistant</td>
</tr>
<tr>
<td>M. Ray Johnston,</td>
<td>Richmond City</td>
<td>Assistant</td>
</tr>
<tr>
<td>Marie L. Waddill</td>
<td>Richmond City</td>
<td>Special Assistant</td>
</tr>
<tr>
<td>Eleanor W. Tilley</td>
<td>Smyth County</td>
<td>Secretary</td>
</tr>
<tr>
<td>Mabel G. Hurt</td>
<td>Tazewell County</td>
<td>Secretary</td>
</tr>
<tr>
<td>Madge V. Howell</td>
<td>Richmond City</td>
<td>Secretary</td>
</tr>
<tr>
<td>Agnes Reid Pickral</td>
<td>Pittsylvania County</td>
<td>Secretary</td>
</tr>
<tr>
<td>Mary Kathryn Church</td>
<td>Richmond City</td>
<td>Secretary</td>
</tr>
<tr>
<td>Margaret E. Bennett</td>
<td>Colonial Heights</td>
<td>File Clerk</td>
</tr>
<tr>
<td>Helen B. Bowles</td>
<td>Goochland County</td>
<td>Receptionist</td>
</tr>
</tbody>
</table>
ATTORNEYS GENERAL OF VIRGINIA
From 1776 to 1958

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. Hank, Jr.............................................................. 1918-1918
John R. Saunders............................................................ 1918-1934
**Abram P. Staples.......................................................... 1934-1947
***Harvey B. Apperson...................................................... 1947-1948
****J. Lindsay Almond, Jr............................................... 1948-1957
*****Kenneth C. Patty...................................................... 1957-1958
A. S. Harrison, Jr........................................................... 1958-

*Hon. J. D. Hank, 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. Resigned September 16, 1957.

*****Hon. Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of Hon. J. Lindsay Almond, Jr., and served until January 13, 1958.
CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


CASES DECIDED IN THE SUPREME COURT OF APPEALS


20. **Moore, Willard v. Dr. Joseph B. Blalock, Supt., Western State Hospital.** Petition for writ of habeas corpus. Denied and order to show cause discharged.


23. **Rogers Jewelry Corporation and Edward Einhorn, individually and trading as Rogers Jewelry Company v. Unemployment Compensation Commission of Virginia.** Affirmed.

24. **Sanderson, Catherine Elizabeth v. Commonwealth.** From Circuit Court of the City of Buena Vista. Second degree murder. Affirmed.


27. **Sloan, John H. v. Commonwealth.** From the Circuit Court of Scott County. Forgery of check. Affirmed.

28. **Spindle, Gilbert Donald v. State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors.** Affirmed, refusal of engineer's certificate sustained.

29. **Swift, Clyde v. Commonwealth.** From Circuit Court of Washington County. Illegal sale of alcoholic beverages. Affirmed.

30. **Trent Lowery v. Dr. Joseph R. Blalock, Supt., Western State Hospital.** Petition for writ of habeas corpus. Denied and order to show cause discharged.
Warner, Paul Ambrose, Jr. v. Perry Tribby, Executor and Trustee, etc., et al. From the Circuit Court of Loudoun County. Upholding of charitable trust by will. Petition for writ of error denied.

CASES PENDING IN THE SUPREME COURT OF APPEALS

5. Fleenor, Ralph Edward v. Commonwealth. From the Corporation Court of the City of Bristol. Seduction. Pending.

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


CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


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


   (1) Arlington-Alexandria Order No. 11
   (2) Arlington-Alexandria Order No. 13
   (3) Arlington-Alexandria Order No. 14


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.


19. Unemployment Compensation Commission of Virginia v. Diamond H. Corporation and 68 other similar suits. Circuit Court of the City of Richmond. Some contested, some were not.

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. Barnes, Lindsay Robertson v. C. H. Lamb, Commissioner, etc. Corporation Court of the City of Charlottesville. Appeal under Section 46-424 from an action of the Commissioner suspending driver's license. Appeal withdrawn.

2. Bingham Truck Service v. C. H. Lamb, Commissioner, etc. Hustings Court, City of Richmond, Part II. Declaratory judgment proceeding to determine whether the owner of vehicles rented should pay the rate prescribed in Section 46-162 for hire carriers or prescribed for private carriers. Judgment in favor of the Commissioner holding that such vehicles must be licensed as for hire carriers.

4. Cocke, Richard v. C. H. Lamb, Commissioner, etc. Corporation Court of the City of Charlottesville. Appeal under Section 46-360 from an action of the Commissioner denying the petitioner the right to drive. No suit entered and appeal withdrawn.


9. Francis, Gilmore T., t/a Francis Used Cars v. C. H. Lamb, Commissioner, etc. Circuit Court of Northampton County. Appeal under Section 46-522 from an action of the Commissioner revoking salesman's license and dealer's license. Action of the Commissioner affirmed.


22. Rozell, Gwendolyn Ann v. C. H. Lamb, Commissioner, etc. Circuit Court of Caroline County. Appeal under Section 46-436 from an action of the Commissioner suspending driver's license due to accident. Question became moot.


24. Scurlock, Arch Chilton v. C. H. Lamb, Commissioner, etc. Corporation Court of the City of Alexandria. Appeal under Section 46-424 from an action of the Commissioner suspending driver's license. Suspension of driver's license modified from 120 days to 90 days by the court.

25. Shefey, Alice Faye v. C. H. Lamb, Commissioner, etc. Circuit Court of Pulaski County. Appeal under Section 46-424 from an action of the Commissioner suspending driver's license for the reason that petitioner had not paid final judgment within fifteen days after its rendition. Judgment for the Commissioner. Court was without jurisdiction to hear case.


27. Vangol, John, Chartered Bus Service, Incorporated v. C. H. Lamb, Commissioner, etc. Circuit Court of Princess Anne County. Appeal under Section 46-60 to determine whether for hire license fees should be charged (Sections 46-154, 46-155 and 46-159). Judgment for Vangol.


CASES TRIED OR PENDING BEFORE THE INDUSTRIAL COMMISSION OF VIRGINIA

James, Annie K. v. Medical College of Virginia. Petition for award of compensation. Denied.

HABEAS CORPUS CASES


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

1957

July 9 Thomas Uly Bays
Aug. 1 Jene L. Christian
Aug. 29 Tommie Lee Tillery
Oct. 4 Edward H. Justice
Oct. 7 Joseph and Laura Mazzuka
Oct. 9 George R. Hill
Oct. 9 William O. Sigmon
Oct. 28 Bruce Lee Styles
Nov. 19 Alfred Clayton Owens
Dec. 10 Albert J. Lemon
Dec. 20 William Corbin

1958

Feb. 5 Joe Paramore
Feb. 13 Jack Lingar
Feb. 17 William Green Hall
Feb. 25 James Edward France
March 13 Henry Guinn
April 9 William Leon Campbell
April 25 Hartwell Baker Parker
May 20 William Y. Morris
May 26 Guin Stanley
This will reply to your letter of October 30, 1957, in which you request an opinion upon the appropriate interpretation to be accorded Section 63-351(4) of the Code of Virginia (1950) as amended, which relates to parental consent in adoption cases. Specifically, you inquire whether or not a court, proceeding under the particular provision noted above, "must require notice to a legal parent of a pending adoption proceeding before the Court can hear evidence on whether or not a valid consent by such parent is unobtainable". You state that the factual setting out of which your inquiry arises is one which involves a child, born in wedlock, being considered for adoption when the whereabouts of its legal father is unknown and cannot be determined after thorough investigation.

In pertinent part, Section 63-351 of the Virginia Code provides:

"No petition for adoption shall be granted, except as hereinafter provided in this section, unless there be written consent to the proposed adoption filed with the petition. Such consent shall be signed and acknowledged before an officer authorized by law to take acknowledgements.

"Consent shall be executed:

"(1) By the parents or surviving parent of a child born in wedlock; provided, however, if the parents are divorced and one has been divested of custody by terms of the divorce and does not consent to the adoption the petition may be granted without the consent of such parent; or

"(2) By the mother of a child born out of wedlock. The consent of the father of a child born to an unmarried woman shall not be required unless such child becomes legitimate prior to the filing of the petition for adoption; or

"(3) By the child placing agency having custody of the child, with right to place for adoption, through court commitment or parental agreement as provided in Sec. 63-73 or Sec. 63-241 of the Code; or

"(4) If after hearing evidence the court finds that the consent of any person or agency whose consent is hereinafore required is withheld contrary to the best interests of the child, or if a valid consent is unobtainable, the court may grant the petition without such consent.

The statute in question was subjected to extensive amendment and attempted amendment at the last session of the General Assembly of Virginia. Both the amendments actually made and the amendment attempted are significant with respect to the disposition of the question here under consideration. In this connection, subparagraph (1) of the statute, which relates to the consent required in cases involving adoption of a child born in wedlock, was amended by elimination of a terminal clause "if the court finds after giving the parent an opportunity to be
heard that the consent is withheld contrary to the best interests of the child", which had previously existed in the 1954 statute. Moreover, subparagraph (4) of the statute—which relates to the power of a court to grant a petition for adoption without the specified consent when such consent is withheld contrary to the best interests of the child, or if a valid consent is unobtainable—was also amended to delete a terminal proviso which conditioned the power of a court to act under subparagraph (4) upon the giving of "ten days' notice in writing" to the person or agency so withholding consent. Finally, as you point out in your communication, the Legislature rejected an amendment which would have added the following language to subparagraph (4) of the statute:

"* * * or, upon affidavit of the petitioner that the address of such person or agency is unknown, the petition may be granted provided such notice is given by publication once a week for two successive weeks in some newspaper published or having general circulation in the county or city."

Under familiar principles, when a statute has been amended and certain provisions thereof have been omitted, the omitted portions of the statute are to be considered repealed. The nature of the provisions which were deleted from Section 63-351 of the Virginia Code by the 1956 amendments and the subject matter of the rejected amendment lead me to the conclusion that the Legislature intended to eliminate any requirement of notice to a parent, or opportunity to be heard, in those cases coming within the purview of subparagraphs (1) and (4) of the statute in question. I am, therefore, of the opinion that, if a court finds after hearing any relevant and admissible evidence that the valid consent of a parent specified in the statute is unobtainable, it may grant a petition for adoption under Section 63-351(4) without requiring notice of the pending proceedings to a legal parent.

AGRICULTURE—Milk and Cream Act—Applicability—Milk Produced and Consumed at Charitable Institution. (113)

December 2, 1957.

DR. W. L. BENDIX
State Veterinarian

This is in response to your letter of November 19, 1957, in which you enclosed certain correspondence relative to the Virginia Baptist Children's Home of Roanoke, Virginia. The factual situation may be summarized as follows:

The Virginia Baptist Children's Home operates a dairy processing plant in Roanoke. All of the milk produced on its farm is processed by the Home and is consumed by the children and others who work at the Home. None of the milk produced by the Home leaves the physical confines of the property owned by the Home.

You ask whether or not the Division of Animal and Dairy Industries of the Department of Agriculture has jurisdiction to enforce the provisions of Article 3 of Chapter 17 of Title 9 of the Code of Virginia, 1950. It is my understanding that the Department of Agriculture has heretofore construed the word "dis-
tributed" appearing in Article 3 to vest the Department with jurisdiction over operations similar to the Virginia Baptist Children's Home.

I am of the opinion that this interpretation is incorrect in view of the fact that the word "distribute" connotes the carrying of a product and the delivery of the same in a manner entirely different from the operation of the dairy of the Virginia Baptist Children's Home. I am, therefore, of the opinion that the Division of Animal and Dairy Industries of the Department of Agriculture is not vested with authority to enforce the provisions of Article 3 of Chapter 17 of Title 3 of the Code of Virginia on such operations as the Virginia Baptist Children's Home.

AGRICULTURE—State Certified Seed Commission—Who Are Members. (65)

HONORABLE W. TAYLOE MURPHY
Member of House of Delegates

This is in response to your letter of October 11, 1957, which I quote below:

"In 1942 the General Assembly established the State Certified Seed Commission and named four department heads as ex officio members to compose the Commission.

"I would like to know if there is any legal reason why the President of the Crop Improvement Association of Virginia could not be added to this Commission as an ex officio member. As I understand it, the Crop Improvement Association is a non-profit corporation composed of seed growers throughout the State, and none of whom are employees of the Commonwealth of Virginia."

In this connection, I quote below Section 3-220 of the Code of Virginia:

"The commission known as the State Certified Seed Commission, hereinafter in this article sometimes called the 'Commission', is continued and is hereby established as a unit of and within the Virginia Agricultural Extension Division of the Virginia Polytechnic Institute.

"The Commissioner of Agriculture and Immigration, the Director of the Agricultural Experiment Station at Blacksburg, the Director of such Extension Division, and the Head of the Agronomy Department, of the Virginia Polytechnic Institute, shall constitute, ex officio, the Commission. A majority of the members of the Commission shall constitute a quorum. One of such members shall be elected chairman."

I note that this section names specifically four State officials who comprise the Seed Commission. There is no provision contained therein which provides that the President of the Crop Improvement Association of Virginia shall be an ex officio member of this Commission. I believe, however, that this section could be amended to provide that the President of the Crop Improvement Association of Virginia be a member of the Seed Commission. I am further of the opinion that the fact that he would have an interest in the decisions of the Commission would not in and of itself provide any legal barrier to such membership.
AGRICULTURE—Department of—Bulletins and Other Publications—No Legal Liability on State for Losses Sustained from Following Information Contained Therein. (66)

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

This is in response to your recent inquiry, in which you ask the following question:

"There has developed recently the question of the legal liability involved in the dissemination of control recommendations to producers or other publics. If, for example, an agricultural chemical should prove deleterious to a crop after a farmer has sprayed according to the quantity and method recommended in a bulletin by a College of Agriculture, is legal liability a personal one (that is, the responsibility of the scientist or extension specialist who published the recommendation) or does the liability rest solely with the land-grant university as an agency of State government? Or is neither liable?"

It is my understanding from the above quoted question that a Bulletin is published by the College of Agriculture containing recommendations to farmers or other interested parties as to particular procedures or products to be used in agricultural enterprises. Inasmuch as the Bulletin is published by the College of Agriculture, I am of the opinion that the sole responsibility is that of the College of Agriculture and not of the individual who may write part of the Bulletin in question.

The Virginia Polytechnic Institute is a State institution or agency and is in legal contemplation a part of the State. This office has heretofore frequently expressed the opinion that neither the State nor any of its governmental agencies, such as V.P.I., is liable for any injury to any person or for any tort committed by such agency. See Opinions of the Attorney General 1938-39, page 260; 1949-50, page 161. It would appear that, if a loss is sustained as a result of following the recommendations contained in the Bulletin published by the College of Agriculture, the cause of action would be in tort. However, in view of our previous opinions, I am of the opinion that the State would not be liable under such circumstances as heretofore set out.

AIRPORTS—Joint Commission—Flight Easements—Has Authority to Acquire by Condemnation. (49)

HONORABLE GEORGE M. COCHRAN
Member House of Delegates

This is in response to your letter of September 10, 1957, inquiring whether or not, in view of Section 5-23, Code of Virginia, the Shenandoah Valley Joint Airport Commission can condemn flight easements through the air space over lands beyond the airport boundaries where growing trees must be cut down. You further state that the Federal Government has deemed it necessary that such flight easements be acquired over portions of lands beyond the immediate airport boundaries in order to provide safe approaches:
Section 5-23, Code of Virginia, provides as follows:

"The counties, cities and towns of the State are hereby granted full power to exercise the right of eminent domain in the acquisition of any lands, easements and privileges which are necessary for airport and landing field purposes. Proceedings for the acquisition of such lands, easements and privileges by condemnation may be instituted and conducted in the name of such county, city or town, and the procedure shall be mutatis mutandis the same as in the acquisition of land by condemnation proceedings instituted by railroads. No proceedings had under this article for acquiring by condemnation any easement, right or privilege over or with respect to land outside the boundaries of any airport or landing field shall be effective to acquire any easement, right or privilege inconsistent with the continued use of such land for the same purposes for which it had been used prior to such acquisition, or inconsistent with the maintenance, preservation and renewal of any structure or any tree or other vegetation standing or growing on said land at the time of such acquisition, provided that the right of condemnation granted herein shall be subject to the same provisions as are provided in Sec. 25-233 concerning the condemnation of property belonging to a corporation possessing the power of eminent domain by another public service corporation."

The Shenandoah Valley Joint Airport Commission was created under Chapter 628, 1956 Acts of Assembly, which provide in part as follows:

"Sec. 3. The Commission, in addition to the powers and duties delegated to it by the participating counties and cities, shall have the following powers:

"To acquire under the power of eminent domain, or by purchase, lease, or otherwise, all the property of any person, partnership, association or corporation deemed necessary for the establishment, use, operation and maintenance of an airport."

"Sec. 4. Proceedings for condemnation hereunder shall be instituted and conducted in the name of the Commission, and the procedure shall be in the manner and under the restrictions prescribed by the general statutes of this State relative to the condemnation of lands and the rights of all persons, partnerships, associations or corporations affected shall be subject to the general laws of this State, in so far as the same may be applicable under the general purposes of this act."

Chapter 628, above quoted, creating the Shenandoah Commission, grants the broad powers of eminent domain in Section 3 thereof, which are stated to be "in addition to the powers" delegated to participating counties and cities. Moreover, Section 4 above provides that the condemnation proceedings shall be pursuant to the State's "general statutes" relative to eminent domain, and that the "rights of all persons", etc., affected shall be subject to the "general laws of this State". Title 25, Code of Virginia, contains certain general laws pertaining to eminent domain. Section 5-23, which contains the provisions prohibiting acquisition of easements outside the airport boundary inconsistent with the preservation of any tree, etc., appears to be a special statute in that it is limited in scope to the subject of eminent domain rights of counties, cities and towns in the establishment of certain aviation facilities.

In accordance with the foregoing, I am of the opinion that the provisions of said Chapter 628, providing for eminent domain under the general statutes relative to the condemnation of land is not limited by the provisions of said Section 5-23, which is a special statute of limited scope. In response to your question, this office
is of the view that the Shenandoah Valley Aircraft Commission can condemn necessary flight easements through the air space over the lands beyond the airport boundaries where growing trees must be cut down.

As there is no prior judicial interpretation of the aforementioned legal questions, the Commission might specifically resolve the matter by the introduction of legislation at the next session of the General Assembly.

ALCOHOLIC BEVERAGE CONTROL LAWS—County Ordinance Regulating Sunday Sales of Beer—Board of Supervisors Must Give Notice as Required by Title 15. (43)

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

This is in reply to your letter of August 14, 1957, in which you ask whether in adopting an ordinance regulating Sunday sales of beer and wine, pursuant to §4-97 of the Code of Virginia, the County Board of Supervisors is required to comply with the requirements of publication of notice of intention to propose and of publication of the text of such ordinance as provided by §15-8 of the Code. You also inquire "Whether it is possible for counties to adopt ordinances under some emergency clause making them effective upon passage."

With respect to the first question presented, you will recall that §4-97 of the Code is an enabling act authorizing the governing bodies of counties, cities and towns to adopt ordinances regulating the time of sale of beer and wine between the hours of twelve o'clock post meridian of each Saturday and six o'clock ante meridian of each Monday, and to provide penalties for violations of such ordinances. This section is expressly excepted in §4-96 from the general prohibition against the adoption by counties, cities and towns of any ordinance or resolution paralleling the alcoholic beverage control laws of the Commonwealth.

There is no provision of §4-97 which dispenses with compliance with the usual formalities required in the enactment of ordinances by boards of supervisors. The only variance mentioned is that the ordinance shall be effective to limit retail licenses previously issued by the Virginia Alcoholic Beverage Control Board only after transmission by the clerk of the Board of Supervisors of a certified copy of the ordinance adopted to the said Alcoholic Beverage Control Board.

As you know §15-8 of the Code prescribes the formal publication requirements with which the governing bodies of counties generally must comply in order to make effective an ordinance or by-law adopted. Section 15-10, however, prescribes an alternate method for the adoption of ordinances, which method may be utilized by counties of a specified nature designated therein, in adopting certain types of ordinances.

The last paragraph of §15-8, added by Chapter 218, Acts of Assembly, 1956, reads as follows:

"The procedure prescribed in this section shall not apply to any county which may adopt ordinances under §15-10 and any county which may act under that section may adopt any other ordinance in the manner prescribed in §15-10."

It is apparent that Prince William County is a county to which §15-10 is applicable, since it is one of the counties "having within their boundaries any United States Marine Corps Base." It is equally manifest that since the effective
date of the above quoted amendment to §15-8, Prince William County is authorized to adopt any ordinance in the manner specified in §15-10.

I am, therefore, of the opinion that Prince William County may comply with the provisions of either §15-8 or §15-10 in adopting the ordinance in question, but there must be compliance with one of these sections of the Code. Further, the second paragraph of §15-10 provides the answer to your second question regarding emergency enactments.

ALCOHOLIC BEVERAGE CONTROL LAWS—Distribution of Funds to Counties, Cities, Towns—County, by Resolution, May Authorize Portion of its Share to Be Paid to Newly Incorporated Town. (75)

October 22, 1957.

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

This is in reply to your letter of October 18, 1957, in which you refer to my letter to you of October 4, 1957, wherein I answered the question of whether the Board of Supervisors of Prince William County may contract with the new Town of Manassas Park and thereby pay over to the new town a proportionate share of the amount received by the County from distribution of A.B.C. profits.

You quoted a statement which I had made to the effect that the Circuit Court of Prince William County could confirm a report made by commissioners determining the population of the new town as of the 1950 census and you now state that in 1950 there was no population within the confines of the present corporate limits of the Town of Manassas Park.

A careful reading of §4-22 of the Code of 1950 reveals that the only basis on which such moneys shall be apportioned and distributed by the Treasurer of Virginia, upon warrants of the Comptroller, is “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.” In my opinion, it necessarily follows that if the area now enclosed within the corporate limits of the new town did not contain, in 1950, any population at all, then it would be impossible for commissioners to report that there were any people living within the area at that time.

For your information, I enclose a copy of an opinion of the Attorney General, dated August 21, 1952, addressed to the Honorable Henry G. Gilmer, Comptroller, in which it is pointed out that there is no authority for increasing the total State population as shown by the 1950 census, therefore, the population figure for 1950 for the County of Prince William cannot be increased over 22,612 as officially reported by the Bureau of the Census. However, if the Board of Supervisors of the County should adopt a resolution authorizing payment to the new town of a portion of future distributions of A.B.C. profits, the State Comptroller may honor such a resolution. Enclosed please find a copy of an opinion of the Attorney General dated June 13, 1955, to the Hon. Felix E. Edmunds, Member of the House of Delegates, which explains this procedure.

Of course, no such resolution could provide that the population of the Town of Manassas Park and of the County of Prince William exceeds in sum 22,612 persons, since this is the figure on which calculations for distribution of A.B.C. profits are now based and will be based until publication of the results of the 1960 decennial United States census.

It is my opinion that unless the Board of Supervisors adopts such a resolution, the Town of Manassas Park will not be entitled to share in these funds until its population has been determined by the next decennial census. As to A.B.C. funds
already distributed during 1957 to the County of Prince William, I feel that §§15-253 and 15-256 of the Code would prevent the Board of Supervisors from ordering a warrant issued payable to the town unless a distribution of these profits could be treated as a "claim" by the town against the county.

ALCOHOLIC BEVERAGE CONTROL LAWS—Distribution of Funds to Counties, Cities, and Towns—Methods of Determining Share of Newly Incorporated Town. (60)

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

This is in reply to your letter of October 2, 1957, which I quote in part below:

"On January 18, 1957, our Circuit Court granted a municipal charter to the Town of Manassas Park. The question has now come up as to the proper division of A.B.C. profits and just how a division should be made between Prince William County and the Town of Manassas Park.

"The amount due Prince William County for the fiscal year ended June 30, 1957, has already been paid to the county and now the Town of Manassas Park is asking for a division.

"There are four questions in my mind about this problem:
1. Does Prince William County have to share any part of the profits already remitted to the County?
2. If so, what would be the population basis on which a division would be made, that is, would an actual census have to be taken of Manassas Park and that figure used in proportion to Prince William County's 1950 census or will some other basis have to be invoked?
3. If Prince William does not have to share any of the profits already received, when will the Town of Manassas Park begin to share such profits and what will be the proportionate basis thereof?
4. Can the Board of Supervisors contract with the Town of Manassas Park on some basis within the legal frame work of answers to the preceding questions?"

I assume from your letter that the Town of Manassas Park was created pursuant to the provisions of §§15-66, et seq., of the Code of Virginia, in which event the population of the new town would be between 300 and 5,000 people.

Section 4-22 of the Code contains the provisions which govern the distribution of the net profits of the Alcoholic Beverage Control Board and does not seem to cover precisely the case of a new town. However, it is unquestionably the intent of the section that incorporated towns shall receive their proportionate part of such net profits despite the fact that the section itself requires determination of the population of any county, city or town for this purpose on the basis of the "last preceding United States census," during which the new town did not exist.

A method of determining the population of a town which has acquired a larger population by annexation is spelled out in §4-22 and the Judge of the Circuit Court of the county in which the town lies is empowered to appoint commissioners to determine the population of the territory annexed as of the date of the last preceding United States census.

It follows, therefore, that if the Board of Supervisors of Prince William County and the Town Council of Manassas Park can agree on a proper figure of
population, as of the 1950 census, of the area now within the corporate limits of the new town, I can see no reason why the Circuit Court could not confirm such agreement or appoint two disinterested persons, one representing the County and the other the Town as commissioners, who could submit to the Court a report based on such an agreement or on the best estimate available. If the court should confirm such a report, it is my opinion that this would be a compliance with the statutory provision.

You state that the distributive share for the fiscal year 1956-57 has already been paid to the County, which brings up the question of when a new town becomes eligible to share in the net profits. On September 23, 1942, the Honorable Abram P. Staples, then Attorney General, in an opinion to the Honorable I. R. Dovel of Luray, Virginia, gave consideration to that portion of §4-22 which reads: "* * * and future distributions of the monies allocated under the provisions of this chapter shall be made in accordance therewith." He held that the failure of a town to comply with the mechanics of the statute for determining the increase of the population (following annexation in that case) prior to a distribution of funds does not deprive the town of its share because, even though the money had been distributed, it was at the time of the annexation a "future distribution" of funds within the meaning of the Act.

In your case, January 18, 1957, which you state is the effective date of the municipal charter, should mark the beginning date of eligibility of the new town. Any distribution of the funds under the statute which takes place subsequent to this date is a "future distribution" and the new town is entitled to its pro rata share.

In sum, it is my opinion that the answer to your first question should be in the affirmative. A suggested method of determining population is set out above and should answer your second question. Likewise, the answer to the first question being in the affirmative, an answer to the third question is not necessary.

Now, considering your fourth question, it is possible for the court to approve a report made to it by commissioners determining the population of the new town as of the 1950 census, and once the population of the new town has been properly determined and the population of the county as shown by the 1950 census has been reduced an equivalent amount, it would be proper for the Board of Supervisors of Prince William County to pay to the Town of Manassas Park the amount it would have received had the Town complied with the mechanics of the statute for determining the population of such town before the distribution was made by the Treasurer of the Commonwealth.

Further, it would be wise if the population figures set by the order of the Circuit Court be certified through the Secretary of the Commonwealth in the same manner as the order granting the charter was certified under Title 15. In this manner, the proper State officials will be put on notice and will make future distributions in accordance therewith.

ALCOHOLIC BEVERAGE CONTROL LAWS—Second Conviction of Violation of §4-58—Jail Sentence May Not Be Suspended. (23)

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

In your letter of July 16, 1957 you asked the following question:

"If the Court and the enforcement officers, including the Commonwealth's Attorney, felt that the facts fully justified the suspension of a sentence on a second conviction under Code Section 4-58, as amended,
would the Court, under any circumstances, have authority or power to suspend the jail sentence under the above-mentioned Code section, as amended?"

The pertinent portion of §4-58, Code of Virginia, 1950, as amended, reads as follows:

* * * *

"The punishment for any violation of the provisions of this section shall be a fine of not less than fifty dollars nor more than five hundred dollars and confinement in jail for not less than thirty days nor more than twelve months. Provided, however, that in the event of a second or subsequent conviction under this section the jail sentence so imposed shall in no case be suspended. (Italics supplied)

* * * *"

The proviso above italicized was inserted in the Alcoholic Beverage Control Act by Chapter 491, Acts of Assembly, 1952. As you are aware, the Code also includes §53-272 which allows a court to suspend the imposition or the execution of sentence, in any case, provided it is satisfied that certain circumstances exist.

It appears that the amendment to §4-58, having been adopted subsequent to the enactment of §53-272, creates an exception to the general grant of discretion to suspend the execution of sentences, and requires a negative answer to your question. However, this exception is applicable only where both the first and second convictions are for violations of §4-58.

---

ALCOHOLIC BEVERAGE CONTROL LAWS—Transporting Legally Acquired Whiskey—More Than One Gallon—Permit Required—From Court to Home, No Exception. (141)

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

Receipt is acknowledged of your letter of December 16, 1957, in which you set out the following facts:

"Local and A.B.C. Officers raided a residence in Appomattox County; during the raid, three pints of illegally acquired whiskey were found and twenty-four pints of legally acquired whiskey were found; one of the owners of the property was arrested and charged with possession of the three pints of illegally acquired whiskey; the twenty-four pints of legally acquired whiskey were brought into Court; the owner was tried; the jury acquitted the owner of the possession of the three pints of illegally acquired whiskey; the twenty-four pints of legally acquired whiskey were turned over to the accused; he placed it in his car and on his way home, the A.B.C. officers arrested him for transporting more than a gallon of whiskey."

You state that you would like to know "if, under these above facts, a crime has been committed and if so, what section of the Code has been violated."

It would appear that the foregoing facts spell out a violation of §4-72 of the Code of Virginia, 1950. You will recall that this section prohibits transportation of distilled spirits within the Commonwealth in quantities in excess of one gallon,
except in cases where the A.B.C. Board grants a transportation permit in accordance with regulations adopted by it.

Under the Board's Regulations, no provision is made for transportation of more than one gallon of distilled spirits by a single individual unless such person shall have a permit which is granted by the Board or one of its agents. In the instant case, therefore, the owner of the whiskey should have applied to the Board for a permit to transport the twenty-four pints of legally acquired whiskey from the Court to his home.

BOARD OF SUPERVISORS—Agriculture—Local Federal Agencies—Authority to Provide Office Space For. (204)

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of March 25, 1958, in which you request my opinion as to whether or not the board of supervisors of a county has the authority to pay rent for offices in a privately owned building for office space occupied by certain federal agencies relating to agriculture, such as the Agricultural Stabilization and Conservation Committee, the Soil Conservation Service and the Farmers Home Administration. You state that these agencies render assistance to and cooperate with the farmers of the county in many ways, and also work in cooperation with the local County Agent, Soil Conservation Committee, etc.

Section 15-11 of the Code of Virginia provides as follows:

"The board of supervisors of any county in this State may, out of the general county levy of the county, apply and expend annually a sum not exceeding $2,500 for the purpose of promoting agriculture in the county."

I am of the opinion that if the board of supervisors of a county feels, and so states by the proper resolution, that the establishment of office space for certain federal agricultural agencies at a convenient location in the county would tend to promote agriculture in the county, then an expenditure of county funds for rental of this office space is a valid expenditure of funds, pursuant to §15-11 of the Code of Virginia. The board of supervisors must be satisfied that the providing of this office space by the county for these federal agencies at a location approved by the board of supervisors will have the effect of promoting agriculture therein to a much greater extent than would be the case if no central and convenient offices were available.

BOARD OF SUPERVISORS—Agriculture—State Animal Diagnostic Laboratory—Authority to Contribute Land or Funds. (197)

HONORABLE LEONARD F. JONES
Commonwealth's Attorney of Campbell County

This will acknowledge receipt of your letter of March 17th, which reads as follows:

"I will appreciate it very much if you will advise me whether or not the Board of Supervisors of Campbell County has the authority to
purchase land in Campbell County and donate the same to the Commonwealth of Virginia for the purpose of establishing thereon an Animal Diagnostic Laboratory, if the State Board of Agriculture is willing to locate such a laboratory in Campbell County.

"If, in your opinion, the County does not have the authority to purchase the land in question and give the same to the State, and assuming the State establishes this laboratory in Campbell County and buys the land for that purpose, can the Board of Supervisors apply $2500.00 annually for two years, as authorized by Section 15-11 of the Code of Virginia for the promotion of agriculture, on the purchase price of the land and for other improvements in connection with said laboratory.

"The laboratory referred to is that provided for in Item 702 of the Appropriations Bill."

By reference to Item 702 of the Appropriation Act of 1958, I find that it is an appropriation for capital outlay to provide funds for “South Central laboratory and equipment.” This is a State project within the Department of Agriculture and Immigration and I do not know of any statute under which a board of supervisors would have authority to provide a site for such facility as an inducement to have the facility located in its county.

You call attention to Section 15-11 of the Code, which authorizes boards of supervisors to “apply and expend annually out of the General Fund of the county a sum not exceeding twenty-five hundred dollars for the purpose of promoting agriculture in the county.” With respect to this Section, I find that the late Justice Staples while Attorney General was of the opinion that it did not give a board of supervisors authority to appropriate funds for the purpose of establishing a lime grinding plant or to purchase land for such plant. *Attorney General Reports*, 1943-44. p. 9. Responding to an inquiry relating to the authority of such a board to purchase land “for the purpose of exhibiting beef cattle thereon and thereby encouraging the raising of such cattle, and also for other incidental purposes for the betterment of the County at large.” Attorney General Staples held that the board did not have such authority. *Attorney General Reports*, 1945-46, p. 13, Judge Staples did hold in an opinion, reported in *Attorney General Reports*, 1936-37, p. 22, that a county could make an appropriation to assist a non-profit terracing corporation in acquiring a terracing machine and tractor, if the board were of opinion that the expenditure would result in promoting agriculture in the county.

With respect to the general subject of the authority of a board of supervisors to expend public funds for capital outlays in State projects, this office held, by a ruling dated November 5, 1954, *Attorney General Reports* 1954-55 p. 23, that the board did not have authority to purchase and donate land to the University of Virginia as an inducement to having a branch established in such county. As a result of this ruling, Section 15-15.1 was enacted at the 1956 Session, specifically authorizing such expenditures.

If the board cannot purchase and donate the site for the facility, it would seem that, for the same reason, it would not have the power to apply $2500.00 annually on the purchase price of the land and other improvements.

The project for which the General Assembly made an appropriation is regional in scope, and presumably its benefits to agriculture will inure to several localities. If Section 15-11 can be construed to authorize an appropriation for the purchase of land for a facility owned and operated by the State, it would seem that before the local governing body can make such an appropriation, its members must be satisfied, and should by resolution declare, that the location of the facility in their county will have the effect of promoting agriculture therein to a much greater extent than would be the case if the facility should be located outside the county.
I think that, as a general rule, specific authority must be granted to counties for the purpose of making donations to purely State projects.

BOARD OF SUPERVISORS—Appropriation to Woman's Club to Repair County Building—No Authority. (6) July 5, 1957.

HONORABLE GEORGE H. PARKER, JR.
Commonwealth’s Attorney
Southampton County

This is in reply to your letter of June 25, 1957, in which you state that a certain old school building in Southampton County was purchased from the Berlin School District in 1928 by the County to be used for district road purposes. A building on this property since 1928 has been used as a woman's club and/or community house. The Woman's Club has requested funds of the County to be used to repair and maintain the building.

I concur in your opinion that the Board of Supervisors may not make an appropriation to the Woman's Club. Since the County has title to the property and building, the Board of Supervisors may repair the building and expend funds to repair the building; however, I do not feel it would be proper for the Board of Supervisors to make a blanket appropriation to the Woman's Club and the Woman's Club then have the building repaired.

BOARD OF SUPERVISORS—Budget and Tax Levy—Latest Possible Date for Adopting. (165)

HONORABLE OTIS B. CROWDER, Treasurer
Mecklenburg County

This is in reply to your letter of January 23, 1958, in which you request my opinion as to the latest date a county can adopt the 1958-59 budget and fix the local tax levy for the year 1958. Section 58-839 of the Code of Virginia provides that "the board of supervisors * * * of each county shall, at their regular meeting in the month of January in each year, or as soon thereafter as practicable, not later than a regular or called meeting in May, fix the amount of the county and district levies for the current year. * * *".

I am of the opinion that the county tax levy must be fixed on or before May 31, 1958. Section 15-575 of the Code provides, in part, as follows:

"At least thirty days prior to the time when the annual tax levy or assessment, or any part thereof, is made, the board of supervisors of the counties * * * shall prepare a budget containing a complete itemized and classified plan of all proposed expenditures and all estimated revenues and borrowings * * * for the ensuing appropriation year, * * *.”

Section 15-577 of the Code of Virginia provides, in part, as follows:

"* * * The final adoption of the county budget by the board of supervisors shall not be later than the date on which the annual levy is made.”
In view of the provisions of these two sections of the Code, I am of the opinion that if the board of supervisors intends to wait until May 31 to fix the local tax levy, then the budget must be prepared on or before May 1, 1958, and must be finally adopted on or before May 31, 1958.

BOARD OF SUPERVISORS—Budget—Consideration of Increased Tax Revenues from New Installation of Public Utility—When May Consider. (158)

HONORABLE ALONZO BEAUCHAMP
Commonwealth's Attorney of Russell County

This is to acknowledge receipt of your letter of January 18 in which you inquire as to whether the Board of Supervisors can take into consideration the anticipated additional valuation which will be placed upon the books of the Commissioner of Revenue by the State Corporation Commission as an assessment of the property of a power company, as a basis of determining the budget for the coming year and making the county and district levies.

You state that the present real estate valuation for the county is about $8,000,000 and that you are informed that the Appalachian Electric Power Company will report that their new plant will have a valuation of $6,500,000 as of January 1, 1958.

Under the provisions of Section 58-607, a power company must report to the State Corporation Commission on or before the 15th of April of each year all its real and personal property belonging to it as of the first of January. Under the provisions of Section 58-610, the State Corporation Commission after giving notice, proceeds to make an assessment. That assessment is transmitted to the Commissioner of Revenue who places the same on his books. This is done on August 1 of each year. I understand that the State Corporation Commission in certain cases (usually at the request of the local authorities) before the company has made a report, prepares a statement known as "Statement Showing Assessed Value as of the beginning of the first day of January—Electric Light and Power Companies, Gas and Water Companies, Pipe Line and Transmission Corporations in the Commonwealth of Virginia." Although such a statement is subject to change or modification, this is rarely done and this statement is the basis of the assessment thereafter made. After the company or corporation has made its report, the State Corporation Commission can and does upon request make a tentative assessment and thereafter the final assessment which is certified to the local Commissioner of Revenue. The Board of Supervisors must make their budget and fix the county and district levies not later than May (Section 58-839 of the Code of Virginia of 1950). I see nothing in Section 58-839 which would prohibit the Board of Supervisors from taking into consideration this anticipated additional valuation of a public service corporation as long as the valuation is definite and reasonable. I believe it will be best for the Board of Supervisors not only can, but should take this into consideration.

It is, therefore, the opinion of this office that the Board of Supervisors could at any time after the State Corporation Commission has made the statement above referred to, take into consideration such anticipated additional valuation in preparing their budget and determining the county and district levies for the current year.
BOARD OF SUPERVISORS—Contracts for Oil and Gas—May Accept Bids Only from Firms in County. (17)

HONORABLE FERDINAND F. CHANDLER
Commonwealth’s Attorney for
Westmoreland County

July 25, 1957.

I am in receipt of your letter of July 11, in which you state that the County School Board and the Board of Supervisors of Westmoreland County contemplate requesting bids from oil and gasoline distributors on a contract to supply fuels for heating various public buildings and operating school buses for the ensuing twelve months. From your communication, it appears that some of the members of the boards in question feel that the bidding on such contracts “should be limited to the resident oil and gasoline distributors of Westmoreland County, while others feel that the bidding should not be limited to this county but should be open to oil and gasoline distributors” generally so long as competent service would be provided. You inquire whether or not the contemplated bidding may be limited to distributors having their offices and business headquarters in Westmoreland County.

In response to your inquiry, permit me to advise that I have been unable to discover any provision of law which requires county school boards to let contracts of the type under consideration on the basis of competitive bids. Moreover, with the exception of those counties in which the board of supervisors has employed a county purchasing agent or designated someone to act in that capacity pursuant to the provisions of Section 15-539 et seq. of the Virginia Code, I am unaware of any provision of law which requires the board of supervisors of a county to award such contracts on a competitive basis. In the absence of any requirement that competitive bids be received, I am of the opinion that there is no legal impediment which would prevent either board from limiting its request for bids in the manner under consideration.

BOARD OF SUPERVISORS—County Funds—May Make Temporary Transfer from General Fund Investment to School Construction. (189)

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

March 5, 1958.

This is in reply to your letter of February 27, 1958, in which you enclosed a letter which you received from Honorable S. Byrne Downing, Treasurer of Warren County, in which Mr. Downing states that Warren County has as a general fund investment $30,000 in United States treasury notes. He states that, commencing this year, the county is levying a local automobile license tax. This automobile license tax is expected to raise at least $50,000, which money is designated for the school building program. Mr. Downing wishes to know if the county may make a temporary transfer or loan of the $30,000 general fund investment to the school construction fund and then repay this money to the general fund investment when the money is collected from the sale of local automobile licenses.

Section 46-64(3) of the Code of Virginia provides that the revenue derived from county automobile licenses shall be applied to general county purposes. I know of no provision of law which would prohibit the county board of supervisors from transferring funds from a surplus in the general fund, which is now invested, to the school construction fund, and then when the automobile licenses are sold, placing a portion of the proceeds in the general fund and a portion in the school construction fund.
HONORABLE EMORY L. CARLTON
Commonwealth's Attorney for
Essex County

I am in receipt of your letter of February 20, 1958, in which you inquire whether or not the Board of Supervisors of Essex County, with the approval of the Circuit Court of Essex County, may exchange with the Beale Memorial Baptist Church a parcel of land (containing 2,370 square feet), which constitutes a part of the “court green” and upon which a jail has been constructed, in return for two parcels of land (containing 2,808 square feet) adjacent to the “court green” and owned by the Church.

Pertinent to the resolution of this question are Secs. 15-686 and 15-692 of the Virginia Code which respectively prescribe:

“§15-686. Courthouse, clerk’s office and jail to be provided by supervisors and council.—There shall be provided by the board of supervisors of every county and the council for every city a courthouse, clerk’s office and jail. The cost thereof and of the land on which they may be, and of keeping the same in good order, shall be chargeable to the county or city. The fee simple of the lands shall be in the county or city, and the supervisors of the county or the council of the city may purchase so much land, as, with what it has, will make two acres, whereof what 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 or city to meet and confer together; provided, however, that any portion of said lands owned by a county and located within a city or town, and not actually occupied by the courthouse, clerk’s office or jail, may be sold or exchanged and conveyed to the said city or town to be used for street or other public purposes. Any such sale or exchange by the board of supervisors of a county shall be made in accordance with the provisions of §15-692. The requirement of two acres shall not apply as to any tract consisting of at least one acre which may be conveyed to a county by a city for use as a courthouse and clerk’s office.”

“§15-692. Purchase, sale or exchange of property; how sale made. The board of supervisors shall have power to sell, at public or private sale, or exchange and convey the corporate property of the county; to purchase any such real estate as may be necessary for the erection of all necessary county buildings; to provide a suitable farm as a place of general reception for the poor of the county, and to make such orders as they deem expedient concerning such corporate property as now exists or as may hereafter be acquired; provided, that no sale or exchange of such property shall be made without the approval and ratification of such sale and exchange by an order of the circuit court of the county or by the judge thereof in vacation, entered of record. But this section shall not be construed to deprive the judge of the right to control the use of the courthouse of the county during the term of his court therein.” (Italics supplied).

Significant in determining the relative scope of the above quoted statutes and the effect of the mandatory provisions of the former upon the authorization conferred in the latter is the case of County of Alleghany v. Parrish, 93 Va. 615, 25 S.E. 882, in which a situation analogous to that presented in your communication was considered by the Supreme Court of Appeals of Virginia. In that case
the Board of Supervisors of Alleghany County had authorized the completion of
an addition to certain private law offices which had been erected upon the
courthouse square with the permission of the County Court, and the question
presented for decision was whether or not the Board of Supervisors could legally
grant such authorization. After pointing out that the provisions of Sec. 1, Ch. 50
of the Code of 1849 (now Sec. 15-686) required the courthouse square—insofar
as it was not occupied by the courthouse, clerk's office and jail—to be planted
with trees and kept as a place for the people to meet and confer, and that the
uses authorized by the statute in question "exhausted all the purposes for which
it (the courthouse square) could be lawfully used," the Court proceeded to
consider the extent of the powers conferred upon the Board of Supervisors by
Sec. 7, Ch. 58 of the Acts of 1878-79 (now Sec. 15-692). In this connection the
Court declared, 93 Va. at 620, 621:

"There was nothing in the statute ** 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 con-
cerning 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." (Italics supplied)

In the light of the above quoted language I am of the opinion that the
provision of Sec. 15-692 of the Virginia Code which authorizes the various Boards
of Supervisors to sell, exchange and convey the corporate property of the County
must be construed with reference to the mandatory provisions of Sec. 15-686
governing the management of courthouse property, and that the authority con-
ferred by the former statute should be deemed modified by the latter in those
instances involving a disposition of property constituting a portion of the court-
house square. As thus modified, Sec. 15-692 would not authorize the Board of
Supervisors to sell, exchange and convey the courthouse square or any portion
thereof.

I believe that support for this position can be found in the proviso annexed to
See Acts of Assembly (1954) p. 324. This proviso authorizes the sale, exchange
and conveyance to a city or town of such portions of the courthouse property
as may be located within the city or town, and not actually occupied by the court-
house, clerk's office or jail, to be used for streets or other public purposes.
Manifestly this language would be superfluous if the broad power of sale conferred
by Sec. 15-692 comprehended the sale of courthouse property. Moreover, the
amendment containing the proviso in question directed that sales or exchanges authorized thereby should be "made in accordance with the provisions of Sec. 15-692," indicating that such sales were not comprehended by that statute. Finally, in 1954, the General Assembly also enacted Sec. 15-692.1 of the Virginia Code validating any conveyance of a portion of the courthouse grounds, made prior to January 1, 1954, by a county to a town to be used for public purposes, again indicating, I believe, the legislative view that such sales could not have derived validity from Sec. 15-692 of the Code.

I am, therefore, of the opinion that the sale contemplated in your communication may not properly be made, since it would not be comprehended by the proviso of Sec. 15-686 of the Virginia Code. I am returning to you the plat of the property in question which you forwarded with your letter.

BOARD OF SUPERVISORS—Expense Allowance—for Secretaries for Members—No Authority for—Meal Taken by Member at County Seat, County With County Manager Government. (145)

HONORABLE ROBERT C. FITZGERALD
Commonwealth's Attorney
Fairfax County

This is in reply to your letter of December 20, 1957, in which you request my opinion as to whether or not Fairfax County can pay certain expenses of members of the Board of Supervisors. The members of the Board of Supervisors of Fairfax County are now receiving the maximum individual compensation of $3,000 per year allowable under Article 6 of Title 14 of the Code of Virginia. You ask if the Board of Supervisors can appropriate a sum not to exceed $30.00 per month for secretarial services for each individual member of the Board in connection with their activity as a member of the Board of Supervisors.

I can find no provision of the Code which would authorize such an appropriation by the Board of Supervisors and, as suggested in your letter, I am of the opinion that the decision of our Supreme Court of Appeals in the case of Johnson v. Black, 103 Va. 477, expressly holds that such an appropriation would be illegal and void. I think that Fairfax County could hire an additional secretary with an office in the County Office Building, or who would be available to do secretarial work for the members of the Board of Supervisors in connection with their duties as a member of the Board, however, I do not feel that appropriations could be made to the individual members for secretarial expenses.

You also request my opinion as to whether or not the County could pay the cost of dinner for members of the Board on those days when the meeting extends after the dinner hour. This dinner would be at some restaurant at or near the county seat. Section 14-5.2 of the Code of Virginia provides as follows:

"Any person traveling on business of any county, except as hereinafter provided, wherein no part of the cost is borne by the State may be reimbursed by such county on a basis not in excess of that provided in §14-5, and any person traveling on business of any town, city, or any county operating under the county manager form of organization and government provided for in chapters 11 (§15-266 et seq.) or 12 (§15-345 et seq.) of Title 15 of this Code, wherein no part of the cost is borne by the State may be reimbursed by any such town, city or county on a basis and in a manner that the governing body of such town, city or county may provide."
Members of boards of supervisors do not receive any part of their salary or expenses from the State, and since Fairfax County is operating under the county manager form of government, the expenses of the members of the Board may be reimbursed by the County on a basis and in a manner that the Board of Supervisors of the County may provide. Therefore, the Board of Supervisors could probably authorize the cost of dinner for its members to be paid by the County; however, as a matter of policy, this may be an unwise precedent, since it is not customary for county officers to be reimbursed for meals taken at the county seat.

BOARD OF SUPERVISORS—Expense Allowance—Meals Taken at County Seat—County Without County Manager Government. (148)


HONORABLE ROBERT C. FITZGERALD
Commonwealth's Attorney
Fairfax County

This is in reply to your letter of January 2, 1958, in which you call my attention to the fact that I made an erroneous assumption concerning the form of government of Fairfax County in my opinion to you of December 31, 1957. In that opinion I stated that since Fairfax County is operating under the county manager form of government, and since expenses of the members of the Board of Supervisors are not in any part paid by the State, therefore, the latter portion of § 14-5.2 of the Code of Virginia would be applicable and that probably the Board of Supervisors could authorize the cost of dinner for its members to be paid by the County.

In your letter of January 2, 1958, you call my attention to the fact that the County of Fairfax is operating under the county executive form of government rather than the county manager form of government. The proviso in §14-5.2 applies only to counties operating under the county manager form of government, therefore, this latter provision would not be applicable, and the expenses of the members of the Board of Supervisors of Fairfax County may only be reimbursed by the county on a basis not in excess of that provided under §14-5 of the Code for persons traveling on State business. It is a policy of the Commonwealth of Virginia not to allow the cost of meals of county officers taken at the county seat or of State officers taken at the town or city wherein their office is located. Therefore, I am of the opinion that the Board of Supervisors has no authority to authorize the cost of dinner for its members to be paid by the County, and in so far as there is any difference between this opinion and the opinion rendered by me on December 31, 1957, this opinion supersedes and modifies that opinion.

BOARD OF SUPERVISORS—Garbage Disposal Area—May Provide for People of County with Certain Conditions. (243)

May 7, 1958.

HONORABLE BYRUM P. GOAD
Commonwealth's Attorney for
Carroll County

This is in reply to your letter of May 5, 1958, which reads as follows:

"People from different sections of Carroll County appeared before the Board of Supervisors of Carroll County today who were interested in establishing dumping grounds for the disposal of garbage and have
asked the Board of Supervisors to appropriate money to buy the land and maintain services necessary for the proposed disposal of garbage.

"The Board of Supervisors asked me as Commonwealth's Attorney for Carroll County to take the matter up with you and ascertain in your opinion whether the county has the right to appropriate the money for maintaining a place for the disposal of garbage.

"In my opinion under Virginia Code Section 15-8 the Board has a right to make the appropriation and you will please give me your opinion for the benefit of the Board and myself."

Section 15-8 of the Code, to which you refer, provides in subsection (5) that the board of supervisors shall have the power:

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

This provision is generally construed to mean that the board of supervisors may adopt ordinances for the purpose of regulating the disposal of waste material so as to promote the health of the people living in the county. It is not generally considered to relate to the power of the board to make expenditures of the public funds. For example, the board could adopt an ordinance, with penalties prescribed for the violation thereof, with respect to the disposal of garbage.

Section 15-707 of the Code appears to be applicable to the question presented by you. This section, as amended at the 1956 Special Session of the General Assembly, reads as follows:

"The governing bodies of counties are authorized in their discretion to acquire by lease, gift, purchase or condemnation, land in each or any magisterial district for the purpose of providing a dumping place for waste material including abandoned automobiles. The area in any magisterial district, except in the county of Albemarle, is limited to three acres and no waste material shall be deposited in any such dump of a liquid or fluid character. In the county of Albemarle the area in any magisterial district shall not exceed fifteen acres. No deleterious substance, which might be or become a nuisance to adjoining property, shall be deposited on such dumps nor any waste material from manufacturing or industrial plants. The governing bodies of counties are vested with the power of eminent domain insofar as the exercise of such power is necessary for the acquisition of lands for the purposes of this section and in the exercise of such power are vested with such powers and rights as are or which may hereafter be vested by law in the governing bodies of counties and the procedure in such condemnation suit or procedure shall be under the restrictions provided by the general satutes of this State relative to the condemnation of land so far as the same may be applicable and are not in conflict with the provisions of this section.

"In any county or any magisterial district thereof in which a dump for waste material has been established as described above, it shall be unlawful to dump any such waste material including abandoned automobiles except with the written consent of the owner of the land. Any person dumping any waste material including abandoned automobiles, except on public dumps or with the written consent of the landowner, in any county in which such a dump has been established shall be guilty of a misdemeanor and punished accordingly."

Under this section it is clear, in my opinion, that the board of supervisors has authority to acquire land for the purpose of establishing a dumping ground for
waste material, within the limits prescribed in said section. Any garbage placed thereon would have to be non-liquid and not a deleterious substance that would create a nuisance to adjoining property. The ordinance should, it would seem, after the board has obtained the advice of the health authorities, prescribe how garbage shall be prepared or treated before being deposited in the place provided therefor.

You will note that this section limits the size of such dumping grounds to three acres in any magisterial district, with certain exceptions which apparently would not apply to your county.

BOARD OF SUPERVISORS—Incorporation of Community—May Not Appropriate Money for Cost Incident Thereto. (41)

HONORABLE E. G. SHAFFER
Commonwealth's Attorney
Wythe County

This is in reply to your letter of August 12, 1957, in which you request my opinion as to whether or not the Board of Supervisors has authority to appropriate money for the necessary costs incident to the legal proceedings for a community to be incorporated. I know of no provision of the Code which authorizes the board of supervisors to appropriate money from the general fund for this purpose.

I should like to call your attention to the fact that the type of problems which are presented in this community could be handled by a sanitary district, as provided for by Chapter 21 of the Code of Virginia. Section 15-16.4 of the Code of Virginia authorizes a board of supervisors to advance funds to a sanitary district to assist the district to initiate the project for which it was created, and §21-134.1 of the Code authorizes the sanitary district to repay the county out of any funds which become available to the sanitary district.
"The question I would like to know is if the Board of Supervisors has a legal right to postpone the date of the regular meeting in March, or a right to sit on the regular day and then continue the regular meeting to some later day."

Section 15-241 of the Code is in part as follows:

"Except as otherwise provided by law, the board of supervisors of each county shall assemble at the courthouse of the county or some county building located at the county seat, in regular session once each month upon such day as may be prescribed by an order of the board and it may adjourn from day to day, or time to time, not beyond the time fixed for the regular meeting, until the business before it is completed. ** **"

Section 15-247 provides as follows:

"Unless otherwise specially provided, the board of supervisors of any county may exercise any of the powers conferred upon it at any lawful meeting of the board, regular, special or adjourned."

Section 15-8 (a) provides as follows:

"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;"

Under this latter provision, since the ordinance in question was introduced at the regular meeting of the Board on January 13, 1958, it may not be adopted prior to the regular meeting in March and only then if not less than sixty days have elapsed between the January regular meeting and the March regular meeting.

In view of Section 15-241, which authorizes the Board to adjourn from day to day, or from time to time, I am of the opinion that when the Board meets on March 10 it may adjourn to a date in March that will be not less than sixty days since January 13 and may adopt the ordinance in question on that date. However, the ordinance should be on the agenda for discussion on March 10 and any citizens who might appear at that meeting, either for or against the ordinance, should be given an opportunity to state their position to the Board. They should also be advised that the Board will, by motion duly made and adopted, adjourn the meeting to a later date in March, and the purpose of the adjournment should be stated.

BOARD OF SUPERVISORS—Member—Employee of Wholesaler Who Supplies Retailer Who Sells to County—Not Prohibited. (48)

September 5, 1957.

HONORABLE WILLIAM F. PARKERSON, JR.
Commonwealth's Attorney for Henrico County

This is in reply to your letter of September 4, 1957, which reads, in part, as follows:

"I am writing to request an opinion from your office as to whether or not a contract between the County of Henrico and the hereinafter mentioned company would be proper in view of the provisions of Section 15-333 of the Code of Virginia of 1950, as amended."
"In purchasing oil to heat its buildings, and so on, the County receives sealed bids from fuel suppliers and awards the contract, of course, to the low bidder. A bid has been received from an oil company, which company in turn purchases its oil supply from a wholesale and retail supplier. One of the members of the Board of Supervisors of Henrico County is the secretary of the last mentioned wholesale and retail supplier and receives compensation on a regular salaried basis. This supervisor owns no stock in the company for which he works nor does he own any stock in the company which has submitted a bid to the County. There is no control by either of the above mentioned companies by the one of the other. Further, no stockholder of the one company is a stockholder of the other company.

"For convenience the company for which the member of the Board of Supervisors works will be hereinafter referred to as the distributing company, and the company from whom the County has received a bid will be referred to as the sub-distributing company. The distributing company maintains barge terminals and storage facilities and supplies numerous sub-distributing companies with their fuel supplies inasmuch as the sub-distributing companies do not maintain the terminal and storage facilities as does the distributing company. The distributing company deals with all sub-distributors alike and the particular sub-distributor which has bid on the County fuel contract enjoys no preferred status over any other sub-distributor that might contract with the distributing company."

I am enclosing copy of an opinion rendered by the late Justice Abram P. Staples during his tenure of office as Attorney General. This opinion is found at page 210, Report of the Attorney General, 1938-39, and, as you will note, concerned a closely related question. While this opinion was based upon the prohibitions contained in §15-504 of the Code (then §2707), I think it is applicable in this instance, since that section and §15-333 are similar in so far as they concern contracts between a county and a member of the board of supervisors.

In the case presented to Attorney General Staples, the supervisor was an employee of the company actually furnishing the supplies to the county. The supervisor did not, however, own any interest in the supply company. The ruling there was that the interest of the board member, if indeed he had any interest, was too remote to come within the prohibitions of the statute.

In the present case the board member is an employee of the wholesaler who sells the oil to the retail distributor who sells to the county. He owns no stock in either company. Under the facts as stated in your letter, the retail distributor is free to purchase the oil from any wholesaler. There is no interlocking ownership of the companies in question. The case presented by you is indeed more remote than the one considered by Attorney General Staples.

In the light of the prior opinion of this office and the facts as presented by you, I am of the opinion that the prohibitions contained in §§15-333 and 15-504 of the Code are not applicable in the case presented by you.
I acknowledge receipt of your letter of July 29, 1957, which reads as follows:

"Please advise me whether or not it is permissible for a member of the Board of Supervisors to hold also a position as teacher in the public schools."

In my opinion, such a contract is in violation of the provisions of §15-504 of the Virginia Code. This section specifically forbids any supervisors from becoming interested, directly or indirectly, in any contract made by the county school board. This section further provides that:

"Any such contract shall be void, and the amount embraced by any contract shall never be paid; or if paid, may be recovered back, with interest within two years from the time of payment."

This is in reply to your letter of January 8, 1958, in which you request an opinion as to whether it is proper for a proposed resolution of the board of supervisors to be incorporated in the minutes of the board under the following circumstances:

"A member of the Board of Supervisors makes a motion that a resolution of an outside body be considered by the Board. This does not have a second. The Board member then requests that the motion be set forth in the minutes of the meeting, and that the resolution of the outside body be also incorporated in the minutes in full."

I am enclosing a copy of an opinion rendered by this office on April 11, 1957 to Honorable Charles J. Ross, Clerk of the Board of Supervisors of Madison County, in which this office ruled that a motion by a member of the board of supervisors under the procedure outlined in §15-245 of the Code of Virginia does not require a second to the motion prior to its being called for a vote. Therefore, in answer to your question, I am of the opinion that the motion was before the Board of Supervisors and, therefore, it would be proper to have the minutes of the Board set forth the proposed resolution as introduced, although it was not acted upon by the Board at its meeting.
BOARD OF SUPERVISORS—Publication of Notice of Proposed Ordinance—Statutory Requirements. (137)

HONORABLE WILLIAM F. PARKERSON, JR.
Commonwealth's Attorney for
Henrico County

This is in reply to your letter of December 19, 1957, which reads as follows:

"I am writing to request an opinion from your office interpreting the following provision of Section 15-10 of the Code:

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

"It may be observed that similar language is found in Section 15-8(1)- (b). Also Section 15-859 of the Code prescribes the particular manner of giving notice of a zoning change and the required publication in the following language:

"'Notice shall be given of the time and place of such hearing by publication once a week for two successive weeks prior to its passage in some newspaper published in the County or having a general circulation therein, the second weekly publication of such notice to be not less than five nor more than ten days prior to the holding of the hearing.'

"My questions concerning the required publication of these notices can be summarized as follows:

"(1) Does the requirement of publication once a week for two successive weeks mean that fourteen (14) days must elapse from the date of the first insertion before a hearing is held or some other act done? If so, may the day of the first insertion be counted as one of the fourteen days? Section 1-13 seems to be the authority for permitting the day of the first insertion to be counted as one of the fourteen days.

"(2) Does the above language require that there be an interval of one week between the publications? For example, if a notice is published on a Thursday, must the second publication also be on a Thursday?

"(3) Is it necessary that all of the publications required be published in the same newspaper?"

Your questions will be answered in the order presented by you.

(1) In my opinion, fourteen days must elapse from the day of the first publication. I think this question was settled by the Supreme Court of Appeals of Virginia in the case of Dillard v. Kriss, 86 Va. 410, at page 412. In that case a similar statute was construed. There the statute provided for publication "once a week for four successive weeks." The Court stated as follows: "There must be at least twenty-eight days from the first insertion to the day fixed for the taking of the account." I concur with your conclusion that under Section 1-13(3) of the Code the day of the first insertion may be counted in determining the fourteen day period of time.

(2) I am of the opinion that the answer to this question is in the negative. It is stated in American Jurisprudence, Vol. 42, Sec. 100, at page 88 that:

"A requirement that publication shall be made once a week does not limit the publication to the same day of each week, but it has been held that a publication which is made twice in one week and not at all in another is insufficient."
(3) The language of the statute is not specific on this point. It might well be concluded that publication one week in one newspaper and the next week in another newspaper would result in wider circulation of the contents of the publication, and with correspondingly greater notice to the general public. However, I feel sure that traditionally the practice has been to insert all of the publications in the same newspaper, which, of course, would be mandatory in cases where the resolution or order designated the paper in which the publication should appear. In my opinion, publication in separate newspapers each week would not be fatally defective, but I feel that publication in a single paper is preferable, due to the recognized practice in this State.

BOARD OF SUPERVISORS—Reforestation—May Not Purchase or Make Donation Towards Purchase of Bulldozer To Be Used on Private Property. (178)

February 13, 1958.

HONORABLE HORACE T. MORRISON
Commonwealth’s Attorney
King George County

This is in reply to your letter of February 12, 1958, in which you request my opinion as to whether or not the Board of Supervisors of your county has authority to use county funds to purchase a bulldozer to be used for reforestation purposes upon land owned by private landowners. The landowners would pay a nominal fee for the use of the bulldozer for this purpose. You also request my opinion as to whether or not the Board of Supervisors has authority to donate county funds to a private organization, such funds to be used by that organization to purchase a bulldozer.

I know of no authority for the board of supervisors to appropriate county funds to purchase a bulldozer to be used for clearing property owned by private landowners. I am of the further opinion that the Board of Supervisors may not appropriate county funds to a private organization, such funds to be used by that organization to purchase a bulldozer to be used for clearing land owned by private landowners.

I am enclosing copies of two opinions rendered in December of 1953 and January of 1954 to Mr. George W. Dean, State Forester, concerning the lack of authority of the board of supervisors to make donations or give monetary credit in lieu of taxes to private landowners for planting trees.


June 13, 1958.

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

This is in reply to your letter of June 12, 1958, which reads as follows:

“The 1958 Legislature passed an Act designated Chapter 340 which sets the pay of Supervisors of Norfolk County between $1500.00 and $2400.00. Chapter 340 provided that this Act should come effective on or after January 1, 1960. Chapter 341 of the Acts of Assembly under
paragraph one subsection nine states as follows: 'In any county having a population of 90,000 inhabitants or more and adjacent to three cities of the first class, the annual compensation of each member of the Board shall be not less than $1500.00 nor more than $2400.00'. Chapter 341 was declared an emergency Act and was approved March 29, 1958, by the Governor and I believe became effective immediately.

"My question is this: If the 1950 census of population is used, then would not Norfolk County come within the aforesaid Section nine entitling the Supervisors to be paid not less than $1500.00 nor more than $2400.00 or if the population was considered after the loss after Tanners Creek, it would remove Norfolk County from aforesaid Section. Would you please advise me if, in considering the pay of the Supervisors, the 1950 census is the determining census or whether the population should be considered in Norfolk County after the loss of the Tanners Creek Section."

Chapter 340 of the Acts of 1958, as you point out, does not become effective until January 2, 1960. This Chapter, as of its effective date, repeals Section 14-57 of the Code and provides for a new section numbered 14-56.1. Therefore, until the effective date of Section 14-56.1, Section 14-57, as amended by Chapter 341, Acts of 1958, will remain in effect. Chapter 341 amends Section 14-57, in paragraph (9), so as to provide that from its effective date on March 29, 1958, the annual compensation of each member of the board of supervisors in a county qualifying under subsection (9) shall be not less than fifteen hundred dollars nor more than twenty-four hundred dollars. In my opinion there is no conflict between these two chapters during the time Section 14-57 remains the law.

The word "population" as used in Section 14-57 of the Code must be construed in accordance with the provisions of Sections 1-13, 1-13.22, 1-13.35 and 1-13.36, which read as follows:

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

"§1-13.22: The word 'population' used in any act of the General Assembly with reference to any county, city or town, unless the context clearly indicates some other meaning, shall be construed to mean the population of such county, city or town as shown by the United States census latest preceding the time at which any provision dependent upon population is being applied, or the time as of which it is being construed, to the end that there will be such flexibility as will constitute the word of general and variable, instead of special and invariable, significance.

"§1-13.35: In order to avoid uncertainty and provide for the uniform application of the results of the census of nineteen hundred fifty, this section shall apply in all cases except as specified in this section and §1-13.36.

As used in the Acts of Assembly and Code of Virginia, the term population shall mean population as of the last preceding United States Census; provided that as to the Census required for nineteen hundred fifty, the populations which shall be shown therein shall not apply to any such act or section of the Code until June thirty, nineteen hundred fifty-two or until the Keeper of the Rolls certifies such population classifications to the governing bodies of the several counties, cities and towns, whichever first occurs.

"§1-13.36: The provisions of §1-13.35 shall not apply to, or limit, the distribution of any State funds, grants-in-aid, or other allocation from the State treasury, to any county, city, town or other political subdivision of the State."
Under these provisions, in my opinion, the population of Norfolk County as shown by the census of 1950 must be considered in determining whether or not the county is within the category of paragraph (9) of Section 14-57. In this connection I am enclosing an opinion issued by this office on February 10, 1955 (Attorney General Report 1954-55, page 64) which relates to the effect of the annexation referred to in your letter.


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

This is in reply to your letter of April 4, 1958, in which you state that the Division Superintendent of Schools has requested the Board of Supervisors to provide for the following levies in the current budget:

$ 3.00 school operating fund
1.40 indebtedness fund
.50 Literary Fund loan
.20 special levy for building and repair fund

You raise a question with respect to the authority of the Board to lay the 20 cents special levy. Your question is stated as follows:

"In your opinion, is this 20 cents special levy legal pursuant to Sections 22-122, 22-126 and 22-128 of the Virginia Code as amended? Would the above mentioned levy be consistent with Section 115a of the Constitution of Virginia?"

Under Section 22-128 the Board is authorized to lay a special levy not in excess of $2.50 for capital expenditures. It is not authorized, however, to lay a special levy for raising funds to be expended for repairs and maintenance. A capital expenditure would be one for the purpose of constructing or acquiring a new building or constructing an addition to an existing building. The amount included for capital expenditures in the estimated fund to be raised by the 20 cents levy may, therefore, be raised by a special levy.

The items of $1.40 and .50 to raise money for paying off an indebtedness would not be for capital expenditures, and, therefore, this total levy of $1.90 would not be taken into account when considering the limitation of $2.50 that may be levied for capital expenditures. There is no statutory limit with respect to a levy for payment of indebtedness.

The funds budgeted for repair and maintenance will either have to come out of the taxes collected from the levy of $3.00 authorized under Section 22-126 or from an additional appropriation out of any funds available pursuant to the authority contained in the terminal sentence of Section 22-127. This provision is not limited to instances where an appropriation for school purposes is made from the general county levy, but is an additional source for school operating funds when a maximum school levy has been laid under Section 22-126. Originally, Sections 22-126, 22-127 and 22-128 were enacted in the same Act and codified in the same Code section.

"Available funds" would, of course, be any unappropriated or unobligated funds
procured from various sources, such as surplus from the levy for general purposes, licenses, A.B.C. receipts and the like.

In my opinion, the provisions of Section 115(a) of the Constitution of Virginia are not applicable to the points discussed in this opinion.

BOARD OF SUPERVISORS—Tax Levies—Must Be Fixed Before End of May—Does Not Have To Be the Regular Meeting. (196)

March 19, 1958.

HONORABLE JENNINGS L. LOONEY
Clerk of the Board of Supervisors of Buchanan County

I am in receipt of your letter of March 13, 1958, in which you call my attention to that portion of Section 58-839 of the Code of Virginia (1950) as amended, which provides that the governing body of each county "at their regular meeting in the month of January in each year, or as soon thereafter as practicable not later than a regular or called meeting in May," shall fix the amount of the county and district levies for the current year and order the levy on designated property within the county. You advise that the regular meeting of the Board of Supervisors of Buchanan County for the month of May will be held on the first Monday of that month (May 5), and you inquire whether or not the board of supervisors may fix and order the levies prescribed in Section 58-839 at an adjourned regular meeting or a called meeting in the month of May after the date of May 5.

I am of the opinion that your inquiry should be answered in the affirmative. Section 58-839 specifies that the levies in question shall be fixed and ordered not later than a regular or called meeting in May. In this connection, Section 15-241 of the Virginia Code authorizes the various boards of supervisors of the Commonwealth to adjourn a regular meeting "from day to day, or time to time," not beyond the time fixed for the regular meeting until the business before it is completed; Section 15-242 of the Code empowers the various boards of supervisors to hold such special meetings as they may deem necessary and to adjourn such meetings from time to time; and Section 15-247 declares that—unless otherwise specially provided—the various boards of supervisors may exercise any of the powers conferred upon them at any lawful meeting of the board, whether regular, special or adjourned.

I do not believe that Section 58-839 contemplates that a called meeting of a board of supervisors to fix and order local levies must be held before the date upon which the regular meeting is scheduled, only that such called meeting must take place during the month of May. I am, therefore, of the opinion that the Board of Supervisors of Buchanan County may fix and order the levies under consideration at any lawful meeting of the board—and adjourned regular meeting or a called meeting—so long as the meeting at which the levies are fixed and ordered is held before the expiration of the month of May.

BOARD OF SUPERVISORS—Temporary Loans—One Resolution May Authorize Treasurer to Borrow Amounts as Needed With Certain Conditions. (127)

December 17, 1957.

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of December 12, 1957, in which you request my opinion as to whether boards of supervisors of counties under the provisions of
§15-250 of the Code of Virginia may pass a resolution authorizing the treasurer to borrow such sums as may be needed by the county from time to time not to exceed a specified amount. The purpose of such authorization being to obtain funds for temporary loans only in the amount and to the degree that funds are necessary from time to time and to avoid borrowing the entire amount authorized and pay interest on funds which are not required immediately.

I am of the opinion that, under the provisions of §15-250 of the Code of Virginia, the board of supervisors may enact a resolution authorizing the treasurer to borrow funds as temporary loans not to exceed the limitations provided for in §15-250 of the Code. The resolution should specifically provide for the maximum amount of the loan; the interest rate to be paid, and the time of repayment, but not in conflict with the provisions of §15-251 of the Code. The resolution could contain a proviso that the treasurer shall not borrow the entire sum at one time, but that he should actually borrow and issue notes of the county from time to time when the actual need for the funds occurs, provided the aggregate of the notes does not at any time exceed the limit prescribed by §15-250 of the Code.

BONDS—Investment of Proceeds from Issue Pending Need for Project—May Be Invested Only in Those Securities Which Are Legal Investments for Public Sinking Funds. (92)

HONORABLE WILLIAM F. STONE
Member House of Delegates

This is in reply to your letter of November 9, 1957, which provides, in part, as follows:

"During the year 1957 a school bond issue in the sum of $2,200,000.00 was approved by the voters of the City of Martinsville for a school construction program. The plans for all of this construction program have not as yet been completed and it is estimated that it will be as long as 18 months or two years before all of the money involved in the bond issue will be expended for construction purposes. The bonds have already been sold and proceeds will probably be delivered to the City Council before the month of December, 1957. The School Board and the City Council would like to invest a greater part of this money until it is needed and thereby get the benefit of interest. The question now arises as to how should this money be invested."

You request my opinion as to whether the City Council of Martinsville may legally invest the funds realized from the sale of these school bonds by accepting interest bearing certificates of deposit of local banks which are secured by bonds placed in escrow. You also request my opinion as to whether or not these funds should be invested by and under the direction of the City Council or the School Board.

The resolution adopted by the City Council authorizing the issuance of these bonds provided that the bonds were to be issued under the provisions of and in conformity with Chapter 193 of the Acts of Assembly of 1950, as amended, and Articles 2 and 4 of Chapter 19 of Title 15 of the Code of Virginia. Section 15-615.1 of the Code, which contains the only provision found in any of the above cited statutes authorizing the investment of funds received from the sale of bonds pending the application of these funds to the project, reads as follows:

"Pending the application of the proceeds of any bonds of any city or town, authorized under the provisions of this article, to the purpose
or purposes for which such bonds have been authorized, all or any part of such proceeds may be invested, upon resolution of the governing body of the city or town authorizing such bonds, in securities that are legal investments under the laws of the Commonwealth for public sinking funds, which shall mature, or which shall be subject to the redemption by the holder thereof at the option of such holder, not later than eighteen months after the date of such investment. Any security so purchased as investment of the proceeds of such bonds shall be deemed at all times to be a 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, director of finance or other chief finance officer of the city or town as custodian thereof and shall be sold by the city or town treasurer, director of finance or other chief finance officer, upon resolution of the governing board of the city or town 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 city or town shall have been authorized."

As you will note from reading this section of the Code, the governing body of the City, that is the City Council, is authorized by resolution to invest these bond proceeds in securities "that are legal investments under the laws of the Commonwealth for public sinking funds."

Section 2-297 of the Code of Virginia lists securities which are proper and legal investments for public sinking funds. Therefore, I am of the opinion that these funds may be invested only in a type of security listed in §2-297 of the Code of Virginia. Certificates of deposit of local banks are not included in this list of securities.

---

BONDS—Paid County and Interest Coupons—Cremation of Permissible—Liability of Treasurer Upon Presentment for Payment of. (195)

March 17, 1958.

HONORABLE J. GORDON BENNETT

Auditor of Public Accounts

I am in receipt of your letter of March 5, in which you forwarded to this office a letter received by you from Mr. Colin C. McPherson, Treasurer of Arlington County, relating to the cremation of paid bonds and interest coupons in Arlington County. From Mr. McPherson's communication and the copy of the proposed resolution of the County Board of Arlington County, it is apparently contemplated that the governing body of the county will direct that all bonds and interest coupons thereon be cancelled upon payment and delivered to a designated fiscal agent, which agent will be authorized and directed to cremate such paid bonds and interest coupons and execute and deliver to the Treasurer of Arlington County a cremation certificate describing the bonds and coupons cremated pursuant to the resolution.

You request to be advised "first, if the county can legally authorize such an arrangement when the principle of cremation of paid bonds and coupons was not considered in the original resolution under which the bonds were issued and sold; second, would the treasurer be relieved of any personal liability if he accepted the cremation certificate authorized by the County Board in the event subsequently bonds or coupons certified as having been cremated were submitted to him for payment; and third, if the resolution authorizing the cremation of paid bonds and coupons is adopted and the principle put into effect, would the treasurer have
the authority to pay from county funds under his control such bonds or coupons which might be certified for payment under the circumstances outlined in item two above. These questions will be considered in the order stated.

First: I am of the opinion that the propriety of the county's authorizing the contemplated arrangement would not be affected by the circumstances that the cremation of paid bonds and interest coupons was not considered in the original resolution under which the bonds in question were issued and sold. While I have been unable to discover any provision of Virginia law which expressly empowers the governing bodies of the various political subdivisions of the Commonwealth to direct cremation of paid bonds and interest coupons, I do not believe that adoption of this method of disposition would infringe any rights secured by the terms of the bonds to the purchasers thereof. This would appear to be especially true with respect to the bonds involved in the situation you present, as the resolution directing cremation was prepared for the governing body of the county by the county's bond attorney.

Second: I am of the opinion that the treasurer of the county—having accepted a cremation certificate authorized by the resolution—would not be relieved of any personal liability if bonds or coupons certified as having been cremated were subsequently submitted to him for payment. In this connection, I do not believe that the liability of the treasurer in such a situation would be affected by the fact that a cremation certificate—rather than cancelled bonds or coupons—was furnished to the treasurer by the fiscal agent designated by the governing body of the county to effectuate cremation.

Third: Notwithstanding adoption of the resolution in question by the governing body of the county, I believe that the treasurer of the county would be authorized to pay, from appropriate county funds, lawfully issued and matured bonds and interest coupons properly presented to him for payment under the circumstances outlined in your second question. In such a situation, however, it would be incumbent upon the treasurer to determine the validity of the bonds and coupons subsequently presented, and it would certainly seem that a cancelled bond or coupon would possess greater evidentiary value than a cremation certificate in enabling the treasurer to resolve this question. In any event, the possession by the treasurer of a cremation certificate indicating that certain bonds and coupons have been cremated would not justify a refusal by the treasurer to pay lawfully issued and matured bonds, apparently covered by the certificate, when properly presented for payment.


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

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

"The Virginia Advisory Legislative Council is considering a recommendation to revise the bond laws of the State relating to the issuance and sale of bonds of political subdivisions and agencies of the State. The Council is considering, where a provision requiring the vote of the people is prescribed, recommending that this be a vote of the qualified voters who are freeholders of the county or city.

"The Council would like to know whether or not you feel a constitutional amendment would be required in order to effect such a provision.

"We would appreciate hearing from you in this connection at your
earliest convenience as the Council is anxious to make its report on this matter to the Governor and the General Assembly as soon as possible."

I am enclosing a copy of an opinion issued by me on November 7, 1957, to Honorable William J. Hassan, Commonwealth's Attorney for Arlington County, in which I came to the conclusion that the question of the issuance of bonds in counties must be determined by submission of the question to the qualified voters of the county. "Qualified voters", as used in Sections 115(a) and 127 of the State Constitution, mean those persons who are qualified to vote under Article II of our Constitution.

In light of my opinion to Mr. Hassan, I feel that an amendment to the State Constitution must be made before the legislation under consideration will be valid. I can see no escape from this conclusion.

BONDS—Referendum—Freeholders Bond Law—Unconstitutional. (85)

November 7, 1957.

HONORABLE WILLIAM J. HASSENN
Commonwealth's Attorney for Arlington County

This will reply to your letter of October 14, in which you request my opinion upon the constitutionality of Chapter 302 of the Acts of Assembly (1956). The enactment in question, commonly known as the Freeholders' Bond Law, amended the Code of Virginia by adding to it Section 15-354.2. In pertinent part, this statute provides:

"Sec. 15-354.2. (a) In the year nineteen hundred fifty-six there may be in any county which has adopted the county manager form of organization and government provided for in this article a referendum on the following question!
"Shall county bond issues be subject to approval of a majority of the voters who are freeholders (as well as a majority of the voters) of the county voting in the election?
"The provisions of Sec. 15-360.1 shall apply, and the election shall be conducted, the ballots marked, the returns canvassed and the results certified as provided in Sec. 24-141 of the Code of Virginia.

"(b) If a majority of the qualified electors voting in the referendum called and held as hereinabove provided shall vote in favor of requiring approval of county bond issues by a majority of the voters who are freeholders, (as well as a majority of the voters) of the county voting in a bond issue election, thereafter no bonds shall be issued by the county approved by a majority of the voters who are freeholders voting and a majority of the total vote cast in an election called or held for the purpose." (Italics supplied).

In response to your inquiry of July 22, 1957, concerning the "mechanics of voting" under the Freeholders' Bond Law, the Honorable J. Lindsay Almond, Jr., then Attorney General, expressed the following opinion on August 19, 1957, based upon his interpretation of the above quoted statute:

"With reference to your letter of July 22, it is my opinion that the freeholder votes as shown on the list prepared under paragraph (c) of the Act should be recorded and counted separately from those qualified
voters who are not freeholders. Those who are freeholders would vote one time only. When the polls are closed the tabulation must show:

"(1) Number of freehold votes cast 'For' and 'Against' the bond issue.
"(2) Number of non-freehold votes cast 'For' and 'Against' the bond issue.
"(3) Number of combined freehold and non-freehold votes cast 'For' and 'Against' the bond issue.

"Under the Act if both (1) and (3) show a majority of votes have been cast in each class 'For', then the bond issue will have carried."

It is thus manifest that—as construed by Judge Almond—the statute under consideration requires prospective bond issues (proposed in those counties voting favorably on the referendum) to be approved by both (a) a majority of the voters who are freeholders voting in the bond issue election and (b) a majority of all the qualified voters voting in such election. Judge Almond's interpretation was predicated primarily upon the nature of the question to be presented to the voters in the referendum and the language of various provisions of the statute italicized above, and I fully concur with the construction which he has placed upon the Act in question.

This brings us to a consideration of the question of whether or not the statute—as thus construed—is repugnant to any provision of the Constitution of Virginia. In response to a similar question posed by the Virginia Advisory Legislative Council on July 10, 1957, Judge Almond expressed the view that there was grave doubt as to the constitutional validity of statutes of the type under discussion. Particularly pertinent with respect to the constitutionality of Chapter 302 of the Acts of Assembly (1956 is Section 115a of the Virginia Constitution, which prescribes:

"Sec. 115a. Power of counties and districts to borrow money and to issue evidences of indebtedness restricted.—No debt shall be contracted by any county, or by or on behalf of any district of any county, or by or on behalf of any school board of any county, or by or on behalf of any school district in any county, except in pursuance of authority conferred by the General Assembly by general law; and the General Assembly shall not authorize any county, or any district of any county, or any school board of any county, or any school district in 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 a prerequisite to contracting such debt. No scrip, certificate or other evidence of county or district indebtedness shall be issued except for such debts as are expressly authorized in this Constitution or by the laws made in pursuance thereof." (Italics supplied).

In effect, the above quoted provision of the Virginia Constitution forbids any county from contracting a debt (with certain exceptions not here material) except in pursuance of authority conferred by the General Assembly by general law, which
law must provide that the question of contracting such debt shall be submitted to the qualified voters of the county "for approval or rejection by a majority vote of the qualified voters voting" in the election. In my opinion, that portion of Section 115a of the Virginia Constitution which provides for the approval or rejection of a bond issue by a majority vote of the qualified voters voting in an election is exclusive and vests in the majority of the qualified voters voting in the election, and in them only, the power to approve or reject a proposed bond issue. Phrased in another manner, I believe that the provision in question constitutes "a majority vote of the qualified voters voting in an election" as the exclusive source from which the approval of a bond issue or the rejection of a bond issue shall emanate.

The constitutional validity of a statute must be determined by its natural and reasonable effect and the practical consequences to which it leads. Almond v. Day, 197 Va. 419, 89 S.E. (2d) 851. Any statute which gives rise to a result forbidden by the Virginia Constitution would conflict with the organic law and be invalid. When these principles are applied in the present setting, it follows that any statute purporting to lodge the power to approve or reject a bond issue in any quarter, other than a majority vote of the qualified voters voting in a bond issue election, would contravene the prescription of Section 115a of the Virginia Constitution.

In its operative effect, the enactment under consideration would permit rejection of a bond issue by a majority vote of the voters who are freeholders voting in the bond issue election, even though issuance of the bonds has been approved by a majority vote of the qualified voters voting in the election. I am, therefore, of the opinion that, to the extent that Chapter 302 of the Acts of Assembly (1956) permits a bond issue to be rejected by a majority vote of the qualified freeholders voting in an election, rather than a majority of the qualified voters without regard to the freeholder qualification, it is repugnant to Section 115a and, therefore, unconstitutional.

---

CHESAPEAKE BAY FERRY DISTRICT—Contracts—May Be Let Without Submitting for Public Bids. (102)

November 8, 1957.

General Counsel
Chesapeake Bay Ferry District

This is in reply to your letter of October 31, 1957, in which you desire my opinion as to whether or not the Chesapeake Bay Ferry District, created by Chapter 693 of the Acts of Assembly of 1954 with further powers granted thereto by virtue of Chapter 714 of the Acts of Assembly of 1956, may enter into a negotiated contract with one of more contractors of its choice for the construction of a bridge-tunnel connection between some location in Northampton County and some location in Princess Anne County, Virginia, without submitting the proposed contract for public bids.

Section 11-17 of the Code of Virginia of 1950, as amended, provides, with certain exceptions not pertinent here, that whenever the State of Virginia or any department, institution or agency thereof shall be a party to a contract for construction work in excess of twenty-five hundred dollars except in the case of an emergency such contract shall be let only after advertising for bids for such work.

The act creating the Chesapeake Bay Ferry District provides that the District
shall be a political subdivision of the State. It is further provided in Section 4(m). Acts of Assembly of 1956, the pertinent portion of which is as follows:

"* * * the Commission is hereby authorized and empowered:

* * * *

"(m) To make and enter into all contracts or agreements, as the Commission may determine, which are necessary or incidental to the performance of its duties and to the execution of the power granted under this act;"

Since the District is a political subdivision of the State, it can be seen that the terms of Section 11-17, Code of Virginia of 1950, as amended, are not applicable. Therefore, it is my opinion that the Chesapeake Bay Ferry District may negotiate a contract for the construction of the proposed bridge-tunnel pursuant to its authority "to make and enter into all contracts or agreements, as the Commission may determine, which are necessary or incidental to the performance of its duties" without submitting the proposed contract for public bids.

CIVIL DEFENSE—Architect Fees—Building Not Erected Because of Action by Arlington County—State Liable for its Pro Rata Share. (80)

October 30, 1957.

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

This is in response to your letter of October 21, 1957, inquiring if the State may legally pay an invoice for work done by the architect based upon a $150,000.00 estimate. You also inquire if upon payment the State would be entitled to the original tracings. Your letter further, in part, states:

"The invoice is predicated on a 6% architect's fee on an estimated cost of $150,000. There is no question about the 6% fee, as this is the usual percentage, but there is some question of this office paying the invoice, since the building has not been erected—the Arlington County Board of Supervisors having failed to make an appropriation for the County's share, namely 25%.

"Approval has been given by this office and the Federal Civil Defense Administration for $98,000 (County 25%, State 25%, F.C.D.A. 50%) as follows: June 30, 1954, $22,000; April 19, 1955, $31,200; December 5, 1955, $44,800, approval withheld pending submission of final detailed plans and specifications. On June 5 1956, Mr. Dickey was made an advance of $1,440 on an estimated cost of $96,000. This was paid from the original allocation of $22,000. The balance of this amount reverted to the General Fund July 1, 1956. There is at present an approved allocation of $31,200 (State share $7,800) and a tentative allocation of $44,800 (State share $11,200).

* * * *

"On September 13, 1957, we were requested by Arlington County to cancel all requests and approved allocations for this project, to which we have acceded."

The file indicates that the contract for architectural services was made
between the county and the architect, in which no maximum limit as to the estimated cost of the project was fixed. The architectural contract was submitted to the State Office of Civil Defense but the Office advised the county that the contract with the architect was a matter for the county to handle. It appears that from time to time the State has approved certain aspects as to the proposed project but has also stated at various intervals that it would not be able to provide more funds unless the General Assembly made more funds available. Moreover, it appears that the Federal Civil Defense Administration requested the original plans to be enlarged to an extent that brought the total estimate up to $150,000, and that pursuant to such request the county directed the architect to prepare the plans. While it appears that formal information of this latter aspect was not received by the State Office of Civil Defense until recently, it appears that the Office had information of the fact that the Federal Civil Defense Administration was requesting these additional plans.

In accordance with the foregoing, it appears that the State would be obligated for its portion of the services performed by the architect. Accordingly, it is recommended that if the county acknowledges its obligation for its prorata share of the architect's charge for services, then it would be in order for the State to pay its prorata amount on the invoice based on a $150,000 estimate.

The State's right to obtain possession of the original plans or tracings is limited by the provisions in the contract providing that all plans remain the property of the architect. Accordingly, unless the architect voluntarily gives up these tracings upon request, it does not appear that the State would be entitled to them.

CIVIL DEFENSE—Warning Sirens in Northern Virginia Region—Commonwealth's Interest May Be Transferred to FCDA. (170) February 3, 1958.

Mr. J. H. Wyse, Coordinator
Office of Civil Defense

This is in response to your letter of February 3, 1958, setting forth the following inquiry:

"During the past five years there have been a number of sirens used for warning the population in the Northern Virginia Region, Alexandria, Falls Church and the Counties of Arlington and Fairfax, purchased by Federal Civil Defense Administration matching funds, that is one-half by FCDA, one-fourth by the localities and one-fourth by the State. The Federal Civil Defense Administration, in order to perfect the warning system in the above political subdivisions, has offered to take over the maintenance and operation of these sirens, provided the title is transferred to the FCDA. At the present time the title is vested in the Commonwealth. I would appreciate your advising whether or not it will be proper to transfer the title to this equipment to the Federal Civil Defense Administration."

You further advise that the Virginia portion of the original outlay for sirens is approximately $5,000.00, and that in the next five or so years the maintenance cost alone will probably amount to $5,000.00. Moreover, you state that FCDA contemplates additional installations of sirens in the Maryland-District of Columbia-Virginia area costing more than $1,000,000.00. It is further stated that the FCDA desires to operate a simultaneous warning device so that all the sirens in the aforementioned area can be controlled from a central switch. It is further stated that FCDA merely wants title to the several dozen sirens located in the
Virginia area for which it has already paid one-half of the original cost, as indicated above.

In view of the foregoing and for reason that the maintenance of the aforementioned sirens will require substantial future outlay from the Commonwealth, and for reason that the FCDA contemplates the installation of many additional sirens in Virginia at considerable expense to it, this office sees no legal objection which would prohibit the transfer of such title as the Commonwealth has in the aforementioned sirens to the FCDA. It is suggested that you ascertain the views of the local governing unit before executing any transfer agreement.

---

**CLERKS—Bonds of Deputies—Board of Supervisors May Pay Premiums.**

Honorable S. L. Farrar, Jr., Clerk
Circuit Court of Amelia County

October 18, 1957.

This is in reply to your letter of October 16, 1957, in which you request my opinion as to whether a board of supervisors of a county has authority to pay the premium on a bond of a deputy clerk of a circuit court.

On March 3, 1955, this office rendered an opinion to Honorable E. H. Richmond, Commonwealth's Attorney for Scott County, in which we held that bonds of deputy treasurers should be paid by the State and county. I am of the view that that opinion is applicable to the question presented by you and that, therefore, the board of supervisors of a county has authority to pay the premium on the bond of a deputy clerk of a circuit court. I am enclosing a copy of the aforementioned opinion.

---

**CLERKS—Fiduciaries Accounts of Sales and Inventories—When May Be Destroyed.**

Honorable John H. Powell, Clerk
Circuit Court of Nansemond County

December 12, 1957.

This is in response to your letter of December 3, 1957, in which you inquire if Chapter 408, 1956 Acts of Assembly, which is codified as Sections 26-16.1 and 26-35.1, Code of Virginia, permitting the destruction of accounts of sales, is applicable to accounts of various fiduciaries, such as administrators, executors, committees and trustees:

Section 26-16.1 provides:

"All inventories filed with the clerk and recorded by him, as required by Secs. 26-14 and 26-16 of the Code of Virginia, may, after the same shall have been actually recorded, compared and indexed as required by law, be destroyed, or returned to the fiduciary.

"All original accounts of sales filed with the clerk and recorded by him as required by Secs. 26-15 and 26-16 of the Code of Virginia shall, after the same shall have been confirmed, recorded and compared and indexed, as required by law, be returned by the clerk to the fiduciary who made such account upon the request of such fiduciary. All such original accounts of sale which shall have remained in the clerk's office three (3) years after the confirmation thereof, without being called for by the fiduciary, may be destroyed by the clerk. Provided, nothing
in this section shall apply to cases in which the original documents are recorded by binding.”

Section 26-35.1 provides:

“After the reports filed with the clerk in accordance with Sec. 26-35 of the Code of Virginia shall have been confirmed, and shall have been actually copied in the records of fiduciary reports, compared and indexed as required by law, the clerk shall, on the request of the fiduciary who filed the same, return the original thereof to such fiduciary.

“All such original reports which remain in the clerk’s office three (3) years after the same shall have been confirmed may be destroyed by the clerk. Provided, nothing in this section shall apply to cases in which the original documents are recorded by binding.”

Section 26-16.1 provides for the destruction of “inventories” after the specified acts have been completed. Moreover, Section 26-35.1 provides, after the performance of the acts specified therein, for the destruction of the Commissioner’s reports of accounts of fiduciaries filed with the clerk. In addition, the foregoing matters are referred to in “Virginia Probate Practice”, by Brockenbrough Lamb, at page 213, in the following language:

“The main object of the 1956 enactments, adding new sections 26-16.1 and 26-35.1, was to allow the original inventories and accounts to be destroyed after recordation or returned to the fiduciary, but both are in express terms made inapplicable to cases in which the recordation of accounts ‘and inventories’ is accomplished by binding the originals.”

CLERKS — Recordation — Conditional Sales Contracts — When “Equipment Lease” To Be Recorded As. (81)

HONORABLE A. T. AUGUST, Clerk
Chancery Court of City of Richmond
November 1, 1957.

This is in reply to your letter of October 16, 1957, in which you request my opinion as to whether or not certain documents which have been presented to you for recordation as conditional sales contracts are, in fact, conditional sales contracts and entitled to be recorded as such, or whether they are leases and, if recorded, should be recorded as leases.

All of these documents carry the title of “equipment lease”. On August 21, 1956, this office rendered an opinion to the Honorable Charles R. Purdy, Clerk of Hustings Court, Part II, on a similar question. These documents on their faces are drafted as equipment leases running for a specified term of months, with a total aggregate rental broken down into monthly payments. All of these “leases” contain a provision that the Lessee shall have the option to purchase said equipment upon giving written notice not less than thirty days prior to the expiration of the original term of the lease, and in all of the documents submitted by you the purchase price is specified as the nominal price of one dollar. In addition to this provision, each one of the documents contains the following provision:

“This lease is irrevocable for the full term hereof and for the aggregate rental herein reserved, and the rent shall not abate by reason of termination of Lessee’s right of possession and/or the taking of possession by Lessor or for any other reason, and delinquent instalments of rental shall bear interest at the highest lawful rate. In case of any default by Lessee hereunder, Lessor may sell the equipment or may release the equipment
for a term and a rental which may be equal to, greater than, or less than the rental and term herein provided. Any proceeds of sale, received within 60 days after repossession, or any rental payments received under a new lease made within such 60 days for the period prior to the expiration of this lease, less Lessor’s expenses of taking possession, storage, reconditioning and sale or re-leasing, shall be applied on the Lessee’s obligations hereunder, and Lessee shall remain liable for the balance of the unpaid aggregate rental set forth above. Lessee’s liability shall not be reduced by reason of any failure of Lessor to sell or re-let within such 60 days.”

The “equipment lease” in question of August 21, 1956, upon which this office rendered an opinion to the Honorable Charles R. Purdy, contained the same provisions as the leases now under consideration. However, the purchase price in that lease was $500, or an amount equal to ten per cent of the total amount of rentals due under the contract. Therefore, in that particular document there was involved for the purchase price more than the nominal sum of one dollar, and led us to conclude that there could be no sale until the substantial additional sum of $500 was paid.

I am of the opinion that the “equipment leases” submitted by you for consideration, namely, one of October 11, 1957, between the Capital Equipment Company, Inc. and Laburnam Construction Corporation; one of August 30, 1957, between Capital Equipment Company, Inc. and Shoosmith Brothers, and one of April 1, 1957, between General Electric Company and L. R. T. Garrett, are, in fact, not leases, but are conditional sales contracts and are entitled to be recorded as conditional sales contracts. This conclusion is based on the two factual situations that are present in all of these “equipment leases” under consideration, namely, that there is a binding obligation upon the Lessee to pay the total amount of the aggregate rental and, if there is any default, the equipment can be repossessed by the Lessor and re-leased or sold and the Lessee held liable for any deficiency, as provided for in the above quoted provision found in all of these “equipment leases”; and, secondly, the purchase price specified in each document is the nominal sum of one dollar.

I feel that my opinion in this matter is supported by the decision of the Supreme Court of Appeals of Virginia in the case of Arbuckle Brothers v. Gates and Brown, 95 Va. 802, wherein the Court held that, where there is a written instrument between two persons concerning the sale or delivery of personal property, then the legal character and effect of the agreement between the parties is to be determined upon consideration of all of its provisions taken together and not from the mere name given to it by the parties thereto. This decision has been cited with approval by the Circuit Court of Appeals for the Fourth Judicial Circuit in the case of Corbett v. Riddle, 209 Fed. 811.

The law on this matter is well summarized in 175 A.L.R., page 1384, as follows:

“The mere fact, however, that an agreement is characterized as a lease or rental agreement of personality is not conclusive; if the transaction is in reality a conditional sale rather than a lease or rental it will be so regarded by the Court.”
CLERKS—Recordation—Plats Attached to Deeds—Procedure to Follow—May Not Be Detached from Deed Without Grantee's Consent. (229)

April 22, 1958.

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

This is in reply to your letter of April 16, 1958, which reads in part as follows:

"Your attention is invited to Section 14-123 (2) and (3) of the 1950 Code of Virginia. When a plat is presented for recordation that has not more than six courses or lines, is it mandatory that I draw this plat in the deed or plat book or may I remove it from the deed and affix the plat to the deed book sheet by permanent mending tape for the fee of $1.00?

"When a plat is presented for recordation that has more than six courses or lines, is it mandatory that I draw this plat in the deed or plat book making the charge of $1.00 plus five cents for each other district line or course, or may I remove the plat from the deed and affix it to the deed book sheet by permanent mending tape and make a charge of $1.00?"

The only statutory provision with respect to the recordation of plats in such instances is Section 17-68 of the Code. Under this section, if a plat book is maintained in the clerk's office and a deed, with plat attached, is admitted to record, the clerk is required to make an appropriate notation in the deed book where the deed is recorded to the effect that the plat attached to said deed is recorded in the plat book, identifying the plat book by number, or other proper identification and showing the page where the plat is spread. This section also requires the clerk to endorse on the plat and the plat book the date of the recordation and a reference to the book and page where the deed is recorded.

I do not construe this section as authorizing the clerk, without the grantee's consent, to detach the plat from the deed. I am informed that it is the practice in some localities for persons who desire a deed to be admitted to record with plat attached to furnish the clerk with an extra copy of the plat. The grantee in the deed, when he withdraws it from your office after recordation, is, in my opinion, entitled to have the plat that is attached to the deed returned along with a proper endorsement that the plat has been recorded. If the grantee consents, it would seem that the plat attached to a deed may be detached by the clerk and securely fastened in the deed book or plat book. I understand that in some counties this procedure is carried out.

Of course, in counties where recordations are made by photostat, no problem is involved. The statute applicable to recordation of plats was enacted before the photostat system was used by any of the localities.

CLERKS—Recordation Tax—Local—Compensation by Locality for Collecting Included When Determining Maximum Compensation. (234)

April 29, 1958.

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

This is in reply to your letter of April 24, 1958, in which you request my opinion concerning compensation for clerks under the provisions found in Chapter 590 of the Acts of Assembly of 1958.

This chapter permits a city or county to impose a local recordation tax in an
amount to equal one-third of the amount of the State recordation tax. This chapter is to be codified as §58-65.1 of the Code of Virginia. The second paragraph of this section reads as follows:

“Every clerk of court collecting any such city or county tax and paying the same into the treasury of his city or county shall be entitled to such compensation for such service as may be prescribed by the governing body of his city or county. Such compensation shall be payable out of the city or county treasury.”

You request my opinion as to whether or not the clerk would be entitled to any additional compensation should such city or county recordation tax be enacted by a local governing body, and if said clerk is entitled to any additional compensation, would he be entitled to receive and retain this compensation in addition to the amount of the maximum compensation now prescribed by law for clerks of courts.

As you can see from the provisions of the second paragraph of new §58-65.1 of the Code of Virginia, clerks shall be entitled to that compensation prescribed by the governing body of his city or county. If the governing body does not prescribe any additional compensation, the clerk would not receive any additional compensation. Should the governing body prescribe additional compensation to compensate the clerk for these additional duties, I am of the opinion that such compensation, when received by the clerk, would be subject to the provisions of §§14-149, 14-155, 14-155.2 and 14-155.7 of the Code of Virginia.

If the city council of a city should prescribe that a clerk could retain as his compensation a certain percentage of all city recordation taxes collected, I am of the opinion that, under the provisions of §14-155, this would constitute a commission allowed by State law for the discharge of any duties imposed upon such officer by the council of the city and, as such, would have to be included in the maximum base compensation for clerks of courts of over 100,000 population or more. If, instead of prescribing a certain percentage of the recordation taxes collected to be retained by the clerk as compensation, the city council prescribes a fixed amount of compensation per month or per year, this additional compensation would be included in and considered as a part of the additional compensation allowable to a clerk by the city council. Under the provisions found in §58-65.1, if the clerk of a court is now receiving the maximum compensation allowable under the provisions of Article 3 of Chapter 2 of Title 14 of the Code of Virginia, I am of the opinion that any compensation prescribed by the local governing body for the services of the clerk in collecting a local recordation tax would have to be paid into the State treasury by the clerk as excess fees. You will recall that §14-149 provides that in determining the excess fees to be paid into the State treasury all fees, allowances, commissions, salary or other compensation of any political subdivision thereof shall be included.


June 10, 1957.

MR. ARNOLD MOTLEY, Clerk
Circuit Court of Essex County

Your letter of May 24, 1957 requests clarification of the method of releasing judgments, tax liens, and recorded conditional sales contracts.

The subject of judgment satisfaction is treated generally in Sections 8-380 through 8-385 of the Code of Virginia.
The clerk is authorized and directed by Section 8-381 to mark satisfied those judgments paid on execution issued from his office, and also those for which satisfaction is certified to him by another clerk. Where satisfaction has not been effected by execution the judgment creditor, his agent, or attorney is required by Section 8-382 to cause such payment or satisfaction to be entered on the judgment docket within 90 days after payment is made. This entry is to be signed by the judgment creditor, his agent, or attorney and attested by the clerk in whose office the judgment is docketed. Section 8-385 provides specifically for the release of judgments in favor of the Commonwealth. It reads as follows:

"§8-385. Marking satisfied judgments for Commonwealth; releasing recognizances.—It shall be the duty of the clerks of the several courts of record of this State, upon the payment of any judgment in favor of the Commonwealth or upon the release of any recognizance by court order to mark the same satisfied upon the judgment lien docket at every place such judgment or recognizance, as the case may be, shall have been recorded upon such lien docket; and in marking such recognizance satisfied it shall be the duty of such clerk to refer by marginal reference to the court order, if any, releasing or discharging such recognizance."

This section authorizes and directs the clerk to mark such judgments satisfied where they have been paid. A marginal reference could be made to the communication from the official of the Commonwealth notifying the clerk that payment has been made, and the communication retained in the clerk's miscellaneous file.

§55-92, as amended, of the Code of Virginia provides for the release of conditional sales contracts for personal property, authorizing the vendor, his agent, or attorney to make the entry which is to be attested by the clerk. This section further provides that the clerk may enter the satisfaction where he is authorized and directed by an affidavit to make and sign the same. Such affidavit may be filed by the vendor, his assignee, or duly authorized agent, or attorney.

Your letter makes this further inquiry concerning the release of a recorded judgment:

"Can any attorney for the judgment creditor over his signature alone designate an agent for his principal for such a purpose as a release of this kind?"

As a general rule an agent may delegate to another agent simple ministerial tasks to be performed on behalf of his principal, however, he is not at liberty to bind his principal where the act such agent purports to have done through a sub-agency is one involving a particular personal skill or service. Where the statute authorizes the release to be made by the judgment creditor, his agent, or attorney it appears to me in view of the significance of the act involved, that the better practice would require that the agent be one clearly acting under the direct authorization of his principal, rather than merely as a sub-agent.

COLLEGES AND UNIVERSITIES—Leases With Staff Members of William and Mary. Overnight Paying Guest Is Not Subletting. (54)

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

September 25, 1957.

This is in response to your letter of September 16, 1957, relating to the use of State owned residential property at the College of William and Mary by lessees.
for the taking of overnight lodgers and roomers. The lease under which the
tenancy is held provides in part that the premises may be used "only as a
dwelling" and that the tenants will not sublet the premises without the written
consent of the Landlord. It is further stated that the Board of visitors has no regu-
lations or rulings concerning the use of such real estate.

It would not be feasible to attempt to set forth the various legal rights and
privileges held by the landlord and tenant under the terms of the lease as sub-
mitted. Moreover, the various facts and circumstances of any particular matter
would have a bearing upon an interpretation of the terms of the lease as applied
to any particular matter. However, in response to your inquiry, I believe it will
suffice to set forth the pertinent general principles. The prevailing rule and the
rule that appears to be applicable in Virginia is that the taking of roomers or
(occasional overnight) lodgers is not a violation of a provision in a lease against
subletting. See, Beall v. Everson, 34 A. (2d) 41; Matter of Bierman, 84 N. Y.
Supp. (2d) 355; Pitt v. Laming, 171 Eng. Rep. 24. In this connection, it has
been held that a roomer is not a tenant; therefore, the taking of roomers or
lodgers is not a violation of a covenant against subletting.

As heretofore stated, the facts and circumstances of a particular situation would
have a bearing upon the matter, as the question might arise as to whether or not
the premises were being used only as a dwelling. Accordingly, the response is
given in general terms and is limited to the situation where an occasional overnight
lodger may be taken or where a limited number of rooms might be used by
roomers.

As it is stated that the Board has no regulations or rules bearing on the matter,
the question of policy is not a matter presented in this inquiry.

COLLEGES AND UNIVERSITIES—Local, Special and State Funds—Account-
ing and Handling Procedures To Be Followed. (63)

October 9, 1957.

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in response to your letter in which you make certain inquiries on behalf
of the Treasurer of Longwood College. This is also in connection with our con-
ference in which the matter was discussed. The inquiries and responses are herein-
after set forth:

"(a) We have a regular contract with a local appliance dealer in
which he agrees to furnish, install and maintain four domestic type
washing machines in basement rooms of our dormitory building. These
are coin operated for use by our students. Under the terms of this con-
tact the appliance dealer is to receive 60% of the collections from the
coin meter and the college is to receive the remaining 40%. The collect-
ions will amount to approximately $160.50 per month. This has been in
operation for two months. I have treated one-half of our portion of
the collections as an expenditure refund to 09-1230 (heat, lights, power
and water). The remaining one-half of our portion of the collections I
have treated as revenue to one of our local funds. Will these dispositions
of this fund meet with your approval?"

It is stated that no State appropriations are used in the above operation and
that the services provided are of a necessary and customary type as furnished in
a number of institutions where students live in dormitories.

As State funds are not involved, I am of the opinion that the remaining portion
of the revenue may be treated as a local fund after the State has been fully reimbursed for its expenses such as heat, light, power, water, etc.

"(b) Each spring we buy used books from our students through our College Bookstore. These are carried through the summer and resold to the returning students in the fall semester. We handle the funds for this purchase through our Student Deposit Account, a local fund. Our profits are then deposited as revenue with the Treasurer of Virginia on June 30th of each year. This amounted to $1,211.65 on June 30, 1957. I would like to ask if it would be possible for us to set this transaction up as a separate local fund to be administered entirely by the college, the college retaining the profits as local revenue."

The exact nature of the "Student Deposit Account" from which funds are derived to purchase the used books is not stated. However, it appears that the facilities and personnel which handle the used books in the College Bookstore are the same as those used in the handling of new books which are purchased through State appropriations. It further appears that the used books are handled in connection with and as an integral part of the College Bookstore. So long as the operation is handled in the above manner, it would appear that it should not be treated as a separate local fund. In the event that the sale of the used books was entirely divorced from the College Bookstore and did not use the same facilities, personnel, etc., then it would appear that the transaction could be set up as a separate local fund matter with the college retaining any profits as a local fund.

"(c) Each student at Longwood College is charged a 'Campus fee'. This money is used for student entertainment; lyceum programs, commencement speakers and assembly speakers. Appropriations from the campus fees are made directly to certain student organizations such as the student newspaper, the student year book, the student dance club, the athletic association, etc. These organizations handle their own financing subject to periodic audits by this office. This procedure makes it necessary that a number of vouchers be handled by this office and by the comptroller's office. I would like to ask if it would be possible for us to prepare one voucher for the total amount of campus fees collected for a given year making this voucher payable to one of our local funds. For the next two fiscal years this would amount to $18,441.00 and $19,041.00 respectively. The entire amount would then be administered by the college as a local fund. The purpose of this campus fee is to provide for student activities here on the campus. If these funds are not used completely during a given biennium, of course, they revert to the general fund and the Longwood College student body, therefore, loses the use of the funds. It seems to me that the plan which I have outlined above would more nearly fulfill the purose of the campus fees."

The "Campus fee" fund appears to fall in the category which could be administered by the college as a local fund. However, the catalogue and representations made on behalf of the College should specify that it is not a fee charged by the college for general college purposes. It should be made clear and distinct that the Campus fee is to be used specifically for student entertainment, programs, etc. It is to be further noted that from the information submitted, the funds involved would in no way be derived from State appropriations.
HONORABLE VINCENT SHEA, Comptroller
University of Virginia

This is in response to your letter of August 9, 1957, regarding Dr. William N. Evans. You enclose correspondence and inquire if repayments of the cash amount of the scholarships may be accepted by the State. It is noted that Dr. Evans has not breached his contract but to date is requesting whether or not he can be released from his contract by payment of money. It is noted that his request does not bring him within any of the exceptions listed for releasing him from the obligations of his contract with the Commonwealth. Moreover, it is further noted that the Legislature has deleted prior provisions of law providing for repayment, thereby indicating that it does not sanction repayment in lieu of obligated services.

It is the view of this office that the contract in question is a valid existing contract between the Commonwealth and the doctor; that the State has satisfied its agreement entered in good faith and that satisfaction should be forthcoming from the recipient of these benefits. This office does not feel that the Commonwealth should in any way condone or assist in the breach of such contracts by agreement.

In the event that some recipient wilfully breaches his signed contractual obligation, then the matter of damages and repayment would arise. Accordingly, without an actual or substantial negation of the contract, there appears to be no provision of law for the voluntary acceptance of repayment or for the releasing of a person from his obligations other than through the legally provided exceptions.

MR. R. T. ENGLISH, JR.
Richmond Professional Institute

This is in reply to your letter of May 23, 1958, in which you request my opinion concerning the residence status for tuition purposes of three different groups of students enrolled at Richmond Professional Institute. As you know, §23-7 of the Code of Virginia is the applicable provision of law relating to this question. This section provides as follows:

"No person shall be entitled to the admission privileges, or the reduced tuition charges, or any other privileges accorded by law only to residents or citizens of Virginia, in the State institutions of higher learning unless such person has been a bona fide citizen or resident of Virginia for a period of at least one year prior to admission to such institution, provided that the governing boards of such institutions may require longer periods of residence and may set up additional requirements for admitting students."

The first group relates to wives, children or other dependents of members of the military service who are stationed in Virginia. A person does not attain the status of a resident of Virginia solely by being stationed in Virginia while in the military service. If a person is stationed in Virginia and is eligible to vote in this State from a residence standpoint when applying for admission privileges, and is also
subject to the State and local taxes, then I am of the opinion that he and the members of his immediate family who reside with him are entitled to the privileges of a resident of the State under the provisions of §23-7 of the Code. However, if a person is stationed in Virginia and is not subject to any of the normal taxes that civilian residents of the State are required to pay in the military service, I am of the opinion that neither he nor his immediate family are entitled to the privileges accorded a resident of Virginia under the provisions of §23-7 of the Code. In this connection I call attention to Section 24 of the Constitution which provides that “No officer, soldier, seaman or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city or town thereof by reason of being stationed therein.”

It would seem, and it is my opinion, that, under this constitutional provision, a member of the military or naval service must have taken affirmative action, such as avowing his intention to establish his citizenship within this State. The filing of income tax returns and personal property assessment returns would constitute evidence of such avowal. Unless such a person has by overt act declared his intention to establish his residence in this State, he cannot, under this constitutional provision, be deemed to be a resident within the meaning of §23-7 of the Code.

Your second group of students are those students who enter college for the first time as nonresident students and then, after matriculation, become legal residents of the State. You state that, at the present time, these persons are charged the fees of a nonresident for the entire time that they are enrolled in college, unless, in the interim, one should drop out of college and at some later date be readmitted. Upon readmission his status as a resident or nonresident is redetermined, and if he has maintained his legal residence in Virginia for at least one year prior to the time of his readmission, he should be accorded the privileges, under the provisions of §23-7 of the Code of a resident student.

Section 23-7 of the Code provides that a person must have been “* * * a bona fide citizen or resident of Virginia for at least one year prior to admission to such institution * * *.” This office has been concerned over the proper interpretation to be given to this word “admission” as used in this section. It appears from the accepted practice of colleges and universities that a student is admitted to a college or university his first year, and, unless he drops out of school, he re-enters each succeeding year, but he is not readmitted each succeeding year. In view of this general practice, I am of the opinion that your procedure in the past in this regard has been correct. If a person is admitted as a nonresident student, then he retains that status the entire time he is enrolled in the school, although his legal residence may have been changed while he was in school. If a student terminates his connection with the school entirely and applies for readmission at some subsequent time, I feel that you could readmit him on the basis of his residence status at the time of such readmission rather than his status at the time of his original admission to school.

The third group concerns the nonresident student who while in school marries a resident student of Virginia and then continues to live in this State. You state that in the past your policy has been that a nonresident student maintains that status as long as they are in school, and you request my opinion as to whether you are correct in this ruling or whether the status of the nonresident changes at the time of the marriage, or one year after the marriage.

I am of the opinion that you are correct in your application of the provisions of §23-7 of the Code to this third group of students. If a student enters as a nonresident student, then that student cannot change his or her status as a nonresident for tuition purposes by marrying a resident of Virginia while enrolled in the school.
REPORT OF THE ATTORNEY GENERAL

COLLEGES AND UNIVERSITIES—Revenue Bonds—Proceeds May Be Invested Pending Need for During Construction of Project. (57) October 4, 1957.

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

This is in reply to your letter of September 30, 1957, in which you state that the College of William and Mary has issued revenue bonds in the amount of $415,000 pursuant to Chapter 3 of Title 23 of the Code of Virginia for the purpose of completing a new women’s dormitory. The funds received from the sale of these bonds have been deposited with the Treasurer of Virginia and the Treasurer has placed these funds in a special construction fund. These funds will be disbursed on a monthly basis as payments to the contractor become due. You state that the College of William and Mary desires to invest these funds in short-term government bonds or notes until such time as they are needed for payments to the contractor.

I am of the opinion that the Treasurer of Virginia, upon being presented with a duly enacted resolution of the Board of Visitors of the College of William and Mary authorizing him to invest these funds in short-term government bonds or notes, may invest these funds under the provisions of Chapter 17 of Title 2 of the Code of Virginia.

COLLEGES AND UNIVERSITIES—Revenue Bond Project—Parking Garage at Medical College of Virginia. (286) June 18, 1958.

HONORABLE L. M. KUHN
Special Assistant to the Governor

This will acknowledge receipt of your letter of June 17, 1958, enclosing a letter dated June 13, 1958 to Governor Almond from W. F. Tompkins, Comptroller of the Medical College of Virginia. In this letter the Governor’s approval is sought in order that the College may construct a garage on property owned by the College and finance the project by the sale of bonds to be repaid out of the revenue collected in connection with the operation of the garage. You request my opinion regarding the authority of the College to create such an obligation.

In my opinion this project may be financed pursuant to the provisions of Chapter 3 of Title 23 of the Code of Virginia wherein the educational institutions listed therein are vested with the power, subject to the approval of the Governor, to issue bonds by complying with the provisions of Sections 23-18 and 23-19 of said Chapter.

Whether or not this Chapter of the Code may be relied upon as authority to issue the proposed bonds depends upon the definition of the word “project,” which is defined in Section 23-15 (e) as follows:

“‘Project’ shall mean any building or improvement involving an outlay of a capital nature which may be required by or convenient for the purposes of an institution, including, without limitation of the foregoing, administration, teaching, lecture and exhibition halls, dormitories, dining halls, laundries, hospitals, infirmaries, and all lands necessary for any project.”

Under this definition any building or improvement which may be required by or convenient for the purposes of the College may be constructed and financed pursuant to this Chapter. I believe it is reasonable to conclude that a garage to
be used in connection with such an institution when located in a congested part of a city would qualify.

The bonds, if issued, must contain a provision complying with Section 23-24 of the Code so as to expressly state that they do not in any way create a debt against the State and do not create or constitute any indebtedness or obligation of the State, either legal, moral or otherwise, and that they shall never be payable out of any funds other than those of the institution.

COLLEGES AND UNIVERSITIES—Tort Immunity of State—Cannot be Waived
V.P.I. May Purchase Liability Insurance for Operation of Atomic Reactor.

(277) June 9, 1958.

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

This is in reply to your letter of June 2, 1958, in which you request my opinion concerning the requirement which would have to be met by V.P.I. in order to obtain a permit from the Atomic Energy Commission to operate an educational atomic reactor. You request my opinion as to whether or not Virginia Polytechnic Institute is permitted to (1) waive tort immunity, (2) execute indemnity contracts indemnifying others, and (3) purchase liability insurance for the protection of others.

As you are aware, neither the State nor any of its agencies or institutions may be sued for a tort except by statutory consent. I am of the opinion that no State institution may contract away this immunity to be sued or to be held responsible for a tort claim. Therefore, I am of the opinion that V.P.I. does not have authority to enter into a contract waiving its immunity, nor does it have the authority to execute a contract indemnifying others from possible tort claims. I am of the opinion that V.P.I. may purchase liability insurance for the protection of itself and others. If such insurance policy were purchased, a provision should be contained in the policy whereby the insurance company agrees that it will be liable in the event of any such claim or suit because of the operation of this atomic reactor; that it further agrees that it would not plead the State's immunity in the event of such a claim or suit.

I am enclosing a copy of a similar ruling which was made along a similar line to the Honorable A. D. Chandler, President of the College of William and Mary, on January 30, 1956.

COMMISSIONERS OF REVENUE—Automobile Licenses—Local—May Not Collect for—Only Treasurer or His Agent May Collect for. (230) April 24, 1958.

Honorable Stanley A. Owens
Commonwealth's Attorney for
Prince William County

This is in reply to your letter of April 23, 1958, relating to my opinion of April 17, 1958, in response to your inquiry of April 16, 1958.

Your last letter is, in part, as follows:

"In the last paragraph of your letter you express the opinion that the board of supervisors does not have the power to authorize the commissioner of the revenue to collect any county revenues. I am wondering
if I failed to make it clear in my former letter that the board was not commanding the commissioner of the revenue to serve as agent for the issuance of county tags and for collection of the fees, but that he had been designated as such agent purely in his individual capacity and not his official capacity as commissioner of the revenue. In other words, he was under bond just as any private individual would be as such agent. I am wondering if this clarification might throw a different light on the situation and whether you would say that our commissioner of the revenue purely as a private individual could act as issuing and collecting agent.

"Finally, in view of the other comments in your letter regarding the duties of the county treasurer as set forth in Title 58 of the Code, I would appreciate your advising me if it is your opinion that the board of supervisors does not have authority to designate anyone except the county treasurer to collect the revenues from the sale of county motor vehicle licenses."

The fee charged by the counties for local automobile taxes is designated as "license fees and taxes" in Section 46-64 of the Code, which permits counties to require the use of such local license tags. Moreover, subsection (3) of this section 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."

As stated in my letter of April 17, I am of the opinion that the county treasurer is the only county official authorized to collect such fees. Section 58-958 of the Code provides that "the levies and other amounts payable into the treasury of the political subdivision" shall be received by the treasurer.

If it is desired that the commissioner of the revenue shall distribute the county tags, I think that, in order for the provisions of the statute to be followed, the person applying for the tag should first pay the license fee to the county treasurer and, upon presenting a receipt therefor to the commissioner of the revenue, such applicant would be entitled to receive his license tag.

With respect to the question presented in the second paragraph quoted above, I am unaware of any statute which authorizes the board of supervisors to designate any person to collect the county revenues. Under the statutes the treasurer is charged with this duty as well as the responsibility of accounting for all such revenues, and he cannot be relieved of this duty and obligation to account for such funds.

COMMISSIONERS OF REVENUE—Automobile Licenses May Be Agents of Division of Motor Vehicles to Issue State Tags—Cannot Collect County Revenues. (224)

April 17, 1958.

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

This is in reply to your letter of April 16, 1958, which reads as follows:

"The Commissioner of the Revenue of Prince William County has been designated by the Commissioner of the Division of Motor Vehicles to sell State automobile license tags, and the Board of Supervisors has
consented to the Commissioner of the Revenue selling State tags from his offices in a County building.

"Our Commissioner of the Revenue also sells County license plates and receives fees for the same, remitting them to the County Treasurer each month without charge to the County. The only expense involved to the County is his surety bond.

"There are three inquiries on the above state of facts:

"1. Is there any legal objection to the Commissioner of the Revenue being the Agent of the Commissioner of Motor Vehicles for selling State automobile license tags?

"2. Is there any legal objection to his using his regular County offices for this purpose?

"3. Is there any legal objection to the Commissioner of the Revenue being a receiving officer of County revenues under surety bond satisfactory to the Board of Supervisors?"

With respect to questions 1 and 2, I am not aware of any statute that would prevent a commissioner of the revenue from acting as agent for the State in connection with the sale of automobile license tags. Furthermore, I feel that the local governing body may authorize the commissioner to sell the tags in the office which the county provides for his official use.

With respect to your question No. 3, the duties of the commissioner of the revenue are as prescribed by Acts of Assembly. Section 110 of the Constitution provides that "there shall be elected by the qualified voters of each county, in addition to other officers, a county treasurer and one commissioner of the revenue." This section also provides that:

"The duties and compensation of such officers shall be prescribed by general law."

I am unable to find any statute that authorizes a board of supervisors to prescribe the duties of these officers, especially with respect to the collection of the county revenues.

There are various general statutes relating to the duties of these officers. Sections 58-243 and 58-874 of the Code provide that a county commissioner of the revenue shall assess and issue licenses. The treasurer's duties are generally set forth in Title 58 of the Code, and Section 58-958 requires this officer to collect the State and local revenues. Section 58-243 of the Code specifically requires license taxes to be paid to the treasurer. This section, which was formerly 2360, is discussed by the Supreme Court of Appeals of Virginia, 136 Va. 573. There the Court, in discussing the division of authority and duties relating to a commissioner of the revenue and a treasurer, stated as follows:

"* * *

The two offices of the commissioner of the revenue and of the treasurer, and the functions of assessing and collecting license taxes to be performed by the respective officers, are required by the statute to be kept separate. The reports of the commissioners of the revenue furnish the sole independent evidence by which the treasurer is charged and held accountable for the license taxes collected. Hence, obviously, the statute allows no consolidation of these two offices and no joint performance of the functions of collecting the taxes and issuing the licenses by a single officer in any case, and hence the imperative provisions of the statute on the subject. * * *"

In view of the statutory provisions and the statement contained in the case cited, I am of the opinion that the board of supervisors does not have the power to authorize the commissioner of the revenue to collect any county revenues.
COMMISSIONERS OF REVENUE—Building Permits—Not Required to Issue if County Has Zoning Law. (82)

HONORABLE C. E. GNADT
Commissioner of the Revenue for
Prince William County

November 1, 1957.

This is in reply to your letter of October 24, 1955, in which you enclosed a copy of a Building Code which has recently been enacted by the Board of Supervisors of your County. This Building Code states that the Building Inspector shall issue building permits in the County.

You call my attention to Section 58-766 of the Code of Virginia, which provides that the Commissioner of the Revenue shall issue building permits, and request my opinion as to whether or not you should continue to issue building permits after the effective date of the Building Code Ordinance as adopted by the Board of Supervisors.

Section 58-766 of the Code of Virginia contains the following provision:

"This section shall not apply to any county which requires a building permit under the provisions of Articles 2, 3 and 4, Chapter 24, Title 15 of the Code of Virginia."

It appears that on May 12, 1955, the Board of Supervisors of Prince William County passed a zoning law which requires a building permit. This zoning law, from the information available to me, was enacted pursuant to the provisions of Article 2, Chapter 24, of Title 15 of the Code of Virginia. Therefore, I am of the opinion that Section 58-766 of the Code of Virginia is not applicable to Prince William County and, therefore, you are not required to issue building permits.

COMMISSIONERS OF REVENUE—Reassessment of Real Property—May Not Be Appointed or Employed as Assessor. (259)

HONORABLE BALDWIN G. LOCHER
Member of House of Delegates

May 21, 1958.

This is in reply to your letter of May 17, 1958, in which you request my opinion on the following matter: 1958 is the year prescribed by the Code of Virginia for general reassessment of real property in all cities of this Commonwealth. The City Council of Buena Vista questions whether or not it can assign the duties of assessor to the local Commissioner of Revenue and compensate him for the extra duties thereby imposed.

I am of the opinion that, under the provisions of §58-786 of the Code of Virginia, the Circuit Court of the City of Buena Vista must appoint the assessor or assessors to make this general reassessment. This assessor is an officer of the City of Buena Vista. I am enclosing a copy of an opinion rendered by this office on April 7, 1955 to the Honorable Ernest W. Goodrich, Commonwealth's Attorney for Surrey County, in which it was held that a member of the Real Estate Assessors is an officer of the city or county.

The Commissioner of Revenue of a city may not hold any other office while he is Commissioner of the Revenue, unless there is a specific provision in the Code or in the charter of the city permitting him to hold a second office. I can find no such provision which would permit the Commissioner of the Revenue for the City of Buena Vista to hold the office of assessor.

I am enclosing a copy of another opinion rendered by this office on January 3,
1957 to Honorable J. B. Cowles, Jr., Commonwealth’s Attorney for James City County, in which we held that a city commissioner of the revenue could not also hold the office of deputy clerk of a county. The Commissioner of Revenue may not be employed to assist the assessors in making the assessment, as this would be a contract in violation of §15-508 of the Code of Virginia.

COMMONWEALTH’S ATTORNEYS—Are Not State Employees. (74)

Honorable Royston Jester, III
Commonwealth’ Attorney, City of Lynchburg

October 21, 1957.

This is in reply to your letter of October 18, 1957, in which you request my opinion as to whether or not the Commonwealth’s Attorney of a city or county is considered a State employee.

Section 110 of the Constitution of Virginia provides, in part, as follows:

“There shall be elected by the qualified voters of each county a treasurer, a sheriff, an attorney for the Commonwealth, and a county clerk, who shall be the clerk of the circuit court; and there shall also be elected by the qualified voters of each county one commissioner of the revenue.

“The duties and compensation of such officers shall be prescribed by general law. * * *”

Section 119 of the Constitution of Virginia provides as follows:

“In every city, so long as it has a corporation court, or a separate circuit court, there shall be elected, for a term of four years, by the qualified voters of such city, one attorney for the Commonwealth, who shall also, in those cities having a separate circuit court, be the attorney for the Commonwealth for such circuit court.

“In every city there shall be elected one commissioner of the revenue for a term of four years.

“The duties and compensation of such officers shall be prescribed by law.”

I am of the opinion that Commonwealth’s Attorneys of counties and cities are not State employees. They are constitutional officers of the county or city for which they have been elected. The General Assembly of Virginia in enacting Chapters 3.1 and 3.2 of Title 51 of the Code of Virginia has excluded a county or city treasurer, commissioner of the revenue and Commonwealth’s attorney, clerk of court, sheriff or sergeant or constable and a deputy or employee of any such local officer from the term “State employee” as used in the Virginia Supplemental Retirement Act and the act providing for Federal social security for State and local employees. See §§51-111.2(e) and 51-111.10(5) of the Code of Virginia.
COMMONWEALTH'S ATTORNEYS—Fees—When Assessed in Misdemeanor Cases—Cases in Juvenile and Domestic Relations Courts. (173)

HONORABLE R. B. DAVIS, Judge
Municipal Court
Bristol, Virginia

February 7, 1958.

I am writing in further connection with your letter of January 7, and our subsequent discussion with respect thereto, in which you request an opinion upon the appropriate interpretation to be accorded certain language contained in Section 14-130 of the Virginia Code. Specifically, you inquire whether or not the fee of the Commonwealth's Attorney prescribed in the third paragraph of the statute in question is to be assessed in every instance in which an attorney for the Commonwealth appears and prosecute a misdemeanor before a trial justice, or only in those cases involving a misdemeanor which the attorney for the Commonwealth is required by law to prosecute.

In pertinent part, Section 14-130 of the Virginia Code prescribes:

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

For each person tried for a misdemeanor in his circuit or corporation court, five dollars, and for each person prosecuted by him before any court or trial justice of his county or city for a misdemeanor, which he is required by law to prosecute, or upon an indictment found by a grand jury, five dollars, except when such prosecution is before a trial justice appointed under the provisions of chapter 2 of Title 16, in which case such fee shall be two dollars and fifty cents; and in every misdemeanor case so prosecuted the court or trial justice shall tax in the costs and enter judgment for such misdemeanor fee. No attorney for the Commonwealth shall receive a fee for appearing in misdemeanor cases before a trial justice, except in those particular violations of the law when he is expressly required to appear by statutory enactment and provision is made for the taxing of his fees in the costs." (Italics supplied).

In light of the language italicized above, I am of the opinion that—in those cases in which the attorney for the Commonwealth appears and prosecutes a misdemeanor before a trial justice—a fee for the Commonwealth's Attorney should be assessed only if the offense is one which the attorney for the Commonwealth is required by law to prosecute, or if the prosecution is predicated upon an indictment found by a grand jury. This view is consistent with that expressed by this office on former occasions. See Report of the Attorney General (1930-31) p. 30; (1935-36) p. 76; (1936-37) p. 84. Copies of the rulings in question are enclosed with this letter.

You also inquire whether or not the fee of the Commonwealth's Attorney should be assessed in those instances in which the attorney for the Commonwealth appears in juvenile and domestic relations cases at the behest of the trial judge. Pertinent in this connection is Section 16.1-155 of the Virginia Code, which provides:

"The judge may, in his discretion, call upon the Commonwealth's attorney of his city or county to assist the court in any proceeding under
this law, and the Commonwealth's attorney shall render such assistance when so requested.

"The Commonwealth's attorney shall represent the State in all cases appealed from the juvenile and domestic relations court to circuit, corporation, or hustings courts."

I believe that this section is mandatory in character, and that it imposes a conditional obligation upon the attorney for the Commonwealth which requires him to assist the court in any proceeding under the Juvenile and Domestic Relations Court law when requested by the judge of a juvenile and domestic relations court. Should the judge of such court call upon the attorney for the Commonwealth to appear and prosecute a misdemeanor cognizable in such court, I am of the opinion that the prescribed fee of the Commonwealth's Attorney should be assessed.

COMMONWEALTH'S ATTORNEYS—FEES—When to Be Assessed in Misdemeanor Cases—in Felony Cases with Plea of Guilty. (126)

December 13, 1957.

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

This is in reply to your letter of December 6, 1957, in which you request my opinion concerning the taxing of a fee in criminal cases for the Commonwealth's attorney as provided for by §14-130 of the Code of Virginia. You ask first, if in a misdemeanor case, the defendant appeals to the circuit court but then when the case is called to trial he appears and enters a plea of guilty before the court, should the fee of $5.00 for the Commonwealth's attorney be taxed.

If the Commonwealth's attorney is actually present at the time the defendant appears and enters his plea of guilty in the court, then I am of the opinion that this fee of $5.00 should be taxed.

You also ask if a fee of $10.00 should be taxed in felony cases where the defendant enters a plea of guilty. Again, I am of the opinion that, if the Commonwealth's attorney is present at the time the plea of guilty is entered in a felony case in the circuit court, then the fee of $10.00 should be taxed. I should like to call your attention to the provisions of §14-99 of the Code of Virginia which provides that no cost or fees shall be taxed for, or in any way allowed, to an attorney for the Commonwealth of the county in any case, unless he in person, or by duly authorized assistant, actually appears and prosecutes a proceeding before the court. If, upon the entry of a plea of guilty in the circuit court, the Commonwealth's attorney is present in the court at the time so as to be able to assist the court should the court desire such assistance, then I am of the opinion that the appropriate fee should be taxed.

CONDITIONAL SALES CONTRACTS — Docketing by Clerk — Where Not Signed by Vendor. (219)

April 15, 1958.

HONORABLE THOMAS P. CHAPMAN, JR., Clerk
Circuit Court of Fairfax County

I acknowledge receipt of your letter of April 14, 1958, which reads as follows:

"I am enclosing herewith a copy of a conditional sales contract submitted for docketing in this office by the Sears, Roebuck and Company. We have examined this contract and fail to find where the vendor,
namely, Sears, Roebuck and Company, has actually signed the instrument. It is our feeling under the laws of this State that both the vendor and vendee must sign a conditional sales contract before it can be docketed in this office.

"I shall appreciate your reviewing this instrument and giving us your opinion on this matter."

Section 55-88 of the Code requires conditional sales contracts to be signed by the vendor and the vendee. I do not believe, however, that you could refuse to docket such contract when it is filed in your office and the docketing fee has been paid, merely because it has not been signed by one of the parties. This section was formerly Section 5189 of the Code of 1919 and prior to that time it was Section 2462 of the Code of 1904. Under the provisions of the 1904 Code it was not necessary that this type of contract be acknowledged in order to be docketed. In the revision of the 1919 Code the section was amended so as to require that all such writings should be recorded in their entirety and acknowledged or attested by a subscribing witness as to both the vendor and the vendee. These requirements have since been removed, and a memorandum is made in the "Conditional Sales Book" pursuant to Section 55-90 of the Code. As you, I am sure, know, where an instrument is required by statute to be acknowledged, the Clerk is not required to record such instrument unless it has been acknowledged. See Section 55-106 of the Code. Such instruments, however, are required to be preserved under the provisions of Section 55-111 of the Code.

I do not feel, therefore, that you should assume the responsibility of refusing to docket this contract in accordance with the requirements of Section 55-90 of the Code. I think, however, you should make a notation in the Conditional Sales Book to the effect that the contract was not signed by the vendor, but by the purchaser only.

CONDENTIAL SALES CONTRACTS—Recordation—What Constitutes Signed Duplicate—Photostat Is Not Unless Signed—When Carbon Signature Constitutes Signing. (292)

June 25, 1958.

HONORABLE KENNETH L. FIGG, JR., Clerk
Circuit Court of Prince George County

This is in reply to your letter of June 24, 1958, which reads as follows:

"A vendor has presented to my office, for filing, in accordance with Section 55-90 Code of Virginia, as amended, a photostatic copy of a conditional sales contract. The said contract complies in all respects with the conditions set out in Section 55-88. However, as stated before, this contract has been presented in the form of a photostatic copy and I would like your opinion as to whether or not a photostat constitutes an executed duplicate copy.

"I would further request your opinion as to whether or not a duplicate carbon, containing thereon carbon signatures, constitutes an executed duplicate copy.

"Heretofore, I have taken the position that a contract, even though a carbon, must contain an original signature of the vendee in order to be filed. This, however, is my first experience with a photostatic copy of a contract."

Section 55-88 of the Code requires that such contracts offered for recordation shall be "signed by the vendor and the vendee." Therefore, in order for a
photostatic reproduction of the original contract to be a recordable instrument, it will be necessary that the actual manually made signature of the vendor and vendee appear thereon. I am of the opinion that the mere photostatic copy of the signatures would not be in compliance with the statute. The document, even though it is a photostatic copy of the original, if it is actually signed, would be a recordable instrument.

With respect to your second question, I am of the opinion that a carbon copy containing a carbon copy signature—that is, a signature made through a carbon along with the signature on the original, with the knowledge that a carbon copy of the original is being executed at the same time by the same manual operation—would be in compliance with the statute. In other words, the parties executing the contract must intend that an exact carbon copy be executed along with the signing of the original.

CONFEDERATE MEMORIAL PARK—Title to All Property Real and Personal in Commonwealth. (152)

MR. D. V. CHAPMAN, JR.
Superintendent, Grounds and Buildings

January 14, 1958.

This is in reply to your letter of December 26, 1957, in which you state that the weather vane has been removed from the three-story brick building occupied by the Virginia Institute for Scientific Research which is located on the R. E. Lee Camp—Confederate Memorial Park. You ask whether or not you should secure the approval of a representative of the United Daughters of the Confederacy before you may declare the weather vane surplus property to the State’s Division of Purchase and Printing.

This property was conveyed to the Commonwealth by the R. E. Lee Camp No. 1 of the Confederate Veterans pursuant to Chapter 625 of the Acts of 1892 and Chapter 98 of the Acts of 1912. Under the provisions of these Acts the grantor lost all control over the property on March 3, 1922. I am, therefore, of the opinion that since that date the property in question has been under the exclusive control of the Commonwealth, and that it is unnecessary for you to secure the approval of the United Daughters of the Confederacy before declaring the weather vane surplus property.

CONSERVATION AND DEVELOPMENT—Parks—Claytor Lake Festival—Funds for—How State May Provide. (208)

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

April 3, 1958.

I acknowledge receipt of your letter of March 28, 1958, in which you refer to Item 295-A and Section 20 of the Appropriation Act of 1958. These provisions are as follows:

Item 295-A:
‘The Department of Conservation and Development is authorized to assist in advertising the Claytor Lake Festival and to utilize its personnel, funds and facilities in aiding the operation of such festival. The Department is further authorized to require all contractors for concessions
at such festival to reserve or set aside a portion of the proceeds realized from such concessions for use in defraying the expenses of operating such festival, the percentage of such proceeds which is to be so reserved or set aside to be determined by the Department."

Section 20:
“All of the following shall be paid directly and promptly into the general fund of the State treasury:
“a. All monies, fees, charges, and revenues, excluding Federal grants, heretofore accumulated or hereafter collected by or on behalf of the agencies listed below:

* * * *

“Department of Conservation and Development, by, from, or through the operation of the State parks, including entrance and concession fees and all other funds derived from the operation or use of such parks; under the provisions of Sections 10-68 to 10-74, inclusive, of the Code of Virginia.”

You state that you have only one concessionaire at Claytor Lake; that you have a three-year contract with him running from October 1, 1956, to October 1, 1959; that this concessionaire operates all concession stands, including the bath house, rental of boats, store for soft drinks, snacks, etc., and that the contract requires the concessionaire to pay to the State a percentage of gross income, which is 20 percent on the bath house receipts and 10 percent on all other receipts. Separately, the Department has an income from parking fees, upon which no commission is paid.

In addition to the income from the above sources, you receive an income from the rental of cabins, which latter income, however, after payment of the maintenance and operation of the cabins, is kept separate in order to provide for the payment of revenue bonds secured by trust indenture upon the cabins.

You state that the income received from the concessionaire is apparently the only source of funds with which to comply with the authorization set forth in Item 295-A.

Your inquiry is whether your Department may use any of the income from the concessionaire to assist in advertising the Claytor Lake Festival.

The first sentence of Item 295-A authorizes your Department to assist in advertising the Claytor Lake Festival and to utilize its personnel, funds and facilities in aiding the operation of such festival. I think it is reasonable to conclude that advertising the festival would be an integral part of its operation. In the operation of the festival, advertisement is desirable, and no doubt necessary in order to produce the results hoped for. I am of the opinion, therefore, that out of the overall and available appropriated funds, not otherwise specifically appropriated, you may make expenditures for the purpose of assisting in advertising and operating the festival. These expenditures, it would seem, would be chargeable to the amount appropriated in Item 295.

Although, pursuant to Section 20 of the Appropriation Act, the special revenues received from the concessionaire and the parking fees, which for the last fiscal year aggregated $13,792.52, are required to be deposited in the general fund of the treasury, it would seem that, if such sum is needed to meet the obligations of Item 295-A, the Governor would have authority to increase the appropriation contained in Item 295 to the extent of such special revenues. This authority is contained in Section 13 of the Appropriation Act. Unless this authority is exercised, then, of course, the special revenues cannot be used for the purpose of complying with Item 295-A.

With respect to the provisions of the second sentence of Item 295-A, due to the fact that you are utilizing the services of only one concessionaire with whom you
have a contract extending to October 1, 1959, I am of the opinion that, unless the concessionaire is willing to revise the contract in order to achieve the purpose of the provision, no such requirement as is contemplated by this part of Item 295-A can be put into effect. Should you, in the meantime, contract with other concessionaires, you should, of course, comply with this requirement in negotiating such contract.

CONSERVATION AND DEVELOPMENT—Parks—Pulaski, Wayside—Deed from U. S. Government Provides Must Be Used for Public Park Purposes. (247)
May 13, 1958.

HONORABLE GARNETT S. MOORE, Member
House of Delegates

This is in reply to your letter of May 6, 1958, in which you request my opinion as to whether the Town of Pulaski would be prohibited from leasing portions of the area know as Pulaski Wayside Park for commercial and business purposes in the event that the Commonwealth of Virginia conveys the Park to the Town of Pulaski.

You advise that the Commonwealth of Virginia acquired the Pulaski Wayside Park from the United States of America by deed dated March 5, 1943, upon the following condition:

"PROVIDED ALWAYS, that this deed is made upon the express condition that the Commonwealth of Virginia shall use the said property exclusively for public park, recreational, and conservation purposes, and the further express condition that the United States of America assumes no obligation for the maintenance or operation of the said property after the acceptance of this deed; * * *.*"

While it is conceivable that the Town of Pulaski could lease portions of the Park to be utilized as business enterprises without violence to the express condition that the land must be used exclusively for park, recreational, and conservation purposes, it, nevertheless, would appear that the opinion of this office to that effect would not be controlling. Inasmuch as the United States of America has reserved unto itself a reversionary right in the Park upon a failure of compliance with the aforementioned condition, I suggest that you consult the Secretary of the Interior of the United States of America before proceeding on the assumption that leasing a portion of the Pulaski Wayside Park for business purposes does not constitute a breach of the condition upon which this area was conveyed to the Commonwealth of Virginia.

CONTRACTORS—County Regulation as to Qualification—Examination of Electrical and Plumbing Contractors Who Are Not Licensed by the State. (76)

October 23, 1957.

HONORABLE WILLIAM F. PARKERSON, JR.
Commonwealth's Attorney
Henrico County

I am writing in further connection with your letter of September 13, and our subsequent discussion concerning the scope of an opinion of this office rendered on April 6, 1937, to Mr. E. L. Kusterer, Executive Secretary of the State Registration Board for Contractors. In that opinion it was ruled that the Counties of
Chesterfield and Henrico were without authority to impose requirements of examination and registration upon contractors who had been examined and registered by the State Registration Board. The position taken by this office upon the question there presented was that the legislative design of Title 54, Chapter 7, of the Virginia Code was to provide for the examination and registration of contractors (as defined in §54-113 of the Code) exclusively by the State and to preclude the exercise of the same authority by local governing bodies.

Noting that plumbing and electrical contractors are embraced within the provisions of §54-113 of the Code, you present the following question:

"Your opinion is requested as to whether the County of Henrico has the power to require the registration of electrical contractors and plumbing contractors and to require a qualifying examination of them when such contractors are not licensed under the provisions of Section 54-113, et seq. of the Code."

As you suggest in your communication, the initial inquiry involved in the resolution of the stated question is whether or not the State "has preempted the field only as to contractors engaged in contracts of $20,000 or more." I am constrained to believe that this preliminary inquiry should be answered in the affirmative. From their inception, the provisions of Title 54, Chapter 7, have been applicable only to "general contractors" or "subcontractors" as defined in what is now §54-113 of the Code, and these definitions have always been limited to include only individuals engaged in the performance of undertakings of contracts in the amount of "twenty thousand dollars or more." See, Acts of Assembly (1938) Chapter 431, page 969. I am, therefore, of the opinion that the State has occupied the field in question only to the extent specifically stated in §54-113 of the Virginia Code.

There still remains the question of whether or not the localities are authorized to enact regulatory ordinances of the type under consideration, in the absence of any statute purporting to regulate the same activity. So far as I have been able to ascertain, the only source of such authority would be certain provisions of §15-8 of the Virginia Code, which statute in part prescribes:

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

* * * *

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

"(3) To provide against and prevent the pollution of water in their respective counties whereby it is rendered dangerous to the health or lives of persons residing in the county.

* * * *

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

The above-quoted provisions of the Virginia Code empowering the governing bodies of various counties of the Commonwealth to enact ordinances designed to prevent the spread of contagious diseases, to prevent the pollution of water and to promote the health, safety and general welfare of local inhabitants are particularly pertinent with respect to ordinances regulating plumbing contractors.
The close relationship between the business of plumbing and the sanitation indispensable to public health has long been judicially recognized. Illustrative of this recognition is the language of an early case, *State ex rel. Winkler v. Benzenberg*, 101 Wis. 172, 76 N.W. 345, in which the Supreme Court of Wisconsin declared:

"Under the modern systems of housebuilding and disposal of sewage, the dangers to the health of the entire public, arising from defective plumbing are so great, and at the same time so insidious, that were the state unable to provide for the proper regulation and supervision of the plumber in his work, so as to minimize the danger to the public health from the escape of sewer gas, the state would certainly be unable to protect the public life and health in a most important particular. This power may be exercised by the legislature by demanding practical knowledge of his business on the part of the plumber, or it may be done by requiring inspection and supervision of his work by experts, or by both means combined; and, when such regulations are brought before the courts, the question simply is whether they are really appropriate and reasonable measures for the promotion of the public health and safety, and hence are a valid exercise of the police power, or whether they go further than this, and unreasonably invade the right of the citizens to pursue a lawful business, under the guise of a police regulation."

Observations of similar import in numerous decisions sustaining state statutes and local ordinances regulating the business of plumbing and requiring examination and registration of individuals engaged in this activity are collected and annotated in 36 A.L.R. 1342; 137 A.L.R. 1065; and 22 A.L.R. 2d 816.

Most significant in this regard, of course, is the decision of the Supreme Court of Appeals of Virginia in *Rountree Corp. v. City of Richmond*, 188 Va. 701, 51 S.E. 2d 256. In that case the court sustained the validity of an ordinance of the City of Richmond requiring the examination and registration of plumbers, without regard to any specific provision of the charter of the City of Richmond purporting to authorize such regulation. The Court pointed out during the course of its opinion that there could be "no substantial doubt that a city, under its police power, has the authority to regulate the activity of plumbers." *Rountree Corp. v. City of Richmond*, supra, at 713. (Italics supplied)

Of importance with respect to ordinances regulating electrical contractors is the power conferred upon the governing bodies of the various counties by §15-8 of the Virginia Code to adopt measures to secure and promote the health, safety and general welfare of the local inhabitants. Pertinent in this connection is the language of the Supreme Court of New Jersey in *Becker v. Pickersgill*, 105 N.J.L. 51, 143 Atl. 859, in which an ordinance of the City of Perth Amboy requiring the examination and registration of electricians was sustained. During the course of its opinion, the court observed:

"It is a matter of common knowledge, arising out of experience, that the mechanics of electricity require technical knowledge and skill in order to guard the safety, health, and general welfare of the public against harmful and destructive results, through unskilful or improper installation of electric wires.

"The application and use of electricity for locomotion, heating, lighting, and for other utilities, both public and private, and especially in the installation of the electric wires in public buildings, stores, and private dwellings, are essential factors to be taken into account on the question of the legal (sic) property of a police regulation to the end, to prevent incompetent persons from exercising, without due authorization,
a business or occupation fraught with danger to the public safety, health, and general welfare. It is a matter of general history of the use of electrical power that there is much greater hazard of injury to life, limb, and property, as a result of the use and application of electricity in the hands of the ignorant than there otherwise would have been if only those who are skilled in the work were intrusted with the task.”

To the same effect are the decisions of various jurisdictions which are collected and annotated in 96 A.L.R. 1506.

In the light of the foregoing, it would appear that the authority to enact ordinances requiring examination and registration of plumbing contractors and electrical contractors is referable to the police power of the localities, i.e. the power to adopt reasonable ordinances appropriately designed to secure and promote the health, safety and general welfare of local inhabitants. While the cited cases deal with local ordinances involving the police power of incorporated municipalities, I am aware of no reason why the police power of municipalities should be superior to that of counties with regard to the activities sought to be regulated in this instance. On the whole, therefore, while the question is not entirely free from doubt, I am of the opinion that the County of Henrico is authorized to enact ordinances requiring the examination and registration of plumbing contractors and electrical contractors who are not within the purview of §54-113 of the Virginia Code.


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

This is in reply to your letter of October 30, 1957, in which you request my opinion as to whether or not a person, firm or corporation which furnishes and erects signs and supporting spans comes within the definition of a contractor as found in §54-113 of the Code of Virginia. You state that a firm contemplates bidding on a project to furnish and erect directional signs for the Richmond-Petersburg Turnpike Authority. The project would include erecting spans from which the signs would hang. These spans would consist of concrete foundations on both sides of the thoroughfare; metal uprights and cross pieces overhead spanning the thoroughfare from side to side and the furnishing and attaching of signs.

I am of the opinion that the spans as described in your letter would comprise a structure requiring the use of paint, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead or other metal, or other building material, and, therefore, if the consideration for furnishing and erecting the spans and the signs is $20,000 or more, any person, firm or corporation bidding on the contract would come within the definition of a contractor under the provisions of §54-113 of the Code of Virginia.

I am of the opinion, however, that a firm could contract to furnish directional signs and to hang or attach these signs from spans constructed and erected by another principal contractor with the Richmond-Petersburg Turnpike Authority, and that the mere furnishing and attaching of signs would not require a person, firm or corporation to register under the provisions of Chapter 7 of Title 54 of the Code of Virginia, even though the amount of the contract was $20,000 or more.
CORPORATIONS—Foreign—Transact Business in State—What Constitutes—Sale of Property as Trustee in Isolated Transaction Does Not. (267)

Mayor 27, 1958.

HONORABLE ROBERT S. WAHAB, JR.
Commonwealth's Attorney
Princess Anne County

This is in reply to your letter of May 21, 1958, which reads as follows:

"A question has arisen as to whether a bank chartered under the laws of New York would be considered as 'doing business in the State of Virginia' in the event that the bank would find it necessary to sell property in the State of Virginia under a deed of trust given to secure a loan to a Virginia corporation."

The answer to your question lies in the interpretation of the following language contained in §13.1-102 of the Code of Virginia (1950), which reads as follows:

"No foreign corporation shall transact business in this State until it shall have procured a certificate of authority so to do from the Commission. * * *." (Emphasis added)

The words "transact business" used in this section of the Code appear in the statutes of only a few jurisdictions. Other jurisdictions usually employ the words "do business."

If the foreign corporation referred to in your letter is engaged in the business of acting in the capacity of a trustee under several deeds of trust, or if such corporation is engaged in other business in this State, and if there is evidence of a continuity of act and purpose sufficient to indicate an intention on the part of the foreign corporation to carry on its business in this State, then I am of the opinion that such foreign corporation is "transacting business" in Virginia. See Western Gas Company v. Commonwealth, 147 Va 235.

If, however, the act of the foreign corporation is a single isolated transaction, a new question must be answered. Your attention is directed to the fact that prior to the enactment of Chapter 428 of the Acts of Assembly of 1956, the pertinent section of the Code contained the words "doing business." To transact business has been held to mean that if a foreign corporation does a single act of business in a state, then it must comply with the registration requirements of that jurisdiction. See S. R. Smythe Company v. Fort Worth Glass and Sand Company, 142 S.W. 1157. These cases hold that there is a distinction between "transacting business" and "doing business." They interpret the former to include a single act of a foreign corporation.

The general rule relative to such isolated acts of foreign corporations is contained in §8469 of Fletcher Cyclopedia Corporations, which reads, in part, as follows:

"The authorities are to the effect that where the corporation enters into a single agreement, or engages in some other isolated business act or transaction within a particular state, with no intention to repeat the same or make such state a basis for the conduct of any part of its corporate business, such corporation cannot be said to be doing business or transacting business within the state, within the meaning of the usual statutory provisions regulating the transaction of business by foreign corporations. * * *.”

If such a foreign corporation were to act as trustee under a single deed of trust, an official of such corporation would have to appear in Virginia at the
sale of the property. However, most of the remaining acts necessary to complete
the transaction and transfer the title to the property could be done outside this
State.

The language of §8486 of Fletcher Cyclopedia Corporations is pertinent to
this question and reads, in part, as follows:

"In accordance with the rule heretofore stated that a mere isolated
and casual act or transaction on the part of a foreign corporation
indicating no purpose to continue the ordinary corporate business in
the state does not constitute a doing of business, a foreign corporation
cannot be said to be doing business in a state merely because of an
isolated or casual purchase or acquisition of real property therein,
particularly where the transaction takes place outside the state; or
where the purchase is at a judicial or execution sale in satisfaction of a
judgment procured on an interstate transaction. Nor is a foreign corpora-
tion carrying on business in the state merely by holding property therein
and in doing things necessary to the care and protection of such
property, and to the preservation of the title. Dealings by a foreign
corporation with citizens of other states in reference to property situated
without the state do not constitute doing business in the state, although
the parties meet and draw up in the state the contract embodying their
agreement with respect to such property."

The intention of the Code Commission in revising the laws relative to corpora-
tions is contained in a report printed as House Document No. 5 of the 1956
Session of the General Assembly. On page 81 of this report appears the comment
relative to §13.1-102 of the Code.

"As in the present statute, no effort is made to define the transaction
of business in Virginia since no inclusive definition seems possible. This
section is not intended to change existing rules of law in this regard."

The Supreme Court of Appeals in construing §§1104 and 1105 of the Code
of 1887 (which use the words "doing business") discussed this matter in the
case of Goldberry v. Carter, 100 Va. 438. The language pertinent to this inquiry
is found on pages 440 and 441, and reads as follows:

"The courts of this country have generally, it seems, in construing
statutes similar to ours, held that the object of such statutes is to forbid
not the doing of a single act of business in the State, but the carrying
on of business by a foreign corporation without having complied with
the provisions of the statute."

While this question is not entirely free from doubt, I am of the opinion that,
if the foreign corporation is acting as a trustee under a deed of trust in an
isolated transaction and if there is no evidence that the foreign corporation is
doing other acts in this State, the corporation is not in fact "transacting business"
in Virginia.
COUNTIES, CITIES—TOWNS—Annexation and Changing Boundaries—Town Charter Which Changes Boundaries so as to Take in Additional Territory is Unconstitutional. (78)

October 28, 1957.

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

This is in reply to your letter of October 24, to which is attached a letter to you dated August 12, 1957, from Mr. Jay G. Kauffman, Attorney at Law, Pennington Gap, in which he requests you to submit to this office for an opinion the question whether or not Chapter 199 of the Acts of the General Assembly of 1930 is in violation of section 126 of the Constitution of Virginia.

Upon examination of this Act, I find that it amends the charter of the town of Pennington Gap so as to change the boundaries of the corporate limits of said town in order to take in additional territory.

Section 126 of the Constitution reads as follows:

"The General Assembly shall provide by general laws for the extension and the contraction, from time to time, of the corporate limits of cities and towns; and no special act for such purpose shall be valid."

This section was considered by the Supreme Court of Appeals of Virginia in the case of Town of Narrows v. Giles County, 128 Va. 572, and subsequently considered by the same court in the case of Wood v. Commonwealth, 146 Va. 296.

It will be observed that in the first case cited, the court, commenting upon the amendment to the charter of the town of Narrows which had the effect of annexing additional territory, stated:

"* * * if cities could take in new territory by simply obtaining a 'new charter,' it would furnish an easy method for evading section 126 of the Constitution, which declares that 'The General Assembly shall provide by general laws for the extension and contraction, from time to time, of the corporate limits of cities and towns; and no special act for that purpose shall be valid.' Clearly, the Constitution cannot be thus evaded. * * *." (128 Va. at page 581).

In the latter case, the court made this statement:

"The Constitution of Virginia, section 126, requires the General Assembly to provide by general law for the extension and contraction of city and town limits, and declares that no special act shall be valid. The legislature has complied with this mandate of the Constitution. Chapter 120, Code of Virginia.

"In 1914 the legislature amended the 1908 charter of the town of Narrows (Acts 1914, c. 327) so as to add additional territory and new inhabitants. The act of 1914 was attacked on the ground that it violated section 126 of the Constitution. This court, in Town of Narrows v. Giles County, 128 Va. 572, 105 S.E. 82, held that so much of 'section 1 as embraces the new territory and the new inhabitants thereof is plainly in violation of section 126 of the Constitution, and therefore null and void.'" (146 Va. at page 302).

In the light of these opinions of the Supreme Court of Virginia, I must conclude that Chapter 199 of the Acts of the General Assembly of 1930 is in conflict with section 126 of the Constitution of Virginia.
HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of December 30, 1957, in which you request my opinion as to the interpretation and definition to be given to the word "allocation" as it is used in §15-353 of the Code of Virginia. The first paragraph of that section reads as follows:

"In addition to such other duties as are or may be prescribed by law or directed by the board, the county manager in counties having a population of five hundred or more per square mile shall each year on or before March fifteenth prepare and submit to the board a tentative budget, prepared in accordance with the provisions of law in effect governing the preparation of the county budget and showing in detail the recommendations of the county manager for expenditures on each road and bridge or for other purposes. Prior to May fifteenth, but not thereafter, the board may alter, amend or change any item reported by the county manager, and shall set the rate for local levies of taxation on or before May fifteenth of each year. In the event of the failure of the board to act thereon, the tentative budget as prepared and submitted by the county manager shall be deemed the county budget and be in full force and effect, subject to the provisions of law as to the county budget. After the county budget has become effective, no changes shall be made in the allocations of funds as therein made, unless such change is recommended by the county manager and approved by the board, provided, that in no event shall any change of more than ten per centum be made in any allocation."

I am of the opinion that the word "allocation" as used in the above-quoted section means those funds which have been appropriated or designated for a function or activity of the county but does not apply to specific objects or projects within a function or activity. For instance, if $100,000 were allocated by a county for construction and repair of sewer mains and this allocation was broken down into four projects which cost approximately $25,000, then the county manager, with the approval of the board of supervisors, could change the allocation for sewer mains up to ten per cent, that is $10,000. The county manager, with the approval of the board, however, could eliminate entirely any project or part thereof without violating §15-353 of the Code, and could transfer $25,000 from one project to any of the other three projects, or to a new project of construction or repair of sewer mains. I am of the opinion that §15-353 of the Code does not apply to specific projects within a function or activity of a county, but only to the function or activity as a whole.

HONORABLE ERNEST W. GOODRICH
Commonwealth's Attorney for
Surry County

October 16, 1957.

This is in response to your letter of October 4, 1957, inquiring what a county is required to do to elect to come under the provisions of Title 27, Chapter 2, Article 1, pursuant to Section 27-23 of the Code of Virginia. You further inquire, if election is made pursuant to Section 27-23, can the county contract with towns within the county to furnish fire protection.

Section 27-23 provides that the Article "shall be applicable in any county in which the governing body elects to come under its provisions." I am of the opinion that a duly adopted ordinance of the Board of Supervisors would satisfy the requirements of election set forth in Section 27-23. I am further of the opinion that upon such election a contract may be made with towns in, adjacent to, or near such county for fire protection, pursuant to Section 27-4.

COUNTIES, CITIES, TOWNS—Incorporating Entire County—Effect Upon Existing Towns—Creation of Special Service Districts—Minimum Area for County—Sanitary Districts—Governing Body—General Law May Provide for Elective Group. (232)

HONORABLE JOHN C. WEBB
Member of House of Delegates

April 25, 1958.

This is in reply to your letter of April 15, 1958, in which you enclosed a memorandum from Mr. Don Larson, of the Public Administration Service, in which he presented six questions for consideration by this office. These questions will be discussed in the order set forth by Mr. Larson.

"1. Would it be legally possible, in a charter approved by the General Assembly, for a city of the first class to create service districts for both electoral (electing city council members) and service purposes, if only service charges are used (to pay for services such as water, sewers, and refuse collection)?"

In my opinion, the charter for the proposed city could contain valid provisions with respect to this matter. In this connection, I call attention to Chapter 4 of Title 21 of the Code and Chapter 414 of the Acts of the General Assembly of 1956, which are general laws with respect to the establishment of sanitary districts and city public facilities districts.

"2. If the charter so provided, could debts incurred for such services be made the responsibility of the district residents receiving the service?"

Under Section 117 of the Constitution, authorizing the General Assembly to enact laws for the establishment and government of cities and towns, no special law or provision can be included with respect to the bonded indebtedness of such city. Under Section 127 of the Constitution general laws may be enacted with respect to such financing by a city. Any provision in the city charter in conflict with the general law with respect to this matter would, of course, be invalid.
"3. If such districts were created, could the charter establish elective boards in each to serve as advisory and auxiliary arms of the city council (but with no taxing power)"

In my opinion, the charter could contain such a provision.

"4. If Fairfax County were to incorporate as a city of the first class, what would be the effect upon the four towns within the County? Specifically, would their charters be automatically dissolved?"

I think it would be necessary for the Act which establishes the city, or some other Act, to specifically repeal the charters of the municipal corporations already in existence in the county. Of course, the charter for the new city would necessarily have to contain provisions providing for the assumption by the new city of all the outstanding obligations of the municipalities being dissolved.

"5. Does the last paragraph of Section 110 of the Virginia Constitution modify Section 111? In other words, would a complete form of county government authorized under Section 110 have to conform to the 30 square mile minimum for magisterial districts found in Section 111 of the Constitution?"

In my opinion, the answer to the first question asked in No. 5 is "No"; therefore, the answer to the second question is "Yes". In this connection I might state that no special Act setting up a special form of county government would be valid. Section 110 of the Constitution provides that the forms of county organization and government different from those provided for in that section may be established by general law and then only after submitting the question to the qualified voters of the county for their approval.

"6. Is there anything in the Virginia Constitution to prevent the General Assembly from amending the sanitary district laws to provide elective district councils to serve as agents of the Board of County Supervisors in ordering district affairs?"

The answer to this question is "No", provided, of course, that any such statute is of general application and not a special law for any particular county.

COUNTIES, CITIES, TOWNS—Jurisdiction Over Municipal Airport—Located in County—Vested in County. (266)

HONORABLE FRANK D. HARRIS, Mayor
The Town of South Hill

May 26, 1958.

This is in response to your inquiry of May 23, 1958, as to whether or not the Town of South Hill has police jurisdiction over its municipal airport, which is owned by the town but located about two miles outside the incorporated limits of the town.

Recently this office considered the same question with regard to the Roanoke airport, also owned by the municipality and located in the county. A copy of the opinion to Sheriff Clarke is enclosed, holding that the police jurisdiction over such airport is vested in the county.

Accordingly, I am of the like opinion, in the absence of legislation or town charter provisions, of which I am not advised, that the Town of South Hill does not have police jurisdiction over its airport located in the county.
COUNTIES, CITIES, TOWNS—Parking Authority—Statutory Authority Required to Establish. (64) October 10, 1957.

HONORABLE LAWRENCE H. HOOVER, Member
House of Delegates

This is in reply to your letter of October 8, 1957, in which you requested my opinion relative to the provision of Chapter 41 of the Acts of Assembly in the 1956 Extra Session, which amended the City Charter of the City of Harrisonburg. Your specific inquiries are as follows:

"Please inform me whether or not, in your opinion, municipally owned parking lots are public utilities within the meaning of the amendment referred to. If not, does the City of Harrisonburg, under its existing charter, as amended to date, have power to establish a Municipal Parking Authority which may be charged with the responsibility of administering the City's parking facilities and issuing revenue producing bonds to acquire lands to establish such facilities? If not, what procedure would be necessary to enable the establishment by the city of such a Municipal Parking Authority? I will appreciate your consideration and opinion on these questions."

I am of the opinion that parking lots are not within the generally accepted meaning of the term "public utilities". There is no language in Chapter 41 of the Acts of 1956, Special Session, which would indicate that the General Assembly intended to extend the definition of the term "public utilities" beyond those public service facilities normally supplied by municipal corporations.

In the absence of express statutory authority, I entertain grave doubt as to the power of the City of Harrisonburg to establish a Municipal Parking Authority which may be charged with the responsibility of administering the City's parking facilities and issuing revenue producing bonds to acquire lands to establish such facilities.

In passing upon a similar question presented by the Honorable John C. Webb, of Fairfax, the Honorable J. Lindsay Almond, Jr., then Attorney General, suggested in a letter of June 18, 1956, that the possibility of providing parking facilities for the Town of Fairfax existed by authority of Section 15-6(2) of the Code of Virginia. I am taking the liberty of enclosing a copy of that letter for your consideration.

You, of course, realize that an alternative procedure for the establishment of municipally owned parking facilities lies in the legislative process for amending the City Charter of the City of Harrisonburg to authorize the creation of a Municipal Parking Authority.


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

This is in reply to your letter of December 5, 1957, in which you request my opinion concerning the maximum tax levies which Madison County may fix for certain purposes, and also the maximum amount of money that the County may borrow in view of the assessed valuation and appraised value of real estate in the county.

There is no limit on the maximum amount of the tax levy that Madison County
may levy for all county purposes. Section 22-126 of the Code provides that the tax levy or the portion of the tax levy for school operating purposes shall not exceed $3.00 per $100.00 assessed valuation. Section 22-128 of the Code provides that the tax levy or portion thereof for school capital expenditures and payment of indebtedness for capital outlay shall not exceed $2.50 per $100.00 or assessed valuation. There is no limit to my knowledge found in the laws of Virginia on the amount of the levy or portion thereof for general county operating purposes and capital outlay other than for schools. There is no limit as to the maximum amount of money that Madison County may borrow provided the qualified voters of the county give their approval to the borrowing of any money at a duly held bond referendum.

COUNTIES—Lease of Property—10 Year Lease for Oil and Gas Needs Approval of Court. (274) June 3, 1958.

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

This is in reply to your letter of June 2nd, in which you state that Highland County owns 135 acres of land which was acquired for the purpose of operating a poor farm. You further state:

"The farm is located in an area in the county where an oil and gas company is now trying to lease all of land in the area for gas and oil for a ten year period at an annual rental of fifty cents per acre. Would you kindly advise me if the local governing body has the power under the law to enter into such a rental contract with the oil and gas company."

You have asked my opinion as to whether or not Sections 15-691 and 15-691.1 of the Code are applicable. Section 15-691 relates to the courthouse property and Section 15-691.1 authorizes the board to lease property for the purpose of constructing swimming pools. In my opinion neither of these sections would give the board authority to enter into the proposed contract with the oil company.

In my opinion the proposed lease with the oil company amounts to a sale of an interest in the land. I am of the opinion, therefore, that such a contract could be made under the provisions of Section 15-692 of the Code. Under this section it would be necessary for the circuit court of the county, or the judge thereof in vacation, to ratify and approve the contract.


HONORABLE H. STUART CARTER
Member of the House of Delegates

This is to acknowledge receipt of your letter of December 5 in which you inquire as to whether there is a duty upon the clerks of courts not of record to forward abstracts of conviction to the Division of Motor Vehicles and if so, is such a clerk entitled to a fee for so doing.

Sections 46-414, 46-414.1 and 46-415 of the Code deal with this subject. The
REPORT OF THE ATTORNEY GENERAL

first section referred to imposes the duty not only upon the clerks of the courts of record but upon the clerks of courts not of record to send the abstracts of conviction of persons found guilty of traffic offenses to the Division of Motor Vehicles. The last sentence of this section provides that clerks of courts of record shall receive a fee of fifty cents for this service. I can find no statute for an allowance of such fee to courts not of record. The statement in Section 46-414, "the court when it has no clerk shall forward to the Commissioner" and the requirement in Section 46-414.1 to the effect that every trial justice shall certify to the judge of the court of record that he has complied with Section 46-414, certainly fortifies the position that these sections apply to courts not of record as well as courts of record.

It is my opinion that there is a duty upon the clerks of courts not of record to furnish the Commissioner with abstracts of conviction and judgments for damages resulting from automobile accidents; and they are not entitled to a fee for so doing.

COUNTY AND MUNICIPAL COURTS—Bond of Judges and Officers in Cities—State Protected Although Bond Payable to City. (18)

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

I acknowledge receipt of your letter of July 23, 1957, in which you refer to §§16.1-15 and 16.1-16 of the Code relating to bonds of the officers of courts not of record. You point out that it is provided that bonds entered into by such officers of a municipal court or of a juvenile and domestic relations court of a city may be made payable to such city and filed with the treasurer or other accounting officer thereof.

You have requested my opinion as to whether such bonds made payable to a city would protect the funds belonging to the Commonwealth coming into the custody of such officers.

The sections of the Code under consideration provide that all such bonds "shall be conditioned for the faithful performance of the duties of the principal." Manifestly, it is the duty of such officers to properly account for all public funds coming into their custody which, in my opinion, would include funds payable to the State as well as the city.

I presume that you satisfy yourself that all such bonds contain the statutory condition.

COUNTY AND MUNICIPAL COURTS—Bonds of Judges, Clerks, and Employers—Statutory Requirements—Minimum Amounts. (67)

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of October 9, 1957, in which you request my opinion on three questions relating to bonds of judges, clerks and employees of courts not of record. Your first question is as follows:

"Under the former law, Section 16-58 of the Code, the trial justice, substitute trial justice, clerk and substitute clerk were required to give bond of not less than $500.00. Under the new law, Sections 16.1-15
and 16.1-16 of the Code, the judges, associate judges, substitute judges, clerks, deputy clerks or other officers or employees of a court not of record who handle funds belonging to or in custody of the courts are required to give bond for not less than $2,000.00. Most of the judges, clerks, etc., gave bond for the term of their appointments at the time of qualification, and these bonds were in force when the new law became effective. In those instances where the bonds of the judges, clerks, etc., were less than the bonds required under the new law should their bonds be increased before the expiration of their respective terms to conform to the new law, or should their bonds continue until the expiration of their terms and new bonds then executed?"

Section 16.1-7 of the Code provides, in part, as follows:

"Every judge or justice and every associate, assistant and substitute judge or justice of a court not of record in office on July 1, 1956, shall continue in office as the judge, associate judge, assistant or substitute judge of such court, under its designation as a county court, a juvenile and domestic relations court, or a municipal court until the expiration of the term for which he was appointed or elected, * * *.*"

As you can see from the above-quoted provisions, the judge or justice shall continue in office under the new system of courts not of record. Section 16.1-15 of the Code providing for the bond of the judge reads, in part, as follows:

"Before entering upon the performance of his duties the judge, associate judge and substitute judge of a court not of record shall enter into bond before the clerk of a circuit or corporation court to which appeals from his court lie."

I am of the opinion that this provision requires a new bond when the judge commences a new term, but so long as he continues to fill the term for which he was bonded prior to July 1, 1956, the bond given by him under the old provisions of the Code is valid and sufficient. Whenever the term of the judge of a court of record expires and he is rebonded or a new judge is bonded, then, before entering into the performance of his duties, the judge shall give a bond as required under §16.1-15 of the Code.

Your second question reads as follows:

"When two or more counties or a county and a city unite in employing a single judge, in accordance with Chapter 4 of Title 16.1, should the judge, clerk or other employees give separate bonds for each court for not less than the minimum amount required, or would one bond for the minimum amount covering all courts comply with the statutes?"

I am of the opinion that, under the provisions of §16.1-15 of the Code of Virginia, the judge shall provide a separate bond for each county or city or town, as that section provides, in part, as follows:

"In each county the bond shall be in a penalty and with corporate surety approved by the judge of such appellate court, and in each city and town the bond shall be in a penalty and with corporate surety approved by the governing body thereof."

Your third question reads as follows:

"In those instances where a judge serves as judge of the county
court and as judge of the juvenile court is one bond required, or should separate bonds be given, each for the minimum amount under the statutes?"

I am of the opinion that if a judge in the same county serves as judge of the county court and also as judge of the juvenile and domestic relations court, he may have both positions covered by one bond, provided, however, that the minimum amount of the bond of $2,000 is made separate for each court. In other words, there may be one bond, but there should be a specific provision that the bond is in the penalty of at least $2,000 for the faithful performance of the duties by the judge for each court.

COUNTY AND MUNICIPAL COURTS—Bonds of Judges, Clerks, and Employees—Statutory Requirements—One Bond to Cover Duties With More Than One Court. (153)

January 14, 1958.

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of January 3, 1958, in which you request an opinion relating to the bond required for a judge who serves as judge of both the county court and the juvenile and domestic relations court. You refer to an opinion this office rendered on October 15, 1957, in which the Honorable Kenneth C. Patty ruled that he was of opinion that, if a judge in the same county serves as judge of the county court and also as judge of the juvenile and domestic relations court, he may have both positions covered by one bond provided, however, that the minimum amount of the bond of $2,000 is made separate for each court. This opinion was rendered in construing §§16.1-15 and 16-1-16 of the Code of Virginia.

I am of the opinion that this opinion is correct. However, in your letter of January 3, 1958, you point out that where one person is appointed judge of the county court and the juvenile and domestic relations court, he normally maintains only one system of accounting for purposes of recording the funds which he receives for both courts, and one bank account to which he deposits the funds for which he is accountable for these courts. You further state that, from an auditing standpoint, it is desirable that only one system of accounts and one bank account be maintained if the person serves as judge of both courts.

In view of this accepted and desired practice, you request my opinion as to whether a single corporate bond may be given by a judge who serves as judge of both the county court and the juvenile and domestic relations court, with the bond showing a penalty of not less than $4,000 with the provision stated in the body of the bond that the bond is to cover the principal in his capacity as judge of the county court and as judge of the juvenile and domestic relations court without there being a specification in the body of the bond of the specific amount of the penalty which will be applicable to each court.

In view of the accepted and desired practice of a person who is judge of both courts maintaining one system of accounts and one bank account, which practice this office was not aware of when the opinion of October 15, 1957 was rendered, I am of the opinion that a single corporate bond may be given with the bond showing a penalty of not less than $4,000, with the provision stated in the body of the bond that it is to cover the principal in his capacity as judge of each court.

I am of the further opinion that the same principle should apply to clerks and other employees referred to in §16.1-16 of the Code who have been appointed by the judge who presides over both the county court and the juvenile and domestic relations court.
HONORABLE RUSSELL W. YOWELL, Judge
Juvenile and Domestic Relations Court

January 24, 1958.

This will reply to your letter of January 10, 1958, in which you forwarded to this office a form copy of a petition and warrant used in proceedings for the commitment of drug addicts to State hospitals and private institutions, together with a form copy of a warrant used in desertion and non-support proceedings. You inquire whether or not the Clerk of the County Court may sign such papers at the places designated for the signature of the Judge of the Court.

The procedure for the commitment of persons addicted to the use of drugs is established by Section 37-154 et seq. of the Code of Virginia (1950). Pursuant to these statutes, drug addicts are committed to State hospitals by commissions "in the same manner and under the same process as is provided by law" for the commitment of mentally ill persons. Commitment of individuals who are mentally ill is accomplished under the provisions of Section 37-61 et seq. of the Virginia Code, which authorize "any trial justice" to issue the warrant therein prescribed. Similarly, the commitment of drug addicts to private hospitals or sanatoria is effected in accordance with the provisions of Section 37-157 et seq., which authorize trial justices "appointed under chapter 2 of Title 16" to issue the designated warrant.

When Title 16 of the Virginia Code was repealed and new Title 16.1 enacted, the trial justice courts of the various counties of the Commonwealth were designated county courts, and the former trial justices of the counties were denominated judges of the county courts. With respect to the powers and duties of the clerks of county courts, Section 16.1-44 of the Virginia Code prescribes:

"The clerk shall be a conservator of the peace within the territory for which the court has jurisdiction, and may within such jurisdiction issue warrants and processes, original, mesne and final, both civil and criminal, and issue subpoenas for witnesses, writs of fieri facias and writs of possession, and abstracts of judgments. He may take affidavits and administer oaths and affirmations, take and certify depositions in the same manner as a notary public, take acknowledgements to deeds or other writings for purposes of recordation, and exercise such other powers and perform such other duties as are conferred or imposed upon him by law. Such clerk shall keep the docket and accounts of the court and shall discharge such other duties as may be prescribed by the judge." (Italics supplied).

In light of the above quoted language, I am of the opinion that the clerk of a county court would be authorized to sign the petition and warrant used in proceedings for the commitment of drug addicts, indicating that his signature is that of the clerk of the court. In this connection, however, permit me to call your attention to the provisions of Sections 37-67 and 37-86.2 of the Virginia Code. The former statute requires the State Hospital Board to prescribe forms to be utilized in commitment proceedings and declares that such forms shall be the sole legal forms used in commitments and admissions; the latter statute requires the superintendent of the hospital or colony to which a person has been committed to examine the commitment papers and receive the patient in question into the hospital if the commitment papers are found to be in conformity with law, or return the papers for correction or amendment if not in conformity with law. As the forms under consideration indicate, it is contemplated that the judge or trial justice will sign at the designated places, and I believe it would be better procedure for the judge, rather than the clerk, to do so.
As the Madison County Court is also the Juvenile and Domestic Relations Court of Madison County, I assume that the Clerk of the County Court is also the Clerk of the Juvenile and Domestic Relations Court. With respect to the powers and duties of the clerks of juvenile and domestic relations courts, Section 16.1-146 in pertinent part provides:

"The clerk of the juvenile court shall be a 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. * * *" (Italics supplied).

I am of the opinion that this provision of the Virginia Code authorizes the Clerk of the County Court in his capacity as Clerk of the Juvenile and Domestic Relations Court to execute warrants employed in desertion and non-support proceedings.

COUNTY AND MUNICIPAL COURTS—Check Issued by, Lost or Stolen—When Duplicate May Be Issued. (108)

HONORABLE RUTH O. WILLIAMS, Judge
County Court, Patrick County

November 29, 1957.

This is in reply to your letter of November 19, 1957, in which you state that on September 25, 1957, you, in your official capacity, issued a check in the amount of $100.00 payable to the order of a named resident of Winston Salem, North Carolina as refund on a cash bond posted by this person. Two weeks after September 25 you were advised by this person that he had not received the check. You state that you immediately requested the bank on which the check was drawn to stop payment on the check. Two months has elapsed since the date of the issuance of the check and the check has not been delivered to this person, the payee, nor has it been returned undelivered to you, nor has it been presented to the bank for payment. You request my opinion as to whether you may issue a duplicate check at this time, and whether you will incur any liability in the event the first check should at some future date be presented to the bank for payment.

If an order check is lost or stolen, a purchaser of the check, even though he takes it for value and in good faith, does not acquire title to it, since he necessarily claims under a forged endorsement. The loser of the check or the payee of the check, therefore, still has a valid claim against the drawer of the check and can demand payment in the amount of the check. The very fact that an unpaid check is outstanding and unaccounted for presents an element of danger, for if the payee has endorsed the check in blank there can be a holder in due course.

I am of the opinion that if you are completely satisfied that the payee has never received the check and has not endorsed it, then you can, without incurring any personal liability, issue a duplicate check to this payee. If there is a chance that the payee has endorsed the check and it has then been stolen or lost, then before issuing a duplicate check you should require the payee to give you proper indemnity.
COUNTY AND MUNICIPAL COURTS—Civil Process—Reissuance of If No Service—Mandatory Requirement—No Time Limit. (272)

Honorable J. Gordon Bennett
Auditor of Public Accounts

You have orally requested my views with respect to Sections 16.1-115 and 14-133 of the Code. You call attention to the last sentence of Section 14-133(1) as amended by Chapter 555, Acts of 1958. The last sentence of this amendment is as follows:

"When no service of process is had on a defendant named in any civil process other than a notice of motion for judgment, such process may be re-issued once by the court or clerk at the court's direction by changing the return day of such process, for which service by the court or clerk there shall be no charge."

(1) You wish to know whether I feel that the county court is required to re-issue such warrant if requested to do so by the plaintiff.
(2) If so, may the county court impose a limitation of time during which he will re-issue the process.
(3) You state that such unserved warrants will be forwarded to the Circuit Court's Clerk's office after six months, pursuant to Section 16.1-115.

I shall discuss these points in reverse of the above order.

With respect to (3) I call attention to the fact that Section 16.1-115 is, in part, as follows:

"All papers connected with any civil action or proceeding in a court not of record, except those in actions or proceedings (1) in which no service of process is had * * *, shall be disposed of as follows:"

It is clear from the above that a warrant or other process that has been returned by the officer to the county court with a notation or return to the effect that it has not been served, must be preserved and kept in the county court and may not be transmitted to the clerk of the circuit court.

(2) The statutes do not fix any time limit. The requirement with respect to re-issuance of these processes is not in any way restricted or limited by the lapse of time.

(1) I can see no escape from the conclusion that the re-issuance of such a warrant or process one time, free of charge, is a mandatory duty. Any court refusing to re-issue the process would be acting in deprivation of a plaintiff's rights—that is, the court would by such refusal deny the plaintiff of a right given him by the statute. The court is under the same obligation to re-issue or cause to be re-issued the process that existed in connection with the original issuance of the process.

You call attention to the fact that Section 14-133 provides "such process may be re-issued, etc." You suggest, and state that some county judges also subscribe to the view, that whether or not the process shall be re-issued lies within the discretion of the court—that is, the court can refuse to re-issue the process. With this view I am compelled to disagree.

The word "may" instead of "shall" was used in this instance for the obvious reason that the General Assembly did not intend to require the re-issuance of the process unless the plaintiff so requested. In other words, it is not intended by this statute that a second process be issued automatically in every case where the original process is returned without service having been made. However, there is a clear duty on the court to issue the process, free of further charge, if the
plaintiff requests him to do so. The court is charged with the duty of issuing all processes to which a citizen is entitled.

In this connection I quote the following language from the case of *Pearson v. Supervisors*, 91 Virginia, 322, at page 333, involving the duties of a constable under an election law where in prescribing his duties the word "may" was used:

"Let us examine somewhat more in detail the duties of (such) a constable. He is an officer charged with the duty to the public of the gravest and most delicate nature, a duty in performance of which the Commonwealth, and not alone the individual voter, who seeks his assistance in the preparation of his ballot, is vitally interested; for nothing more nearly concerns the Commonwealth than that each of her citizens shall cast an intelligent ballot, which, when cast, shall be honestly counted. Under such circumstances, we may declare with confidence that the word 'may,' as used in the fifteenth section of this statute, is always construed as mandatory, and not as merely permissive or directory. Without doubt the primary meaning of 'may' is permissive or directory, while the primary meaning of 'shall' is mandatory or imperative; yet courts, in order to accomplish what to them appears to be the leading purpose of the legislature, have never hesitated in a proper case to hold 'may' to be mandatory and 'shall' to be merely directory. These rules of construction are too elementary and well established to need any citation of authority in support of them. Nothing is better established than that where a power or duty is conferred upon an official by the use of the word 'may,' and the public are concerned in the due performance of that duty, the word 'may' will be deemed to be mandatory, and the officer can be compelled to perform it. Such being the case, it is the duty of the special constable to render to him who is blind, or unable by defective education to read, every assistance asked for and required by the elector to aid him in preparing his ballot."

---

COUNTY AND MUNICIPAL COURTS—Fees—Effect of Statute Providing Blanket Fee—Amount in Tax Cases, State and County. (300)

June 27, 1958.

HONORABLE E. J. SUTHERLAND
County Judge of Dickerson County

I acknowledge your letter of June 20th in which you present the following questions:

"1. Does the Act approved March 29, 1958 (Acts—1958, page 822) constitute the whole of the contents of Sec. 14-133, or does it merely amend Sub-Sec. 1 of Sec. 14-133?
"2. If it only amends Sub-Sec. 1, what becomes of the other 16 sub-sections as enacted in 1956?
"3. When and by whom are the costs in tax cases collected?"

The amendment to Section 14-133 of the Code as contained in Chapter 555 of the Acts of the General Assembly of 1958 amends and supercedes the entire section. Section 14-133 as contained in the Code prior to this amendment is no longer in effect.

In view of this conclusion, no reply is necessary to your question No. 2.

With respect to your question No. 3, I am enclosing a copy of an opinion to the Honorable J. Gordon Bennett, dated July 10, 1956 and published in the Attorney
General Reports for 1956-57 at page 75. Under this opinion no fees are allowed in connection with suits for the recovery of taxes due the State except the 25-cent filing and indexing fees which are payable to the Clerk of the Circuit Court.

Where suit is brought for the recovery of county or municipal taxes in your court, the fees payable to the county court should be collected from the plaintiff as in all other cases. Such fees would be included as a part of the costs in any judgment that might be entered.

COUNTY AND MUNICIPAL COURTS—Fees—Notice of Motion Not Served—Serving Officer Returns Fee to Plaintiff. (258)

Honorable J. Gordon Bennett
Auditor of Public Accounts

This will reply to your letter of May 14, in which you call my attention to the provisions of Section 14-133 of the Virginia Code, as amended by Senate Bill 98 which was enacted during the recent session of the General Assembly of Virginia and becomes effective June 27, 1958. In connection with the above mentioned statute, you present the following situation and inquire:

"I have received an inquiry from Judge William P. Hay, Jr., of Prince Edward County Court, relative to the disposition of the $3.00 court fee which would be collected in a notice of motion filed through the court for service by the sheriff in the case where the sheriff was unable to obtain service on the notice of motion.

* * * *

"I would appreciate it if you would review (Senate Bill 98) and give me your opinion as to whether the court would be required to return the $3.00 court fee paid into the court at the time a notice of motion was filed with the court for service by the sheriff. The language seems to be reasonably clear that in the event of the failure to obtain service on a notice of motion filed directly with the sheriff that the sheriff would be required to return the $3.00 court fee to the plaintiff. It is not clear to me whether the court, under similar circumstances, would be required to return the $3.00 fee."

Section 14-133 of the Virginia Code, as recently amended, in pertinent part provides:

"Fees in civil cases for services performed by the judges or clerks of county courts, municipal courts and police justice courts, or by justices of the peace in the event any such services are performed by such justices in civil cases, shall be as follows, and, unless otherwise provided, shall be included in the taxed costs and shall not be refundable, except in cases of error or as herein provided:

"(1) For all court and justice of the peace services in each distress, detinue, interrogatory summons, unlawful detainer, civil warrant, notice of motion, garnishment, attachment issued, or other civil proceeding, $3.00 unless otherwise provided in this section, which shall include the fee prescribed by Sec. 16.1-115.

"The judge or clerk shall collect the foregoing fee at the time of issuing process. Any justice of the peace or other issuing officer shall collect the foregoing fee at the time of issuing process. He may deduct therefrom a justice of the peace (or other issuing officer) fee of $1.25
for his services in the case. He shall remit the remainder promptly to the
court to which such process is returnable, or to its clerk. Any sheriff,
city sergeant, or other officer serving process shall collect the foregoing
court fee before serving any notice of motion of judgment, which fee
he shall remit on or before the return day of such motion to the court
to which such motion is returnable, or to its clerk, except that no fee
shall be collected in tax cases until after process has been served. When
no service of process is had as to any defendant served by notice of
motion for judgment, the officer serving process shall return such notice
of motion and the court fee collected by him to the plaintiff or his
counsel. The foregoing court fee shall not include the service fee of any
sheriff, city sergeant, or other officer serving process, but the person
issuing process shall accept and forward any such service fees when
tendered at the time of issuing process. When no service of process it
had on a defendant named in any civil process other than a notice of
motion for judgment, such process may be reissued once by the court
or clerk at the court's direction by changing the return day of such
process, for which service by the court or clerk there shall be no
charge." (Italics supplied)

Requisite to a full understanding of the provisions of the above quoted statute,
especially those relating to the disposition of fees collected in connection with the
serving of a notice of motion for judgment, are Sections 16.1-81 and 16.1-82 of
the Code of Virginia (1950) as amended. These latter statutes—which became
operative on July 1, 1956, the effective date of new Title 16.1 of the Virginia
Code—respectively prescribed:

"A civil action in a court not of record may be brought by motion
for judgment. Such motion shall be in writing, signed by the plaintiff or
his attorney, and shall contain a caption setting forth the name of the
court and the title of the action, which shall include the names of all
parties and the address of each defendant. It shall state the facts on which
the plaintiff relies, and shall be sufficient if it clearly informs the defend-
ant or defendants of the true nature of the claim asserted. The motion
shall notify the defendant or defendants of the day on which such motion
shall be made, which day shall not be more than thirty days from the date
of service of the motion.

"The plaintiff shall deliver to the officer or other person serving the
motion an original motion for judgment and as many copies as there
are defendants upon whom it is to be served. Service of such motion
shall be as provided in chapter 4 (Sec. 8-43 et seq.) of Title 8,
but the motion must be served not less than five days before the return
day. Returns shall be made on the original motion for judgement and
shall show when, where, how and upon whom service was made. The
motion or motions with the returns thereon shall be delivered to the
court prior to the return day thereof, but if not so delivered may, within
the discretion of the judge of the court, be delivered before the court
convenes on the return day. The motion for judgment shall be heard
and disposed of by the court in the same manner as if it were a civil
warrant. Except as otherwise provided herein, procedure upon such
motion for judgment shall conform as nearly as practicable to the
procedure in motions for judgment prescribed by Rules of Court for
civil actions in courts of record." (Italics supplied).

I believe it is manifest from the language of Sections 16.1-81 and 16.1-82
italicized above that—in those instances in which a civil action is to be brought
in a court not of record by means of a motion for judgment—the original motion
and as many copies thereof as there are defendants to be served should be delivered by the plaintiff to the officer or other person serving the motion, rather than filed in the court not of record. The original motion, with the returns endorsed thereon, are subsequently delivered to the court by the officer or other person serving process. No provision is made for the filing by a plaintiff of a motion for judgment in a court not of record or the issuance of process thereon by the court or its clerk.

The special provisions of Section 14-133 with respect to the disposition of fees collected in connection with the serving of a notice of motion for judgment are clarified when viewed against this statutory background. The second paragraph of Section 14-133(1) requires the sheriff, city sergeant or other officer serving process (not the court or clerk issuing process) to collect the prescribed court fee before serving any notice of motion for judgment. When no service of process can be realized upon any defendant, the officer serving process is required to return the court fee to the plaintiff or his counsel. No provision is made for the judge of a court not of record, or the clerk thereof, or any officer issuing process to return the court fee to the plaintiff or his counsel if no service of the notice of motion for judgment can be had. Presumably, this is so because the statutes in question do not contemplate that the prescribed court fee will ever be in the hands of the court or its clerk until such fee is forwarded to the court by the sheriff, sergeant or other officer serving the notice of motion for judgment, after service has been made. The terminal provision of the second paragraph of Section 14-133(1)—which provides for one reissuance, without additional charge to the plaintiff, of any civil process other than a notice of motion for judgment—is, I believe, consistent with this interpretation of the statutes under consideration.

So far as the disposition of any court fees which may improperly have been paid to a court not of record in connection with an action brought by motion for judgment, I am constrained to believe that the payment of such fee to the court not of record may be considered erroneous and that such fee may properly be refunded in accordance with the exception specified in the initial paragraph of Section 14-133 of the Virginia Code.

COUNTY AND MUNICIPAL COURTS—Fees—Civil Cases Instituted by County. (133)

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for Wise County

December 20, 1957.

This is in reply to your letter of December 17, 1957, in which you state that Wise County has instituted a number of tax suits in the County Court of Wise County. You request my opinion as to whether or not the County is obligated to pay all the usual fees prescribed by Title 14 for civil cases instituted in a county court for these cases, or is the 25¢ fee which is required in cases on behalf of the Commonwealth sufficient.

Section 14-98 of the Code of Virginia provides as follows:

"No clerk, sheriff, sergeant or other officer shall receive payment out of the State treasury for any services rendered in cases of the Commonwealth, except when it is allowed by this or some other chapter."

This section of the Code, above quoted, is the statutory provision which allows the Commonwealth to institute a suit in a county court and only pay a 25¢ fee, which 25¢ fee eventually goes to the clerk of the circuit court, who is a fee officer
and who is entitled to this fee for filing the papers of the case after it has been finally decided in the county court. I know of no similar statutory provision which relieves a county of the payment of fees when it brings a case in the county court, and, therefore, I am of the opinion that the County when maintaining a tax suit in the County Court of Wise is obligated to pay all the fees prescribed by Title 14 of the Code of Virginia for civil cases when they are instituted in a county court.

COUNTY AND MUNICIPAL COURTS—Judges—Hold Office Until Their Successor Qualifies—Time Served While Holding Over Counts for Retirement. (260)

HONORABLE DANIEL WEYMOUTH, Judge
Twelfth Judicial Circuit of Virginia

This is in reply to your letter of May 17, 1958, in which you state that two county court judges in your circuit plan to retire on September 1, 1958. You state that one is eligible for retirement at present and the other will reach retirement age in August, 1958. The present terms of both of these county court judges expire on July 1, 1958. You request my opinion as to whether or not these judges could continue to hold office, perform their duties and receive compensation until they retire on September 1, 1958, without their being appointed to a new term of office to commence on July 1, 1958.

Section 33 of the Constitution of Virginia, as you point out, provides that all officers elected or appointed shall continue to discharge the duties of their offices after the terms of their offices have expired until their successors have qualified.

I am of the opinion that judges of county courts come within the provisions of this section of our Constitution and, therefore, if no appointment is made on July 1, and such appointment is made at a later date, these two judges would continue to hold office and perform the duties of their office and receive compensation until such time as their successors qualify.

In the case of Chadduck v. Burke, 103 Va. 694, which holding was reaffirmed in Owens v. Reynolds, 172 Va. 304, our Supreme Court of Appeals held:

"* * * The period between the expiration of an incumbent's term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed statutory period. * * *"

I am of the further opinion that in the time that these two judges are serving between July 1, 1958 and the time that their successors qualify, they may give notice to the Comptroller, in writing, of their intention to retire on September 1, 1958, under the provisions of Chapter 2.2 of Title 51 of the Code of Virginia. Of course, this notice of retirement and the date of retirement must occur before their successor qualifies as judge of the county court.

COUNTY AND MUNICIPAL COURTS—Summons on Interrogators—Issuance by Judge or Clerk Under §8-320. (169)

HONORABLE JOHN W. SNEAD, Judge
County Court of Chesterfield County

This is in reply to your letter of January 22, 1958, in which you request my opinion as to whether the county court or the clerk thereof has authority to issue
summons on interrogatories provided for under §8-320 of the Code of Virginia. Section 16.1-27 of the Code of Virginia provides as follows:

"Except as otherwise provided by general law or by municipal charter, a judge of a court not of record may, within the scope of his general jurisdiction within the area which his court serves, issue warrants, summons and subpoenas, including subpoenas duces tecum or other process, in civil and criminal cases, to be returned before his court, and may also issue fugitive warrants and conduct proceedings thereon in accordance with the provisions of §§19-51 to 19-56."

I am of the opinion that this section of the Code confers authority upon you as Judge of the County Court of Chesterfield County to issue summons provided for under §8-320 of the Code, as this summons is a process in a civil case.

Section 16.1-44 of the Code of Virginia reads as follows:

"The clerk shall be a conservator of the peace within the territory for which the court has jurisdiction, and may within such jurisdiction issue warrants and processes, original, mesne and final, both civil and criminal, and issue subpoenas for witnesses, writs of fieri facias and writs of possession, and abstracts of judgments. He may take affidavits and administer oaths and affirmations, take and certify depositions in the same manner as a notary public, take acknowledgments to deeds or other writings for purposes of recordation, and exercise such other powers and perform such other duties as are conferred or imposed upon him by law. Such clerk shall keep the docket and accounts of the court and shall discharge such other duties as may be prescribed by the judge."

This section, in my opinion, constitutes sufficient authority for the clerk of the county court to issue the summons provided for in §8-320 of the Code.

COUNTY AND MUNICIPAL COURTS—Term of Office of County Judge—Change from Trial Justice to County Court Did Not Affect. (296)

June 26, 1958.

HONORABLE E. J. SUTHERLAND
County Judge of Dickenson County

This is in reply to your letter of June 20, in which you request an opinion concerning the dates of commencement and termination of your current term of office. You advise that you were appointed Trial Justice of Dickenson County, for a term of four years, in December, 1949, and reappointed for like terms in 1953 and 1957. Calling my attention to the enactment of new Title 16.1 of the Virginia Code, which law became operative on July 1, 1956, and effected a fundamental reorganization of the various courts not of record in Virginia, you inquire whether or not your current term of office should be deemed to have an effective commencement date of July 1.

Pertinent in connection with the question you present are Sections 16.1-7 and 16.1-37 of the Code of Virginia (1950) as amended, which statutes respectively prescribe:

"Sec. 16.1-7. Every judge or justice and every associate, assistant and substitute judge or justice of a court not of record in office on July 1, 1956, shall continue in office as the judge, associate judge, assistant or substitute judge of such court under its designation as a
report of the attorney general

county court, a juvenile and domestic relations court, or a municipal court until the expiration of the term for which he was appointed or elected, and 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:

“(1) In counties each such judge, associate judge or substitute judge shall be appointed for a term of four years by the judge or judges of the courts of record having jurisdiction within the area served by the court. * * *” (Italics supplied).

“Sec. 16.1-37. The trial justice court in each county on July 1, 1956, shall continue as the county court of such county, with territorial jurisdiction over such county and over any city within the county for which a municipal court with general civil and criminal jurisdiction has not been established. The trial justice, the associate trial justice, if any, and the substitute trial justice in office on that day shall continue in office as the judge, associate judge or substitute judge of the county court until the expiration of the term for which he was appointed. The clerk, deputy clerks and clerical assistants of such court on that day shall likewise continue in like positions with the county court.” (Italics supplied).

I think it is manifest that the effect of the above quoted statutes is to continue in office, under the new designation of judge of the county court, every trial justice who was in office on July 1, 1956. Each such trial justice is continued in office until the expiration of the term for which he was appointed, and, upon the expiration of that term and each successive term thereafter, a successor is to be appointed for a term of four years, effective when the appointment is made, in the manner prescribed in Section 16.1-7 of the Virginia Code.

From your communication, it appears that you were in office, as Trial Justice of Dickenson County, on July 1, 1956, pursuant to your appointment to that office for a term of four years beginning December, 1953. By virtue of the statutes in question, you were continued in office after July 1, 1956, as Judge of the County Court of Dickenson County, until the expiration of the four year term for which you were appointed in December, 1953, and which you were serving on July 1, 1956, when new Title 16.1 became effective. It was only upon the date of expiration of that term, i.e., December, 1957, that a successor could be appointed, and when you were reappointed in December, 1957, such appointment was for a term of four years, effective as of the date upon which the appointment was made.

COURTS—Hustings Courts Has All Statutory Powers Conferred Upon Corporation Courts—Jail and Court Facilities in Roanoke. (106)

HONORABLE C. E. CUDDY
Commonwealth's Attorney of the City of Roanoke

November 26, 1957.

This will reply to your letter of November 19, 1957, in which you present the following question:

"Does the Judge of the Hustings Court for the City of Roanoke, Virginia have power and authority to order or mandamus the Council of the City of Roanoke to provide proper courtroom facilities and adequate jail facilities when the present accommodations are wholly insufficient for the work of the Court or incarceration of prisoners in the City of Roanoke?"
Pertinent to your inquiry are certain of the provisions of Section 15-693.1, Code of Virginia (1950) and Section 53-129, Code of Virginia (1950), which respectively prescribe:

“Sec. 15-693.1. When it shall appear to the circuit court of any county or the corporation court of any city, from the report of persons appointed to examine the courthouse, or otherwise, that the courthouse of such county or city is insecure or out of repair, or otherwise insufficient, such court shall award a rule, in the name and on behalf of the Commonwealth against the supervisors of the county, or the members of the council of the city, as the case may be, to show cause why a peremptory mandamus should not issue, commanding them to cause the courthouse of such county or city to be made secure, or put in good repair, or rendered otherwise sufficient, as the case may be, and to proceed as in other cases of mandamus, to cause the necessary work to be done.” (Italics supplied).

* * * *

“Sec. 53-129. When it shall appear to the circuit court of any county or the corporation court of any city that there is no jail therein, or when it appears to such court, from the report of persons appointed to examine the jail or otherwise, that the jail of such county or city is insecure or out of repair, or otherwise insufficient, it shall be the duty of such court to award a rule, in the name and on behalf of the Commonwealth against the governing body of the county, or the governing body of the city, as the case may be, to show cause why a peremptory mandamus should not issue, commanding them to erect a jail for the county or city, or to cause the jail of such county or city to be made secure, or put in good repair, or rendered otherwise sufficient, as the case may be, and to proceed as in other cases of mandamus, to cause the necessary work to be done”. (Italics supplied).

It is apparent from the foregoing that the “corporation court” of any city is authorized to issue mandamus for the purposes specified in your communication; thus, the critical inquiry presented in the instant situation is whether or not the Hustings Court of the City of Roanoke constitutes a “corporation court” within the purview of the above quoted statutes.

Initially significant in this connection are the provisions of Sections 17-135 and 17-136 of the Code of Virginia (1950), as amended. The former statute declares Roanoke to be a city of the first class for “the purpose of a judicial system”, while the latter statute in part provides:

“The corporation or hustings courts established and existing the day before this Code takes effect in each of the above-named cities of the first class, are continued with the same name under which they have been previously known, and shall be taken and deemed to be the corporation courts required by the Constitution to be established in such cities.

“The corporation or hustings court of the city of Roanoke, by whatever name herefore known or called, shall be hereafter named and called the Hustings Court of the city of Roanoke.” (Italics supplied).

In substantially identical language, the provisions of the initial paragraph of Section 17-136 first appeared in Chapter 433 of the Acts of Assembly (1902-3-4) and carried into effect the provisions of Section 98 of the Constitution of Virginia (1902) which, prior to its amendment in 1928, required each city of the first
class to have a corporation court. The language of the second paragraph of Section 17-136 was first enacted in Chapters 125 and 344 of the Acts of Assembly (1926). It is thus manifest that the corporation or hustings court of Roanoke has constituted a "corporation court", for the purposes of the judicial system of the Commonwealth, since at least 1904 and that such court has been designated the Hustings Court of the City of Roanoke since 1926 and so exists today.

Further in this connection, Sections 1-13 and 1-13.4 of the Virginia Code prescribe:

"Sec. 1-13. Rules of construction.—In the construction of this Code and of all statutes, the rules shall be observed as set forth in the following sections, unless the construction would be inconsistent with the manifest intention of the General Assembly."

"Sec. 1-13.4. Corporation court.—The words 'corporation court' shall be construed to embrace Hustings courts, and as to the city of Richmond, they shall refer to the Hustings Court and Hustings Court Part Two of the city of Richmond, unless otherwise stated."

Application of the above quoted rules of construction to the language of Sections 15-693.1 and 53-129 of the Virginia Code compels the conclusion that the Hustings Court of the City of Roanoke constitutes a corporation court within the purview of these statutes, and, in light of what has been said above, I am of the opinion that this construction is in no way inconsistent with the manifest intention of the General Assembly. It follows, therefore, that the Hustings Court of the City of Roanoke is authorized to issue mandamus for the purposes prescribed in Sections 15-693.1 and 53-129 of the Virginia Code.

——-

CRIMINAL LAW—Lewd and Lascivious Cohabitation—Couple With a Mensa Et Thoro Divorce Not Guilty of. (176)

HONORABLE GLYN R. PHILLIPS
Commonwealth's Attorney for Dickenson County

February 11, 1958.

This is in response to your letter of February 7, 1958, making the following inquiry:

"If after the granting of an a mensa et thoro divorce and before a merger into a divorce a vinculo matrimoni or before the filing of a joint application or petition to revoke the decree as provided by Section 20-120, Code of Virginia, 1950, the parties having the a mensa et thoro divorce resume living together in the same house as husband and wife, are they guilty of lewd and lascivious cohabitation as set forth in Section 18-84, Code of Virginia, 1950? If not guilty of violating this Section are they guilty of any other crime?"

Reference is also made to Sections 20-120 and 20-121, Code of Virginia, providing for "evidence of their reconciliation" in the former and reference in the latter that "a separation has continued without reconciliation since the granting of such divorce". (From bed and board). Accordingly, it appears that the statutes contemplate that some persons having a divorce from bed and board may become reconciled and discontinue their separation. Moreover, the marital bonds have not been severed in the situation which you present and there is also the strong public policy for preserving a marriage.

In accordance with the foregoing, this office is of the opinion that Section 18-84, pertaining to lewd and lascivious cohabitation (or other related offenses) would not be deemed to be applicable to parties who have resumed living together after the entry of only a divorce decree a mensa et thoro.
CRIMINAL LAW—Taxicab Fare—Misdemeanor to Cheat or Defraud Operator Out of. (168)  

February 3, 1958.

HONORABLE L. MELVIN GILES  
Commonwealth’s Attorney for Pittsylvania County

This is in response to your letter of January 31, 1958, which reads in part as follows:

“A calls a taxicab and makes an agreement with B, the owner and operator of the taxicab, to take him to a certain designation with the understanding the fare to be charged is $5.00. Upon completion of the trip A refuses to pay B and runs off without paying B the fare of $5.00.

"Has A violated Title 18, Section 219 of the Code of Virginia of 1950?"

"In my opinion Title 18, Section 219 of the Code of Virginia of 1950 has been violated and that it is a criminal offense in Virginia to obtain a taxi-ride through deceit or with the intent to cheat or defraud the owner and operator of the taxicab."

Section 18-219 provides as follows:

“If any person procure any such animal, automobile, aeroplane or other vehicle mentioned in the preceding section, by fraud or by misrepresenting himself as some other person or with the intent to cheat or defraud such licensed livery stable keeper or other person, he shall be punished by a fine not less than twenty-five dollars nor more than five hundred dollars or by imprisonment for not less than ten days nor more than one year or both. The failure to pay the rental for or damage to such animal, automobile, aeroplane or other vehicle, or absconding without paying such rental or damage, shall be prima facie evidence of the intent to defraud at the time of renting or leasing such animal, automobile, aeroplane or other vehicle.”

The above quoted section makes it a crime and provides a penalty for procuring an automobile and defrauding such licensed livery stable keeper or other person. Moreover, it states that the failure to pay rental for such automobile or other vehicle or absconding without paying such rental shall be prima facie evidence of intent to defraud. Accordingly, I concur in your opinion that Section 18-219, Code of Virginia, has been violated under the facts as stated in your inquiry.

CRIMINAL LAW—Trespass, as at Common Law—Constitutes a Crime in Virginia. (79)  

October 28, 1957.

HONORABLE RICHARD E. RAILLEY, Judge  
Juvenile and Domestic Relations Court of Southampton County

This will reply to your letter of October 2, in which you point out that Section 18-225 of the Code of Virginia (1950) as amended “makes it a misdemeanor to trespass after having been forbidden to do so” and inquire whether or not “common law trespass is still a crime in Virginia”. The statute to which you refer provides:
"If any person shall without authority of law go upon or remain upon
the lands or premises of another, after having been forbidden to do so
by the owner, lessee, custodian or other person lawfully in charge of
such land, or after having been forbidden to do so by sign or signs
posted on the premises at a place or places where they may be reason-
ably seen, he shall be deemed guilty of a misdemeanor, and upon con-
viction thereof shall be punished by a fine of not more than twenty-five
dollars.

"This section shall not be construed to affect in any way the provi-
dions of Secs. 29-165 to 29-170."

At common law trespass constituted a crime if it amounted to a breach of the
peace or if it tended to or threatened a breach of the peace. Miller v. Harless, 153
Va. 228; Henderson v. Commonwealth, 49 Va. (8 Gratt.) 708. By virtue of Section
1-10 of the Virginia Code, the common law of England is continued in full force
and effect in Virginia in so far as it is not repugnant to the principles of the
Bill of Rights and the Constitution and has not been altered by the General
Assembly. It would thus appear that a trespass constituting a crime at common law
would still be a crime in Virginia unless this aspect of the common law has been
changed by statute, specifically Section 18-225 of the Virginia Code in the sit-
uation you present. In this latter connection, it must be borne in mind that the
common law is not to be considered as altered or changed by statute unless the
legislative intent to that effect is plainly manifested. Hannabass v. Ryan, 164 Va.
519, 525; cf. Tate v. Ogg, 170 Va. 95.

Particularly significant with respect to the resolution of your inquiry is the
language of the Supreme Court of Appeals of Virginia in Miller v. Harless, supra.
That case involved an action for alleged false arrest against certain personnel of
the Virginia Polytechnic Institute. Upon appeal from a judgment in favor of the
plaintiff, the defendants assigned as error the refusal of the trial court to instruct
the jury that if the plaintiff went upon the grounds of the Virginia Polytechnic
Institute, after being warned to leave said grounds, and continued to trespass
thereon, then the plaintiff was guilty of a misdemeanor. Noting that the requested
instruction was based upon the provisions of Section 3338 of the Code of Virginia
(1919), as amended by Chapter 123 of the Acts of Assembly (1922), which pro-
vided that if any person, after being warned not to do so by the owner or tenant
of any premises, "shall go upon the lands of the said owner or tenant, he shall
. . . be deemed guilty of a misdemeanor," the Court held that the instruction in
question should have been given. In addition, the Court also pointed out, 153 Va.
at 243, 244:

"Moreover, even were it true, as contended for the plaintiff, that
neither of these statutes could be applied under the facts of this case,
nevertheless, if the plaintiff wilfully and contumaciously refused to leave
the premises after being requested and directed to do so, and went into
the field of growing alfalfa and trampled it down and injured it, this
was a misdemeanor at common law.

"It is true that a mere trespass upon real or personal property, which
is also the subject of a civil action, is not always a crime at common
law; but it is a crime at common law if it amounts to a breach of the
peace, or if it tends to or threatens a breach of the peace.

* * * *

"The rule which we have just stated applies to the facts of this case.
The conduct of the plaintiff and his companion, if the evidence offered
for the defendants is true, was exasperating, tended to violence and a
breach of the peace, and hence was a misdemeanor at common law for
which they were liable to arrest." (Italics supplied).
Manifestly, the Court in that case took the position that one might be liable to arrest for the commission of a trespass constituting a crime at common law, even if the statute there in question was inapplicable. The statute under consideration in the Miller case, Section 3338 of the Code of Virginia (1919) as amended, was repealed by Chapter 247 of the Acts of Assembly (1930), but was reenacted in substantially identical form by Chapter 165 of the Acts of Assembly (1934) and now finds expression as Section 18-225 of the Virginia Code. Although the view of the Court enunciated in the above quoted language may properly be classified as dictum, I believe that it may be relied upon as expressing the applicable law in Virginia. I am, therefore, of the opinion that a trespass constituting a crime at common law would still be a crime in Virginia.


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

I am in receipt of your letter of January 13, 1958, in which you call my attention to the circumstances surrounding the recent prosecution of one Marjorie Young Taylor for violation of Section 18-327 of the Virginia Code. From your communication, it appears that when the case came on to be heard in the Circuit Court of Arlington County, the Court sustained defendant's demurrer to the warrant, declared the statute in question unconstitutional and dismissed the warrant. Pointing out that Section 88 of the Virginia Constitution imposes certain restrictions upon appeals by the Commonwealth, you inquire whether or not the Commonwealth has a right of appeal in the instant case.

Section 18-327 of the Code of Virginia (1950) provides:

"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." (Italics supplied).

The pertinent provision of Section 88 of the Constitution of Virginia (1902) as amended, prescribes:

"No appeal shall be allowed to the Commonwealth in a case involving the life or liberty of a person except that an appeal by the Commonwealth may be allowed in any case involving the violation of a law relating to the State revenue."

A review of the various decisions of the Supreme Court of Appeals of Virginia relating to the above quoted provision of the Virginia Constitution reveals that
"a case involving the life or liberty of a person" is one in which the conviction of an accused may result in a sentence of death or imprisonment, i.e., a judgment directly depriving an individual of his life or liberty. A criminal proceeding charging an offense for punishment of which only a fine is prescribed is not a case involving "life or liberty" as that phrase is utilized in Section 88 of the Virginia Constitution. See, Forbes v. State Council, 107 Va. 853, 60 S.E. 81; Commonwealth v. Perrow, 124 Va. 805, 97 S.E. 820; Smyth v. Godwin, 188 Va. 753, 51 S.E. (2d) 230. Illustrative of this distinction is the observation of the Supreme Court of Virginia in Commonwealth v. Perrow, supra, at 810:

"In the case of Commonwealth v. Willcox, 111 Va. 849, 69 S.E. 1027, it was held that under the provision of section 88, quoted above, a writ of error does not lie upon the petition of the Commonwealth in any case involving the life or liberty of a person where no question touching the State revenue is involved, . . . The case at bar, however, is not expressly covered by the Willcox Case, because the offense with which Willcox was charged was one involving his liberty, and therefore came clearly within the terms of section 88 of the Constitution upon which the decision turned, while the offense with which Perrow is here charged is punishable by fine only and does not directly imperil his liberty. (Forbes v. State Council, 107 Va. 853, 859, 60 S.E. 81.) Section 88 expressly confers the right of appeal in all revenue cases, regardless of the form or degree of punishment, and expressly denies it in all other than revenue cases where the penalty is such as to involve life or liberty, thus leaving the legislature, so far as this particular section of the Constitution is concerned, a free hand with reference to appeals in criminal cases where no other punishment than a fine is prescribed. . . ."

In light of the foregoing, it would appear that Section 88 of the Virginia Constitution presents no impediment to an appeal by the Commonwealth in the case under consideration, as a violation of Section 18-327 of the Virginia Code is an offense for punishment of which only a fine is prescribed. Notwithstanding, it is very probable that a constitutional prohibition of such an appeal is contained in that provision of Section 8 of the Virginia Constitution which declares that no man shall be put twice in jeopardy for the same offense. In this connection, the Supreme Court of Appeals of Virginia has held that a misdemeanor which is punishable by a fine only is an offense within the above mentioned provision of Section 8 of the Virginia Constitution, that the rule of "twice in jeopardy" applies in all criminal cases regardless of the character and degree of punishment and that, when the purpose of an appeal in a criminal case is to procure on behalf of the State a reversal of the judgment and a new trial of the accused, the rule forbidding second jeopardy for the same offense operates to destroy the right of appeal. Commonwealth v. Perrow, supra.

Implicit in every situation involving application of the rule forbidding second jeopardy for the same offense is the question of whether or not the individual concerned was in jeopardy at his first trial. When an initial trial is terminated adversely to the Commonwealth by reason of a ruling by the trial court upon a question of law, the critical inquiry centers upon the nature of the legal question decided. Unfortunately, I do not find that the Virginia decisions supply a dispositive answer to the question of whether or not jeopardy attaches in those cases in which a warrant or indictment is dismissed by the trial court, on demurrer of the defendant, because of the constitutional invalidity of the statute upon which the warrant or indictment is predicated. See, Dulins Case, 91 Va. 718, 20 S.E. 321; Commonwealth v. Willcox, 111 Va. 849, 69 S.E. 1027; Commonwealth v. Perrow, supra, Adkins v. Commonwealth, 175 Va. 590, 9 S.E. (2d) 349; City of Roanoke v. Conchers, 187 Va. 491, 47 S.E. (2d) 440; Mealy v. Commonwealth, 193 Va. 216, 68 S.E. (2d) 507. However, resolution of this issue is not necessary to the
disposition of the precise question presented in your communication. Regardless of constitutional considerations, the Commonwealth can have no right of appeal in any case unless expressly prescribed by statute. In this connection, Section 19-255 of the Virginia Code prescribes:

"A writ of error shall lie in a criminal case to the judgment of a circuit court or the judge thereof, or of a corporation court, or of a hustings court, from the Supreme Court of Appeals. It shall lie in any such case for the accused and if the case be for the violation of any law relating to the State revenue it shall lie also for the Commonwealth. And a writ of error shall also lie for any city or town from the Supreme Court of Appeals to the judgment of any circuit, corporation or hustings court declaring any ordinance of such city or town to be unconstitutional or otherwise invalid, except when the violation of any such ordinance is made a misdemeanor by State statute." (Italics supplied).

Manifestly, the above quoted statute does not authorize an appeal by the Commonwealth in any case which does not involve the violation of a law relating to the State revenue. As the revenue of the State is not involved in the instant case, I am of the opinion that the Commonwealth has no right of appeal.

You will, of course, appreciate that this office can take no position upon your suggestion concerning the advisability of legislative action in this field; however, I am enclosing with this opinion a copy of a memorandum of law which elaborates upon the views I have expressed. Trusting that this material will be of assistance to you, I am

CRIMINAL PROCEDURE—Arrest and Disposition of Person—In Jurisdiction Other Than Where Offense Committed and Original Warrant Issued. (211)

HONORABLE T. GRAY HADDON
Commonwealth's Attorney for City of Richmond

This is in reply to your letter of March 25, 1958, which reads as follows:

"1. In a situation where a warrant has been issued in another jurisdiction in Virginia, let us say Norfolk, charging a person with petit larceny, and the warrant has come into the hands of a Richmond justice of the peace who has endorsed it with his name and official character, the accused person arrested thereon, and is unable to post bond with surety, what disposition should be made of the prisoner?

"2. In a situation where a warrant is issued in Richmond charging the accused with an offense in Norfolk, and the accused is arrested and cannot post bond, under Section 19-78 must the Richmond magistrate commit him to a Richmond officer to carry the accused to Norfolk, or
may the accused be committed to jail, and the Norfolk police authorities notified to come to Richmond and transport the accused to Norfolk? If the latter procedure is lawful in your opinion, what process, if any, is necessary to lodge the accused in jail and release him therefrom to a Norfolk officer, and by whom issued? Also, what authority does the Norfolk officer have to transport the accused to Norfolk?

"The justices of the peace for the City of Richmond have asked my opinion as to what the procedure should be in cases arising under questions 1 and 2 on the preceding page."

In the hypothetical case presented in connection with question No. 1, it is my opinion that the endorsement made by the official in Richmond on the warrant that was originally issued in Norfolk serves to validate the warrant and, in effect, gives it the same status as an original warrant issued in Richmond. With this writ, an officer in Richmond may arrest the person charged in the warrant with having committed an offense in Norfolk.

The City of Richmond officer, upon arresting the person charged in the warrant with an offense, is required under Section 19-77 to bring the prisoner before and return the warrant to a justice of the peace or judge of the municipal court, unless the accused is promptly let to bail. Upon the prisoner's being brought before the local justice of the peace or other municipal court judge, such official, in accordance with the provisions of Section 19-78, shall, by warrant, commit the prisoner to the custody of an officer who may be a Norfolk officer, who shall transport the accused to Norfolk and deliver him to the official in Norfolk who issued the warrant or to another municipal official of like judicial authority.

From the views expressed in the preceding paragraph, you will determine that I am of the opinion that the Richmond officer who made the arrest would not necessarily be required to take the accused to Norfolk. The warrant of commitment issued pursuant to Section 19-78 of the Code would, in my opinion, be sufficient authority for the arresting officer to turn the prisoner over to a Norfolk officer or for lodging the prisoner in a Richmond jail pending the arrival of an officer from Norfolk, if he is not immediately available.

I believe that the views herein expressed make it unnecessary to give a detailed reply to question number 2. With respect to this question number 2, the original warrant issued in Richmond for the arrest of the accused and the committal warrant issued after his arrest would, it would seem, be all that is necessary to authorize the Norfolk officer to take the accused into custody and return him to Norfolk and there deliver him over to a proper justice of the peace in that jurisdiction.

CRIMINAL PROCEDURE—Bail on Appeals from County Court—When Bail Commissioner May Grant. (275)

June 4, 1958.

HONORABLE RICHARD E. RAILEY
Judge, Southampton County Court

This will acknowledge receipt of your letter of June 2, 1958, in which you present the following questions:

"May a bail commissioner admit to bail an accused who appeals from a judgment of the county court? And if a bail commissioner can admit such accused to bail, can he set the bail at an amount lower than that set by the county judge at the time the appeal was taken?"
Section 16.1-135 of the Code, in part, provides:

"When an appeal is taken at the time judgment is rendered, the accused shall, unless let to bail, be committed to jail by the court * * *. When an appeal is taken subsequent to the entry of the judgment of conviction, the judge shall enter the allowance of the appeal on the warrant, and such judge, or the circuit court of the county or corporation or hustings court of the corporation, or the judge thereof, as the case may be, may admit the accused to bail. * * *"

Under this section it is clear that an accused who appeals a judgment of conviction in a county court may be let to bail either by the county judge or by the court of record, or judge thereof, to which the appeal is taken.

Section 19-93 provides that a bail commissioner may admit to bail all persons charged with crime in his jurisdiction. This same section provides further that no bail commissioner shall admit to bail in any case after any court of record having jurisdiction to admit to bail in the case, or the judge thereof, has acted upon the application for bail. This section also provides that during the pendency of proceedings before such court of record, or judge thereof, to obtain bail, the bail commissioner shall not grant bail.

It would seem, therefore, that when a person is convicted in a county court, he may note an appeal from the judgment of that court to the circuit court or other court of record having jurisdiction. He may, if he elects to do so, apply to the county court judge for bail. If he does not apply to the county court for bail, or if he does apply and the application is rejected, he may apply to the appropriate appellate court, or the judge thereof for bail. (Section 19-89). If he does apply to the appropriate court of record, or the judge thereof, for bail, then, in that event, the bail commissioner may not grant bail. However, if he does not make application for bail to the county court or the appropriate court of record, or the judge thereof, in my opinion the bail commissioner may admit the person to bail, and the Commonwealth's Attorney, if he thinks the amount of the bail is too small, may apply to the appropriate court of record, or the judge thereof, to have the amount of the bail increased—See Section 19-96 of the Code.

With respect to your second question, I am of the opinion that it must be answered in the negative. While, as I have pointed out, there is a statute (Code 19-96) providing for an appeal from the action of a bail commissioner with respect to bail deemed inadequate, there is no statute allowing an appeal to the bail commissioner by a person who feels aggrieved at the amount of bail fixed by any other officer who has passed upon the question. The function of a bail commissioner, in a proper case, is to grant bail to a person who is charged with a crime and who is under arrest, and such bail commissioner has no authority in this respect where the applicant, being already admitted to bail, seeks a reduction in the amount.

The proper procedure in a case where an accused feels that the amount of bail required by a county court, or the judge thereof, is excessive is to petition the appropriate court of record, or the judge thereof, as provided in the second paragraph of Section 19-89 of the Code.
CRIMINAL PROCEDURE—Cost—No Provision for Taxing Fees for City Police Officers as. (172)  
February 4, 1958.

HONORABLE BEVERLY T. FITZPATRICK, Judge  
Municipal Court of the City of Roanoke

This is in response to your recent letter setting forth the following inquiry:

"I would appreciate your giving me an opinion on whether or not the costs as set out under Section 14-122 of the Code of Virginia apply to services rendered by city police officers in the absence of a city ordinance setting forth costs to be taxed in criminal actions."

Section 14-122, in designating those officers to whom fees are to be paid under the provisions thereof, refers to "sheriffs, sergeants and criers". As city police officers are not designated in Section 14-122, Code of Virginia, it does not appear that that section is applicable to services performed by them. Moreover, there is no provision that "such fees shall be included in the taxed costs" as provided for in Section 14-132. Accordingly, I am of the opinion that the answer to your question is in the negative.

---

CRIMINAL PROCEDURE—Fines—Violation of Town Ordinance on Appeal to Circuit Court—Paid to Town. (207)  
April 2, 1958.

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

This is in reply to your letter of April 1, 1958, which is as follows:

"I apologize for bothering you so frequently and so early in your tenure of office. However, some confusion has developed in our Circuit Court Clerk's Office here on the following problem and question; and I would appreciate it if you will give me the opinion of your office on the question, which is as follows: Where a traffic case is tried in and by the proper official of the Town of Appomattox, as a result of which, there is a conviction followed by an appeal to the Circuit Court of the County, in case of a conviction on the appeal, does the fine go to the Town or to the State? "I will appreciate it if you will write me on this at your convenience."

This office has held on several occasions that fines for violations of town ordinances shall be turned into the treasury of the town. Section 16.1-70 of the Code continued all existing courts in cities and towns created under former Section 16-129. Section 16.1-71 provides that "The fees in such courts shall, unless otherwise provided by charter or by ordinance, be the same as those provided by law for county courts, and the Council may provide that such fees and all fines imposed by the trial officer shall be paid into the treasury of the city or town." Section 16.1-73 provides for appeals from the decisions of such town trial officer to the Circuit Court of the County having jurisdiction over such town. The fact that the case may have been appealed from a conviction by the town trial officer to the Circuit Court does not in any way affect the disposition of the fine in case the Circuit Court affirms the conviction imposed below. While such cases are tried de novo in the Circuit Court, they are, nevertheless, tried for the violation of the offence charged in the original warrant. If the original warrant
charged the accused with a violation of a town ordinance and he is convicted in the Circuit Court on an appeal from the judgment of the town trial officer, the fine would still be paid into the town treasury pursuant to the provisions of Section 16.1-71.

CRIMINAL PROCEDURE—Jurisdiction of Sheriff to Arrest Without Warrant—County Courthouse Property Located in City. (20)  
July 30, 1957.

HONORABLE JOSEPH A. MASSIE, JR.  
Commonwealth's Attorney  
Frederick County  
December 17, 1957

This is in reply to your letter of July 24, 1957, in which you request my opinion as to whether or not the Sheriff of Frederick County has authority and jurisdiction to make an arrest without a warrant or capias on county property such as the Court House and jail which is located within the corporate limits of the City of Winchester.

I am of the opinion that the Sheriff of Frederick County does have authority and jurisdiction to make an arrest upon the property owned by the county which is used for the Court House, the jail, the clerk's office and any other county buildings located on the Court House Square. This property is under the control of the Board of Supervisors and the Judge of the Circuit Court of Frederick County and, as the chief law enforcement officer of the Board of Supervisors and of the Circuit Court, I am of the opinion that the Sheriff and his deputies have criminal authority and jurisdiction over this property.

CRIMINAL PROCEDURE—Mileage of Sheriff—Should Not Be Taxed for that Incurred in Search for Accused Prior to Arrest. (128)  
December 17, 1957

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

This is in reply to your letter of December 6, 1957, in which you request my opinion as to whether or not you should tax against the defendant in a criminal case mileage for the sheriff and his deputies for travel incurred by them in search for the defendant prior to the time that the warrant was actually served upon him and arrest made.

Section 14-116 and 14-122 of the Code of Virginia provide for the taxing of mileage for the sheriff for carrying a prisoner to and from jail; for carrying a prisoner to the jail under order of a justice; for each mile traveled of the prisoner in carrying him to jail when the distance is over ten miles; however, I can find no provision in the Code that provides that the defendant in a criminal case may be charged for mileage incurred by the sheriff and his deputies in search for him prior to the time of his arrest. Therefore, I am of the opinion that mileage for this service cannot be taxed against the defendant in a criminal case.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Plea of Guilty—Misdemeanor in Court of Record—May Be Entered by Counsel in Defendant's Absence. (293)

June 25, 1958.

HONORABLE WILLIAM L. WINSTON
Member House of Delegates

I am in receipt of your letter of June 12, 1958, in which you request an opinion upon the following question:

"May an attorney representing a defendant charged with a misdemeanor in a court not of record enter a plea of guilty for his client in said court in the defendant's absence?"

In response to your inquiry, permit me to advise that I have been unable to discover any provision of Virginia law upon which a dispositive answer to your inquiry may be predicated. Although Section 19-154 of the Virginia Code prescribes that, in any prosecution for a misdemeanor, a court may proceed to judgment in the absence of the accused, and Section 19-168 of the Virginia Code authorizes the trial of all cases of a misdemeanor by the court, without the intervention of a jury, upon a plea of guilty tendered in person by the accused or by his counsel, it would appear that the latter statute is applicable only to proceedings in a court of record and that no similar provision of law exists which specifically permits an attorney, representing an individual charged with a misdemeanor before a court not of record, to enter a plea of guilty in the absence of the accused.

However, since the 1928 amendments to Article I, Section 8 of the Virginia Constitution (1902), there has been no prescribed constitutional requirement that a plea of guilty be made in person. See Gross v. Smyth, 182 Va. 724, 30 S.E. (2d) 570; Cottrell v. Commonwealth, 187 Va. 351, 46 S.E. (2d) 413. In the latter case cited, the court noted that such a requirement is now only statutory and that, being only statutory, it may be waived. See, Cottrell v. Commonwealth, supra, at 361. The statute referred to by the court in the Cottrell case, Section 4900 of the Code of Virginia (1942), is now Section 19-166 of the Virginia Code and prescribes that a court shall hear and determine a felony case without the intervention of a jury, upon a plea of guilty tendered in person by the accused. As already noted, Section 19-168 of the Virginia Code permits such a plea to be tendered, in a misdemeanor case before a court of record, either by the accused in person or by counsel, but there is no specific provision of law prescribing the manner in which a plea of guilty may be tendered in a misdemeanor case before a court not of record.

So far as the law upon this subject generally is concerned, it would appear that—while there is a diversity of opinion among the various jurisdictions—a plea of guilty may be made by counsel in a misdemeanor case even in the defendant's absence, if the making of such a plea has been authorized by the defendant. See, 22 C.J.S. 652, Criminal Law: Section 422; 14 Am. Jur. 944, Criminal Law: Section 259; Annotation, 110 A.L.R. 1300 et seq.

In light of the foregoing—although the question is not entirely free from doubt—I am of the opinion that, in the absence of any prescribed constitutional or express statutory requirement to the contrary, a plea of guilty may be entered by counsel in a misdemeanor case before a court not of record in the absence of the defendant, if the defendant has authorized the making of such a plea.
CRIMINAL PROCEDURE—Suspended Sentence—Revocation of—Defendant Does Not Have to Have an Attorney for. (201)

March 25, 1958.

HONORABLE KENNETH P. ASBURY
Commonwealth’s Attorney for Wise County

This will reply to your letter of March 19, 1958, in which you call my attention to Section 53-278.1 of the Virginia Code, which makes provision for pre-sentence investigations and reports in certain criminal cases, and the decisions of the Supreme Court of Appeals of Virginia applying this statute in Linton v. Commonwealth, 192 Va. 437. You inquire whether or not—in light of the above mentioned decision—a trial court must appoint an attorney for a defendant before revoking such defendant’s probation under the provisions of Section 53-275 of the Virginia Code.

Section 53-278.1 of the Code of Virginia (1950) as amended, prescribes:

“When a person is tried upon a felony charge for which a sentence of death or confinement for a period of over ten years may be imposed and pleads guilty, or upon a plea of not guilty is tried by the court without a jury as provided by law, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before fixing punishment or imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer shall present his report in open court in the presence of the accused who shall be advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case.” (Italics supplied).

In Linton v. Commonwealth, supra, the accused was indicted for perjury and plead guilty to the indictment upon arraignment. On motion of her counsel, imposition of sentence was deferred and the case referred to a probation officer for a pre-sentence report. Subsequently, the report in question was filed and, without notice thereof to her attorneys and in their absence, the accused was brought before the trial court and the maximum sentence of ten years’ imprisonment was imposed. Upon appeal, the question presented to the Virginia Supreme Court was whether or not the trial court had erred to the prejudice of the accused when it received and considered the pre-sentence report in the absence of counsel, failed to afford counsel an opportunity to examine the probation officer upon the report and imposed sentence upon accused in the absence of her counsel. Pointing out that the statute in question did not require a report from a probation officer in the case there under consideration, but noting that the pre-sentencing procedure adopted by the trial court was undertaken upon the authority of the statute, the Court reversed the judgment of conviction and awarded defendant a new trial. During the course of its opinion, the Court declared, 192 Va. at 441:

“As the court undertook to act under the statute, it is our opinion that accused was entitled to have her counsel afforded opportunity to cross-examine the probation officer and after scrutiny of the report, ‘present any additional facts bearing upon the matter which’ they might wish to offer. Having availed itself of the provisions of the statute, the court should have been governed by its terms.”
Manifestly, Section 53-278.1 of the Code deals with the making of investigations and reports by probation officers before sentence is imposed in specified cases and, as indicated by that portion of the statute italicized above, the right to cross-examine the investigating officer and present additional facts bearing upon the issue of punishment is expressly conferred upon the accused. By contrast, Section 53-275 of the Code relates to the revocation of the suspension of a sentence and any probation upon which a convicted defendant may have been placed by the trial court. Specifically, the statute provides:

"The court may, for any cause deemed by it sufficient, revoke the suspension of sentence and any probation, if the defendant be on probation, and cause the defendant to be arrested and brought before the court at any time within the probation period, or if no probation period 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. In case the execution of the sentence has been suspended, the original sentence shall be in full force and effect, and the time of probation shall not be taken into account to diminish the original sentence. In the event that any person placed on probation shall leave the jurisdiction of the court without the consent of the judge, or having obtained leave to remove to another locality violates any of the terms of his probation, he may be apprehended and returned to the court and dealt with as provided above. Provided, however, that nothing contained herein shall be construed to deprive any person of his right to appeal in the manner provided by law to the circuit or corporation court having criminal jurisdiction from a judgment or order revoking any suspended sentence."

Significant with respect to the provisions of the above quoted statute are certain observations of the Supreme Court of Appeals of Virginia in Slayton v. Commonwealth, 185 Va. 357, in which case the Court, enunciating the principles governing the interpretation of this statute, declared (1) that the trial court was not required to empanel a jury to try the issue of the sufficiency of the cause of revocation (2) that probationer was entitled to a judicial hearing before revocation but that a summary hearing was sufficient (3) that probationer was not entitled to a jury trial on the issue of sufficient cause, and (4) that the sufficiency of the evidence to sustain an order of revocation is a matter within the sound discretion of the trial court. In light of these observations of the Supreme Court of Appeals and the difference in subject matter between the two statutes under discussion, I am of the opinion that there is nothing in the Linton case which warrants the conclusion that a trial court must appoint an attorney for a defendant before revoking such defendant's probation.
CRIMINAL PROCEDURE—Trial of Misdemeanor in Presence of Defendant—Duties Upon Defendant’s Counsel as to Payment of Fine and Surrendering Driving Permit. (110)

December 2, 1957

HONORABLE E. GARNETT MERCER, JR.
Commonwealth’s Attorney for Lancaster County

This is in response to your letter of November 15, which provides in part as follows:

"I should like to request that your office advise me of your interpretation of the authority granted in Sec. 19-168 of the Code of Virginia, which purports to authorize the Circuit Court in cases of misdemeanors to try and dispose of such cases on a plea of guilty or plea of not guilty without a jury with the consent of the accused given in person or by his counsel and in the absence of the accused. Specifically, I should like your opinion as to the following:

"(1) Does this section extend to and apply to the County Court or is it intended merely to apply to the Circuit Court.

"(2) Assuming that the case is tried in the absence of the accused, does counsel for the accused have to be prepared, for example, in a drunk driving case, to surrender the operator’s license of the accused and have available funds to pay whatever fine may be imposed by the Court.

"(3) When the accused is under bond for his appearance, does this section relieve the defendant of his obligation to appear in person when represented by counsel who pleads for the accused in open Court."

In response to question numbered (1), I am of the opinion that Section 19-168, entitled “Trial of misdemeanors by court without jury”, is intended to apply to the Circuit Court and not to the County Court, as only circuit courts have provisions for a jury, and, moreover, the entire Article 2 of Title 19, in which said Section 19-168 is included, is headed, “trial without jury”.

In response to question numbered (2), where the misdemeanor is tried in the absence of the accused, with the accused being represented by counsel, it appears that the prisoner can be tried pursuant to Section 19-158 of the Code of Virginia and given such penalty as prescribed by statute. See, Noel v. Commonwealth, 135 Va. 600. Accordingly, it would appear that provision should be made by counsel in such matters for the satisfaction of the punishment awarded by the court, whether it be revocation of license, fine, etc.; otherwise, the accused might subject himself to additional penalty.

In response to question numbered (3), where a recognizance bond is given requiring the presence of the accused, it appears that there is no specific statute excluding the accused from the requirement of appearing where such recognizance so requires even when the accused is represented by counsel who pleads for the accused in open court. However, Section 19-108, as amended, appears to resolve the matter in that it provides, in part, that “* * * if there be default (in the conditions of the recognizance) and it be a case which may be tried in the absence of the defendant and he is so tried * * * 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, * * *”.

I enclose a copy of an opinion rendered by this office to Trial Justice Smith on September 24, 1954, found in the 1954-55 Report of the Attorney General, at page 160, wherein this office approves a certain procedure followed by Judge Smith in trying a violator in his absence.
CRIMINAL PROCEDURE—Venue—Libel and Slander—Writing and Sending Threatening Letters—Suspension Sentence for Misdemeanor For More Than One Year. (198)

March 20, 1958.

HONORABLE FRANK N. WATKINS
Commonwealth's Attorney
Prince Edward County

This is in reply to your letter of March 12, 1958, in which you request my opinion in answer to two questions involving criminal laws and procedures. Your first question is whether or not a county judge or a circuit judge may suspend the sentence in the case of a misdemeanor and place the defendant on probation for a period longer than one year.

On September 8, 1955, this office rendered an opinion to Honorable Lyon G. Tyler, Jr., Commonwealth's Attorney of Charles City County, in which it was held that a judge could suspend a sentence for misdemeanor and place a person on probation for a longer period of time than one year. I am enclosing copy of that opinion.

Your second question relates to the violation of §18-133 or §18-134 of the Code of Virginia. You state that a person mails a letter in Nottoway County to a person who receives the letter in Prince Edward County, which letter violates either §18-133 or §18-134 of the Code. You request my opinion as to which county is the proper county of venue to prosecute such case.

Section 18-133 of the Code involves the offense of libel and slander and, in the case of written libel, the statute provides that if a person falsely write and publish such libelous words, it shall constitute a misdemeanor. I can find no law on the question in Virginia as to where the proper place of venue is, whether the place where the libelous words were written or the place where the libelous words were published, i.e., received by someone else. In most jurisdictions in this country mailing libelous matter has been held to be a publication in the jurisdiction wherein it was received and not in the jurisdiction wherein such matter was mailed. 33 American Jurisprudence, page 301. I am of the opinion that it would be more desirable for a person violating §18-133 of the Code to be prosecuted in the county within which publication took place. Therefore, since the letter was received in Prince Edward County, prosecution would be in Prince Edward County.

Section 18-134 of the Code is entirely different and separate from §18-133 of the Code of Virginia. This section deals with threat of death or bodily injury to a person or a member of his family, and it provides that, "if any person write or compose and also send or procure the sending of any letter or inscribed communication * * * to any person containing a threat to kill or do bodily injury to the person to whom such letter or communication is sent * * *" the person shall be guilty of a felony. In this particular crime, the crime is completed upon the sending of the letter. Therefore, I am of the opinion that the proper venue would be the county wherein the letter was mailed, that is Nottoway County.

CRIMINAL PROCEDURE—Violations of County Ordinance and State Law—One Warrant May Cover Both, but Two Warrants Advisable. (15)

July 22, 1957.

HONORABLE S. L. FARRAR, JR., Clerk
Circuit Court of Amelia County

This is to acknowledge receipt of your letter of July 16, 1957 which reads in part:
"Recently a motorist was apprehended by an officer and given a ticket for his appearance in Court for failure to have a county license tag in violation of above local ordinance. At the same time he was also charged with operating his motor vehicle without an operator's license, which is, of course, in violation of State law.

* * * *

"A question has arisen whether there should be two warrants written or whether the state and county violations could be charged on the same warrant and heard on one warrant."

A warrant in which these two separate offenses are included is valid if it meets the requirements as to substance and form. However, the two offenses are separate and distinct, one is the violation of a State statute and the other the violation of a county ordinance. The issuing authority can issue both a state and a county warrant and the county court under Section 16.1-123 has the authority to try a misdemeanor arising from the violation of a county ordinance and also the jurisdiction to try a misdemeanor arising from the violation of a state statute, and furthermore, a county police officer or a state police officer has the authority to make an arrest under such a warrant charging dual offenses. Hence, if such a warrant were issued it would be valid. However, I would strongly recommend that in such cases that two warrants be issued; one warrant charging the violation of the county ordinance and the other warrant violating the state statute. This would enable the court to more readily account for the fees and costs collected, etc.

CRIMINAL PROCEDURE—Warrants—May Not Be Signed by Issuing Officer
By Use of Facsimile Stamp. (255)

May 19, 1958.

HONORABLE R. L. QUARLES
Judge of the Municipal Court of Roanoke

This will reply to your letter of May 9, in which you state that Section 28 of the charter of the City of Roanoke authorizes or requires warrants in civil cases to be issued and signed by one of the deputy clerks of the Municipal Court of the City of Roanoke. You inquire whether or not the deputy clerk may properly sign such warrants by means of a facsimile stamp.

I am constrained to believe that your question must be answered in the negative. As you point out, Section 16.1-94 of the Virginia Code expressly provides that the signature of the judge of a court not of record may be affixed to a judgment (entered on a warrant or other paper) by means of a facsimile stamp, accompanied by the initials of the judge upon the notation of the judgment. I assume, however, that no similar provision is contained in the charter of the City of Roanoke with respect to the signing of civil warrants by deputy clerks, and in the absence of express statutory authorization, I am of the opinion that adoption of such a procedure would not be permissible.

In this connection, this office has previously ruled that, in the absence of statutory authority, county treasurers may not utilize facsimile stamps to sign warrants issued by the county, even in those instances in which the warrant has already been signed by one or more members of the local board of supervisors. See, Report of the Attorney General (1953-54) p. 224. A copy of this opinion is enclosed.
This is in response to your letter of November 15, inquiring if the owner of sheep killed by dogs is entitled to collect compensation from the county in a situation where he has been reimbursed full value from an insurance company with whom he had a contract covering the loss of his sheep.

Section 29-202, Code of Virginia, as amended, provides:

"Any person who has any livestock or poultry killed or injured by any dog not his own shall be entitled to receive as compensation therefor a reasonable value of such livestock or poultry; provided that in the counties of Fauquier, Giles, Halifax, Pittsylvania, Washington, Russell, Tazewell, Patrick, Rockbridge, Fairfax, Carroll, Floyd and Grayson, the governing body may compensate the claimant upon the basis of the assessed value of such livestock and the fair value of unassessed lambs and poultry, but in no event to exceed the reasonable value thereof. Nothing herein shall be construed as limiting the common law liability of an owner of a dog for damages committed by it, and when compensation is paid as above provided, the county or city shall be subrogated to the extent of compensation paid to the right of action to the owner of the dog and may enforce the same in an appropriate action at law. Claimants for damages shall furnish evidence under oath of quantity and value to the governing body of the county or of any city within ninety days after sustaining such damage.

"Provided, however, that if the governing body of the counties of Surry, Carroll, Grayson, Sussex and Floyd so prescribe by ordinance, no payment by the county shall be made under this section unless and until the claimant shall have exhausted his legal remedies against the owner of the dog doing the damage for which compensation under this section is sought; such governing body of such county may require the submission of evidence that the claimant has exhausted his legal remedies against the owner of the dog, if known."

It is noted that the above statute provides that the owner of livestock killed by any dog not his own "shall be entitled to receive" compensation. The section does not exclude payment where the person has been reimbursed through insurance. Moreover, the owner would have had to pay premiums for such insurance coverage. Accordingly, I am of the opinion that the owner of the sheep killed by dogs other than his own is entitled to compensation from the county even though he also happened to have insurance coverage for the loss of the sheep. In this connection, it is suggested that as a sound business practice it be specifically determined whether or not the owner's claim was transferred to the insurance company through any subrogation provision which might have been contained in his insurance coverage.
This is in response to your letter of December 23, 1957, enclosing a letter from the Treasurer of Prince William County, which is returned herewith, and inquiring whether or not the Board of Supervisors of such county may transfer a certain sum from the General Fund of the county to the Dog Tax Fund. It is further stated that the credit of the Dog Fund is nearly exhausted and that certain claims drawn on the Dog Fund have been authorized.

Section 29-209, Code of Virginia, as amended, pertaining to the disposition of the Dog Fund and with appropriation by specified counties from the General Fund for the payment of costs and claims against the Dog Fund, in part provides:

"After paying the fifteen per centum on gross collections to the State Treasurer as otherwise provided, the remaining amount in the dog fund of the county or city shall first be used to pay for control of rabies, treatment of persons for rabies, advertising notices, freight and express or postage, and if the remainder is sufficient, all damages to livestock or poultry, and if the governing body of the county so desires it may make therefrom an allowance to the game warden for services, and all allowances and payments heretofore made by the governing body of any county to game wardens and ex officio game wardens for services are hereby validated. In the event the remainder is not sufficient to pay such damages, the claims shall be filed and paid in the order of presentation out of the first available money coming into the fund.

"In the county of Orange, the governing body may employ, and pay from the dog fund, a person or persons to investigate claims made for payment under this section.

"Should there not be a sum sufficient in the dog fund of the county of Augusta, county of Rockbridge or of the county of Albemarle, respectively, to defray all costs in such county, including the payment of claims as provided in Sec. 29-202, then the governing body of such county may appropriate a sufficient amount from the general fund of such county to provide payment of such costs and claims."

The first paragraph of the above section provides for the priority of claims and makes reference to the situation in which the fund is not sufficient to pay such claims. Moreover, the third paragraph thereof designates three counties which may appropriate sufficient amounts from their General Funds to provide payment of such costs and claims, should there not be a sum sufficient in the Dog Funds of such counties. It is further noted that Rockbridge County was included among such counties in the 1956 amendment, thereby revealing certain legislative intent and action at such recent time.

In view of the foregoing limitation and designation of the specific counties which may appropriate amounts from the General Fund to the Dog Fund, it appears that the Legislature did not intend to give such authority to counties other than those so designated. Accordingly, as Prince William County is not among the counties authorized to make such appropriations, I am of the opinion that Prince William County is without authorization to make such appropriation and transfer. It is suggested that the matter might be resolved by the introduction and passage of appropriate legislation at the coming session of the General Assembly.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Annexed Area of City—Residents of Voting and Running in City Election Held Less than Six Months After Annexation. (134)

December 20, 1957.

HONORABLE LEVIN NOCK DAVIS, Secretary
State Board of Elections

I acknowledge your letter of December 20, 1957, in which you request my opinion with respect to the matters presented in a copy of a letter attached thereto dated December 17, 1957, and addressed to me from Mr. S. Thomas Martin, Chairman of the City Democratic Committee, Lynchburg, Virginia.

It is stated in this letter that certain areas of Bedford County and Campbell County will be annexed to the City of Lynchburg under a decree of Court in an annexation proceeding recently had. This annexation will be effective January 1, 1958.

The questions presented for my determination are as follows:

1. May the qualified voters living in the annexed areas vote in a Primary to be held on April 1, 1958, for the selection of candidates for City offices in Lynchburg, and may these persons vote in the General Election on June 10, 1958?
2. May a qualified voter in the territory to be annexed qualify as a candidate in said Primary by filing the necessary application and petitions not later than December 31, 1957?
3. If such a person may qualify as a candidate, are other qualified voters living in the territory to be annexed qualified to sign the candidate's petitions?

In my opinion, the answer to each question must be in the affirmative. Section 15-152.24 of the Virginia Code provides as follows:

"Whenever, by extension of its territorial limits as aforesaid, territory is annexed to a city or town, the council thereof shall, if the city or town is divided into wards, by ordinance immediately organize the same into a new ward or wards and forthwith select the proper number of councilmen from the residents and qualified voters of such new ward or wards to serve until the next general election, or attach the same to an existing ward or wards, under such regulations as are provided by law. 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. But the failure of council to so district the territory shall not invalidate an election held in the city or town."

This section sets out the procedure under which the qualified voters living in the annexed territory may be placed upon the registration books of the City.

The letter from Mr. Martin suggests that, due to the provisions of Section 18 of the Constitution of Virginia and of Section 24-17 of the Code of Virginia implementing said constitutional section, the voters living in the territory to be annexed would not be qualified to vote in any election in the City of Lynchburg until six months after the effective date of the annexation. Section 18 of the Constitution is as follows:

"Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days, next
preceding the election in which he offers to vote, has been registered and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

"The right of citizens to vote shall not be denied or abridged on account of sex."

Section 24-17 is in essence the same.

I do not feel that the constitutional and legislative provisions just quoted were ever intended to disfranchise a group of voters through no fault of their own. These provisions, in my opinion, relate to a situation where a voter in one jurisdiction actually moves the situs of his residence from one point to another. Persons residing in the territory being annexed do not move in any sense as the word "removal" is used in the Constitution and the Act. They become residents of the City, not by voluntary or involuntary removal, as this word is ordinarily used, but they become residents of the City because of the extension of the boundaries of the City in legal proceedings. People who are annexed to a city do not in any way lose their status as citizens and electors, except to the extent that the situs of their residence and citizenship may be instantaneously transferred from one jurisdiction to another by operation of law and not by voluntary change of their citizenship or residence.

I note that the question has been raised as to the duties of the Treasurer of the City of Lynchburg with respect to certifying the names of those who have paid their poll taxes six months prior to the election.

Section 24-127 of the Code covers a similar situation where the annexation has been made by a town, but I do not find any Code section specifically relating to annexation by cities. The Treasurer of the City of Richmond, I understand, upon a certificate exhibited to him such as may be obtained under Section 24-128 of the Code, will place such person upon the certified list made up by him under the provisions of Section 24-120 of the Code. However, if the Treasurer of the City of Lynchburg should not feel inclined to do this, it is manifest that all of the voters who have been brought into the City by the annexation could qualify, from a poll tax standpoint, by following the provisions of Section 24-128.

ELECTIONS—Ballots—Seal of Electoral Board for New Consolidated City. (236)

Honorable Fred W. Bateman, Secretary
Office of the General Registrar
City of Warwick

I acknowledge receipt of your letter of April 28, which reads as follows:

"The Cities of Warwick and Newport News consolidate as of July 1, 1958.

"We are confronted with a primary election in the First Congressional District necessitating the preparation of ballots by the present respective electoral boards of the cities of Newport News and Warwick and, ostensibly, a new board will be appointed after July 1 and supervise the election.

"The question has arisen as to the type of seal that the Warwick Electoral Board will use on the primary ballots to be used in July."
"It is our thought that under Section 24-43 the Electoral Board may change its seal in the discretion of the Board and, accordingly, we intend to pass a resolution changing the seal and using the Newport News seal. "Will you please let us have your opinion as to whether or not the above suggested procedure is legal and, if it is not, will you please advise the manner in which we should proceed with respect to placing a seal on the primary ballots to be used in July."

It is my understanding that effective July 1 the City of Warwick will no longer be in existence, but that the territory now constituting the City of Warwick will become a part of the new City of Newport News. Under these circumstances, all of the ballots in the consolidated City of Newport News should contain the seal of the new City. I think that in the preparation of the ballots the present Electoral Boards of the City of Newport News and the City of Warwick should agree upon a seal for the new City of Newport News, which seal can be adopted by the respective Electoral Boards of the City of Warwick and the City of Newport News for use upon the ballots for the election in July that will be held after the City of Warwick and the now existing City of Newport News have ceased to exist, and the new City of Newport News has come into existence.

---

ELECTIONS—Bond Referendum—Requirement of Approval by Freeholders—Constitutional Question. (11)

July 16, 1957.

Mr. G. M. Lapsley, Recording Secretary
Virginia Advisory Legislative Council

This is in reply to your letter of July 10, 1957, which reads as follows:

"A Committee of the Virginia Advisory Legislative Council is studying legislation relating to standardized procedure for the issuance of bonds by political subdivisions and agencies of this State. In connection with this study a suggestion has been made that in counties, and in those instances where approval of the voters of cities and towns is required for bond issues, approval by a majority of the freeholders who are qualified voters of the political subdivision be required as well as approval by a majority of all the qualified voters thereof.

"I have been directed to write to you on behalf of this Committee to inquire whether a general law imposing such a requirement would be valid under the provisions of §§115-a and 127 of the Constitution of Virginia."

The proposed statute would place a veto power in the freeholders which in order to be valid would, in my opinion, require a constitutional amendment. Section 30 of the Constitution authorizes the General Assembly to prescribe a property qualification in local elections for all local public officers, other than for members of the General Assembly. In view of this constitutional provision, it would seem that a property qualification not contemplated therein would be invalid.

I find that in some States statutes under constitutional provisions, similar to Sections 115(a) and 127, have been upheld where the statute prescribed that the total vote in the bond issue election must be at least 50% of the total number of votes cast in the last preceding general election, but some courts have held to the contrary. See A.L.R. 106, at page 222, et seq.

There is grave doubt that the legislation contemplated would be constitutional.
ELECTIONS—Bond Referendum for Schools in Counties—No Waiting Period for Second after First Defeated. (5)  

HONORABLE CHESTER J. STAFFORD  
Commonwealth's Attorney  
Giles County  

This is in reply to your letter of June 26, 1957, in which you request my opinion as to the time necessary to wait after the defeat of a school bond referendum before a second school bond referendum may be held in a county such as Giles County, Virginia. 

I can find no fixed waiting period in the statutes of Virginia and, therefore, if the County School Board desires to set a date for a second referendum, then they may call for the referendum as soon after the first referendum as it is practically possible. 

ELECTIONS—Candidates—Filing Declarations and Petitions with State Board—Effect of, When Left at Board's Office After Office Closed on Last Day. (221)  

HONORABLE LEVIN NOCK DAVIS, Secretary  
State Board of Elections  

This is in reply to your letter of April 15, 1958, which reads in part as follows: 

"The municipal elections are being held this year on June 10, 1958, and the last day in which candidates could file for this election, under Section 24-345.3 of the Code, expired at midnight April 11, 1958, which is ten days after April 1, 1958. 

"The enclosed declarations of candidacy and petitions were delivered to the office of the State Board of Elections on Friday for James P. Brice, Dr. Charles M. Cornell, Carl B. Woodson, and Robert H. Wagner. However, these papers were left on my desk in the office as shown by a memorandum attached to said papers at 11:31 P.M. and the time was witnessed by B. O. Dillard and M. L. Bowman. Mr. M. L. Bowman, a guard at the State Capitol, informed me on Saturday that the person who had delivered the papers was endeavoring to push them through the door but could not do so and that he unlocked the door and then placed the papers on my desk. I found said papers on my desk when I came to the office on Saturday morning, April 12, shortly after 8:00 A.M. 

"For your information, I had been in the Capitol from 7:30 P.M. until about 11:15 P.M., when I left to go to the Richmond Hotel. 

"You are further advised that Mr. Brice, one of the candidates, called me on Friday from Roanoke, stating that he had filed his papers with the clerk in the city of Roanoke and said that he did not know that he was required to file with this office too. He wanted to know if he could mail his papers to this Board. I informed him that under the law, he was required to file both with the clerk and with this Board and that the deadline would expire at midnight on Friday. I also told him that he would find me at the Richmond Hotel if I were not in this office, as the office would be closed at 5:00 P.M. on Friday. 

"The question now is whether the delivery of these papers in the manner set out above constitutes a proper filing as required by law."

The question presented is not free from doubt. The courts in numerous instances have considered similar cases, but it does not seem that there has been a clear
and satisfactory determination of a case such as you have presented. I am unable to find that the Virginia Court has considered the precise point.

In the case of Elliott v. Gardner (Ind.), 46 N.E. (2d) 702, the appellant, on the last day for filing his briefs, went to the office of the Appellate Court of that State at about 9 P.M. The clerk's office was closed and appellant was unable to make delivery of the briefs to either the clerk of the court or any of his deputies. A night watchman was on duty and this watchman had a key to the clerk's office. The appellant delivered his briefs to the nightwatchman, who immediately unlocked the office of the clerk and placed the briefs in the clerk's office, where the clerk found them the next morning. The court held in this case that this was sufficient compliance with the rules of the court requiring papers to be filed with the clerk within a certain time. The opinion in this case fails to discuss the point at length, the court apparently feeling that, under the circumstances, the conclusion was obvious.

In Vol. 2 of Words and Phrases, 2nd Series, at page 531, there appears this statement:

"There can be no filing of a paper in a legal sense except by its delivery to an official whose duty it is to file the papers and who is required to keep and maintain an office or other public place for their deposit, and the papers must either be delivered personally to such officer with the intent that the same shall be filed by him, or delivered at the place where the same should be filed."

I do not think that the phrase "filed * with the Board" can be construed to mean that the papers necessarily have to be endorsed and marked "filed" by the Board or some official thereof on the last day for filing. Quite a number of the cases with respect to this matter involve situations where such an endorsement had to be made before the filing was completed.

Although, as I have indicated, the question involved is not free from doubt, I am of the opinion that the notices of candidacy in question have been filed in substantial compliance with the manifest intent and purposes of Chapter 13.1 of Title 24 of the Code.

To rule otherwise would place a strained construction on the statute which requires candidates to file their notices of candidacy with the Clerk and State Board of Elections. Here the four candidates for the office of City Council of the City of Roanoke filed their notices of candidacy, with accompanying petitions, with the Clerk of the Hustings Court of the City of Roanoke prior to April 11, 1958, and each notice was marked, "Received and Filed," by the Clerk, and the date of filing noted thereon.

While filing with the State Board of Elections is a requisite, the statute does not require filing with a member or with the Secretary of the Board, but with the Board. It is conceded here that prior to midnight, April 11, 1958, the four notices of candidacy, and accompanying petitions, were actually delivered to and deposited in the office of the State Board of Elections in Richmond, Virginia, and on the desk of the Secretary, who is also a member of the Board. Admittance to the office of the Board of Elections was by the custodian thereof, who attested the delivery of the notices and other papers as having been at 11:31 o'clock P.M. So far as the candidates are concerned, they did everything required of them except make physical delivery within sight of a member or employee of the Board. Everything was done that could have been done had the Secretary or some other member of the Board been present,—other than their marking the notices filed and noting the date and time of filing. Papers are as effectively filed without the date being noted thereon, as with the date. The purpose of noting the date on a paper is to establish the fact of filing within time.

Accordingly, it is the opinion of this office that the names of the four candidates should be certified to the Electoral Board of the City of Roanoke, Virginia, in
order that they may be printed on the official ballots to be used in the election to be held in that City on June 10, 1958.

Incidentally, at the 1958 Session of the General Assembly, Section 24-345.3 of the Code was amended by H. B. 389, which is Chapter 309 of the Acts of 1958. Under this amendment, after the effective date of the Act, which is the latter part of June, 1958, the requirements for filing declarations of candidacy with the State Board of Elections will no longer be applicable to candidates for town, county and city offices.


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

This is in reply to your letter of December 20, 1957, in which you request my opinion as to whether or not petitions by candidates for the office of justice of the peace in the City of Harrisonburg should be signed by qualified voters residing in the ward from which the person is a candidate or whether these petitions may be signed by any qualified voter in the City.

Justices of the Peace in Harrisonburg are elected from their specific wards, and not by the voters of the entire city. On May 6, 1949, this office rendered an opinion to Honorable Robert J. McCandlish, Jr., Member of the House of Delegates from Fairfax, Virginia concerning a similar question for the City of Falls Church. I am enclosing a copy of that opinion. As you can see from reading that opinion, this office is of the view that, while it is desirable that the petition be signed only by the qualified voters of the particular ward from which the person is a candidate, petitions of candidates for city offices who are elected from a specific ward may be signed by the qualified voters of the city as a whole, as officers are in fact officers of the city and not just officers of the ward.


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

This is in reply to your letter of December 13, 1957, relating to the procedure to be followed by candidates for city and town council.

These elections are held on the second Tuesday in June, pursuant to §24-136 of the Code.

Candidates for city council running not as party nominees, but as independents, must file their notices of candidacy, along with a petition as required by Code §24-133 (50 qualified voters of the city) within ten (10) days after the first Tuesday in April. Duplicate copy of the notice of candidacy and the petition must be filed with the State Board of Elections as well as the local clerk of court as provided in §§24-131 and 24-345.3 of the Code, which will be April 11, 1958.

The requirements for town council and mayor are the same, except that the candidates for town office are not required to file petitions—but merely notices of candidacy with the clerk and the State Board of Elections.

I am enclosing copies of two opinions rendered by this office to Honorable Levin Nock Davis, Secretary, State Board of Elections, which pertain to town elections and which are dated March 11, 1955 and April 25, 1957, respectively.

HONORABLE EARL F. WAGNER
Commonwealth's Attorney of the City of Alexandria.

This is in reply to your letter of April 25, 1958, in which you refer to Section 10.01 of the charter of the City of Alexandria as published in Chapter 262 of the Acts of the General Assembly of 1956. You have presented the following question:

"Specifically we should like to have your opinion as to whether or not any candidate can be written in on the ballot under the heading of Mayor; and the same candidate can be written in on the ballot under the heading of Councilman. Would this write-in vote count for either Mayor or Councilman?"

The pertinent language of Section 10.01 of the City Charter is as follows:

"** A candidate for mayor shall file his petition therefor specifically, and a candidate for city councilman shall file his petition therefor specifically, provided, however, that a candidate who files his petition for mayor shall not have his name printed on the ballot for city councilman. The names of all candidates for city council shall be listed together, alphabetically, on the ballot; the names of all candidates for mayor shall be listed together on the ballot, alphabetically. Immediately above the list of names of candidates for city council shall appear the words 'For City Council, vote for no more than six (6)', or some similar designation. Immediately above the list of names of candidates for mayor shall appear the words 'For Mayor, vote for one', or some similar designation.

In the event no candidate shall file a petition for the office of mayor, the ballot shall show no candidates for that office and the member of council who receives the largest popular vote shall be the mayor of the city and the persons receiving the next six highest votes shall be the city councilmen.

"The said election shall be held in accordance with the general laws of the Commonwealth relating to primary and general elections wherever applicable."

As I construe the foregoing provision, in the event no person files as a candidate for mayor, there will not be an election for that office, and the election will be limited to candidates for councilmen, in which event the person receiving the largest number of votes for councilman will automatically become mayor. Under such circumstances, there could not be a valid write-in vote for the office of mayor.

In the event one or more candidates file for the office of mayor, I am of the opinion that a write-in vote for such office will, if properly cast as provided in Section 24-252 of the Code, be valid. For the same reason and under the same conditions a write-in vote for the office of councilman will be valid, provided the voter does not also cast a write-in vote for mayor.

I am of the opinion, however, that in any case where a voter votes by the write-in method for the same person for the office of mayor and also the office of city councilman, the vote cast for such person for the office of city councilman would be void, and that the vote cast by this same voter for such person for the office of mayor would be a valid vote and should be counted. This conclusion is reached because of the fact that the city charter specifically disqualifies a candidate for mayor from being a candidate in the same election for city councilman. It would seem that, if a candidate for mayor cannot file for both offices at the same time, a write-in voter cannot by his action designate the same person as a can-
didate for the office of mayor and city councilman at the same time. Therefore, should there be any ballots upon which the same person has been voted by the write-in method for mayor and city councilman, I feel that the vote cast for such person for mayor should be counted and that the vote cast by the same voter for such person for city councilman should not be counted.

I have been unable to find any cases or prior rulings on this point and, therefore, the question is not entirely free from doubt.

ELECTIONS—Democratic Primary—Participation in by Voter Voting For Republicans in Previous General Election. (96)

HONORABLE GORDON F. MARSH
State Senator

November 15, 1957.

I acknowledge your letter of November 14 which reads as follows:

"I have had a request from a leader in my Senatorial district to write to you for a ruling on the following question:

"Under the law, will one who voted for the Republican candidates in the general election on November 5, 1957 be eligible to participate in the Democratic primary in July, 1958?"

I am enclosing a copy of the Democratic Party Plans and call attention to the provisions found on pages 11 and 12. The provisions of the Party Plan together with sections 24-367 and 24-368 provide the answer to your question.

I believe that it probably would be necessary for the democratic committee of the county or city involved to adopt the resolution provided for in the Democratic Party Plans.

I am enclosing a copy of sections 24-367 and 24-368.

ELECTIONS—Electoral Board—May Not Appoint Assistant Secretary. (297)

June 26, 1958.

MR. J. WILLIAM CLEMENT, Chairman
Electoral Board of the City of Danville

This is in reply to your letter of June 25, 1958, which reads as follows:

"I am Chairman of the Danville Electoral Board.

"We have a general registrar for the entire city, who is appointed by the city and paid by the city. The electoral board is appointed by the Judge of the Corporation Court and its members, including the secretary, are paid by the city.

"Would you please give me an opinion on whether the Judge of the Corporation Court, or the City Council, can appoint an assistant secretary to the electoral board and, if so, can the registrar likewise hold the office of assistant secretary to the electoral board."

I am unable to find any statute authorizing the appointment of an assistant secretary to the electoral board. Section 24-32 of the Code provides that "the board
shall elect one of their number chairman and another secretary." Each member of the electoral board is a city officer and, under section 24-29, is required to take and subscribe to the oath required of other city officers. Moreover, each member of an electoral board is a constitutional officer. ... Section 31 of the Constitution.

In view of these provisions, and the duties of the secretary, as set out in Chapter 4 of Title 24 of the Code, I do not feel that an assistant secretary, who would not be a member of the board, could perform the functions of a secretary. The secretary is the custodian of the seal of the board, and also the custodian of the ballots packaged for delivery to the various precincts. The applications for mail ballots are required to be processed by the electoral board and the voted ballots are required to be returned to this board and kept by it until delivered to the judges of election at the various precincts. Under Section 24-343 the secretary of the electoral board is allowed a fee of twenty-five cents for each application filed. Generally, in actual practice, it is the secretary who processes mail ballots on behalf of the board. In my opinion none of these duties may be delegated to an assistant.

Under Section 24-344 it is provided that the governing body of each county and city shall provide the electoral board with such assistance as may be necessary to carry out the provisions of the applicable statutes with respect to the processing of mail ballots. However, I consider that this section is intended to authorize the local governing body to provide the funds for the payment of clerical help employed by the board who would serve the board in a mere clerical capacity.

In view of my opinion as set forth herein, it is apparent that the answer to your second question is in the negative.

ELECTIONS—Electoral Board—Member for City Must Actually Reside in City.

Honorable Levin Nock Davis, Secretary
State Board of Elections

This is in reply to your letter of February 12, 1958, in which you present the following question:

"The question has been raised by some of the members of the electoral boards as to whether a citizen residing outside of the corporate limits of a city yet being a registered voter in said city is entitled to be appointed as a member of the electoral board of said city."

Section 15-487 of the Code of Virginia provides in part 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 32 of the Constitution of Virginia provides 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, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; and except,
further, that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill positions or posts requiring special technical or professional training and experience.

"Persons eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity."

On January 31, 1956, this office received an inquiry from the Commonwealth's Attorney of Lee County as to the eligibility of a person holding the office of Mayor, whose actual place of residence was outside the corporate limits of the municipality in question, but who retained his right of suffrage in such municipality. In that opinion it was stated as follows:

"I am of the opinion that place of residence as contained in the foregoing provisions has reference to the actual physical place of abode as distinguished from the place of legal domicile. This conclusion, I think, is supported by the opinion in the case of Williams v. Commonwealth, 116 Va. 272, and the authorities cited therein. This view of the matter, it appears, is recognized in 62 C.J.S. at Article 479.

"While the person in question is an elector within the town, I do not feel that he has the status of a resident elector. Frequently persons move from one community to another and retain their voting place at the place from which they have moved, and this they may do if they have the intention of ultimately returning, but for the purpose of holding office under the constitutional and statutory provisions herein cited, I am of the opinion they fail to qualify."

Members of the electoral board are officers within the meaning of that term as used in the statutory and constitutional provisions quoted above.

For the reasons set forth in the opinion of this office under date of January 31, 1956, I am of the opinion that a member of the electoral board must actually reside within the corporate limits of the city in order to be eligible to hold such office in said city.

ELECTIONS—Mayors—Vacancies in Towns—Charter Provisions Enacted Prior to 1903 No Longer in Effect. (27)

August 2, 1957.

HONORABLE LEVIN NOCK DAVIS, Secretary
State Board of Elections

I acknowledge receipt of your letter of July 31, 1957, enclosing a letter from Honorable Edward McC. Williams, Commonwealth's Attorney and also Attorney for the Town of Berryville. Mr. Williams called attention to the provisions of the charter of the Town of Berryville relating to the election of town officers and the filling of vacancies with special reference to the filling of a vacancy in the Mayor's office. These charter provisions I find are contained in Chapter 819 of the Acts of 1897 and 1898 and are in conflict with the general law with respect to the election of town officers contained in §§24-168 through 24-175 of the Code and the filling of vacancies as provided for in §24-145 of the Code. The provisions of §§24-168 through 24-175 were enacted by Chapter 269 of the Acts of 1903 and all charter provisions inconsistent therewith were repealed. Therefore, the election of officers of the Town of Berryville is required to be held under general law. Section 1028(a), paragraph (2) as contained in Chapter 269, acts of 1902, 03 and 04,
REPORT OF THE ATTORNEY GENERAL

provides that vacancies in town offices shall be filled as prescribed by law. The law at that time was §1030, Code of 1887, which became §3003, Code of 1919, and is now §15-423, Code of 1950.

Section 24-145 applies when there is no other provision made for filling the vacancy. Section 15-423 makes provisions for filling the mayoralty vacancy.

Therefore, in my opinion, any vacancies in any such offices would be filled in accordance with the general law and not in accordance with the charter provisions. The general law applicable is §15-423 of the Code, which provides that a vacancy in the office of mayor may be filled by the council from the electors of the town.

The charter provisions referred to by Mr. Williams are no longer in effect.

ELECTIONS—Primary—Write-in Votes—Not Permissible or of Any Effect. (2)

HONORABLE E. L. TURNER, Secretary
Electoral Board, City of Charlottesville

This will reply to your letter of June 27, 1957, in which you request to be advised whether or not “write-in” votes cast for a person who has not complied with the provisions of the Virginia Code relating to primary elections are valid, and whether or not a person who has not complied with such provisions could be declared the nominee of a political party by virtue of his having received a majority of the “write-in” votes at a primary election. Specifically, your request has reference to the impending Democratic Primary to be held on July 9, 1957.

As a prelude to a consideration of the questions presented in your communication, I might point out that Chapter 14 of Title 24 of the Virginia Code, which governs the conducting of primary elections in Virginia, contains no provision expressly authorizing the casting of “write-in” votes at a primary election. However, §24-252 of the Virginia Code, which is contained in Chapter 11 of Title 24 relating to elections generally, does provide for the casting of such votes, and the critical question posed is whether or not the provisions of §24-252 are made applicable to primary elections by the language of §24-356 of the Code which, in pertinent part, prescribes:

“All the provisions and requiremnts of the statutes of this State in relation to the holding of elections, the counting of ballots, the making and certifying of returns and all other kindred subjects shall apply to all primaries insofar as they are consistent with this chapter.” (Italics supplied).

Upon examination of the various provisions of the Virginia law relating to the holding of primary elections, I am constrained to believe that your inquiries should be answered in the negative. Section 24-347 of the Code declares that a primary, when held, shall be conducted “in all respects” under the provisions of Chapter 14. Section 24-351 makes it the duty of the chairman and secretary of the State central committee of every party to notify the State Board of Elections, at least thirty days prior to the date specified in §24-349 of the Code for the holding of primary elections, whether such committee has or has not adopted the direct primary method of nominating candidates, and §24-352 directs the State Board of Elections, after receipt of appropriate notice, to order the holding of a primary election in any county, city or other district of the State “in which it is so notified that a primary is intended to be held.”

With regard to the qualification of candidates, §24-369 of the Code prescribes that the name of a candidate shall not be printed upon any official ballot used
at a primary unless such person is legally qualified to hold the office for which he is a candidate and unless he is eligible to vote in the primary in which he seeks to be a candidate. Moreover, related portions of Chapter 14 provide for the filing of a written declaration of candidacy with the chairman or chairmen of the several committees of the respective parties, the acknowledgement of such declaration, the accompanying of such declaration with a petition therefor signed by a specified number of qualified voters and the payment of a fee to assist in defraying the expenses of conducting the primary. See, §§24-370, 24-372, 24-373, 24-374, 24-398, 24-399 and 24-400. In addition, §24-375 directs the chairman or chairmen of the respective parties to furnish the electoral boards charged with the duty of preparing and printing primary ballots the names of the candidates to be printed thereon.

With respect to the required declaration of candidacy, §24-371 directs that it shall be in substantially the following form:

"I, ................................, of the county (or town or city of) .................., a member of the ....................... party, declare myself to be a candidate for nomination to the office of ....................... to be made at the primary to be held on the .......... day of ............... If I am defeated in the primary I hereby direct and irrevocably authorize the election officials charged with the duty of preparing the ballots to be used in the succeeding general election not to print my name on said ballots."

Supplementing the declaration of candidacy prescribed by §24-371 of the Code the following provision of the Democratic Party Plans adopted in accordance with the provisions of §24-363 of the Virginia Code:

"The name of no candidate shall be printed upon any official primary ballot unless and until such person complies with all of the requisites of the State Primary Laws and in addition subscribes thereto and files with his declaration of candidacy the following pledge of honor: 'I, .................., do state on my sacred honor that I am a member of the Democratic party and believe in its principles; that I voted for all of the nominees of said party at the next preceding general election in which I voted and in which the Democratic nominee or nominees had opposition; and that I shall support and vote for all of the nominees of said party in the next ensuing general election. Given under my hand this .......... day of .................., 19........'"

The requirements of Chapter 14 summarized above are substantially similar to those considered in State v. Board of Commissioners of Lincoln County, 131 P. (2d) 278, in which case the Supreme Court of New Mexico was called upon to resolve a question identical to that here under consideration. With particular regard to the provisions of §24-356 of the Virginia Code, Section 13 of the Primary Election Code of New Mexico prescribed that primary elections should be held and conducted and the voters should vote therein and returns made in the same manner as provided by law for general elections "except as herein otherwise provided or inconsistent with the provisions of this act; and such primary elections shall in all respects conform to the laws governing general elections, except as herein otherwise provided." Holding that write-in votes were not permissible under the laws regulating primary elections in that State, the Supreme Court of New Mexico observed:

"A review of the foregoing provisions of the controlling statute leaves us quite satisfied that it neither contemplates nor permits the write-in method of nominating candidates. That such a method defeats one of
the main objects of a primary election, viz., that of seasonably submitting the names of candidates for consideration by the qualified electors, there can be no doubt. And as against majority selection, the desired result in all elections, it is plain that a very small minority through last minute activity could foist on a political party as its nominee for a given office, a candidate so obviously unfit and wanting in qualifications, that the mere filing of a declaration of candidacy by him in the primary would have drawn forth others to insure his defeat.

"* * * * *

"One of the opening sections of the Act, Section 2, defines the legislative policy by declaring that candidates of political parties for the offices to which it applies 'shall not be otherwise selected or nominated'. Any other method of selecting candidates represents an exception carved out of the all embracing prohibition contained in Section 2. Hence, the language relied upon to create it is to be strictly, although not unreasonably, construed. 59 C.J. 1092 25 R.C.L. 983."

"* * * * *

"The Act abounds with requirements and provisions demonstrating beyond peradventure of doubt that it was never the intention of the legislature that a candidate could be nominated at a primary election by the write-in method of voting. Relator places great reliance on the language of Section 13 directing that such elections shall be held and conducted and that voters shall vote therein as by law provided for general elections. She reminds us that the write-in method of voting is permissible at the general election. 1929 Comp. Sec. 41-312; N. M. St. 1941, Sec. 56-313. It is to be noted, however, that by the express language of said section the machinery of the general election law is not to be assimilated where otherwise provided by the Primary Election Code or where inconsistent therewith. As already shown, the claimed right to nominate a candidate by the write-in method of voting is denied by the plain import of numerous provisions of the Act and is inconsistent with the whole plan and purpose of the primary method of selecting candidates of political parties in a primary election."

I am of the opinion that the views expressed in the above cited case are sound and that the reasons advanced by the majority of the Court in support thereof are apposite to the instant situation. See, also, State v. Board of Ballots Commissioners, (W. Va.) 96 S.E. 1050; Board of Supervisors of Elections v. Blunt, (Md.) 88 A. (2d) 474. I am especially constrained to this belief by reason of the pledge of honor required of candidates for nomination at a Democratic Primary. I am of the opinion, therefore, that write-in votes are not permissible under the laws governing primary elections in Virginia, and that a person who has not complied with these laws may not be declared the nominee of a political party by virtue of having received a majority of such votes in a primary election.
ELECTIONS—Poll Taxes—Block Payments—Treasurer Must Accept Payment—But Should Not Certify Names on List of Those Who Have Personally Paid.

November 20, 1957.

HONORABLE WALTER B. GENTRY
Treasurer of the City of Richmond

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

"Each year my office has various clubs and organizations and in some instances individuals making block payment for Commonwealth of Virginia capitation taxes, for members.

"The Commonwealth's Attorney has asked that I obtain an opinion from you as to the legality of this procedure and I would appreciate such an opinion, not only for him, but for my own information as well."

Section 24-129 of the Code makes it unlawful for any person to pay or offer to pay the State poll tax of another under such circumstances as to show an indicated purpose or intent to have the name of such other person placed upon the certified poll tax list. This section further makes it the duty of the Treasurer to whom any such payment is made to report forthwith the fact of such payment and the circumstances relating thereto to the Commonwealth's Attorney. This section does not authorize the Treasurer to refuse to accept the payment, even though he may be of the opinion that it is being made contrary to the provisions of this Code section. It would appear, therefore, that the Treasurer does not have the right to refuse to accept poll tax payments.

Section 21 of the Constitution provides that, as a prerequisite to the right to vote, a person shall personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him during the three years next preceding that in which he offers to vote. This office in various prior opinions has held that a Treasurer would violate the law should he certify on the list required by Section 24-120 of the Code the names of those persons whose poll taxes have not been personally paid.

In considering what constitutes personal payment of poll taxes, the Supreme Court of Appeals of Virginia has stated:

"The principal definition of the word 'personally' given by Webster and the Century Dictionary is, 'in a personal manner,' and every one of ordinary intelligence understands that he does not personally or 'in a personal manner' pay a debt he owes unless its payment reduces his estate or means to the extent of the payment; and that if this be not the case, but the debt be paid by another out of that other's means, such debtor could not claim that he had personally discharged the obligation. Where, however, the debtor was the source of the payment and paid the debt because he desired to discharge the obligation out of his own funds, it is, as would seem clear, a personal payment, no matter by what method or avenue the money is made to reach the hand of the creditor.

"So, as would seem equally clear, where it appears that a voter was the source of the payment of the poll-taxes required of him, and paid them out of his own estate or funds because he wished to pay them, it is a personal payment by the voter, whether the money was handed by the voter to the treasurer, or to one of his deputies, or sent by check drawn on a bank in which the drawer has funds to meet its payment, or by the hand of the tax-payer's clerk or duly authorized agent; and a payment by a voter of his poll-tax in either of the methods mentioned other than the handing of the money himself to the treasurer, would as effectually guard against the corrupt practices which Article II
of the Constitution is designed to prevent as would a manual delivery of the money to the treasurer, and the voter would stand on the same footing, as far as being free from influence is concerned, in the one case as in the other, since there would be in neither case the apprehended ground of improper influence or control of the voter.” Tilton v. Herman, 109 Va. 503, 507-8.

There is a clear duty and obligation upon every Treasurer to be satisfied that a person's poll taxes have been personally paid. Whenever such taxes are paid by a person other than the taxpayer, you must know that the payment is being made with funds furnished by the person in whose name the taxes are being paid and pursuant to his request. In such cases you would have authority to place the name of the taxpayer on the certified list required to be published and posted under Section 24-120 of the Code. This, of course, is subject to the exceptions set forth in Section 24-129 permitting the payment of the poll tax by a person for a member of his household or of any person related to him by consanguinity or affinity, as father or mother, son or daughter, brother or sister, grandfather or grandmother, or grandson or granddaughter.

ELECTIONS—Poll Taxes—List of Persons Paying for Town Elections—Expense of Preparing. (250)

May 16, 1958.

HONORABLE JULIUS GOODMAN
Commonwealth’s Attorney of Montgomery County

This is in reply to your letter of May 13, 1958, in which you refer to Section 24-127 of the Code and other related sections.

You state that there will be elections held in June of this year in the incorporated towns of the county and present the following question:

“Is the county of Montgomery through its Board of Supervisors or governing body required to pay the expenses of preparing and printing the county and town lists, or either one of said lists, for the incorporated town's election since there are no county officers to be elected in June but being solely an election held for the benefit of officers such as councilmen, mayor, etc., of the respective incorporated towns, or,

“Should the incorporated towns bear the expenses of preparing and printing the county and town lists or either one of said lists?”

With respect to the list of qualified voters for the county, which is required to be prepared and published in accordance with the provisions of Sections 24-120 and 24-121, it is provided in Section 24-125 that the clerk's fees for his services in this connection shall be paid out of the treasury of the county. I am unable to find any statutory provision under which the towns would be required to bear this expense or any part thereof.

Section 24-127 requires the treasurer of the county to make up a separate list with respect to the voters residing in any town located in the county. This section requires the treasurer to file this list with the clerk. Of course, since the treasurer is no longer on a fee basis there is no compensation payable to him for his services in connection with either the county list or the town list.

Section 24-125 of the Code does not apply to the list to be furnished under Section 24-127. Section 24-125 and prior sections in Chapter 7 of Title 24, originated in a separate Act of the General Assembly from the Act under which
Section 24-127 was passed. There has never been any provision providing for compensation to the Clerk for his services in connection with the list provided for in Section 24-127. I am unable to find any statute that would authorize the county to compensate the clerk in this connection, nor is there any statute requiring towns to pay for this service.

The provisions of Section 24-124 with respect to the certified list being conclusive evidence of the facts therein stated for the purpose of voting, are not applicable to the list mentioned in Section 24-127. The late Justice Staples, while he was Attorney General, ruled to the same effect (Attorney General Reports 1941-42, p. 152).

Obviously, it would be almost impossible for the treasurer to make an accurate list of the taxpayers who are residents of the town. Any person who is a registered voter within a town would be entitled to vote in the June election if his name appears on the certified list for the county, even though his name may not appear on the special town list, prepared under Section 24-127.

---

**ELECTIONS—Poll Taxes—Paid by Mail—Date Received by Treasurer, Not Date of Postmark, is Date of Payment. (241)**

May 6, 1958.

**MRS. ANNE H. MILLER**
Treasurer for Washington County

This is in reply to your letter of May 5, 1958, in which you ask whether or not the postmark or date of mailing of the payment of a State capitation tax shall be considered as the actual date of payment in order to meet the requirement of Section 21 of the Constitution of Virginia relating to the qualification of a person for voting, which is in part as follows:

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

I am enclosing a copy of an opinion rendered by this office on June 20, 1951, and published in the Attorney General's Report for 1950-51 at page 100, in which this question is discussed at length. I am in accord with this opinion.

As you know, the treasurer, pursuant to Section 38 of the Constitution and Section 24-120 of the Code, is required to file with the clerk of his court a list of all persons in his jurisdiction who have paid, not later than six months prior to such election, the State poll taxes required by the Constitution. As pointed out in the enclosed opinion, this office has consistently taken the position that payment is not made to the treasurer prior to the time it is actually received by him or one of his deputies. During the time that a check or other method of payment is in the custody of the U. S. mails, it cannot be said and the treasurer cannot certify that he has actually received payment. His certificate with respect to who has made timely payment of the poll taxes is limited to those poll taxes in his actual custody on the final day for payment.

---
REPORT OF THE ATTORNEY GENERAL


HONORABLE HOWARD L. PRICE, Chairman
Montgomery County Electoral Board

I acknowledge receipt of your letter of March 10, which reads as follows:

"As you know, the town of Blacksburg annexed several outlying areas with an estimated population of three thousand (3,000) people, and this became effective January 1, 1958.

"Some people in these annexed areas have paid their poll taxes after December 5, 1957, but before January 1, 1958, the date of the annexation, and feel that they should be entitled to vote in the June, 1958, town election.

"Please send me a ruling on this, stating the latest possible date these people in the annexed area can pay their poll taxes and be eligible to vote in the June, 1958, town election."

Under Sections 24-136 and 24-168 of the Code, elections for town officers are required to be held on the second Tuesday in June.

Section 24-127 of the Code requires the County Treasurer to furnish the Clerk of the Circuit Court of his County, in any year in which an election will be held therein, a list showing the residents of an incorporated town who have paid the State poll tax as provided by law six months prior to the second Tuesday in June. This list shall be in all respects in compliance with Section 38 of the Constitution.

Under these provisions, in order for any person to be qualified to vote in the town election to be held on June 10, 1958, he must have paid not less than six months prior to June 10, 1958, all poll taxes assessable against him for the three years next preceding.

June 20, 1958.

HONORABLE W. O. JONES
Treasurer of Nansemond County

I acknowledge receipt of your letter of June 19, 1958, which reads as follows:

"I have a problem that has come up with reference to tax collections, and I would like a ruling from you.

"I have a man on my books that paid by check his Personal Property tax and Capitation on May 3, 1958 the deadline for Capitation tax. I gave him an official receipt for same stamped paid on that date. A few days later the check came back from the bank marked "Insufficient Funds". In the meantime, we had made up the voting list and naturally we had put this man's name on the list. Later the check was made good.

"Now I am getting some criticism from some of the Board members that this name should not have been on the voting list due to the fact that his check was returned.

"I would appreciate very much having a definite answer from you whether I was wrong in putting his name on the voting list."
Section 124 of the Code of Virginia provides that the list required under Section 24-120 of the Code "shall be conclusive evidence of the fact therein stated for the purpose of voting."

The question presented by you involves the same type as was considered by former Attorney General Abram P. Staples in an opinion dated July 21, 1939, and published in the Reports of Attorney General 1939-40, pages 80 and 81, a copy of which I am enclosing.

Section 111 of the Code referred to in Attorney General Staples' opinion is now Section 24-124 of the Code.

The language contained in Section 24-124 of the Code with respect to the list being conclusive is also contained in Section 38 of the State Constitution.

I concur in the opinion heretofore issued by this office.


HONORABLE MARGARET COWAN, Treasurer
Montgomery County

This is in reply to your letter of January 15, 1958, in which you state that on January 1, 1958 the Town of Blacksburg, which is located entirely within the limits of the Blacksburg Magisterial District, annexed large areas of the county which more than double the town's population. You state that there was not sufficient time to identify the persons living in the newly annexed areas and prepare Blacksburg's Town voting list within five months prior to the town election to be held on June 10, as required by §24-120 of the Code of Virginia. You state that the 1958 assessment list of the Commissioner of Revenue will not be completed prior to the town election to be held in June, and that a list of new residents is not available from the town authorities. In view of these circumstances you request my opinion in answer to the following question:

"Would I, as treasurer of Montgomery County, be complying with the intent and purposes of the law if I filed a list of all persons living within the Blacksburg Magisterial District (instead of a list of those within Blacksburg Corporation) who had paid the state capitation tax for the years 1955, 1956 and 1957 on, or before, December 10, 1957?"

Section 24-127 of the Code of Virginia provides that you are to furnish the Clerk of the Circuit Court with a list of the residents of the town of Blacksburg who have paid the State poll taxes provided by law within six months prior to the second Tuesday in June, and that this list shall be prepared and posted in all respects as it is provided for in Section 38 of the Constitution. Section 38 of the Constitution does not require that the separate list for towns shall be posted—the constitutional provisions relate to counties and cities only. Obviously, the purpose of §24-127 is to require the county treasurer to publish the list of voters living in the corporate limits of the town merely for the convenience of the judges of election. This list, however, is not exclusive, and any person offering to vote in a town election, if in all other respects qualified to vote therein, may not be deprived of the right to cast his vote if the list filed by the treasurer under §24-120 and certified and posted under §24-121 shows that such person's poll tax has been timely paid.

I am enclosing copies of opinions rendered by this office on December 30, 1953, to Honorable A. C. Fuller, Jr., Treasurer of Russell County; on December
14, 1955 to Honorable Levin Nock Davis, Secretary of the State Board of Elections, and on April 25, 1950 to Honorable William J. Phillips, Commonwealth's Attorney for Warren County. As you can see from these opinions, persons living in the annexed territory are entitled to vote in the election to be held in the Town of Blacksburg on June 10th of this year. In the opinion of December 30, 1953, to the Treasurer of Russell County, this office ruled that the Treasurer of the County should include in the list that is made up for a town the names of all persons who have paid their necessary poll taxes who are residents of the town, including those residing in a territory which has recently been annexed.

You should endeavor to prepare this list as quickly and completely as possible. In view of the circumstances, it would be desirable to notify the election officials for the Town that the names of some qualified voters in the recently annexed territory may have been inadvertently omitted from the list, and that the list for the entire magisterial district should be available to the judges of election.

ELECTIONS—Poll Tax List—Town Elections—List for Entire County Must Be Prepared by Treasurer if there is Regular June Election. (156)

January 21, 1958.

HONORABLE R. M. LOVING, JR.
Treasurer of Alleghany County

This is in reply to your letter of January 20, 1958, which reads as follows:

"Alleghany County has but one incorporated town (Iron Gate) located within its bounds, and that town has a regular June election only every other year. Alleghany County does not have regular June elections.

"Am I required to prepare a voting list in January for Alleghany County and the Town of Iron Gate every year for those persons paying poll taxes six months before the regular June elections, when there are no such elections?

"When there is a regular June election in the Town of Iron Gate and none in the County, is it necessary to compile a voting list in January for the entire County, including Iron Gate, or only for the Town of Iron Gate?"

Under the provisions of Section 24-120 of the Code and Section 38 of the Constitution, the treasurer of each county is required to file with the clerk of the court a list of persons who have made timely payments of their poll taxes. This list has to be filed each year at least 158 days before the regular election day in November. Such a list also has to be filed five months before any regular June election in said county. In my opinion, in any year in which there is no June election in the county, the latter list need not be filed. However, in any year in which there is a town election, the poll tax list for the county, in my opinion, should be filed five months before the date on which the June election is to take place. In addition to the list covering the county, the treasurer is required under Section 24-127 of the Code to prepare and file with the clerk a separate list showing the poll taxes paid by the residents of the town. It will be noted that Section 24-120 provides that "at least five months before the second Tuesday in June of each year in which a regular June election is to be held in such county" the treasurer of the county shall file with the clerk of the circuit court a list of all persons in his county who have paid not later than six months prior to the June election the State poll taxes required under the Constitution. In each year, therefore, that the Town of Iron Gate holds its election for Town officers, it
seems that the list must be prepared and filed with the clerk five months before the June election, and that this list must include all the voters in the county who are entitled to have their names placed thereon.

This office has taken the position that the county list, as well as the town list provided for under Section 24-127, should be filed with the judges of election in any town election. This will enable the judges to look to the county list to determine whether or not a person offering to vote has paid his poll taxes as required by law and whose name may have been inadvertently omitted from the special town list prepared under Section 24-127.

ELECTIONS—Registration—1958 Statute—Duties of and Procedure to be Followed by Registrars in Compliance with. (226)

April 18, 1958.

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This letter is in response to your request for advice regarding the duties of Registrars under the amendments made to Sections 24-53, 24-68 and 24-71 of the Code of Virginia by the 1958 General Assembly. The effect of the amendments is as follows:

(a) It is the duty of Registrars, upon request of an applicant for registration, and in advance of the applicant's making written application, to give the applicant information as to the requirements incident to registration and advise as to the pertinent provisions of Chapter 576 of the Acts of the 1958 General Assembly and the Constitution of Virginia.

(b) In addition, the Registrar is required to furnish the applicant copies of the applicable provisions of the Constitution and Code of Virginia.

(c) The Registrar shall furnish every applicant a sheet of paper containing no written or printed data, information, question or words, for use by the applicant in making his written application for registration.

(d) While making his application for registration, and this must be done in the presence of the Registrar, the applicant shall not be permitted to refer to any pamphlet, booklet or other memorandum, printed or written, nor to discuss with any person any matter concerning the requirements necessary in order to register under said Chapter 576. This, however, shall not be construed as preventing the applicant, while making application, from having in his possession, and referring to the applicable provisions of the Constitution and Code of Virginia.

(e) Any Registrar or Assistant Registrar who registers, or permits the registration of any person who has not made application to register as required by and in conformity with said Chapter 576 and Section 20 of the Constitution may be removed from office by the Electoral Board of the county or city, and if so removed, shall be ineligible to serve as Registrar anywhere in Virginia for a period of five years.

The amendments emphasize the requirements of Section 20 of the Constitution that an application must be made in the handwriting of the applicant, and without aid, suggestion or memorandum,—other than such as might be obtained from the pertinent provisions of the Code and Constitution, which the amended statute permits applicant to have in his or her possession.

The information which the applicant must supply in his own handwriting, and on a sheet of paper containing no written or printed data, information, question or words, is the information required by Section 20 of the Constitution and Section 24-68 of the Code, to-wit:
(1) Name of applicant.
(2) Age of applicant.
(3) Date of applicant's birth.
(4) Place of applicant's birth.
(5) Residence of applicant at the time application is made.
(6) Residence of applicant for one year next preceding the making of the application.
(7) Occupation of applicant at the time application is made.
(8) Occupation of applicant for one year next preceding the making of the application.
(9) Whether applicant has previously voted.
(10) If applicant has previously voted, the State, County and precinct in which applicant last voted.

If an applicant makes application in his or her own handwriting, and without aid, suggestion or memorandum, other than the right to refer to the pertinent provisions of the Code and the Constitution, then such applicant has satisfied the requirements of law, so far as a written application is required.

Your attention is invited to the provisions of Section 24-72 of the Code, which makes it the duty of the Registrar to preserve the written applications of all persons who are either registered, or denied registration, for at least one year after such application is presented, such application to be filed and kept with the registration books and preserved as a part of the official records.

After the application has been made, in the manner aforesaid, then the applicant is required to answer on oath any and all questions affecting his qualification as an elector submitted to him by the Registrar. These questions, and the applicant's answers thereto, must be reduced to writing, certified by the Registrar, and preserved as a part of his official records. (Section 24-69 of the Code of Virginia, and Section 20 of the Constitution of Virginia.)

There is no objection to the use by Registrars of printed forms or questionnaires to determine the qualifications of an applicant as an elector, and otherwise obtain information from the applicant needed by the Registrar for the orderly registration of voters and maintenance of office records. The questions to be asked an applicant for registration would be questions which would test the accuracy of, or supplement, information given in the written application; whether or not the applicant has paid to the proper officer all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register; and questions to determine whether or not the applicant is disqualified from registering and voting under Section 24-18 of the Code of Virginia. For your information, this Section provides as follows:

"Persons disqualified from registering and voting.—The following persons shall be excluded from registering and voting: Idiots, insane persons and paupers; persons who, prior to the adoption of the Constitution, were disqualified from voting by conviction of crime, either within or without the State, and whose disabilities shall not have been removed; persons convicted after the adoption of the Constitution, either within or without this State, of treason, of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement; forgery or perjury; persons who, while citizens of this State since the adoption of the Constitution, have fought a duel with a deadly weapon, or sent or accepted a challenge to fight such duel, either within or without this State, or knowingly conveyed a challenge, or aided or assisted in any way in the fighting of such duel." (Section 23 of the Constitution of Virginia).

Section 24-69 of the Code makes it mandatory that those persons mentioned in
Section 24-18, they being persons disqualified from registering and voting, shall be excluded from registration unless the disabilities incurred by them have been removed. It is, therefore, the duty of each Registrar to determine if any applicant is so disqualified, and whether the disabilities that disqualified the applicant have been removed.

If proper written application is made, and the Registrar is satisfied as to the applicant's qualifications, the applicant must then be administered the oath required by Section 24-83 of the Code before the Registrar shall register the name of any person as a voter. This oath, so subscribed, shall be filed with the Registrar and preserved with the books of registration. The oath may be appended to the bottom of any form used by a Registrar to elicit information as to the qualifications of applicants for registration.

No particular form is prescribed for use by Registrars in determining the qualifications of voters. It is their responsibility to determine these qualifications, and if disqualifications exist, the manner in which they do so being within their discretion, so long as the applicable provisions of the law are observed requiring that answers to questions propounded be on oath, reduced to writing, certified by the Registrar, and preserved as a part of his records.

It is not believed that the amendments will require any substantial change in the practice and procedure heretofore followed by Registrars, except that the mandate of the Constitution that an application for registration be in the handwriting of the applicant and contain certain required information, must now be followed strictly.

It is observed that the Constitution of Virginia has prescribed, as a qualification for an elector, no test of knowledge or understanding or educational requirement, other than that the applicant shall be able to make, in his own handwriting, without aid, suggestion or memorandum, the required application, and answer in writing questions affecting his qualification as an elector, which may be submitted to him by the Registrar. Davis v. Allen, 157 Va. 84.

The amendments should result in increased registrations, for by the amendments the General Assembly of Virginia has determined that possession of, and reference to, the applicable provisions of the Constitution and Code of Virginia pertaining to elections while making written application for registration, is not the "aid, suggestion or memorandum" prohibited by the Constitution. The legislative enactment carries with it a presumption of constitutionality. Therefore, any person who can read and write should be able to make the written application, and if otherwise qualified for registration, and not excluded from registering and voting, is entitled to be registered.

To summarize:

I. All applications to register must be made in the applicant's own handwriting, and in the manner aforesaid.

II. Forms or questionnaires may be used by Registrars in determining the qualifications of an applicant for registration, in determining whether or not such applicant is disqualified, and to obtain other pertinent information.

III. Questions affecting an applicant's qualifications as an elector, and answers under oath to such questions, must be reduced to writing, certified and preserved.

IV. All applications of persons permitted or denied registration must be retained by the Registrar for at least one year.

V. Every person applying for registration shall, before he is registered, take and subscribe the oath prescribed in Section 24-83 of the Code, which oath must be filed with the Registrar and preserved.

I trust that the above may be of some help to your office, the Electoral Boards, and Registrars in obtaining uniformity in their practices and procedures regarding registration of voters.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Residence—Person who Moves and Receives Transfer Cannot be Reinstated Unless Residence Reestablished (29)

August 7, 1957.

HONORABLE LIGON L. JONES
Commonwealth’s Attorney
City of Hopewell

This is in reply to your letter of August 5, 1957, which reads as follows:

“The registrar of the City of Hopewell advises me that a registered voter of the City of Hopewell who had moved to Arlington, Virginia, requested in writing that the registrar furnish him a transfer certificate in accordance with Section 24-86 of the 1950 Code of Virginia. This the registrar did. The voter’s name was erased from the registration books of the City of Hopewell. A few days later the voter returned the transfer certificate and requested that his name be reinstated on the registration books of the City of Hopewell and requested a mail ballot for the November election. This request was made by the voter because he found that he could not register in Arlington because he had not resided there for the necessary six months period.

“Will you please advise me whether the registrar of the City of Hopewell should reinstate the voter’s name on the registration books of this city.”

I am unable to find any statutory authority under which the person in question may be reinstated as a voter in the City of Hopewell except by re-establishing his residence in that City. The act of applying for a transfer from that City to another jurisdiction was a declaration by him that he had ceased to be a resident of the City of Hopewell and had established his residence in the County of Arlington. If he will have been a resident of Arlington for six months on November 5, 1957, his transfer should be accepted and he should be enrolled as a registered voter in that jurisdiction.

I am of the opinion that the person under consideration, once having given up his residence in Hopewell, may not regain such residency except by actual establishment thereof in Hopewell for the statutory period of six months.

The provisions with respect to the establishment of residency for voting purposes do have the effect at times of causing a person who has moved from another State to this State or from one county or city in this State to another county or city in this State to be deprived of voting at elections occurring within the period for the establishment of a voting residency in the jurisdiction to which he has moved.

ELECTIONS—Special for State Senator—Between November General Election and January 1st, Who Qualified to Vote. (97)

November 15, 1957.

HONORABLE OTIS B. CROWDER
Treasurer Mecklenburg County

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

“I understand that we are going to have a special election to fill the office of Senator from our District when the Honorable Albertis Harrison resigns to become Attorney General.

“I will thank you to advise me just who will be qualified to vote in this election. I particularly want to know if those persons who did not
pay their poll taxes in time to vote in the last November election can qualify by paying between now and the special election and vote by showing their receipts. Also whether one that is not registered would have to register thirty days before such special election.

I understand that the Governor has fixed December 17 as the date for the special election. Under the provisions of section 24-22 of the Code, any person who was qualified to vote in the election held on November 5, 1957, will be qualified to vote in this special election. Young voters who have just become of age or who will be twenty-one years of age not later than December 17 may register and be qualified to vote.

Under the provisions of section 24-83.1 the registration books shall be closed at all of the precincts for the purpose of registering and transferring voters for a period of six days next preceding and including the day of the special election.


HONORABLE ROBERT C. FITZGERALD
Commonwealth's Attorney for Fairfax County

This is in reply to your letter of June 24, 1958 in which you refer to my letter of June 6, 1958 to Honorable Levin Nock Davis, Secretary of the State Board of Elections, concerning the charter provisions of the town of Clifton, a copy of which I understand you have in your possession.

Your letter is in part as follows:

"You have reviewed the Town Charter of Clifton and are familiar with the conflicts between the charter and the general law but I do not believe that the actual procedures used in their election on June 10, 1958, have been stated. All of the candidates for Mayor and Councilmen complied with Section 24-170 by filing notice with the Clerk of the County on or prior to April 10, 1958, who in turn notified the Secretary of the State Board of Elections, Mr. Levin Nock Davis, by letter of April 14, 1958. The ballots were printed, Judges appointed and the election actually held pursuant to the Town Charter provisions. The election returns were made pursuant to Section 24-173. The ballots and returns were canvassed in compliance with Section 24-175, by the regular canvassers of the Electoral Board of the County and have been certified by them. There was only one candidate over and above the offices to be filled and it is my information that no one in the Town of Clifton is challenging the election, however, the elected officers are desirous of having their position clarified."

In view of the above information I am of the opinion that the election of town officers was a valid election and that the successful candidates in said election are entitled to qualify for the offices to which they were elected.

While the provisions of Section 24-345.3 of the Code should have prevented the local Electoral Board from printing the names of the candidates on the official ballot, unless such candidates had complied with said section, 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 the failure to comply with Section 24-345.3. In such cases, assuming the election was in all other respects legal, one would not be
disqualified from assuming and holding the office merely because his name was placed on the ballot through error. This conclusion is in accord with a similar opinion rendered by this office on June 17, 1957 to the Honorable Stanley A. Owens, Commonwealth's Attorney of Prince William County.


HONORABLE LEVIN NOCK DAVIS
Secretary
State Board of Elections

This is in reply to your letter of June 18, 1958, in which you enclosed a letter to you dated June 12, 1958 from Mr. A. Dow Owens, Secretary of the Pulaski County Electoral Board, which reads as follows:

"It has been brought to my attention that in our recent municipal election on June 10th that one of our candidates failed to pay his poll tax by December 10, 1957. However, he paid his tax on the 26th day of February, 1958, and would thus be eligible to vote in the election in November, 1958, and will be a qualified voter in September when he will take his oath of office.

"From my conversation with your office, I was told that Mr. Aust would be permitted to take office if he were a qualified voter as of the date the oath was given.

"I would greatly appreciate it if you would give me a written opinion to this effect."

You call attention to the fact that the Charter of the town of Pulaski, which is Chapter 253 of the Acts of General Assembly of 1956, provides in Section 8(2) thereof as follows:

"Any person elected to or seeking the office of councilman shall be a freeholder and a resident within and of the town of Pulaski and shall be a qualified voter in the town election in which he or she offers, and any such person shall be eligible for the office of councilman. All qualified voters who are residents of the town shall be entitled to vote for the person seeking election as councilman without respect to any ward in which either the councilman resides or the voter resides, and he or she shall be entitled to vote for all councilmen seeking office in that election."

You then present the following questions:

(1) May the individual in question who was not eligible to vote in the town election held on June 10, 1958 due to non-payment of his poll tax six months prior to that date, but who received a sufficient number of votes in the election for town council held in the town of Pulaski on June 10th to be elected, qualify for and serve the term of office to which he was elected?

"(2) In the event he is not entitled to take his seat, whether the candidate receiving the next highest vote for councilman would be elected, or, if said councilman would have to be elected by a vote of the council."
In my opinion the individual who was elected to the Town Council under such circumstances may not be denied the office to which he was elected on account of the fact that he was not a qualified voter in the June 10th election. In this connection I am enclosing copy of an opinion issued by this office on March 13, 1957, to the Honorable Otis B. Crowder, Treasurer of Mecklenburg County, Virginia. This opinion is published in Reports of Attorney General 1956-57, at page 103.

I am of the opinion that that portion of the Charter of the town of Pulaski which requires a candidate for the office of councilman to be a qualified voter in the town election for which he is a candidate, is in conflict with the provisions of Section 32 of the Constitution and, therefore, void.

In view of my opinion with respect to your question one, no answer to your question number two is required.

ESCHEAT—Realty and Personalty—Procedure for Paying Fees and Expenses of Escheator. (40)

HONORABLE RANDOLPH W. CHURCH
State Librarian

This is in response to your letter of August 7, 1957, with enclosures, which are herewith returned, regarding questions pertaining to escheated real estate and personalty (i.e., money on deposit).

With regard to the payment of the fee for the title search which was stated to be necessary, it is suggested that it could be listed as an expense to be paid out of the Governor's discretionary fund after consultation with the office of the Director of the Budget. This would appear to be a reasonable manner of handling this expense as the property in question is escheated to the Commonwealth as a whole rather than to any particular agency of the Commonwealth.

With regard to the question of an escheator's fee on personalty, it appears that there is no specific provision for the same. Moreover, personalty appears to be escheated by the provisions of Section 55-197 (and as amended) et seq., requiring the filing of a bill in equity. The court would possibly provide for payment of fees for proper services rendered in connection with such a suit and proper fees could be received by persons rendering required services at that time.

EXPENSES—Mileage of Sheriff and Deputies—Limitation upon Number of Miles Sheriff Travels by Board of Supervisors—No Authority for. (246)

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

This is in reply to your letter of May 6, 1958, which reads as follows:

"At the request of the Board of Supervisors of Scott County, I am writing you seeking your opinion with reference to the construction of Section 14-88 and Section 14-89 of the Code of Virginia as amended. Under Section 14-88 of the Code what authority does the Board of Supervisors have to make adjustments and reductions in the mileage sub-
mitted by the sheriff or any of his deputies each month? Section 14-88 provides as follows: 'Each sheriff shall submit a statement of all expenses incurred by him and by each of his full time deputies to the Compensation Board monthly. Each officer shall at the same time transmit a copy of the statement to the Board of Supervisors.' However, the above mentioned section of the Code does not specifically grant the board the right to make any changes, modifications or deletions from the mileage and expenses so submitted by the Sheriff.

"We would like to have your construction on this statute as promptly as possible.

"Some time ago, the Board passed a resolution allowing a maximum of 1850 miles for the Sheriff and each of his deputies per month, and in addition thereto made extra allowance for mileage for services performed under orders of court or extradition papers issued by the Governor.

"It is my understanding that the Sheriff agreed to this maximum of 1850 miles allowance. Would this agreement be legal and binding if the Compensation Board agreed to same under the provisions of Section 14-89 of the Code? I am reasonably sure that the minutes of the Board of Supervisors will reveal that the allowances were made at a maximum of 1850 miles, but the minutes probably do not show that the Sheriff agreed to it. However, in fact he did so agree and such agreement can be proven by each member of the Board of Supervisors."

Section 14-88 of the Code provides as follows:

"Each sheriff and each sergeant shall submit a statement of all expenses incurred by him, and by each of his full-time deputies, to the Compensation Board monthly on forms provided by the Board. Each officer shall at the same time transmit a copy of such statement to the board of supervisors or other governing body of the county or the council of the city for which he is elected or appointed. The Compensation Board shall examine the statement of expenses incurred and, in the event it is of opinion that the annual expense allowance which it has made to any such officer is greater or less than necessary to defray the proper expenses of such officer, then the annual expense allowance theretofore made to such officer shall be reduced or increased to conform to the findings of the Compensation Board. From any such reduction or increase in such allowances the board of supervisors, the city council or the officer affected shall, however, have the same right of appeal as is provided in the case of other salaried officers of the counties and cities by §14-65."

In my opinion, this section does not grant authority to the board of supervisors to make adjustments and reductions in the mileage account submitted by the sheriff. The Compensation Board is specifically given the power to fix the annual expense allowance for such purpose, subject to the appeal provided for in the terminal sentence of the section. I have discussed this matter with Honorable J. Gordon Bennett, State Auditor, who is a member of the State Compensation Board, and he states that in such cases an allowance is made by the Board for a "sum sufficient" to provide for this expense, due to the fact that it is apparently impossible to determine in advance what this expense will amount to.

Under Section 14-89, a board of supervisors may enter into an agreement with the sheriff with respect to a flat sum to be paid in lieu of actual mileage. Such an agreement must, however, be approved by the State Compensation Board. As I understand your letter, the alleged agreement in this case has not been approved by the Board and, unless it is so approved, it has no binding effect.
I am advised by the Compensation Board that several counties have provided the sheriffs with county-owned automobiles, which may be purchased and operated free from the Federal and State taxes, and that it appears such method of providing official transportation has resulted in reducing the travel expense.


HONORABLE JOHN C. WEBB
Member House of Delegates

I am in receipt of your letter of April 4, 1958, in which you advise that the County of Fairfax has adopted subdivision regulations by ordinance pursuant to the authority conferred in Chapter 379 of the Acts of Assembly (1946) as amended. You enclose a copy of the ordinance in question and call my attention to the provisions of Sections 5-1(3) and 5-13 thereof, which sections respectively prescribe:

"Sec. 5-1(3). Subdivide—To separate in any manner any tract of land into three or more lots or other divisions of land at one time or over an extended period of time; provided that the separation of any tract of land into lots or other divisions of land each of which contains an area of five acres or more shall not be considered a Subdivision, except that (a) such separation include, in each or any lot or in any part of the Subdivision, a dedication of land to public use, or (b) all or part of the Subdivision is in any business district, as defined by Chapter 5 of Volume II of the Code of the County of Fairfax (1954), as amended. The partition of land ordered by a court of proper jurisdiction shall not be considered a Subdivision.

"Sec. 5-13. (1) No person, firm or corporation shall construct any road, sidewalk, curb and gutter, drainage structure, sanitary sewer, or any public utility within the boundaries of a dedication or a proposed dedication to public use, including easements, or begin any such construction without first obtaining a permit therefor. Application for such permit shall be made to the Director on such forms as he shall prescribe and shall be accompanied in each case by detailed Plans and Specifications and locations of right-of-way or easements unless such Plans and Specifications have been submitted and approved by the Director. Application for such permit shall be made to the Director on such forms as he shall prescribe and shall be accompanied in each case by detailed Plans and Specifications and locations of right-of-way or easements unless such Plans and Specifications have been submitted and approved by the Director. Nothing in this Section shall apply to any street or road after such has been accepted for maintenance by the Virginia Department of Highways and has become a part of the State system.

"(2) Before a permit is issued for the construction of any gas, electric power, telephone, or water facility within the boundary of a dedication or a proposed dedication to public use, the applicant for a permit to undertake such construction shall pay to Fairfax County the prescribed inspection fees and post an adequate performance bond or cash guarantee as determined by the Director. The prescribed inspection fees shall be in accordance with the current requirements of the Virginia Department of Highways' Manual of Permits and an engineering fee commensurate with the engineering work performed."

In light of the above quoted provisions, you request my opinion upon the following questions:
REPORT OF THE ATTORNEY GENERAL

"1. Whether or not the Fairfax County has any authority to require permits to be applied for before construction of a street not part of a subdivision can be started even though such street may be dedicated to public use; and

"2. Whether or not the County has the authority to establish standards for street construction not within subdivisions even though such streets may be dedicated to public use; and

"3. In the event the County can require application for permit and can establish standards for such streets, does the County have authority to establish standards greater than those established by the State Highway Department?"

With respect to the first two questions presented in your communication, I find nothing in the ordinance which purports to make the provisions of Section 5-13, requiring construction permits, or Section 5-14, establishing subdivision street standards, applicable to streets which are dedicated to public use, but which are not part of a subdivision. All of the above mentioned provisions of the ordinance are portions of Chapter 5, Volume 2, of the Code of the County of Fairfax, relating to and entitled "Subdivisions". As defined in Section 5-1(4), a subdivision embraces land subdivided as prescribed in Section 5-1(3) of the ordinance. If a subdivision—as thus defined—contains land dedicated to the public use, the provisions of Sections 5-13 and 5-14 of the ordinance are applicable to the land so dedicated; however, I do not construe such provisions to be applicable to land dedicated to the public use when such land is not part of a subdivision as defined in the ordinance under discussion.

The conclusion stated above obviates consideration of the third question presented.

FAIRFAX COUNTY—Policeman’s Retirement Fund—Investment of Funds.

(109)

HONORABLE ROBERT C. FITZGERALD
Commonwealth’s Attorney
Fairfax County

November 29, 1957.

This is in reply to your letter of November 18, 1957, in which you request my opinion concerning the investment of funds belonging to the Policeman’s Retirement Fund of Fairfax County. The investment of these funds was formerly regulated by the provisions of §11 of Chapter 303 of the Acts of Assembly of 1944. This section provided that these funds could be invested in first trust notes on improved and farm properties. In 1956 the General Assembly, by Chapter 184 of the Acts of Assembly of 1956, amended §11 of Chapter 303 of the Acts of Assembly of 1944. Section 11 was amended to read as follows:

"Any and all cash assets and funds on hand at any time not necessary for immediate payment of pensions or benefits hereunder shall be invested in securities that are legal investments under the laws of the Commonwealth for public sinking funds."

You ask in your first question what effect the 1956 amendment has upon existing investments which have been made under the provisions of §11 of Chapter 303 of the Acts of Assembly of 1944. I am of the opinion that this amendment has no effect upon any investment which was existing prior to the effective date of Chapter 184 of the Acts of Assembly of 1956, as this section 11 applies only to
any and all cash assets and funds on hand, and if the money is invested, it is not a cash asset or funds on hand. I am of the opinion that the 1956 amendment does prohibit the investment of funds and assets of the Policeman's Pension Fund of Fairfax County in first trust notes after the effective date of Chapter 184. It also prohibits the reinvestment of any funds, which were invested prior to the effective date of Chapter 184, in first trust notes. After the effective date of this chapter, these funds can only be invested in securities that are legal for public sinking funds. These securities are listed in §2-297 of the Code of Virginia, and first trust notes are not included in this list.

FEES—Clerks—Making Certain Reports of Motor Vehicle Violations. (273)
June 2, 1958.

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of May 28, 1958, which reads as follows:

"The General Assembly of 1958 enacted Senate Bill No. 10 which is now shown in the Acts of Assembly of 1958 (advance sheets) as Chapter 541. This chapter repealed, in addition to other sections, Sections 46-1 to 46-553 of the Code of Virginia.

"Section 46-414, as amended by the General Assembly of 1952 and which was repealed by the 1958 legislature, provided in part:

'There shall be allowed to the clerk of the court of record a fee of fifty cents for each report hereunder to be paid out of the State Treasury from funds appropriated for criminal charges. Such payment shall be made on warrants of the Comptroller issued upon an allowance made by the court.'

"In Chapter 541, page 775 of the Acts of Assembly of 1958, Section 46.1-413, item (d), states:

'There shall be allowed to the clerk of any court a fee of fifty cents for each report hereunder to be taxed and payable as a part of the court cost.'

"I would appreciate it if you would refer to Section 46.1-413, and specifically to item (d) and advise me whether the fifty cent fee to the clerk of any court is now payable only to the clerks of courts when the fee has been assessed as a part of the cost and collected from the defendant. In other words, may any of the fees now be paid out of the State Treasury as was provided by Section 46-414 of the Code of Virginia which was repealed by the 1958 legislature?"

In my opinion the clerk's fee would be payable out of the State Treasury in accordance with the provisions of Section 14-96 of the Code. I am sure that you are familiar with this section since it involves to some extent the duties of your office. The fifty cent clerk's fee provided for in Section 46.1-413 (d) is the fee allowed the clerk and payable out of the State Treasury under the conditions set forth in Sections 14-96 and 19-293 of the Code, as is the case with respect to other fees payable to the clerk in criminal cases.

Whenever the clerk has taxed his fee as a part of the costs under Section 46.1-413 (d) and such costs are collected they shall be distributed in accordance with the provisions of Section 14-111 of the Code.
HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

March 11, 1958.

This is in reply to your letter of March 3, 1958, in which you enclosed a letter from the Honorable Paul D. Brown, Judge of the County Court of Arlington County, which reads as follows:

"We are desirous of taxing County Court costs as accurately as possible and before I give the two enclosed memoranda to the Clerk's Office and Special Justices, it is my request that you check them for any omissions and for construction of the statutes in these three regards:

1. That Code 14-132(6) relating to a 25¢ filing fee is so written that it applies to the number of papers containing charges rather than the number of charges.
2. That Code 19-317 is applicable to each fine forwarded and does not apply where there is no fine or if the same has been suspended.
3. That Code 14-130 limits the Commonwealth Attorney fee described therein to statutes where there is direct reference to taxing his fee.

I have spent hours in the Code trying to locate all reference to Commonwealth Attorney fees but may have overlooked some. The construction I propose to follow is clearest in this example: The ABC law directs prosecution by the Commonwealth Attorney but makes no provision for his fees. Therefore, I take it there is no fee chargeable in this type of case."

In connection with Judge Brown's interpretation of Section 14-132(6) of the Code, he cites the following examples:

"1. County and State Costs: The 25¢ which is charged for filing the case papers is applicable only to each paper on which a charge or charges are brought. For example: a man charged with speeding and no registration with the minimum prepayment would only pay $15.25 and not $15.50. However, if the same person were charged with speeding and with disorderly conduct, those are found on two pieces of paper and the 25¢ would be chargeable for each paper.

Another example: If a man has four charges, and two tickets are used to write them up, there would be two 25¢ fees. The whole thing hinges on 25¢ per paper, whether that paper contains one or more charges."

The fee allowed to the clerk under this provision is 25¢ for filing and indexing all the papers connected with a particular criminal action. For example, if a warrant charges the defendant with violating the speed laws, and another warrant charges the same defendant with resisting arrest, then the clerk would be entitled to the fee of 25¢ for filing and indexing all the papers relating to each warrant, regardless of the number of such papers. However, if a single warrant was issued concerning both offenses, then the clerk would be entitled to receive 25¢ and no more; that is to say, the clerk's fee hinges upon the number of separate criminal actions involved.

I concur in Judge Brown's interpretation of Section 19-317 of the Code. Section 14-130 of the Code, relating to the fee of a Commonwealth's Attorney, contains this language:

"For each person tried for a misdemeanor in his circuit or corporation
court, five dollars, and for each person prosecuted by him before any court or trial justice of his county or city for a misdemeanor, which he is required by law to prosecute, or upon an indictment found by a grand jury, five dollars; except when such prosecution is before a trial justice appointed under the provisions of chapter 2 of Title 16, in which case such fee shall be two dollars and fifty cents; and in every misdemeanor case so prosecuted the court or trial justice shall tax in the costs and enter judgment for such misdemeanor fee.

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

It will be observed that under the first paragraph just quoted it is provided that for each person prosecuted by the Commonwealth's Attorney before a trial justice for a misdemeanor, which he is required by law to prosecute, the trial justice shall tax in the costs and enter judgment for such misdemeanor fee.

The last paragraph quoted from Section 14-130 provides that the Commonwealth's Attorney is not entitled to a fee for appearing in misdemeanor cases before a trial justice, "except in those particular violations of the law when he is expressly required to appear by statutory enactment and provision is made for the taxing of his fees in the costs".

I do not feel that in order for the fee of the Commonwealth's Attorney to be taxable as a part of the costs it is necessary that the statute under which he is directed to prosecute shall contain a provision for the payment or taxing of his fee. In the example given by Judge Brown, it is true that Section 4-92 of the alcoholic beverage control statutes does not provide for a fee and the taxing thereof, but this section must be read and considered along with the language contained in Section 14-130, which I have quoted herein.

Section 4-92 directs the Commonwealth's Attorney to appear and represent the Commonwealth in cases tried before a trial justice. Section 14-130 provides that if the Commonwealth's Attorney is required to prosecute, then the trial justice shall tax in the costs the amount of his fee. I am of the opinion, therefore, that the Commonwealth's Attorney is entitled to a fee in ABC cases, and that such fee is taxable as a part of the costs. It seems that a similar view was taken by Judge Staples, as appears from the enclosed copy of an opinion rendered by him on October 30, 1942. See, Report of the Attorney General (1942-43), page 47.

FEES—Justice of Peace—Warrant of Arrest—When may Collect $1.00 and when may Collect $1.50—Effect of Collecting $1.00 from State. (284)

June 17, 1958.

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of June 10, 1958, in which you request my opinion concerning §14-136 of the Code of Virginia as amended by Chapter 286 of the Acts of Assembly of 1958. This section, as amended, provides in part as follows:

"A justice of the peace shall charge for services rendered by him in criminal actions and proceedings the following fees only:

"(1) For issuing a warrant of arrest, or a warrant for violation of any ordinance, including the issuing of all subpoenas, one dollar; provided, that when such fee is collected from the defendant or other person for him, such fee shall be one dollar and fifty cents."
I am of the opinion that under this provision in a criminal case if a warrant or subpoena is issued and the defendant is found not guilty, then the justice of the peace may collect a fee of $1.00 from the State Treasury. If a warrant or subpoena is issued in a criminal case by the justice of the peace and the defendant is found guilty, then the court shall assess a fee of $1.50 for the issuance of the warrant or subpoena. If this fee is recovered from the defendant and a justice of the peace has not collected any fee from the State Treasury for the issuance of such warrant or subpoena, then the entire fee of $1.50 shall be paid to the justice of the peace. If prior to the time this $1.50 fee is collected from the defendant, the justice of the peace elects to collect his fee of $1.00 from the State Treasury and this fee is paid out of the State Treasury and a notation to that effect is made on the docket of the court concerned, I am of the opinion that if the $1.50 fee for the issuance of the warrant or subpoena should at some later date be collected from the defendant, the entire fee of $1.50 should be paid into the State Treasury. Once the justice of the peace elects to bill and collect from the State Treasury the fee of $1.00, he loses all claim to any part of the $1.50 fee which might be collected at a later date from the defendant.


HONORABLE ROBERT C. FITZGERALD
Commonwealth's Attorney
Fairfax County

This is in response to your letter of May 23, 1958, which reads as follows:

"In its last session, the General Assembly amended Section 59-218 of the Code by deleting the words 'roman candle' and inserting 'fountains'. A roman candle has always meant to me a tube shaped device that was made to be held in the hand and upon ignition shoot fire balls into the air. Fountains, in my experience, are either conical or cylindrical in shape and are made to set upon the ground and upon ignition, spew a mass of sparks into the air. There are also many devices of various shapes and designs which are made to set on the ground and upon ignition shoot fire balls upward along with a spew of sparks. In view of what I believe to be commonly known as roman candles, I am inclined to class the last mentioned devices in the category of fountains, but, inasmuch as the manufacturers, shippers and wholesalers (who are at present inquiring here) will be selling and shipping all over the State, I feel compelled to have your concurrence."

Section 59-218 of the Code, as amended by Chapter 168 of the Acts of Assembly of 1958, which is effective on the first moment of June 27, 1958, reads as follows:

"This chapter shall not apply to sparklers, fountains, Pharoah's serpents, caps for pistols, nor shall it apply to pinwheels commonly known as whirligigs or spinning jennies, when used, ignited or exploded on private property with the consent of the owner of such property."

As pointed out in your letter, the words "Roman Candles" have been deleted from this section and the word "fountains" has been substituted. A "fountain" is defined on page 997 of Webster's International Dictionary, Second Edition, as "a firework that emits a fountainlike shower of sparks." A Roman Candle is defined
in the same dictionary as "a kind of firework in the form of a straight cylindrical case (generally held in the hand), characterized by the continued emission of a shower of sparks, and the ejection at intervals of balls or stars of fire." There is, therefore, a clear distinction between a "roman candle" and a "fountain." It must be assumed that the amendment to this Code section was enacted with knowledge of the distinction made in the Dictionary as to these particular fireworks. In the absence of convincing argument to the contrary, I think the amendment must be construed in this manner.

Accordingly, it appears that a "fountain" is a firework which emits solely a shower of sparks, and a "roman candle" is any device that ejects balls of stars or fire, together with a shower of sparks, and, as the effective date of Chapter 168 of the Acts of 1958, will no longer come within the exceptions set out in §59-218 of the Code.

FUNERAL DIRECTORS AND EMBALMERS—Apprentices—New Act Does Not Require Re-Registration of. (46)

HONORABLE FRANK A. BLILEY, Secretary
Virginia Board of Funeral Directors and Embalmers

This is in reply to your letter of August 23, 1957, in which you request my opinion as to whether or not a person who was registered with the Board as an apprentice embalmer prior to the date that Chapter 10.1 of Title 54 of the Code of Virginia became effective may be required to re-register under the new Act as an apprentice embalmer.

I can find no provision in Chapter 10.1 of Title 54 of the Code of Virginia which requires re-registration of apprentice embalmers any more than that Act would require re-registration of licensed embalmers. There is no provision in the Act which fixes a maximum length of time that a person may serve as an apprentice embalmer. He cannot become a licensed embalmer unless he has served at least two years as an apprentice, however, there is no provision that would prohibit him from serving twenty or more years without re-registration as an apprentice embalmer.

Sections 54-260.34 through 54-260.38 of the Code provide for registration, application requirements for training, credit for training and supervision and reports concerning the training of apprentices. There is a provision in §54-260.37 requiring every apprentice and every funeral establishment training an apprentice to file a report concerning the progress of the apprenticeship at least every six months. That section of the Code provides that failure of the apprentice to make a report shall forfeit all credit to him for training since the last report made by him. The failure of a person or funeral service establishment to file such report shall forfeit approval of such person or establishment for the giving of apprenticeship training; however, there is no provision which provides that failure to file such reports shall be cause for the re-registration of an apprentice.
FUNERAL DIRECTORS AND EMBALMERS—Reciprocity Licenses—Person Doing Business in State Permitting Burial Insurance. (10)

HONORABLE FRANK A. BLILEY, Secretary
State Board of Funeral Directors and Embalmers

This is in reply to your letter inquiring as follows:

"Could the Virginia Board of Funeral Directors and Embalmers issue a reciprocal funeral director's, or embalmer's, license to a person licensed by, and doing business in, a neighboring state which permits burial insurance, provided that the person making application for such reciprocal license is not engaged in the business of burial insurance directly, or indirectly?"

I quote below the following sections of the Code of Virginia:

"§54-251.—Embalmers and funeral directors licensed in other states.—The Board may recognize licenses issued to embalmers or funeral directors by state boards of embalming and state health authorities of other states; and upon the presentation of such licenses and the payment of a fee which shall be equal to the fee charged Virginians for licenses by the state in which such person is licensed, but not less than twenty-five dollars, may issue to the lawful holders thereof the embalmer's or funeral director's license herein provided for. Such reciprocal license shall be renewed annually upon the payment of the renewal fee fixed by §54-255 upon the same terms and conditions as provided herein and the rules and regulations of the Board of renewal. No person shall be entitled to a reciprocal license as a funeral director or embalmer unless he gives proof that he has, in the state in which he is legally licensed, complied with requirements substantially equal to those set out in this chapter relating to funeral directing and embalming."

"§54-260.5. Funeral directors and embalmers licensed in other states.—The Board may recognize to such extent as the Board may deem to be in the public interest licenses issued to funeral directors and embalmers by the state board of health or similar authorities of other states and of the District of Columbia having substantially the same or equivalent standards and requirements for the issuance thereof as provided in this chapter, but no holder of such license of another state shall engage in the profession or business of funeral directing or the practice of embalming in Virginia unless he be licensed by the Board as provided in this chapter. The Board may enter into agreements with the licensing authority of any state a part of whose boundary is contiguous with any part of the boundary of the Commonwealth and with the licensing authority of the District of Columbia for the granting of certain privileges to persons resident in any such state or the District of Columbia and duly licensed therein as funeral directors or embalmers and having an established place of business therein, on condition that such state or the District of Columbia grants similar privileges to residents of Virginia duly licensed as funeral directors or embalmers by the Board and having an established place of business in Virginia. Any such agreement may provide that such nonresident funeral directors or embalmers may make interments in, remove bodies from and arrange funerals or embalm bodies in this Commonwealth and shall provide that such nonresident funeral directors or embalmers shall not establish a place of business in, nor engage generally in the business of funeral
directing or embalming in, nor be employed in any such business in, nor have solicitors or agents in, nor advertise in this Commonwealth."

"§38.1-566. Certain interests of officers, etc., prohibited.—No officer, agent or employee of any such society shall have a proprietary or financial interest in or be employed by or act as agent for, any undertaker, mortician, or any person, firm, corporation or association engaged in the business of embalming or of burying the dead."

In accordance with the foregoing, I am of the opinion that the Board may issue such a license under the circumstances set forth in your letter.

GAME AND INLAND FISHERIES—Big Game License—Application as to Residents and Non-Residents of County of Issuance. (239)

HONORABLE C. E. MORAN, Clerk
Corporation Court City of Charlottesville

May 5, 1958.

This is in reply to your letter of May 3, 1958, in which you refer to Section 29-122 of the Code, as amended by Chapter 318, Acts of 1958, and which will be effective ninety days after March 28, 1958. This section, as amended, is as follows:

"§29-122. There shall be a special license for hunting bear, deer and turkey in this State, which shall be in addition to regular season license required to hunt other game. The fee for such special license shall be one dollar for a resident and two dollars and fifty cents for a non-resident.

"Such license shall be required of persons to hunt bear, deer and turkey in the county wherein they are legal voters, or in which they are stationed or located, or of which they are residents within the meaning of §29-58; provided, however, that no fee shall be charged any such person for such license.

"The license to hunt bear, deer and turkey may be obtained from the clerk or agent of any county or city whose duty it is to sell hunting licenses."

You present the following questions:

"Application is made to me by a legal voter of the city of Charlottesville who desires to hunt deer in Buckingham County and who has never been a legal voter of that county, nor has he ever been stationed or located therein, nor has he ever been a resident of that county within the meaning of §29-58. In view of the last clause in paragraph two what fee, if any, shall be charged such applicant for such license? If, as in the past, I have issued a special license to a resident of any county in Virginia to hunt in any county in this State for bear or deer, except the National Forests, upon payment of the required fee of 1.00, to what class of applicants does the last clause in paragraph two apply, which reads 'provided, however, that no fee shall be charged any such person for such license'?"

Prior to the amendment this section provided as follows:

"Such special stamp shall not be required of any person to hunt bear or deer in the county where they are legal voters, or in which they are
stationed or located, or of which they are residents within the meaning of §29-58."

It will be noted from the language last quoted that prior to the amendment no license or stamp was required of a person if he confined his hunting in the county where he was a legal voter or otherwise qualified as a resident within the meaning of Section 29-58 of the Code. The effect of the amendment, in my opinion, is to remove the exemption that heretofore existed to certain persons, so as to require every person to obtain a license. The amendment provides, however, that no fee shall be charged to a person, who, prior to the amendment, would have been exempt from the license requirement. This seems to be the only logical interpretation.

The person who is a resident and voter in the City of Charlottesville would, in my opinion, be subject to the license fee of one dollar, since he is a resident of this State and not exempt for any of the reasons under which an exemption may be made.

With respect to your concluding question, whenever a person purchases a license to hunt outside of his county and anywhere in the State, such person is subject to the payment of a fee of $1.00 for such license, provided he is a resident of this State; if he is a non-resident, of course, the fee is $2.50.

A person is never exempt from the payment of the fee except when he confines his hunting to the county in which he is a legal voter, or otherwise qualifies for the exemption by being stationed or located in the county in which he will limit his hunting, or is a resident of such county within the meaning of Section 29-58 of the Code.

GAME AND INLAND FISHERIES—Big Game Stamps—Rockbridge County—Surplus Funds May Be Used to Control Fox Rabies. (24) August 1, 1957.

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney
Rockbridge County

This is in reply to your letter of July 26, 1957, in which you request my opinion as to whether or not funds obtained through the sale of big game stamps in Rockbridge County may be used in a fox rabies control program. You state that foxes are spreading rabies in the county and that there is evidence that game animals are developing this disease as a result of their contact with foxes.

These big game stamps are sold in Rockbridge County under the provisions of Chapter 208 of the Acts of Assembly of 1950. That act provides that the money received from the sale of these special big game stamps shall be paid to the county treasurer to the credit of a special fund and the net amount thereof, or so much as is necessary, shall be used for the payment of damages to crops or livestock by deer or bear in the county, and that any surplus remaining at the end of a year shall remain in a special fund and be used for the conservation of wild life in a county under the direction of the board of supervisors.

I am of the opinion that any surplus in this special fund at the end of a year may be used to help finance a program to control fox rabies in the County under the direction of the Board of Supervisors.
REPORT OF THE ATTORNEY GENERAL

GAME AND INLAND FISHERIES—Dog Funds—Reimbursement For Previously Lost Tags Which Have Been Returned. (150) January 6, 1958.

HONORABLE I. T. QUINN, Executive Director
Commission of Game and Inland Fisheries

This is in response to your inquiry if reimbursement may be made by the Treasurer of Norfolk County and the Commission upon delivery of previously lost dog tags in a situation where the seller of dog tags failed to report certain tags numbered 401401 to 401425 in 1952, because the licenses had been lost and paid the County Treasurer the sum of $75.00 for the lost tags (the county keeping 85% of the payment and forwarding 15% of the payment to the State, as provided by law).

It appears that this is a matter of lost tags which were never used and have been subsequently found intact, and that it would be inequitable for the storekeeper to lose $75.00 after recovering the tags. This office has checked with the office of the Auditor of Public Accounts and that office sees no objection to making the refund by the county and by the Commission if the bookkeeping transactions are such that the tags and the refund may be positively identified and recorded so as not to establish precedent for possible fraudulent transactions.

In the event the records permit sufficient handling of the matter, this office sees no reason why refund should not be made by the treasurer, and by the Commission to the treasurer for remittance of its portion to the storekeeper.

GAME AND INLAND FISHERIES—Hunting Laws—Changing Season or Bag Limits on Request of Board of Supervisors—To be changed for one year at a time. (237) May 1, 1958.

HONORABLE I. T. QUINN, Executive Director
Commission of Game and Inland Fisheries

This is in response to your letter of April 15, 1958, and subsequent letter of April 22, 1958, in which you inquire if:

"It has long been held as good game management practices in fixing open seasons on game and establishing bag limits to vary either seasons and/or bag limits with the increase or decrease in game populations.

"By Section 29-129.1 of the Code of Virginia, it is provided that upon request or by resolution of the governing body of any political subdivision of the State requesting the Commission to shorten the open season or reduce the bag limit, said Commission shall comply with such request or resolution.

"Does the Commission have authority to fix such shorter season or reduce bag limit for one year only?"

Examination has been made of Section 29-129.1, Code of Virginia, as amended, which provides as follows:

"Notwithstanding any other provisions hereafter enacted or ordained of local or special law, or any local ordinance the Commission shall have power, after careful study of each species of wild bird, animal and fish within the jurisdiction of the Commission in each of the several
counties of the State to prescribe the seasons and bag limits for hunting, fishing, trapping or otherwise taking such wild birds, animals and fish by regulation adopted as provided in this article, but such seasons and bag limits shall not exceed the limits fixed by general law. Provided that the Commission shall close Sundays or reduce the season or bag limit applicable by general law or regulation to any species in any political subdivision of the State on request of the governing body of any political subdivision of the State by resolution adopted by a majority vote of the members of such body."

The above section has been read in conjunction with other pertinent sections such as Section 29-125, authorizing periodic evaluation of the abundance of game, etc., and Section 29-128.1, pertaining to annual publication of laws and regulations. It should be stated at the outset that Section 29-129.1 does not specifically state whether or not any request shall obtain until revoked or whether or not the Commission, pursuant to such request, may fix such shorter season or reduce bag limit for one year only. However, the provisions of said Section 29-125 contemplate that the Commission shall review the matters mentioned therein and promulgate regulations from time to time. It is my understanding that this evaluation is made each year prior to fixing seasons and bag limits.

In view of the foregoing, this office is of the opinion that the Commission would appear to have authority to fix a shorter season or reduce bag limit for one year only. An evaluation should be made prior to any changing of the season and bag limits for the following year. However, the local governing body may forward a subsequent request which would be applicable to the year in which such request is made and received.

GAME AND INLAND FISHERIES—Private Pond Owned by Corporation—Guest Required to have Fishing License. (51)

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

This is in response to your letter of September 5, 1957, inquiring if guests of a fish pond owned by a corporation are required to have a fishing license to fish in said pond in view of the provisions of Section 29-52, Code of Virginia, as amended. Section 29-52, subsection (2), provides:

"License shall not be required of bona fide tenants, renters or lessees to hunt, trap or fish within the boundaries of the lands or waters of which they are tenant, renter or lessee and on which they reside; provided such tenant, renter or lessee has the written consent of the landlord upon his person, and provided further that a guest of the owner of a private fish pond shall not be required to have a fishing license to fish in such pond."

Also, Section 29-78 provides:

"Nothing in this title shall be construed as permitting any person to hunt, trap or fish in or on the lands or waters of any public or private club, association or preserve of any description as a landowner or in any other capacity unless such person has a license."

While the matter is not free from doubt, it appears that the word "owner",

referred to in said Section 29-52(2), is used to denote an individual person rather than a public or private body. The foregoing is strengthened by the fact that the term "guest" is used. Moreover, Section 29-78 above should be considered in conjunction with Section 29-52 aforesaid, and Section 29-78 prohibits fishing in waters owned by any public or private association without a license. Accordingly, I am of the opinion that a corporation may not be considered as the owner of a private fish pond under the provisions of Section 29-52(2) so as to permit persons to fish in ponds owned by it without a license.

GAME AND INLAND FISHERIES—Sanctuaries and Refuges for wild life—Commission has no legal remedy to overcome objection of landowner to establishment of. (171) February 4, 1958.

HONORABLE I. T. QUINN, Executive Director
Commission of Game and Inland Fisheries

This is in response to your letter of January 31, 1958, which reads in part as follows:

"On the south side of the Rappahannock River abutting Caroline and Essex Counties there is a bay, known as Port Tobago Bay. This body of water, which is a part of the Rappahannock River, is quite shallow and often during the summer and fall months it is scarcely deep enough to push a skiff over it.

"During the migration period, from November to February, wild geese find this shallow area a haven of refuge. But too often game slaughterers go in with boats, propelled by fast outboard motors and kill these birds promiscuously.

"All of the landowners, except one, would like for the Commission of Game and Inland Fisheries to take over the area and develop it as a wildlife refuge on which no shooting would be permitted at any time. In order to accomplish this purpose, it would be necessary for the Commission to prohibit shooting within approximately 750 yards of the Bay shoreline. The landowners, except one, would cede the hunting rights on their lands to the Commission for the purpose of establishing a sanctuary or refuge for waterfowl.

"The Commission would like to be advised what legally, justifiable steps may be taken to overcome the objection of this one abutting landowner who is in opposition to the proposed project. Would the fact that Port Tobago Bay is a part of a navigable body of water in anyway stand in the way of the proposed development?"

Section 29-50, Code of Virginia, provides that certain land owners may assign the wild life rights to his land and permit the Commonwealth to use such land as a State game sanctuary. There appears to be no provision permitting the State to require any land owner to make such assignment. Moreover, hunting rights have long been deemed to be the property of the land owner in accordance with State law. In addition, there are those provisions of statute permitting a land owner to file for water fowl blind permits. Accordingly, this office is not advised of any proceedings at law which could be taken to overcome the objection of a land owner who does not desire to voluntarily relinquish his rights. This office is not advised of any regulations enacted by the Commission pertaining to the subject.

In view of the foregoing answer to your first inquiry, it does not appear necessary to go into the question of navigability of Tabago Bay as applicable to your inquiry.
REPORT OF THE ATTORNEY GENERAL


HONORABLE EARL A. FITZPATRICK
Member of Senate of Virginia

June 17, 1958.

This is in reply to your letter of June 12, 1958, which reads as follows:

"If you will examine Chapter 417 of the Acts of Assembly of 1958, which amends Section 34-29 relating to exemption of wages or salaries of a laboring man, you will note that the new language of the statute is as follows:

"'Provided such minimum and maximum exemption shall be increased by $15.00 per month for each dependent child of such householder or head of a family.'"

"As you are aware, the fact that a wage earner has one child places him in the category of a householder or head of a family. The question now has arisen as to whether or not this wage earner would, in addition to getting the exemption of a householder or head of a family by reason of his having one child, also get an additional $15.00 exemption for the same child, and would appreciate very much your office giving me an opinion as to whether or not this would be true.

"There has also arisen a question when the word 'per month' is used in the statute as to whether that means per month from the date of the service of the garnishment, or whether it is the contracted monthly salary of the laboring man."

With respect to your first inquiry, I am of the opinion that the wage earner in such a case would be entitled to the fifteen dollars per month extra exemption.

Prior to this amendment the householder was entitled to the statutory exemption merely by qualifying as a householder or head of a family. Under this amendment if he qualifies, then the exemption to which he was heretofore entitled is increased in the amount of fifteen dollars per month for each dependent child. For example, if a widower with one dependent child would be entitled to one hundred and fifty dollars exemption under this Code section if it had not been amended, he will, when the amendment becomes effective, be entitled to an exemption of one hundred and sixty-five dollars.

With respect to your second question, Section 1-13.13 of the Code provides that—

"'Unless otherwise expressed, the word 'month' shall be construed to mean a calendar month.'"

Section 34-29 fails to define the word "month". Therefore, I am of the opinion that the exemption applies to the earnings of the wage earner in a calendar month.
GARNISHMENTS—Householder's Exemption—Determining Amount—Based on
gross wages—Deductions, including F.I.C.A., Paid from Exempt Amount. (47)

Mr. J. F. Boone, Treasurer
Virginia Polytechnic Institute

I acknowledge receipt of your letter of August 23, 1957, which reads, in part, as follows:

"On August 2, this office was served with a garnishee against one of
our employees. The principal and cost of this garnishee is $49.50. This
particular case is to be brought up in court on the 10th day of
September, 1957. The period between August 2 (date summons was
served) and September 10 (date case comes up in court), we will have
paid this employee three checks (August 5, August 20 and September
5.) This office was later served with a householder's exemption based
on Section 34-30 Code of Virginia 1950 which reads as follows: 'that
wages now due, and to hereafter become due—shall be exempt from
distress, levy, garnishment or other process, to the extent of seventy-five
per cent of such wages or salary, provided, however, that in no case
it shall be exempt by less than $100.00 per month, nor more than
$150.00 per month.' This employee receives $146.00 per month,
75 per cent of this amount totals $109.50. The question we raise here is
this, does the difference between the $109.50 and the $146.00 become
subject to the garnishment ($36.50)? Should we take into account that
F.I.C.A. enters into the picture? If there are other deductions, should
these deductions be taken into account in figuring what amount would
apply toward this garnishee?

"We are listing below a break-down on salary and deductions for this
employee. This office would appreciate a ruling as to the Attorney
General's view point with reference to certain deductions in attempting
to determine how much of this man's wages should apply on the
garnishee.

(Figures omitted)

"Inasmuch as this case will appear in court on the 10th of September,
we would appreciate an immediate reply as to how we should determine
the amount due the employee and the creditor. This particular case has
created quite a bit of conversation and interpretation in two counties
in this area on the part of the Clerk of Court and Judges and independent
attorneys in addition to the 'horseback' opinion of the writer."

I am of the opinion that the excess of 75% of the gross wages is subject to
garnishee. You should, it would seem, file a statement with the court, under
the provisions of §8-443 of the Code, showing that the gross wage of the employee
is $146.00 per month, one-half of which is payable on the 1st and 15th of each
month. This certificate should contain a statement to the effect that the employee
has filed a certificate under Chapter 4, Title 34 of the Code claiming the
exemptions provided for therein. The Court will no doubt enter an order
directing you to pay the excess above 75% of the gross wages into court or to
the judgment creditor. I do not believe that you should make payment of the
excess except pursuant to an order of the Court. Of course, if the excess is greater
than the judgment creditor's claim, the amount remaining after complying with
the court order should be paid to the employee.

In this specific case, the deductions, including F.I.C.A., would be taken out
of the 75% exemption of $109.50. The amount to which the judgment creditor
would be entitled in this instance would be $36.50.

In those cases where you are required to withhold Federal Income Tax, the
tax would be deducted from the $109.50, or such amount of exemption to which
the employee is entitled.
GENERAL ASSEMBLY—Oath of office—Senator elected to fill vacancy—When may be taken. (105)

November 27, 1957.

HONORABLE THOMAS C. PHILLIPS
Senator Elect

This is in reply to your letter of November 13, 1957, in which you request my opinion as to whether or not it is legal for you to be sworn in as a member of the Senate of Virginia at once to fill the unexpired term of Honorable George M. Warren, deceased.

I am of the opinion that you may take oath of office at any time after you have received a certificate of election from the Secretary of the State Board of Elections, since you were elected to fill an unexpired term. However, I find that it has always been customary in the past, without exception, for a Senator who has been elected to fill an unexpired term to take the oath of office before the Senate of Virginia on the morning that the Senate first convenes after such election.

HEALTH—Local Departments—Appropriation of Funds and Notice to State Department by Board of Supervisors constitutes legal obligation on County. (180)

February 14, 1958.

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

This is in reply to your letter of February 6, 1958, in which you state that, on May 29, 1957, the Board of Supervisors of Warren County notified the State Department of Health that it had appropriated the sum of five thousand, five hundred and thirty-two dollars "toward the conduct of the Warren County Health Department for the period from July 1, 1957, to June 30, 1958." You request my opinion as to whether or not the Board of Supervisors can approve the payment to the State Department of Health of an amount less than that which has been appropriated.

Apparently Warren County and the State Department of Health have entered into a contract agreement for the creation of a county health department pursuant to §§32-40.1 and 32-40.2 of the Code of Virginia. Pursuant to this contractual agreement the county notified the State Department of Health that, for the fiscal year 1957-58, the county would pay the State Department of Health five thousand, five hundred and thirty-two dollars as its share of the cost of operating the Warren County Health Department.

I am of the opinion that this is a valid contractual agreement between the county and the State Department of Health and that the county is, therefore, legally obligated to pay the State Department of Health the total amount of the appropriated sum.

HIGHWAYS—Chesapeake Bay Ferry Commission—What Commission to consider in giving permit for Project. (45)

August 22, 1957.

GENERAL J. A. ANDERSON
State Highway Commissioner

This is in reply to your letter of August 12, 1957, in which you request my opinion as to whether the State Highway Commission may consider the merits of a crossing of the Chesapeake Bay at any location other than that proposed
by the Chesapeake Bay Ferry Commission when considering the granting of a permit in accordance with Section 33-251 of the Code of Virginia of 1950, as amended, for the location of a crossing facility within ten miles of an existing project financed by bonds issued pursuant to the State Revenue Bond Act.

Chapter 714, Acts of Assembly of 1956. Section 1, Subsection 4a, authorizes the Chesapeake Bay Ferry Commission to establish, construct, maintain, repair and operate a project crossing the Chesapeake Bay. Subsection 4b empowers that Commission to determine the location, character, size and capacity of the project. Thus, it is manifestly the function of the Chesapeake Bay Ferry Commission to determine the location of any crossing of the Chesapeake Bay, subject only to the provisions of Chapter 462, Acts of Assembly of 1956, and Section 33-251 of the Code of Virginia (portion of the State Revenue Bond Act) relating to the approval by the State Highway Commission for the location of any such crossing.

Section 33-251 of the Code provides, in part, that

“No bridge or tunnel * * * shall hereafter be constructed and operated * * * within ten miles of any terminus of any project acquired or constructed under the provisions of this article * * * except under a written permit granted by the Commission [State Highway Commission] which is hereby exclusively authorized to grant such permits under the terms and conditions hereof. No such permit shall be granted by the Commission until it shall ascertain by an investigation, including hearing * * * that there is an urgent public need for the operation of such bridge, tunnel or ferry and that its operation will not affect the revenues of any such project of the State so as to impair the security of any revenue bonds issued for the acquisition or construction of such project.”

It is the function of the State Highway Commission, under the provisions of Chapter 462, Acts of Assembly of 1956, to either approve or disapprove the location proposed by the Chesapeake Bay Ferry Commission for any crossing of the Chesapeake Bay. I presume this provision was placed in the Chesapeake Bay District Act in order that the State Highway Commission may ascertain how any proposed crossing of the Bay would affect the existing systems of State Highways.

In addition to the foregoing, the State Highway Commission is authorized either to grant or refuse a permit for such crossing pursuant to Section 33-251 of the Code. The State Highway Commission must reach two conclusions in making the determination regarding such a permit: first, that there is an urgent public need for the operation of such crossing facility, and, secondly, that its operation will not affect the revenues of any project already existing so as to impair the security of any revenue bonds issued for the acquisition or construction of such projects.

Since it is the function of the Chesapeake Bay Ferry Commission to determine the location of the proposed crossing, and that Commission has requested the approval of the State Highway Commission as to one particular location only for such crossing, any discussion at a public hearing held by the State Highway Commission as to merits of alternate locations would appear to be irrelevant to the questions which must be determined by the State Highway Commission pursuant to the foregoing authorities.

It is, therefore, my opinion that any hearing before the State Highway Commission regarding the proposed Chesapeake Bay crossing should properly be confined to discussion which would bear upon a determination to either approve the particular location proposed by the Chesapeake Bay Ferry Commission and issue a permit therefor, or else disapprove such location.
This is in reply to your letter of July 8, 1957 in which you ask to be advised as to charges in connection with the recordation of certificates of deposit by the State Highway Commissioner and the withdrawal of a certain percentage of that amount deposited pursuant to §33-70 of the Code of Virginia of 1950, as amended.

While the statute is silent as to the nature of the proceedings under §33-70 of the Code, it appears that such proceedings are preliminary steps to a condemnation proceeding, or corollary thereto, in the event that a condemnation suit has been instituted at the time of the recordation of the certificate of deposit. For this reason it would appear logical to treat all proceedings arising pursuant to §33-70 as chancery matters.

For the recordation of the certificate of deposit on behalf of the State Highway Commissioner a charge should be made in the same manner as is prescribed for the recordation of deeds.

Charges for all subsequent proceedings should be borne by the party instituting the action, and the fees should be fixed pursuant to §14-124 of the Code. Should the persons entitled to the amount on deposit file a petition for the withdrawal of a certain percentage of that amount, the charges therefor should be assessed against the petitioners.

This is in reply to your letter of April 24, 1958 in which you make inquiry as to the appropriate fee to be charged by the Clerk in connection with petitions on behalf of the State Highway Commissioner for Court approval of compromise and release of certificates of deposit under §33-70 of the Code of Virginia.

I am enclosing a copy of an opinion of the Honorable J. Lindsay Almond, Jr., my predecessor in office, of July 10, 1957 addressed to the Clerk of the Circuit Court of Spotsylvania County wherein he discussed the question of fees to be charged in connection with suits instituted pursuant to this section of the Code.

While your present inquiry relates to a different aspect of the proceedings instituted pursuant to §33-70 of the Code, I am of the opinion that the view expressed in the Attorney General's letter of July 10, 1957 can be applied in the instant case. The proceeding brought by the State Highway Commissioner to obtain Court approval of a compromise and to relieve the Commonwealth of further obligation to keep on deposit a sum as evidenced by a certificate of deposit is chancery in nature, and the Clerk's fee should be fixed accordingly. If a condemnation proceeding has been instituted prior to the time the decree in question is sought, it would appear logical to dispose of the matter in the same proceeding. However, where no such proceeding has been instituted, the petition of the State Highway Commissioner should be treated as a separate proceeding in chancery.

I draw your attention to the recent enactment of Chapter 581 of the Acts of Assembly of 1958 wherein the Clerk's fees are specified for the filing of the petition and entry of the order here in question.

Mr. F. A. Davis, Commissioner
Department of Highways Richmond, Virginia

This is in reply to your letter of May 22, 1958, which for clarity I set forth in full:

"The Interstate System of highways is to be constructed as controlled access highways, some portions of which will be located along or across existing highways. In the construction of limited access highways the Department of Highways is often confronted with the problem of providing access to properties the value of which, in many instances, appears to be less than the cost of providing an access road. Many of the properties will be cut off from an existing road by the taking of a portion of the land which fronts on an existing road, while others may be landlocked due to the projection of a limited access highway across an existing public road so as to obstruct such road on either side of the limited access highway.

"In order that we may consider the feasibility or necessity of providing access roads in such instances it will be appreciated if you will advise as to the following:

"(1) Is all property legally entitled to an access to some public road?

"(2) Is the Commonwealth legally prohibited from constructing or locating a limited access highway so as to landlock properties, or sever land so as to deprive access to residue parcels remaining after the right of way is acquired?

"(3) Is the State Highway Commission authorized to acquire title to residue parcels of land, not necessary for the highway project, either through voluntary conveyance or by condemnation, in lieu of constructing a service road to serve remnant parcels?

"(4) Can the Commonwealth legally extinguish access rights through negotiation or by condemnation, whereby the landowner may be paid for loss of access, rather than construct a service road?"

I am aware of no provision in the law which entitles all properties to an access to a public road. Nevertheless, the law is well settled that upon the establishment of a conventional highway, an easement of access in and to the highway attaches to abutting land, which easement is considered as an interest in the land. However, where the highway is established as a "limited access" highway, no such right attaches, inasmuch as the right is expressly negatived by the statutes authorizing the construction of such highways. Section 33-37, Code of Virginia of 1950, as amended, defines a limited access as follows:

"§33-37. Definition.—A limited access highway is defined as a highway especially designed for through traffic, over which abutters have no easement or right of light, air or access to by reason of the fact that their property abuts upon such limited access highway."

In the event the limited access highway is not a newly established public road, but is a designation of an existing road as limited access, pursuant to the provisions of §33-39 of the Code, not only must the existing easements of access be extinguished and compensated for, but a service road must be constructed under
present law. This mandatory requirement that service roads be constructed was deleted from the statute by the General Assembly in its recent session. After the effective date of the amendatory Act, the construction of such service roads will be required only where necessary and feasible. As amended, §33-39 of the Code provides as follows:

"§33-39. Designating existing highway as limited access highway; extinguishing easements of access; service roads.—The Commission may designate an existing highway as or included within a limited access highway.

"Notwithstanding any other provisions of this section all existing easements of access, light or air, shall be extinguished by the Commission where necessary and where necessary and feasible, service roads shall be constructed in accordance with the plans and specifications of the Commission."

Your second inquiry cannot be answered categorically, either negatively or affirmatively, due to the various problems presented when properties presently served by a public road are landlocked.

The legislature having supreme control over the public roads of this state, it has the power to open, construct, alter or close such highways as may be necessary to best serve the public need. This power has been delegated to the State Highway Commission by the General Assembly of Virginia, and as a general rule, so long as it is not exercised arbitrarily or capriciously, roads may be altered or closed by the State Highway Commission even though existing easements of access may thereby be extinguished or properties landlocked. This power however is subject to certain limitations.

At the outset, I feel it essential to distinguish between properties landlocked due to an obstruction of an existing public road and properties landlocked due to the severance of a parcel of land. In the first instance, the vacation of an existing public road cannot be accomplished except by the legal process promulgated for that purpose. Any obstruction of an existing highway by a projection of a limited access highway which provides for no means of access thereto would likely be considered as an act of abandonment or closing of the portion so obstructed, thereby necessitating a compliance with the applicable statutory procedure in such cases. Even though the power exists in the State Highway Commission to abandon or close an existing road it is essential that the Commission comply with the requirements set forth by the General Assembly before exercising that power; otherwise, the obstruction could be held to be an illegal act which would subject the State Highway Commission to the injunctive process of the courts. This conclusion is based upon the general principle of law enunciated in 25 Am. Jur. p. 617. The cases of Basic City v. Bell, 114 Va. 157 and City of Lynchburg v. Peters, 145 Va. 1, indicate that the Virginia courts would follow the general rule.

A reference to the statutes relating to abandonment of roads will disclose that the courts are empowered to require the public road be kept open in the event that the abandonment thereof would deprive a property owner of a means of access to a public road. Section 33-76.4 of the Code of Virginia provides in part as follows:

"§33-76.4 * * *

"Upon any such appeal, if it shall appear to the court that by the abandonment of such section of road or such crossing as a public road or crossing any party to such appeal would be deprived of access to a public road, the court may cause the railway company and the board of supervisors or other governing body, or either, to be made parties to the proceedings, if not already parties, and may enter such orders
as seem to it just and proper for keeping open such section of road or such crossing for the benefit of such party or parties as would by such abandonment be deprived of access to a public road. "* *"

In view of the foregoing quoted provision, it would appear that the State Highway Commission cannot legally close or vacate an existing public road so as to leave properties landlocked.

In addition to the foregoing it appears certain that any owner adjacent to the obstructed portion of the existing road, and any owner landlocked thereby, whether or not an adjacent owner, would have a claim against the Commonwealth for damages suffered by reason of the deprivation of such access. The Supreme Court of Appeals of Virginia had occasion to pass upon this point in the case of City of Lynchburg v. Peters, 156 Va. 40.

Turning now to the question presented in those instances where the property is landlocked due to severance, it appears well settled that the State Highway Commission is legally empowered to either extinguish easements of access to an existing public road, or so sever a tract of land as to leave a remnant without access to a public road. In either event the owner is entitled to compensation for the taking or resultant damages.

I am of the opinion that your third inquiry must be answered in the negative. The general powers of the State Highway Commissioner to acquire land for limited access and conventional highway rights of way are codified as §§33-38 and 33-57 of the Code of Virginia. The latter section provides in part as follows:

"33-57. The State Highway Commissioner is hereby vested with the power to acquire by purchase, gift, or power of eminent domain such lands, structures, rights of way, franchises, easements and other interest in lands, including lands under water and riparian rights, of any person, association, partnership, corporation, or municipality or political subdivision, deemed to be necessary for the construction, reconstruction, alteration, maintenance and repair of the public highways of the State and for these purposes and all other purposes incidental thereto may condemn property in fee simple and rights of way of such width and on such routes and grades and locations as by the Commissioner may be deemed requisite and suitable. "* *"

You will note that the authorization for the State Highway Commissioner to acquire land or interest therein is limited to that land necessary for highway purposes, or for purposes incidental thereto. It is also to be noted that the power to acquire by eminent domain is conferred upon the State Highway Commission by the same statute as is the power to acquire by purchase or gift. It appears manifest that the State Highway Commissioner is limited in the acquisition of land, however acquired, to that land necessary or incidental to the purposes specified in §33-57 and §33-58 of the Code.

You will undoubtedly recall that the Virginia Advisory Legislative Council sponsored a bill in the recently adjourned session of the General Assembly which would have authorized the State Highway Commission to acquire such residue parcels and to dispose of them under certain conditions. This bill failed to pass either house of the legislature.

I am therefore of the opinion that the State Highway Commission is without authority to acquire residue parcels of land when severed by a right of way acquisition, in lieu of providing an access road to serve such remnants.

As explained in my answer to your first inquiry, access to a public road is a property right in the land. This right like any other interest in land, may be conveyed by the owner, or condemned by the public. Inasmuch as the State Highway Commission is authorized to acquire any interest in land necessary or incidental to highway purposes, whether by gift, purchase or eminent domain, I am
of the opinion that easements of access may be acquired by the Commission, in lieu of constructing a service road to serve those properties where access is extinguished by a limited access highway. This conclusion is, of course, subject to the limitations set forth in answer to your second inquiry relating to obstructions of existing roads.

HIGHWAYS—State Convict Road Force—Department has no Authority over Security of—Status of Employee acting as Guard. (13) July 18, 1957.

GENERAL J. A. ANDERSON State Highway Commissioner

This is in reply to your letter of July 8, 1957, in which you raised the question of whether an employee of the Department of Highways, when performing duties as a guard on the State Convict Road Force, would be performing official duties and be eligible for defense counsel as provided in Section 33-11.1 of the Code of Virginia of 1950, as amended.

Section 33-11.1 of the Code provides as follows:

"If any person employed by the State Highway Commission shall be made defendant in any civil action for damages arising out of any matter connected with his official duties, he may, in the discretion of the Attorney General, be represented in such action by the Attorney General or one of his assistants. If, in the opinion of the Attorney General, it is impracticable or uneconomical for such legal service to be rendered by him or one of his assistants, he may employ special counsel for such purpose, whose compensation shall be fixed by the Attorney General.

"If any such employee shall be arrested or indicted or otherwise prosecuted on any charge arising out of any act committed in the discharge of his official duties, the State Highway Commissioner may with the approval of the Governor employ special counsel to defend such employee. The compensation for special counsel employed, pursuant to this section, shall be paid out of the funds appropriated for the administration of the State Highway Commission."

The "official duties" contemplated by this section of the Code mean those duties which the employee is authorized or obligated to perform on behalf of the State Highway Commission. The employee's official duties can extend no further than the scope in which the State Highway Commission has jurisdiction to act. The general scope of authority of the State Highway Commission is set forth in Title 33 of the Code of Virginia of 1950. It is from that statutory authority, either express or implied, that the State Highway Commission may act or cause others to act in its behalf.

Section 33-12 of the Code, setting forth the general powers, does not confer upon the State Highway Commission any power, nor the duty, to provide guards for prisoners on the State Convict Road Force. Similarly, Section 33-13 of the Code does not confer this power or duty upon the State Highway Commissioner.

Section 53-121 of the Code of Virginia of 1950 was the only statute which conferred upon the State Highway Commissioner any jurisdiction over the State Convict Road Force. That statute was repealed by the General Assembly in 1956.

Section 53-4 authorizes the Director of the Department of Welfare and Institutions to engage, or authorize the engagement of, such agents and employees as may be needed by him in the exercise of the functions, duties, and powers conferred or imposed upon him. Section 53-122 of the Code provides that the
Director of the Department of Welfare and Institutions shall provide all clothing, food, quarters and guards for the State Convict Road Force when at work on the roads in any county in the State.

It thus appears that the security of prisoners is the sole obligation of the Director of the Department of Welfare and Institutions.

While there is no express statutory authority for employees of the Department of Highways to serve as guards for prisoners, I presume that the Director of the Department of Welfare and Institutions may appoint them as relief guards and cloak them with the same authority as is applicable to regularly employed guards.

However, when an employee of the Department of Highways is serving as a temporary guard, he is doing so as a loaned employee, and during this time, he is an employee of the Department of Welfare and Institutions.

It is, therefore, my conclusion that an employee of the Department of Highways, when performing duties as a guard on the State Convict Road Force, would not be performing official duties for the Department of Highways, and would, therefore, be ineligible for defense counsel as provided in Section 33-11.1 of the Code of Virginia of 1950, as amended.

HIGHWAYS—Vacation of City Streets—Procedure for—Applicable Law. (31)

HONORABLE JAMES M. THOMSON
Member House of Delegates

This is in reply to your letter of July 31, 1957, in which you ask to be advised whether Section 33-76.8 et seq., of the Code of Virginia of 1950, as amended, have repealed the former law governing the abandonment of streets and roads. You are particularly interested in knowing whether the State Highway Commissioner or the County Board of Supervisors should be the grantor in a deed conveying a portion of a vacated street extending through a subdivision.

It should be noted at the outset that Section 33-76.24 of the Code provides that Chapter 23 of Title 15 of the Code is to be unaffected by the provisions of Articles 6.1, 6.2 or 6.3 of Chapter 1 of Title 33 of the Code. In effect, this means that the vacation of city streets or those in subdivisions may still be vacated pursuant to Chapter 23 of Title 15.

The articles of Chapter 1, Title 33, aforementioned, apply to the abandonment of roads in the Primary and Secondary Systems of State Highways and to those roads in the counties which are in neither of the State systems. As you know, subdivision streets in cities and towns having a population under 3500 may be included in the Secondary System of State Highways. Section 15-766 of the Code, a portion of Chapter 23 of Title 15, provides alternative methods for the vacation of streets in cities and towns.

Prior to the enactment of Section 33-76.11 and sections complementary thereto, by the 1950 session of the General Assembly, the counties had no express statutory authority to convey vacated rights of way. The general rule applicable in such cases where an easement for road purposes had been acquired was that the title and possession of the vacated right of way reverted to the owner of the fee, without further action by the public or highway authorities. In the absence of evidence to the contrary, the fee is presumed to be in the abutting landowners. If the highway was the boundary line between the different tracts, the presumption is that the reversion to each owner is to the center of the highway.

The foregoing rule would not appear to apply to streets in which the public owns the fee, except in those cases where the street comes within the provisions of Section 15-766.2.

I am of the opinion that the 1950 legislative enactments here involved were intended to provide a full procedure for the discontinuance, abandonment and
conveyance of public roads outside of cities having a population in excess of 3500, except where the provisions of Chapter 23, Title 15, dictate some procedure to the contrary.

I am further of the opinion that the conveyance provisions of Articles 6.1, 6.2 and 6.3 of Chapter 1 of Title 33, apply only in those cases where the State or political subdivision has acquired the fee in the right of way. In such cases, the deed of conveyance should be granted by the governing body, in which the title was vested, whether by dedication, deed or condemnation.

HIGHWAYS—Weight Laws—Violation by Non-Resident—Holding and Disposing of Vehicle. (151)

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

January 9, 1958.

This is in reply to your letter of December 31, 1957, in which you asked the following questions in regard to Section 46-338.2, Code of Virginia, as amended, relative to a non-resident trucker who has been found guilty of violation of Section 46-334 and whose vehicle is now being held:

"1. Do the State Police have authority to store this vehicle at a public garage and charge the costs thereof against the value of the vehicle and its load? 2. What is to be done with the vehicle if the amount so assessed for overweight not be paid into the court or satisfactory bond not be given therefor?"

Section 46-338.2 provides that

"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 vehicle liquidated damages * * *

"Any officer authorized to make arrests and weigh vehicles under the provisions of this chapter may for a period of twenty-four hours and thereafter upon order of the court hold the vehicle involved in the overweight violation, provided same is not registered in this State, until the amount so assessed be paid into the court or satisfactory bond is given therefor."

At the outset, I am frank to state that I cannot make a categorical answer to your inquiries inasmuch as the statute provides no procedure for the manner of holding overweight vehicles or for the disposition thereof in the event the assessed penalty is not paid. The statute, in stating the vehicle may be held, by implication, contemplates that the vehicle will be taken into possession and some means for its safekeeping should be provided either in an area set aside for this purpose, or, if none exists, then parking it at a public garage would appear reasonable. Inasmuch as the necessity for storage arose by acts of the owner, and the storage of the vehicle being for the owner's protection, it would appear that the costs should be borne by the owner of the vehicle.

In the event an owner of a vehicle not registered in this State refuses to pay the liquidated damages for the violation of the weight limits, the Commonwealth should proceed in a civil action against the owner of the vehicle. While there is no special form of action prescribed in this situation, it is suggested that the vehicle be attached and the proceeding be in the nature of an attachment for the
purpose of recovering the penalty for the liquidated damages. Upon prevailing in
the attachment proceedings, this would give a "res" in the State over which juris-
diction would be obtained. The vehicle could then be ordered sold in satisfaction
of the penalty and cost. In this event, the vehicle would be treated as any other
attached personal property.

Needless to say, this problem could best be remedied by legislative enactment.

HIGHWAYS—Weight Laws—Violations—Liquidated Damages—How may be
collected—Capias Pro Fine can not be used. (25)

HONORABLE STUART B. CARTER
Member Senate of Virginia

This is to acknowledge receipt of your letter of July 25, 1957 in which you ask
my opinion on the following question, to-wit:

"If a truck is found to be overweight and a summons is issued to the
driver, and the driver fails to appear at the specified time before the
County Judge, and he is fined in his absence, and liquidated damages
are assessed, can the liquidated damages be collected on a capias?"

Section 46-335.1 of the Code provides that the violation of the various statutes
prescribing limitations as to weight shall constitute a misdemeanor and is punish-
able as set forth in Section 46-18 of the Code. This latter section prescribes the
fines to be assessed. The accused may make a deposit in lieu of recognizance in an
amount determined by the magistrate (Section 19-106). Upon his failure to be
present at the date of trial, he may be tried in his absence. The cash deposit
which he has furnished is applied towards the payment of the fine adjudged by
the court. If the fine is less than the cash, the difference is returned to the ac-
cused. If the fine is greater than the cash deposit then a capias pro fine may be
issued under Section 19-319.

Section 46-338.2 which provides for liquidated damages in a certain amount
upon a conviction of a person for the violation of any weight, was enacted in
1956. This section supersedes Section 46-338.1 which said section provided for a
fine in an amount based upon the overweight. This said section was repealed in
1956.

Obviously, the statute (Section 46-338.2) no longer prescribes a fine but merely
fixes liquidated damages for which the driver and owner of the vehicle are liable.
Hence, any amount which is required of the defendant as security at the time he
is arrested may only be applied to the payment of the fine. The duty of the
court under such circumstances as you mention is to advise the Commissioner
of the Division of Motor Vehicles of the conviction and the said Commissioner
upon receipt of such information takes the proper acts to deny the offending person
the right to operate a motor vehicle upon the highways until the assessment for
the liquidated damage is paid. The Commonwealth may proceed in a civil action
against the offending person to collect the said liquidated damages.

I am, therefore, of the opinion that the court is without authority to issue a
capias for the collection of the liquidated damages for which the person con-
victed and the owner of the vehicle are liable under Section 46-338.2.
REPORT OF THE ATTORNEY GENERAL

HOTELS, INNS—Liability for Possessions of Guests—Notice Limiting Liability Must be Posted—Definition of Posted. (175)

HONORABLE MACK I. SHANHOLTZ, Commissioner
Department of Health

This is in reply to your letter of February 3, 1958, in which you make reference to §§35-2, 35-10 and 35-11 of the Code of Virginia. These three sections require that "an innkeeper post in a conspicuous place" or "post conspicuously" certain notices relative to the liability of such innkeeper for the possessions of his guests. You state that certain hotels now desire to place in a folder upon the desk or dresser the notice which is usually posted upon the door in each room relative to the liability of the innkeeper. You ask the following two questions:

"(1) Would inclusion of these three printed sections of the Code in such a folder constitute 'POSTING IN A CONSPICUOUS PLACE,' as required by law?"

"(2) If the answer to Part No. 1 is 'No', would the innkeeper be properly advised if he were told that under such conditions he forfeits immunity or protection the law was intended to provide?"

I am unable to find a decision of any court in this State dealing with this specific question. The cases from other jurisdictions are apparently in agreement that the word "post" in such statutes should be construed literally. The following statement contained in the case of Epp v. Bowman-Biltmore Hotels Corporation, 12 N. Y. Sup. 384, at page 388 is particularly pertinent to this question:

"To 'post', as here used, means to nail, attach, affix or otherwise fasten up physically and to display in a conspicuous manner, and not theoretically (Penn v. Dyba, 115 Cal. App. 67, 1 P. 2d 461) and a posting is not made by printing or recording a notice in a book or on a card and keeping it on a desk."

I am, therefore, of the opinion that the placing of the notice as suggested by you in a folder on the desk or dresser in a hotel room is not in compliance with the statute, which requires that such notice be posted in a conspicuous place in each room.

Inasmuch as my answer to your first question is in the negative, a discussion of the second question is necessary.

I am also unable to find a Virginia decision on this point. However, Judge Stirling Hutcheson discussed this matter in the case of Sagman v. Richmond Hotels, 138 Fed. Sup. 407, at page 410:

"* * * To encourage commerce and trade it was found expedient to safeguard those engaged in traveling, whether for business or social reasons. The law placed upon the innkeeper duties of an insurer. With the change brought about by more efficient law enforcement and the improvement of facilities for the accommodation of guests, the severity of the common law requirement on the part of inn-keepers is no longer necessary. As a consequence, statutes have been enacted limiting their liability. Ordinarily, such a limitation is conditioned upon some affirmative action by the inn-keeper. In the instant case it is conditioned upon posting the signs referred to. Compliance with the statutory requirement results in protection of the inn-keeper against liability beyond the statutory provisions." (Italics supplied)
I am of the opinion that, where an innkeeper fails to comply with the statutory requirement dealing with the posting of notices in conspicuous places, he forfeits the protection provided to him by §§ 35-10 and 35-11 of the Code of Virginia.

INSANE AND MENTALLY ILL—Commitment Fees—Obligation upon County of Residence for—even though have not been collected from Patient. (181)

HONORABLE HIRAM W. DAVIS, Commissioner
Department of Mental Hygiene and Hospitals

This is in reply to your letter of February 11, in which you enclosed a copy of a letter from the Clerk of Halifax County to the City Sergeant of Staunton, Virginia, which is as follows:

"I have your bill in the amount of $20.00 for Commitment fees for Frank Tune Henderson. Our board has never paid fees in the commitment of an inebriate unless he has no estate at all. Before payment of this could be made the board would need an affidavit from his next of kin to the effect that he was a resident of Halifax County and has no estate with which to pay the amount due."

I understand from your letter that the expenses sought to be collected by the City of Staunton for commitment fees were incurred under the provisions of Section 37-6.1 through Section 37-6.5 of the Code, and you desire my opinion as to whether or not the county in which the person committed had his residence is primarily liable for the payment of the commitment fees.

Section 37-75 of the Code is in part as follows:

"* * * All expenses incurred, whether such person be committed to any State hospital or colony or not, including the fees, attendance and mileage aforesaid, shall be paid by the county or city of which such person was a legal resident at the time of such commitment; provided, that if such person's residence is not established in the State of Virginia, costs shall be paid by the State, and provided 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. Any such fees, costs and expenses incurred in connection with the examination of any person under the provisions of §§ 37-61 to 37-65, when paid by any county, city, or the State, shall be recoverable by such county, city or the State, from the person so examined, or from his estate, in an appropriate action or proceeding for such purpose; provided, no such fee or costs shall be recovered from any person or his estate when he is found sane or not subject to commitment under §§ 37-61 to 37-65."

Under this section the obligation is clearly upon the county in which the person committed had his residence to pay the fees, even though such fees may not already have been collected from the patient. There is no provision in Section 37-75 which would authorize the county to refuse to pay such obligation unless an affidavit from the next of kin of the person committed has been filed to the effect that such person was a resident of the county involved and has no estate from which to pay such fees.

It will be noted that the section under consideration provides that, if the
place of residence cannot be established in the State of Virginia, then the costs in connection with the commitment shall be paid by the State.

The statutory provision does not state who is to determine, or be responsible for determining, the legal residence of the person committed.

---

INSANE AND MENTALLY ILL—Commitment Proceedings—Appointment of Attorney for Patient—Duty also Special Justice. (228)  
HONORABLE HARRY N. PHILLIPS, JR.  
Special Justice

This is in reply to your letter of April 18, 1958, which reads as follows:

"On March 29, 1958, Governor Almond signed Senate Bill 242, which reads as follows:  
"Be it enacted by the General Assembly:  
"That the Code of Virginia be amended by adding a section numbered 37-62.1 as follows:  
"Section 37-62.1. In any proceeding for commitment under this article, the judge upon whose warrant such proceeding is being held shall ascertain if the person whose commitment is sought is represented by counsel. If such person is not represented by counsel such judge shall appoint an attorney at law to represent such person in such proceeding. For his services rendered in connection with the proceeding for commitment such attorney shall receive a fee of ten dollars, to be paid as a part of the fees and expenses of commitment as provided in Section 37-75 of the Code of Virginia.  
"In 1953 I was appointed special justice as provided in Section 37-61.2 for the purpose of holding commissions in commitment proceedings. Inasmuch as the bill refers to the judge, and I am a special justice of the peace, is the provision for the appointment of an attorney binding upon me?"

Section 37-61.2 of the Code which authorizes the appointment of special justices for performing the duties prescribed in Article 1, Chapter 3 of Title 37 of the Code, provides that:

"Such special justice or justices, when so appointed, shall have all the powers and jurisdiction conferred upon the justice or trial justice by this title."

The new section added by the 1958 General Assembly will, when it becomes effective, be a part of Title 37. The term "judge" as used in this new section is for the purpose of conforming to the provisions of Title 16.1 of the Code, which abolished the office of trial justice and created the county court system, and designated the justices thereof as "judges". The duties conferred upon you as a special justice under Section 37-61.2 are, in my opinion, not affected by the fact that old Title 16 has been repealed and a new title enacted designating the officers of the courts not of record as "judges" instead of trial justices.

I conclude, therefore, that the provisions of Senate Bill 242 adding Section 37-62.1 to the Code are binding upon a special justice appointed under Section 37-61.2 of the Code.
INSANE AND MENTALLY ILL—Commitment Proceedings—Justice of Peace—
Circuit Court may still Appoint to hold in County where no County Judge
Resides. (280)

June 11, 1958.

DR. HIRAM W. DAVIS, Commissioner
Department of Mental Hygiene and Hospitals

I am in receipt of your letter of June 4, in which you forwarded to this office
a certain correspondence addressed to you by Dr. Joseph E. Barrett, Superintendent
of Eastern State Hospital, relating to the composition of commissions for the
commitment of mentally-ill, epileptic, mentally-deficient or inebriate persons in
accordance with the provisions of Section 37-61 et seq. of the Virginia Code. If
I have correctly assessed Dr. Barrett’s communications, the question presented is
whether or not—in view of the provisions of Section 37-61.2 of the Virginia Code,
enacted in 1952 as Chapter 700 of the Acts of Assembly (1952)—a justice of the
peace may still serve on commissions of the type under consideration.

Pertinent with respect to this question are Sections 37-61 and 37-61.2 of
the Virginia Code, which respectively prescribe:

“Any circuit or corporation judge, or any trial justice, when any
person in his county or city is alleged to be mentally-ill, epileptic,
mentally-deficient or inebriate, upon the written complaint and informa-
tion of any respectable citizen, shall issue his warrant, ordering such
person to be brought before him. The judge or justice may issue the
warrant on his own motion.

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

“The authority having the power to appoint the justice or trial justice
defined in Section 37-1.1 may appoint one or more special justices who
shall be licensed, practicing attorneys at law, for the purpose of
performing the duties required of the justice or trial justice by this
title. Such special justice or justices, when so appointed, shall have all
the powers and jurisdiction conferred upon the justice or trial justice
by this title. The special justice or justices shall serve under the
supervision and at the pleasure of the authority making the appointment.
The special justice or justices shall collect the fees prescribed in this
title for such service and shall retain fees unless the governing body
of the county or city in which such services are performed shall provide
for the payment of an annual salary for such services, in which event
such fees shall be collected and paid into the treasury of such county
or city.” (Italics supplied).

Section 37-1.1 of the Code, to which reference is made in Section 37-61.2,
declares that the term “justice” or “trial justice” includes “police justices or civil
and police justices of cities, but except as hereinafter provided shall not include
a justice of the peace or mayor; * * *”. Manifestly, Section 37-61 of the Virginia Code authorizes the judge of the circuit
court of a county in which no trial justice resides to appoint a justice of the peace
to assist the judge of the circuit court in discharging the duties and executing the
powers conferred by Title 37. This authorization to appoint a justice of the
peace is conferred only upon the judge of the circuit court of a county and may
be exercised only with respect to counties in which no trial justice resides. Upon
being appointed pursuant to this statute, a justice of the peace is vested with all
the powers conferred by Title 37 upon trial justices.

In addition, Section 37-61.2 of the Virginia Code declares that the authority
empowered to appoint justices and trial justices (including police justices and
civil and police justices of cities, but not justices of the peace or mayors) may
appoint one or more "special justices" for the purpose of performing the duties
imposed upon justices or trial justices by Title 37. Any "special justice" appointed
in accordance with this statute must be a licensed, practicing attorney-at-law, and,
when appointed, such special justice is also vested with all the powers and
jurisdiction conferred by Title 37 upon trial justices.

I am constrained to believe that, in its operative effect, Section 37-61.2 of
the Code broadens the power of judges to appoint persons to carry out the duties
imposed upon judges, justices and trial justices by Title 37 of the Virginia Code.
Prior to 1952, this power was limited to the appointment of justices of the peace
under circumstances described above; however, since the enactment of Section
37-61.2, special justices may be appointed in the manner specified therein. I do
not believe that the enlargement of the appointive power of judges by the 1952
amendment infringes the power to appoint justices of the peace which existed at
the time of the 1952 amendment. I am, therefore, of the opinion that a justice
of the peace appointed by the judge of the circuit court of a county in which no
trial justice resides, pursuant to the authorization conferred by Section 37-61 of
the Code may still serve upon commissions for the commitment of mentally-ill,
epileptic, mentally-deficient or inebriate persons.

INSANE AND MENTALLY ILL—Commitment Proceedings—Records Closed to
Public—Copies may not be made to be used in Private Court Litigation—
Law Enforcement Officers May Inspect under Certain Conditions. (256)

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

This will reply to your letter of May 14, in which you call my attention to the
provisions of Section 37-69 of the Virginia Code and inquire whether or not it
would be permissible for you (1) to make certified copies of the papers referred
to in the above quoted statute for possible use in pending litigation or (2) to
permit law enforcement officers to inspect such records in connection with pending
litigation.

Under the provisions of Section 37-68 of the Virginia Code, that portion of
the record of proceedings for the commitment of mentally-ill, epileptic, inebriates
and mentally-deficient persons, consisting of the warrants of arrest and application
therefor, the medical certificate and the order of commitment are made in dupli-
cate, and Section 37-69 of the Virginia Code provides:

“One of such copies shall be transmitted by the judge or justice to
the superintendent of the hospital or colony to which admission is sought
and the other copy filed with the clerk of the court of the county or
city in which deeds are admitted to record. The clerk shall enter the
copy sent him in a book to be supplied by his county or city, shall
properly index the same and shall not permit the same to be kept open
to public inspection.” (Italics supplied).

In light of the language of Section 37-69 italicized above, I am of the opinion
that it would not be permissible for the clerk of a court in which papers of the
type under consideration are filed to make certified copies of such papers for use by
private citizens in pending litigation. Should any party litigant be entitled to inspect such record, the court in which the litigation is pending may make provision for its production at a specified time and place. On the other hand, the requirement that the clerk shall not permit a record of commitment to be kept open to public inspection would not, in my opinion, prohibit the clerk from granting law enforcement officers access to such record, when inspection thereof is incident to the discharge of the duties imposed upon these officials by law. I do not believe that granting permission in the latter situation would constitute keeping a record of commitment open to “public inspection” within the purview of Section 37-69 of the Virginia Code.

INSANE AND MENTALLY ILL—Commitment Procedure—Warrant for Patient —Summons for Physician—Duty of Superintendent of Hospital if Proceedings Invalid. (136)

HONORABLE RICHARD F. MCPHERSON, Judge
Civil and Police Court and Juvenile and Domestic Relations Court

This will reply to your letter of December 10, in which you request an opinion upon the following questions relating to the commitment of persons to State hospitals or colonies:

“1. Under Section 37-61 of the Code of Virginia is it mandatory for the Judge to issue a warrant for the arrest of the persons alleged to be mentally-ill, etc.?

“2. Under Section 37-62 of the Code of Virginia is it mandatory that two physicians shall be summoned if they will appear voluntarily?

“3. If your answer to either 1 or 2 above is in the affirmative and these steps are not taken, is the commitment still valid and must the Superintendent of the institution to which the person is committed accept such person?”

Pertinent to the resolution of the first question presented in your communication is Section 37-61 of the Virginia Code, which prescribes:

“Any circuit or corporation judge, or any trial justice, when any person in his county or city is alleged to be mentally-ill, epileptic, mentally-deficient or inebriate, upon the written complaint and information of any respectable citizen, shall issue his warrant, ordering such person to be brought before him. The judge or justice may issue the warrant on his own motion. In any county in which no trial justice resides, the judge of the circuit court may appoint one justice of the peace in such county to assist him in carrying out the duties and powers conferred by this title. Each justice of the peace so appointed by the judge shall serve under the supervision and at the pleasure of the judge making the appointment and shall be vested with all the powers conferred by this title on trial justices.” (Italics supplied).

It is manifest from the language italicized above that this provision of the Virginia Code contemplates the issuance of formal process, i.e., a warrant, for the arrest of any person who is alleged, in the written complaint and information of any respectable citizen, to be mentally-ill, epileptic, mentally-deficient or inebriate; or who is believed by the specified judge or justice to be in such condition. Other
REPORT OF THE ATTORNEY GENERAL

of the general provisions relating to the commitment of mentally-ill, epileptic, mentally-deficient or inebriate persons prescribe that the warrant of arrest shall be a part of the report of the commission that one of the forms which the State Hospital Board is required to prepare for use—to the exclusion of all other forms—in commitments and admissions shall be that of the warrant of arrest; that the portion of the record consisting of the warrant of arrest and application therefor, the medical certificate and the order of commitment shall be made in duplicate; and that one of such duplicate copies shall be transmitted to the superintendent of the hospital or colony to which admission is sought, and the other to the clerk of the court of the county or city in which deeds are admitted to record to be entered and indexed in a book to be supplied by the county or city. See, Sections 37-66 through 37-69, Code of Virginia (1950). In light of the foregoing, I am of the opinion that the provision of Section 37-61 of the Virginia Code relating to the issuance of a warrant of arrest is mandatory and that the specified judge or justice is required to issue such warrant.

With respect to the second question presented, Section 37-62 of the Virginia Code provides:

"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).

It will be noted that this provision of the Virginia Code does not state that the judge, trial justice or special justice shall issue a summons for the appearance of two licensed and reputable physicians; the statute merely provides that the judge, trial justice or special justice "shall summon" such physicians. Moreover, the statutes, cited above, relating to the composition of the report of the commission, the preparation of forms, the composition of the record of commitment proceedings and the entering and indexing of a portion of the record by the clerk of the court of the county or city in which deeds are admitted to record make no mention of a formal summons for the appearance of the required physicians. I am, therefore, of the opinion that the issuance of formal process to such physicians is not a mandatory requirement of Section 37-62 and that such a summons need not be utilized if the physicians in question will appear voluntarily.

With regard to your third inquiry, I am of the opinion that the statutory procedure for the commitment of mentally-ill, epileptic, mentally-deficient or inebriate persons must be strictly followed and that no valid commitment may be made without compliance with the mandatory requirement for the issuance of a warrant of arrest prescribed in Section 37-61. Moreover, with respect to the duty of the superintendent of an institution to which a person is committed to accept such person, Section 37-36.2 of the Virginia Code provides:

"Upon the receipt of any interrogatories and papers of commitment of any mentally-ill, epileptic, mentally-deficient or inebriate person, the superintendent of the hospital or colony shall carefully examine the same and if they are found to be in conformity with the law and contain evidence tending to show that such person is mentally-ill, mentally-
deficient, epileptic or inebriate, the superintendent shall forthwith send
for the patient and receive him into the hospital or colony. If the
commitment papers do not conform to law and do not contain satisfactory
and sufficient evidence of mental illness, mental deficiency, epilepsy or
inebriety, the superintendent shall return such papers to the sheriff or
sergeant for correction, or amendment as to additional evidence, by
the court or the justice or proper members of the commission.** (Italics
supplied).

It would appear from the language italicized above that the obligation of
the superintendent of a hospital or colony to receive a person committed to
such institution is conditioned upon the superintendent's finding that the
commitment papers are in conformity with law. If the commitment papers do not
conform to law, the superintendent is required to return such papers for
correction by the court or the justice or proper members of the commission. I
am, therefore, of the opinion that the superintendent of an institution is not
required to accept a person committed to such institution until the commitment
papers have been properly executed.

INSANE AND MENTALLY ILL—When Patient May be Sterilized—Type of
Commitment Required. (182)

HONORABLE HIRAM W. DAVIS, Commissioner
Department of Mental Hygiene and Hospitals

This is in reply to your letter of February 14, 1958, in which you request
my opinion on two matters concerning the sterilization of mentally deficient per-
sons who are inmates of State mental hospitals. Your first question is, may a
woman who is under sentence of a court for violation of a criminal offense but who
has also been legally committed to Central State Hospital as a mentally deficient
person, be sterilized?

Section 37-231 of the Code of Virginia confers power upon superintendents of
State mental hospitals to authorize the performance of the operation of sterilization
upon certain inmates under certain conditions. Section 37-231.1 of the Code of
Virginia provides that "the term inmate shall include any person, male or female,
who has been duly committed to and admitted to any of the institutions named
in §37-231 * * * ."

I am of the opinion that, if this inmate has been duly committed under a
general commitment, as provided for in Title 37 of the Code, to Central State
Hospital, she may be sterilized under the conditions and procedure outlined
in Chapter 9 of Title 37 of the Code, although, at the same time, she is under
sentence of a court for violation of a criminal offense.

Your second question is whether sterilization may be performed on a person
who has been admitted to a State mental hospital by court order and not commit-
ted as a mentally ill or deficient person.

I am of the opinion that, in order for a person to be sterilized under the pro-
cedure outlined in Chapter 9 of Title 37 of the Code, the person must have been
duly committed to and admitted to one of the State mental hospitals or colonies.
When the term "duly committed to" is used in §37-231.1 of the Code, I am of the
opinion that it is referring to a general commitment made under Title 37 of the
Code, but it is doubtful whether it embraces those commitments made under
Article 5 of Title 19 of the Code.
REPORT OF THE ATTORNEY GENERAL

JAILS AND PRISONERS—Sheriff's Duty as to—Where there is separate County Police Department and Prisoners kept in Jail of Another County. (302)

June 30, 1958.

HONORABLE ERNEST P. GATES
Commonwealth's Attorney for Chesterfield County

I am in receipt of your letter of June 23, 1958, in which you present the following situation and inquiries:

"The County of Chesterfield was authorized by Chapter 21 of the Acts of Assembly, 1944 and other Acts adopted prior thereto, to establish a County police department and pursuant to said Act, has a County Police Department. The Circuit Court of the County on December 31, 1942, under authority of Sec. 53-139 of the Code of Virginia, adopted the Jail of Henrico County as the Jail for the County of Chesterfield. Prior to this time, the County operated and maintained a jail at the Court House under the supervision of the Sheriff. The aforementioned Court order stated, among other things, that all persons who may be in the future confined in the jail from the various Courts of the County or who may be held for trial, should be held in custody in the Jail of Henrico County until the further order of the Court, except such persons as the Sheriff of Chesterfield County, or any police officer, may desire to confine in the Jail at Chesterfield to await trial before the Trial Justice Court and the Sheriff was directed to receive them.

"Subsequent to the entry of this order, the Jail at Chesterfield was renovated, remodeled and repaired and the office of the County Police Department was established in this building and a lock-up maintained under the supervision of the Police Department. It is the policy in the County for the State Police, County Police and Sheriff's Department to deliver the persons arrested to the Jail in Chesterfield and then the prisoners are transported from this Jail to the Henrico Jail by the County Police Department. The prisoners are then brought from Henrico Jail by the Police Department for trial at Chesterfield and if confinement is ordered, they are returned by the Sheriff's Department to the Henrico Jail.

"The County is constructing a new office building and upon its completion, the Police Department will be located in this building. If the Jail in Chesterfield is to be operated, it will be necessary to have a person present 24 hours a day to receive prisoners.

"* * * *

"In view of Sec. 53-141 of the Code of Virginia, is it the responsibility of the Sheriff to operate the lock-up at Chesterfield and transport prisoners from Chesterfield to Henrico and back to Chesterfield for trial and returned to Henrico for confinement if ordered? Does the County of Chesterfield have the authority to operate a police lock-up? Is the Sheriff of Chesterfield responsible for keeping records as required by Secs. 53-151, 53-170 and 53-172?"

In connection with the first question you present, Sections 53-139 and 53-141 of the Virginia Code respectively prescribe:

"Sec. 53-139. When a county or city is without sufficient jail, or its jail is to be removed, rebuilt or repaired, the court thereof may adopt as its jail the jail of another county or city, until it can obtain a sufficient jail. All persons committed or to be committed to the jail of the first mentioned county or city, at or after such adoption, and
before a sufficient jail be so obtained, shall be conveyed to the jail so adopted."

"Sec. 53-141. The keeper of any jail so adopted for a county or city or so designated shall, as to the person so conveyed to such jail, be deemed the jailer of such county or city, until the court thereof shall declare its own proper jail to be sufficient, whereupon such persons shall be delivered to the sheriff of such county or sergeant of such city, who shall convey them to his jail." (Italics supplied).

So far as the situation you present is concerned, I do not believe that the latter statute quoted above contains any language which could properly be deemed to impose upon the Sheriff of Chesterfield County the responsibility for operating the lock-up at Chesterfield County or for transporting prisoners from Chesterfield to Henrico for incarceration, back to Chesterfield for trial and finally to Henrico again for confinement. However, Section 17-13 of the Virginia Code requires the sheriff of each county in which any court is held to attend such court and act as its officer, and I am of the opinion that the Sheriff of Chesterfield County, as officer of the Circuit Court of Chesterfield County, would be required to make such disposition of prisoners before that court as the judge thereof may direct.

With regard to your second question, while I have been unable to discover any statute expressly relating to the establishment or operation of lock-ups by the various localities of the Commonwealth, I am of the opinion that the general powers conferred upon counties to provide for the safety and general welfare of the inhabitants thereof would be sufficiently broad to authorize the operation of a lock-up by Chesterfield County.

With respect to the third question posed in your communication, Sections 53-151 and 53-170 of the Virginia Code provide for the keeping of records concerning persons or prisoners committed to or confined in jail. Section 53-151 prescribes that the records specified therein shall be kept by the jailer and, as you will note from the language of Section 53-141 of the Virginia Code italicized above, keeper of a jail adopted for a county or city pursuant to Section 53-139 of the Virginia Code is deemed the jailer of the adopting county or city. Moreover, Section 53-151 requires the jailer to keep a record indicating whether or not a convict has faithfully observed the rules and requirements of the jail and to make certain deductions, based upon such record, from the individual convict's term of confinement. Similarly, Section 53-170 of the Virginia Code requires each sheriff to keep a "daily record" showing the total number of prisoners confined in the jail of his county, the number of prisoners admitted, the number released and the time of each such admittance and release. The records contemplated by Section 53-170 must show such information separately as to prisoners of the Commonwealth, of each county, city and town, of the United States, and of any other State or country. In the situation you present, it would appear that the information required by the two statutes under consideration would be readily available only to the Sheriff of Henrico County, and I am of the opinion that the records specified in Sections 53-151 and 53-170 of the Virginia Code should be kept by that official.

On the other hand, Section 53-172 of the Virginia Code requires the sheriff of each county, on the first day of each term of the circuit court thereof, to make a report to the judge of such court showing the number of prisoners in jail on that day and the name, date of commitment, offense and sentence of each prisoner, which report is ultimately to be filed in the clerk's office of such county. As this statute envisions the making of a report to the judge of the circuit court, and as the Sheriff of Chesterfield County is the officer of the Circuit Court of Chesterfield County, I am constrained to believe that the report contemplated in Section 53-172 of the Virginia Code should be made by the Sheriff of Chesterfield County.
REPORT OF THE ATTORNEY GENERAL


HONORABLE WALTER T. McCARTHY, Judge
Circuit Court of Arlington County

I am in receipt of your letter of December 3, in which you request my opinion upon the following question:

"Would a judge of a court of record of the State of Virginia, retired under any of the provisions of Section 51-3 of the Code of Virginia, be thereafter prohibited from receiving compensation from any branch of the State or a sub-division thereof?

"More specifically, would a judge, retired under said Section 51-3, be prohibited from acting as a professor or teacher of law at any institution receiving financial help from the Commonwealth of Virginia and receiving compensation from such institution therefor?"

I have been unable to discover any provision of Virginia law which would prohibit the judge of a court of record who has retired under Section 51-3 of the Virginia Code from accepting a position of the character described in your communication. I am, therefore, of the opinion that your question must be answered in the negative. If there is any specific provision of the organic or statute law of Virginia which you believe may bear upon this situation, I would be happy to consider the matter anew at your further request.


HONORABLE GERALD NOELL
Justice of the Peace, Chatham, Virginia

This is in response to your letter of April 12, 1958, in which you present the following situation for a ruling:

"A is a Justice of Peace for Pittsylvania County, Virginia. Trooper Sneeze arrests C for driving under the influence and takes C to A's place of abode in Pittsylvania County, but not finding A at home proceeds to take C to the jail in the City of Danville, Virginia. In a matter of minutes A arrives at the Danville jail, examines C, and proceeds to write a warrant against C for driving under the influence at the jail within the City of Danville, Virginia.

"In view of Title 39, Section 4 of the Code of Virginia of 1950, as amended, does A have authority to write the warrant in the City of Danville, Virginia? It is admitted A could have written the warrant in Pittsylvania County, Virginia."

Reference is made to Section 39-4, Code of Virginia, which, in part, provides:

"Justices of the peace within their respective counties and on any property geographically within any city therein, which is owned and used by the county, shall, however, have the same power to issue attachments, warrants and subpoenas within the jurisdiction of such trial justice as is conferred upon the trial justice, * * *."
In accordance with the foregoing, it does not appear that a justice of the peace for the county would have jurisdiction to issue a warrant within the limits of the City of Danville. I enclose a copy of an opinion dated August 13, 1953, to Sheriff T. H. Lillard, contained in the 1953-54 Report of the Attorney General at page 115, which pertains to a related situation.

JUVENILE AND DOMESTIC RELATIONS COURTS—Warrants or Summons in matters within Jurisdiction of—May be Issued by Justices of Peace and Municipal Courts. (117)

Honorable Beverly T. Fitzpatrick, Judge
Municipal Court for the City of Roanoke

December 10, 1957.

This will reply to your letter of November 27, 1957, in which you state that Section 27(f) of the charter of the City of Roanoke provides that the Municipal Judge for the City of Roanoke "shall possess and exercise all the jurisdiction, power and authority * * * which are now or may hereafter be conferred by the laws of the Commonwealth upon any trial justice or upon any justice of the peace * * *". You further advise that Roanoke has a Juvenile and Domestic Relations Court established under the pertinent general statutes of Virginia, Code of Virginia (1950) as amended, Section 16.1-139 et seq. In light of the foregoing, you inquire whether or not the Municipal Judge for the City of Roanoke may issue a summons or a warrant in (a) juvenile cases and (b) domestic relations matters, including non-support situations and those involving offenses committed by one member of a family against another member of the family.

As you are aware, most juvenile cases are initiated by the filing of a petition in the Juvenile and Domestic Relations Court and the issuance of a summons by that Court. However, a juvenile may be taken into custody upon a warrant, Section 16.1-194, and this office has previously ruled that—subject to the limitations set out in Section 16.1-195 of the Virginia Code—a justice of the peace may issue such warrants. See, Report of the Attorney General (1950-51), p. 188. As the provisions of the charter of the City of Roanoke to which you refer invests the Municipal Judge of the City of Roanoke with all the power and authority conferred by the laws of the Commonwealth upon justices of the peace, I am of the opinion that the Municipal Judge for the City of Roanoke may issue warrants in juvenile cases to the extent permitted by Section 16.1-195 of the Virginia Code.

Justices of the peace are also authorized to issue process for the arrest of persons charged with offenses generally, Section 19-71 of the Virginia Code, although the authority to do so is circumscribed in non-support cases by the provisions of Section 20-70 of the Virginia Code. See, Diggs v. Commonwealth, 181 Va. 49, 23 S. E. (2d) 788. Exclusive original jurisdiction of non-support proceedings and cases involving offenses committed by one member of the family against another member of the family is, with certain specified exceptions, vested in the various Juvenile and Domestic Relations Courts. Sections 20-67 and 16.1-158, Code of Virginia (1950) as amended. As a justice of the peace may issue warrants in such domestic relations matters, I am of the opinion that the Municipal Judge for the City of Roanoke would be authorized to do so by virtue of the provisions of Section 27(f) of the charter of the City of Roanoke.
REPORT OF THE ATTORNEY GENERAL

LABOR LAWS—Apprenticeship—Authority of Local Committee—Compel Employers to Rotate Apprentices, Use certain Classes, or Contribute to Local Committee. (147)

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

January 2, 1958.

This is in response to your letter of December 27, 1957, in which you set forth the following questions:

"(1) Does the Virginia Apprenticeship Council have the authority to approve a Joint Apprenticeship Committee with standards which require an employer to rotate his apprentices from one shop to another at regular intervals?

"(2) Should an employer be required to send his apprentices to a school sponsored and partly financed by the local Joint Apprenticeship Committee, when the employer desires to send his apprentices to classes taught in electricity which are open to the general public and sponsored wholly by the public school system?

"(3) Under the provisions of the Virginia Apprenticeship Act, can an employer be required to make regular financial contributions to a local Joint Apprenticeship Committee requiring participating employers to finance an apprenticeship school, pay a salaried apprenticeship director and other incidental expenses, which have been approved by the participating members of the Joint Apprenticeship Committee?"

The answers to the questions which you set forth involve the authority of the local joint apprenticeship committee. This office is further advised that the requirements which are contained in the above stated questions are not State-wide nor is there any information that the requirements obtain in more than one area in the State.

In determining the authority of the local committees, reference is made to Section 40-125, Code of Virginia, which sets forth their functions and, therefore, authority, as hereinafter designated:

"(1) To co-operate with school authorities in regard to the education of apprentices;

"(2) In accordance with standards established by the Apprenticeship Council, to establish local standards of apprenticeship regarding schedule of operations, application of wage rates, working conditions for apprentices and the number of apprentices which shall be employed locally in the trade; and

"(3) To adjust apprenticeship disputes.

In answer to question No. 1, this office finds no authority for a local committee to require an employer to rotate his apprentice from one shop to another at regular intervals. As mentioned above, there has been no showing that this is a uniform or standard requirement throughout the State or in more than one locality.

In answer to question No. 2, this office finds no authority for the local committee to require an employer to send his apprentice to a particular school where there are other approved schools in the locality which meet all requirements.

In answer to question No. 3, this office can find no legal authority for requiring an employer to make financial contributions to a local committee for any purpose.
LABOR LAWS—Right to Work Law—Applicability to Municipal Employees—
Recent Court Decision. (3) 

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

This is in reply to your letter of June 18, 1957, in which you request my opinion as to whether or not such municipal employees as fire fighters would be protected under the State right-to-work law as found in §§40-65 and 40-68 of the Code of Virginia should these firefighters join a labor union or organization.

This matter has been decided recently by the courts of Virginia and by the Supreme Court of the United States in the case of Verhaagen v. Reeder. I am enclosing a copy of the statement of the action taken by the courts of Virginia in this case, along with a copy of the order of the Supreme Court of the United States. I feel that this court decision answers the question raised by you.

LABOR LAWS—State, Local Employees—Applicability of Right to Work Law—
Recognition of Union. (121)

HONORABLE EDMOND M. BOGGS, Commissioner
Department of Labor

This is in reply to your letter of December 3, 1957, in which you request my opinion as to whether or not Articles 2 and 3 of Chapter 4 of Title 40 of the Code of Virginia supersede Senate Joint Resolution No. 12 of the General Assembly of 1946.

Article 2 of Chapter 4 of Title 40 of the Code prohibits an employee of the Commonwealth or of any county, city or town from engaging in a strike. Senate Joint Resolution No. 12 is a statement of public policy of Virginia that no State, county, municipal officer or agent shall have the authority to recognize any labor union as a representative of any public officers or employees or negotiate with a labor union.

I can find nothing in Article 2 of Chapter 4 of Title 40 of the Code concerning the joining of a labor union by employees of the State or of any political subdivision thereof. Therefore, I am of the opinion that there is no conflict between Article 2 and Senate Joint Resolution No. 12. Article 3 of Chapter 4 of Title 40 of the Code, known as the Right-to-Work Law, provides that no one may be denied employment solely on the ground that he is or is not a member of any labor union or organization. Article 3, as written, contains no expressed exception as to State, county or municipal employees, and, therefore, there would appear to be a conflict between Article 3 and Senate Joint Resolution No. 12; however, I should like to call attention to the point which this office made in an opinion to you on July 3, 1957, in which you asked a question as to whether or not municipal employees would be protected under the State Right-to-Work Law as found in Article 3 of Chapter 4 of Title 40 should these employees join a labor union or organization. As I wrote you at that time, the Law and Chancery Court of the City of Norfolk in the recent case of Verhaagen v. Reeder held that municipal employees in the State of Virginia did not come within the provisions of the State Right-to-Work Law. The Supreme Court of Virginia denied a petition for writ of error from this decision, and the Supreme Court of the United States denied a petition for writ of certiorari. Therefore, I feel that this decision of the courts resolves the conflict between Article 3 and Senate Joint Resolution No. 12 to the effect that municipal, county and State employees do not come within the provisions of the State Right-to-Work Law.
LOTTERIES—Consideration—Lucky License Number Radio Program—When Listening to Radio and Going to Pick-up Prize is consideration. (69)

October 17, 1957.

HONORABLE ROYSTON JESTER, III
Commonwealth's Attorney, City of Lynchburg

This will reply to your letter of September 27, 1957, in which you outline the features of a certain promotional scheme—known as "Lucky License Number"—to be broadcast by Radio Station WLVA. From your communication and the documents enclosed therewith, it appears that the radio station proposes to announce an automobile number, apparently selected at random, during the course of a spot commercial broadcast on behalf of a particular sponsor. If the person whose license number is selected and announced presents himself at one of the sponsor's outlets, he will be awarded a specified amount of that sponsor's goods or services free of charge.

With respect to the existence of consideration in the sales promotional plan outlined above which—together with the admittedly present elements of prize and chance—would bring the enterprise under consideration within the condemnation of the Virginia anti-lottery laws, you state that you have taken the position that "the listening to the radio or the going to the establishment to receive the award" would constitute consideration. You request my opinion upon the correctness of the alternate views you have expressed.

In response to your inquiry, permit me to advise that, if it is necessary for an individual to be listening to the radio when his license number is announced in order to be eligible to receive an award, I concur in your opinion that listening to the radio would furnish the necessary element of consideration to constitute the venture a lottery under Virginia law. I believe this position is supported by the decision of the Supreme Court of Appeals in Maughs v. Porter, 157 Va. 415.

On the other hand, whether or not "going to the establishment to receive the award" would constitute the necessary element of consideration is, I believe, more subject to question. In this connection, the critical inquiry is whether the requirement of an individual's going to the sponsor's establishment to receive an award is a requested consideration of the sponsor's promise to make an award, or whether that act is a mere condition in a gratuitous promise. See, 1 Williston on Contracts, 378-380; Consideration: §112. Certainly the act of going to the sponsor's outlet to obtain the award is capable of being consideration. While it is possible that the act in question may be a mere condition in a gratuitous promise, it is equally possible—since some benefit, in the nature of advertising value, will accrue to the sponsor because of the individual's going to the sponsor's outlet—that the act in question constitutes sufficient consideration to bring the program under consideration within the scope of the anti-lottery laws of Virginia.

LOTTERIES—"Ringo"—Radio or Television Bingo Constitutes. (213)

April 8, 1958.

HONORABLE HUNT M. WHITEHEAD
Member House of Delegates

I am in receipt of your letter of April 3, in which you enclosed a letter sent to you by Mr. G. W. Sandefur, Manager of Radio Station WMNA, concerning the legality of the broadcast game, "Ringo". You request my opinion upon this matter.

I have considered Mr. Sandefur's communication and am of the opinion that the promotional enterprise in question would constitute a lottery under Virginia law. 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. Unquestionably, the elements of prize and chance are present in this venture, and the requirement that a prospective recipient of a prize obtain a "Ringo" sheet from the sponsor and listen to the radio as various numbers are called would constitute sufficient consideration within the definition of a lottery. In this connection, the fact that "Ringo" sheets may be obtained from the sponsor without cost and without making a purchase of the sponsor's product would not suffice to remove the venture from the condemnation of the Virginia lottery laws. This ruling is consistent with numerous past opinions of this office rendered in connection with a variety of promotional enterprises.

MEDICINE—Board of Medical Examiners' Interpretation to be given to following terms: "Four Satisfactory Courses," "Graduate of a Recognized School," "Recognized Professional School." (90) November 11, 1957.

HONORABLE K. D. GRAVES, Secretary-Treasurer Board of Medical Examiners

This is in reply to your letter of November 4, 1957, in which you request my opinion concerning the proper interpretation to be given to certain provisions found in §54-306 of the Code of Virginia. Your first question is as to whether the term "four satisfactory courses" used in §54-306 of the Code refers to the subject matter taught in the courses or to the success of the candidate taking the course.

I am of the opinion that this term refers to both of these, and the candidate must successfully master a course which meets with the satisfaction and approval of the Board.

Your second question relates to the term found in paragraph 3 of §54-306 of the Code, "any graduate of a recognized school." You state that many medical schools in Great Britain do not give a diploma or certificate, but after a student has studied medicine a given length of time he takes a licensing examination, and if he passes this examination he is then a bona fide doctor, although not necessarily a M.D., which, in Great Britain, is a degree obtained by writing a thesis and passing other tests. If a person has satisfactorily completed the required course of study of a recognized medical school and said school does not give a diploma or certificate of graduation, then I am of the opinion that this person is a graduate of a recognized medical school within the intent and meaning of that term as used in §54-306.

You further request my opinion as to the meaning of the term "recognized professional school," especially in regard to the word "recognized." Of course, paragraphs Nos. 1 and 2 provide detailed provisions concerning the recognition of a professional school. The problem arises only in construing paragraph No. 3 of §54-306 of the Code of Virginia. That paragraph provides as follows:

"(3) If outside of the United States and Canada, is found by the Board from evidence submitted by the graduate or from its own investigation to have maintained at the time of such professional study standards equal to those required of other schools for qualification hereunder."

I am of the opinion that the Board of Medical Examiners has the final decision as to whether or not these schools are recognized to be professional schools. In ascertaining this fact the Board should consider whether or not the school is known and accepted by the members of the medical profession in the country wherein
the school is located as being a professional school. The question as to whether or not the statute should be amended to further specify what the term "recognized professional school" is to include is primarily a policy question, and if this terminology has made it difficult for the Board of Medical Examiners to carry out its functions in the past, then I would suggest that the Board request an amendment to the statute.

MEDICINE—Board of Medical Examiners—Unlicensed Physician May Not be Employed by Hospital as Surgical Pathologist. (303) June 30, 1958.

Mr. W. L. Beale, Superintendent
Norfolk General Hospital

This is in reply to your letter of June 26, 1958, relating to the proposal to employ Dr. William Carroll as Surgical Pathologist at the Norfolk General Hospital.

Dr. Carroll is a graduate of a medical school that has not been approved by the Board of Medical Examiners. He is a graduate of the University of Moscow and is now teaching at the Medical College of Virginia. He has been licensed by the State of Ohio, which State maintains standards acceptable for reciprocity with this State. However, due to the time element, he cannot be admitted and licensed by this State under the reciprocity arrangement with Ohio. Dr. Graves has advised you that the employment is prohibited under the provisions of Section 54-276.7 of the Code, as amended by Chapter 55, Acts of Assembly, 1958.

As will be observed from the Title to Chapter 55, the Code section under consideration applies to the employment of "licensed or unlicensed practitioners as internes or residents in hospitals." It is my understanding that a Surgical Pathologist does not come within the category of "internes" and "residents" as those terms are commonly used in the medical profession. If this understanding is true, then, in my opinion, the employment of Dr. Carroll would be in violation of the statute.

This section of the Code contains the following language:

"No graduate of a substandard medical school may be employed as an interne or resident in any hospital or in any capacity involving professional duties, except that the Board may in its discretion under unusual temporary or emergency conditions permit the employment of graduates of such schools under such restrictions and conditions as the Board may prescribe in each particular case."

I have quoted the above language due to the fact that upon first impression, it might be considered that the language which I have underscored would permit the Board to grant permission to your Hospital to engage the services of Dr. Carroll. Manifestly, the underscored exception relates to the employment of graduates of substandard schools at no higher level than interne or resident. The quoted provision, though not specifically amended at the recent session of the General Assembly, was never intended to authorize employment of such persons except as internes or residents or in lessor capacities involving professional duties. The amendment to which Dr. Graves referred in his letter to you adds force to this conclusion.
MEDICAL EXAMINERS—Appointment of Local—Submission of Names to State Health Commissioner by Local Medical Society. (98)

November 15, 1957.

DR. GEOFFREY T. MANN
Chief Medical Examiner

This will reply to your letter of November 13, 1957, in which you call my attention to certain language of Section 19-21 of the Code of Virginia (1950), as amended, which relates to the appointment of medical examiners and provides:

"* * * All vacancies in the office of medical examiner shall be filled by the State Health Commissioner for the unexpired terms, but temporary appointments may be made by the Chief Medical Examiner to expire upon the appointment of a medical examiner for that section or district by the State Health Commissioner. Each medical examiner shall be appointed from a list of two or more licensed doctors of medicine submitted by the component Medical Society of the county or city in which the appointment is to be made, or of the district in which the county or city is located. If no list of names is submitted by the society the State Health Commissioner shall appoint a medical examiner or medical examiners from the licensed medical doctors of such country or city. * * *"

In connection with the above quoted language, you state that, in your opinion, "it was clearly the intent of the statute for the medical society to submit two or more names from which a medical examiner willing to accept unqualified appointment could be selected for a three year term". In effect, it is your position that the phrase "two or more licensed doctors of medicine" utilized in the statute under consideration should be construed to mean two or more licensed doctors of medicine "willing to serve as the medical examiner for the area" in question. You request my opinion upon the correctness of this view.

I think it is apparent that the statute under discussion contemplates that the authority to make appointments to fill vacancies in the office of medical examiner shall be lodged in the State Health Commissioner, the range of the Commissioner's possible selection to be confined to a list containing the names of not less than two licensed doctors of medicine—submitted by the component medical society of the locality in which the vacancy exists—from which the appointment may be made. Manifestly, this legislative design cannot be effected in the manner prescribed by statute unless the list to be submitted by the component medical society contains the names of at least two licensed doctors of medicine who are willing to accept the appointment. If no practitioner named in the list is willing to serve, the submission of the list is superfluous; if only one practitioner named in the list is willing to serve, the State Health Commissioner cannot exercise the discretion in making the appointment which the statute clearly contemplates. I, therefore, concur in the view you have taken and am of the opinion that the statutory language in question should be construed to require submission of a list by the component medical society containing the names of at least two practitioners of medicine who are willing to serve as medical examiner in the area for which the appointment is to be made.
REPORT OF THE ATTORNEY GENERAL

MENTAL HYGIENE AND HOSPITALS—Copy of Proceedings of Temporary Commitments and Admission on Physician’s Certificate filed with Department. (42)

August 20, 1957.

HONORABLE HIRAM W. DAVIS, Commissioner
Department of Mental Hygiene and Hospitals

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

“A question has arisen relating to Sections 37-69, 37-99 through 102 and 37-110.1 of the statutes.

“As you know, the Department of Mental Hygiene and Hospitals has a statistical section. Is it a requirement within the interpretation of the above named sections for this Department to request a copy of the proceedings in the case of observation and temporary commitments, and admission without commitment on Certificate of Physicians, for persons who are not subsequently legally committed?”

I am enclosing copy of an opinion dated May 31, 1956, published in the Report of the Attorney General, 1955-56, at page 105, in which I expressed the view that the record of the commitment proceedings should be filed in accordance with §37-69 of the Code, even though no commitment was made.

With respect to commitments made under §§37-99 through 37-102, I am of the opinion that the same principle applies. It will be noted that, under §37-102, it is stated “The same provisions as to filing and recording are to be observed as in regular commitments.”

MENTAL HYGIENE AND HOSPITALS—Extradition of Persons of Unsound Minds—Requesting State Must Pay Expenses of. (205)


HONORABLE JOSEPH E. BARRETT
Superintendent, Eastern State Hospital

This is in reply to your letter of March 24, 1958, in which you state that, on February 13, 1958, two juvenile patients escaped from Eastern State Hospital; they were taken into custody on February 15, 1958 in Howard County, Maryland, and Eastern State Hospital was notified that they had been taken into custody. The Maryland authorities were requested to place the two escaped patients in a mental institution of the State of Maryland and proceed through regular channels to have the patients returned to the Eastern State Hospital. The Maryland authorities informed you that, after examination by two competent physicians, they could find no grounds for commitment of these two patients to a mental hospital of the State of Maryland, and you were requested to send for the two juvenile patients. When your agents went to Howard County Jail to take into custody the two juvenile patients, the Sheriff of Howard County presented these agents with a bill in the amount of $27.00 for nine days' lodging of the two patients. You request my opinion as to whether or not Eastern State Hospital and the Commonwealth of Virginia are liable for the sum of $27.00 for the lodging of these two patients in the Howard County Jail.

Chapter 10 of Title 37 of the Code of Virginia is the Uniform Act for the Extradition of Persons of Unsound Minds. In §37-251 of that chapter, dealing with the procedure for apprehending and returning escaped mental patients by one state to another state, the following provision is found:
"The costs and expenses incurred in the apprehending, securing, maintaining and transmitting the fugitive to the state making such demand shall be paid by such state."

In view of this provision in the Uniform Act for the Extradition of Persons of Unsound Minds, I am of the opinion that Eastern State Hospital and the Commonwealth of Virginia are legally liable for the sum of $27.00 for the lodging of the two escaped mental patients who were being held by the Maryland authorities at the request of officers and agents of the Commonwealth of Virginia.

MENTAL HYGIENE AND HOSPITALS—Mental Hygiene Clinics—Local Funds—Not Public Funds—Not Subject to Control by State. (265)

HONORABLE ALFRED E. H. RUTH, Director
Department of Mental Hygiene and Hospitals

This is in reply to your letter of May 12, 1958, in which you request my opinion concerning the responsibility of the Department of Mental Hygiene and Hospitals for the handling and audit of Fund B by local advisory boards of mental hygiene clinics established pursuant to §37-38 of the Code of Virginia. You state that this Fund B is composed entirely of local funds contributed or donated by various individuals, organizations and agencies, and is administered by the local advisory board of the mental hygiene clinic concerned.

I am of the opinion that this Fund B is not public or State funds and, therefore, that the Department of Mental Hygiene and Hospitals has no control over or responsibility for the administration and audit of these funds. These funds are raised and expended by local charitable organizations, namely, the local advisory board of a mental hygiene clinic. The State has no voice in how these funds were raised or how these funds are to be expended, although the funds are usually expended in the furtherance of the operation of a local mental hygiene clinic, which is an agency of the State Department of Mental Hygiene and Hospitals.

If any of the funds in Fund B are turned over to a doctor or other employee of the mental hygiene clinic to be used in the furtherance of the objects of the mental hygiene clinic, this doctor or employee in handling and expending these funds is acting as an agent of the local advisory board and not as an officer, employee or agent of the Department of Mental Hygiene and Hospitals.

In order that there may be no misunderstanding of the responsibility for the handling and audit of the funds found in this Fund B, I feel that it would be desirable that either a copy of this opinion or a letter from the Department of Mental Hygiene and Hospitals outlining the ruling in this opinion be sent to all the local advisory boards.

MENTAL HYGIENE AND HOSPITALS—Sheriff’s Expenses—Transporting Patients—Sheriff’s House to County Seat. (4)

HONORABLE HIRAM W. DAVIS, Commissioner
Department of Mental Hygiene and Hospitals

This is in reply to your letter of June 27, 1957, in which you request my opinion as to whether or not a hospital or colony under the Department of Mental Hygiene and Hospitals is liable for travel expenses incurred by a member of the sheriff’s department of a county between the home of that member and the
county seat when the member of the sheriff's department leaves his home and travels to the county seat and takes a person who has been committed to a State hospital or colony into custody and transports that person to a particular State hospital or colony.

I am of the opinion that, under the facts stated above, the hospital or colony to which the committed person is conveyed is liable only for the travel incurred by the member of the sheriff's department from the county seat to the hospital or colony. If the member of the sheriff's department is to be reimbursed for his expenses incurred between his home and the county seat this will have to be done in the manner that he is reimbursed for his other expenses.

MOTOR VEHICLES—Blood Test for Alcohol—Juvenile Offenders—Consent of Parent Not Required before Withdrawing Blood—Refusal of Physician to Withdraw Blood Does Not Preclude Prosecution. (263)

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney for Rockbridge County

This will reply to your letter of May 5, in which you inquire whether or not a blood sample may be obtained from a juvenile arrested for operating a motor vehicle while under the influence of alcoholic intoxicants—such sample to be taken at the juvenile's insistence but in the absence of his parents' consent—without subjecting the physician, nurse or laboratory technician withdrawing the blood sample to personal liability for a possible assault on a minor or operation on a minor without his parents' consent. You further inquire whether or not the failure to obtain a blood sample from a juvenile because of the refusal of a physician to withdraw the juvenile's blood without his parents' consent would preclude subsequent prosecution of such juvenile for the above mentioned offense.

Pertinent to the resolution of the questions you present is Section 18-75.1 of the Code of Virginia (1950) as amended, which in pertinent part provides:

"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.\textsuperscript{176} (Italics supplied)

It is manifest from the language italicized above that Section 18-75.1 of the Virginia Code bestows a \textit{right} to a blood alcohol determination upon any person arrested for the offense of driving under the influence of alcoholic intoxicants. This statutory right is conferred upon \textit{any person arrested} for a violation of Section 18-75 of the Virginia Code or a similar ordinance of any county, city or town, without regard to the age of the person so arrested. The Legislature has made provision for the protection of citizens in the exercise of the right in question by providing that no person so charged shall be required to submit to a blood alcohol determination and by providing that only a physician, nurse or laboratory technician shall withdraw the accused's blood. A juvenile's enjoyment of the benefits of the statute is not conditioned upon his obtaining the consent of his parents before permitting the withdrawal of his blood—a process which is indispensable to the enjoyment of the right conferred. I am, therefore, of the opinion that such prior parental consent is not contemplated by the statute and that a blood sample may be obtained from a juvenile when a blood alcohol determination is requested by him, without subjecting the physician, nurse or laboratory technician withdrawing the juvenile's blood to liability for a possible assault upon a minor or operation upon a minor without his parents' consent.

With respect to your second question, I do not believe that the failure to obtain a blood sample from a juvenile, because of a physician's refusal to withdraw the juvenile's blood without the consent of his parents, would preclude subsequent prosecution of such juvenile for the offense under consideration. This office has previously ruled that the Commonwealth may be deprived of its right to proceed with the prosecution of an accused in those instances in which the failure to obtain a blood alcohol determination is occasioned by the failure of the Commonwealth's officers properly to perform the duties enjoined upon them by Section 18-75.1 of the Virginia Code. See, Report of the Attorney General (1956-1957), pp. 167, 172. However, we have also ruled that—where the arresting authorities have discharged the statutory duty to render full assistance in obtaining a blood alcohol determination with reasonable promptness, and the failure to obtain an analysis of the accused's blood does not result from any departure from the statutory mandate on the part of the arresting authorities—no question of a violation of the rights of the accused is presented. See, Report of the Attorney General (1956-1957), p. 173. In the case you present, the failure to obtain a sample of the accused's blood was not occasioned by a failure on the part of the arresting authorities to perform the duties imposed upon them by statute, but rather by the refusal of a physician to withdraw the blood of the accused. I am, therefore, of the opinion that the situation under discussion would fall within the scope of the latter ruling, a copy of which is enclosed, and that the inability of the accused to have the benefit of a blood analysis would not preclude subsequent prosecution for the offense with which he is charged.
MENTAL HYGIENE AND HOSPITALS—Surplus Property—Disposal of by Board—No Authority to Commence Proceedings under 1958 Act until effective Date. (227)

April 21, 1958.

HONORABLE ALFRED E. H. RUTH
Director of Mental Hospitals

I am in receipt of your letter of April 11, 1958, in which you call my attention to Chapter 556 of the Acts of Assembly (1958), which authorizes the State Hospital Board to dispose of certain properties under its control and establishes procedures whereby such properties may be declared surplus and sold with the approval of the Governor. In light of this legislation, you state:

"The State Hospital Board has instructed me to request an opinion of your office on the following question: may the Board properly, prior to the effective date of the Act, carry out procedures leading up to the sale of surplus property so long as actual sale is not consummated until after the effective date of the act?

"By way of specific example, would it be proper for the Board to proceed now to carry out the provisions of sections 37-34.2:3 and 37-34.2:4 of said act in anticipation of selling a piece of property after the effective date of the Act?"

The specific provisions of Chapter 556 to which you refer prescribe:

"Sec. 37-34.2:3. Whenever the Board finds that there is any property under its control which is not being used and is not required for the care and treatment of patients it shall notify the Governor thereof, and in addition shall make such information public through newspapers and other media of public information.

"Sec. 37-34.2:4. Not less than forty-five and not more than seventy days after such notification to the Governor the Board shall hold a public hearing at some reasonably convenient place near the property to be disposed of. Notice of such public hearing shall be given the Governor and in statements released to newspapers and other media of public information at least thirty days prior to the time of the hearing. At the time and place of such hearing any citizen may appear and state his views concerning the action of the Board in declaring such property surplus."

The legislation under consideration manifestly contemplates that properties under the control of the State Hospital Board shall be disposed of in accordance with the procedure therein set forth. The above quoted provisions of Chapter 556 establish with precision a sequence of steps constituting a condition precedent to the disposal of properties pursuant to the Act in question, and strict adherence to the statutory procedure is necessary to the consummation of a valid sale by the Board. However, until the Act becomes effective, no legal authorization exists for the State Hospital Board to invoke the prescribed procedure or execute in an official capacity the preliminary steps stated in Sections 37-34.2:3 and 37-34.2:4. I am, therefore, of the opinion that the Board may not properly adopt the statutory procedure under consideration prior to the effective date of the legislation in question.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Chauffeur’s Licenses—Persons engaged in hauling in their own vehicles on an hourly basis for the Highway Department. (95)

November 18, 1957.

HONORABLE ROBERT WHITEHEAD
Member of House of Delegates

This is in reply to your letter of November 2, 1957, in which you ask to be advised as to the applicability of the statutory provisions requiring chauffeurs’ licenses in the situations as hereinafter set forth. I quote in part from your letter:

“I refer to men who are operating for the Highway Department, that is, engaged in hauling for the Highway Department of Virginia on a basis of a fixed sum per hour, and are operating their own vehicles. These persons are generally referred to as individual contractors. They are in no sense employees of the Highway Department, they are not covered by Social Security, retirement benefits, sick leave, vacations and all of the other things which are associated with the employees of that Department.

“I have read sections 46-343, 56-273 and 56-274(10), and I can see no authority for requiring a person who is operating his own truck and working for the Highway Department on a basis by which he is paid a certain sum per hour for the use of the truck, being required to have a chauffeur’s license. He certainly has to have an operator’s license.”

The definition of a chauffeur, as expressed by Section 46-343(1) of the Code of Virginia, is as follows:

“‘Chauffeur’.—Every person employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property.”

Due to the widespread misunderstanding which exists with regard to the application of the foregoing section, I feel it appropriate to discuss this problem in greater detail than is customarily done by this office.

In several opinions rendered by my predecessors in office, it has been stated that it is necessary to consider the nature of the operation in each instance in order to determine whether an operator of a motor vehicle falls within the purview of Section 46-343(1) of the Code.

On the basis of the facts stated in your letter, I have grave doubts as to whether the operators in question are independent contractors, rather than employees of the Virginia Department of Highways. The Supreme Court of Appeals of Virginia has classified such persons as employees, in spite of the fact that they owned and operated their personal motor vehicles. (See Phillips v. Brinkley, 194 Va. 62). However, I do not know that the distinction is too material in this case, inasmuch as the probative question is not whether they are employees, but whether they are employed for the principal purpose of operating a motor vehicle. It may well be that these persons are not employed for the primary purpose of operating the vehicle, it being incidental to the primary purposes of employment. Of course, if the principal purpose of employment is to operate the vehicle, such persons are chauffeurs under the definition of Section 46-343(1).

Assuming that the persons in question are not employed by the Department of Highways for the principal purpose of operating the vehicles they own, we turn to a consideration of the secondary portion of the definition “chauffeur”. If a person drives a vehicle while in use as a public or common carrier of persons or property, he is classified as a chauffeur, irrespective of the ownership of the vehicle being driven. It remains then to determine if the vehicles in question are public or common carriers of property.
Generally speaking, the words "public carrier" and "common carrier" are used synonymously. However, the General Assembly did not indicate that such was the case in defining "chauffeur"; hence, we must give significance to the words employed if possible so to do.

You suggest that Sections 56-273 and 56-274 are apropos. While a "common carrier by motor vehicle" has been defined by Section 56-273(d), there is no such definition for "public carrier".

It has been suggested from time to time that the phrase "public carrier" was added to the definition of "chauffeur" so as to include a "contract carrier" as defined in Section 56-273(f) of the Code. The fact that a person is licensed as a "contract carrier by motor vehicle" by the State Corporation Commission under the provisions of Chapter 56 of the Code is rather persuasive that such person is engaged as a "public carrier". However, this does not necessarily follow, inasmuch as a person could haul for hire for one individual only and thus be a "private carrier". Historically, a person who hires out his services as a carrier to one person only is classified as a private carrier. If he holds his services out to the public generally, he is a public carrier, or common carrier as the term was used at common law.

At any rate, the definitions in Section 56-273 of the Code are not overly helpful in consideration of the question before us, since Chapter 12 of Title 56 (of which Section 56-273 is a portion) pertains to the types of operation by motor vehicle which are to be regulated by the State Corporation Commission, while Chapter 5 of Title 46 (of which Section 46-343 is a portion) pertains to the licensure requirements for operators and chauffeurs on the public highways. Thus, it is irrelevant when considering Section 46-343 that certain types of motor vehicle operations, for example, school buses, taxicabs, farm produce haulers, etc., are excluded from the regulatory provisions of Chapter 12 of Title 56 by virtue of Section 56-274. Surely no one would contend that a taxicab driver is not operating as a public carrier and hence is a chauffeur, even though excepted from the regulatory provisions administered by the State Corporation Commission.

From the foregoing discussion, I feel the following conclusions may be drawn:

1. Persons employed for the principal purpose of operating a motor vehicle are chauffeurs, regardless of ownership of the vehicle;
2. Persons driving a motor vehicle which is being used as a private carrier of persons or property are not chauffeurs unless they fall within the purview of (1) above; and
3. Persons driving a motor vehicle which is being used as a public carrier or common carrier of property or persons are chauffeurs, irrespective of the ownership of the vehicle.

If we may assume that the persons performing the services mentioned in your letter are engaged for the primary purpose of hauling material solely for the Highway Department, rather than for the primary purpose of operating the vehicles owned by them, then, in my opinion, they are not chauffeurs within the scope of the relevant statutes.

MOTOR VEHICLES—Chauffeur's License—When Owner of Gravel Hauling Truck Required to have—Person under 18. (50)

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

This is to acknowledge receipt of your letter of September 17, 1957, in which you request my opinion as to the following question:

"Two brothers, one under 18 years of age and the other over 18
years of age, purchased a truck; they, as owners, are hauling gravel from a local gravel producing concern; they haul this gravel for hire, of course. I would like to know if the brother, who is under 18 years of age, is violating the law in driving without a chauffeur's license?"

Your attention is invited to Section 46-343(1) which defines the term "chauffeur" to be:

"Every person employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property."

I am enclosing herewith a copy of a letter to the Honorable A. Erwin Hackley, Commonwealth's Attorney of Page County, dated November 5, 1956, which is the last official opinion issued on this subject by this office. From what you state neither one of these brothers is employed for the principal purpose of operating a motor vehicle. They contract to haul gravel for compensation. The use of the truck is incidental to the principal work. Hence, the question to be determined is whether the truck is used as a public carrier of property. Manifestly, the truck is not licensed as a common carrier, but if it is licensed as a contract carrier under the provisions of Chapter 12, Title 56, of the Code and is used to haul gravel, the driver would be a chauffeur within the meaning of the statute although he may be an owner or co-owner. I am of the opinion that neither of these young men is required to purchase a chauffeur's license to drive this vehicle unless the truck is used and licensed as a contract carrier vehicle.

MOTOR VEHICLES—Common Carriers, Definition of—Relative to Subjection to Local Licenses. (216)

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

This is to acknowledge receipt of your letter dated March 3 which was received yesterday. In that letter you state:

"In Section 46-64 'common carriers of persons or property operating between cities and towns in this state and not in intracity transportation or between cities and towns on the one hand and points and places without cities and towns on the other and not in intracity transportation' are exempt from license fees.

"Many of our I.C.C. truckers refuse to buy this tag claiming to be common carriers. Would you please direct me just what is meant by a common carrier under this section."

Title 46 of the Code of Virginia does not define the term "common carrier," however, that term is defined in Section 56-273 of the Code as follows:

"(d) The term 'common carrier by motor vehicle' means any person who undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property for the general public by motor vehicle for compensation over the highways of the State, whether over regular or irregular routes, including such motor vehicle operations of
carriers by rail or water and of express or forwarding companies under this chapter."

The Interstate Commerce Act, United States Code, Title 49, Section 203, defines the term "common carrier" as follows:

"(14) The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I."

I am informed that most of the motor carriers licensed by the Interstate Commerce Commission hold permits as common carriers and thus classified. It is reasonable to believe that the legislature intended that the term "common carrier" in Section 46-64 should apply to both enfranchised carriers (motor vehicle) by the State Corporation Commission and carriers holding permits as common carriers (motor vehicle) from the Interstate Commerce Commission.

My conclusion is that the I.C.C. truckers who hold permits as common carriers are exempt under the provisions of the statute (Section 46-64), and hence the counties and cities are without authority to require them to secure license tags for their motor vehicles so long as the other conditions of the statute are met.

MOTOR VEHICLES—Dealers—Detailed Statement to be Presented to Purchasers Listing all Charges Made. (288)

June 19, 1958.

HONORABLE CHARLES T. MOSES
Member, Senate of Virginia

This is in reply to your letter of June 18, 1958, in which you discussed Chapter 541 of the Acts of the General Assembly of 1958, which revised, re-arranged, amended and re-codified the motor vehicle laws of Virginia. Your inquiry relates specifically to Section 46.1-545 of the Code of Virginia. You present the following question:

"I am writing to inquire if it would be under your interpretation of law sufficient for the dealer to have a stamp to use on each bill of sale for the customer saying that each insurance policy on the original or duplicate, if sold straight or vehicle if financed, will show the breakdown of charges appearing on the policy when the purchaser received his policy or copy. This would certainly be much more convenient and easier for the dealers to handle and I think under the circumstances would certainly be entirely what was intended in the senate amendment of Senate Bill No. 10. This law becomes effective June 27."

In my opinion the procedure suggested by you would not be in compliance with the provisions of sub-section (b) of the above numbered section of the Code. Sub-section (b), you will recall, provides that "Prior to or at the time of delivery of the motor vehicle the seller shall deliver to the buyer a written statement describing clearly the motor vehicles sold to the buyer, the cash sale price thereof,
the cash paid down by the buyer, the amount credited the buyer for any trade-in and a description of the motor vehicle traded, the amount of the finance charge, in separate amounts the specific charge for any kind of insurance to be effected, the amount of any other charge specifying its purpose, the net balance due from the buyer, the terms of the payment of such net balance and a statement showing each kind of insurance coverage to be effected. Whenever any charge for a summary of insurance coverage appears on such statement, and the insurance coverage effected or to be effected thereunder does not include a policy of motor vehicle liability insurance, the seller or his assignee shall stamp or mark upon the face of such writing in red letters no smaller than eighteen point type the following words: 'No Liability Insurance Included.' The Commissioner may determine the form of such statement to be included therein. In the event that a policy of insurance of any kind is purchased at the time of the sale of a motor vehicle the seller shall deliver to the purchaser the policy of insurance, or a copy of the policy, within a reasonable time." (Underscoring supplied).

I can see no escape from the conclusion that under this provision it is mandatory upon the seller to furnish to the buyer a statement showing all of the various charges enumerated in said section. This statement must also include a breakdown of the specific charge being made for each type of insurance coverage and it must be delivered to the purchaser prior to or at the time of delivery of the motor vehicle to him.

In the absence of strict compliance of this provision it would appear that the seller of the automobile would be subjecting himself to the hazards of sub-section (c) in case the purchaser should refuse to pay the deferred purchase price.

---

MOTOR VEHICLES—Dealers—Salesman Exhibiting and Selling Motor Vehicles on Vacant Lot at his Home—When Supplemental Dealer’s License Required. (72)

HONORABLE SHULER A. KIZER
Commonwealth’s Attorney for the City of Buena Vista

October 18, 1957.

This is to acknowledge receipt of your letter of October 15, 1957 in which you state there is a corporation which is duly licensed as a motor vehicle dealer and has an established place of business in Waynesboro, Virginia. One of the licensed salesmen for this corporation is a resident of the said city. This salesman has an established practice of keeping from two to five motor vehicles at his residence within the city. These motor vehicles are parked either on the street or in a vacant lot adjacent to the residence of the said salesman, but not at an established place of business as defined in the act. The sales were made by the salesman more than one year ago, however, during the past year, the salesman has continued to follow the practice mentioned and no doubt has made sales within the past year.

You ask me for my opinion as to whether or not under these circumstances the corporation is subject to the penalties provided in Section 46-509 of the Code, which provides as follows:

"Any person violating any of the provisions of this chapter, except those of §46-540, shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine of not exceeding five hundred dollars or to undergo imprisonment for not to exceed six months, or by both such fine and imprisonment."

Chapter 7 of Title 46 is known as the Motor Vehicle Dealer Licensing Act. Paragraph 5 of Section 46-503 of the Code defines the term "motor vehicle
salesman” as “any person who is employed as a salesman by, or has an agreement with, a motor vehicle dealer to sell or exchange motor vehicles.”

Section 46-525 states in part:

“Each licensee shall be responsible for the acts of any or all of his salesmen while acting as his agent, if such licensee approved of or had knowledge of such acts or other similar acts and after such approval or knowledge retains the benefit, proceeds, profits or advantages accruing from such acts or otherwise ratified the acts.”

Section 46-539 makes it unlawful for any motor vehicle salesman to sell any motor vehicle except for the licensed motor vehicle dealer by whom he is employed. A dealer must keep a current list of his licensed salesmen conspicuously posted at his place of business (Section 46-519). The dealer is required by the Division of Motor Vehicles to endorse the applications of his salesmen for licenses. It would seem, therefore, that there is a very close connection between a motor vehicle salesman and a motor vehicle dealer as set forth in the above chapter. No person may be licensed as a salesman unless he is employed by a licensed dealer.

Section 46-517 provides in part:

“The licenses of new motor vehicle dealers, used motor vehicle dealers, manufacturers, factory branches, distributors and distributor branches shall specify the location of each place of business or branch or other location occupied or to be occupied by the licensee in conducting his business as such * * * *”

See also Section 46-511 which provides that where a dealer uses a vacant lot more than twenty-five yards distance from his established place of business then a supplemental license may (must) be obtained. Section 46-514 provides that a supplemental license must be secured for each place of business, operated by the licensee which is not contiguous to other premises for which a license is issued. Paragraph 12 of Section 46-503 defines the term “established place of business.” Hence, if the salesman is maintaining the practice of exhibiting motor vehicles on a vacant lot near his home or on the street, which place or places are not specified in the license issued his dealer, the dealer by permitting this practice and reaping the benefits therefrom is in violation of the statute.

It is, therefore, my opinion that if the evidence is such that there is no doubt at all that this salesman was an agent for a dealer and the dealer retained the benefits or profits from the undertaking, then the dealer can and should be prosecuted and is subject to the penalties prescribed in Section 46-509. Of course, as you know the prosecution must be initiated within a year from the time the offense or offenses are committed.

MOTOR VEHICLES—Driving After License Suspended or Revoked—What Constitutes Second Offense. (58)

HONORABLE S. PAGE HIGGINBOTHAM
Commonwealth’s Attorney of Orange County

October 4, 1957.

This is to acknowledge receipt of your letter of October 2, 1957 in which you state:

“We would like your interpretation as to the meaning of Section 46-347.1 of the Code.
“In order to constitute a second or subsequent offense, is it necessary
that the second or subsequent offense be committed within the same suspension or revocation period as the first offense was committed in?

"More specifically, if a person is convicted under said section and later has his license restored and thereafter have his license revoked and during this last revocation drive his automobile, will a conviction based upon this last driving constitute a second or subsequent offense?"

Section 46-347.1 is as follows:

"No person whose operator's or chauffeur's license has been suspended or revoked by any court or by the Commissioner shall thereafter drive any motor vehicle in this State unless and until such suspension or revocation shall have terminated. Any person violating the provisions of this section shall for the first offense be confined in jail not less than ten days nor more than six months and for the second or any subsequent offense be confined in jail not less than two months nor more than one year; and may in addition be punished by a fine of not less than one hundred nor more than one thousand dollars."

There is no provision in this statute which states that the second or subsequent conviction must be committed within a specified time before that portion of the statute applies. Such a conviction is not limited to any specific revocation period.

It is, therefore, my opinion that under the circumstances you relate, the conviction of this person based upon his last driving would constitute a second or subsequent offense.

MOTOR VEHICLES—Farm Tractors—Conviction of Drunk Driving—Person May Not Operate After. (1)

HONORABLE E. GARNETT MERCER, JR.
Commonwealth's Attorney for Lancaster County

This will reply to your letter of June 12, in which you state that an individual who had previously been convicted of operating a motor vehicle while under the influence of alcohol was recently arrested for driving a farm tractor on a public highway which ran through the farm upon which he was working. You inquire whether or not Section 18-75 of the Virginia Code, which prohibits the operation of certain vehicles while under the influence of alcohol, includes "those vehicles exempt from license and registration in Sections 46-345 and 46-348 of the Code, and if so, may a person convicted for operating such vehicle while under the influence of alcohol be prosecuted under Section 18-78 of the Code for driving a motor vehicle (farm tractor) so exempted during the period prescribed in Section 18-77".

I am of the opinion that both of your inquiries should be answered in the affirmative. Section 18-75 of the Virginia Code prohibits the operation, while under the influence of alcoholic intoxicants, of "any automobile or other motor vehicle, car, truck, engine or train". This office has previously ruled that a farm tractor is a motor vehicle within the meaning of this section of the Virginia Code. See, Report of the Attorney General (1952-53) page 148. Punishment for a violation of Section 18-75 is specified in Section 18-76 of the Code, while Section 18-77 prescribes:

"The judgment of conviction if for a first offense under Sec. 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 judgment of conviction thereof. If any person has heretofore been convicted of violating any similar act of this State and thereafter is convicted of violating the provisions of Sec. 18-75, such conviction shall for the purpose of this and the preceding section be a subsequent offense and shall be punished accordingly; and the court may, in its discretion, suspend the sentence during the good behavior of the person convicted.” (Italics supplied).

The provisions of the above quoted statutes are self-executing and no action or order of a court or other officer is necessary to put them into effect. Commonwealth v. Ellett, 174 Va. 403. Upon conviction of a charge of driving under the influence of alcohol in violation of Section 18-75 of the Code, the judgment of conviction itself operates to deprive the person so convicted of “the right” to drive a motor vehicle during the periods prescribed in Section 18-77 and violations of the provisions of the statute in question are punishable under Section 18-78 of the Code. I am, therefore, of the opinion that a person who has been convicted of operating a motor vehicle while under the influence of alcohol may be prosecuted under the provisions of Section 18-78 of the Virginia Code for operating a farm tractor during the period within which he is deprived by Section 18-77 of the right to operate a motor vehicle.

True it is that Section 46-416(2) and 46-417 of the Code require the Commissioner of the Division of Motor Vehicles to revoke—and not thereafter reissue during certain prescribed periods—the license of any person convicted of a violation of Sections 18-75 or 18-78 of the Code, and that Section 46-348 exempts from the requirement of obtaining an operator's or chauffeur's license any person operating certain specified vehicles, including farm tractors. However, I am of the opinion that these sections of the Virginia Code, which are embodied in the Virginia Operators' and Chauffeurs' License Act, have no effect upon the self-executing provisions of Section 18-77 of the Virginia Code.

MOTOR VEHICLES—Fire Engines—Are Trucks under Speed Limit Laws. (12)

HONORABLE ROBERT C. FITZGERALD
Commonwealth’s Attorney of Fairfax County

This is to acknowledge receipt of your letter of July 11th in which you request my opinion as to whether a fire engine is a truck within the meaning of Section 46-212(3), Title 46, Code of Virginia, which fixes the speed limit of forty-five miles per hour for trucks of greater than one ton rated capacity.

Section 46-212 (3) reads as follows:

“Drive anywhere else upon a highway in this State any school bus carrying school children to or from school at a speed in excess of thirty-five miles per hour, or any other passenger-carrying bus at a speed in excess of fifty-five miles per hour, or any passenger motor vehicle or motorcycle at a speed in excess of fifty-five miles per hour, or any truck at a speed in excess of forty-five miles per hour, except a pickup or panel truck with a rated carrying capacity not exceeding one ton, or drive any such pickup or panel truck at a speed in excess of fifty-five miles per hour, or any other motor vehicle at a speed in excess of fifty-five
miles per hour, unless the State Highway Commission prescribes a lower rate of speed; * * *” (Underscoring supplied)

The motor vehicle code does not define the term "truck," however, attention is invited to Corpus Juris Secundum, Volume 60, Page 113:

"An automobile truck is an automobile for transporting heavy loads."

I understand that these fire engines are built on truck chasis and are described by manufacturers as trucks and are usually registered with the Division of Motor Vehicles as such. The primary purpose of the fire engine truck is to transport heavy loads consisting of fire fighting equipment. All this gives rise to the inescapable conclusion that a fire engine which is propelled as a motor vehicle is a truck within the meaning of the statute.

I am, therefore, of the opinion that a fire engine which is propelled as a motor vehicle while traveling on the highways is a truck within the meaning of the aforesaid section and, hence the speed limit applicable thereto is forty-five miles per hour, while not driven in an emergency.

---

MOTOR VEHICLES—“For Hire” Licenses—Merchant with Regular Place of Business Hauling Commodities to or from such place, Not required. (159)

January 24, 1958.

HONORABLE W. FRANCIS BINFORD, Judge
Prince George County Court

This is to acknowledge receipt of your letter of January 21 in which you ask for my opinion as to whether a person who holds a regular merchant's license as well as a commission merchant’s license is required to purchase "for hire" license for his truck. In your letter you state:

"Specifically, this merchant purchases fertilizer in Norfolk, Va., which he hauls to his store in this county and upon receipt of orders from farmers, under his merchant's license, he delivers fertilizer to the farmers. Further, he buys peanuts at his store on a commission basis, being responsible for the correct weight and grades of said peanuts and then delivers said peanuts to Franklin, Virginia. He is responsible to the company at Franklin, Virginia for the grade of the peanuts he buys and if they are not up to quality they have a right to return the peanuts to him.

"He does not hire his truck out to any person, all of the goods he hauls are under the conditions set out above."

Your attention is invited to the following sections of the Code:

Section 46-1 (28)

"‘Operation or use for rent or for hire', etc.—The terms operation or use for rent or for hire, for the transportation of passengers, or as a property carrier for compensation, and the term business of transporting persons or property, wherever used in this title, mean any owner or operator of any motor vehicle, trailer or semi-trailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly."

Section 46-152
Evidence or presumption of carriage for compensation.—The presence on a motor vehicle, trailer or semi-trailer of property as to which the owner or operator of such motor vehicle, trailer or semi-trailer is unable to show evidence of ownership or of having produced the same, or that he has sold the same in the regular course of his usual business, shall be prima facie evidence that he is transporting such property for compensation.

"Any person who purchases articles, merchandise, commodities or things at one point or points and transports them in a motor vehicle, trailer or semi-trailer to another point or points for sale at the latter point or points, in the sale price of which is reflected a charge for the transportation of such articles, merchandise, commodities or things, or who permits any such vehicle to be so used by another, shall be deemed to be operating such vehicle for compensation; provided, that this provision shall not apply to merchants maintaining a bona fide and a regular place of business and transporting to and delivering from such place of business by motor vehicle, trailer or semi-trailer articles, merchandise, commodities and things sold by them, nor to peddlers, commission merchants or brokers holding the proper authority and having paid the State license tax required for the business in which they are engaged, nor to persons acting as authorized commission agents in the distribution of goods, wares or merchandise." (Underscoring supplied)

As this man maintains a bona fide and regular place of business and is licensed as a merchant and also as a commission merchant, his transportation of these commodities as you describe, is in my opinion not deemed to be an operation for compensation within the meaning of the statutes and, therefore, he should not be required to secure a "for hire" license for his truck so used.

MOTOR VEHICLES—Injuring Motor Vehicles—Proper Code Provision for Criminal Prosecution. (94)

November 15, 1957.

HONORABLE FRANK N. WATKINS
Commonwealth's Attorney for Prince Edward County

This is in response to your letter of November 8, 1957, in which you state that a person, without intent to cause personal injury, injured the brakes of a tractor trailer by crawling beneath the vehicle and cutting the air brake connection, and that he intended to cause the truck to be destroyed in a wreck. You inquire whether or not prosecution for the injury to the vehicle is limited to the provisions of Section 46-8, Code of Virginia, and Section 46-18, which provides penalties for offenses under the provisions of Chapter 1 through 4 of Title 46, where no other penalty is provided. You also refer to Section 18-224, pertaining to unlawful injury to personal property and to Section 19-265, which sets forth the penalty for misdemeanors for which no other punishment is prescribed.

Section 46-8 provides as follows:

"Any person who shall individually or in association with one or more others wilfully break, injure, tamper with or remove any part or parts of any motor vehicle, trailer or semi-trailer for the purpose of injuring, defacing or destroying such motor vehicle, trailer or semi-trailer, or temporarily or permanently preventing its useful operation, or for any purpose against the will or without the consent of the owner of such motor vehicle, trailer or semi-trailer, or who shall in any other manner wilfully or maliciously interfere with or prevent the running or opera-
tion of such motor vehicle, trailer or semi-trailer, shall be guilty of a misdemeanor.”

I am of the opinion that the Legislature has dealt specifically with the offense in question pursuant to Section 46-8 above, pertaining to “injuring vehicles”. Moreover, the penalty appears to be limited by the provisions of Section 46-18, as Section 46-8 falls within Title 46, Chapters 1 through 4, and there is no penalty provided in Section 46-8. Moreover, I am of the view that as the Legislature has clearly made the matter an offense under Section 46-8, it intended to cover the subject of injuring vehicles in accordance with the provisions of the said section, and that such action of the Legislature has removed the matter from enforcement under the provisions of Section 18-224, which is rather vague and general statute.

MOTOR VEHICLES—Juvenile and Domestic Relations Court—Appeal from—Suspensed Operator’s Permit is Not Returned to Juvenile Offender. (26) August 1, 1957.

HONORABLE M. ANDERSON MAXEY
Commonwealth’s Attorney of the City of Suffolk

This is to acknowledge receipt of your letter of July 30 in which you state:

“A juvenile 17 years of age is tried and convicted in the Juvenile and Domestic Relations Court for reckless driving. He is fined $25.00 and costs and his driving permit is suspended for 30 days. He perfects an appeal and requests that his driving permit be restored to him pending a trial in the Circuit Court.

“The juvenile court takes the position that the driving permit cannot be restored pending the appeal because of Section 16-216 of the Code of Virginia.

“Please advise me, if, in your opinion this interpretation is correct.”

Section 16.1-216 is as follows:

“Petition for or the pendency of an appeal or writ of error shall not suspend any judgment, order or decree of the juvenile court in any case, nor operate to discharge any child concerned or involved in the case from the custody of the court or other person, institution, or agency to which the child has been committed, unless so ordered by the judge of a court of record or directed in a writ of supersedeas by the Supreme Court of Appeals or a judge thereof.” (Underscoring supplied)

Section 46-195.1 is as follows:

“In any case in which the accused is convicted of an offense, upon the conviction of which the law requires revocation or suspension of the operator’s or chauffeur’s license of the person so convicted, such justice or judge shall order the surrender of such license, which shall remain in the custody of the court until (1) the time allowed by law for appeal has elapsed, when it shall be forwarded to the Commissioner, or (2) an appeal is effected and proper bond posted, at which time it shall be returned to the accused.

“Provided, however, when the time of suspension or revocation coincides or approximately coincides with the appeal time, such justice or judge may retain the license and return the same to the accused upon the expiration of the suspension or revocation.” (Underscoring supplied)
The question is whether the juvenile's driving permit should be returned to him under Section 46-195.1 or whether the same should be retained by the court under Section 16.1-216. As the juvenile was convicted in the Juvenile and Domestic Relations Court, the effect of that conviction and the validity of the orders issued by such Court are controlled by Title 16.1 of the Code. There is a marked difference between the effect of noting an appeal from the County Court or Police Court and noting one from the Juvenile and Domestic Relations Court. In the former case, the perfection of an appeal operates as a vacation of the judgment of conviction whereas under Section 16.1-216 the judgment of the court continues during the pendency of the appeal and the juvenile is not released unless specifically ordered by the judge of the court of record or by a writ of supersedeas issued by the Supreme Court of Appeals.

I am, therefore, of the opinion that the driving permit of the juvenile cannot be returned to him during the pendency of the appeal unless specifically so ordered by the Judge of the Circuit Court in which the appeal is pending.

MOTOR VEHICLES—Local License—Board of Supervisors May Provide that Owners of more than one vehicle, pay only on One Vehicle. (244)

May 7, 1958.

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

This is in reply to your letter of May 6, 1958, which reads as follows:

"A member of our Board of Supervisors has asked me to request your office to rule on the following inquiry:

"Is it lawful or proper for the County of Appomattox, in laying a license tax on motor vehicles, to provide that a license tax of $10.00 and a license plate shall be required of every person owning a motor vehicle or vehicles with the provision that in case more than one vehicle is owned a duplicate tag and license certificate shall be issued but without an extra charge for the additional vehicle or vehicles?

"Also, the Board would like to know if the $10.00 license tax may be laid on each vehicle registered in Appomattox County but where more than one vehicle is owned by the same person or vehicles in excess of one shall be levied with a license tax of only $1.00?"

Section 46-64 of the Code of Virginia is, in part, as follows:

"(1) Except as hereinafter otherwise provided, counties, incorporated cities and towns may levy and assess taxes and charge license fees and taxes upon vehicles, except license fees and taxes upon vehicles used by a dealer or manufacturer for sales purposes, and except vehicles used by common carriers of persons or property operating between cities and towns in the State and not in intracity transportation or between cities and towns on the one hand and points and places without cities and towns on the other and not in intracity transportation. 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 such county, city or town on any class of vehicle shall not be greater than the amount of license tax imposed by the State on vehicles of like class."
This section, it will be noted, provides that the license fees "shall be charged, imposed and assessed in such manner, on such basis, and for such periods" as the governing body of the county may determine. I am of the opinion, therefore, that your board of supervisors may adopt an ordinance with respect to either plan suggested by you. It does not seem that the board would be confronted with any valid objection so long as the ordinance applies uniformly to all owners of motor vehicles of the same class.

MOTOR VEHICLES—Local Licenses—Board of Supervisors. No Authority to Place on Sale Prior to Final Adoption of Ordinance. (215)  

April 9, 1958.

HONORABLE ERNEST W. GOODRICH
Commonwealth's Attorney for Surry County

I am in receipt of your letter of April 7, 1958, in which you advise that Surry County wishes to adopt an automobile license tax ordinance pursuant to the provisions of Section 46-64 of the Code of Virginia (1950) as amended. You further state that the board of supervisors proposes to make the initial license year begin on July 1, 1958; that the next meeting of the board of supervisors will be on April 28, 1958; and that—under Section 15-8 of the Virginia Code—the ordinance cannot be adopted prior to June 28 or June 30, 1958.

You request to be advised whether or not there is any legal objection to the county's placing the license tags, which the proposed ordinance will require, on sale on June 1, 1958, a date prior to the adoption of the ordinance, it being contemplated that in subsequent years taxpayers would be required to purchase automobile license tags between June 1 and July 1 of each succeeding year.

In this connection, I am of the opinion that, until the proposed ordinance is adopted by the board of supervisors, there would be no legal authority for the treasurer of the county to collect automobile license fees or for the commissioner of the revenue of the county to issue automobile license tags. In the situation outlined in your communication, I would suggest that provision be made in the ordinance for a period of grace with respect to the initial license tax year, enabling prospective licensees to purchase automobile license tags for a limited period after July 1, 1958, and that prospective licensees be required to obtain automobile license tags between June 1 and July 1 of each succeeding year.

MOTOR VEHICLES—Local Licenses—Constitutional. (124)  

December 16, 1957.

HONORABLE LUCAS D. PHILLIPS
Member of the House of Delegates

This is to acknowledge receipt of your letter of December 11 in which you request my opinion as to whether Section 46-64, which authorizes counties, incorporated cities and towns to levy and assess taxes and charge license fees and taxes upon motor vehicles, is contrary to the provisions of Section 168 of the Constitution of Virginia, which provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. You point out that residents of the county outside the corporate limits of a town may be required to pay larger license taxes than that paid by residents of the town although the town is within the county.
Section 46-64 of the Code grants to counties, incorporated cities and towns the authority to levy and assess taxes and charge license fees and taxes upon motor vehicles. The pertinent provisions of this section relative to this inquiry are as follows:

“(2) If in any county imposing license fees and taxes under this section a town imposes like fees and taxes upon vehicles of owners resident in such town, then such vehicles and owners shall be subject to only one such local license fee and tax, it being the intent of this section to permit counties to tax only vehicles and owners resident outside a town when the town imposes any such fee or tax on vehicles and owners resident in the town, to the end that double taxation of such vehicles and owners be avoided.” (Underscoring supplied)

Section 168 of the Constitution of Virginia reads as follows:

“All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general law. The General Assembly may define and classify taxable subjects, and, except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes may be levied.”

From the language of the provision quoted above, it seems clear that it is the legislative intent that double taxation on motor vehicles should be avoided and that the authority of the county is limited to impose such license fees and taxes upon motor vehicles of owners residing in a county outside of a town which imposes like license fees. It seems to me that in this instance, the term “territorial limits of the authority levying the tax” as used in the Constitution applies to the territorial limits of a town separate and distinct of the territorial limitation of the county in which the town is located, inasmuch as the statute, 46-64, authorizes both counties and towns to levy and assess such license taxes. In the case of Washington County National Bank v. Washington County, 176 Va. 216, it was held that if the burden be uniform upon a class of properties within the territorial limits of the authorities levying the tax, the requirements, of this section are met.

Furthermore, I believe that Section 46-64 applies only to license taxes (fees) on motor vehicles. Personal property taxes on motor vehicles are imposed by Section 58-829 of the Code and are retained by the localities (58-9). As Section 46-64 only includes license taxes or fees, Section 168 of the Constitution has no application. In the case of Commonwealth v. Whiting Oil Company, 167 Va. 73, the court held:

“(4) Moreover, section 168 of our Constitution, requiring equality and uniformity of taxation in theory, applies only to a direct tax on property, and not to license taxes. Commonwealth v. Bibee Grocery Company, 153 Va. 935, 151 S. E. 293.” (Underscoring supplied)

In the case of Langston v. City of Danville, 189 Va. 603, the court stated:

“(2) The contention that the ordinance is violative of section 168 of the Virginia Constitution, which requires 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,’ is sufficiently answered by our holdings in Bradley & Co. v. Richmond, 110 Va. 521, 66 S. E. 872 (affirmed 227 U. S. 477, 33 S. Ct. 318, 57 L. Ed. 603). In that case we said that the provisions of this section ‘apply to
a direct tax on property, and not to license taxes, which do not admit of a tax strictly equal and uniform in the sense contended for."

My conclusion, therefore, is that Section 46-64 of the Code is not invalidated by Section 168 of the Constitution of Virginia.

MOTOR VEHICLES—Local Licenses—Effect of New Legislation on Existing County Ordinance as it Relates to Automobiles with Town Licenses. (200) March 25, 1958.

MRS. NILLA B. TREDWAY
Treasurer of Pittsylvania County

I am in receipt of your letter of March 23, 1958, in which you state that the motor vehicle license tax ordinance of Pittsylvania County imposes a tax, for the license year beginning annually on April 15 and ending the following April 14, of $5.00 upon motor vehicles in that county and that the towns of Chatham and Gretna, situated in Pittsylvania County, also impose a motor vehicle license tax in the amount of $2.00 and $5.00, respectively. The county ordinance in part provides:

"If any incorporated town within Pittsylvania County imposes a license fee and tax upon vehicles of owners resident in such incorporated town, then such vehicles and owners shall be subject to only such local fee and tax. However, in the event the governing body of an incorporated town within Pittsylvania County, Virginia, rescinds its license fee and tax on its motor vehicles this ordinance shall immediately apply to all motor vehicle owners resident in such incorporated town or towns."

You advise that the above quoted provision of the county ordinance was inserted to conform the enactment to the requirements of Section 46-64(2) of the Code of Virginia (1950) as amended. However, at the 1958 Session of the General Assembly the statute in question was again amended and, upon its becoming effective, the second paragraph thereof will prescribe:

"If in any county imposing license fees and taxes under this section, a town therein imposes like fees and taxes upon vehicles of owners resident in such town, the owner of any vehicle subject to such fees or taxes shall be entitled, upon such owner displaying evidence that he has paid the amount of such fees or taxes, to receive a credit on the fees or taxes imposed by the county to the extent of the fees or taxes he has paid to such town. Nothing herein contained shall be construed as depriving any town now imposing such licenses and taxes from increasing the same or as depriving any town not now imposing the same from hereafter doing so, but subject to the limitations provided in the foregoing paragraph. The governing body of any county and the governing body of any town in said county wherein each impose the license tax herein provided may provide mutual agreements so that not more than one license tag in addition to the State tag shall be required.

"Except as provided by this paragraph numbered (2), no vehicle shall be subject to taxation under the provisions of this section in more than one jurisdiction."

In view of the impending effectiveness of the statute as amended at the recent session of the Legislature, you pose a number of questions involving the interplay
REPORT OF THE ATTORNEY GENERAL

193

of the amended statute with the existing ordinance of Pittsylvania County. I believe, however, that disposition of the two questions set out below will obviate consideration of your other inquiries:

"What effect, if any, does the 1958 amendment of Section 46-64 of the Code of Virginia, 1950, have on the provision of the County Ordinance which provides in part 'if any incorporated town within Pittsylvania County imposes a license fee and tax upon vehicles of owners resident in such incorporated town, then such vehicles and owners shall be subject to only such local fee and tax?"

"Does the Board of Supervisors have to rescind that provision set forth in paragraph II above before anything can be done to comply with the amendment of Section 46-64 of Code of Virginia of 1950 as amended at the 1958 Session of the General Assembly?"

With respect to the first question stated, I am of the opinion that enactment of the recent amendment to Section 46-64(2) will have no effect upon the above quoted provision of the county ordinance. Section 46-64 of the Virginia Code is an enabling statute and authorizes the various political subdivisions of the Commonwealth to impose the license tax in question, subject to certain specified limitations. The statute is not self-executing and does not, of itself, operate to alter the provisions of any existing county ordinance which may have been enacted upon the authority of the statute prior to amendment.

In light of the foregoing, I am of the opinion that the second question stated above must be answered in the affirmative and that it will be necessary for the Board of Supervisors of Pittsylvania County to amend the ordinance under consideration if it wishes to take advantage of the benefits conferred upon the county by the recent statutory amendment.

MOTOR VEHICLES—Local License—Exemption of Private Vehicles of Members of Volunteer Fire Department—No Authority for. (116) December 6, 1957.

HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney of Floyd County

I am in receipt of your letter of December 2, 1957, in which you inquire whether or not a board of supervisors may appropriately exempt from the provisions of a motor vehicle license tax ordinance the privately owned automobiles of thirty members of a volunteer fire department.

Section 46-64 of the Virginia Code, which authorizes the governing bodies of the various counties of the Commonwealth to enact motor vehicle license tax ordinances, prescribes that such fees and taxes shall be charged, imposed and assessed in such manner and on such basis as the proper authorities of the locality may determine. It would thus appear that the governing bodies of the various localities have the authority to classify motor vehicles for the purpose of imposing license fees and taxes, including the authority to specify what vehicles shall be exempt from the operation of the ordinance. However, such classification must not be purely arbitrary, but must rest upon some rational basis and be appropriate to the occasion. That is to say, the basis of such classifications as the local governing body may establish and such exemptions as it may specify must bear some relation to the purpose of the law and be predicated upon some reasonable distinction which renders one class, including the exempted class, different from another.

In an ordinance of the type contemplated in your communication, membership
REPORT OF THE ATTORNEY GENERAL

in a volunteer fire department constitutes the basis upon which the proposed exemption would rest, and the amenability of a privately owned vehicle to the license fees and taxes imposed would turn upon the membership or non-membership of its owner in a specified private association. I am unable to discern any relationship between membership in such an association and the purpose of the ordinance in question, nor am I aware of any rational or practical grounds for exempting certain citizens of the locality from the payment of a tax upon their private vehicles because of such membership. I am, therefore, constrained to believe that a board of supervisors may not validly exempt from the provisions of a motor vehicle license tax ordinance the privately owned vehicles in question.

MOTOR VEHICLES—Local Licenses—May be made Retroactive—Procedure to follow in adopting—Amending Proposed Ordinance. (112)

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

This will reply to your letter of November 14, 1957, in which you state:

"It is contemplated that an automobile license tax ordinance will be introduced at the next regular meeting of the Board of Supervisors of Isle of Wight County on December 5. After advertisement thereof pursuant to Section 15-8 of the Code, said ordinance will come before the Board for adoption at its regular meeting on February 6, 1958, which is the earliest date it can be considered after its introduction."

You inquire whether or not the proposed ordinance may be made retroactive to an effective date of January 1, 1958, and whether or not the proposed ordinance may be amended at the regular meeting of the Board of Supervisors on February 6, 1958, and adopted on the same date as amended, without being again published and posted in accordance with the pertinent provisions of Section 15-8 of the Virginia Code. These questions will be considered in the order stated.

Since it is the general rule that retroactive laws are not invalid unless they partake of the nature of ex post facto laws, impair the obligation of contracts, disturb vested rights or deny a citizen of property without due process of law, I believe the ordinance in question may appropriately be made retroactive to an effective date of January 1, 1958. However, Section 46-64 of the Virginia Code, which authorizes the various counties to impose license fees and taxes upon vehicles, prescribes that such fees and taxes shall be:

"* * * subject to proration for fractional periods of years in the same manner as prescribed in Sec. 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." (Italics supplied).

While I am of the opinion that the license tax ordinance under consideration may be made retroactive to January 1, 1958, such ordinance must, of course, conform to the above quoted proscriptions.

With respect to the second question presented, Section 15-8 of the Virginia Code in pertinent part provides:

"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;

"(c) The proposed ordinance shall be posted at the front door of the county courthouse and at each post office in the county."

It will be noted that the above quoted language requires a proposed motor vehicle license tax ordinance to be published once a week for four successive weeks in a newspaper published or having general circulation in the county in question, and to be posted at certain prescribed locations; however, no publication of the ordinance after its adoption is necessary nor is there any requirement that a specified period of time elapse between the adoption of the ordinance and its becoming effective. This procedure differs from that prescribed in Section 15-8 of the Virginia Code for the adoption of county ordinances generally and that prescribed in Section 15-10 of the Virginia Code for the passage of ordinances by the governing bodies of those counties falling within the classifications therein prescribed. In these latter instances, the proposed ordinance itself need not be published prior to its adoption—only notice of intention to propose the same for passage need be given. Moreover, after adoption, general county ordinances adopted under the relevant provisions of Section 15-8 must be published in full once a week for two successive weeks before they may become effective, and ordinances enacted under Section 15-10 may not become effective until thirty days after their enactment, except in emergency situations.

Since a county vehicle license tax ordinance itself must be published and posted prior to its adoption and may become effective immediately upon its passage, I am of the opinion that such an ordinance may not be amended after publication and posting and thereafter adopted as amended until it has been published and posted in its amended form.

Finally, I am of the opinion that ordinances adopted pursuant to the provisions of Section 15-10 of the Virginia Code may be amended and adopted as amended at the same meeting of the Board of Supervisors. As noted above, Section 15-10 requires only that notice of an intention to propose an ordinance for passage be given prior to its adoption, and there is no requirement that an ordinance, as proposed or as adopted, be published before becoming effective. The situation obtaining under Section 15-10 of the Virginia Code is similar to that envisioned by Section 15-782 of the Virginia Code. With regard to the requirements of this latter statute, this office ruled, on October 31, 1956, in an opinion to the Honorable Stirling M. Harrison, Commonwealth's Attorney for Loudoun County, that the Board of Supervisors might amend a proposed land subdivision ordinance without readvertising the ordinance and holding a second meeting of the Board of Supervisors. I am of the opinion that the views expressed in that opinion would be equally applicable to instances involving the amendment and enactment of ordinances under Section 15-10 of the Virginia Code.
REPORT OF THE ATTORNEY GENERAL


HONORABLE CURTIS A. SUMPTER
Commonwealth’s Attorney of Floyd County

This is to acknowledge receipt of your letter of November 22, 1957 in which you inquire whether or not the Board of Supervisors may adopt an amendment to an ordinance imposing a license tax on motor vehicles which would exempt therefrom vehicles operated by volunteer fire departments.

The authority of the county to adopt such an ordinance imposing a license tax on motor vehicles is found in Section 46-64 of the Code. The pertinent provisions of that section are 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)

You will notice that Section 46-45.1 exempts vehicles used exclusively by volunteer fire departments from obtaining annual registration certificates and license plates. The limitation expressed in Section 46-64 would include the exemption provided for in Section 46-45.1. It seems to me that the Board of Supervisors in making such an exemption from the provisions of their licensing ordinance would be following the policy outlined in Section 46-45.1 and their action would be in accordance therewith.

I am, therefore, of the opinion that the County Board of Supervisors may adopt an ordinance exempting vehicles used by local volunteer fire departments from the operation of an ordinance imposing license fees on motor vehicles. Such an amendment should be adopted in accordance with the procedure outlined in Section 15-8 of the Code.


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

I am in receipt of your letter of March 5, 1958, in which you enclosed a copy of the motor vehicle license tax ordinance of Madison County and a blank form which the county proposes to use in connection with the sale of licenses prescribed by the ordinance. The form is captioned "County Motor Vehicle License 1958—Car-Pickup" and bears an inscription which states that the license expires on June 30, 1959. You advise that the suggestion has been made that the presence of the inscription "Expires June 30, 1959" renders the form invalid for use in connection with the sale of licenses from March 1, 1958 to April 15, 1958, and you request an opinion upon the propriety of the county's using the form in question for such sales.

Examination of the copy of the ordinance which you forwarded with your communication discloses that the license required thereby must be purchased from the office of the Treasurer of Madison County "beginning March 1, 1958 and not
later than April 15, 1958," and each successive year during the same period.

Ordinance, Sec. (2). Sec. 6 of the ordinance prescribes that the period which
such license shall cover "shall be from the 1st day of July through the 30th day
of June", while Sec. 7 of the ordinance provides that the cost of a license for
which application is made for any license year "subsequent to the 1st day of
January," shall be one-half the initial cost of such license. The concluding para-
graph of the ordinance apparently imposes the initial license tax for the license
year July 1, 1957 through June 30, 1958.

In light of the above mentioned provisions, I am of the opinion that the
propriety of the county's using the form in question depends upon the identity
of the particular license year to which the form relates. If the license required to be
purchased by Sec. 2 of the ordinance is intended to cover the license year July 1,
1957 through June 30, 1958, then such license will expire on June 30, 1958, in
accordance with the provisions of Sec. 6 of the ordinance, not on June 30, 1959,
as stated on the form. In this setting I believe it would be permissible to delete
the expiration inscription and to specify instead that the license to which the form
relates should be renewed during the period March 1, 1959 through April 15, 1959.

MOTOR VEHICLES—Local Licenses—Procedure to follow in Adopting and
Amending Proposed Ordinance. (130)

December 18, 1957.

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

I am in receipt of your letter of December 13, 1957, in connection with my
opinion of December 2, 1957, concerning the enactment of motor vehicle license
tax ordinances by county board of supervisors. In your communication you pose
certain additional questions with respect to the above mentioned opinion, which
questions will be answered in the order presented.

First: I am of the opinion that general county ordinances adopted pursuant to
the relevant provisions of Section 15-8 of the Virginia Code may be amended and
adopted as amended at the same meeting of a county board of supervisors.

Second: Pursuant to Section 46-64 of the Virginia Code, which authorizes the
various counties to impose license fees and taxes upon vehicles, such fees and taxes
must be prorated in the manner provided in Section 46-176 of the Code and may
not be prorated on a six months basis only.

Third: If the proposed motor vehicle license tax ordinance is to be amended
for the purpose of conforming the ordinance to the requirements of Section 46-64
of the Virginia Code, I am of the opinion that the ordinance in question may not
be thus amended and adopted as amended until it has been published and posted,
as required in Section 15-8 of the Virginia Code, in its amended form. The cir-
cumstance that the proposed amendment is necessary to conform the ordinance to
the mandate of the statute does not, in my opinion, warrant a different conclusion
from that expressed in my ruling of December 2, 1957.
HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney for Floyd County

I am in receipt of your letter of December 13, in connection with my opinion of December 6, 1957, in which it was ruled that a board of supervisors may not validity exempt from the provisions of a motor vehicle license tax ordinance the privately owned vehicles of members of a county volunteer fire department. You now inquire whether or not a board of supervisors "may validly purchase and distribute a certain number of 'red fire department tags' to such Fire Department and not require the members of such Fire Department to purchase the regular white county license tags".

Although the phrase "red fire department tags" is set out in quotations in your communication, the instrument from which the language in question is quoted is not specified. I am, therefore, unable to ascertain whether or not the privately owned vehicles of members of a county volunteer fire department fall within the classification of vehicles for which such tags may be used. However, I am unaware of any provision of the Virginia Code which authorizes a board of supervisors to expend public funds for the purchase of license tags of any type to be distributed through a volunteer fire department to the individual members thereof, for use by the latter on their privately owned vehicles in place of the license tags which such members would otherwise be required to procure. I am, therefore, of the opinion that the procedure contemplated in your communication is not sanctioned by law.

MOTOR VEHICLES—Mail Carrier—Sign on Vehicle when Not in Use as.

MR. T. H. LILLARD
Sheriff of Madison County

This is to acknowledge receipt of your letter of November 15, 1957 in which you state:

"Please tell me if a mail carrier has the right to have a sign on his car, Frequent Stops Mail Carrier, if he is not carrying mail at the time he has the sign on car and he is off on vacation."

The statute pertaining to this type of sign is Section 46-256.1 which reads as follows:

"The provisions of §46-256 shall not apply to any rural mail carrier stopping on the highway while loading or unloading mail at a mail box, provided there be lettered on the back of the vehicle operated by such rural mail carrier, or lettered on a sign securely attached to and displayed at the rear of such vehicle, in letters at least four inches in height, the following:

CAUTION
FREQUENT STOPS
U. S. MAIL

"Provided further that nothing in this section shall be construed so as to relieve any such mail carrier from civil liability for such stopping
on any highway, if he is negligent in so doing, and if said negligence proximately contributes to any personal injury or property damage resulting therefrom."

Section 46-256 prohibits the stopping of a vehicle on a highway in a manner which would render dangerous the use of the highway by others. Hence, Section 46-256.1 simply permits the mail carrier to stop on the traveled portion of the highway if he has his vehicle properly marked. The mere fact that he has such a sign on his vehicle does not permit him to stop on the highway while not loading or unloading mail. I can find no provision in the statutes which prohibits a person from placing on his vehicle any kind of sign he chooses with the exception that signs made of non-transparent material on front windshields, sideshields and rear windows of motor vehicles are prohibited. However, the Superintendent of State Police may expressly permit the placing of signs or posters thereon (Section 46-295).

It is my opinion, therefore, that a mail carrier is not violating the law if he drives his vehicle with such a sign on the rear although at that time he is not actually engaged in carrying the mail.

MOTOR VEHICLES—Local Licenses—Servicemen Residing on Federal Reservation under exclusive Federal Jurisdiction—Not Subject to. (248)

Honorable Paul Crockett
Commonwealth's Attorney for York County

In further reference to your letter of April 14, 1958 concerning the question of whether or not military personnel residing on military installations in York County who have voluntarily registered and licensed their automobiles in this State can be compelled to pay the registration fees required by a resolution adopted by the Board of Supervisors of York County, you are advised that I have had the opportunity to consider the opinion rendered on April 13, 1955 by Attorney General Almond (Annual Report of the Attorney General 1954-1955, Page 155). Attorney General Almond reached the conclusion that servicemen who are temporarily residing in York County under military orders and who have not registered their vehicles in the state of their domicile, but have voluntarily registered them in Virginia are amenable to the automobile license tax imposed by York County. This correctly states the law but no differentiation is made between servicemen residing in York County and servicemen residing on military installations. This office has heretofore ruled that persons residing on the Naval Proving Ground at Dahlgren, Virginia and vote in King George County and who own real estate within the county are not required to purchase county automobile license tags (Annual Report of the Attorney General 1955-1956, Page 136).

The ordinance adopted by the Board of Supervisors of York County (1958) imposes a license tax upon motor vehicles owned by "persons resident in the County of York." So this question resolves itself as to whether a person who is residing on a military reservation in the territorial limits of York County is in fact a resident of York County within the meaning of the ordinance and the appropriate statutes.

The question of whether the area over which the United States has exclusive jurisdiction was a part of a county or of the state was before the court in the case of Hercules Powder Company v. Ruben, 188 Va. 694, in which the court stated:

"It is the contention of the plaintiff-in-error that the Circuit Court
of Pulaski county was without power to hear the action because it did not arise in Pulaski county but arose on a Federal reservation which was not a part of the county.

* * * * *

"In Foley v. Shriver, supra (81 Va. 568), the question presented involved an attachment of funds in the hands of an officer of the National Home for Disabled Volunteer Soldiers. The home was situated within the geographical limits of Elizabeth City county, Virginia.

* * * * *

"The court had this to say, 'In this case the State legislature having given the required consent and the United States having purchased the land in question, the United States have acquired, under the Federal Constitution, exclusive jurisdiction over the ceded lands and they are no longer a part of the State of Virginia and are not subject to the jurisdiction of the State courts.'

"This is a clear decision of the question now before us.

* * * * *

"One of the early Supreme Court cases is Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264. There it was held that the area on which Fort Leavenworth, Kansas, was located had been taken by the United States, that it acquired exclusive jurisdiction, and that the area ceased to be a part of the State.'

Although these governmental installations are located on territory which was at one time a part of York County and are surrounded by the lands of the county, it cannot be said that they are a part of the county any more than it could be said that if a city of the first class were established in York County that it would be a part thereof, and that persons residing therein be residents thereof. These government reservations over which the United States exercises exclusive jurisdiction are not a part of York County.

This conclusion is not altered by the recent revision of the Motor Vehicle Code (Title 46.1). However, we find the word "resident" defined in Section 46.1-1 (16(c)) as follows:

"A person who has actually resided in this State for a period of six months, whether employed or not, or who has registered a motor vehicle, listing an address within this State in the application for registration, shall be deemed a resident for the purpose of this title."

The listing of an address of a military installation by a registrant does not constitute an address within York County.

I am, therefore, of the opinion that persons, including military personnel, residing on a military installation over which the United States has exclusive jurisdiction are not residents of York County and cannot be compelled to register their motor vehicles and pay the fees in accordance with the ordinance ordained by the said county.

However, attention is invited to the fact that the United States does exercise exclusive jurisdiction on all areas which it owns in York County. (See case of Waltrip v. Commonwealth, 189 Va. 385.) In administering the said ordinance care should be taken to determine the jurisdiction of the United States over the particular area on which the owners of motor vehicles reside.
HONORABLE D. R. TAYLOR, Judge
James City County Court

This is to acknowledge receipt of your letter of June 11, 1958 in which you request my opinion as to when an order of revocation issued by the Division of Motor Vehicles becomes effective.

Briefly the facts stated by you are as follows:

On December 30, 1957 the Commissioner of the Division of Motor Vehicles issued an order revoking the driving license of the accused for a period of sixty days under the provisions of Section 46-416.2; the last judgment of conviction of the accused having been rendered on November 29, 1957. The accused received this revocation order by Registered Mail, but failed to comply with the same. On May 14, 1958 an Inspector for the Division took the license from the possession of the accused acting under the authority of Section 46-395 of the Code. Prior to that date, however, the accused was observed operating a motor vehicle. He is now charged with operating a motor vehicle on a public highway while his operator's license was revoked in violation of Section 46-347.1.

An order of revocation entered by the Commissioner of the Division of Motor Vehicles is enforceable from the date the same is issued. Under the provisions of Section 46-395, the licensee must return his license so revoked and if he does not do so he can be punished. Under that section, the Commissioner of the Division of Motor Vehicles is authorized to take possession of any license that has been suspended or revoked. In the case you mention, the accused can be prosecuted under Section 46-395.

The question is presented whether the accused can be prosecuted under the provisions of Section 46-347.1. The pertinent provisions of that section are as follows:

"No person whose operator's or chauffeur's license has been suspended or revoked by any court or by the Commissioner shall thereafter drive any motor vehicle in this State unless and until such suspension or revocation shall have terminated." (Underscoring supplied)

Obviously this statute covers the situation where the individual is apprehended driving a motor vehicle during the period of suspension or revocation, i.e., he is forbidden to drive until the revocation has terminated. Before the suspension or revocation terminates it must necessarily commence at a definite time. What then constitutes the period of revocation within the meaning of this statute, that is, when does it commence and when does it terminate?

Section 46-427.1 reads in part as follows:

"Wherever * * * the operator's or chauffeur's license * * * of any person be suspended or revoked for a period of time on conviction of certain offenses * * * such period shall be counted from one hundred eighty days after said conviction becomes final * * * or shall be counted from the date on which the said license * * * are surrendered to the Commissioner * * * or to the court * * * whichever period shall first commence * * *"

Certainly, the period of revocation does commence when the license is surrendered. It (the suspension or revocation period) also commences after the expiration of one hundred eighty days from the date of the final conviction even though the license has not been surrendered. If the person fails to surrender his license, the period of revocation does not commence until one hundred eighty
days after his conviction becomes final, hence, if he does not surrender his license
and drives during the period commencing one hundred eighty days after final
conviction and ending at the termination of the period prescribed by statute, he
can be prosecuted under Section 46-347.1 of the Code. This latter situation would
only occur in the rare instances where the court has failed to cause the person
convicted to surrender his driving license in accordance with Section 46-195.1.

In this particular case the accused is guilty of refusing to surrender his
operator's license in violation of Section 46-395. However, his action in driving
a motor vehicle after receiving notice of the order of revocation, prior to the
surrender of the same but before the lapse of one hundred eighty days after the
date his conviction became final, does not constitute a violation of Section 46-347.1
of the Code.

MOTOR VEHICLES—Special Police Officers—Receiving No Salary—May
Enforce Laws Relative to and Make Arrest. (146)

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

This is to acknowledge receipt of your letter of December 24 in which you state
in part:

"The Judge of the Circuit Court of Appomattox County has ap-
pointed a Special Police Officer under the powers as set forth in the
Code of Virginia providing for such appointment. This officer will be
terably uniformed and will carry his badge. However, he is not paid a
salary. He will receive no commissions whatsoever for any work that he
does.

"The problem that has arisen is whether or not this Special Officer
will have authority to issue a traffic summons summoning alleged violators
to Court for violation of the laws of Chapters 1 to 4 of the 1950
Code of Virginia.

Such special police officers appointed pursuant to Section 15-562 of the Code,
are conservators of the peace and according to Section 15-571 have authority to
apprehend all persons whom they have cause to suspect have violated, or intend to
violate any law of the State.

Section 46-14 of the Code reads as follows:

"Every county, city, town or other political subdivision of the State,
as well as the State authorities and law enforcement officers, shall
enforce the provisions of Chapters 1 to 4 of this title through the agency
or any peace or police officer, sheriff or deputy; provided, that such
officers shall be completely uniformed at the time of such enforcement
or shall display his badge or other sign of authority, and provided
further, that all officers making arrests incident to the enforcement of
this title shall be paid fixed and determined salaries for their services
and shall have no interest in, nor be permitted by law to accept the
benefit of, any fine or fee resulting from the arrest or conviction of an
offender against any provision of this title." (Underscoring supplied)

Section 46-193 empowers the arresting officer to issue a summons to the person
arrested of the violation of any provision of Title 46. It seems to me that the
summonses issued under this section could only be issued after an officer has ar-
rested or apprehended a person for the violation of a traffic law. The mere de-
taining of a person until the summons is issued constitutes an arrest within the
meaning of the statute. Section 46-14 places the duty on all enforcement officers,
which would include these special police officers, to enforce the provisions of the
Motor Vehicle Code.

The real question is whether the language, "and provided further that all
officers making arrest incident to the enforcement of this title shall be paid fixed
and determined salaries for their services" is mandatory or directory. If it is
mandatory, then such special police officers which receive no fixed and deter-
mined salaries for their services, would be divested of the authority to enforce the
traffic laws. On the other hand, if this language is directory, then these officers
would have all the authority necessary to enforce the provisions of Title 46 of the
Code. The purpose of this language and the language immediately following it,
is to prohibit the arresting officer from sharing in any fees charged against the
law violators and provides for the proper and orderly enforcement of the law.

Michie's Jurisprudence of Virginia and West Virginia, Volume 17, Section 75,
Page 337, reads in part as follows:

"If that which is directed to be done is of the essence of the thing
required, the statute is mandatory."

Section 76, Page 339:

"Those directions which are not of the essence of the thing to be done,
but which are given with a view merely to the proper, orderly and
prompt conduct of the new business, and by failure to obey which the
rights of those interested will not be prejudiced, are not commonly to be
regarded as mandatory, and if the act is performed but not in the time
or in the precise mode indicated, it may still be sufficient if that which is
done accomplishes the substantial purpose of the statute."

Cumulative Supplement (1957) Section 76, Page 25:

"Ordinarily, a statute providing simply a mode of procedure will be
held directory and, if the thing intended to be done is done in some
other way than that provided by the statute, it will be valid, unless the
statute in express terms provides that it shall be invalid unless performed
in the manner pointed out."

The essence of Section 46-14 is that it requires all police officers to enforce
the motor vehicle laws. That portion providing that the officers should be paid
a fixed salary is not mandatory but directory and, therefore, the arrest made by a
duly appointed police officers is valid irrespective of whether he is paid a fixed
salary.

It is, therefore, my opinion that a special police officer appointed by a court
under the provisions of Article 3, Chapter 17, Title 46, although he receives no
fixed and determined salary for his services as a police officer has the authority
to arrest persons for the violation of the provisions of Chapter 46 of the Code
and issue summonses pursuant to Section 46-193 of the Code.
This is to acknowledge receipt of your letter of January 22, 1958, in which you state in part:

"Will you please advise us of your opinion as to whether this Division should accept applications for and issue certificates of title in joint names with an appropriate right of survivorship clause thereon."

Section 55-20 of the Code provides that the right of survivorship between joint tenants, be the estate real or personal, is abolished. The next section, however, 55-21, states that the preceding section shall not apply when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should belong to the other. I see no reason why the right of survivorship in personal property, including a motor vehicle, could not be created by the proper instrument. Where this is done, the joint owners should have the title to the motor vehicle issued in such form as to manifest this. Section 46-42 simply provides that the owner shall apply to the Division and obtain registration for the vehicle and a certificate of title therefor. There is nothing in Section 46-1(15) or in Sections 46-84, 46-88, 46-89 or 46-90 which would prohibit the Division from issuing a certificate of title in the names of the joint owners; in fact, it would seem that where evidence of the joint ownership is made clear to the Division, by application or otherwise, then it would be the duty of the Division to so title the motor vehicle.

I do not think that the form appearing on the application for the title, or the form which you place on the title certificate, is all-important in such instances, as the tenor of the instrument creating the estate is controlling. However, there should be a proper notation on the title certificate indicating the existence of such an estate in the motor vehicle. You should require the applicants for certificates of title to indicate clearly the estate which they have in the motor vehicle.

I understand that in the case of real property, it is customary where the parties are husband and wife to use this language:

"................................ and ................................, husband and wife, respectively, as tenants by the entireties with the right of survivorship as at common law."

Where the parties are not husband and wife, then the following form is generally used:

"................................ and ................................, as joint tenants with the right of survivorship as at common law."
MOTOR VEHICLES—Uninsured Motorist Law—Interpretation of Provisions of. (276)

June 6, 1958.

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This is to acknowledge receipt of your letter of April 8 in which you ask a series of questions pertaining to House Bill No. 423. This legislation is now Chapter 407, Acts of 1958, and since the date of your letter the Code Commission has designated this Act as Article 10, Chapter 3, Title 46.1 which (article) was thereby added to the Code and has assigned certain numbers to the six lettered paragraphs of this Act, being Sections 46.1-167.1, 46.1-167.2, 46.1-167.3, 46.1-167.4, 46.1-167.5 and 46.1-167.6 respectively. For the sake of clarity, I have referred to this legislation as Chapter 407 and have considered your questions amended accordingly. Where appropriate, I have referred to the actual code sections assigned.

I shall answer the questions which you raise seriatim:

Question 1. Will the provisions of Chapter 407 apply to motor vehicles temporarily registered as provided in Section 46.1-43 (46-44)?

Answer: Section 46-44 was first enacted in 1932, being Section 25 of the Motor Vehicle Code. The last paragraph in that section contained this language:

"Nothing in this section shall be construed as imposing or permitting the collection of the fee specified in this section if the motor vehicle for which such temporary registration is issued has been registered under the provisions of section thirty-five of this act." (Italics supplied)

This language was deleted in 1944. Since that time this section has been applied not only to vehicles which cannot be licensed due to the size and peculiar structure of the same, but also to licensed vehicles with excessive weight authorized to be moved on the highways under hauling permits issued by the State Highway Commission or local authorities of cities and towns pursuant to Section 46-339 (46.1-343). This section permits such equipment to be moved upon the highways on the payment of a fee of ten cents per mile. Such permits are issued for a specified date or periods of a short duration. Furthermore, the permit is issued at the discretion of the Commissioner, when it appears that it is equitable so to do. Under these circumstances, it cannot be said that the securing of a permit under this section constitutes registration within the meaning of Chapter 407, Acts of 1958. It is, therefore, my opinion that Chapter 407 will not apply to those motor vehicles which are not licensed and moved by such special permits; but said chapter will apply to those vehicles which are licensed and for which such permits are issued together with the hauling permits.

Question 2: Will the provisions of Chapter 407 apply to motor vehicles registered by administrative agencies of the Commonwealth, and counties, cities and towns of Virginia, such vehicles being specifically required to be registered but exempted from the license fee requirement by the provisions of Section 46.1-49 (46-48)?

Answer: Attention is invited to the first sentence of Chapter 407 which reads as follows:

"In addition to any other fees prescribed by law, every person registering an uninsured motor vehicle, as hereinafter defined, in this State on and after October one, nineteen hundred fifty-eight and for the registration year commencing April one, nineteen hundred fifty-nine,
and each registration year thereafter, shall pay at the time of registering
the same a fee of fifteen dollars."

The additional fee is none other than license tax imposed on persons who
operate uninsured motor vehicles upon the highways of Virginia. Obviously, it
was not the legislative intent that the commonwealth, cities, towns and counties
be required to pay this tax. Furthermore, the $15 uninsured fee must be in
addition to other fees prescribed by law. If this fee were exacted from the Com-
monwealth, cities, towns and counties, it would not be in addition to any other
fee but would be the sole fee required. Under the circumstances, this question
must be answered in the negative.

Question 3. Will the provisions of Chapter 407 apply to motor
vehicles registered by diplomatic officers of foreign governments, such
vehicles being required to be registered but exempted from the license
fee requirement by the provisions of Section 46.1-50 (46-48.1)?

Answer: These diplomatic officers occupy a most unusual status and are not
167). Furthermore, as they pay no fee now to register a motor vehicle they
cannot be required to pay the $15 additional fee. The question, therefore, must
be answered in the negative.

Question 4: 46.1-46 (46-45.1) Those motor vehicles owned or under
the exclusive control of volunteer fire departments, volunteer first aid
crews or rescue squads are exempt from annual registration, but must
file with the Division of Motor Vehicles and State Police on prescribed
forms a certification of the equipment to be operated. Would this
certification requirement constitute registration and bring these motor
vehicles under the provisions of Chapter 407?

Answer: Section 58-12 of the Code as amended by the Acts of 1956 exempts
these associations from taxation and as you point out they are not required to
pay the annual registration fees or any other fee for registering such vehicles
owned and controlled by them. I believe that the certification requirement does
not constitute registration within the meaning of the said act. This being the
situation, it is my opinion that such vehicles are not covered by Chapter 407,

Question 5: 46.1-55 (46-53) If an owner has once registered an
uninsured motor vehicle and paid the fee provided under Chapter 407
and it should become necessary for him to apply for a second reissue
set of license plates requiring him to pay the full vehicle fee the second
time within the same license year, would he also be required to pay a
second fee as required under Chapter 407 for this twice registered
uninsured motor vehicle?

Answer: According to the language of Chapter 407, it is obvious that the
$15 fee must be paid only once during the license year for any one vehicle.
This fee has been paid for the uninsured vehicle for the license year. There is
no requirement in Chapter 407 that he pay again even though he may be required
to pay an additional fee in order to obtain other tags for his vehicle in lieu of
those that were lost. The answer, therefore, to this question must be in the
negative.

Question 6: 46.1-59 (46-57) If a person having paid the fees re-
quired for original license for an uninsured vehicle and later those plates
were taken up for illegal use and canceled, would he be required to pay
REPORT OF THE ATTORNEY GENERAL

207

the fee required under Chapter 407 if at a later date in the same license year he relicensed the same uninsured vehicle by paying a second vehicle fee and being issued new tags?

Answer: The action taken by the Division under this section by revoking, rescinding, or canceling the registration number plates has the effect of nullifying the registration of the vehicle. Hence, in order that the vehicle be re-registered, a person must pay another registration fee plus the $15 fee prescribed in Chapter 407 before the uninsured vehicle may be lawfully licensed; therefore, this question must be answered in the affirmative.

Question 7: Pursuant to Section 46-99.1, Code of 1950, (46.1-104), this Division has issued and there is now outstanding license plates to owner of antique motor vehicles. Such license plates will continue to be issued now and after October 1, 1958. As re-registration of such motor vehicles for each registration year is eliminated, do the provisions of Chapter 407 apply to the owners of such vehicles each registration year, or is compliance with Chapter 407 when the antique vehicle is first registered, thereafter sufficient?

Answer: The license plates issued pursuant to this section are valid as long as title to the vehicle is vested in the present owner. If the vehicle in now lawfully licensed under this section, there is no requirement that the same be re-registered. If a person should care to register an antique motor vehicle after October 1, 1958 and the same is uninsured then it comes under the purview of Chapter 407 and the applicant must pay the $15 fee or exhibit proof of financial responsibility. Once, however, this fee is paid there would be no obligation on the owner to pay another like fee for the ensuing registration years. The compliance with Chapter 407 when an antique vehicle is first registered is sufficient.

Question 8: In the event a person registers a motor vehicle prior to October 1, 1958, and subsequently on or after October 1, 1958, disposes of such vehicle and acquires another motor vehicle, which is uninsured, does Chapter 407 require the collection of the uninsured fee of $15.00 from the owner registering the subsequent vehicle as permitted by Section 46.1-95 (46-91)?

Answer: Although Chapter 407 becomes law on June 27, 1958, the date on which it becomes operative is October 1, 1958. Legislation is prospective in operation rather than retroactive. There is nothing in the Act which indicates that it should be applied retroactively to the persons who have registered their vehicles prior to October 1, 1958 or in any way affect the registration of any vehicles for the registration year of 1958 which are registered between March 15, 1958 and September 30, 1958. Under the provisions of Section 46-91, an owner who sells a registered motor vehicle may have the license plates assigned to another vehicle of like design and weight upon the payment of a transfer fee of $1.00. This does not constitute registration of the second vehicle within the meaning of the statutes. As far as registration is concerned, the owner has simply substituted one vehicle for another without paying another registration fee. In other words, he is not required to pay another registration fee after October 1 on the new vehicle. This being the situation, if the vehicle is uninsured at the time his old license plates are transferred to it, he is not required to pay an additional fee of $15. Therefore, the answer to this question is in the negative.

Question 9: Assume further that the person disposes of the second motor vehicle and acquires a third vehicle during the same license year, which vehicle is uninsured. Is he again assessable for the uninsured fee of
$15.00 upon registering the third vehicle and transferring the license plates?

Answer: So long as the license plates can be and are lawfully transferred to the new vehicle upon the payment of the transfer fee (Section 46-91) he is not assessable for the uninsured fee of $15. The answer, therefore, to this question is in the negative.

Question 10: Does the person who has registered a motor vehicle prior to October 1, 1958, and who takes no action either to dispose of, or transfer such motor vehicle for the remainder of the license year ending March 31, 1959, have to meet any requirements of the Act which becomes effective October 1, 1958, or does he first become subject to its provisions upon his act of registering the same vehicle for the 1959 license year or registering another vehicle at some time subsequent to October 1, 1958?

Answer: Once the vehicle is registered for the year 1958 prior to October 1, 1958, the provisions of Chapter 407 are not applicable in respect thereto. However, when the vehicle is registered for the year 1959, the owner becomes subject to the provisions of Chapter 407.

Question 11: Under the provisions of this section a motor vehicle owner may secure an emergency transfer of his license to a vehicle loaned him by a motor vehicle dealer who is repairing his car. If the licensee's motor vehicle is uninsured and he has paid all fees required for his license, would the licensee be permitted to operate the dealer's car on licensee's plates without regard to insurance coverage on the loaned vehicle or should the Division require evidence of insurance with respect to the loaned vehicle on the part of the dealer or require the licensee to pay an additional $15.00 under the provisions of Chapter 407?

Answer: The issuance of a permit under this section does not constitute registration of the loaned vehicle. No additional registration fee is charged for this service. The licensee's vehicle which is undergoing repairs and after the tags are removed therefrom cannot be lawfully driven upon the highways. The loaned or substituted vehicle may be driven when the permit is issued and the registration plates of the licensee's vehicle are attached thereto. I do not feel that the statute contemplates that more than one uninsured fee of $15 be collected for a set of license plates during any registration year. Otherwise, a person would be taxed twice for the same privilege. My opinion, therefore, is that the Division should not require evidence of insurance with respect to the loaned vehicle on the part of the dealer or require the licensee to pay an additional $15 under the provisions of Chapter 407.

Question 12: Are dealer's license plates subject to the provisions of Chapter 407?

Answer: As dealer's license plates are evidence of registration privileges, although no particular cars are specifically registered by virtue thereof, the issuance of the same results in the operation of motor vehicles upon the highways and such license plates are subject to the provisions of Chapter 407. Otherwise, the purpose of the statute to afford protection against the negligence of the driver of the uninsured vehicle would be defeated. The answer to this question is, therefore, in the affirmative.

Question 13: If the answer is in the affirmative, should uninsured
motor vehicle dealers be charged $25.00 for the first two sets of plates issued and $30.00 for the uninsured owner's fee, or $25.00 for the first two sets of license plates issued and $15.00 for the uninsured owner's fee, and $8.00 for each additional set of license plates issued plus $15.00 uninsured owner's fee for each additional set of dealer's license plates issued?

Answer: For each set of dealer's license that are issued, you should collect the $15 uninsured owner's fee.

Question 14: 46.1-121 (46-109.1) Are the temporary 10-day registration plates issued by motor vehicle dealers as provided under this section deemed to be registered motor vehicles within the meaning and intent of Chapter 407 and therefore subject to its provisions?

Answer: This section provides a means by which motor vehicles may be temporarily licensed and driven upon the highways by virtue of such licensing. The mere fact that the dealer actually issues such plates to the licensee does not alter the fact that the vehicles are duly registered and licensed during the ten day period. For all intents and purposes, the dealers in so far as the issuing of these tags are concerned are agents of the Division and the procedure outlined in Article 6 of Chapter 3, Title 46.1 must be followed before the temporary license plates are valid. No additional payment of this $15 fee should be charged upon the issuance of the permanent license tag to the holder of the temporary registration plate. The answer, therefore, to this question is in the affirmative and the dealers may legally issue these temporary plates after October 1, 1958 upon requiring the licensee to pay the uninsured owner's fee of $15.

I may state in passing that under the provisions of Section 46.1-129, the Commissioner could, by the promulgation of rules and regulations, exact from the dealers proper requirements in order to effect the collection of the $15 fees under Chapter 407 and securing evidence of proof of financial responsibility.

Question 15: Does the language of Section 46.1-167.4 require the insurance companies to file the notices of cancellation or termination of insurance beginning June 27, 1958, the effective date of the legislation, or is this paragraph qualified by the October 1, 1958 date contained in Section 46.1-167.1?

Answer: As hereinafter stated, this Act has no application to those vehicles licensed for the license year of 1958 between March 15 and September 30, 1958. Section 46.1-167.5 provides that the Commissioner, upon receipt of the notice of cancellation or termination, shall revoke the certificate of registration and license plates with respect to which such policy was theretofore in force. As Chapter 407 applies only to those vehicles which are registered after October 1, 1958 it would be a useless gesture on the part of the insurance companies to file such notices of cancellation or termination covering the vehicles registered prior to October 1, as the Commissioner could not require the owners thereof to pay the additional fee of $15 or require proof of financial responsibility. I am, therefore, of the opinion that the language in Section 46.1-167.4 is qualified by the October 1, 1958 date contained in Section 46.1-167.1 and that the insurance companies do not have to file notices of cancellation or termination of insurance between June 27, 1958 and September 30, 1958.

Question 16: If such notices are required to be filed beginning June 27, 1958, is it mandatory under Section 46.1-167.5 that as of October 1, 1958, that the registration and license plates of all motor vehicles to which the accumulated notices filed between June 27, 1958, relate be revoked; or shall only the notices received on or after October 1, 1958, be acted on as provided in Section 46.1-167.5?
Answer: Only notices received on or after October 1, 1959 relating to motor vehicles registered on or after October 1, 1958 should be acted on as provided in Section 46.1-167.5.

Question 17: Does the last sentence of Section 46.1-167.2 require the denial of registration and the revocation of operator's and chauffeur's license when the records of the Division of Motor Vehicles actually show that a false certificate or false evidence is presented that a vehicle is insured, even though the offender is not prosecuted under the provisions of the first sentence of Section 46.1-167.2 for knowingly making a false certificate or presenting false evidence that a vehicle is insured?

Answer: I do not think that such ground for revocation is based solely upon the evidence reflected in these records of the Division of Motor Vehicles. Other evidence can also be considered. The prosecution for making such false certificate and the revocation of the operating and registration privileges are separate and distinct. While it is quite apparent that if a person is so convicted, the Commissioner could use this evidence as a basis of revocation, I do not think the Commissioner's action is solely limited to this. The conviction of the person concerned is not necessary to warrant such revocation.

Question 18: Does the denial of registration provided for in the last sentence of Section 46.1-167.2 run to the motor vehicle for which a false certificate or false evidence is presented that the vehicle is insured, for the period provided, regardless of whether the then owner sells the motor vehicle and a second owner applies for registration?

Answer: The denial of registration applies solely to the motor vehicle for which a false certificate or false evidence is presented so long as the same is owned by the person making the false statement and cannot be registered. However, if the owner disposes of the vehicle, then the vendee or assignee may license the same provided the transfer is bona fide and is not made to defeat the purpose of the Act.

After the Act under consideration goes into effect, actual situations may come up which would conceivably make it necessary for this opinion to be re-considered to some extent.

MOTOR VEHICLES—Used to Transport Farm and Forest Products—When Not Required to Register with State Corporation Commission. (77)

HONORABLE CARLETON PENN, Judge
Loudoun County Court

October 23, 1957.

This is to acknowledge receipt of your letter of October 18 in which you request my opinion as to whether Section 56-304.2, Code of 1950 as amended, is applicable to motor vehicles used exclusively in carrying agricultural commodities or forest products as enumerated in Section 56-274(7). Stated in another way, would vehicles that are excluded from the operation of Chapter 12, Title 56 as enumerated in Section 56-274 be exempt from the provisions of Section 56-304.2.

By Chapter 341, Acts of 1954, the General Assembly added Section 56-304.2 to the Code thereby making it a part of Chapter 12, Title 56. Being a part of Chapter 12, it would be subject to exclusions set forth in Section 56-274 which commences: "This chapter shall not be construed to include * * *" and then enumerates certain vehicles there being eleven categories altogether. Section
56-304.2 is valid and must be read in connection with all other provisions of Chapter 12, Title 56. There is nothing in Chapter 341, supra, which would indicate that the exclusions set forth in Section 56-274 do not apply to new sections added in 1954 including Section 56-304.2. The owners of vehicles which are operated for the transportation of property not for compensation must comply with Section 56-304.2 unless their vehicles come within the exclusions set out in Section 56-274.

It is, therefore, the opinion of this office that motor vehicles which are in the various categories expressed in Section 56-274, being excluded from the operation of Chapter 12, Title 56, are exempt from the provisions of Section 56-304.2 and, hence, the person who operates or causes the operation of the same are not required to register such vehicles with the State Corporation Commission.

MOTOR VEHICLES—Weight Laws—Liquidation Damages—Not Assessed on Basis of Excess Axle Load. (218)

HONORABLE W. E. HOGG, Judge
York County Court

This is to acknowledge receipt of your letter of April 7, 1958 in which you ask whether the liquidated damages provided for in Section 46-338.2 of the Code should be figured on the weight of each separate axle or on the weight of both axles jointly.

In the case you cite, both of the axle loads exceed that permitted in the statute. Section 46-334 prescribes limitation of the axle weight and the gross weight. Section 46-338.2 provides for the assessment of liquidated damages for so much per pound of “excess gross weight.” The term “axle weight” is not found in that statute. This penalty cannot be assessed for the excess of the axle weight as prescribed in Section 46-334 and this office has so ruled. (See the opinion of February 7, 1958 addressed to the Honorable Thomas A. Williams, Commonwealth’s Attorney of Northumberland County, Callao, Virginia.) A copy of that letter is enclosed.

If you follow the ruling of this office, then in the case you mention there would be no assessment of liquidated damages. However, the accused would be in violation of Section 46-335.1 and a fine may be assessed as provided in Section 46-18.

I call your attention to the fact that the deficiency in this statute (Section 46-338.2) has now been corrected. See Section 46.1-342 of the revised Motor Vehicle Code, 1958.

MOTOR VEHICLES—Weight Laws—What Constitutes Violation—Tandem Axle—Criminal Intent or Knowledge Not Element of Violation. (174)

HONORABLE THOMAS A. WILLIAMS
Commonwealth’s Attorney of Northumberland County

This is to acknowledge receipt of your letter of January 31, 1958 in which you ask several questions concerning the violations resulting from the overloading of vehicles. As you point out, Sections 46-334 and 46-338.2 are the controlling statutes and for brevity I shall not quote therefrom.

I shall answer your questions seriatim:
Question 1. The truck is licensed for 56,800 pounds and has (a) a gross load of 60,000 pounds, and the weight is distributed as follows: (b) 2nd axle 20,000; (c) tandem 34,000; 1st axle 6,000. Should the defendant be convicted for a, b, and c under 46-334 and punished as provided in 46-18 under 46-335.1; and should 46-338.2 apply to a, b and c or should it apply to only excess gross weight?

Answer: (a) As the gross load is in excess of the limit prescribed in paragraph (3) of Section 46-334, to-wit 56,800 pounds, the defendant is in violation of the statute. (b) As the second axle is a single axle and the load on it exceeds 18,000 pounds, the defendant is in violation of the said statute. (c) I understand that a group of axles is not considered a tandem if the spacing between the axles is more than seven feet or less than four feet. I take it that the term “tandem” as used by you comes within this meaning. The tandem combination of axles is considered a single axle within the meaning of the statute. As the load on the tandem is 34,000 pounds, which exceeds the limit of 32,000, the same is in violation of paragraph (3) of Section 46-334. Section 46-338.2, enacted in 1956, is a re-enactment of the former Section 46-338.1. As the present wording of this statute provides for liquidated damages for each pound of excess gross weight, I am of the opinion that this penalty cannot be assessed for excess of the axle weight as prescribed in Section 46-334. Therefore, in this particular case, Section 46-338.2 would only apply to the excess gross weight, to-wit: the difference between 60,000 pounds and 56,800 pounds, to-wit: 3,200 pounds which the liquidated damages could be assessed.

Question 2. A truck is thirty one (31) feet long between extremes of any group of axles and licensed by the owner for 56,800 but the law allows only 53,490 pounds gross weight. This defendant, the driver, but not owner takes the truck with the empty weight marked 8,965 and gross weight 56,800. He picks up a load of 47,600 by his bill of loading and then his actual gross weight is 56,565 pounds. He is charged with being over gross weight of 3,075. Question: Is the defendant, a truck driver, responsible for overweight when he has done everything possible to comply with the law except get down between the axles and measure the distance. Is this a violation of any section other than 46-334?

Answer: Criminal intent or guilty knowledge is not an essential element of an offense which is purely malum prohibitum and this office has so held (Annual Report of the Attorney General, 1955-1956, Page 153). The truck driver is responsible for the weight on his vehicle and the type and character of his vehicle. His lack of knowledge concerning the distance between the axles is no defense. The fact that the owner has licensed this vehicle for a greater weight than it can be lawfully operated, is no defense to such a charge. I know of no section other than 46-334 which makes this act a violation.

Question 3. When a truck is thirty five (35) feet and only has license for 50,000 pounds, but its gross weight is 60,000, is the truck gross overweight 10,000 pounds or 3,200 pounds? Does 46-338.2 apply to 10,000 pounds or 3,200 pounds?

Answer: The provisions of Section 46-338.2 apply to the excess of the gross overweight as prescribed in paragraph (3) of Section 46-334. In this instance, it would be the difference between 60,000 pounds and 56,800, that is, 3,200 pounds. As this vehicle is licensed for only 50,000 pounds and driven on the highway in excess of the gross weight for which it is licensed, the operator and the owner may be prosecuted under the provisions of Section 46-167, paragraph (3).
NATIONAL GUARD—Release to be Executed by Civilians Traveling in Air National Guard Aircraft. (217)

April 9, 1958.

MAJOR GENERAL SHEPPARD CRUMP
The Adjutant General

Thank you for your letter of 4 April 1958 in which you enclosed certain correspondence between your office and the National Guard Bureau relative to the liability of the Commonwealth in case of accidents which might occur in the course of authorized flights in National Guard aircraft.

The first Indorsement, dated 31 March 1958, in reply to your letter of 26 February 1958 makes reference to ANGR 76-6, which regulation apparently requires each civilian transported in an Air National Guard Aircraft to execute a release of the Federal government from any liability for personal injury or property damage which may be incurred, but does not require the execution of an instrument similarly releasing the Commonwealth. It is apparent that the National Guard Bureau requires the “Federal” release because of the existence of the Federal Tort Claims Act [28 USCA 1346, etc.] under the terms of which the United States allows itself to be sued and recovery obtained in limited amounts under certain circumstances.

The Commonwealth of Virginia has not adopted any such legislation and continues to remain immune from civil action for the torts of its agents or employees, until such time as a constitutional or statutory provision is adopted making it liable for such acts. It follows that, as a practical matter, where an agent or employee of the Commonwealth is guilty of negligence which causes an injury, he may be sued for damages as an individual.

Although the Commonwealth itself cannot be made liable, nor can it waive its liability, except by constitutional or legislative fiat, I feel that a release of the Commonwealth and its officers, agents or employees, should be executed by others than Air Force or Air Force National Guard personnel making flights in line of duty. You will recall Mr. Patty’s letter to you of February 28, 1958, in which he enclosed a form of release for execution by the parents of minors. I would suggest that you discuss this matter with the insurance carrier to whom you referred in your letter to me of 27 February 1958.

NATIONAL GUARD—Retirement—Officers to be Given Credit for Time in Active Service with Army, Navy, or Marine Corps. (262)

May 22, 1958.

MAJOR GENERAL SHEPHERD CRUMP
The Adjutant General

This will acknowledge receipt of your letter of 6 May 1958, which I quote as follows:

"With reference to Section 44-119, Military Laws of Virginia, information is requested on the following subject:

"Paragraph 3 of this Section gives credit for time spent in the National Guard and also while on active duty. My interpretation is that this service for which retirement might be claimed with advanced rank begins the day the officer became a member of the Virginia National Guard and that under the present laws he may be retired in the highest grade reached, including active Federal service. I do not believe it was intended that any service he may have had prior to becoming a member of the Virginia National Guard should be credited to his account for this purpose."
"I can think of a case which might happen of an officer never having been in the Virginia National Guard until after he had been in the Regular Army, Navy or Marine Corps, or the National Guard of some other state for twelve years and reached the grade of Lieutenant Colonel; then joined the Virginia National Guard and served for three years. While during his three years of service in the Virginia National Guard he might be promoted to Colonel. With this record of only three years in the Virginia National Guard, should prior service be credited and he be retired with the rank of Brigadier General in the Virginia Service?"

The portions of Section 44-119 of the Code pertinent to your inquiry read as follows:

"Any person who shall have been appointed and served as Adjutant General, and shall have resigned or been relieved, 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.

"Officers shall be commissioned on the retired list in the Virginia militia, unorganized, in their respective grade, or the highest grade held by them in the military service of the State or the United States, except in 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 of their respective grade or the next higher service grade to the highest rank held by them in the military service of the State or the United States."

You will recall the opinion of my predecessor in office, under date of October 30, 1956, in which it was pointed out that in order to be placed on the retired list of the Virginia National Guard an officer must be a member of the Virginia National Guard at the time of retirement or have an honorable discharge therefrom after having served at least ten years.

From your statement it appears that you interpret this section to mean that the period of service taken into account in order to determine eligibility for retirement must begin with the date of enlistment or commission in the Virginia National Guard and only Federal service accomplished subsequent to that date may be counted as a part of the ten or fifteen year period necessary, as the case may be.

Historically, I find that prior to 1892 there is no mention in the Acts of Assembly of a retired list, but rather members of the Virginia Volunteers, the predecessor of the Guard, were issued Certificates of Discharge. In 1892 (Chap. 628, Acts 1891-2, p. 983) provision was made for retirement in grade of members of the Volunteers after ten years' service as an active member, and "in computing the term of service necessary to be placed upon the retired list herein provided for, the time of service of any applicant in the Army of the Confederate States of America shall be considered a part of said ten years' service: ** ** *".

In 1901 (Chap. 332, Acts, 1901, p. 365) the statute was amended to include
in the ten year period "any period in which he shall have been in the active service of the Confederate States or United States" and provision was made for the retirement of officers and non-commissioned officers in the highest grade held by them in either the Virginia Volunteers, or in the service of the Confederate States, or of the United States.

In 1912 (Chap. 310, Acts 1912, p. 629) this section, which was then designated as Section 372-a of the Code, was amended to include any person who shall have served as Adjutant General and to add to the types of service which could be counted in determining eligibility for retirement service as a cadet at the Virginia Military Institute or the Virginia Polytechnic Institute. At this time, also, the provisions were included allowing retirement of officers with fifteen years or more creditable service with commission in the next higher service grade to the highest grade held while in active service of Virginia, the Confederate States, or the United States.

Finally, in 1930, Section 44-119 was adopted in its present form. In none of the previous enactments is there any positive indication whether the General Assembly intended for a member of the militia to have first served in the State forces and then in the Confederate or Federal forces.

The second paragraph of Section 44-119 of the Code quoted above, provides that only the following shall be eligible to be placed upon the retired list:

1. Any person who shall have been appointed and served as Adjutant General,
2. Any officer or enlisted man in the Virginia National Guard who shall have served at least ten years as an active member of the component, or
3. Any officer or enlisted man in the Virginia National Guard who shall have served ten years computing the period served in the Virginia National Guard and the period served in active Federal service. These same provisions as to component and period of service are necessarily included in the third paragraph of the section providing for retirement of officers in the next higher grade after fifteen years' total service.

It is my opinion that the plain language of the statute must control and, since there is no specification by the General Assembly that service in the Virginia National Guard must occur first, I feel that your question should be answered in the affirmative. Consideration of Section 44-29 of the Code, prescribing the qualifications of National Guard officers, reveals that among those eligible for commission in the Guard are "* * * officers active or retired, reserve officers, and former officers of the United States army, navy or marine corps, enlisted men or former enlisted men of the army, Navy or marine corps, who have received an honorable discharge therefrom; * * *". Clearly, the General Assembly contemplated officers and enlisted men who had previously served with the Federal forces being commissioned in the Guard.

Reading these two sections together leads me to the conclusion that even though the officer whom you mentioned in your hypothetical example served only three years in the Virginia National Guard, his prior service in the regular establishment could be credited and, should the Governor, as commander-in-chief, see fit, this officer could be retired with commission in the next higher service grade. I do not feel, however, that service in the National Guard of some other State is qualifying service, since our statute does not mention such service, but specifically restricts active service to the army, navy or marine corps of the United States and the Virginia National Guard.
REPORT OF THE ATTORNEY GENERAL

PHARMACY—State Board—Wholesaler or Distributor of Drugs—1958 Act Requiring Permit From is Valid. (249)

HONORABLE RALPH M. WARE, JR., Secretary
State Board of Pharmacy

This is in reply to your letter of May 7, 1958, in which you request my opinion as to whether or not new §§ 54-399(10) and 54-425.1 of the Code as enacted in Chapter 551 of the Acts of Assembly of 1958 are in conflict in whole or in part with §54-480.1 of the Code of Virginia which was not amended or changed by the 1958 Session of the General Assembly.

New §54-399(10) of the Code reads as follows:

"A 'wholesaler' or 'distributor' shall be every person, engaged in the business of distributing drugs or medicines at wholesale to pharmacies, hospitals, practitioners, governmental agencies or other lawful outlets permitted to sell or use drugs or medicines; such person shall not be subject to any State or local tax as a wholesale merchant by reason of this definition, but they shall be subject to the definition contained in §58-304."

New §54-425.1 of the Code reads as follows:

"Every person desiring to act as a wholesaler or distributor as defined in paragraph (10) of Sec. 54-399 in this State shall apply to the Board for a permit so to do; such permit, if granted, shall be renewed annually. The fee for such permit, either original or renewal, shall be two dollars payable January one of each year.

"No person shall be granted a permit as a wholesaler or distributor unless he is of good moral character and properly equipped as to land, building and equipment to carry out the functions of a wholesaler or distributor with due regard to the protection of the public. The Board may adopt such regulations as may be necessary to protect the public in the storage, handling and distribution of the products handled by such wholesaler or distributor and which products are subject to this chapter.

"Application for such permit shall not be required of manufacturers of drugs and medicines and cosmetics who are subject to Sec. 54-447, nor shall it be required of wholesalers or distributors of medicated feeds, insecticides, fungicides and rodenticides properly registered as provided by law."

New §54-480.1 of the Code provides as follows:

"Nothing in this chapter shall be construed to prevent or interfere with any retail druggist or wholesale dealer, or manufacturing concern or their employees from selling, compounding or manufacturing in the regular course of business, any pharmaceutical preparations, or any patent or proprietary preparations that conform to the requirements of this chapter, and the sale of which is not in conflict with any of its provisions."

I am of the opinion that there is no conflict between these sections of the Code. Section 54-480.1 provides that nothing in the chapter of the Code containing the Pharmacy and Drug Act shall be construed to prevent or interfere with any retail druggist, wholesale dealer or manufacturing concern from selling, compounding or manufacturing pharmaceutical preparations or patent or proprietary preparations that conform to the requirements of the Pharmacy and Drug Act, or the
sale of which is not in conflict with any of the provisions of the Pharmacy and Drug Act. Prior to the enactment of Chapter 551 of the Acts of Assembly of 1958 there was no provision in the Pharmacy and Drug Act providing for the issuance of a license or permit to a wholesaler or distributor. Under the provisions of §54-425.1 of the Code a wholesaler or distributor is now required to obtain a permit from the Board of Pharmacy. Prior to the enactment of Chapter 551 of the Acts of Assembly of 1958, retail druggists and manufacturing concerns were required to obtain a license or permit from the Board of Pharmacy.

New §54-425.1 places wholesalers and distributors under the provisions of the State Board of Pharmacy. New §54-425.1 of the Code does not interfere with or prohibit the distribution or sale at wholesale level of any pharmaceutical preparation or any patent or proprietary preparations. It does require a person engaged in the distribution or sale at wholesale level of drugs or medicines to obtain a permit, which permit shall not be granted unless the person satisfies the Board of Pharmacy that he is of good moral character and is properly equipped from a health and safety aspect to be a wholesaler or distributor of drugs or medicine.

PUBLIC OFFICERS—Contracts with County Treasurer May Not Deliver Oil to County on Commission Basis. (209)

HONORABLE J. C. MARSH, JR., Treasurer
County of Lancaster

This is in reply to your letter of April 2, 1958, in which you state that, in addition to being Treasurer of Lancaster County, you are also the local distributor for the Gulf Oil Corporation. You state that, by being a distributor, you deliver the products of the Gulf Oil Corporation to the contracted customers of the Oil Corporation on a small commission basis. The contracts are in the name of the Gulf Oil Corporation and all payments are made direct to the Gulf Oil Corporation. You request my opinion as to whether or not under this set of facts the Gulf Oil Corporation may contract with the Board of Supervisors and the School Board of Lancaster County to supply fuel oil.

Section 15-504 of the Code of Virginia, as amended by the 1958 session of the General Assembly, reads, in part, as follows:

"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, judge of the county court, 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."

Since you receive a commission as a result of the contract entered into between the county and the Gulf Oil Corporation, I am of the opinion that you would be either directly or indirectly interested in the contract and in the profits of the contract; therefore, the Board of Supervisors or the School Board of Lancaster
County may not contract with the Gulf Oil Corporation if you, the County Treasurer, are the local distributor for that Corporation. Gulf Oil Corporation may contract with the county to furnish fuel oil so long as you do not deliver the oil, and you do not receive any commission or remuneration from the contract.

PUBLIC OFFICE—Federal Employee—Ineligible to Hold Town Office. (164)

HONORABLE BLAKE T. NEWTON
State Senate

This is in reply to your letter of January 28, 1958, which reads in part as follows:

"I am writing to request that you give me an opinion as to whether or not residents of Colonial Beach, Virginia, who are employed by the United States Government at the Dahlgren Proving Grounds are eligible under the Hatch Act to run for political office at Colonial Beach, Virginia."

I am of the opinion that the residents in question employed by the United States Government (apparently as civilian employees holding undesignated positions) would be unable to qualify for political offices in the City of Colonial Beach while receiving salaries in the employment of the Federal Government. In my judgment, the holding of any city office under the given information would be in violation of Section 2-27 of the Code of Virginia, which reads as follows:

"No person shall be capable of holding any office or post mentioned in the preceding section, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, ipso facto, vacate any office, or post of profit, trust or emolument under the government of this Commonwealth or under any county, city, or town thereof."

While the exact position of the employees is not stated, there is no information given which would bring the matter within the exceptions set forth in Section 2-29 of the Code. Reference is also made to an opinion dated April 4, 1956, to the Honorable H. B. Batte, contained in the 1955-56 Report of the Attorney General at page 160, a copy of which is enclosed. The Federal "Hatch Act" appears to be inapplicable to the facts stated herein.

PUBLIC WELFARE—District Homes for the Indigent—Distribution of Funds Derived from Admission of Another County. (83)

HONORABLE EDWARD H. RICHARDSON
Commonwealth's Attorney for Roanoke County

This is in response to your letter of October 14, 1957, in which you inquire whether or not a fund derived from the admission of Botetourt County into a
regional combination with certain counties and the City of Roanoke should be distributed prorata among the participating governmental units or could be held for the purpose of capital improvements. Your letter also states as follows:

"Up until a few years ago the Counties of Roanoke, Montgomery, Craig, Pulaski, Bland and Giles, together with the City of Radford, operated a joint home for the indigent, known as 'Fairview Home' in Pulaski County. A few years ago Botetourt County asked to be admitted, and after an appraisal of the property, paid its proportionate part, and was admitted so that its indigent could be taken care of in the Home. This payment, together with some other savings, has created a surplus of approximately $18,000.00."

While your letter does not refer to the statutes upon which the home for the indigent was created, it is assumed that it was created as a District Home under Section 63-308, Code of Virginia, et seq. Reference is also made to Section 63-312, providing for the method for determining the proportion of outlay and ownership by the various governmental units. Your letter states that the sum in question was derived from a payment by Botetourt for admission, which appears to constitute the equivalent of its outlay for capital investment. The original participating units have their equity reduced in proportionate amounts by the admission of Botetourt County. Accordingly, it appears that the fund paid by Botetourt County should be apportioned and distributed in proper proportionate parts to the other participating governmental units.

Section 63-310 permits the participating localities to appropriate the necessary funds to pay their proportionate costs of the District Home and to hold and own the same in the same proportion. There is no provision for creating or maintaining a reserve for future expansion. If at any time expansion is necessary, each unit has authority to appropriate its proportionate share, at that time.

Upon the entry of Botetourt County into the joint project, the physical assets remained the same, but the equity or proportionate holding of the original governmental units was reduced.

I am of the opinion that the amount paid by Botetourt County should be distributed to the original units in proportion to their respective investments in the property.

PUBLIC WELFARE—Foster Care Funds for Children—When may be used—may not be used for Child Committed to Local Juvenile and Domestic Relations Court. (149)

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


I am in receipt of your letter of January 2, 1958, in which you make the following statement and inquiries:

"On June 13, 1955, in response to a question presented by me, Judge Almond rendered an opinion upon the construction of Section 16-172.78 of the Virginia Code (now Section 16.1-211) with respect to the use of criminal funds by a juvenile and domestic relations court in those instances in which a child, initially committed to this Department, has been returned to the court for supervision and it becomes necessary to place such child in a foster home. See, Report of the Attorney General (1954-55) p. 180. Subsequently, in a letter to the Honorable O. Raymond Cundiff, Judge of the Juvenile and Domestic Relations Court
of the City of Lynchburg, dated July 6, 1955, Judge Almond elaborated upon the above mentioned opinion. A copy of Judge Almond's letter to Judge Cundiff is enclosed. Some question has now arisen concerning the combined effect of these two communications with regard to the use of criminal funds under what is now Section 16.1-211 of the Code, and I should appreciate an expression of your views in this connection.

"In addition, I should like to present the following question:

"May foster care funds appropriated to the local departments of public welfare by the various communities be used to maintain in a foster home a child who has been returned to the local juvenile and domestic relations court for supervision in accordance with the provisions of Section 16.1-210 of the Virginia Code?"

Sections 16.1-210 and 16.1-211 of the Code of Virginia (1950) as amended, respectively provide:

"When the Department returns a child or minor who has been committed to its custody to a local community for supervision, the Director may return the child or minor to either the local juvenile and domestic relations court or to the local department of public welfare of the community. The agency to which the child or minor is returned for supervision shall accept responsibility for this service. When a child or minor is so paroled for local supervision, he shall be deemed to be still in the custody of the Department.

"The local supervising agency shall furnish such child or minor a written statement of the conditions of his parole and shall instruct him regarding the same. In the event it is determined by a court of competent jurisdiction that the child or minor has violated the terms of his parole, the child or minor may then be returned to the Department."

"When the child or minor is returned to the court or the local department of public welfare for supervision, and, after a full investigation, the court or local department of public welfare is of the opinion that the child or minor should not be placed in his own home, and there are no funds available to board and maintain said child, the court or the local department of public welfare shall arrange with the Director of the Department of Welfare and Institutions for the boarding of the child or minor in a foster home or with any incorporated institution, society or association, and the cost of maintaining such child shall be paid monthly, according to the schedule prepared and adopted by the Department, by the State Treasurer, out of funds appropriated in the general appropriation act for criminal costs." (Italics supplied).

Prior to the repeal of Title 16 of the Virginia Code at the 1956 Session of the General Assembly, the above quoted statutes appeared, in substantially identical language, as Sections 16-172.77 and 16-172.78 of the Virginia Code and were effective in that form during 1955.

I have studied Judge Almond's opinion to you and his letter to Judge Cundiff, and I find no inconsistency in the views Judge Almond expressed on these two occasions. In his opinion of June 13, 1955—in response to your inquiry concerning the use of criminal funds under what is now Section 16.1-211 of the Virginia Code—Judge Almond pointed out the language of that statute italicized above, viewed it as stating a condition precedent to the use of criminal funds and declared:

"As I construe this section, it means that before the board of the child may be paid out of the appropriation for criminal costs there must be no funds available from other sources out of which this board may be paid."
Since it appeared that other funds \textit{were} available to board and maintain the child involved in the specific situation concerning which you inquired, Judge Almond, consonant with his construction of the statute in question, took the position that such funds must be exhausted before resort might be made to the appropriation for criminal costs.

In his subsequent letter to Judge Cundiff, dated July 6, 1955, Judge Almond pointed out that the position taken in his opinion to you was "based upon the assumption" that there were other funds available for foster care from which the board and maintenance of the child under consideration might be paid. On this point, Judge Almond stated:

"Indeed, before writing Colonel Copeland, a member of my staff conferred with a member of his staff and was informed that there were foster care funds held by the local Welfare Department and that these funds, by administrative procedure, could be made available to your Court for the board of children returned to you."

On the other hand, Judge Almond indicated that if his assumption was unwarranted, i.e., if there were no funds available for the board and maintenance of the child in question, then criminal funds might be utilized for this purpose. In this connection, he declared:

"If, however, as a matter of fact and of law, these foster care funds in the hands of the local Welfare Department may not be made available to your Court, then I am of opinion that under Section 16-172.78 the appropriation for criminal charges may be used."

In neither instance was Judge Almond called upon to consider the specific question you now present as to whether foster care funds in the hands of the local departments of public welfare may be utilized to maintain in foster homes children who have been returned to local juvenile and domestic relations courts for supervision in accordance with the provisions of Section 16.1-210 of the Virginia Code. I am constrained to believe that this question must be answered in the negative.


HONORABLE B. M. MILLER, Judge
County Court of Rappahannock County

This is in reply to your letter of April 23, 1958, in which you request my opinion as to whether or not a county is entitled to recover civilly from a former recipient of public assistance of the amounts paid him during the period he was receiving public assistance if this recipient is now self-sufficient and earning a substantial income. It appears from your letter that this recipient received public
assistance under the provisions of Chapter 9 of Title 63 of the Code of Virginia which provides for general relief.

I can find no provision in that chapter of the Code for recovery of assistance paid under the provisions of that chapter, except for the provisions found in §63-218.1, which reads as follows:

"Whenever a sale of real property of a recipient of public assistance under this chapter is made or whenever any 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 reimburse the source or sources of the public assistance granted to such recipient to the extent of such grant or grants in the manner provided by §63-129, and the balance, if any, of such proceeds shall be paid to any person entitled thereto."

If a person has received public assistance under the provisions of Chapter 6 of Title 63 of the Code which provides for old age assistance, and there has been a change in the condition of the recipient, §63-124 provides, in part, as follows:

"Any assistance, or part thereof, previously paid may be recovered as a debt."

Section 63-215 of the Code, found in Chapter 9 of Title 63, relating to a change of condition of the recipient under that chapter, does not contain a provision giving the right of recovery similar to that contained in §63-124.

PUBLIC WELFARE—Local Board—Office Space in Building Owned by School Board—State May Reimburse for Rent. (140)

December 30, 1957.

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

I am in receipt of your letter of December 13, 1957, in which you advise that an existing regulation of the State Board of Welfare and Institutions prohibits the reimbursement of expenditures made by a local department of public welfare as rent for office space furnished in buildings owned by a county or city. You state that the regulation in question was predicated upon two prior opinions of this office in which the Honorable Abram P. Staples, then Attorney General, expressed the view that a county which has office space available for the local department of public welfare should furnish such space without charge. See, Report of the Attorney General (1940-41) p. 19; Report of the Attorney General (1942-43) p. 195.

From your communication, it also appears that your Department:

"... (has) now been informed by the City Manager of Portsmouth City that the Social Service Bureau, of the Department of Public Welfare, is now occupying office space in a building owned and maintained by the Portsmouth School Board. The Manager advises that, under the City Charter, the School Board is separate and apart from the City government. The Manager now requests permission for the Department of Public Welfare to pay to the School Board the same amount in rent and on the same terms as the Social Service Bureau has been paying the owner of the property they have vacated."
In light of the foregoing, you inquire whether or not "local boards of public welfare may rent office space from local school boards and pay to the school board such rent as may be agreed upon, anticipating reimbursement from State and Federal funds appropriated for reimbursing local board administrative costs".

I am constrained to believe that your inquiry should be answered in the affirmative. While Judge Staples ruled that counties should furnish office space to local boards of public welfare without charge if such space was available, he also declared, Report of the Attorney General (1942-43) p. 195:

"If there is no space for a county board of public welfare made available by the board of supervisors in the court house or other county building without a rent charge, then such board of public welfare unquestionably may acquire other office space and pay to the owner thereof such rent as may be agreed upon." (Italics supplied).

Apparently, the regulation mentioned in your communication is consistent with the above quoted observation in that such regulation only forbids reimbursement for expenditures made by local boards of public welfare as rent for office space in buildings owned by a county or city. Thus, the regulation in question does not forbid reimbursement for expenditures made by a local board of public welfare to a local school board as rent for office space furnished by the school board, and I am aware of no provision of Virginia law which prohibits reimbursement in such circumstances. Assuming there is no prohibition against the use of Federal funds for reimbursement in such cases, I am of the opinion that State and Federal funds may be used to reimburse local boards of public welfare for expenditures made by them for the purpose of acquiring office space in buildings not owned by the county or city.

PUBLIC WELFARE—Old Age Assistance—Lien on Property of Recipient—No Statute of Limitation on Recovery under Old Statute. (210)

April 4, 1958.

HONORABLE JOHN PAUL CAUSEY
Commonwealth's Attorney for King William County

This is in reply to your letter of March 29, 1958, in which you request my opinion in answer to the following question:

"What is the life of a lien filed pursuant to Section 63-127 of the Code, prior to its amendment in 1954, when no action is taken by the Board of Public Welfare through institution of a suit or otherwise to proceed with the collection of the amount advanced, other than the filing of the statutory notice?"

This office has rendered several opinions relating to the question of whether or not there is a statute of limitation on the recovery from the estate of recipients of old age assistance under the provisions of §63-127 of the Code prior to its amendment in 1954. In these opinions this office has consistently ruled that there is no statute of limitation on the right to recovery from the estate of such recipient. I am enclosing a copy of the most recent of these opinions which was rendered on March 9, 1953 to Honorable George F. Abbitt, Jr., Commonwealth's Attorney for Appomattox County. As you can see from reading that opinion, in that instance the claim was not filed within one year after the death of the recipient; however, I feel that this difference in the facts does not alter the opinion in answer to your question, and I am of the opinion that the life of a lien filed pursuant to §63-127 of the Code, prior to its amendment in 1954, is indefinite. Section 8-35 of the
Code was amended at the recent session of the General Assembly, however, this amendment does not alter or affect the prior opinions of this office on this question.

I am of the opinion that the amendment in 1954 to §63-127 of the Code in no way impaired or altered the validity of liens filed under the provisions of that section prior to June 30, 1954.

PUBLIC WELFARE—Old Age Assistance—Lien on Property of Recipient—Not Affected by Mental Condition of Recipient at time of application for. (183)

HONORABLE WILLIAM C. COULBOURN
Commonwealth's Attorney for Mathews County

This will reply to your letter of February 13, 1958, in which you outline the following situation:

"An eligible aged person applies for old age assistance by filing a written application as prescribed in Code Section 63-116. The application is signed by the applicant's mark, duly witnessed, and discloses that he owns real estate. The assistance applied for is received and accepted and all necessary steps are taken by the local board of public welfare to perfect the lien provided by Section 63-127."

You inquire whether or not the lien in question can be set aside upon a showing that the recipient, at the time he signed the application for assistance, lacked sufficient mental capacity to understand what he was signing, or whether the fact that he has been a recipient of old age assistance would be sufficient to protect the lien.

I am constrained to believe that the lien upon the real property of a recipient of old age assistance may not be set aside upon a showing that the recipient lacked sufficient mental capacity to understand the nature of the instrument he was signing when making application for such assistance in accordance with the provisions of Section 63-116 of the Virginia Code. In this connection, the relationship between a local board of public welfare, in whose favor the lien provided for in Section 63-127 is established, and a recipient of old age assistance, for whose benefit this segment of the public assistance laws of Virginia was enacted, is not a contractual one. No consensual agreement is entered into by a local board of public welfare and a recipient. On the contrary, in discharge of the duties imposed upon it by the old age assistance laws of the Commonwealth, a local board of public welfare determines whether or not an applicant is eligible for assistance and, if so, the amount thereof, orders such amount to be paid by the treasurer or other disbursing officer of the county or city, as the case may be, and files the notice required by Section 63-127 of the Virginia Code setting forth the specified information concerning the recipient.

Section 63-127 provides that the filing of the notice in question "shall create a lien" in favor of the local board against all real property of a recipient lying within the county or city wherein the notice is filed. This lien is purely statutory and applies to the real property of one who has received assistance, without regard to the mental capacity of the recipient at the time he made application for assistance. I am, therefore, of the opinion that the receipt of old age assistance by an applicant therefor is sufficient to establish the lien in question and that the validity of such lien is not affected by the mental capacity of the recipient at the time application for such assistance was made.
PUBLIC WELFARE—Old Age Assistance—Local Board Must Consider Income of Recipient in determining Amount—Local Board may administer funds from Private Sources. (28)

August 7, 1957.

Honorabe Richard W. Copeland, Director
Department of Welfare and Institutions
I am in receipt of your letter of July 15, 1957, in which you present the following information and inquiries:

"Under procedures currently in effect the local boards of public welfare deduct from the computed requirements of an applicant for or recipient of public assistance any regular income which he may have in determining the amount of the assistance payment. The Board of Directors of the District Home at Manassas has, in effect, requested a modification of this procedure so as to permit the issuance of assistance checks in the full amount of the computed requirements of the recipient with respect to recipients residing in the institution and for the local board making the payment to accept as a refund from the recipient any income which he may have from other sources. The State Board of Welfare and Institutions has instructed me to request your opinion as to whether the procedure which has been proposed, namely, the disregarding of any income which the recipient may have from other sources in determining the amount of the assistance payment to him and receiving from him such other income as he may have to be deposited as a refund on the assistance payments made to him, is permissible under the statutes.

"The Board of the Manassas District Home has also requested that all payments for the care of residents at the institution be made by or through local departments of public welfare even though the resident may have sufficient income from sources other than public assistance for full payment for his care there. We should like to have your opinion as to the authority of local boards of public welfare to accept payments from individuals for use in behalf of the individuals from whom they are received. With respect to this question, does the State Board have any authority or responsibility to promulgate rules and regulations concerning the practice of the local boards of public welfare in receiving funds under the provisions of Section 63-66.1 of the Code?"

With respect to the first question presented, I am of the opinion that adoption of the procedure for making public assistance payments which you have outlined in your communication would not be permissible under the applicable provisions of Virginia law. Pertinent in connection with the determination by local boards of public welfare of the amount of assistance to which an applicant may be entitled and the method of payment of such assistance are §§63-119 and 63-126 of the Virginia Code, which govern the computation and payment of old age assistance and aid to the permanently and totally disabled. These statutes are substantially identical to §§63-145 and 63-150 (Aid to Dependent Children) §§63-183 and 63-190 (Aid to the Blind) and 63-209 and 63-213 (General Relief) of the Code and provide:

"The amount of assistance which any person shall receive as aid to the permanently and totally disabled or the amount of assistance which any person shall receive under provisions of this chapter shall be determined with due regard to the property and income of the person and any support which he may or should receive from any other sources, including assistance from persons legally responsible for his support, the necessary expenditures of the individual and the conditions existing in each case, and in accordance with rules and regulations made by the
State Board, except that the first fifty dollars earned per month by a person receiving aid to the blind or eligible to receive such aid shall not be considered in determining the amount of assistance that any person may receive under this chapter. It shall be sufficient, when added to all other income and support of the recipient, to provide such person with a reasonable subsistence." (Italics supplied)

"Assistance shall be paid to or on behalf of the applicant monthly, or at such other time or times as the rules and regulations of the State Board may provide, by the treasurer or other disbursement officer of the county or city, upon order of the local board of such county or city, from funds appropriated or made available for such purpose by the board of supervisors, council or other governing body of such county or city." (Italics supplied)

In the light of the language italicized above, I believe it is manifest that the amount of assistance which a person may receive must be determined with regard to income which such person may have from other sources, that this amount of assistance should be paid to the recipient and should, when added to all other income and support of the recipient, provide him with a reasonable subsistence. Moreover, public assistance must be paid to the recipient by the local treasurer or other disbursement officer "from funds appropriated or made available for such purpose by the board of supervisors, council or other governing body" of the locality. I find nothing in the statutes applicable to this question which authorizes the local boards to receive payments from a recipient, deposit such payments with the local treasurer and call upon the treasurer to disburse these funds which have not been appropriated or made available for public assistance by the local governing body.

With regard to your second question, I am also unable to discover any provision of the laws relating to the distribution of public assistance which authorizes local boards of public welfare to accept payments from an individual and disburse such funds in his behalf.

Section 63-66.1 of the Virginia Code, to which your third question relates, prescribes:

"The local boards are authorized to receive and disburse funds derived from private sources in the form of gifts, contributions, bequests or legacies for the purpose of aiding needy persons within their respective counties or cities. Eligibility for aid from these sources need not be limited to requirements established for the public assistance programs in this State. All such funds as may be received from such sources shall be deposited in the treasuries of the respective counties and cities to the credit of the local boards and disbursed as authorized by such local boards."

So far as the administration of the above quoted statute is concerned, I am of the opinion that the State Board of Welfare, pursuant to the rule making authority conferred upon it by §63-25 of the Code, may promulgate rules and regulations relating to the practice of local boards of public welfare in receiving funds under the provisions of the statute in question, if such rules and regulations are necessary or desirable to carry out the true purpose and intent of the public welfare laws.
REPORT OF THE ATTORNEY GENERAL

PUBLIC WELFARE—Old Age Assistance—Recipient May Not Convey Property Without Permission of Local Board. (21)

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

I am in receipt of your letter of July 15, in which you state that a recipient of public assistance, in the form of aid to the permanently and totally disabled, inherited an interest in certain real property and subsequently conveyed this interest to a purchaser without the consent of the local board of public welfare. At the time of the conveyance, payment of the purchase price, a sum equal to the total amount of public assistance theretofore granted to the recipient, was tendered to the local board on behalf of the recipient in discharge of the lien established in favor of the local board by Sections 63-127 and 63-220.1 of the Code of Virginia (1950) as amended. From your communication, it appears that the local board refused to consent to the sale in question because it would be necessary for the recipient to continue to receive public assistance, and the members of the board were of the opinion that the property in question would probably appreciate in value. You inquire whether or not the local board could properly refuse to consent to the transfer in question.

In light of the circumstances outlined above, I am of the opinion that the local board could properly refuse to give its consent to the transfer under consideration; however, as the recipient has effected the conveyance without the consent of the board, I am constrained to believe that the only remedy available to the local board would be criminal prosecution of the recipient in accordance with the provisions of Section 63-138 of the Virginia Code. Upon repayment of the assistance previously granted to the recipient, the local board should comply with the pertinent provision of Section 63-127 of the Code and prepare, acknowledge and file a notice showing the name of the 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.

SANITARY DISTRICT—Transfer of from County to Town—Boundaries of District Must be Same as those of Town. (251)

HONORABLE FELIX E. EDMUNDS
Member of House of Delegates

This is in reply to your letter of May 14, 1958, in which you request my opinion relative to the transfer of a sanitary district to an incorporated town. You ask whether or not, under the provisions of §21-119.1 of the Code of Virginia, a sanitary district may be transferred by the board of supervisors of a county to a newly incorporated town, the boundaries of which town completely encompass the sanitary district, but the boundaries of the town are not the same as those of the sanitary district.

The first paragraph of §21-119.1 of the Code provides as follows:

"The governing body of any county in which a sanitary district has been established and subsequent thereto a town has been created, the boundaries of such town being the same as those of the sanitary district, is authorized to transfer all jurisdiction and control over such district to such town." (Italics supplied)

In view of the terminology found in the italicized portion of the above-quoted paragraph, I am of the opinion that, in order for this section to be operative, the boundaries of the sanitary district and of the town must be exactly the same.
This is in reply to your letter of March 28, 1958, in which you request my opinion with respect to the questions raised in a letter to you dated March 26, 1958, from Thomas W. Howard. Mr. Howard's letter is in part as follows:

"I would like your assistance as Commonwealth's Attorney for the City of Hopewell in determining, by an Attorney General's ruling, the extent of my right and privilege of inspection of the minutes and records of the official actions and proceedings of the Hopewell City School Board as specified under Section 22-53, Code of Virginia.

"Specifically, I would like to determine by a ruling of the Attorney General of the Commonwealth of Virginia whether I have, as a citizen, the right to inspect the official records and minutes of the official actions and proceedings of the Hopewell School Board, without qualifications and reservations, and if there are qualifications and reservations, just what they are?

"As a resident and qualified voter of Virginia and the City of Hopewell, on February 25, 1958, I requested permission from Mr. Charles W. Smith, Superintendent of Schools for the City of Hopewell, to inspect and examine the minutes of the official meetings. Mr. Smith replied that the policy of the School Board is to permit the citizen making the request to see only those portions of the official minutes which pertain and affect the citizen making the request, and the board's policy is not to permit the citizen to make a general and unqualified inspection of the minutes. This policy, I was told, is taken in line with a ruling of the Attorney General (Rep. Atty. Gen. 1939-40), page 192) regarding this subject."

Mr. Howard refers to an opinion of the Attorney General dated January 29, 1940, published in the Attorney General's Report for 1939-40, page 192. For your information I am enclosing a copy of that opinion. You will note that in the terminal paragraph of this opinion the Attorney General stated that he was unable to find any statute pertaining to the records of School Boards. Since this opinion was rendered by Mr. Staples, Chapter 97 of the Acts of 1940 has been enacted, which Chapter reads as follows:

"1. Be it enacted by the General Assembly of Virginia, That it shall be the duty of the county school boards and the boards of supervisors or other governing bodies, of all the counties in this State, to cause to be recorded in well bound books, complete minutes of all their respective meetings and proceedings, including all bids submitted on any building, materials, supplies, work, or project to be let to contract by any such school board, or board of supervisors or other governing body, which books shall be kept open to public inspection of any such minutes at all reasonable times for a period of three years after the recordation thereof."

This Act of the Legislature became Section 2722-a of Michie's Code of 1942, and upon the Code revision in 1950 it became Section 22-53.

In view of the provisions of Section 22-53 of the Code, it is my opinion that the minute books of the School Board shall be open to the inspection of every citizen of the City of Hopewell for a period of three years after recordation. Of course, any citizen entitled to inspect the records would have to make application during reasonable hours.

In considering this question, weight must be given to House Joint Resolution
No. 74, passed at the recent session of the General Assembly, which reads as follows:

"Whereas, the Commonwealth of Virginia was the leader in the framing of the Bill of Rights in 1789 and has always played a vital role in guaranteeing the rights of individuals and establishing safeguards for the protection of individual liberties; and

"Whereas, the right of the people to know of the activities of their government is an essential right, and access to public records is a part of this right that must never be abridged; now, therefore, be it

"Resolved by the House of Delegates, the Senate concurring, that the General Assembly deplores unnecessary secrecy at every level of government, federal, state and local.

"Be it further resolved, that the General Assembly urges upon all agencies of government a policy granting the public full access to information consistent with (1) the national security, (2) the protection of the privacy of individuals in personal matters not related to public business, and (3) the premature disclosure of information where such disclosure would be harmful to the public interest, in making official records and meetings of official bodies open to the public."

---

SCHOOLS—Board—Minutes of—Open to Inspection of Newspaper Reporters for Purposes of News Story. (242) May 6, 1958.

HONORABLE LIGON L. JONES Commonwealth's Attorney for City of Hopewell

I acknowledge receipt of your letter of May 6, 1958, in which you refer to my opinion of March 31, 1958, relating to Section 22-53 of the Code of Virginia. Your letter is, in part, as follows:

"With reference to your opinion of March 31, 1958, the School Board of the City of Hopewell has asked me to obtain your opinion as to whether a news reporter is entitled to peruse the minutes of the School Board for the sole purpose of obtaining a news story."

Assuming that the news reporter is a citizen of the city of Hopewell, I am of opinion that the clerk of the school board has no authority to refuse to allow him to inspect the records mentioned in Section 22-53. The statute does not require a citizen to state the purpose for which he wishes to make such inspection. In my opinion, a citizen does not have to state his purpose.

I am not aware of any statute under which the school board may restrict the publication of their official actions as recorded by the clerk in the official record book.

As pointed out in my letter of March 31, the Resolution (House Joint Resolution No. 74, Session of 1958) demonstrates that the General Assembly frowns upon efforts to restrict access to public records. In this Resolution the General Assembly stated:

"* * * the right of the people to know of the activities of their government is an essential right, and access to public records is a part of this right that must never be abridged * * *"
This is in reply to your letter of July 12, 1957, in which you state that the School Board of Prince William County is contemplating purchasing a tract of land from a corporation in which the County Treasurer, Commonwealth's Attorney and member of the Board of Supervisors and also one or more members of the School Board own stock. You request my opinion as to whether or not it would be a violation of the laws of Virginia for the School Board to purchase this tract of land from a corporation in which the above-named officers of the county are stockholders.

Section 15-504 of the Code of Virginia provides, in part, as follows:

"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, trial justice, sheriff or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency thereof, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county."

I am of the opinion that, as stockholders in a corporation, the above-named officers would be interested in a contract between the County School Board and the corporation for the purchase of land from the corporation, and, therefore, such a transaction would constitute a violation of §15-504 of the Code. You will note that that section of the Code provides certain exceptions, one of which reads as follows:

"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."

If the prohibition against county officers being interested in contracts was not intended to apply to corporations in which they were stockholders, there would have been no necessity for the above-quoted exception. I feel that this exception exemplifies the position that I have taken in this opinion.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—Budget—No Authority in Board of Supervisors or its Clerk to Change Items in Estimate Submitted by School Board. (223) April 17, 1958.

HONORABLE JAMES O. MOREHEAD
Superintendent of Bland County Schools

This is in reply to your letter of April 14, 1958, which reads as follows:

"In the publication of a brief synopsis of the County School Board's Budget as approved by the School Board and presented to the Board of Supervisors, may the Board of Supervisors or more specifically the clerk of said board, alter or change the School Board's budget of estimated revenues and expenditures prior to date as set for the public hearing?"

"In this particular case, the budget hearing is scheduled for Monday, April 28 at 10:00 a.m., however, when the budget estimates appeared in the local paper on April 10, complete changes, deductions and alterations were made by the clerk of the Board of Supervisors in the School Board's budget."

Under the provisions of Section 22-122 of the Code, it is the duty of the division superintendent of schools, with the advice of the school board, to prepare and file with the board of supervisors an estimate of the moneys which will be needed during a scholastic year for the support of the public schools. This estimate must be itemized in accordance with the requirements of this Code provision.

I am not aware of any statute which authorizes a board of supervisors, or its clerk, to make any changes in the various items included in such an estimate. The Court of Appeals of Virginia in the case of Board of Supervisors v. County School Board, 182 Va. 266 (at pp. 280, 281), speaking through Mr. Justice Browning, stated:

"I am, therefore, of the opinion that the board of supervisors has the right, within the limits prescribed by law, in their discretion, to fix the amount of money to be raised by local taxation for school purposes at whatever amount they see fit, but they are concerned only with the total amount of tax to be levied, and not with the individual items of the school budget, except in so far as it helps them to determine the total amount of the tax to be levied. After the board of supervisors have appropriated money for schools, the exclusive right to determine how this money shall be spent is in the discretion of the school board, so long as they stay within the limits set up in the budget."

Section 22-121 of the Code provides that the school budget, which is the estimate prepared under Section 22-122, shall be included in the publication of the synopsis of the county budget, as required by Section 15-577 of the Code. The obvious purpose of this requirement is to inform the citizens of the county of the estimated funds sought by the school officials, so that the citizens may appear at the public hearing and state their views with respect thereto.

As stated in the Supreme Court case cited herein, after the publication of the proposals submitted by the school officials and after the public hearing has been held, the power lies in the local governing body to appropriate a sum less than requested by the school authorities, beyond which total appropriation the school board may not go.

I enclose a copy of an opinion issued by this office on March 9, 1955 (Attorney General's Report 1954-55, p. 203), which discusses the procedure to be followed where a board of supervisors has appropriated less money than has been requested by the school officials.

I am, therefore, of the opinion that neither the board of supervisors nor the clerk of such board has authority to make any changes in the estimate submitted pursuant to Section 22-122 of the Code.
SCHOOLS—Board—Town Councilman May be Member of. (279) June 12, 1958.

MISS MAY CAMPELL, Secretary
School Trustee Electoral Board for Caroline County

This is in reply to your letter of June 11, 1958, which reads as follows:

"C. H. Kidwell is a member of the school board of Caroline County. On June 10, 1958, Mr. Kidwell was elected a member of the Bowling Green Town Council. His term as school board member expires on June 30, 1958. Can the school trustees electoral board reappoint him to the school board, or is he barred from serving on the school board and as a member of the town council at the same time? We will appreciate your opinion."

Section 22-69 of the Code prohibits certain officers from serving as members of a county school board. This section is as follows:

"No State or county officer, or any deputy of such officer, and no supervisor shall be chosen or allowed to act as a member of the county school board, provided that the provisions herein contained, shall not apply to county superintendents of the poor, commissioners in chancery, commissioners of accounts, registrars of vital statistics, notaries public, clerks and employees of the federal government in Washington, or officers and employees of the District of Columbia. In Northumberland county, a justice of the peace or an oyster inspector may be chosen and allowed to act as a member of the county school board. In the county of Lunenburg, a member of the county library board, a member of the board of public welfare, and a justice of the peace may be chosen and allowed to act as a member of the county school board."

You will note that this section does not include members of a town council in its prohibitions. Therefore, I am of the opinion that a member of the town council is not ineligible, for that reason alone, to serve on this school board of the county in which the town is located.

SCHOOLS—Building Fund—Created by Annual Appropriations by Supervisors to School Board—School Board has Control over. (38) August 14, 1957.

HONORABLE WILLIAM B. COCKE, JR., Clerk
Circuit Court of Sussex County

This is in reply to your letter of August 12, 1957, which reads as follows:

"Over a period of years, there has been placed in the School Budget of Sussex County, an item for school construction, and the Board of Supervisors has appropriated sufficient funds, annually, to cover this item. The School Board has set up with the County Treasurer, a School Building Fund that now amounts to approximately $340,000.00.

"It is now the desire of the School Board and the Board of Supervisors to spend this money for the construction of schools. The question has arisen as to which Board has control of this fund.

"The Board of Supervisors is of the opinion that since this is a sep-
It is stated in the first paragraph of your letter that the Board of Supervisors has appropriated the funds in question. Assuming that these funds have been appropriated from year to year to the School Board, I am of the opinion that the School Board may draw upon the fund without further authority from the Board of Supervisors.

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, * * * ."


June 27, 1958.  

HONORABLE DAVIS Y. PASCHALL  
Superintendent of Public Instruction

This is in reply to your letter of June 27, 1958, in which you enclosed Specimen of Automobile Policy MV with attached Virginia School Board Amendments No. 1721, which policy and amendments are issued by the Travelers Insurance Company. You request my opinion as to whether or not this policy with attached amendments meets the requirements of Article 2 of Chapter 13, Title 22 of the Code of Virginia, which article relates to school bus insurance.

I am of the opinion that the provisions of this standard school bus policy, with the attached amendments, complies with these requirements found in the Code of Virginia so long as the policy is written for at least the minimum amounts required by §§22-285 and 22-286 of the Code of Virginia.
SCHOOLS—Condemnation of Property—County School Board May in Adjoining City. (7) July 8, 1957.

HONORABLE DAVIS Y. PASCHALL
Superintendent of Public Instruction

This is in reply to your letter of July 2, 1957, in which you request my opinion as to whether or not Albemarle County has the power and authority to condemn property located within the corporate limits of the City of Charlottesville. The property will be condemned for the purpose of erecting a county-owned elementary school.

Sections 22-149 and 25-232 of the Code of Virginia give the School Board of Albemarle County authority to condemn property to be used for school purposes. I can find no provision in the Code which would prohibit the School Board of Albemarle County from condemning property in an adjacent county or city for the purpose of erecting a school. Therefore, I am of the opinion that if the County can show the need for the particular piece of property in question, then the School Board may enter a condemnation proceeding for this purpose, although the property is located within the corporate limits of the City of Charlottesville.

SCHOOLS—Construction of Road to School—Board May Appropriate Funds for, if have Right of Way, in another political subdivision. (59) October 4, 1957.

HONORABLE CHARLES H. WILSON
Commonwealth's Attorney for Nottoway County

This will reply to your letter of September 19, in which you state that the School Board of Nottoway County has erected "a new elementary school building in the Town of Burkeville, Virginia and in order to gain access to said elementary school building it is necessary that a road be constructed from the intersection of Route 624 South to the school property, a distance of about 0.21 miles". You inquire whether or not the School Board of Nottoway County may lawfully expend funds to provide a reasonably satisfactory road to the school in question over that part of the route lying within the Town of Burkeville and not on property owned by the School Board.

I am of the opinion that your inquiry should be answered in the affirmative. In this connection, I am forwarding to you an opinion of this office, rendered September 2, 1942, by the Honorable Abram P. Staples, then Attorney General, to the Commonwealth's Attorney for the City of Williamsburg, Virginia, in which a substantially similar question was considered. As you will note, Judge Staples ruled that the powers conferred upon local school boards by Section 656 of the Code of Virginia (1942), now Section 22-72 of the Virginia Code, were sufficiently broad to authorize a local school board to make repairs to a "private road" in James City County in order to enable the school bus to reach certain school children residing some two miles from a public road. I concur in the view enunciated by Judge Staples, and I am of the opinion that, if the School Board of Nottoway County acquires a right of way over property not owned by it, funds may lawfully be expended to construct a reasonably satisfactory access road to the elementary school in question.
SCHOOLS—Contracts—May Employ Relative of Board Member as Teacher if she was regularly employed by any School Board before inception of the relationship. (261) May 22, 1958.

HONORABLE BAXLEY T. TANKARD
Attorney for the Commonwealth Northampton County

This is in reply to your letter of May 21, 1958, which reads as follows:

"The School Board of Northampton County would like very much to employ a sister-in-law of one of the School Board members. This sister-in-law would be the wife of a brother of a member of the School Board. Such sister-in-law, before her marriage, taught in the Special School District for the Town of Cape Charles located in Northampton County, Virginia, and since her marriage has taught for some considerable time in Fauquier County, Virginia. However, her last employment as a teacher was terminated in Fauquier County in June, 1957. In view of Section 22-206 of the Code of Virginia, I would appreciate your opinion as to whether this person is eligible for employment at this time by the School Board of Northampton County, Virginia."

Section 22-206 of the Code, by emergency act, was amended at the recent session of the General Assembly and is Chapter 635 of the Acts of Assembly, 1958. The third sentence of Section 22-206 was amended so as to read as follows:

"This provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board * or division superintendents of schools *, or who has been regularly employed by any school board prior to the inception of such relationship or relationships."

The underscored part of this sentence constitutes the amendment.

It seems clear from your letter that the sister-in-law of the School Board member was regularly employed by the School Board of the Town of Cape Charles prior to the time that she was married to the brother of the School Board member. The answer to your question, therefore, depends upon the construction to be placed upon the phrase "any School Board." In an opinion dated June 30, 1940, rendered by former Attorney General Abram P. Staples, and published in the Attorney General Reports, 1939-1940, at page 198, the following language appears:

"It seems to me that the words 'any school board' in the proviso are not restricted to the board that is making the contract but applies to any other school board in the State. Statutes of this kind are to be strictly construed against rendering a person ineligible to employment."

I concur in the statement made by former Attorney General Staples. Furthermore in my opinion, the phrase "regularly employed" does not mean continuous employment but it means employment for a regular session as distinguished from employment on a temporary basis, such as employment as a substitute teacher.

I am of the opinion, therefore, that under the state of facts presented by you the School Board of Northampton County is not prohibited by Section 22-206 from employing the teacher in question.
SCHOOLS—CONTRACTS—May Purchase School Bus from Son of Board Member if Member has No Interest or connection with Son’s Business. (235) April 29, 1958.

HONORABLE BONSALL SYKES, Chairman
Dickenson County School Board

This is in response to your letter of April 28, which reads in part as follows:

“I would appreciate a ruling from your office concerning school board purchases, specifically school buses, from a dealer who has a son who is a member of the school board. The dealer’s son has no connection with this business itself.”

Upon examination of Section 22-213, Code of Virginia, which relates to the type of contracts a member of the school board is prohibited from being a party to or having any interest therein, I find no inhibition against the type of contract referred to in your letter wherein it is stated that the school board member “has no connection” with the business conducted by his father.

SCHOOLS—Division Superintendents—Retirement Act has No Effect upon Four Year term of office. (166) January 31, 1958.

HONORABLE CHARLES H. SMITH, Director
Virginia Supplemental Retirement System

This is in reply to your letter of January 24, 1958, in which you request my opinion as to whether or not the provisions of §51-111.54 of the Code of Virginia would have any effect upon the tenure of office of a division superintendent of schools who has attained the age of 70 years prior to completing his four-year term of office.

Section 133 of the Constitution of Virginia provides, in part, as follows:

“There shall be appointed by the school board or boards of each school division, one division superintendent of schools, who shall be selected from a list of eligibles certified by the State Board of Education and shall hold office for four years.”

I am of the opinion that §51-111.54 of the Code has no effect upon the tenure of office of the division superintendent of schools, since the Constitution of Virginia prescribes a four-year term of office for such superintendents.
SCHOOLS—Employing Relative of Superintendent or Board Members as Employee or Teacher—Prohibitions—May Contract with as Independent Contractor. (231)

HONORABLE M. P. BOSWELL, Chairman
Nottoway County School Board

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

"As Chairman of the Nottoway County School Board I would like your opinion on the following two questions, pertinent to our schools:

1. One of our board members has a brother-in-law that has recently gone into the electrical repair and contracting business in our county. The board member has nothing what so ever invested in this business and is not connected with it in any way. Would we be within our legal rights to allow this person to bid on electrical work or to call him for repairs in our various schools?

2. Our school division superintendent's wife has been a teacher in Virginia schools since 1928. She has never taught in Nottoway County, but is now teaching in an adjoining county. Can we employ her as a teacher in our county while her husband is superintendent in the county?"

I shall answer your questions in the order stated in your letter.

1. Under Section 22-206 of the Code, the school board would be prohibited from employing a brother-in-law of a member of the board. This section, as amended at the 1958 session of the General Assembly and which became effective on March 29, 1958, is as follows:

"§22-206. 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. This provision shall not apply to any such relative employed by any school board at any time prior to June twenty-first, nineteen hundred thirty-eight. This provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board or division superintendent of schools, or who has been regularly employed by any school board prior to the inception of such relationship or relationships. If the school board violates these provisions, the individual members thereof shall be personally liable to refund to the local treasury 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. Such funds, when recovered, shall be paid into the local treasury for the use of the public schools."

Under this section, if there is any employer-employee relationship between the school board and the individual engaged in electrical repair and contracting business, who is a brother-in-law of one of the board members, such an arrangement would be prohibited.

Sections 22-213 and 15-504 of the Code relate to public contracts made upon an independent basis. Neither of these sections prohibits the negotiation of a con-
tract with an independent contractor where the independent contractor is a brother-in-law of a county official.

I am of the opinion, therefore, that, if the dealings with the brother-in-law are entirely upon an independent contractual basis, free from any common-law relationship of employer and employee, the arrangement would not be in violation of any provisions of the statute.

2. If the wife of the division superintendent has been regularly employed since prior to June 21, 1938, the employment contemplated by your school board would not be prohibited under the statutes.


HONORABLE TYLER FULCHER
Superintendent of Schools of Amherst County

This is in reply to your letter of March 22, 1958, in which you request my opinion in answer to the following question:

"Does the School Board have the legal right to invest any part, or portion, of its operating funds in U. S. Government Bonds, or any other securities, on a short term, or any other, basis?"

On November 23, 1956, this office rendered an opinion to Honorable James E. Durant, Treasurer of the City of Falls Church, in which it was held that §2-298 of the Code of Virginia authorizes the investment of any and all public moneys or other public funds, other than sinking funds, belonging to or within the control of certain public officers and boards in stocks, bonds, treasury notes and other evidences of indebtedness of the United States of America. I am enclosing copy of that opinion.

I am of the opinion that §2-298 of the Code of Virginia confers upon a school board the authority to invest that portion of its operating funds which are not immediately necessary for the operation of the public schools in U. S. Government bonds and those other securities which are legal investments for fiduciaries under the provisions of clauses (1), (2), (3), (4), (5) and (24) of §26-40 of the Code of Virginia.

SCHOOLS—Issuance of Bonds—Discretionary with School Board Although Majority of Voters Vote for Bond Issue. (61) October 8, 1957.

HONORABLE ROBERT D. BAUSERMAN
Commonwealth's Attorney Shenandoah County

This is in reply to your letters of September 10 and October 2, 1957, in which you request my opinion on the following question:

"Should the Board of Supervisors apply to the Literary Fund for a loan of $1,500,000 and it be granted, would the School Board and the Board of Supervisors still be liable to issue bonds on the credit of the county in the amount of $1,500,000, as authorized in the referendum of September 11, 1956?"
The history of this bond referendum is as follows:

On June 14, 1956, the School Board of Shenandoah County passed a resolution requesting the Circuit Court of Shenandoah County to submit the question to the voters of Shenandoah County as to whether or not the Shenandoah County School Board may issue bonds in the amount of $1,500,000 to cover the cost of school construction, said bonds to be issued pursuant to §22-167 of the Code of Virginia. On June 18, 1956, the Board of Supervisors of Shenandoah County duly adopted a similar resolution approving the contracting of a loan by the School Board and the issuance of bonds therefor on the credit of the County in the amount of $1,500,000, and said Board of Supervisors approved the resolution of the School Board and joined in the request to the Circuit Court of the County that a bond referendum be held. The Circuit Court of Shenandoah County duly entered an order approving the action of the School Board and the Board of Supervisors and ordered that a bond referendum be held on September 11, 1956. On August 16, 1956, the School Board of Shenandoah County adopted a resolution which provided, in part, as follows:

"Now, therefore, if a majority of the voters approve the referendum of September 11, 1956, be it resolved that this school board does pledge itself to endorse an offering of bonds only if they shall bear a rate of interest not greater than two and one-half per cent."

The bond issue was approved by the voters of the county; however, no sale can be found for the bonds at an interest rate not to exceed two and one-half per cent. Section 22-174 of the Code of Virginia provides as follows:

"After the issuance of such order by the court or judge, the bonds authorized at the election may be issued by the county school board."

I am of the opinion that the School Board of Shenandoah County has within its legal discretion the right to refuse to issue bonds, even though the issuance of said bonds has been approved by the voters of the county. Therefore, no one can compel the School Board of Shenandoah County to issue these bonds since the issuance of the bonds is a discretionary duty rather than a purely ministerial duty, or a mandatory duty.

SCHOOLS—Joint Operation—Interpretation of “on a Pro-Rata Basis based on Enrollment of Pupils.” (104)

HONORABLE H. RAY WEBBER
Member House of Delegates

November 27, 1957.

This is in reply to your letter of November 15, 1957, in which you request my opinion concerning the proper construction and interpretation to be given to §22-100.9 of the Code of Virginia. This provision of the Code reads as follows:

"Notwithstanding the provisions of §22-100.8, the local operating cost as well as the expenditures for capital outlay purposes and incurring indebtedness for the construction of school buildings shall be on a pro rata basis based on enrollment of pupils or such other basis as may be mutually agreed upon by the division school board with the approval of the governing bodies of the participating counties and/or cities."

You request my opinion as to the meaning of the term "on a pro rata basis
based on enrollment of pupils." I am of the opinion that this term means that the entire operating cost of the school division, along with the expenditures for capital outlay for all the schools in both the city and the county, would be added together. Then if 56% of the children enrolled in the division are residents of the county, and 44% enrolled in the division are residents of the city, the county would pay 56% of the total cost and the city would pay 44% of the total cost, and any funds received from the State would be credited to the county and the city in the same percentage.

SCHOOLS—Joint Operation—Localities May by Mutual Agreement Determine How Costs are to be Apportioned.

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

This is in reply to your letter of November 30, 1957, referring to my opinion of November 27 to Honorable H. Ray Webber with respect to Section 22-100.9 of the Code of Virginia. Your letter is, in part, as follows:

"At present the school boards of the City of Covington and County of Alleghany have under consideration the creation of a school division composed of Alleghany County and the City of Covington, pursuant to Section 22-100.1 et seq. of said Code, and I am advised by these bodies that in the event such a school division is created, it is further contemplated that the local operating costs, as well as the expenditures for capital outlay purposes, would be divided between the two political subdivisions in proportion to the number of pupils in each school from each subdivision. In other words, the sharing of expenditures would be determined by the pupil enrollment in each school rather than on a pro rata basis of pupil enrollment in the City and County as a whole.

"The question here presented is whether or not the term 'or such other basis as may be mutually agreed upon by the division school board with the approval of the governing bodies of the participating counties and/or cities,' would permit the sharing of costs as contemplated by the two school boards as aforesaid."

The opinion of November 27 was limited to the precise question presented by Mr. Webber. With respect to the question presented by you, I am of the opinion that the local school boards may, with the approval of the local governing bodies, agree to share the costs in the manner contemplated by the boards as set forth in your letter.

SCHOOLS—Literary Loan—City Charter Provision Relating to General Indebtedness Does Not Restrict Authority of City for.

HONORABLE HENRY B. VANCE
City Attorney, Buena Vista

At the request of Honorable Baldwin G. Locher, I am glad to furnish you an opinion with respect to the question presented in your letter of November 27 to Mr. Locher, which letter is in part as follows:
"The Superintendent of Schools is anxious to have an opinion of
the Attorney General on the following question. I would appreciate it
if you would make the request for such opinion on behalf of the City
of Buena Vista.

"Section 22-107, Code of Virginia, 1950 Ed., as amended, provides,
in part, that Local School Boards may borrow from the Literary Fund.
Article 2.214, Charter of the City of Buena Vista, Virginia, found in
Acts of Assembly, 1952 Session, provides the general borrowing power
of the City. In this article it states that all indebtedness, other than
bonded indebtedness, incurred by the City Council shall not exceed
fifty percent of the previous years taxes levied against real estate.

"The question is whether the provision of defining and limiting the
borrowing power of the Council in any way affects the power of the
School Board to borrow from the Literary Fund?"

I am of the opinion that the limitation set forth in section 2.214 of the
charter of the city of Buena Vista (Chapter 325, Acts of 1952) applies to short
term loans in anticipation of revenues for the current year, as permitted under
section 127(a) of the Constitution of Virginia. Furthermore, section 6.3 of the
city charter provides that the school board of such city shall have all the
powers of school boards under the Constitution and the laws, and that nothing in
the charter shall negate any of the powers granted to a school board under the
Constitution and laws of the State.

It is my opinion, therefore, that the school board of the city of Buena Vista
has the power to negotiate a literary fund loan under the provisions of Title
22 of the Code.

SCHOOLS—Literary Loan—County Obligation to be Repaid by Countywide
Levy—Contracts with Teacher and Wife of Member of Board of Supervisors.
(167)

February 3, 1958.

HONORABLE JAMES O. MOREHEAD
Superintendent, Bland County Schools

This is in reply to your letter of January 28, 1958, in which you request my
opinion on three matters relating to the borrowing of money by the Bland County
School Board. Your first question reads as follows:

"1. In Bland School Division where we adhere to the Magisterial
District System for capital outlay purposes, may two districts jointly
assume responsibility of a Literary Loan to finance a capital outlay pro-
gram located within one of the districts in question?"

In the case of Henrico v. City of Richmond, 177 Va. 754, the Supreme Court
of Appeals of Virginia, in construing then §644, which is now codified as §22-113
of the Code of Virginia, held:

"This leaves no room for doubt that the loans from the Literary Fund
are county obligations which must be repaid by county levies on a
county-wide basis."

In view of the expressed holding of the Supreme Court of Appeals, I am of the
opinion that if Bland County borrows money from the Literary Fund, this must be
repaid by the levying of a county-wide tax and not just a district tax.

Your second question reads as follows:
"2. May a county School Board borrow money on a temporary-loan basis from a teacher who is currently employed in the school system?"

Section 22-213 of the Code of Virginia provides that it shall be unlawful for any teacher in a public school except by permission of the State Board of Education evidenced by resolution of that board, to have any pecuniary interest directly or indirectly in certain contracts with the county school board; however, I do not find included in this list of prohibited contracts the borrowing of money on a temporary loan. Therefore, I am of the opinion that the County School Board may borrow money as a temporary loan from a teacher who is currently employed in the school system. This, in my opinion, is in accord with an opinion rendered by this office on September 20, 1950 to Honorable J. Gordon Bennett, Auditor of Public Accounts, which opinion is found on page 246 of the Opinions of the Attorney General, 1950-51.

Your third question reads as follows:

"3. May a County School Board borrow money on a temporary-loan basis from the wife of a member of the County Board of Supervisors?"

I am enclosing a copy of an opinion rendered by this office on March 14, 1956, to the late Superintendent of Public Instruction, Honorable J. Dowell Howard, in which this office ruled that a county school board could contract with the husband of a member of the local school board. I can find no prohibition in §15-504 of the Code which would prohibit the wife of a member of board of supervisors from contracting with the county school board so long as her husband, the member of the board of supervisors, had no direct or indirect interest in said contract.
in this State making application therefor in the manner prescribed by law, money belonging to the Literary Fund, and in hand for investment, for the purpose of erecting, altering or enlarging schoolhouses in such counties, cities and towns, on the terms and conditions hereinafter set forth, and subject to such rules and regulations as may be promulgated by the State Board."

The State Board, therefore, does not have authority to make loans from this fund for the purpose of purchasing school buses. Upon inquiry, I find that the State Board has never considered that it has the power to make such loans.

With respect to your second question, it is true that section 22-120 of the Code authorizes school boards to negotiate temporary loans, subject to the approval of the local tax levying body, for the purpose of purchasing new school buses to replace obsolete or worn out equipment, and the section prescribes that the loans shall be repaid within not less than five years. The five-year provision, however, is in my opinion in conflict with the provisions of section 115a of the Virginia Constitution. This is in accord with an opinion rendered by Attorney General Almond on April 6, 1956, reported in the Opinions of the Attorney General 1955-1956, page 185, a copy of which I enclose.

SCHOOLS—Materials for Building—When May Be Purchased from Former Architect. (56)

October 2, 1957.

HONORABLE J. AUBREY MATTHEWS
Commonwealth's Attorney for Smyth County

This is in reply to your letter of September 30, 1957, which reads, in part, as follows:

"Approximately two years ago the Smyth County School Board purchased from J. L. Williams and Associates plans and specifications for the construction and alterations for the construction of new school buildings and the alterations of existing buildings in Smyth County, Virginia. J. L. Williams and Associates was and is a partnership existing in Marion, Virginia. At the time of the submission of the plans and specifications, J. L. Williams was one of the partners of the firm furnishing the plans and specifications. After the plans and specifications were submitted, accepted and paid for by the School Board of Smyth County Mr. Williams sold his interest in the partnership to the remaining partners and since August, 1956 has not been connected with the firm.

"The plans and specifications for alterations and additions to the Sugar Grove High School were advertised for bids and bids accepted about ten days ago. At this time Marco B. Buchanan, trading as Industrial Welding and Machine Company, submitted the low and best bid for this job. After selling his interest in the architect partnership firm J. L. Williams was employed by Industrial Welding and Machine Company. He is a salaried employee of this company and has no ownership interest in the company.

"The Superintendent of Public Schools has informed me that no money by appropriations, grant-in-aid, or loan is being used at all to cover the cost of this project, instead the total cost will be paid from the proceeds of a Bond issue and sale recently passed by Smyth County."
Section 15-710 of the Code of Virginia reads as follows:

"No building materials, supplies and equipment for any building or structure being erected or constructed or hereafter erected or constructed by, for, or on behalf of any county, city or town shall hereafter be purchased from any person employed or acting as architect or supervising architect for such building or structure, or from any partnership, association or corporation of which such person employed or acting as such architect or supervising architect is an officer, director or stockholder or in which such person is otherwise financially interested. If anyone shall buy, or sell or supply, or contract so to do, any building materials, supplies or equipment in violation of the provisions of this section, he shall be guilty of a misdemeanor and upon conviction shall be punished accordingly and in addition thereto all such contracts and agreements shall be null and void and of no effect."

I am of the opinion that, since Mr. Williams is no longer connected with the firm of architects which designed the building, and since Mr. Williams is not employed or acting as architect or supervising architect for the new school building, the prohibition in §15-710 of the Code of Virginia is not applicable in this instance. In view of the fact that no State funds, either by appropriation, grant-in-aid or loan, are to be used for any part of the construction of this new school building, §22-166.12 of the Code is not applicable.

SCHOOLS—Member of Board—Firm May Not Contract with City, Charter Provision of City of Richmond notwithstanding. (299) June 27, 1958.

MR. FRANK S. CALKINS
Member School Board, City of Richmond

This is in reply to your letter of June 24, 1958, in which you state that you are a member of the School Board of the City of Richmond and that you are also a member of the accounting firm of Leach, Calkins & Scott. The City of Richmond employs independent auditors to audit its accounts every five years. This audit, however, does not include the accounts of the City School Board which are audited annually by the State Auditor of Public Accounts. You request my opinion as to whether or not your firm would be prohibited by the laws of Virginia from entering into an agreement with the City of Richmond to audit the accounts of the City because of your membership on the City School Board.

You call my attention to §20.06 of the Charter of the City of Richmond, Chapter 116 of the Acts of Assembly of 1948. This section provides as follows:

"No officer or employee of the City shall be interested in any contract entered into by the City with any person, firm or corporation, but this prohibition shall not apply to nonsalaried officers or unsalaried members of boards or commissions in respect of contracts other than those in the making of which they have a part as officers or members of such boards or commissions."

You specifically request my opinion as to whether or not this section of the City Charter has the effect of superseding the provisions of §15-508 of the Code of Virginia in so far as the City of Richmond is concerned. Section 15-508 of the Code of Virginia provides, in part, as follows:
"No member of the council, board of aldermen or member of the school board, or any other officer, or agent, * * * during the term for which they are elected or appointed, shall be a contractor or subcontractor with the corporation or its agents, or with such committee, nor shall they be interested, directly or indirectly, in any contract, subcontract or job of work, or materials or the profit or contract price thereof, or any service to be performed for the city, or town for pay under any contract or subcontract * * *.

The provisions of §20-06 of the City Charter provides that the prohibition found in that section of the City Charter shall not apply to nonsalaried officers or unsalaried members of boards or commissions. In view of the way this section of the charter is written, I am of the opinion that it does not supersede §15-508 of the Code of Virginia and, therefore, that the auditing firm of which you are a member may not enter into any agreement, or contract with, or perform any services for the City of Richmond so long as you are a member of the City School Board.

SCHOOLS—Pupil Transportation—Supplemental Appropriation for from Literary Fund Interest—Method of Distributing by State Board of Education. (190)

March 11, 1958.

HONORABLE DAVIS Y. PASCHALL
Superintendent of Public Instruction

This is in reply to your letter of March 5, 1958, in which you request my opinion concerning the expenditure of funds appropriated by Item 136 of the Appropriation Act of 1956. This Item reads as follows:

"Provided that should such interest payments exceed the sum of $750,000; then such excess to the extent of $100,000 during the second year of the biennium is hereby appropriated for transportation of pupils of primary and grammar grades, to be apportioned on a basis of school population, which shall be in addition to all other appropriations for pupil transportation."

You state that Item 143 of the Appropriation Act of 1956 provides the main appropriation for pupil transportation and provides that the appropriation shall be distributed as reimbursement of cost of pupil transportation under rules and regulations to be prescribed by the State Board of Education, provided that no county or city shall receive an allotment in excess of the amount actually expended for transportation of pupils to and from public schools. The method of apportioning the funds appropriated by Item 136 is different from that found in Item 143 of the Appropriation Act. This difference was necessary because of the constitutional provisions found in Section 135 of the Constitution of Virginia relating to apportionment of interest from the Literary Fund. This section provides that such funds shall be for the equal benefit of all the people of the State to be apportioned on a basis of school population; the number of children between the ages of 7 and 20 years to be the basis of such apportionment. Your question is whether or not it is mandatory for the State Board of Education to expend $100,000 referred to in the second paragraph of Item 136 of the Appropriation Act of 1956.

I am of the opinion that, should interest payments on the Literary Fund exceed the sum of $750,000, then such excess, to the extent of $100,000, must be made available to each school district in the State on the basis of school popula-
tion for transportation of pupils of primary and grammar grades. This money can be used only for school transportation, and if a school district receives any portion of this appropriation, it must be used for school transportation. In view of the conditions attached to this appropriation, I am of the opinion that the State Board of Education would be justified in prescribing certain requirements which a local school district must comply with before receiving its share of this appropriation in order to assure the State Board of Education that the funds received by the district will be used for transportation of pupils of primary and grammar grades.

SCHOOLS—Purchase of Real Estate—Board May Not from Employee of County.

(32) August 9, 1957.

Honorable William F. Parker, Jr.
Commonwealth's Attorney for Henrico County

This is in reply to your letter of August 2, 1957, in which you request my opinion as to whether or not it is proper for the County School Board of Henrico County to enter into a contract to purchase real estate from a person who is regularly employed by the County of Henrico. Section 15-333 of the Code of Virginia provides as follows:

"No member of the board of county supervisors or other officer or employee of the county, or person receiving a salary or compensation from funds appropriated by the county shall be interested directly or indirectly in any contract to which the county is a party, either as principal, surety or otherwise; nor shall any such officer or employee or his partner, agent, servant or employee or the firm of which he is a member purchase from or sell to the county any real or personal property, nor shall he be financially interested, directly or indirectly, in any work or service to be performed for the county or in its behalf. Any contract made in violation of any of these provisions shall be void.

"The amount embraced by any such contract, the value of any thing so purchased or sold, and the amount of any claim for any such work or service shall never be paid, or, if paid, may be recovered back, with interest, by the county, in the circuit court of the county, by action or motion, within two years from the time of payment."

I am of the opinion that this section of the Code prohibits the board of supervisors or the school board from purchasing property from an employee of the county. Although this property would be purchased by the School Board, it would still constitute a contract with the County and a sale to the County of real property. I should like to refer you to §22-161 of the Code of Virginia which refers to school board property as being "school property of the county."
SCHOOLS—Real Estate—Acceptance from Federal Government with Certain Conditions—Deferred Payment Plan Valid if no obligation on Board to make Payments in Future. (252)

May 16, 1958.

HONORABLE EDWARD H. RICHARDSON
Commonwealth's Attorney for Roanoke County

In your recent letter you enclosed drafts of a quit-claim deed to be executed by the United States of America and accepted by the County School Board of Roanoke County and of an escrow agreement to be executed by these two parties under the terms and provisions of which some twelve (12) acres of land in Roanoke County is to be conveyed to the School Board subject to certain terms and conditions. You also forwarded a photostatic copy of an executed and recorded quitclaim deed, bearing date of September 5, 1956, by which the United States had conveyed this tract of land to the County School Board, as well as certain correspondence including a letter application from the Roanoke County School Board to the Regional Property Coordinator of the Department of Health, Education and Welfare.

You stated in your letter that whereas the School Board had advised in its letter application of July 7, 1955, that it was then financially prepared to build and operate an elementary school at the site in question, yet the School Board "has not built the school building at this time, and does not feel that it is able to build any time in the immediate future, and due to the failure to build and use the said land for school purposes, the United States is of the opinion that this will breach the condition No. 1 set forth on Page 3 of the deed from the United States Government to the School Board, dated September 5, 1956."

The "Condition No. 1" to which you refer is, of course, a condition subsequent subject to which the School Board accepted the conveyance of the twelve acre parcel and reads in pertinent part:

"1. That for a period of twenty (20) years from the date of this deed the above described property herein conveyed, shall be utilized continuously for Educational purposes in accordance with the proposed program and plan as set forth in the application of the party of the second part, dated July 7, 1955, as revised by letter dated April 20, 1956, and as supplemented by a Resolution of the party of the second part dated June 13, 1955, and for no other purposes ..."

You further state that negotiations between the United States and the School Board have been renewed and the letter from the Regional Property Coordinator of the Department of Health, Education and Welfare, under date of April 21, 1958, mentions the fact that the re-negotiation is "on the basis of the deferred payment plan."

You have asked my opinion whether the County School Board of Roanoke County can legally enter into and accept the proposed quitclaim deed and legally execute the proposed escrow agreement.

The proposed quitclaim deed purports to convey the twelve-acre tract, subject to some five enumerated conditions subsequent which are to be accepted by the School Board, in consideration of the payment annually by the School Board of a sum equal to five per cent (5%) of the fair value of the premises conveyed, together with interest on the unpaid balance of such fair value. These annual payments are to continue until such time as the facilities contemplated in the program and plan have been constructed and placed in use. When such facilities have been constructed within a time limit which is not spelled out in the draft, but which you advised will be some four or five years, the annual payments of principal and interest shall cease and the School Board will become entitled to a "public benefit allowance of one hundred (100%) per cent on the unpaid balance" or the stated fair value.

The proposed quitclaim deed contains the same provision as to continuous use
for twenty (20) years from its date in the manner and for the purposes [educational] found in the recorded deed of September 5, 1956, and, in essence, is similar to the recorded quitclaim deed except that the annual payments of principal and interest mentioned above are added. The terms of the two instruments spelling out the consequences of a breach of any of these conditions subsequent are roughly similar, with the exception that the recorded quitclaim deed states that upon a breach by the School Board all right, title and interest in and to the property shall revert to and become the property of the United States, at its option, whereas the proposed deed does not call for such reversion and forfeiture at the option of the United States unless and until the School Board shall have failed or refused to remedy any such breach or to comply with the enumerated conditions within ninety (90) days after receipt of written notice from the Department of Health, Education and Welfare of such default or non-compliance.

The recorded quitclaim deed and the proposed draft both require that where title reverts to the United States for non-compliance or is voluntarily reconveyed in lieu of reverter, the School Board, at the option of the Department of Health, Education and Welfare, "shall be responsible and shall be required" to reimburse the United States for the decreased value of the property not due to reasonable wear and tear, acts of God and alterations and conversions made by the School Board to adapt the property to the use for which it was acquired. In addition thereto, the United States shall be reimbursed "for such damages including such costs as may be incurred in acquiring title of and possession of the above described property, as it may sustain as a result of the non-compliance."

It is my opinion that these particular provisions with reference to possible reimbursement of the United States for damages and expenses should not be construed as creating a debt which the present School Board or some future school board may be called upon to pay in some future fiscal year. Agreement to abide by such a condition is more in the nature of a covenant against waste on the part of a tenant or licensee of real estate. While the question is not entirely free from doubt, I do not feel that acceptance of title to the land subject to these particular conditions by the School Board without prior approval by the qualified voters would constitute a violation of Section 115-a of the Constitution of Virginia.

Further, I find no difficulty in construing the provisions requiring annual payment of a portion of the fair value of the real estate plus interest on the unpaid balance as being in the nature of an option to purchase such real estate. If the School Board was forced to discontinue making annual payments and the agreement was breached thereby, it could not be held legally liable for any further payments, since both title and possession would revert to the United States.

Further, it is my opinion that execution of a quitclaim deed by the School Board reconveying the property simultaneously with its acceptance of title thereto would not be such a transaction as to require court approval as provided in Section 15-692 of the Code.

In view of the foregoing, it is my opinion that there exists no legal impediment to the execution of the proposed quitclaim deed and escrow agreement by the County School Board of Roanoke County.

SCHOOLS—Segregation Statutes—How Statutes Operate in event of Integration.
(62)

Honorable Phillip P. Burks, Treasurer
Bedford County

This is in reply to your letter of September 26, 1957, which reads, in part, as follows:

"There appears to be so much confusion and so much misunderstanding concerning the law of Virginia enacted at the Special Session of
the General Assembly in 1956 pertaining to the operation of our public schools, I shall appreciate it if you will advise me as follows:

"1. If any public white school in Bedford County, under whatever compulsion, accepts a Negro student, does the law of Virginia require that the said school be closed?

"2. If the United States Supreme Court should order a Negro admitted to a Bedford County public white school, would the said school stay closed or would the said school open on an integrated basis?

"3. If a public white school is closed under the Virginia law because it accepts a Negro student, does the law of Virginia provide that Bedford County will be cut off from all further State funds for both primary and secondary public school purposes, or does the law provide that State school funds will be cut off for only the particular public school from which the Negro student came and the particular public white school which accepted the Negro student?"

I shall answer your questions in the order set forth above.

1. Under the provisions of §22-188.5 of the Virginia Code such school is automatically closed whenever the student body consists of white and colored children. Under the same Code section, the school is automatically removed from the public school system. At the same time, all power and control over such school, its principal, teachers, other employees and its pupils become vested in the Commonwealth of Virginia to be exercised by the Governor.

2. The Governor would not have authority to reopen the school on an integrated basis. Section 22-188.6 prescribes the conditions upon which the school may be reopened. This section reads as follows:

"Immediately upon such control, power and authority becoming vested in the Commonwealth of Virginia, by reason of the occurrences provided for in §22-188.5 aforesaid, such school is closed, and shall not be reopened, as a public school, until, in the opinion of the Governor, and after an investigation by him, he finds and issues an executive order that (1) the peace and tranquility of the community in which the school is located will not be disturbed by such school being reopened and operated, and (2) the assignment of pupils to such school could be accomplished without enforced or compulsory integration of the races therein contrary to the wishes of any child enrolled therein, or of his or her parent or parents, lawful guardian or other custodian."

3. During the time the school in question is closed it is not a part of the public school system. Therefore, the remaining schools of the locality would not during that time be subject to the cut-off provisions of the Appropriation Act (Chapter 716 of the Acts of Assembly, 1956, as amended at the Extra Session, 1956).

In the event the Governor would be unable to reorganize such school and unable to return it to the locality as a segregated school, it is provided in §22-188.12 of the Code that the local school board or the local governing body may have the school returned to the county. If the county should then operate the school on an integrated basis, the cut-off provisions of the Appropriation Act would apply, and all State financial support for all schools of the same class (elementary or secondary) would immediately cease.
SCHOOLS—Superintendent—May be Director of Bank—School Board may not deal with Bank if Superintendent is Officer or Director. (135)

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This is in reply to your letter of December 17, 1957, in which you request my opinion as to whether or not there is any statute in Virginia which would prohibit a superintendent of schools of a county from becoming a director in a State or National Bank.

I know of no provision of the Code of Virginia which would prohibit a superintendent of schools from being at the same time a director of a bank.

You also request my opinion as to whether or not the school board of a county could make loans with or have financial dealings with a bank, a director of which bank is the superintendent of schools of the county and who holds shares of stock in said bank.

I am enclosing copy of an opinion rendered by this office on April 11, 1956, to the Clerk of the Circuit Court of Prince Edward County, in which opinion this office held that a clerk of a county could not deal in his official capacity with a bank in which he was a director, however, that, if his interest in the bank was merely that of a stockholder, there would be no violation of said law if he carried on financial transactions with the bank in his official capacity. I am of the opinion that, under the provisions of §15-504 of the Code of Virginia, a school board may have financial transactions with a bank in which the superintendent of school owns stock, however, if the superintendent of schools is an officer or director of the bank, then the school board may not carry on financial transactions with the bank.

SCHOOLS—Teachers—"Regularly Employed"—Construction as to Code Section Prohibiting Employment of Relative of Board Member. (8)

DR. DAVIS Y. PASCHALL
Superintendent of Public Instruction

This will reply to your letter of June 21, in which you request an opinion upon the proper interpretation to be accorded Section 22-206 of the Virginia Code with respect to the following situation presented to you by a local school board:

"Under consideration by the electoral board was the appointment of a new school board member for a four year term beginning July 1, 1957. A daughter of the person under consideration had been appointed to a teaching position in the county at a meeting of the School Board on June 10, 1957, and issued a contract that will become effective August 30, 1957. She has not been regularly employed by any school board prior to this appointment.

"Is the daughter 'regularly employed' as of June 10, 1957, and therefore prior to the taking of office of a father on July 1, 1957, or thereafter, and in this case prior to a possible appointment of the father?"

"* * * *

"The School Trustees Electoral Board wishes to know if a person, with father-daughter relationship under foregoing conditions, is eligible for appointment to the school board."
Section 22-206 of the Virginia Code provides:

"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. This provision shall not apply to any such relative employed by any school board at any time prior to June twenty-first, nineteen hundred and thirty-eight. This provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board, or division superintendent of schools. If the school board violates these provisions, the individual members thereof shall be personally liable to refund to the local treasury 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. Such funds, when recovered, shall be paid into the local treasury for the use of the public schools." (Italics supplied).

So far as the specific inquiry made by the local school board is concerned, I am of the opinion that the father in the above outlined situation is eligible for appointment to the local school board. The quoted statute contains no language which purports to make an individual ineligible to serve as a member of a local school board if someone within the prohibited degrees of relationship is employed by the board. More pertinent, I should think, to the matter under consideration would be the question of whether or not the local school board may retain the daughter in a teaching position and make payments to her without incurring the penalty prescribed in the terminal provisions of the statute. The critical inquiry in connection with the disposition of this alternative question is whether or not the daughter has been "regularly employed" by the school board prior to the taking of office of the father and would thus be within the ambit of the exception italicized above.

As utilized in the statute in question, the term "regularly employed" is susceptible of various interpretations. With regard to persons appointed to teaching positions, it might be said that the phrase was designed to embrace only those who had actually engaged in teaching or rendered service in such capacity prior to the taking of office of the individual within the specified relationships. On the other hand, the phrase could be construed to designate those employed in accordance with some established method or plan adopted by or enjoined upon the employer; or to indicate those who are employed in a regular and continuous, as distinguished from a casual, intermittent or substitute capacity.

If I have correctly assessed the situation set out in the letter of the local school board, the daughter in question would be deemed regularly employed within the latter interpretations, i.e., she was employed in accordance with the established practice governing appointment of teachers and was retained as a regular and full time rather than a casual or substitute teacher. As statutes of the type under consideration are to be strictly construed against rendering a person ineligible for employment, I am constrained to believe that the daughter would come within the purview of the italicized exception to the general prohibition and may properly be retained by the local school board as a teacher in accordance with her contract of employment.
October 17, 1957.

HONORABLE EUGENE B. SYDNOR, JR.
Member of the Senate of Virginia

This is in reply to your letter of October 14, 1957, in which you request an outline from this office as to the salary commitments of any locality to its teachers in the event its schools are closed as a result of the voluntary or involuntary mixing of the races therein. The only commitment of the localities is the commitment agreed to by the local school board in their contract with the individual teachers. The General Assembly, at the Special Session held in 1956, enacted several provisions which commit the State to assist in the payment of salaries of these teachers. The first is found in §22-188.14 of the Code of Virginia. That section reads as follows:

"The Commonwealth of Virginia assumes the contractual obligation of the school board of any political subdivision, in which a school is closed under this article, with the principal, teachers and employees of such closed school, and it is directed that the salary, wage or compensation of such principal, teachers of employees be paid upon authorization of the Governor as agreed and provided by the terms of their contract with such school board and for the time specified in the contract, or so long as such principal, teachers and employees are under the control of the Governor by virtue of the provisions of this article; provided, however, nothing herein contained shall obligate the Commonwealth of Virginia to employ or compensate such principal, teachers and other employees beyond the expiration date of their contract with such school board."

In the Appropriation Act as amended at the Special Session, the following provision is found attached to Item 143 of that act. You will note that this provision does not obligate the State beyond the terms of the commitment made by the locality to the teachers in the contract.

"It is provided that the limitations herein set forth shall not prohibit the release and distribution of the funds apportioned and allocated, or any unexpended part thereof, to which any county, city or town would otherwise be entitled, to such county, city or town for the payment of salaries and wages of unemployed teachers in State aid teaching positions, and other public school employees, who are under contract and for educational purposes which may be expended in furtherance of elementary and secondary education of Virginia students in nonsectarian private schools, as may be provided by law."

You also ask if a school teacher may earn retirement benefits for subsequent service as a teacher in a private school entitled to receive tuition grants for children wishing to avoid enforced integration. The amendments to the laws relating to the Retirement System passed by the Special Session of 1956 are found in §§51-111.10 and 51-111.38:1. These two sections read as follows:

"(4) 'Teacher' means any person who is regularly employed on a salary basis as a professional or clerical employee of a county, city or other local public school board or of a corporation participating in the retirement system as provided by article 4.1;

"(6) 'Employee' means any teacher, State employee, officer or
employee of a locality participating in the retirement system as provided in article 4, or any employee of a corporation participating in the retirement system as provided in article 4.1;

“(7) ‘Employer’ means Commonwealth, in the case of a State employee, the local public school board in the case of a public school teacher, or the locality or corporation participating in the retirement system as provided in articles 4 and 4.1;”

“§51-111.38:1. Any corporation organized after December 29, 1956, for the purpose of providing elementary or secondary education may by resolution duly adopted by its board of directors and approved by the Board of Trustees of the Virginia Supplementation Retirement System elect to have teachers employed by it become eligible to participate in the retirement system. Acceptance of the teachers employed by such an employer for membership in the retirement system shall be optional with the Board and if it shall approve their participation, then such teachers, as members of the retirement system, shall participate therein as provided in the provisions of this chapter.”

As you can see from these provisions, any corporation organized after December 29, 1956, for the purpose of providing elementary and secondary education may elect to have teachers employed by it to become eligible to participate in the retirement system.


HONORABLE LEONARD F. JONES Commonwealth’s Attorney for Campbell County

This is in reply to your letter of January 9, 1958, in which you enclosed a copy of a letter addressed to Mr. J. J. Fray, Superintendent of Schools of Campbell County, from Mr. F. F. Jenkins, Director of the Division of Research and Planning of the State Board of Education, in which letter Mr. Jenkins raises a question concerning the method of appointment of the representative from the school district of the Town of Altavista to the School Board of Campbell County. In 1937, pursuant to the now §22-43 of the Code of Virginia, the Town of Altavista petitioned the State Board of Education to set up a school district for the Town of Altavista for representation on the Campbell County School Board. The State Board of Education authorized the town to be set up as a separate school district for the purpose of representation only on the Campbell County School Board. Section 22-43 of the Code of Virginia provides, in part, as follows:

“* * * incorporated towns having a population of not less than three thousand five hundred inhabitants, according to the last United States census, may, by ordinance of the town council and by and with the approval of the State Board, be constituted separate school districts either for the purpose of representation on the county school board, or for the purpose of being operated as a separate school district under a town school board of three members, appointed by the town council. In the event that such a town district be set up, to be operated by a board of three members, the members of such board shall be appointed in accordance with §22-89, providing for the appointment of trustees in cities
and of such members, one shall be designated by the town school board as a member of the county school board and entitled to serve as a member of the county board."

Section 22-61 of the Code of Virginia reads as follows:

"The county school board shall consist of one member appointed from each school district in the county by the school trustee electoral board, provided that in towns constituting separate school districts and operated by a school board of three members, one of the members shall be designated annually by the town board as a member of the county school board. The members of the county school board from the several districts shall have no organization and duties except such as may be assigned to them by the school board as a whole."

There is no question from a study of these two provisions of the Code quoted above that in any town constituting a separate school district where the school board of the town operates the schools of the town, there is a three-member town school board and one of the members of the town school board shall be designated annually by the town school board to serve as a member of the county school board. However, from a study of the same two sections of the Code, it is questionable as to whether or not there is authority for a three-member town school board where the town constitutes a separate school district for purposes of representation only, and also a question as to who selects the members from this type of town school district to serve on the county school board.

Since these questions do exist as to whether there is authority for a school board of the Town of Altavista and who should select the members from the Town School District of Altavista to serve on the Campbell County School Board, I am of the opinion that it would be desirable to amend §§22-43 and 22-61 of the Code of Virginia so as to resolve these questions.

SCHOOLS—Workmen's Compensation—Board is Employer within scope of the Act. (88)

HONORABLE J. H. COMBS
Division Superintendent of Schools Floyd County

This is in reply to your letter of October 28, 1957, in which you request my opinion as to whether or not the County School Board of Floyd County is liable as an employer under the Workmen's Compensation Act for injuries sustained by regular employees, including school teachers, bus drivers, janitors, etc., while engaged in their regular duties.

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 an employee of the School Board, such as a teacher, bus driver or janitor is injured while engaged in his regular duties, then the School Board would be liable for payment of workmen's compensation to this teacher, bus driver or janitor. The amount of compensation would vary in each individual case, depending upon the salary and injury of the individual concerned.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS—Administrator of Estate—Not Required to Charge and Collect Fee. (19)

HONORABLE COPELAND E. ADAMS
Commissioner of Accounts, Circuit Court of Nottoway County

July 30, 1957.

This is in reply to your letter of July 29, 1957, in which you refer to the opinion issued by this office on August 18, 1950 (Report of Attorney General, 1950-51, page 130) to the Sheriff of Augusta County with respect to the disposition of commissions collected by a sheriff as administrator of an estate when required to act as administrator under §64-124 of the Code.

You inquire whether "there is a duty on him (a sheriff) to make any charge at all by way of commission."

I am unable to find any statute requiring an administrator of an estate to charge and collect a commission for his services. A reasonable commission shall be allowed by the Commissioner of Accounts under §26-30 of the Code for such services. Therefore, in my opinion, a sheriff is not compelled to charge a commission for services rendered pursuant to §64-124 of the Code.

SHERIFFS—Administrator of Estate—Not Required to Charge and Collect Fee—Commissioner of Accounts May Fix Fee at less than 5%. (254)

HONORABLE CHESTER J. STAFFORD
Commonwealth's Attorney of Giles County

May 19, 1958.

This is in reply to your letter of May 14, 1958, which reads as follows:

"In order to bring a wrongful death action in the Circuit Court of Giles County, Virginia, I had John E. Hopkins, Sheriff of Giles County, Virginia, appointed Administrator of the estate of the young man who was killed in an accident out of which the suit arose. Mr. Hopkins has only performed nominal duties in connection with such appointment. As a matter of fact, his primary duty will consist in the distribution by checks of the sum recovered in the wrongful death action.

"The question has arisen as to whether Mr. Hopkins, as Sheriff of Giles County, Virginia, is entitled to a commission on the funds derived from the wrongful death action, and if so, the amount of such commission. It was my contention that since Mr. Hopkins performed only nominal duties, that he would not be entitled to any commission which would necessarily reduce the net recovery to the statutory beneficiaries of the wrongful death action. However, it was contended on his behalf that as Sheriff of Giles County he had a duty to collect a commission and that if he failed to do so the State of Virginia could collect such a commission from him personally.

"Please advise whether Mr. Hopkins, as Sheriff of Giles County, is entitled to any commission in this matter. If so, is he entitled to the commission provided by Section 14-120 of the Code of Virginia, a 5% commission on the recovery, or can the Court fix a commission which it deems fair and just under all of the circumstances. I would also like to know whether collection of the commission could be waived; that is, if in your opinion the Sheriff is entitled to a commission, could he waive collection of that commission and yet not be chargeable personally by the State for failure to collect the commission."
I am unable to find any statute requiring an administrator of an estate to charge and collect a commission for his services. A reasonable commission shall be allowed by the Commissioner of Accounts under §26-30 of the Code for such services. Therefore, in my opinion, a sheriff is not compelled to charge a commission for services rendered pursuant to §64-124 of the Code.

However, it is within the discretion of the Commissioner of Accounts, or the Court, to fix a reasonable compensation, which may be less than five per cent. See Jones v. Virginia Trust Company, 142 Va., at page 241.

I am of the opinion that the Sheriff would not be accountable for any greater amount of commission than approved by the Commissioner or the Court even though the amount would be much less than the customary five per cent.

SHERIFFS—Administrator of Estate—When Entitled to Keep Fees for Services as.

HONORABLE HARRY P. TREAKLE
Sheriff of Lancaster County

I acknowledge your letter of November 16, which reads as follows:

"As Sheriff of Lancaster County I have upon occasions been called upon to act as Administrator of Estates. Since I have already given bond as sheriff it has, of course, been unnecessary for me to give further surety. In the administration of these estates, which I consider not to be a part of the Sheriff's duties, the question has arisen as to whether or not I would be properly entitled to the commissions allowed by the Commissioner of Accounts, or should these be turned in to the State as a part of the income received by me as fees in the course of the performance of my duties. Another alternative, of course, would be that the Commissioner of Accounts would not allow any fees under these circumstances.

"In order that this issue may be settled I would appreciate it if you would advise me if I am entitled to the commissions as Administrator in my individual capacity, which seems to me would be only logical under the circumstances."

I am enclosing copies of two opinions rendered by this office during the term of the late Abram P. Staples. One of these opinions is dated February 6, 1943, and the other dated February 17, 1943, and they are published in the Report of the Attorney General 1942-43 at pages 219 and 220.

You will note from these opinions that where an estate is committed to the Sheriff under the provisions of Section 64-124 of the Code (formerly Section 5374) the commissions received by the Sheriff should be paid over to the County Treasury. Of course, in those cases where the estate is not committed to the Sheriff under Section 64-124, but he is acting in his individual capacity and not as Sheriff, then he would be entitled to retain the commissions.

This office has consistently adhered to the opinions rendered by Judge Staples during his term of office as Attorney General.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS—Defense of in Criminal Prosecution—Board of Supervisors has No Authority to Appropriate Funds for. (91)

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

This is in reply to your letter of November 11, 1957, which reads as follows:

"The Sheriff of Isle of Wight County recently became personally involved in a homicide. The Sheriff went to the home of a Negro man to talk with him about his knowledge of certain stolen personal property. The Negro man asked the Sheriff to come inside of his home as he did not want to be seen talking to the 'law.' After going into the house, the Negro man attacked the Sheriff with a meat cleaver, whereupon the Sheriff, in order to defend himself, struck the Negro man with his blackjack, The Negro man died a few minutes later."

You request my opinion as to whether or not the Board of Supervisors of your county has the authority to pay in whole or part the fee of counsel to represent the Sheriff of the county in a criminal prosecution against him growing out of the above described homicide.

On March 23, 1950, this office rendered an opinion to the Honorable Charles H. Wilson, Commonwealth's Attorney of Nottoway County, to the effect that the board of supervisors could not pay the cost, judgment or legal fees incident to a civil case of false arrest instituted by an individual against the sheriff of a county. I am enclosing copy of that opinion.

Section 114 of the Constitution, in my opinion, does not apply to criminal prosecution, however, I can find no statutory authority for the Board to appropriate money for this purpose. Therefore, I am of the opinion that the Board of Supervisors has no authority to pay any part of the legal fees of counsel to defend the Sheriff of the County in a criminal prosecution against him.

SHERIFFS—Estates Administered by—Effect of and Procedure to be followed upon Death of Sheriff—Estates Not Settled. (245)

HONORABLE THOMAS E. WARRINER, JR.
Commonwealth's Attorney for Brunswick County

This is in reply to your letter of May 7, 1958, which reads as follows:

"I respectfully request that the Attorney General render an opinion concerning the following matter:

"H. E. Valentine, Sheriff of Brunswick County, Virginia, died on 4 April 1958. No personal representative has qualified on his estate nor is it probable one will voluntarily qualify. In his official capacity as Sheriff, Mr. Valentine was administering several estates committed to him as Sheriff for administration. A new Sheriff, William Earl Hill, has been appointed and has qualified.

"It is my opinion that the Code does not clearly recite how the estates still unadministered, committed to H. E. Valentine, Sheriff, Administrator, are to be further administered and settled.

"Will the Attorney General please set forth the steps required for the administration of said estates?"

There is no statutory provision under which estates committed to a sheriff
under Section 64-124 of the Code shall, upon the death of the sheriff, be automatically transferred to his successor in office. In my opinion, the procedure to be followed is the same as would be required in the case of the death of an administrator who did not hold the office of sheriff. It is well settled that when the term of office of a sheriff expires he must proceed with the administration until completed. Michie's Jurisprudence, under Title of Executors and Administrators, Vol. 8, Sec. 13, page 154; Tunstall v. Withers et al., 86 Va. 892, at page 895; Dabney's Administrator v. Smith, 32 Va. (5 Leigh) page 13, at page 20.

The administration of the estates in question does not, in my opinion, devolve upon the new sheriff unless the court appoints him as administrator.

It is stated in Corpus Juris Secundum, Vol. 34, Sec. 831, at page 950, that the general rule is that, where an administrator dies without having settled his administration account, it is for his own representative and not the administrator de bonis non of the first decedent to settle the account of the deceased representative. This State, it seems, does not follow the general rule, but the procedure is controlled by Section 26-47 of the Code, which is as follows:

"At or after the date of any order revoking and annulling the powers of any fiduciary, the court in which he qualified shall exercise such jurisdiction, either by appointing an administrator de bonis non, or a new guardian, or otherwise, as it could have exercised if such fiduciary had died at that date."

Under this section, the court may appoint an administrator de bonis non for each separate estate that was being administered by the sheriff at the time of his death. The court may, if it elects to do so, appoint Mr. Valentine's successor as such administrator, or it may appoint some other person, or different persons, for each of the estates.

SHERIFFS AND CITY SERGEANTS—Summons Issued by Commissioner of Revenue—Duty to Serve. (34)

HONORABLE WILLIAM M. McCLENNY
Commonwealth's Attorney for Amherst County

August 12, 1957.

This is in response to your letter of August 9, 1957, inquiring if it is a sheriff's duty to serve a summons issued by the Commissioner of Revenue under Section 58-860, Code of Virginia. It is noted that the statute provides that the Commissioner may "summons such taxpayer by registered letter or otherwise", thereby leaving the manner of the summoning to the discretion of the Commissioner of Revenue. Moreover, this is an official proceeding and careful safeguards should be taken to secure a lawful summons. Accordingly, it would appear that the Commissioner could determine to have a summons issued and served by the office of the sheriff.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS—Estates Administered by—Effect of and Procedure to be followed upon Death of Sheriff—How Administrator de bonis non Acquires Assets. (271)

May 29, 1958.

HONORABLE THOMAS E. WARRINER, JR.
Commonwealth's Attorney for Brunswick County

I am in receipt of your letter of May 26th, in which you make further inquiry concerning the matter originally presented in your communication of May 7, 1958, and discussed in my opinion of May 8, 1958. With respect to your initial question concerning the manner in which estates, committed to a sheriff in accordance with the provisions of Section 64-124 of the Virginia Code and still unsettled at the time of the sheriff's death, should be further administered and ultimately settled, I was of the opinion that the court concerned might "appoint an administrator de bonis non for each separate estate that was being administered by the sheriff at the time of his death."

You now request further clarification, by presenting the following question and observations:

"Specifically, we would like to know how the administrator de bonis non, appointed by the Court as suggested in your opinion, acquires the assets of the various estates being administered by the deceased sheriff at the time of his death. For example, how will the assets be transferred from the estate of H. E. Valentine, Sheriff, Administrator, to the new administrator de bonis non? If there were a qualification on the estate of H. E. Valentine, it is possible that the administrator of his estate could transfer those assets. But if there is no qualification, it would seem that the administrator de bonis non would have no assurance concerning the location of, amount of, or character of the assets of the various estates. Nor, it would seem, could the personal representative of the estates being administered by H. E. Valentine, Sheriff, be, by the mere qualification of a new administrator de bonis non, absolved of the obligation to account for administration up to the time of death. While it may be determined that H. E. Valentine, Sheriff, does not have pending as Administrator any estates with substantial or dispersed assets or where the administration thereof is complicated, it would seem that such is a possibility and that there ought to be some method of ascertaining the character and extent of each estate and an accounting had before a new administrator de bonis non takes possession."

As I pointed out in my opinion of May 8th, I feel that the proper course to follow in any case where an administrator of an estate dies before completing his duties incident to such estate is for the court to appoint an administrator de bonis non. By virtue of his appointment, such administrator becomes entitled, and, it would seem under obligation, to take possession of the estate involved wherever it may be. If a proper certificate of his appointment is presented to any bank in which monies belonging to the estate are deposited, the bank will be required to deliver the money or transfer the account to the new administrator. Such an administrator would be entitled to examine the files and records of the deceased administrator wherever found. I can see no justification for the appointment of a personal representative of the deceased sheriff.

In case a dispute should develop between the administrator de bonis non and any of the heirs of the late sheriff with respect to the title or ownership of any assets—that is, whether such assets were part of an estate being administered by the late sheriff or belonged to him personally, then, of course, appropriate court proceedings would be necessary in order to resolve the question. No doubt the late sheriff's records, together with any appraisals that were made, will reveal the nature and extent of the assets of each estate that was being administered at the time of the sheriff's death.
This is in reply to your letter of October 10, 1957, which reads as follows:

"The Department of Health, Education, and Welfare has raised the question as to whether or not a Delinquent Personal Property Tax Collector, appointed by a County Board of Supervisors for a term of four years, giving bond in the amount of $1500.00 at the time of taking the oath of Office, and retaining one-third of the taxes collected, is covered under the Federal-State Social Security agreement.

"The Tax Collector is furnished an office, utilities and some equipment, however, must provide out of his funds for any personnel assistance which might be required.

"In this particular case, the Tax Collector has paid FICA self-employment taxes for the years: 1951, 52, 53, 54, 55, and 1956.

"Your opinion is respectfully requested as to whether or not the Tax Collector is covered under the Federal-State Social Security agreement."

I find that this tax collector was appointed pursuant to the provisions of section 58-991 of the Code. Under the provisions of this section, he is vested with all the power and authority to enforce collections by levy, distress, or otherwise, as is vested in the treasurer of the county.

It is stated in your letter that the appointment is for a term of four years, and that the tax collector was required to take the oath of office and execute a bond in the penalty of $1500.

I am of the opinion that the tax collector in question is an officer of the political subdivision in which he was appointed by the board of supervisors. It follows, therefore, that under the provisions of section 51-111.2 (c) of the Code this tax collector would be an employee and entitled to social security coverage.
Security coverage the employees involved in this instance, the Governor of the State shall certify to the Secretary of Health, Education, and Welfare that the following conditions have been met:

"(A) A referendum by secret written ballot was held on the question of whether service in positions covered by such retirement system should be excluded from or included under an agreement under this section;

"(B) An opportunity to vote in such referendum was given (and was limited) to eligible employees;

"(C) Not less than ninety days' notice of such referendum was given to all such employees;

"(D) Such referendum was conducted under the supervision of the governor or an agency or individual designated by him; and

"(E) A majority of the eligible employees voted in favor of including service in such positions under an agreement under this section."

It will be noted that under (B) the Governor is required to certify that an opportunity to vote in such referendum was given, and was limited, to eligible employees.

Since it is clear from the facts presented in your letter and the accompanying papers that the opportunity to vote in such referendum was not limited to eligible employees, but that 101 ineligible persons were offered an opportunity to vote, it follows that the Governor would not be in a position to make the certificate as required by the statute.

Inasmuch as the election held on December 11, 1957, was not held in accordance with the provisions of law, I am of the opinion that it was an invalid election and that, therefore, the proceedings had with respect to said election are void and of no effect.

SOIL CONSERVATION—State Committee May Not Loan Funds to Watershed Improvement Districts—But May to Local Soil Conservation Districts. (33)

August 9, 1957.

COLONEL J. H. BRADFORD
Director of the Budget

I am in receipt of your letter of August 7, 1957, in which you point out that Item 473-A of the Appropriation Act of 1956 provides for an appropriation of $150,000.00 to the State Soil Conservation Committee for "watershed development with Federal aid". You inquire whether or not these funds may appropriately be used to make loans to watershed improvement districts for work involving Federal aid.

I am unable to discover any provision of the Virginia Code which authorizes the State Soil Conservation Committee to make loans to watershed improvement districts; however, the Committee is authorized by Section 21-10(1) of the Code to make loans to the supervisors of soil conservation districts for carrying out the powers and programs of such districts. One of the stated purposes of the Soil Conservation Districts Law (Title 21, Chapter 1) is to prevent floodwater and sediment damages, and further agricultural phases of the conservation, development, utilization and disposal of water throughout the Commonwealth. See,
Section 21-2(c)(d). In furtherance of this objective, local soil conservation districts are authorized to establish or perform works of improvement for flood prevention or agricultural phases of the conservation, development, utilization and disposal of water within each district, Section 21-56, and to make loans to any agency, governmental or otherwise, for carrying out such works of improvement. Section 21-57, Code of Virginia (1950) as amended. In light of the foregoing, I am of the opinion that the funds comprising the appropriation in question may be loaned by the State Soil Conservation Committee to local soil conservation districts and that such funds may, in turn, be loaned by local soil conservation districts to local watershed improvement districts, so long as such funds are utilized for watershed development with Federal aid and all necessary legal steps have been taken to perfect the loan in accordance with the requirements of Title 21 of the Virginia Code.

You further inquire whether or not the excess income derived from the rental of certain equipment by the State Soil Conservation Committee pursuant to the provisions of Section 21-11 of the Code, which revenues constitute a special fund in the State treasury and have been reappropriated by Item 275 of the Appropriations Act of 1956, may be utilized for the purposes specified in Item 473-A of the Appropriations Act.

In this connection, the terminal sentence of Section 21-11 of the Virginia Code prescribes:

"The income derived from the sale or rental provided for in this section and in Sec. 21-65 shall be paid into the State treasury, segregated, and placed in a revolving fund for use for the maintenance, storage, repairs and replacements of the machinery and other equipment. (Italics supplied).

In light of the language italicized above, I am of the opinion that the special funds appropriated by Item 275 of the Appropriation Act may not be used for the purposes stated in Section 473-A of the Appropriations Act but must be utilized in conformity with the directive of Section 21-11 of the Virginia Code.

SOIL CONSERVATION—State Committee—Who are Members with Voting Rights—No Authority to Contribute to State Association of Supervisors. (53)

HONORABLE JOHN H. DANIEL
Member House of Delegates

In response to your letter of September 18, 1957, regarding four inquiries in connection with the Soil Conservation District Committee and the Soil Conservation District Supervisors, the questions and answers will be hereinafter set forth:

"1. Has the acting director of the Agriculture Extension Service, W. H. Daughtry, Jr., voting rights on the State Soil Conservation Committee?"

This office is advised that Mr. Daughtry is actually designated as Director of the Agricultural Extension Service by the Board of Visitors of V. P. I. under an agreement of understanding with the U. S., and is listed as Director by the Division of Personnel of the Commonwealth. In accordance with the foregoing, it
appears that Mr. Daughtry has voting rights as the Director of the State Agricultural Extension Service on the State Soil Conservation Committee.

"2. Does the State Conservationist, who is an appointee of the Secretary of Agriculture, have a right to vote on the State Soil Conservation Committee (the State Soil Conservationist is an employee of the Federal Government, who is a member of the State Soil Conservation Committee by reason of invitation by the State Soil Conservation Committee)?"

Section 21-6, Code of Virginia, provides, in part, that "the Committee may invite the Secretary of Agriculture of the United States of America to appoint one person to serve with the above mentioned members as a member of the committee. Accordingly, such appointee by the Secretary at the invitation of the Committee would have a right to vote as such person is given the status of a member of the Committee.

"3. Can a member of a State Soil Conservation Committee, who is unable to attend a meeting of the Committee, designate an agent to represent him at such meetings. If so, does this designated individual have the same authority to vote as the member of the Committee? If he does have a right to vote, would it be necessary for him to have a proxy of the person he is representing, or could he vote without the proxy?"

Section 21-8, Code of Virginia, provides, in part, that "a majority of the Committee shall constitute a quorum, and the concurrence of a majority, present at any meeting, in any matter within their duties shall be required for its determination". The foregoing requirement of presence at any meeting appears to prohibit the authority to designate any representative to sit in the place of an actual member and further appears to prohibit any use of a proxy.

"4. In connection with the Soil Conservation Districts, we have in Virginia what is called the Virginia Association of Soil Conservation Districts. Can the State Soil Conservation Committee give financial and other assistance to the Virginia Association of Soil Conservation Districts, an organization of Soil Conservation District Supervisors formed to promote and develop the District program as they can to individual Districts as authorized under section 21-10.(1) of the Soil Conservation Districts law of Virginia."

This office is not advised of any authority for the giving of assistance to the Virginia Association of Soil Conservation Districts. The authority to give assistance contained in Section 21-10.(1), as amended, is limited "to the supervisors of soil conservation districts, organized as provided hereinafter, in the carrying out of any of their powers and programs".

The phrase, "organized as provided hereinafter", relates to districts created under Article 3 of Chapter 1, Title 21, and obviously supervisors of such districts would be the only officials who could qualify for the assistance contemplated by Section 21-10(1). The Virginia Association is not included within the scope of the statute.
STATE TREASURER—Expenditures and Accounts—May keep all Funds in one Bank Account or may have Separate Bank Accounts—Appropriation Act Not Required for Investment or Trust Funds. (282)

June 16, 1958.

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of June 11, 1958, which reads as follows:

"Supplementing our conferences with you, the State Treasurer and the State Comptroller with respect to certain changes in procedures affecting the offices of the aforementioned officers, we should appreciate your opinion as to the legality of making certain changes which we believe will establish a more efficient system of checks and balances between the offices of the Treasurer and the Comptroller.

"At the present time the Treasurer is maintaining a number of bank accounts designated for specific funds—such as, literary fund, sinking funds, endowment funds and various other special and trust funds; and such funds are disbursed on checks of the Treasurer without any warrant of the Comptroller. The questions we have are as follow:

1. May the bank accounts for the funds enumerated above be combined with the General Treasury Cash Bank Account?
2. Should not all disbursement of these funds be made upon warrants issued by the Comptroller?

"Because of the restriction of Section 2-200 of the Code of Virginia, which provides in part that No money shall be paid out of the State treasury except in pursuance of appropriations made by law', we should like to point out that no provision is contained in the appropriation bills for the disbursement of these funds."

All of the various statutes relating to the duties and functions of the offices of State Treasurer and State Comptroller were discussed thoroughly in a conference between a member of our staff, the State Treasurer, the State Comptroller and representatives of your office. At this conference it was brought out that it has been the policy and practice of the State Treasurer to maintain separate bank accounts for various funds such as Sinking Fund, Literary Fund, Endowment Funds, and various other special and trust funds. I am of the opinion that the Treasurer may, if he desires, and finds it practical to do so, maintain separate bank accounts for various funds such as enumerated above. But I am of the further opinion that there is no statutory prohibition against a Treasurer maintaining a single account in the name of the Treasurer in the various depositories in which he deposits State funds or other funds in his custody. Under such procedure the Treasurer, of course, would have to maintain appropriate ledger accounts with respect to the various funds deposited to his credit.

With respect to your question No. 2, I direct your attention to the following sections found in Article 6 of Chapter 14 of Title 2 of the Code: Section 2-201; Section 2-202; Section 2-204; Section 2-205; Section 2-206; Section 2-207.

These sections relate to disbursements of the State funds generally. In addition to the above sections, I wish to specifically call attention to Section 2-162 and Section 2-170. These two sections are as follows:

"In the Department of Accounts and Purchases the Comptroller shall maintain a complete system of general accounting to comprehend the financial transactions of every State department, division, officer, board, commission, institution or other agency owned or controlled by the
REPORT OF THE ATTORNEY GENERAL

265

State, whether at the seat of government or not. All transactions in public funds shall clear through the Comptroller's office."

"On the last day of each quarter of the fiscal year, the Comptroller shall compare the books of his office with those in the State Treasurer's, and strike the balance on his books, showing the amount of money in the State treasury, which balance he shall carry forward to the next quarter."

These two sections, together with the other sections cited herein and other provisions of the Code not specifically referred to, clearly demonstrate that it is the intention of the General Assembly that there shall be maintained in the office of the Comptroller a control over the expenditures of all State funds. This can only be done by the Treasurer making payments out of the State treasury on warrants issued by the Comptroller. Unless this procedure is strictly adhered to it would be impossible to comply with the provisions of Section 2-170.

In the last paragraph of your letter you raise the following question:

"Because of the restriction of Section 2-200 of the Code of Virginia, Virginia, which provides in part that 'No money shall be paid out of the State treasury except in pursuance of appropriations made by law,' we should like to point out that no provision is contained in the appropriation bills for the disbursement of these funds."

Section 2-200 to which you refer, reads as follows:

"No money shall be paid out of the State treasury except in pursuance of appropriations made by law.

"No appropriation to any department, institution or other agency of the State government, except the General Assembly and the judiciary, shall become available for expenditure until the agency shall submit to the Director of the Division of the Budget quarterly estimates of the amount required for each activity to be carried on, and such estimates shall have been approved by the Governor."

At the conference in my office it was stated that in some instances no specific appropriations are contained in the General Appropriation Act and the point was illustrated by referring to the Literary Fund. The question was raised as to the authority of the Comptroller to issue a warrant for the investment of literary funds in the absence of an appropriation. With respect to this specific fund, as well as various trust funds which by statute or the terms of the trust are segregated and designated for specific purposes and none other, it is not necessary that an appropriation be made. Section 186 of the Constitution and the statute in question have reference to the expenditure of State funds which are received from the revenues collected by the State in the form of taxes, licenses, and other related income classed as revenue. While it is true that the Literary Fund has been built up and is added to from year to year from the sources set out in Section 134 of the Constitution, these funds are not subject to appropriation due to the fact that they may only be used for the purpose of making loans to the localities and other investments in accordance with the provisions set out in Chapter 7 of Title 22 of the Code.

Section 22-102 of the Code directs that The State Board of Education shall invest the capital and unappropriated income of the Literary Fund in securities that are legal investments under the laws of the State for public sinking funds.

When the State Treasurer invests public funds in his custody, including the Literary Fund, he is not "paying money out of the State treasury." A Literary Fund loan to a county or city of this State is an investment. In my opinion, there is no provision in the Constitution or Code of Virginia which requires an appropriation to be made by the General Assembly before public funds may be
invested; appropriation by the General Assembly is required if the funds are to be paid out or expended.

Where moneys are donated to the State in the nature of a trust, such a fund is not a revenue requiring an appropriation before it can be expended so as to carry out the conditions and terms of the trust. These funds are distributed in accordance with the directives of the donors and, therefore, the State Treasurer is acting in the capacity of trustee, and hence no appropriation is required. Any State officer when carrying out the provisions of such a specific trust acts as trustee rather than strictly as a State official.

SUPPORT LAWS—Uniform Reciprocal Enforcement—Person May Not be put on Convict Road Force. (161)

HONORABLE L. BROOKS SMITH, Judge
Juvenile and Domestic Relations Court

This will reply to your letter of January 20, 1958, in which you point out that Section 20-88.26 of the Code of Virginia (1950) as amended, authorizes the courts of this State—when acting as the responding state in proceedings under the Uniform Reciprocal Enforcement of Support Act—to punish a defendant who violates any order of the court "to the same extent as is provided by law for contempt of the court in any other suit or proceeding cognizable by the court." You inquire whether or not a court so acting could sentence a defendant to the State convict road force under the provisions of Section 20-61 of the Virginia Code, instead of punishing such defendant for contempt.

I am constrained to believe that your inquiry must be answered in the negative. Desertion and non-support proceedings under Section 20-61 et seq. of the Virginia Code are criminal in nature, such proceedings accord no civil remedy, and it is only upon being convicted of a misdemeanor for violation of the provisions of Section 20-61 that a husband or father may be sentenced to the State convict road force. See, Report of the Attorney General (1955-56), p. 118. On the other hand, proceedings under Article 3 of the Uniform Reciprocal Enforcement of Support Act are civil in character, and while a defendant who violates any order of the court may be punished for contempt in accordance with the provisions of Section 20-88.26, no provision is made for the commitment of such defendant to the State convict road force or for the transmission of support payments to the court by the State Highway Commissioner. I am, therefore, of the opinion that a defendant who violates an order entered in proceedings initiated under the Uniform Reciprocal Enforcement of Support Act may not be sentenced to the State convict road force under the provisions of Section 20-61 of the Virginia Code.

SUPPORT LAWS—Uniform Reciprocal Act—Proper Parties to Initiate Proceedings under—Proceedings under not required before seeking Extradition for Non-Support. (199)

HONORABLE L. BROOKS SMITH, Judge
Juvenile and Domestic Relations Court

This will reply to your letter of March 20, 1958, in which you request to be advised concerning the identity of the proper party or parties to initiate proceedings under the Uniform Reciprocal Enforcement of Support Act (Code of
Virginia (1950) as amended, Section 20-88.12 et seq.), and inquire whether or not it is necessary to invoke the provisions of the Uniform Reciprocal Enforcement of Support Act before attempting to extradite a person charged with desertion and non-support and secure his return to Virginia. These questions will be considered in the order stated.

Section 20-88.20 of the Virginia Code declares that all duties of support contemplated by the above mentioned Act are enforceable by petition and confers jurisdiction of all proceedings under such Act upon the circuit or corporation court—or juvenile and domestic relations court—of the county or city (1) in which the obligee resides or (2) where the duty of the support last arose, at the option of the obligee. In light of this provision, I am of the opinion that the obligee, i.e., the person to whom a duty of support is owed, would be the proper party to institute proceedings under the Act in question, subject to the express qualifications stated in Sections 20-88.19 and 20-88.20:1 of the Virginia Code. Of these last mentioned statutes, the former prescribes that the State or a political subdivision thereof which has furnished support to an obligee shall have the same right to invoke the provisions of the Act as the obligee to whom support was furnished, for the purpose of securing reimbursement for expenditures so made, while the latter prescribes that a petition on behalf of a minor obligee may be brought by a person having legal custody of such minor, without appointment as guardian ad litem. In this general connection, I am informed by the Department of Welfare and Institutions that it is customary for the local boards of public welfare to render assistance to obligees in the preparation and filing of petitions for support, especially when application has been made by such obligees to the local board for aid under the public assistance laws of the Commonwealth.

With respect to the second question presented, I am of the opinion that it would not be necessary for proceedings to be instituted under the Uniform Reciprocal Enforcement of Support Act before initiating extradition proceedings to secure the return to Virginia of a person charged with desertion and non-support. Extradition proceedings would be instituted by the Attorney for the Commonwealth of the political subdivision in which the charge of desertion and non-support is pending. The Attorney for the Commonwealth would request the Governor of Virginia to secure extradition of the person charged and would furnish necessary particulars of the case. The cost of returning the individual in question to Virginia, if extradition is granted, would be borne by the Commonwealth and the political subdivision, the Commonwealth assuming one-third of the costs. Any attempt to obtain extradition in situations of the type under consideration would, of course, be subject to the provisions of Section 20-88.17 of the Virginia Code which declares that any obligor contemplated by Section 20-88.18 who submits to the jurisdiction of the court of the State from which extradition is sought and complies with such court's order of support, shall be relieved of extradition for desertion or non-support during the period of such compliance.

TAXATION—City Utilities Located in County, Operated at a Profit—Taxable, Retroactive for Three Years. (86) November 7, 1957.

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

This is in reply to your letter of October 29, 1957, which reads as follows:

"The Commissioner of Revenue of Rockingham County has brought to the attention of the Rockingham County Board of Supervisors that the City of Harrisonburg has never been assessed for city utilities situated
within Rockingham County, furnished county consumers at a profit to the city, in accordance with Section 58-19 of the Code.

"Since the assessment has not heretofore been made, please advise if the county has the right to make this assessment this year and for what years it would be retroactive."

I am of the opinion that §§58-1164 and 58-1165 of the Code would apply. Under these provisions an assessment may be made for the then current year and the three tax years next preceding the then current year.

I find that this conclusion is in accord with prior informal opinions of the State Tax Commissioner.

---

TAXATION—Delinquent Real Estate—Application for Tax Deed—Attorney’s Fee Can Not be Assessed as Cost. (177)  
February 11, 1958.

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

This is in reply to your letters of January 29 and February 3, 1958, in which you request my opinion as to whether or not the clerk can include attorneys’ fees as a part of the cost where an application for a tax deed has been made pursuant to §58-1083 of the Code of Virginia and an heir of the original owner of the property has redeemed the property after the application for the tax deed has been filed.

I can find no provision in the Code of Virginia which would authorize or permit an attorney’s fee to be taxed as part of the costs in a proceeding such as this. I am of the opinion that §58-1093 of the Code which provides how real estate may be redeemed, and provides that the clerk shall assess costs, refers to the costs listed in §58-1092 of the Code.

---

TAXATION—Delinquent Real Estate—Penalty and Interest—Disputed Claim—Board of Supervisors No Authority to Compromise or Release. (132)  
December 19, 1957.

HONORABLE BAXLEY T. TANKARD  
Commonwealth’s Attorney for Northampton County

This is in reply to your letter of December 10, 1957, in which you request my opinion as to whether or not the Board of Supervisors of Northampton County has the authority to remove the payment of interest and penalties on delinquent real estate taxes. You further request my opinion as to whether or not the Board of Supervisors has the right to compromise a disputed tax claim for a lesser amount than the original assessment, plus penalty and interest.

Section 58-963 of the Code of Virginia provides that any person failing to pay any State taxes or county and city levies on or before the 5th day of December shall incur a penalty thereon which shall be added to the amount of taxes or levies due from such taxpayer, and which shall when collected by the treasurer be accounted for in his settlements. Section 58-964 of the Code provides for interest on any unpaid taxes or levies from the 30th day of June of the year next following the assessment year and provides that the interest shall be collected upon the principal and penalties and shall be accounted for by the officers charged with the duty of collecting such taxes or levies. As you will note from reading these two
sections, the mandatory word "shall" is used. Therefore, I am of the opinion that penalties and interest, if due under these two sections of the Code, cannot be removed by the board of supervisors of a county or by anyone who may be charged with the duty of collecting taxes.

I know of no provision in the Code which authorizes the board of supervisors to compromise a tax claim. The board of supervisors of a county has no authority over individual assessments or collection of taxes. This is a duty of the Commissioner of Revenue and the Treasurer and, if these officers properly perform their duties as prescribed by law, the board of supervisors has no authority to change an assessment or compromise a tax claim.

---

TAXATION—Licenses—Cigarette Vending Machines—License on Premises Rather than Machine—More than One Machine at Same Location. (278)

June 12, 1958.

HONORABLE JAMES W. ROBERTS
Member House of Delegates

I am in receipt of your letter of May 29, in which you forwarded to this office certain correspondence between the Old Dominion Tobacco Company and Mr. H. T. Leake, Director of the Corporation Division of the State Tax Department, concerning the application of the provisions of Section 58-362.1 of the Virginia Code to a situation involving the installation of more than one cigarette vending machine upon the same premises. The specific circumstances of the situation about which you inquire are stated in the company's letter of May 28, 1958, in the following language:

"Recently, the pattern of smokers' preference has become such that a great many brands must be stocked at each location. This has necessitated, in some instances, placing two small machines, side by side, or in close proximity to each other in order to offer the many brands now in demand. These instances are rare because the new pattern has brought into production and use larger machines whose capacity, as a single unit, is ample. We have, however, always considered the two small machines so located as a single location and such is the custom of the trade."

Section 58-362.1 of the Virginia Code prescribes:

"The use of a cigarette vending machine on premises which are not already covered by a tobacco retailer's license shall require the owner of such vending machine to take out a tobacco retailer's license for that location." (Italics supplied).

In light of the language italicized above, it would appear that the critical consideration in determining the number of tobacco retailers' licenses required in any particular instance is the number of locations or premises upon which cigarette vending machines are used, rather than the number of cigarette vending machines utilized at one location. I am, therefore, of the opinion that the position stated in the company's letter of May 28 and your letter of May 29 is well taken and that only one tobacco retailers' license would be required under such circumstances. I have discussed this matter with the Honorable C. H. Morrissett, State Tax Commissioner, and am authorized to express his concurrence in this view.

I might add that the language contained in Mr. Leake's letter of May 27, 1958,
was taken from an opinion of the State Tax Commissioner dated May 20, 1958; however, the precise situation concerning which you inquire was not presented to the Commissioner for decision in that instance, and the language in question was not intended to enunciate a general rule of unqualified application to all cases involving Section 58-362.1 of the Virginia Code.

TAXATION—Licenses—County, City or Town May Impose License Greater than State if No Statutory Restrictions. (225) April 18, 1958.

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

This is in reply to your letter of April 15, 1958, which reads as follows:

"Section 58-377 of the Code imposes a State license tax of $500.00 on fortune tellers, etc., for each county. Section 58-377.1 of the Code provides that the governing body of each county is authorized to impose a license tax on fortune tellers, etc., but does not provide for the amount of the license tax.

"We understand that some of the adjoining counties have, by ordinance, imposed a license tax of $1,000.00 on fortune tellers, etc. A question has arisen as to whether or not a county can impose a greater license tax than that required by the state for engaging in the business of fortune telling, etc. We would, therefore, appreciate your opinion as to whether or not the Board of Supervisors may, by ordinance, impose a license tax on fortune tellers, etc., under Section 58-377.1 of the Code, supra, in an amount greater than that imposed for such business by the state under Section 58-377 of the Code, supra."

I am enclosing a copy of an opinion rendered by this office on January 22, 1931, with respect to Section 296 of the Tax Code (now 58-266.1, Code 1950), in which it was held that the Town of Galax could impose a license tax under that section at a higher rate than fixed by law. Also, in the case of Home Brewing Company v. Richmond, 181 Va. 793, 27 S. E. (2d) 188, our Supreme Court of Appeals held that an ordinance imposing a license tax of $200.00 in the manufacture of bottled soft drinks was valid although the State license tax imposed for the same purpose was only $25.00.

Section 58-377.1 of the Code is analogous to Section 58-266.1, in that it does not contain any limitation upon the rate of tax the county may impose.

In light of these decisions, I am of the opinion that the county may impose a greater license tax under Code Section 58-377.1 than is imposed by the State for the same privilege under Section 58-377 of the Code.

TAXATION—Local Licenses—Photographers—Persons Transmitting Pictures Out of State to be Copied—Not Subject to. (142) December 30, 1957.

HONORABLE GRADY W. DALTON
Member of the House of Delegates

I am in receipt of your letter of December 19, 1957, in which you outline a situation involving the conducting of a photography business in the Town of Richlands by interests located outside the State of Virginia. You inquire whether
or not the Town of Richlands may legally enact an ordinance requiring those operating this type of enterprise to purchase a business license.

From the facts stated in your communication, it would appear that the answer to your inquiry is dictated by the decision of the Supreme Court of Appeals of Virginia in the case of Commonwealth v. Olan Mills, Inc., 196 Va. 898. In that case, the Court held that Section 58-393 of the Virginia Code—which imposed a State license tax upon every photographer and every person canvassing or acting as agent for a photographer in transmitting pictures or photographs to other points for the purpose of having them copied—was not applicable to Olan Mills, Inc. upon the facts presented in that case. As stated in the Court's opinion, these operative facts were as follows:

"Olan Mills is a Tennessee corporation with its principal office in Chattanooga in that State, but qualified to do business in Virginia (Code Sec. 13-211). In its operations an advance sales unit, composed of from two to five persons, employed by and under the supervision of Olan Mills, solicits orders for photographs in a municipality in Virginia. All orders are accepted for future delivery, to be manufactured, processed and finished in Chattanooga. At the time the order is accepted the customer is notified when and where to appear to have a 'sitting' or 'exposure' made, and at the same time a fifty-cent deposit is collected. These sittings or exposures are made at a hotel or other location rented on a temporary basis. The corporation reserves the right to accept or reject the order given its salesman.

"At the appointed time and place a cameraman, also employed by and under the supervision of the Chattanooga office of the corporation, takes the sitting or exposure and an additional deposit of fifty cents is then collected. The negatives so taken are forwarded by mail to the corporation's plant in Chattanooga and are there developed, processed and proofs manufactured. The proofs are then sent by mail to another agent of the corporation at the place where the order was taken. The customer is notified by mail as to the time and place to select the proof and order any additional pictures desired. For the one dollar previously deposited the customer receives one 8 x 10 unmounted photograph and orders for additional photographs are sent by mail to the corporation's plant in Chattanooga where the finished photographs are processed or developed and mailed directly to the customer. Any amount due for the additional photographs, mountings, tinting, etc., all of which is done in Chattanooga, is paid in cash on delivery.

"No part of the processing or manufacturing is done within the State of Virginia."

Pointing out that the activities of Olan Mills Inc. constituted an over-all interstate business the Court declared:

"The soliciting of the orders, the act of the cameraman, the developing and processing of the negatives into proofs, the processing of the proofs into the finished photographs and the interstate movement which links these acts together and brings to consummation the sale of the finished picture, constitute an integral chain of interstate commerce. The act of the cameraman, which is the second step in the interstate transaction begun by the act of the solicitor, undeniably non-taxable, cannot be regarded as an activity 'in a vacuum', but it is an essential part of a connected series of events which together made one composite transaction in interstate commerce which the Commerce Clause of the Constitution shelters from the application of a State license tax of the kind created by Sec. 58-393."
It would appear that the situation presented in your letter is substantially identical to that considered by the Supreme Court in the above mentioned case, and I believe that the Court's decision therein would be equally applicable in this instance. I am, therefore, of the opinion that the Town of Richlands may not enact an ordinance imposing a local license tax upon businesses conducted in the manner you describe.

TAXATION—Motor Vehicles—Situs of for Personal Property Taxes—Owner Domiciled in one County—Resides in Second County and Vehicle Principally Garaged in Second. (295)

June 25, 1958.

MR. A. N. NICCOLLS
Deputy for Director of Finance County of Henrico

This will reply to your letter of June 18, 1958, in which you call my attention to the provisions of Section 58-834 of the Virginia Code and request an opinion of this office concerning the applicability of this statute to the following factual situation:

"A taxpayer, residing in Henrico and maintaining his legal residence in King William County, has his automobile registered in King William and reports it to that County for tax purposes. He lives in Henrico County, is buying a home in Henrico, reports his household furniture to Henrico, purchases Henrico County license tags for the automobile and garages it in Henrico. He works in the City of Richmond and uses the car for transportation to and from work."

You inquire whether the automobile in question should properly be taxed as tangible personal property by the County of Henrico, where it is garaged and used, or whether such tax should be imposed by King William County, where the vehicle is registered and located on January 1 of each year.

Section 58-834 of the Virginia Code provides:

"The situs for the assessment and taxation of tangible personal property, merchants' capital and machinery and tools shall in all cases be the county, district or city in which such property may be physically located on the first day of the tax year."

The first day of January is established as "the first day of the tax year" by Section 58-835 of the Virginia Code.

Particularly pertinent to the question you present is the decision of the Supreme Court of Appeals of Virginia in the recent case of Hogan v. County of Norfolk, 198 Va. 733. The critical inquiry in that case concerned the proper situs of certain taxicabs which were owned by a resident of the City of Portsmouth, Virginia, and were operated and physically present in the County of Norfolk on the first day of each tax year under consideration. Sustaining an assessment of tangible personal property taxes imposed by the County of Norfolk, the Supreme Court of Appeals of Virginia—in response to the taxpayer's contention that "just being in Norfolk County" was not sufficient to make the automobiles under discussion taxable by the county—observed (198 Va. at 735):

"That would be true if it also appeared that they were not physically located in that county in the sense that they belonged there, but that their presence there was transitory or temporary and that was not where they really belonged.
At the present day, the separation of the situs of personal property from the domicil of the owner for the purposes of taxation is a familiar doctrine, and the maxim "mobilia sequuntur personam" is no longer controlling on the question of taxation of personal property which has an actual situs elsewhere than at the owner's domicil. It may be taxed where it is situated or located, although the domicil of the owner is elsewhere. The test of situs for taxation purposes is the place of its location and use. * * *" 51 Am. Jur., Taxation, Sec. 449 at p. 464.

"In any event the common law rule that the situs of personal property for taxation follows the owner may be changed by the legislature at its pleasure. Commonwealth v. Ches. & Ohio Ry. Co., 118 Va. 261, 281-2, 87 S. E. 622, 629. It has been changed in Virginia by Sec. 58-834, which provides that the situs of tangible personal property for tax purposes is the county, etc., in which it is physically located. The situs for taxation as used in this statute means something more than simply the place where the property is. It does not mean property which is casually there or incidentally there in the course of transit, but it does necessarily involve the idea of permanent location like real property. It is sufficient if it is there and being used in such a way as to be fairly regarded as part of the property of the county. 84 C.J.S., Taxation, Sec. 115 at pp. 225-6." (Italics supplied).

Applying the criteria enunciated in the Hogan case to the situation presented in your communication, I am constrained to believe that the automobile concerning which you inquire is properly taxable as tangible personal property by the County of Henrico. So far as I am able to ascertain from the facts stated in your letter, the vehicle in question was only "casually" or "incidentally" in King William County on January first, it had acquired sufficient aspects of a "permanent location" in the County of Henrico and it was being used in Henrico County in such a way as to be "fairly regarded as part of the property" of the County of Henrico.

---

TAXATION—Payment of by Bad Check—Procedure to be followed by Treasurer.

(290)

June 20, 1958.

HONORABLE ROGER C. SULLIVAN
City Treasurer

This is in response to your letter of June 18, 1958, regarding your authority to swear out warrants for the purpose of bringing taxpayers into court who have given bad checks in payment of taxes and licenses. Your letter is not exactly clear whether the warrant referred to is a criminal warrant or a civil warrant for the tax owed.

In the event criminal proceedings are involved, it is suggested that you always consult the Commonwealth's Attorney prior to instituting any action.

With regard to the collection of taxes for which a bad check has been received, it is noted that the tax has not been paid upon receipt of such bad check but is still due and outstanding. Accordingly, the regular procedures pertaining to the collection of unpaid taxes would apply. Enclosed is a copy of a letter dated June 2, 1953, to the Honorable Joseph C. Hutcheson, Commonwealth's Attorney for Brunswick County, discussing the procedures authorized for the collection of unpaid taxes.
This is in reply to your letter of March 21, 1958, which is in part as follows:

"A large number of foreign corporations have their regional offices in the District of Columbia. Some of them have their home offices there. The businesses done by these companies run the gamut from insurance to soft drink bottling. It is their policy and practice to own a great number of company cars and to permit their salesmen and agents to take these cars home with them at night. Of course, this is for the convenience both of the companies and the employees. In most cases the employees keep the cars in Washington during the day. In many cases they use them while traveling through Maryland, the District and Virginia. In some cases the agents admittedly spend more time in Virginia than in any other jurisdiction.

"These cars are registered in Washington, D.C. and therefore have District of Columbia titles. Tangible personal property taxes on the vehicles are paid to the District of Columbia.

"A few of the companies buy District of Columbia tags. However, most of them buy Virginia tags and buy county or city tags based on the residence of the employee who happens to be using the car at the time the purchase of tags is required. In some of our northern Virginia jurisdictions the Commissioners of Revenue, in order to help the State and the localities, countenance the practice of the purchase of state tags and local tags in Virginia, but do not compel the owner of the vehicle to pay the local tangible personal property tax where this has actually been paid to the District of Columbia. I understand that other localities take the position that the tangible personal property tax must be paid in addition to the license taxes.

"One of my primary concerns is that the attempt by some localities to levy what is in effect double taxation in the form of a tangible personal property tax will inevitably result in arrangements being attempted by the owners of these vehicles to refuse to pay the state license tags or the local license tags and to cause a loss in total revenues to either the State or the local governing bodies.

"My purpose in writing you is to ask you for an opinion as to the legality of the double tangible personal property tax. If this tax is paid in the District of Columbia where the owner has his place of business, where the vehicles are titled and have their place of business, can the same tax also be assessed by the jurisdiction in which the employees who live who bring the cars home overnight. Is there a situs in Virginia for tangible personal property taxation where the vehicles are not permanently located here, but are only temporarily located? Very respectfully I should like to call your attention to the case of Northwest Airlines v. State of Minnesota (1944) 322 U.S. 292, 88 Law. Ed. 956, 153 A.L.R. 245. I also refer you to Section 58-834 of the Virginia Code relating to situs for assessment of personal property subject to local taxation, and Section 58-835 making January 1 the date for tangible personal property tax situs. See also 51 American Jurisprudence, pages 466 to 474.

"I suppose basically my principal concern is what will happen if the
companies involved register their cars in the District, license their cars in the District, pay tangible personal property taxes in the District, keep the cars in the District on January 1 of each year and dole them out to their employees as they see fit at various times during the year. Of course, in many cases the cars are made available for one employee who may live in Alexandria and who gives up his job, in which event the car may then be turned over to another employee living in Falls Church or living in Maryland, or the District."

In my opinion, there is no constitutional prohibition against the localities imposing a property tax upon the automobiles in question. The power of the locality to impose the tax is not affected by the fact that the same automobile may be registered or licensed outside of the State of Virginia. It is likewise not affected by the fact that a similar tax may be imposed against the same automobile in the District of Columbia or some other jurisdiction outside of Virginia. For the purpose of taxation, under the provisions of Chapter 16 of Title 58, the automobiles in question should be treated as any other tangible personal property. The Commissioner of the Revenue, in determining whether or not the property is subject to assessment of personal property taxes, should consider the property as though it were any other personal property, not subject to registration and license tags under the provisions of the Motor Vehicle Code. The place of registration or the place of issuance of the license tag on the automobile does not govern or determine the situs of the vehicle for the purpose of personal property tax.

I have considered the case of *Northwest Airlines v. State of Minnesota*, cited in your letter. As pointed out in the dissenting opinion by Mr. Chief Justice Stone, the fact that the majority opinion held that the airplanes were subject to the Minnesota tax did not necessarily prohibit other jurisdictions from imposing a similar tax.

This office, of course, will cooperate in any efforts that may be made to work out a satisfactory method of handling problems such as the one presented by you. However, this is a matter in which the Department of Taxation, due to its experience in the field of taxation, could render more efficient service.

---

**TAXATION—Personal Property Returns—May Be Examined by Collector of Delinquent Taxes of County.**

(253)

May 19, 1958.

**HONORABLE F. L. WYCHE**

Commonwealth's Attorney of Prince George County

This is in reply to your letter of May 15th in which you state that the Board of Supervisors of your County has employed a Delinquent Tax Collector under the provisions of Section 58-991 of the Code, and you present the following question:

"Does the Commissioner of the Revenue have the authority to allow the delinquent tax collector to examine the tangible personal property return on file in his office for the purpose of determining the correctness of the local levy based upon the tangible personal property return?"

Section 58-46 of the Code contains the provisions with respect to the secrecy of the information shown on personal property returns. It will be noted that this
section contains a proviso to the effect that the inhibitions of this section do not extend to any matters required by law to be entered on any public assessment roll or book, nor to any act performed or words spoken or published in the line of duty under the law.

I am of the opinion that under this proviso the Collector of Delinquent Taxes would be entitled to examine the personal property return of any delinquent taxpayer who disputes the correctness of the tax bill.

__TAXATION—Petition for Correction of Erroneous Assessment of Real Estate—County May Employ Private Counsel to Defend. (184)__

February 21, 1958.

_Honoroble A. Dunston Johnson_
Commonwealth's Attorney for Isle of Wight County

This is in reply to your letter of February 18, 1958 in which you state that an owner of real estate in your county has filed a petition in the Circuit Court seeking relief from certain alleged erroneous assessments of real estate under §58-1145 of the Code of Virginia. You request my opinion as to whether or not the Board of Supervisors may employ and pay private counsel to assist the Commonwealth's Attorney in opposing this application for correction of alleged erroneous assessments of real estate.

Section 15-9 of the Code of Virginia provides that the board of supervisors may employ counsel to assist the attorney for the Commonwealth in any suit against the county. In the case of _Leesburg v. Loudoun National Bank_, 141 Va. 244, the Supreme Court of Appeals of Virginia held that this statute is applicable to a suit brought against the county for the correction of an alleged erroneous assessment of taxes. I am of the opinion, in view of §15-9 of the Code and the decision of our Supreme Court of Appeals in the above-cited case, that the Board of Supervisors may employ private counsel to assist you in the case now pending in the Circuit Court of Isle of Wight County.

__TAXATION—Photography Business—Change in Statute Does Not Subject Interstate Business to State Taxes. (285)__

June 18, 1958.

_Honoroble C. H. Morrissett_
State Tax Commissioner

This is in reply to your letter of June 11, 1958, in which you request my opinion as to the applicability and validity of the recently enacted Section 58-393.1 of the Code of Virginia as applied to the operations of Olan Mills, Incorporated. The company's operations are understood to be the same as were considered by the Supreme Court of Appeals of Virginia in its consideration of the applicability of Section 58-393 of the Code, and reported as _Commonwealth v. Olan Mills, Incorporated_, 196 Va. 898.

In reaching the decision that Section 58-393 of the Code is not applicable to photography businesses conducted partially within this State, as to the initial stages, and partially in another state as to the finishing processes, the Court based its conclusion on the ground that the stages of operation carried on in
Virginia could not be severed from the remaining stages so as to make those acts a taxable local incident separate and distinct from the sum of the other functions and activities which constitute interstate commerce.

Apparently Section 58-393.1 of the Code is designed to bring within the license requirement specified acts of photography conducted in Virginia. I am of the opinion that specifically setting forth the incidents of the operation carried on in Virginia does not alter the decision of the Court of Appeals that those specified activities cannot be severed from the total interstate activities so as to make the acts a taxable local incident.

In view of the foregoing, I am of the opinion that Section 58-393.1 of the Code cannot lawfully be applied to photography businesses carried on through interstate commerce as is done by Olan Mills, Incorporated.

TAXATION—Real Property—Military Housing Project—When Exempt. (55)

September 26, 1957.

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

This is in reply to your letter of September 6, 1957, in which you request my opinion as to whether or not the Toms Cove Apartments located in Chincoteague, Virginia are subject to county real estate taxes. Your letter reads as follows:

"Near the Chincoteague Naval Air Station the Bush Construction Company has built several apartment units for naval personnel under Public Law 1020 and the usual financing was made by the Federal Government.

"The County of Accomack assessed the real estate and has taxed said apartment units in the amount of $7,956.00.

"Under Public Law 874 and 815 the County of Accomack received moneys exceeding the taxed property amount above-listed, but the amount paid under the pupil allotment plan, Public Law 874, to the county was credited with part of the local levy representing the school levy.

"Under Public Law 1020, a copy of which I am enclosing herewith, the Toms Cove Corporation is claiming that there should be no tax collected by the County of Accomack under Title 5.

"Since the allowances made the county under Public Law 874 and 815 exceed the tax on the Toms Cove Corporation, this county would be in a dilemma in being unable to collect any taxes from the Toms Cove Corporation if their position is sound."

Section 511 of Public Law 1020, 84th Congress, reads, in part, as follows:

"Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by mortgage insured under such provisions of title VIII: Provided, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessees shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be
equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property."

I am of the opinion that these apartments are subject to the full amount of the real estate taxes which have been levied against them, unless the Toms Cove Corporation presents you with a statement by the Secretary of Defense showing the amount of any payments made by the Federal government to Accomack County with respect to said property in accordance with the proviso found in Section 511 of Public Law 1020.

---

TAXATION—Recordation—Assignment of Deed of Trust—Subject to—Procedure to Record Assignment. (257)

May 20, 1958.

HONORABLE JULIAN UPDIKE
Clerk, Circuit Court of Warren County

I acknowledge your letter of May 19th in which you enclose an assignment of a deed of trust and the note secured thereby. You have asked me for an opinion with respect to two questions—(1) whether or not the assignment is subject to the recording tax, and (2) whether or not the assignment will affect its purport.

In my opinion the assignment comes within the definition of a contract as contemplated by Section 58-58 of the Code and therefore would be subject to the recordation tax of 15 cents on every $100 or fraction thereof. The amount actually assigned on which the tax would be based is $34,036.09, plus the interest that has accrued thereon from the 27th of February, 1958 to the date of the assignment.

While this is a procedure different from that permitted under Section 55-66.1, I believe that it is sufficient, provided a marginal notation is made on the deed of trust showing that the assignment has been admitted to record and giving the deed book and page.

Of course, the assignors in this instance could execute a power of attorney designating an attorney in fact to make the marginal assignment as provided in Section 55-66.1. The power of attorney of course would not be subject to the recordation tax, but there would be the usual Clerk’s fee in connection with the recordation thereof.

I am enclosing a copy of an opinion rendered by the late Abram P. Staples, while he was Attorney General, which relates to the subject matter. This opinion is published in the Reports of 1941-42 at page 161.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Deed Exchanging One Piece of Real Estate for Another—Amount of Tax Based on Value of Both Pieces of Property. (188)

March 4, 1958.

HONORABLE G. O. CALDWELL, Clerk
Circuit Court of Giles County

This is in reply to your letter of February 26, 1958, in which you request my opinion regarding the method to be used in taxing the recordation of a deed pursuant to §58-54 of the Code of Virginia. You state that in this deed A conveys a parcel of real estate to B and, in the same deed, B conveys a separate parcel of real estate to A, the real value of the two parcels of real estate is assumed to be equal and there is no exchange of money.

Section 58-54 of the Code provides that the tax shall be based upon the consideration of the deed or the actual value of the property conveyed whichever is greater. In this deed two separate parcels of property are conveyed; therefore, the amount of tax should be based on the actual total value of both parcels of real estate. That is, if each parcel of real estate is worth $2,000 the tax should be based on the total value, or $4,000.

I am enclosing a copy of an opinion rendered by this office on January 24, 1946 to Honorable H. M. Walker, Clerk of the Circuit Court of Northumberland County, in which this office ruled that if a deed conveys more than one tract of land, then the tax should be based upon the total value of all the land conveyed.

TAXATION—Recordation—Exemption—Community Chest Not Exempt. (220)

April 16, 1958.

HONORABLE C. E. MORAN, Clerk
Corporation Court City of Charlottesville

This is in reply to your letter of April 11, 1958, which reads as follows:

"There has been presented in this office for recordation a deed of bargain and sale in which the grantee is a corporation whose name is Charlottesville and Albemarle Community Chest, Incorporated. Though the deed does not so state, I am advised that the property conveyed by this deed is to be used as a nursery for colored children.

"Paragraph (c) of the charter recorded in this office is as follows: "

'To coordinate therewith the soliciting, raising of funds by public appeal, public subscription or otherwise, to carry on the charitable, religious, and philanthropic work of all social agencies of this community which shall meet the standards of membership in this corporation which the Board of Directors shall from time to time establish in its by-laws.'

"Although Section 58-64, as amended by Acts of 1956, does not expressly mention such as the one under consideration as being included in Exemptions from Recordation Tax, it would appear that there should be no such tax in the deed to the Charlottesville and Albemarle Community Chest as presented in this office.

"I shall greatly appreciate your advice as to whether or not a recordation tax should be charged."

Section 58-64 of the Code, as amended, provides:

"The taxes imposed by §§58-54 and 58-55 shall not apply to any deed conveying real estate to an incorporated college or other incor-
porated institution of learning, not conducted for profit, where such real estate is intended to be used for educational purposes and not as a source of revenue or profit; nor to any deed conveying real estate to the trustee or trustees of any church or religious body, where such real estate is intended to be used exclusively for religious purposes, or for the residence of the minister of any such church or religious body; nor to any deed conveying property to the State or to any county, city, town, district or other political subdivision of this State, nor to any deed conveying property to the Virginia Division United Daughters of the Confederacy; nor to any deed conveying property to any nonstock corporation organized exclusively for the purpose of owning and/or operating a hospital or hospitals not for pecuniary profit; nor to any deed of trust or mortgage given by an incorporated college or other incorporated institution of learning, not conducted for profit, nor to any deed of trust or mortgage given by the trustee or trustees of a church or religious body; nor to any deed of trust or mortgage given by any nonstock corporation organized exclusively for the purpose of owning and/or operating a hospital or hospitals not for pecuniary profit. The words 'trustee or trustees' as used in this section mean the trustees mentioned in §57-8 and the ecclesiastical officers mentioned in §57-16."

Statutes granting exemptions from taxation must be construed strictly. Unless the exemption sought is clearly granted, the rule is well established that the exemption will not be allowed.

The wording of paragraph (c) of the charter of the corporation indicates that it is organized for the purpose of raising funds for what is commonly known as a Community Chest. I am unable to find any language in Section 58-64 that could be construed as creating an exemption from the recordation tax of a deed conveying property to a corporation, even though it is not operated for profit, organized for such a purpose. In my opinion, the tax may not be waived in this instance.

TAXATION—Recordation—Local—Proposed Model Ordinance—Determining Amount when Deed Conveys Land in More than One County. (264)

HONORABLE N. C. SHARP
Executive Secretary to the Board of Supervisors of Prince William County

This is in response to your letter of May 19th which reads as follows:

"1. Does the attached recordation tax ordinance comply with the intent of Section 58-65.1 of the Code of Virginia as amended by the General Assembly of Virginia?

"2. Do you have any suggestions for the rewording of any section of this ordinance as herein submitted to you by the Board of Supervisors of Prince William County?

"3. Can the Board of Supervisors of Prince William County have a public hearing on this ordinance prior to July 1 of this year?"

I suggest that the ordinance be redrafted as follows:

"PROPOSED RECORDATION TAX

"The Board of Supervisors of Prince William County, Virginia, at its regular meeting held at the County Courthouse in Manassas, Vir-
GINA, on ............................ ..., 1958, directed the advertisement in the manner prescribed by law of the following ordinance, which will be proposed for passage by the said Board of Supervisors at its next regular meeting to be held at the Prince William County Courthouse on ............................ ..., 1958, at ......... o'clock M., to wit:

"BE IT ORDAINED by the Board of Supervisors of Prince William County, Virginia, that the following ordinance be passed and ordained:

THAT THE BOARD OF SUPERVISORS of Prince William County doth impose a county recordation tax in an amount equal to one-third of the amount of the State recordation tax collectable for the State on the first recordation of each taxable instrument; provided, no tax shall be imposed under this ordinance upon any instrument in which the State recordation tax is fifty cents specifically; and provided further, that where a deed or other instrument conveys, covers or relates to property located partly in Prince William County and partly in another county or city, or in other counties or cities, the tax imposed under the authority of this ordinance shall be computed only with respect to the property located in Prince William County.

"The Clerk of the Circuit Court of Prince William County collecting the tax imposed under this ordinance shall pay the same in to the Treasury of Prince William County. For his services in collecting the tax imposed by this ordinance, the Clerk shall be compensated out of the treasury of Prince William County in the amount of ................ upon each instrument taxable under this ordinance recorded in his office. Such compensation shall be paid out of the county treasury.

"The effective date of this ordinance shall be the first moment of June 27, 1958.

"The Executive Secretary to this Board is directed to publish in the manner prescribed by law, the above proposed ordinance."

Section 58-65.1 leaves some doubt as to whether any local tax may be charged upon the recordation of an instrument upon which the State tax is fixed at fifty cents. The local tax would be too small on this type of instruments, it would seem, to justify compensating the clerk for collecting thereon, and I am suggesting that on such instruments no tax be charged.

As we construe Section 58-65.1 it provides that:

1. If all the real estate conveyed in a taxable instrument lies in Prince William County, the county may collect a tax equal to one-third of the State recordation tax.

2. If a part of the real estate conveyed by the instrument lies in one or more other jurisdictions, then Prince William County may collect only its pro-rata share of one-third of the State recordation tax, and whether or not Prince William County is the jurisdiction in which the deed is first recorded is not important in arriving at the amount of the local recordation tax.

With respect to question 3, I am of the opinion that this ordinance may be adopted under the general provisions of Section 15-8 of the Code. The exceptions contained in the paragraph immediately preceding (a) are not applicable. You will note that immediately after paragraph (8), in this section, it is provided that:

"For carrying into effect these (meaning the 8 powers listed) and their other powers, the boards of supervisors may make ordinances, etc."

I think this proposed ordinance comes within the scope of "other powers." Therefore, the publication provided for therein will, in my judgment, suffice. If you do not have time to publish the proposed ordinance in the manner required, it will be necessary to change the effective date of the ordinance.
Furthermore, I am of the opinion the proposed ordinance may be adopted prior to the effective date of Section 58-65.1, which effective date is the first moment of June 27, 1958, provided the effective date of the proposed ordinance is fixed as of the first moment of June 27, 1958, or a later date.

TAXATION—Refund of Real Estate Taxes Erroneously Collected After Statutory Time has Passed—Board of Supervisors Has No Authority to. (187)

HONORABLE ROBERTINE H. JORDAN
Commissioner of Revenue, Montgomery County

This is in reply to your letter of February 26, 1958, in which you state that a home purchased new in 1949 was apparently from that time until 1955 assessed and taxed at double the rate of assessment and taxation of all other real estate in the county. You state that the Commissioner of Revenue who assessed this property is now deceased. The Board of Supervisors wishes to make a refund to this property owner for the excess taxes which he has paid over the past several years. You request my opinion as to whether or not the Board has authority to make such a refund.

I know of no provision in the Code which would authorize the board of supervisors to make a voluntary refund of excess real estate taxes where the taxes were voluntarily paid due to an error of assessment made by the Commissioner of Revenue who is now deceased. There is no provision for such a refund to my knowledge anywhere in Title 58 of the Code of Virginia.

Section 12-253 of the Code of Virginia provides for the presentment and allowance of claims against the county; however, in my opinion, when the term "claims" is used in this section, I do not believe that the term is broad enough to cover the refund of taxes. Therefore, I am of the opinion that, since the time for filing a petition for correction of erroneous assessment as provided for by §58-1143 of the Code has passed, there is no way a refund of taxes can be made by the board of supervisors.

TAXATION—Slot Machines—Local Licenses—May be Imposed by Both County and Town. (125)

HONORABLE HAROLD L. TOWNSEND
Commonwealth's Attorney, Greensville County

This is in reply to your letter of December 10, 1957, in which you request my opinion as to whether or not under the provisions of Article II of Chapter 7 of Title 58 of the Code of Virginia both the Town of Emporia and Greensville County may impose a local license tax upon coin-in-the-slot machines which are located within the corporate limits of the Town of Emporia.

Section 58-361 of the Code of Virginia provides as follows:

"In addition to the tax herein imposed the governing body of any county, city or incorporated town may impose and collect a license tax upon slot machines."

If a slot machine is located within the corporate limits of the town of Emporia, it is within the taxing jurisdiction of both the County and the Town. There is
no provision in Article II of Chapter 7 of Title 58 which provides that such
deso machines shall be subject to only one such license fee similar to that found
in §46-64 of the Code of Virginia relating to local licenses on automobiles. There-
fore, I am of the opinion that if a coin-in-the-slot machine is located in the
corporate limits of the Town of Emporia, the governing bodies of the County of
Greensville and the Town of Emporia may impose a separate license tax on the
machines.

---

TREASURERS—Assessment of County License Tax—No Authority to—Board of
Supervisors Can Not Direct. (194)

HONORABLE CLIFTON C. SIMMS
Treasurer of Grayson County

This is in reply to your letter of March 12, 1958, which reads as follows:

“This past Monday the Grayson County Board of Supervisors imposed
a county revenue license tax on slot machines located in the county. The
license tax will parallel the State tax. The Board of Supervisors want
me to assess and collect the county license tax. I question my authority
to assess taxes and think that the matter should be administered like
State license taxation, that is, the Commissioner of the Revenue should
assess the tax and I should collect it.”

Treasurers and commissioners of the revenue of counties are constitutional offi-
cers and the Constitution provides that their duties “shall be prescribed by general
law.” Section 110 of the Constitution of Virginia. I am unable to find any statute
that authorizes a board of supervisors to prescribe the duties of these officers,
especially in regard to the matter presented by you.

There are various general statutes relating to the duties of these officers. Sections
58-243 and 58-874 of the Code provide that a county commissioner of the revenue
shall assess and issue licenses. The treasurer’s duties are generally set forth in
Title 58 of the Code, and §58-958 requires this officer to collect the State and
local revenues. Section 58-243 of the Code specifically requires license taxes to
be paid to the treasurer. This section, which was formerly §2360, is discussed
by the Supreme Court of Appeals of Virginia, 136 Va. 573. There the Court, in
discussing the division of authority and duties relating to a commissioner of the
revenue and a treasurer, stated as follows:

“** The two offices of the commissioner of the revenue and of the
treasurer, and the functions of assessing and collecting license taxes to
be performed by the respective officers, are required by the statute to be
kept separate. The reports of the Commissioners of the revenue furnish
the sole independent evidence by which the treasurer is charged and
held accountable for the license taxes collected. Hence, obviously, the
statute allows no consolidation of these two offices and no joint perform-
ance of the functions of collecting the taxes and issuing the licenses by a
single officer in any case, and hence the imperative provisions of the
statute on the subject. ** ”

In view of the statutory provisions and the statement contained in the case cited,
I am of the opinion that the Board of Supervisors does not have the power to
direct the treasurer to make assessments of the license taxes in question. Further-
more, the treasurer has no authority in any event to assess such license taxes.
REPORT OF THE ATTORNEY GENERAL


HONORABLE CHARLES A. REID, Treasurer
Greensville County

This is in reply to your letter of November 23, 1957, in which you request my opinion as to whether or not a county treasurer can be required by the Board of Supervisors to furnish that board with a monthly analysis of disbursements, showing the amount budgeted for each item; amount expended for each item to date of report and the unexpended balance for each item.

Section 15-263 of the Code of Virginia provides that the board of supervisors may require monthly financial reports from any officer of the county, however, I am of the opinion that reports, such as outlined by you, are more than what is contemplated in §15-263. You, as Treasurer of the County, are acting in a capacity as a banker for the County, and you may be required to give a monthly report concerning the funds of the county and the amount of each, and also concerning the existing liabilities of the county. However, in my opinion, there is no duty upon you to make a detailed report showing item by item the disbursements and unexpended balance. I am informed that the ledger for this and these reports are customarily made by the clerk of the board of supervisors. In a very few counties in the State the treasurer does keep such ledger and makes such report; however, this has been done by mutual agreement between the treasurer and the board of supervisors.

I can find no provision in the Code which provides for the Commonwealth of Virginia to share in the cost of the keeping and posting of the ledger covering the distribution of general governmental expenditures of a county.

VIRGINIA MUSEUM OF FINE ARTS—Glasgow Trust—Interpretation of. (93)

MR. GEORGE D. GIBSON, President
Virginia Museum of Fine Arts

I have received your letter of November 13, 1957 with enclosures, requesting my opinion as to the proper legal interpretation of the gift of the late Arthur Graham Glasgow to the Virginia Museum of Fine Arts. This gift is provided for in Mr. Glasgow’s Trust of October 14, 1955, which provides, in part, as follows:

"C. After the death of the Grantor the net income produced by forty per cent (40%) of his said Residuary Estate shall be paid to the Virginia Museum of Fine Arts, for addition to the ‘Arthur and Margaret Glasgow Endowment’: to be utilized as prescribed in the Will of his beloved wife Margaret Branch Glasgow for the Arthur and Margaret Glasgow Collection of Examples of Fine Art and museum-worthy objects of artistic interest or use, as understood and recognized throughout the past centuries; UNLESS, on the advice of the President and the Director of the Museum, a majority of the full Board of Trustees and the Trustees of his own Estate find greater need for exhibition space, than for more objects d’art."

The will of Mrs. Glasgow, referred to in the Trust Agreement, provides:
"I. When my daughter dies, leaving no descendant, the accumulated income in my trust estate but no principal shall be transferred and paid over absolutely to the Virginia Museum of Fine Arts, to form or be added to the Arthur and Margaret Glasgow Endowment, the income to be utilized for collection of examples of fine art and museum-worthy objects of artistic interest, as understood and recognized throughout the past centuries."

A reading of the above quoted provisions of Mr. Glasgow's Trust Agreement and other pertinent provisions of that document and Mr. Glasgow's Will make uncertain the intent of Mr. Glasgow as to whether the income received by the Virginia Museum of Fine Arts may itself be used to purchase objects d'art or whether the income received must be held in trust as an endowment and only the income from the endowment used to purchase art objects. In such a situation the law provides that the intention of the donor may be determined from available extrinsic evidence. See Coffman v. Coffman, 131 Va. 456 and 20 Michie's Jurisprudence 271-2.

In this connection I have examined the letter of Mr. Leslie Johnson dated November 6, 1957 who was Mr. Glasgow's private secretary for many years and sole Trustee of the Glasgow Trust. I have also examined a letter dated November 6, 1957 from Mr. Lee McCanlis who, as Mr. Glasgow's attorney, was the draftsman of the Trust Agreement as well as Mr. Glasgow's Will. From all of these facts and circumstances, it is my opinion that the Trust Agreement of Arthur Graham Glasgow dated October 14, 1955 should be construed, insofar as the Virginia Museum of Fine Arts is concerned, so that the entire income received by the Museum may be used for the purchase of art objects and the Museum should not be required to re-invest such income.

VIRGINIA STATE PORTS AUTHORITY—Revenue Bonds—May Not Issue to Construct Ocean Going Vessels. (16)

HONORABLE D. H. CLARK, Executive Director
Virginia State Ports Authority

This is in reply to your letter of July 5, 1957, in which you request my opinion as to whether or not Virginia State Ports Authority may issue revenue bonds, the receipts from which bonds would be used to construct ocean-going ships or vessels which would be leased to a steamship operator. Section 62-106.7(g1) gives the Authority power "to issue revenue bonds for the acquisition, construction, reconstruction or control of harbors, seaports and other port facilities; * * * ."

Section 62-106.8(f4) provides that the Authority "is authorized to issue revenue bonds for the acquisition, construction, reconstruction or control of harbors, seaports and facilities used in connection therewith."

Although §62-106.8(c) authorizes the Authority to acquire, construct, maintain, equip and operate any ships, I am of the opinion that it does not have authority to issue revenue bonds for the purpose of acquiring or constructing ocean-going ships or vessels. An ocean-going ship or vessel cannot be construed to be a facility used in connection with a seaport or harbor. Harbor vessels, such as tug or dredges could be construed to be such facilities, but ocean-going vessels, in my opinion, could not. Therefore, I am of the opinion that the Virginia State Ports Authority may not issue revenue bonds and use the proceeds thereof to build ocean-going ships or vessels.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA 350th ANNIVERSARY COMMISSION—Transfer of Property of Corporation to Jamestown Foundation—Creation of New Corporation. (301)
June 30, 1958.

HONORABLE FRED G. POLLARD
Member House of Delegates

This will reply to your letter of June 23, 1958, in which you call my attention to Chapter 449 of the Acts of Assembly (1954) which established the Virginia 350th Anniversary Celebration Commission and to Chapter 498 of the Acts of Assembly (1958) which creates the Jamestown Foundation and repeals Chapter 449 of the Acts of Assembly (1954) as amended. Noting that Section 5(b) of the former enactment authorizes the Commission to form a non-profit corporation as an instrumentality for assisting in details of the administration of the celebration and that the Attorney General ruled that the powers of the corporation could not exceed those conferred upon the Commission by that enactment, you present the following inquiries:

"(1) Does the life of the corporation cease with that of the Commission, or does it continue on as provided in its charter, which states 'The period for the duration of the corporation shall be unlimited'?

"(2) If the corporation expires, can the assets of the corporation be transferred to the Foundation or to a non-profit corporation organized by it?

"(3) The Foundation is authorized to organize a non-profit corporation. Can the Foundation take over the existing corporation or will it have to form a new one?"

Pertinent to the questions you present are portions of Sections 1, 2(d) and 4(3) of Chapter 498 of the Acts of Assembly (1958), which sections in part prescribe:

"Sec. 1. Effective July 1, 1958 there is hereby created the Jamestown Foundation hereinafter referred to as Foundation. * * *

"Sec. 2. The Foundation shall have the following powers and duties:

* * * * *

"(d) To establish a nonprofit corporation as an instrumentality to assist in the details of administering the affairs of the Foundation.

* * * * *

"Sec. 4(3) Chapter 449, as amended, of the Acts of Assembly of 1954, approved April 3, 1954, is repealed effective July 1, 1958, and all land, property and rights held by or vested in the Commission created by said Chapter or the nonprofit corporation authorized by said Chapter are hereby transferred to the Foundation created by this act."

In his opinion of April 4, 1955, to which you refer, Judge Almond, then Attorney General, pointed out that the non-profit corporation authorized by Section 5(b) of Chapter 449 of the Acts of Assembly (1954) was intended to serve as an instrumentality of the Commission and to function as an agency of the Commission in effectuating the special purpose assigned to it in Section 5(b) of the Act creating the Commission. In light of this ruling and the provisions of Section 4(3) of Chapter 498 of the Acts of Assembly (1958) repealing the Act which established the Commission, I am of the opinion that the "life of the corporation" established by the Commission will cease with that of the Com-
mission. However, in view of the fact that “all land, property and rights held by or vested in . . . the non-profit corporation” authorized by the Act creating the Commission are transferred to the Jamestown Foundation by virtue of the provisions of Section 4(3) of the 1958 Act quoted above, I am of the opinion that the non-profit corporation in question would be authorized to execute the necessary documents evidencing the transfers contemplated and effectuated by the provisions under discussion. Finally, I am constrained to believe that the Act creating the Jamestown Foundation contemplates that the Foundation shall establish a new non-profit corporation as an instrumentality to assist in the details of administering the affairs of the Foundation rather than take over the existing corporation formed by the Virginia 350th Anniversary Celebration Commission.

---

WATER AND SEWER AUTHORITIES—Condemnation—No Power to Condemn Entire Water System Owned by Public Service Company—Fairfax County May. (36)

HONORABLE ROBERT C. FITZGERALD
Commonwealth’s Attorney for Fairfax, County

This is in reply to your letter of August 6, 1957, in which you request my opinion as to whether or not a Water Sewer Authority, created pursuant to Chapter 22.1 of the Code of Virginia, would have the power to condemn an entire water system owned by a public service corporation.

I am of the opinion that such an Authority would not have the power to condemn an entire water system owned by a public service corporation. The Authority, under §15-764.12(f) has the right “to acquire by gift, purchase or the exercise of the right of eminent domain lands or rights in land or water rights in connection therewith; and to sell, lease as lessor, transfer or dispose of any property or interest therein at any time acquired by it; provided, however, that the provisions of §25-233 of the Code of Virginia, 1950, shall apply as to any property owned by a corporation possessing the power of eminent domain that may be sought to be taken by condemnation under the provisions of this chapter, * * * .”

I am of the opinion that the power given by the above-quoted provision of the Code is not broad enough to enable the Authority to condemn an entire public water system. You ask if the County of Fairfax, with the authority granted it in §15-761.2 has the right to condemn such water systems and to turn the system over to such an Authority upon receipt by the County of the cost of the same.

Section 15-761.2 codifies by reference Chapter 116 of the Acts of Assembly of 1956. This Act of the Assembly reads as follows:

“§1. For the purpose of making provision for an adequate water supply or of acquiring, maintaining or enlarging a water works system or for the further purpose of providing for an adequate system of sewage disposal or of acquiring, maintaining or enlarging a sewage disposal system, within the county or any part thereof, the board of supervisors of any county adjoining a city with a population of more than two hundred twenty-five thousand, and the governing body in any county having a population in excess of ninety-eight thousand but not in excess of one hundred twenty-five thousand, in addition to other powers conferred by law, shall have the power to acquire within the limits of the county, by purchase, condemnation, lease or otherwise, the property within the county, in whole or in part, whenssoever acquired, of any private or public service corporation operating a water system or a sewer
REPORT OF THE ATTORNEY GENERAL

system or chartered for the purpose of acquiring or operating such a system, whether such property, or any part thereof is essential to the purposes of the corporation or not; however any county condemning property hereunder shall rest under the same obligation in respect of furnishing water or sewer service to such customers of any water or sewer company whose property is condemned as that under which such companies rested before such proceedings were taken and had; provided that no county shall take by condemnation proceedings any property belonging to any corporation possessing the power of eminent domain, unless, after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto; and provided further that this act shall not apply to the property owned or operated by any corporation subject to regulation by the Interstate Commerce Commission."

I am of the opinion that this Act of the Assembly gives the County of Fairfax the authority to acquire by condemnation an entire water system from a public service corporation, provided the State Corporation Commission after a hearing as provided for in the Act shall find that a public necessity or an essential public convenience shall require the system to be taken over by the County. The intention of the County to sell the system at a subsequent date to a Water Sewer Authority would, of course, be a pertinent issue in the hearing before the State Corporation Commission and would be passed upon by the Commission at the time of the hearing.


HONORABLE STUART CARTER
Member House of Delegates

This is in reply to your letter of August 17, 1957, in which you request an opinion from me relating to §15-764.22 of the Code of Virginia, which section deals with rates and charges which a water and sewer authority may charge for water and sewage disposal. I concur in your interpretation that an authority may fix rates and charges without any notice to the public, and that charges for sewage disposal can be fixed only after giving public notice.

I should like to call your attention to the last line of §15-764.22 which provides that if a change or revision in sewage disposal rates be made substantially pro rata as to all classes of service, no hearing or notice shall be required. I interpret this provision as meaning that if the authority wanted to increase the rate for all classes of service by 10% or 20%, etc., then this section does not require public notice to be given.


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

This is in reply to your letter of August 6, 1957, in which you request my
opinion concerning who appoints the Board of Zoning Appeals for a town under the provisions of §15-825 of the Code of Virginia.

The applicable portion of this section of the Code reads as follows:

"Such local hustings or corporation court of a city or, if it has no such court, the circuit court having jurisdiction in such city and the circuit court of the county wherein a town or any part thereof may be located may provide for the appointment of a board of zoning appeals and in the regulations and restrictions adopted pursuant to the authority of this article may provide that the board of zoning appeals may, in appropriate cases and subject to appropriate conditions and safeguards, vary the application of the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained. * * *

I am of the opinion that, if there is no provision in the town charter concerning a board of zoning appeals and if the town is to have a board of zoning appeals, the circuit court in which the town is located shall appoint the board of zoning appeals. I am of the opinion that the terminology "may provide for the appointment of the board of zoning appeals" should be interpreted to mean that a town is not required to have such a board, even though they have a zoning commission, but that if it is desirous of having such board, the circuit court shall make this appointment.

This provision of the Code was first enacted and the above quoted language was first used in Chapter 197 of the Acts of Assembly of 1926. I am of the opinion that permissive language is used concerning the adopting of regulations and restrictions rather than mandatory language because, again, the town has the discretion to decide whether or not it wants a board of zoning appeals.

ZONING—Board of Zoning Appeals—Member—Is Officer of County—Can Not Present Claim to County for Services Rendered in Individual Capacity. (35)

August 13, 1957.

HONORABLE ROBERT C. FITZGERALD
Commonwealth's Attorney for Fairfax County

This is in reply to your letter of August 9, 1957, in which you request my opinion as to whether or not the County may pay a fee of $950.00 to the Chairman of the Board of Zoning Appeals of the County for services which the Chairman rendered in giving assistance to private counsel who was retained to defend the validity of a zoning ordinance adopted by the Board of Supervisors.

I am of the opinion that the Chairman of the Board of Zoning Appeals is an officer of the County and, as an officer of the County, he is prohibited under §§15-301 and 15-504 of the Code from contracting with the County or from presenting a claim to the County for any services rendered by him in his individual capacity.

I am enclosing copy of an opinion rendered on December 4, 1956, to Honorable Bryan F. Hepler, Chairman of the Electoral Board for the City of Covington, concerning a similar question relating to a member of a local electoral board.
ZONING—Non-Conforming Structure—Private Person May Not Construct and Lease to Federal Government—Federal Government May Construct and Use. (37)

HONORABLE ROBERT C. FITZGERALD
Commonwealth’s Attorney for Fairfax County

This is in reply to your letter of August 9, 1957, in which you request my opinion as to whether or not §7-20 of the Code of Virginia would render inoperative the zoning ordinance of a county where a private individual owns a parcel of land in a residential section and proposes to construct a building to be leased to the Federal Government for use as a post office, such use is not permitted by the zoning ordinance for a residential district.

Section 7-20 of the Code of Virginia provides as follows:

"The unconditional consent of the Commonwealth of Virginia is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any lands in Virginia, from any individual, firm, association or body corporate, for sites for post offices, or for services incidental to postal work; provided, however, there is hereby expressly reserved in the Commonwealth the jurisdiction and power to serve criminal and civil process on such lands.

"Whenever the United States shall cease to use any of such lands so acquired for any one or more of the purposes hereinabove set forth, the jurisdiction and powers herein ceded shall as to the same cease and determine, and shall revert to the Commonwealth."

I am of the opinion that this section of the Code does not give a private individual authority to construct a nonconforming structure and lease it to the Federal government. Should the Federal government lease the property, then the Federal government could construct and operate a post office on the property, even though it does not conform to the local zoning ordinance.

ZONING—Town Laws Limited to Incorporated Area—Building Permits to be Issued only in Town. (87)

HONORABLE EDWARD MCC. WILLIAMS
Commonwealth’s Attorney for Clarke County

This is in reply to your letter of October 24, 1957, in which you state that the Town of Berryville has adopted a subdivision control ordinance pursuant to the provisions of §15-786 of the Code of Virginia, and this ordinance is effective in the Town limits and for a radius of one and one-half miles beyond the corporate limits of the Town. You state that the Town has also adopted a zoning ordinance pursuant to the provisions of Article 1 of Chapter 24, Title 15 of the Code of Virginia. You request my opinion as to whether or not the authority of the Town Manager to issue building permits as conferred by the Town's zoning regulations extends into the area of one and one-half miles beyond the corporate limits of the Town.

I am of the opinion that the authority of the Town Manager to issue building permits is limited to that area within the corporate limits of the Town of Berryville. I am of the further opinion that the Town Council of Berryville does not have the authority to make its zoning regulations effective outside of the corporate limits and, therefore, any attempt to effectuate these zoning regulations outside of the Town limits by amending the zoning ordinance would be invalid.
INDEX
OPINIONS
ATTORNEY GENERAL OF VIRGINIA
1957-1958

AGRICULTURE
Animal Diagnostic Laboratory—Board of Supervisors—question authority to contribute land or funds............................................. 11
Federal agencies—board of supervisors—authority to provide office space for ................................................................. 11

AIRPORTS
Joint Commission—flight easements—has authority to acquire by condemnation ................................................................. 4
Jurisdiction over municipal airports located in county—vested in county............................................................. 68

ALCOHOLIC BEVERAGE CONTROL LAWS
County ordinance regulating Sunday sales of beer—board of supervisors must give notice as required by Title 15....................... 6
Second conviction of violation of section 4-58—jail sentence may not be suspended ................................................................. 9

ALEXANDRIA
Election of councilmen and mayor—charter provisions—effect of write in vote ...................................................................... 109

APPROPRIATIONS ACT
State Treasurer—not required for investment of funds or expenditure of trust funds by.................................................................... 264

BOARD OF SUPERVISORS
Agriculture—local Federal agencies—authority to provide office space for ................................................................. 11
State animal diagnostic laboratory—authority to contribute land or funds ................................................................. 11
Appropriation to woman's club to repair county building—no authority......................................................................................... 13
Budget—
Consideration of increased tax revenues from new installation of public utility—when may consider........................................................................... 14
Tax levy—latest possible date for adopting................................................................................................................................. 13
Contracts for oil and gas—may accept bids only from firms in county............................................................................. 15
County funds—may make temporary transfer from general fund investment to school construction................................. 15
Courthouse property—may not exchange portion of for other adjacent property ................................................................................. 16
Expense allowance—meals taken at county seat—county without county manager government ................................................................. 16
Garbage disposal area—may provide for people of county with certain conditions ............................................................................. 19
Incorporation of community—may not appropriate money for cost incident thereto ................................................................. 19
Licenses—
Local automobile—
No authority to place on sale prior to final adoption of ordinance ............................................................................. 190
Ordinance adopted prior to March 1, 1958, may impose for 1957-58 .................................................. 196
Ordinance—procedure to be followed as to time and notice before adoption—motor vehicles .................................................. 21
Member—
Employee of wholesaler who supplies retailer who sells to county—not prohibited .................................................. 22
May not hold contract as teacher with county................................................. 24
Petition for correction of erroneous assessment of real estate tax—
may employ private counsel to defend................................................. 276
Procedure at meetings—motion should be shown in minutes although not seconded or voted upon................................................. 24
Reforestation—may not purchase or make donation towards purchase of bulldozer to be used on private property................................................. 26
Refund of real estate taxes erroneously collected—no authority to after statutory time has passed................................................. 282
Salaries—what statute governs until 1960—Norfolk County, population bracket .................................................. 26
School budget—no authority to change items in estimate submitted by school board................................................. 231
School levy—no authority to make special separate levy for repairs and maintenance .................................................. 28
Tax levies—must be fixed before end of May—does not have to be the regular meeting.................................................. 29

BAIL AND RECOGNANCE

Apell from County Court—when bail commissioner may grant............. 91
Forfeiture—commonwealth's attorney in fact to confess judgment on... 282
Justice of peace should not be bondsman................................................. 9
No default—to be returned to person making deposit—not to be kept for fine .................................................. 240
Recognizances always payable to Commonwealth.................................. 110
Time for docketing judgment on default—judgement must be rendered by court .................................................. 218

BONDS

Paid county and interest coupons—cremation of, permissible—liability of treasurer upon presentment for payment of................................................. 31
Referendum—requirement of approval by free-holders—constitutional question .................................................. 105

CITIES AND TOWNS

Mayors—vacancies in towns—charter provisions enacted prior to 1903 no longer in effect.................................................. 112

CIVIL PROCEDURE

County and Municipal Courts—process—reissuance if no service—mandatory requirement—no time limit.................................................. 76
Garnishments—exemptions under 1958 act for dependent children—how computed.................................................. 143
Summons on interrogatories under section 8-320—judge or clerk of county or municipal courts may issue.................................................. 81
Tort immunity of State—may not be waived without statutory authority—agency may purchase liability insurance.................................................. 49

CIVIL DEFENSE

Warning sirens—in Northern Virginia region—Commonwealth's interest may be transferred to FCDA.................................................. 37
CLERKS
Conditional Sales Contract—docketing by clerk where not signed by vendor.................................................. 55
Fees—
Filing criminal warrants—25¢ for each warrant—forwarding fine—no fee if payment suspended.......................... 133
Making certain reports of motor vehicle violations...................................................................................... 132
Recordation—
Conditional Sales Contract—what constitutes signed duplicate—photostat is not unless signed—when carbon signature constitutes signing........................................ 56
Plats attached to deeds—procedure to follow—may not be detached from deed without grantee's consent.................. 41
Recordation tax—local—compensation by locality for collecting included when determining maximum compensation.............. 41
Release of judgments, tax liens, recorded conditional sales contracts—methods of........................................ 42

COLLEGES AND UNIVERSITIES
Leases with staff members of William and Mary—overnight paying guest is not sub-letting............................................. 43
Local, Special, and State Funds—accounting and handling procedures to be followed............................................. 44
Medical Scholarships—State cannot voluntarily release recipient from obligations.............................................. 46
Resident tuition—who entitled to—dependent's of military personnel—non-resident marrying resident—non-resident becoming resident after admission to school.................................................. 46
Revenue Bond Project—parking garage at Medical College of Virginia............................................................ 48
Tort Immunity of State—cannot be waived—V.P.I. may purchase liability insurance for operation of atomic reactor........ 49

COMMISSIONERS OF REVENUE
Automobile Licenses—
Local—may not collect for—only treasurer or his agent may collect for.......................................................... 49
May be agent of Division of Motor Vehicles to issue state tags—cannot collect county revenues............................ 50
Reassessment of real property—may not be appointed or employed as assessor.................................................. 52
Summons issued by—duty upon sheriff to serve............................................................................................. 258

COMMONWEALTH'S ATTORNEYS
Fees—
Misdemeanor case—when assessed for appearance.......................................................... 133
When assessed in misdemeanor cases—cases in Juvenile and Domestic Relations Courts...................................... 54

CONDITIONAL SALES CONTRACTS
Docketing by clerk—where not signed by vendor............................................................................................. 55
Recordation—what constitutes signed duplicate—photostat is not unless signed—when carbon signature constitutes signing.................................................. 56
Release of by clerk—method of........................................................................................................ 42

CONFEDERATE MEMORIAL PARK
Title to all property real and personal in Commonwealth.............................................................................. 57
## CONSERVATION AND DEVELOPMENT

<table>
<thead>
<tr>
<th>Parks</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claytor Lake Festival—funds for—how state may provide</td>
<td>57</td>
</tr>
<tr>
<td>Pulaski Wayside—deed from U.S. Government provides must be used for public park purposes</td>
<td>59</td>
</tr>
</tbody>
</table>

## CONSTITUTIONAL LAW

| Criminal cases—appeal by Commonwealth when warrant dismissed | 88   |

## CORPORATIONS

| Foreign—transact business in state—what constitutes—sale of property as trustee in isolated transaction does not | 63   |

## COST

| Criminal cases—fees for service of city police officers—no provision for taxing as | 93   |

## COUNTIES

| Budget and tax levy—latest possible date for adopting | 13   |
| Court house property—board of supervisors may not exchange portion of for other adjacent property | 16   |
| Lease of property—10 year lease for oil and gas needs approval of court | 70   |

## COUNTIES, CITIES, TOWNS

| Bonds—cremation of permissible—liability of treasurer upon presentment for payment of | 31   |
| Incorporating entire county—effect upon existing towns—creation of special service districts—minimum area for county | 67   |
| Jurisdiction over municipal airport located in county—vested in county | 68   |
| Licenses—may impose one greater than state if no statutory restrictions | 270  |
| Local Health Departments—appropriation of funds for and notice to state department constitutes legal obligation on locality | 145  |
| Subdivision regulations—applicability of Fairfax county ordinance to streets not in subdivision | 130  |
| Vacation of streets—procedure for—applicable law | 152  |

## COUNTY AND MUNICIPAL COURTS

| Bail on criminal appeals from—when bail commissioner may grant | 91   |
| Bonds of judges—and officers in cities—state protected although bond payable to city | 71   |
| Bonds of judges, clerks, and employees—statutory requirements—one bond to cover duties with more than one court | 73   |
| Civil process—reissuance if no service mandatory requirement—no time limit | 76   |
| Clerks—petition and warrants in commitment proceedings—when may sign | 74   |
| Fees—Effect of statute providing blanket fee—amount in tax cases, state and county | 77   |
| Notice of motion not served—serving officer returns fee to plaintiff | 78   |
| Judges—hold office until their successor qualifies—time served while holding over counts for retirement | 81   |
| Summons on interrogatories—issuance by judge or clerk under section 8-320 | 81   |
| Term of office of county judge—change from trial justice to county court did not affect | 82   |
CRIMINAL LAW

Lewd and lascivious cohabitation—couple with a mensa et thoro divorce not guilty of................................................................. 85
Taxi cab fare—misdemeanor to cheat or defraud operator out of................. 86

CRIMINAL PROCEDURE

Appeal by Commonwealth when warrant dismissed—no appeal unless state revenues involved.................................................. 88
Arrest and disposition of person—in jurisdiction other than where offense committed and original warrant issued................................. 90
Bail on appeals from county court—when bail commissioner may grant... 91
Blood test for alcohol—juvenile offenders—consent of parent not required before withdrawing blood—refusal of physician to withdraw blood does not preclude prosecution..................................................... 175
Cost—no provision for taxing fees for city police officer as................................. 93
Fines—violation of town ordinance on appeal to circuit court—paid to town.................................................................................. 93
Jurisdiction of sheriff to arrest without warrant—county courthouse property located in city.............................................................. 94
Plea of guilty—misdemeanor in court of record—may be entered by counsel in defendant’s absence......................................................... 95
Suspended sentence—
May not be if person has second conviction under section 4-58—
A.B.C. laws ....................................................................................... 9
Revocation of—defendant does not have to have an attorney for........... 96
Venue—libel and slander—writing and sending threatening letters—suspended sentence for misdemeanor for more than one year.................................................. 99
Violations of county ordinance and State law. One warrant may cover both, but two advisable............................................................. 99
Warrants—may not be signed by issuing officer by use of facsimile stamp 100

DOMESTIC RELATIONS

Lewd and lascivious cohabitation—couple with a mensa et thoro divorce not guilty of................................................................. 85

ELECTIONS

Ballots—seal of electoral board for new consolidated city................................. 104
Bond referendum—
For schools in counties—no waiting period for second after first defeated.................................................................................. 106
Requirement of approval by freeholders constitutional question.............. 105
Candidates—filing declarations and petitions with state board—effect of when left at board’s office after office closed on last day...................... 106
Councilmen and Mayor of Alexandria—charter provision—effect of write in vote.............................................................................. 109
Electoral board—
May not appoint assistant secretary.......................................................... 110
Member for city must actually reside in city................................................ 111
Mayors—vacancies in towns—charter provisions enacted prior to 1903 no longer in effect................................................................. 112
Poll taxes—
List—
Name placed on by treasurer—when person paid by bad check cannot be removed from list.......................................................... 119
Persons paying for town elections expense of preparing.......................... 117
Town elections—list for entire county to be prepared by treasurer if there is regular June election......................................................... 121
REPORT OF THE ATTORNEY GENERAL

Town elections—newly annexed area, residents of—duty of treasurer to furnish.......................... 120
Paid by mail—date received by treasurer, not date of post mark, is date of payment........................ 118
Town elections—persons in recently annexed area—must be paid 6 months prior to election........ 119
Primary—write-in votes—not permissible or of any effect................................................................. 113
Registration—1958 statute—duties of and procedure to be followed by registrars in compliance with ................................................................. 122
Residence—person who moves and receives transfer cannot be reinstated unless residence re-established................................................................. 125
Town—conducted under state law, not invalid charter provisions, are valid even though names placed on ballots erroneously............................ 126
Town council—person not qualified to vote in election elected—entitled to office if qualified when takes oath—Pulaski charter provision invalid 127

EMBALMERS AND FUNERAL DIRECTORS
Apprentices—new act does not require re-registration of............................ 136
Reciprocity licenses—person doing business in state permitting burial insurance................................................................. 137

ESCHEAT
Realty and personalty—procedure for paying fees and expenses of excheator................................................................. 128

ESTATES
Sheriff as administrator—
Effect of and procedure to be followed upon death of sheriff—as to estates not settled................................................................. 257
Effect of and procedure to be followed upon death of sheriff—how administrator de bon non acquires assets................................................................. 259
Not required to charge and collect fee—commissioner of accounts may fix fee at less than 5%........ 255

EXPENSES
Mileage of sheriff and deputies—limitation upon number of miles sheriff travels by board of supervisors—no authority for............................ 128

FAIRFAX COUNTY
Ordinance regulating subdivisions and streets—applicability of................................................................. 130

FEES
Attorney’s—tax deed—application for—can not be assessed as cost........ 268
City police officers in criminal cases—no provisions for payment to—or taxing as................................................................. 93
Clerk’s—making certain reports of motor vehicle violations.................. 132
Commonwealth’s attorneys—when assessed—in misdemeanor cases—cases in Juvenile and Domestic Relations Court................................................................. 54
County and Municipal Courts—notice of motion not served—serving officer returns fees to plaintiff.......... 78
Criminal cases—when assessed for: clerk filing warrants—clerk forwarding fine—commonwealth’s attorney in misdemeanor case............................ 133
Justice of peace—warrant of arrest—when may collect $1.50—effect of collecting $1.00 from State................................................................. 134
Sheriff serving as administrator of estate—not required to charge and collect fee................................................................. 255
# FIRE  
**Motor Vehicle Laws**—fire engines are trucks as to speed limits.............. 185  

# FIREWORKS  
Definitions—roman candles and fountains................................................. 135  

# GAME AND INLAND FISHERIES  
**Big game license**—application as to residents and non-residents of county of issuance...................................................................................................................... 138  
**Big game stamps**—Rockbridge County—surplus funds may be used to control fox rabies......................................................................................................................... 139  
**Dog funds**—reimbursement for previously lost tags—which have been returned............................................................................................................................... 140  
**Hunting laws**—changing season or bag limits on request of board of supervisors to be changed for one year at a time...................................................... 140  
**Private pond owned by corporation**—guest required to have fishing license............................................................................................................................... 141  
**Sanctuaries and refuges for wildlife**—Commission has no legal remedy to overcome objection of landowner to establishment of.............................................. 142  

# GARNISHMENTS  
**Exemptions**—dependent children under 1958 Act—how computed.............. 143  
**House holder’s exemption**—determining amount—based on gross wages—deductions, including F. I. C. A., paid from exempt amount....................... 144  

# HEALTH  
**Local departments**—appropriation of funds and notice to state department by board of supervisors constitutes legal obligation of county............. 145  

# HIGHWAYS  
**Chesapeake Bay Ferry Commission**—what commission to consider in giving permit for project................................................................. 145  
**Condemnation proceedings**—certificates of deposits—recording fee............... 147  
**Limited access**—roads to property located along—duty upon highway department when property is land locked—can condemn only what is necessary for highway............................................................................... 148  
**Pulaski Wayside Park**—deed from U. S. Government provides must be used for public park purposes............................................................... 59  
**State Convict Road Force**—Department has no authority over security of—status of employee acting as guard............................................................................. 151  
**Vacation of city streets**—procedure for—applicable law.................................. 152  
**Weigh laws**—liquidation damages—how may be collected—capias pro fine can not be used............................................................................................. 154  
Liquidated damages—not assessed on basis of excess axle load......................... 211  
Violation by non-resident—holding and disposing of vehicle............................. 153  

# HOTELS, INNS  
**Liability for possessions of guest**—notice limiting liability must be posted definition of posted.................................................................................. 155  

# INSANE AND MENTALLY ILL  
See Also “Mental Hygiene and Hospitals”  
**Commitment fees**—obligation upon county of residence for—even though have not been collected.................................................................................. 156  
**Commitment proceedings**—Appointment of attorney for patient—duty also upon special justices 157
Justice of peace—circuit court may still appoint to hold in county where no county judge resides.......................................................... 158

Records closed to public—copies may not be made to be used in private court litigation—law enforcement officers may inspect under certain conditions........................................................................ 159

When patient may be sterilized—type of commitment required.................................................. 162

INSURANCE
Motor Vehicles—uninsured motorist law—interpretation of provisions of 205

JAILS AND PRISONERS
Sheriff's duty as to—where there is separate county police department and prisoners kept in jail of another county.............................................. 163
State Convict Road Force—highway department has no duty or authority over security of............................................................................................ 151

JUDGEMENTS
Release of by clerk—method of.................................................................... 42

JUSTICES OF PEACE
Fee for warrant of arrest—when may collect $1.50—effect of collecting $1.00 from state.......................................................................................... 134
Jurisdiction to issue warrant—may not issue in Danville for Pittsylvania County........................................ 165

JUVENILE AND DOMESTIC RELATIONS COURTS
Bonds of judges, clerks, and employees—statutory requirements—one bond to cover duties with more than one court........................................ 73
Clerks—warrant in desertion and non-support proceedings—when may sign.......................................................... 74

Foster Care Funds—
For children—may not be used for child committed to local court... 219
May not be used to maintain in foster homes, children returned to court pursuant to Sec. 16. 1-210.................................................. 219
Suspended operator's permit is not returned to juvenile offender when appeal perfected.................................................. 188

LABOR LAWS
Apprenticeship—authority of local committee—compel employers to rotate apprentices, use certain classes, or contribute to local committee.......................................................... 167
Right to work law—applicability to municipal employees—recent court decision.................................................. 168

LANDLORD AND TENNANT
Taking of overnight paying guests is not subletting.................................................. 43

LOTTERIES
“Ringo”—radio or television bingo constitutes.................................................. 169

MEDICINE
Board of Medical Examiners—unlicensed physician may not be employed by hospital as surgical pathologist.......................................................... 171
MENTAL HYGIENE AND HOSPITALS

See Also "Insane and Mentally Ill"
Copy of proceedings of temporary commitments and admission on physician's certificate filed with department ................................................................. 173
Extradition of persons of unsound minds—requesting state must pay expenses of ................................................................. 173
Mental health clinics—local funds—not public funds—not subject to control by state ................................................................. 173
Sheriff's expenses—transporting patients—Sheriff's house to county seat 174
Sterilization of patient—type of commitment required for ........................................ 162
Surplus property—disposal of by board—no authority to commence proceedings under 1958 Act prior to effective date ........................................ 177

MOTOR VEHICLES

Blood test for alcohol—juvenile offenders—consent of parent not required before withdrawing blood—refusal of physician to withdraw blood does not preclude prosecution ........................................................................... 175
Chauffeur's license—when owner of gravel hauling truck required to have
—person under 18 .................................................................................. 179
Clerks, fees for making certain reports of violations ........................................... 132
Common carriers, definition—relative to subjection to local licenses .................. 180
Dealers—detailed statement to be presented to purchasers listing all charges made .................................................................................. 181
Farm tractors—conviction of drunk driving—person may not operate after...
"Fire engines—are trucks under speed limit laws ........................................ 185
"For Hire" Licenses—merchant with regular place of business hauling commodities to or from such place, not required ........................................ 186
Juvenile and Domestic Relations Court—Appeal from—suspended operator's permit is not returned to juvenile offender ........................................ 188
Licenses—Commissioner of Revenue may be agent of Division to issue state tags—cannot collect money for local licenses ........................................ 50
Local Licenses—
Board of Supervisors may provide that assessable only on one vehicle if owner owns more than one . ................................................................. 189
Board of Supervisors—no authority to place on sale prior to final adoption of ordinance ................................................................. 190
Effect of new legislation on existing county ordinance as it relates to automobiles with town licenses .......................................................... 192
Ordinance adopted prior to 1 March 1958 may impose license for 1957-58... 196
Procedure to be followed by Board of Supervisors as to time and notice before adoption ................................................................. 21
Service men residing on Federal reservation under exclusive Federal jurisdictions—not subject to ................................................................. 199
Treasurer or his agent are only persons who may collect for—commissioner of the revenue cannot ................................................................. 49
Personal Property Tax—automobiles owned by firms in other states but housed in Virginia—subject to same as any other property ........................................ 274
Revocation of License—driving after—when license has not been surrendered—when revocation is effective ................................................................. 201
Titles—owners may be registered as joint tenants with right of survivorship ................................................................. 204
Town Ordinance—fine for violation of—on appeal to circuit court, paid to town ................................................................. 93
Uninsured Motorist Law—interpretation of provisions of ........................................ 205
REPORT OF THE ATTORNEY GENERAL

Weight Laws—liquidated damages—how may be collected—capias pro fine cannot be used...................................................................................... 154
Liquidated damages—not assessed on basis of excess axle load........... 211
What constitutes violation—Tandem Axle—criminal intent or knowledge not element of violation.................. 211

NATIONAL GUARD
Release to be executed by civilians traveling in Air National Guard Aircraft........................................................................... 213
Retirement—officers to be given credit for time in active service with Army, Navy, or Marine Corps.................................................... 213

NORFOLK COUNTY
Population bracket—salaries of members of Board of Supervisors........ 26

PHARMACY
State Board—wholesaler or distributor of drugs—1958 Act requiring permit from is valid........................................................................... 216

PUBLIC FUNDS
Local, Special, and State funds—
Colleges and Universities, accounting and handling procedures to be followed........................................................................... 44

PUBLIC OFFICE
Federal employee—ineligible to hold town office.................................. 218

PUBLIC OFFICERS
Contracts with county—treasurers may not deliver oil to county on commission basis................................................................. 217
Residence requirements—city officer must actually reside in city—electoral board................................................................. 111

PUBLIC WELFARE
Foster Care Funds—
For children—when may be used—may not be used for child committed to local juvenile and domestic relations court......... 219
May not be used to maintain in foster homes children returned to juvenile and domestic relations courts pursuant to Sec. 16.1-210.... 219
General relief—recovery from recipient when he becomes self-sufficient—no provision for................................................................. 221
Old age assistance—lien on property of recipient no statute of limitation on recovery under old statute................................. 223
Lien on property of recipient—not affected by mental condition of recipient at time of application for.................................................. 224
Local Board must consider income of recipient in determining amount—local board may administer funds from private sources... 225
Recipient may not convey property without permission of local board...................................................................................... 227

RECORDATION
Assignment of deed of trust—procedure for—tax upon............................... 278
Fee—condemnation proceedings—certificates of deposit.......................... 147
Fee for certificate of deposit—highway condemnation proceedings........... 147
Local Tax—proposed model ordinance—determining amount when deed conveys land in more than one county—hearings on before effective date of 1958 Act........ 280
Plats attached to deeds—procedure to be followed by clerks—may not be detached from deed without grantee’s consent................................. 41

RICHMOND, CITY OF
Contract by member of school board with city—charter provision do not supersede state law................................................................. 244

SANITARY DISTRICTS
Governing Body—general law may provide for elective body............... 67
Transfer of—from county to town—boundaries of district must be same as those of town................................................................. 227

SCHOOLS
Board—
Minutes of—
Open to inspection by public...................................................... 228
Open to inspection of newspaper reporter for purpose of news story................................................................. 229
Town councilman may be member of.............................................. 232
May not purchase property from corporation—stockholders of which are county officers................................................................. 230
Bond Referendum—for schools in counties—no waiting period for second after first defeated................................................................. 106
Budget—no authority in Board of Supervisors or its clerk to change items in estimate submitted by school board................................................................. 231
Building Fund—created by annual appropriations by supervisors to school board—school board has control over................................................................. 232
Buses—liability insurance—standard school bus policy meets require-
ments of Code................................................................. 233
Condemnation of property—county school board may in adjoining city...
Contracts—employing relative of superintendent or board member as employee or teacher—prohibitions may contract with as independent contractor................................................................. 237
Contracts—
For oil and gas—board may accept bids only from firms in county.... 15
May employ relative of board member as teacher if she was regularly employed by any school board before enception of the relationship................................................................. 235
May purchase school bus from son of board member if member has no interest or connection with son’s business................................................................. 236
With teachers and wife of member of board of supervisors.............. 241
Division Superintendents—retirement act—no affect upon four year term of office................................................................. 236
Investment of funds—board may invest operating funds in certain short term securities................................................................. 238
Levies—board of supervisors—no authority to make special separate levy for repairs and maintenance................................................................. 28
Literary Fund—investment of by loaning to localities—no appropriation act required................................................................. 264
Literary Loans—
County obligations to be repaid by county wide levy...................... 241
May not be used to purchase school buses...................................... 242
Member of board—firm may not contract with city, charter provision of City of Richmond not withstanding................................................................. 244
Pupil transportation—supplemental appropriation for from literary fund interest—method of distributing by State Board of Education................................. 245
Real Estate—
Acceptance from Federal Government with certain conditions—deferred payment plan valid if no obligation on board to make payments........................................................................................................ 247
Board may not purchase from employee of county........................................ 246
Teachers—"Regularly employed"—construction as to Code section prohibiting employment of relative of board member.......................................................... 250
Town School District—for representation only—how member of county board appointed Altavista............................................................. 253

SHERIFFS
Administrator of Estates—
Effect of and procedure to be followed upon death of sheriff as to estates not settled.................................................................................................................. 257
Effect of and procedure to be followed upon death of sheriff—how administrator bon non acquires assets.......................................................... 259
Not required to charge and collect fee.................................................. 255
Not required to charge and collect fee—commissioner of accounts may fix fee at less than 5%................................................................ 255
Arrest without warrant—county court—house property located in city........... 94
Jails and prisoners—duty of as to—where there is separate county police department and prisoners kept in jail of another county...................... 163
Mileage of—limitation upon number of miles traveled by board of supervisors—no authority for............................................................................... 128
Travel expenses—home to county seat—while transporting patient to mental hospital........................................................................................... 174

SHERIFFS AND SERGEANTS
Summons issued by commissioner of revenue—duty to serve.......................... 258

SOIL CONSERVATION
State Committee—may not loan funds to water shed improvement districts—but may to local soil conservation districts.................................................. 261
State Committee—who are members with voting rights—no authority to contribute to state association of supervisors.............................................. 262

STATE TREASURER
Expenditures and accounts—may keep all funds in one bank account or may have separate bank accounts—appropriation act not required for investments of trust funds........................................................................ 264

SUPPORT LAWS
Uniform reciprocal enforcement—person may not be put on convict road force................................................................................................. 266
Uniform reciprocal enforcement—proper parties to initiate proceedings under—proceedings under not required before seeking extradition for non-support ......................................................................................... 266

TAXATION
Delinquent real estate—application for tax deed—attorney’s fee cannot be assessed as cost................................................................................................. 268
Federal reservations under exclusive Federal jurisdiction—not subject to local motor vehicle licenses.............................................................. 199
Licenses—
Cigarette vending machines-license on premises rather than machine—more than one machine at same location.............................................. 269
County, City, or town may impose license greater than State if no statutory restrictions................................................................. 270
Licenses—local—treasurer can not assess—board of supervisors can not direct........................................................................ 31
Payment by bad check—procedure to be followed by treasurer........... 273
Personal property—
Automobiles owned by firms in other states but housed in Virginia—
subject to same as any other property........................................... 274
Motor vehicles—situs of, for owner domiciled in one county—resides in second county and vehicle principally garaged in second
Returns may be examined by collector of delinquent taxes of county.. 275
Petition for correction of erroneous assessments of real estate—county
may employ private counsel to defend.......................................... 276
Photography business—change in statute does not subject interstate business to state taxes.................................................................................. 276
Public Utility—when board of supervisors may consider tax revenues from new installation in fixing budget.......................... 14
Real property—military housing project—when exempt.................... 277
Reassessment of real property—commissioner of revenue may not be appointed or employed as assessor.............................. 52
Recordation—
Assignment of deed of trust—subject to—procedure to record assignment......................................................... 278
Deed exchanging one piece of real estate for another—amount of tax based on value of both pieces of property.......................... 279
Exemption—Community Chest not exempt.................................... 279
Local—compensation of clerk by locality included when determining maximum compensation................................................. 41
Local—proposed model ordinance—determining amount when deed conveys land in more than one county—hearings on before 1958 Act effective......................................................... 280
Refund of real estate taxes erroneously collected after statutory time has passed—board of supervisors has no authority to........... 282

Treasurers
Assessment of county license tax—no authority to—board of supervisors can not direct........................................................ 283
Contracts with county—may not deliver oil to county on commission basis 217
Taxes paid by bad check—procedure to be followed......................... 273

Virginia 350th Anniversary Commission
Transfer of property of corporation to Jamestown Foundation—creation of new corporation......................................................... 286

Virginia State Ports Authority
Revenue bonds—May not issue to construct ocean going vessels............. 285

Virginia Supplemental Retirement System
Division superintendents of schools—no effect upon four year term of office................................................................. 236

Water and Sewer Authorities
Condemnation—no power to condemn entire water system owned by public service company—Fairfax County may................................. 287
Rates and charges—when may be fixed or changed without public notice.. 288
WELFARE AND INSTITUTIONS

See “Public Welfare”

Foster Care Funds—may not be used to maintain in foster homes children returned to Juvenile and Domestic Relations Courts pursuant to sec. 16.1-210.............................. 219

ZONING

Board of Zoning Appeals—
Discretionary with towns—members appointed by judge of Circuit Court................................................................. 288
Member is officer of county—cannot present claim to county for services rendered in individual capacity........................................... 289
Non-conforming structure—private person may not construct and lease to Federal Government—Federal Government may construct and use........ 290
## CONSECUTIVE LIST OF STATUTES REFERRED TO IN OPINIONS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ACTS OF ASSEMBLY</strong></td>
<td></td>
</tr>
<tr>
<td>Acts of 1878</td>
<td></td>
</tr>
<tr>
<td>58, Sec. 7</td>
<td>17</td>
</tr>
<tr>
<td>Acts of 1891,2</td>
<td></td>
</tr>
<tr>
<td>625</td>
<td>57</td>
</tr>
<tr>
<td>628</td>
<td>214</td>
</tr>
<tr>
<td>Acts of 1897,8</td>
<td></td>
</tr>
<tr>
<td>819</td>
<td>112</td>
</tr>
<tr>
<td>Acts of 1901</td>
<td></td>
</tr>
<tr>
<td>332</td>
<td>214</td>
</tr>
<tr>
<td>Acts of 1902</td>
<td></td>
</tr>
<tr>
<td>433</td>
<td>84</td>
</tr>
<tr>
<td>Acts of 1903</td>
<td></td>
</tr>
<tr>
<td>269</td>
<td>112</td>
</tr>
<tr>
<td>Acts of 1912</td>
<td></td>
</tr>
<tr>
<td>98</td>
<td>57</td>
</tr>
<tr>
<td>310</td>
<td>215</td>
</tr>
<tr>
<td>Acts of 1922</td>
<td></td>
</tr>
<tr>
<td>123</td>
<td>87</td>
</tr>
<tr>
<td>Acts of 1926</td>
<td></td>
</tr>
<tr>
<td>125</td>
<td>85</td>
</tr>
<tr>
<td>197</td>
<td>289</td>
</tr>
<tr>
<td>344</td>
<td>85</td>
</tr>
<tr>
<td>Acts of 1930</td>
<td></td>
</tr>
<tr>
<td>199</td>
<td>65</td>
</tr>
<tr>
<td>247</td>
<td>88</td>
</tr>
<tr>
<td>Acts of 1934</td>
<td></td>
</tr>
<tr>
<td>165</td>
<td>88</td>
</tr>
<tr>
<td>Acts of 1938</td>
<td></td>
</tr>
<tr>
<td>431</td>
<td>60</td>
</tr>
<tr>
<td>Acts of 1940</td>
<td></td>
</tr>
<tr>
<td>97</td>
<td>228</td>
</tr>
<tr>
<td>Acts of 1944</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>163</td>
</tr>
<tr>
<td>303</td>
<td>131</td>
</tr>
<tr>
<td>Acts of 1946</td>
<td></td>
</tr>
<tr>
<td>379</td>
<td>130</td>
</tr>
<tr>
<td>Acts of 1948</td>
<td></td>
</tr>
<tr>
<td>116</td>
<td>244</td>
</tr>
<tr>
<td>Acts of 1950</td>
<td></td>
</tr>
<tr>
<td>193</td>
<td>30</td>
</tr>
<tr>
<td>208</td>
<td>139</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Acts of 1952</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>325</td>
<td>241</td>
<td></td>
</tr>
<tr>
<td>491</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>700</td>
<td>138</td>
<td></td>
</tr>
<tr>
<td>Acts of 1954</td>
<td></td>
<td></td>
</tr>
<tr>
<td>341</td>
<td>210, 211</td>
<td></td>
</tr>
<tr>
<td>449</td>
<td>286</td>
<td></td>
</tr>
<tr>
<td>693</td>
<td>35</td>
<td></td>
</tr>
<tr>
<td>Acts of 1956</td>
<td></td>
<td></td>
</tr>
<tr>
<td>41</td>
<td>69</td>
<td></td>
</tr>
<tr>
<td>116</td>
<td>287</td>
<td></td>
</tr>
<tr>
<td>184</td>
<td>131</td>
<td></td>
</tr>
<tr>
<td>218</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>253</td>
<td>127</td>
<td></td>
</tr>
<tr>
<td>262</td>
<td>109</td>
<td></td>
</tr>
<tr>
<td>302</td>
<td>33, 34, 35</td>
<td></td>
</tr>
<tr>
<td>408</td>
<td>38</td>
<td></td>
</tr>
<tr>
<td>414</td>
<td>67</td>
<td></td>
</tr>
<tr>
<td>428</td>
<td>63</td>
<td></td>
</tr>
<tr>
<td>462</td>
<td>146</td>
<td></td>
</tr>
<tr>
<td>628</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>714</td>
<td>35, 146</td>
<td></td>
</tr>
<tr>
<td>716</td>
<td>249</td>
<td></td>
</tr>
<tr>
<td>Sec. 4(m)</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>Acts of 1958</td>
<td></td>
<td></td>
</tr>
<tr>
<td>55</td>
<td>171</td>
<td></td>
</tr>
<tr>
<td>168</td>
<td>135, 136</td>
<td></td>
</tr>
<tr>
<td>286</td>
<td>134</td>
<td></td>
</tr>
<tr>
<td>309</td>
<td>108</td>
<td></td>
</tr>
<tr>
<td>318</td>
<td>138</td>
<td></td>
</tr>
<tr>
<td>340</td>
<td>26, 27</td>
<td></td>
</tr>
<tr>
<td>341</td>
<td>26, 27</td>
<td></td>
</tr>
<tr>
<td>407</td>
<td>205, 206, 207, 208, 209</td>
<td></td>
</tr>
<tr>
<td>417</td>
<td>143</td>
<td></td>
</tr>
<tr>
<td>498</td>
<td>286</td>
<td></td>
</tr>
<tr>
<td>541</td>
<td>132, 181</td>
<td></td>
</tr>
<tr>
<td>551</td>
<td>216, 217</td>
<td></td>
</tr>
<tr>
<td>555</td>
<td>76, 77</td>
<td></td>
</tr>
<tr>
<td>556</td>
<td>177</td>
<td></td>
</tr>
<tr>
<td>576</td>
<td>122</td>
<td></td>
</tr>
<tr>
<td>581</td>
<td>147</td>
<td></td>
</tr>
<tr>
<td>590</td>
<td>41</td>
<td></td>
</tr>
<tr>
<td>635</td>
<td>235</td>
<td></td>
</tr>
</tbody>
</table>

### APPROPRIATION ACT 1956

<table>
<thead>
<tr>
<th>Item</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>136</td>
<td>245</td>
</tr>
<tr>
<td>143</td>
<td>245, 252</td>
</tr>
<tr>
<td>473-A</td>
<td>261, 262</td>
</tr>
<tr>
<td>275</td>
<td>262</td>
</tr>
<tr>
<td>Chapter</td>
<td>1958</td>
</tr>
<tr>
<td>---------</td>
<td>------</td>
</tr>
<tr>
<td>Item 295-A</td>
<td>57, 58, 59</td>
</tr>
<tr>
<td>702</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>50 Sec. 1</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Code of 1849</td>
<td></td>
</tr>
<tr>
<td>Code of 1887</td>
<td>64</td>
</tr>
<tr>
<td>1104</td>
<td></td>
</tr>
<tr>
<td>1030</td>
<td>113</td>
</tr>
<tr>
<td>Code of 1904</td>
<td>56</td>
</tr>
<tr>
<td>2462</td>
<td></td>
</tr>
<tr>
<td>Code of 1919</td>
<td>113</td>
</tr>
<tr>
<td>3003</td>
<td>56</td>
</tr>
<tr>
<td>3338</td>
<td>87, 88</td>
</tr>
<tr>
<td>5189</td>
<td>234</td>
</tr>
<tr>
<td>Code of 1942</td>
<td>2360</td>
</tr>
<tr>
<td>4900</td>
<td>51</td>
</tr>
<tr>
<td>656</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Code of 1950</td>
<td>264</td>
</tr>
<tr>
<td>1-13</td>
<td>25, 27, 85</td>
</tr>
<tr>
<td>1-13(3)</td>
<td>25</td>
</tr>
<tr>
<td>1-13.4</td>
<td>85</td>
</tr>
<tr>
<td>1-13.13</td>
<td>143</td>
</tr>
<tr>
<td>1-13.22</td>
<td>27</td>
</tr>
<tr>
<td>1-13.35</td>
<td>27</td>
</tr>
<tr>
<td>1-13.36</td>
<td>27</td>
</tr>
<tr>
<td>2-27</td>
<td>218</td>
</tr>
<tr>
<td>2-29</td>
<td>218</td>
</tr>
<tr>
<td>2-162</td>
<td>264</td>
</tr>
<tr>
<td>2-170</td>
<td>264, 265</td>
</tr>
<tr>
<td>2-200</td>
<td>264, 265</td>
</tr>
<tr>
<td>2-201</td>
<td>264</td>
</tr>
<tr>
<td>2-202</td>
<td>264</td>
</tr>
<tr>
<td>2-204</td>
<td>264</td>
</tr>
<tr>
<td>2-205</td>
<td>264</td>
</tr>
<tr>
<td>2-206</td>
<td>264</td>
</tr>
<tr>
<td>2-207</td>
<td>264</td>
</tr>
<tr>
<td>2-297</td>
<td>31, 132</td>
</tr>
<tr>
<td>2-298</td>
<td>238</td>
</tr>
<tr>
<td>Title 2, Chap. 14</td>
<td>264</td>
</tr>
<tr>
<td>Title 2, Chap. 17</td>
<td>48</td>
</tr>
<tr>
<td>Title 3, Art. 3, Chap. 17</td>
<td>2, 3</td>
</tr>
<tr>
<td>3-220</td>
<td></td>
</tr>
<tr>
<td>4-22</td>
<td>7, 8, 9</td>
</tr>
<tr>
<td>4-58</td>
<td>9, 10</td>
</tr>
<tr>
<td>4-72</td>
<td>10</td>
</tr>
<tr>
<td>4-92</td>
<td>134</td>
</tr>
<tr>
<td>4-96</td>
<td>6</td>
</tr>
<tr>
<td>4-97</td>
<td>6</td>
</tr>
<tr>
<td>Title 14</td>
<td></td>
</tr>
<tr>
<td>Title 14, Art. 6</td>
<td></td>
</tr>
<tr>
<td>Title 14, Chap. 2, Art. 3</td>
<td></td>
</tr>
<tr>
<td>15-6(2)</td>
<td></td>
</tr>
<tr>
<td>15-8</td>
<td>6, 7, 20, 22, 60, 61, 190, 194, 195, 196, 197, 281</td>
</tr>
<tr>
<td>Sec.</td>
<td>Title 15, Chap. 23</td>
</tr>
<tr>
<td>------</td>
<td>-------------------</td>
</tr>
<tr>
<td>15-8(1) (b)</td>
<td>25</td>
</tr>
<tr>
<td>15-9</td>
<td>276</td>
</tr>
<tr>
<td>15-10</td>
<td>6, 7, 25, 295</td>
</tr>
<tr>
<td>15-11</td>
<td>11, 12</td>
</tr>
<tr>
<td>15-15:1</td>
<td>12</td>
</tr>
<tr>
<td>15-16:4</td>
<td>21</td>
</tr>
<tr>
<td>15-66</td>
<td>8</td>
</tr>
<tr>
<td>15-152:24</td>
<td>103</td>
</tr>
<tr>
<td>15-241</td>
<td>22, 29</td>
</tr>
<tr>
<td>15-242</td>
<td>29</td>
</tr>
<tr>
<td>15-245</td>
<td>24</td>
</tr>
<tr>
<td>15-247</td>
<td>22, 29</td>
</tr>
<tr>
<td>15-250</td>
<td>30</td>
</tr>
<tr>
<td>15-251</td>
<td>30</td>
</tr>
<tr>
<td>15-253</td>
<td>8, 233</td>
</tr>
<tr>
<td>15-256</td>
<td>8</td>
</tr>
<tr>
<td>15-263</td>
<td>284</td>
</tr>
<tr>
<td>15-266</td>
<td>18</td>
</tr>
<tr>
<td>15-301</td>
<td>289</td>
</tr>
<tr>
<td>15-333</td>
<td>22, 23, 246</td>
</tr>
<tr>
<td>15-338</td>
<td>72</td>
</tr>
<tr>
<td>15-353</td>
<td>66</td>
</tr>
<tr>
<td>15-354.2</td>
<td>33</td>
</tr>
<tr>
<td>15-354.2(a)</td>
<td>33</td>
</tr>
<tr>
<td>15-405</td>
<td>250</td>
</tr>
<tr>
<td>15-423</td>
<td>113</td>
</tr>
<tr>
<td>15-487</td>
<td>111</td>
</tr>
<tr>
<td>15-508</td>
<td>53, 244, 245</td>
</tr>
<tr>
<td>15-539</td>
<td>15</td>
</tr>
<tr>
<td>15-562</td>
<td>202</td>
</tr>
<tr>
<td>15-571</td>
<td>202</td>
</tr>
<tr>
<td>15-575</td>
<td>13</td>
</tr>
<tr>
<td>15-577</td>
<td>13, 231</td>
</tr>
<tr>
<td>15-615.1</td>
<td>30</td>
</tr>
<tr>
<td>15-686</td>
<td>16, 17, 18</td>
</tr>
<tr>
<td>15-691</td>
<td>70</td>
</tr>
<tr>
<td>15-691.1</td>
<td>70</td>
</tr>
<tr>
<td>15-692</td>
<td>16, 17, 18, 70, 248</td>
</tr>
<tr>
<td>15-692.1</td>
<td>18</td>
</tr>
<tr>
<td>15-693.1</td>
<td>84, 85</td>
</tr>
<tr>
<td>15-707</td>
<td>20</td>
</tr>
<tr>
<td>15-710</td>
<td>244</td>
</tr>
<tr>
<td>15-761.2</td>
<td>287</td>
</tr>
<tr>
<td>15-764.12(f)</td>
<td>287</td>
</tr>
<tr>
<td>15-764.22</td>
<td>288</td>
</tr>
<tr>
<td>15-766</td>
<td>152</td>
</tr>
<tr>
<td>15-766.2</td>
<td>152</td>
</tr>
<tr>
<td>15-782</td>
<td>195</td>
</tr>
<tr>
<td>15-786</td>
<td>290</td>
</tr>
<tr>
<td>15-825</td>
<td>289</td>
</tr>
<tr>
<td>15-859</td>
<td>25</td>
</tr>
<tr>
<td>Title 15, Chap. 19, Art. 2, 4</td>
<td>30</td>
</tr>
<tr>
<td>Sec.</td>
<td>Page</td>
</tr>
<tr>
<td>-----------</td>
<td>------------</td>
</tr>
<tr>
<td>CODE OF 1950—Continued</td>
<td></td>
</tr>
<tr>
<td>19-77</td>
<td>90, 91</td>
</tr>
<tr>
<td>19-78</td>
<td>90, 91</td>
</tr>
<tr>
<td>19-89</td>
<td>92</td>
</tr>
<tr>
<td>19-93</td>
<td>92</td>
</tr>
<tr>
<td>19-96</td>
<td>92</td>
</tr>
<tr>
<td>19-106</td>
<td>154</td>
</tr>
<tr>
<td>19-108</td>
<td>98</td>
</tr>
<tr>
<td>19-134</td>
<td>95</td>
</tr>
<tr>
<td>19-158</td>
<td>98</td>
</tr>
<tr>
<td>19-166</td>
<td>95</td>
</tr>
<tr>
<td>19-168</td>
<td>95, 98</td>
</tr>
<tr>
<td>19-235</td>
<td>90</td>
</tr>
<tr>
<td>19-265</td>
<td>187</td>
</tr>
<tr>
<td>19-293</td>
<td>132</td>
</tr>
<tr>
<td>19-317</td>
<td>133</td>
</tr>
<tr>
<td>19-319</td>
<td>154</td>
</tr>
<tr>
<td>Title 19, Art. 2</td>
<td>98</td>
</tr>
<tr>
<td>Title 19, Art. 5</td>
<td>162</td>
</tr>
<tr>
<td>20-61</td>
<td>266</td>
</tr>
<tr>
<td>20-67</td>
<td>166</td>
</tr>
<tr>
<td>20-70</td>
<td>166</td>
</tr>
<tr>
<td>20-88.12</td>
<td>267</td>
</tr>
<tr>
<td>20-88.17</td>
<td>267</td>
</tr>
<tr>
<td>20-88.18</td>
<td>267</td>
</tr>
<tr>
<td>20-88.19</td>
<td>267</td>
</tr>
<tr>
<td>20-88.20</td>
<td>267</td>
</tr>
<tr>
<td>20-88.20:1</td>
<td>267</td>
</tr>
<tr>
<td>20-88.26</td>
<td>266</td>
</tr>
<tr>
<td>20-120</td>
<td>85</td>
</tr>
<tr>
<td>20-121</td>
<td>85</td>
</tr>
<tr>
<td>21-2 (c) (d)</td>
<td>262</td>
</tr>
<tr>
<td>21-6</td>
<td>263</td>
</tr>
<tr>
<td>21-8</td>
<td>263</td>
</tr>
<tr>
<td>21-10(1)</td>
<td>261, 263</td>
</tr>
<tr>
<td>21-11</td>
<td>262</td>
</tr>
<tr>
<td>21-56</td>
<td>262</td>
</tr>
<tr>
<td>21-57</td>
<td>262</td>
</tr>
<tr>
<td>21-119.1</td>
<td>227</td>
</tr>
<tr>
<td>21-134.1</td>
<td>21</td>
</tr>
<tr>
<td>Title 21, Chap. 1</td>
<td>261, 263</td>
</tr>
<tr>
<td>Title 21, Chap. 4</td>
<td>67</td>
</tr>
<tr>
<td>22-43</td>
<td>253, 254</td>
</tr>
<tr>
<td>22-53</td>
<td>228, 229</td>
</tr>
<tr>
<td>22-51</td>
<td>254</td>
</tr>
<tr>
<td>22-69</td>
<td>232</td>
</tr>
<tr>
<td>22-72</td>
<td>233, 234</td>
</tr>
<tr>
<td>22-73</td>
<td>233</td>
</tr>
<tr>
<td>22-78</td>
<td>233</td>
</tr>
<tr>
<td>22-100.1</td>
<td>240</td>
</tr>
<tr>
<td>22-100.9</td>
<td>239, 240</td>
</tr>
<tr>
<td>22-101 through 22-115</td>
<td>242</td>
</tr>
<tr>
<td>22-102</td>
<td>265</td>
</tr>
<tr>
<td>22-105</td>
<td>242</td>
</tr>
</tbody>
</table>

* Through
<table>
<thead>
<tr>
<th>Sec.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>CODE OF 1950—Continued</td>
<td></td>
</tr>
<tr>
<td>24-133</td>
<td>108</td>
</tr>
<tr>
<td>24-136</td>
<td>108, 119</td>
</tr>
<tr>
<td>24-143</td>
<td>112, 113</td>
</tr>
<tr>
<td>24-168</td>
<td>112</td>
</tr>
<tr>
<td>24-168 through 24-175</td>
<td>112</td>
</tr>
<tr>
<td>24-170</td>
<td>112</td>
</tr>
<tr>
<td>24-173</td>
<td>126</td>
</tr>
<tr>
<td>24-175</td>
<td>126</td>
</tr>
<tr>
<td>24-252</td>
<td>109, 113</td>
</tr>
<tr>
<td>24-343</td>
<td>111</td>
</tr>
<tr>
<td>24-344</td>
<td>111</td>
</tr>
<tr>
<td>24-345.3</td>
<td>106, 108, 126</td>
</tr>
<tr>
<td>24-347</td>
<td>113</td>
</tr>
<tr>
<td>24-349</td>
<td>113</td>
</tr>
<tr>
<td>24-351</td>
<td>113</td>
</tr>
<tr>
<td>24-352</td>
<td>113</td>
</tr>
<tr>
<td>24-356</td>
<td>113, 114</td>
</tr>
<tr>
<td>24-363</td>
<td>114</td>
</tr>
<tr>
<td>24-367</td>
<td>110</td>
</tr>
<tr>
<td>24-368</td>
<td>110</td>
</tr>
<tr>
<td>24-369</td>
<td>113</td>
</tr>
<tr>
<td>24-370</td>
<td>114</td>
</tr>
<tr>
<td>24-371</td>
<td>114</td>
</tr>
<tr>
<td>24-372</td>
<td>114</td>
</tr>
<tr>
<td>24-373</td>
<td>114</td>
</tr>
<tr>
<td>24-374</td>
<td>114</td>
</tr>
<tr>
<td>24-375</td>
<td>114</td>
</tr>
<tr>
<td>24-398</td>
<td>114</td>
</tr>
<tr>
<td>24-399</td>
<td>114</td>
</tr>
<tr>
<td>24-400</td>
<td>114</td>
</tr>
<tr>
<td>Title 24, Chap. 4</td>
<td>111</td>
</tr>
<tr>
<td>Title 24, Chap. 7</td>
<td>117</td>
</tr>
<tr>
<td>Title 24, Chap. 11</td>
<td>113</td>
</tr>
<tr>
<td>Title 24, Chap. 13.1</td>
<td>107</td>
</tr>
<tr>
<td>Title 24, Chap. 14</td>
<td>113</td>
</tr>
<tr>
<td>25-232</td>
<td>234</td>
</tr>
<tr>
<td>25-233</td>
<td>287</td>
</tr>
<tr>
<td>Title 25</td>
<td>5</td>
</tr>
<tr>
<td>26-16.1</td>
<td>38, 39</td>
</tr>
<tr>
<td>26-20</td>
<td>255, 256</td>
</tr>
<tr>
<td>26-35.1</td>
<td>38, 39</td>
</tr>
<tr>
<td>26-40</td>
<td>238</td>
</tr>
<tr>
<td>26-47</td>
<td>258</td>
</tr>
<tr>
<td>27-4</td>
<td>67</td>
</tr>
<tr>
<td>27-23</td>
<td>67</td>
</tr>
<tr>
<td>Title 27, Chap. 2, Art. 1</td>
<td>67</td>
</tr>
<tr>
<td>29-50</td>
<td>142</td>
</tr>
<tr>
<td>29-52</td>
<td>142</td>
</tr>
<tr>
<td>29-52(2)</td>
<td>142</td>
</tr>
<tr>
<td>29-58</td>
<td>138, 139</td>
</tr>
<tr>
<td>29-78</td>
<td>142</td>
</tr>
<tr>
<td>29-122</td>
<td>138</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>29-125</td>
<td>141</td>
</tr>
<tr>
<td>29-128.1</td>
<td>141</td>
</tr>
<tr>
<td>29-129.1</td>
<td>140, 141</td>
</tr>
<tr>
<td>29-202</td>
<td>101</td>
</tr>
<tr>
<td>29-209</td>
<td>102</td>
</tr>
<tr>
<td>32-40.1</td>
<td>145</td>
</tr>
<tr>
<td>32-40.2</td>
<td>145</td>
</tr>
<tr>
<td>33-11.1</td>
<td>151, 152</td>
</tr>
<tr>
<td>32-12</td>
<td>151</td>
</tr>
<tr>
<td>33-13</td>
<td>151</td>
</tr>
<tr>
<td>33-37</td>
<td>148</td>
</tr>
<tr>
<td>33-38</td>
<td>150</td>
</tr>
<tr>
<td>33-39</td>
<td>148, 149</td>
</tr>
<tr>
<td>33-57</td>
<td>150</td>
</tr>
<tr>
<td>33-58</td>
<td>150</td>
</tr>
<tr>
<td>33-70</td>
<td>147</td>
</tr>
<tr>
<td>33-76.4</td>
<td>149</td>
</tr>
<tr>
<td>33-76.8</td>
<td>152</td>
</tr>
<tr>
<td>33-76.11</td>
<td>152</td>
</tr>
<tr>
<td>33-76.24</td>
<td>152</td>
</tr>
<tr>
<td>33-251</td>
<td>146</td>
</tr>
<tr>
<td>Title 33</td>
<td>151</td>
</tr>
<tr>
<td>Title 33, Chap. 1</td>
<td>152, 153</td>
</tr>
<tr>
<td>34-29</td>
<td>143</td>
</tr>
<tr>
<td>34-30</td>
<td>144</td>
</tr>
<tr>
<td>Title 34, Chap. 4</td>
<td>144</td>
</tr>
<tr>
<td>35-2</td>
<td>155</td>
</tr>
<tr>
<td>35-10</td>
<td>155, 156</td>
</tr>
<tr>
<td>35-11</td>
<td>155, 156</td>
</tr>
<tr>
<td>37-1.1</td>
<td>158</td>
</tr>
<tr>
<td>37-6.1</td>
<td>156</td>
</tr>
<tr>
<td>37-6.5</td>
<td>156</td>
</tr>
<tr>
<td>37-34.2:3</td>
<td>177</td>
</tr>
<tr>
<td>37-34.2:4</td>
<td>177</td>
</tr>
<tr>
<td>37-36.2</td>
<td>161</td>
</tr>
<tr>
<td>37-38</td>
<td>174</td>
</tr>
<tr>
<td>37-61</td>
<td>74, 158, 159, 160, 161</td>
</tr>
<tr>
<td>37-61.2</td>
<td>157, 158, 159</td>
</tr>
<tr>
<td>37-62</td>
<td>160, 161</td>
</tr>
<tr>
<td>37-62.1</td>
<td>157</td>
</tr>
<tr>
<td>37-66 through 37-69</td>
<td>161</td>
</tr>
<tr>
<td>37-67</td>
<td>74</td>
</tr>
<tr>
<td>37-68</td>
<td>159</td>
</tr>
<tr>
<td>37-69</td>
<td>159, 160, 173</td>
</tr>
<tr>
<td>37-75</td>
<td>156, 157</td>
</tr>
<tr>
<td>37-86.2</td>
<td>74</td>
</tr>
<tr>
<td>37-99 through 37-102</td>
<td>173</td>
</tr>
<tr>
<td>37-102</td>
<td>173</td>
</tr>
<tr>
<td>37-110.1</td>
<td>173</td>
</tr>
<tr>
<td>37-154</td>
<td>74</td>
</tr>
<tr>
<td>37-157</td>
<td>74</td>
</tr>
<tr>
<td>37-231</td>
<td>162</td>
</tr>
<tr>
<td>37-231.1</td>
<td>162</td>
</tr>
<tr>
<td>Sec.</td>
<td>CODE OF 1950—Continued</td>
</tr>
<tr>
<td>------</td>
<td>------------------------</td>
</tr>
<tr>
<td>37-251</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 37</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 37, Chap. 3, Art. 1</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 37, Chap. 9</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 37, Chap. 10</td>
<td>.............................</td>
</tr>
<tr>
<td>38.1-566</td>
<td>.............................</td>
</tr>
<tr>
<td>39-4</td>
<td>.............................</td>
</tr>
<tr>
<td>40-55</td>
<td>.............................</td>
</tr>
<tr>
<td>40-68</td>
<td>.............................</td>
</tr>
<tr>
<td>40-125</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 40, Chap. 4</td>
<td>.............................</td>
</tr>
<tr>
<td>44-29</td>
<td>.............................</td>
</tr>
<tr>
<td>44-119</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-1(16)(c)</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-43</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-46</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-49</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-50</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-55</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-59</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-95</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-110</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-113</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-121</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-129</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-167.1-6</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-342</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-413</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1-545</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1(15)</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1(28)</td>
<td>.............................</td>
</tr>
<tr>
<td>46-1 through 46-553</td>
<td>.............................</td>
</tr>
<tr>
<td>46-6</td>
<td>.............................</td>
</tr>
<tr>
<td>46-14</td>
<td>.............................</td>
</tr>
<tr>
<td>46-18</td>
<td>.............................</td>
</tr>
<tr>
<td>46-42</td>
<td>.............................</td>
</tr>
<tr>
<td>46-44</td>
<td>.............................</td>
</tr>
<tr>
<td>46-45</td>
<td>.............................</td>
</tr>
<tr>
<td>46-45.1</td>
<td>.............................</td>
</tr>
<tr>
<td>46-64</td>
<td>.............................</td>
</tr>
<tr>
<td>46-64(3)</td>
<td>.............................</td>
</tr>
<tr>
<td>46-68</td>
<td>.............................</td>
</tr>
<tr>
<td>46-88</td>
<td>.............................</td>
</tr>
<tr>
<td>46-89</td>
<td>.............................</td>
</tr>
<tr>
<td>46-90</td>
<td>.............................</td>
</tr>
<tr>
<td>46-91</td>
<td>.............................</td>
</tr>
<tr>
<td>46-99.1</td>
<td>.............................</td>
</tr>
<tr>
<td>46-152</td>
<td>.............................</td>
</tr>
<tr>
<td>46-167</td>
<td>.............................</td>
</tr>
<tr>
<td>46-176</td>
<td>.............................</td>
</tr>
<tr>
<td>46-193</td>
<td>.............................</td>
</tr>
<tr>
<td>46-195.1</td>
<td>.............................</td>
</tr>
<tr>
<td>46-212(3)</td>
<td>.............................</td>
</tr>
<tr>
<td>46-256</td>
<td>.............................</td>
</tr>
<tr>
<td>46-256.1</td>
<td>.............................</td>
</tr>
<tr>
<td>46-295</td>
<td>.............................</td>
</tr>
<tr>
<td>46-334</td>
<td>.............................</td>
</tr>
<tr>
<td>46-335.1</td>
<td>.............................</td>
</tr>
<tr>
<td>46-338.1</td>
<td>.............................</td>
</tr>
<tr>
<td>46-338.2</td>
<td>.............................</td>
</tr>
<tr>
<td>46-339</td>
<td>.............................</td>
</tr>
<tr>
<td>46-343</td>
<td>.............................</td>
</tr>
<tr>
<td>46-343(1)</td>
<td>.............................</td>
</tr>
<tr>
<td>46-347.1</td>
<td>.............................</td>
</tr>
<tr>
<td>46-348</td>
<td>.............................</td>
</tr>
<tr>
<td>46-395</td>
<td>.............................</td>
</tr>
<tr>
<td>46-414</td>
<td>.............................</td>
</tr>
<tr>
<td>46-414.1</td>
<td>.............................</td>
</tr>
<tr>
<td>46-415</td>
<td>.............................</td>
</tr>
<tr>
<td>46-416</td>
<td>.............................</td>
</tr>
<tr>
<td>46-417</td>
<td>.............................</td>
</tr>
<tr>
<td>46-427.1</td>
<td>.............................</td>
</tr>
<tr>
<td>46-503</td>
<td>.............................</td>
</tr>
<tr>
<td>46-509</td>
<td>.............................</td>
</tr>
<tr>
<td>46-511</td>
<td>.............................</td>
</tr>
<tr>
<td>46-514</td>
<td>.............................</td>
</tr>
<tr>
<td>46-517</td>
<td>.............................</td>
</tr>
<tr>
<td>46-519</td>
<td>.............................</td>
</tr>
<tr>
<td>46-525</td>
<td>.............................</td>
</tr>
<tr>
<td>46-539</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 46.1, Chap. 3</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 46, Chap. 1-4</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 46, Chap. 5</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 46, Chap. 7</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 46, Chap. 17</td>
<td>.............................</td>
</tr>
<tr>
<td>51-3</td>
<td>.............................</td>
</tr>
<tr>
<td>51-111.2(c)</td>
<td>.............................</td>
</tr>
<tr>
<td>51-111.2(e)</td>
<td>.............................</td>
</tr>
<tr>
<td>51-111.10</td>
<td>.............................</td>
</tr>
<tr>
<td>51-111.10(5)</td>
<td>.............................</td>
</tr>
<tr>
<td>51-111.38.1</td>
<td>.............................</td>
</tr>
<tr>
<td>51-111.54</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 51, Chap. 2.2</td>
<td>.............................</td>
</tr>
<tr>
<td>Title 51, Chap. 3.1 &amp; 3.2</td>
<td>.............................</td>
</tr>
<tr>
<td>Sec.</td>
<td>Page</td>
</tr>
<tr>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>53-275</td>
<td>96, 97</td>
</tr>
<tr>
<td>53-278.1</td>
<td>96, 97</td>
</tr>
<tr>
<td>54-113</td>
<td>60, 62</td>
</tr>
<tr>
<td>54-251</td>
<td>137</td>
</tr>
<tr>
<td>54-260.5</td>
<td>137</td>
</tr>
<tr>
<td>54-260.34 through 54-260.38</td>
<td>136</td>
</tr>
<tr>
<td>54-276.7</td>
<td>171</td>
</tr>
<tr>
<td>54-306</td>
<td>170</td>
</tr>
<tr>
<td>54-399 (10)</td>
<td>216</td>
</tr>
<tr>
<td>54-425.1</td>
<td>216, 217</td>
</tr>
<tr>
<td>54-480.1</td>
<td>216</td>
</tr>
<tr>
<td>Title 54, Chap. 7</td>
<td>60, 62</td>
</tr>
<tr>
<td>Title 54, Chap. 10.1</td>
<td>136</td>
</tr>
<tr>
<td>55-20</td>
<td>204</td>
</tr>
<tr>
<td>55-21</td>
<td>204</td>
</tr>
<tr>
<td>55-66.1</td>
<td>278</td>
</tr>
<tr>
<td>55-88</td>
<td>56</td>
</tr>
<tr>
<td>55-90</td>
<td>56</td>
</tr>
<tr>
<td>55-92</td>
<td>43</td>
</tr>
<tr>
<td>55-106</td>
<td>56</td>
</tr>
<tr>
<td>55-111</td>
<td>56</td>
</tr>
<tr>
<td>55-197</td>
<td>128</td>
</tr>
<tr>
<td>56-273</td>
<td>178, 179, 180</td>
</tr>
<tr>
<td>56-273 (d)</td>
<td>179</td>
</tr>
<tr>
<td>56-273 (f)</td>
<td>179</td>
</tr>
<tr>
<td>56-274</td>
<td>179, 210, 211</td>
</tr>
<tr>
<td>56-274 (7)</td>
<td>210</td>
</tr>
<tr>
<td>56-274 (10)</td>
<td>178</td>
</tr>
<tr>
<td>56-304.2</td>
<td>210, 211</td>
</tr>
<tr>
<td>Title 56, Chap. 12</td>
<td>179, 180, 210, 211</td>
</tr>
<tr>
<td>58-9</td>
<td>191</td>
</tr>
<tr>
<td>58-12</td>
<td>206</td>
</tr>
<tr>
<td>58-46</td>
<td>275</td>
</tr>
<tr>
<td>58-54</td>
<td>279</td>
</tr>
<tr>
<td>58-55</td>
<td>279</td>
</tr>
<tr>
<td>58-58</td>
<td>278</td>
</tr>
<tr>
<td>58-64</td>
<td>279</td>
</tr>
<tr>
<td>58-65.1</td>
<td>42, 280, 281, 282</td>
</tr>
<tr>
<td>58-243</td>
<td>51, 283</td>
</tr>
<tr>
<td>58-266.1</td>
<td>270</td>
</tr>
<tr>
<td>58-361</td>
<td>282</td>
</tr>
<tr>
<td>58-362.1</td>
<td>269, 270</td>
</tr>
<tr>
<td>58-377</td>
<td>270</td>
</tr>
<tr>
<td>58-377.1</td>
<td>270</td>
</tr>
<tr>
<td>58-393</td>
<td>271, 276</td>
</tr>
<tr>
<td>58-393.1</td>
<td>276, 277</td>
</tr>
<tr>
<td>58-607</td>
<td>14</td>
</tr>
<tr>
<td>58-610</td>
<td>14</td>
</tr>
<tr>
<td>58-766</td>
<td>52</td>
</tr>
<tr>
<td>58-786</td>
<td>52</td>
</tr>
<tr>
<td>58-829</td>
<td>191</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>------------</td>
</tr>
<tr>
<td>8</td>
<td>89, 95</td>
</tr>
<tr>
<td>18</td>
<td>103</td>
</tr>
<tr>
<td>20</td>
<td>122, 123</td>
</tr>
<tr>
<td>21</td>
<td>116, 118</td>
</tr>
<tr>
<td>24</td>
<td>47</td>
</tr>
<tr>
<td>30</td>
<td>105</td>
</tr>
<tr>
<td>31</td>
<td>111</td>
</tr>
<tr>
<td>32</td>
<td>111, 128</td>
</tr>
<tr>
<td>33</td>
<td>81</td>
</tr>
<tr>
<td>38</td>
<td>118, 120, 121</td>
</tr>
<tr>
<td>68</td>
<td>88, 89</td>
</tr>
<tr>
<td>98</td>
<td>84</td>
</tr>
<tr>
<td>110</td>
<td>51, 53, 68, 283</td>
</tr>
<tr>
<td>111</td>
<td>68</td>
</tr>
<tr>
<td>114</td>
<td>257</td>
</tr>
</tbody>
</table>

**UNITED STATES CODE**

Title 49, Sec. 203 181