

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

*From July 1, 1958 to June 30, 1959*



COMMONWEALTH OF VIRGINIA  
Department of Purchases and Supplies  
Richmond  
1959



# Letter of Transmittal

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July 15, 1959

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

MY DEAR GOVERNOR ALMOND:

In accordance with § 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, 1958 through June 30, 1959.

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.

In the interest of economy, portions of the addresses, the salutations and signatures have been omitted.

Respectfully submitted,

A. S. HARRISON, JR.

*Attorney General*

**PERSONNEL OF THE OFFICE**  
(Post Office Address, Richmond)

<b>Name</b>	<b>City or County</b>	<b>Official Title</b>
A. S. Harrison, Jr.	Brunswick County	Attorney General
Kenneth C. Patty	Tazewell County	First Assistant
D. Gardiner Tyler	Charles City County	Assistant
Thomas M. Miller	Richmond City	Assistant
Francis C. Lee	Hanover County	Assistant
Robert D. McIlwaine, III	Petersburg City	Assistant
John W. Knowles	Henrico County	Assistant
Reno S. Harp, III	Richmond City	Assistant
M. Ray Johnston	Henrico County	Assistant
M. Harris Parker	Greensville County	Assistant
Frank V. Emmerson	Surry County	Assistant
Harold V. Kelly	Henrico County	Assistant
Marie L. Waddill	Richmond City	Secretary
Eleanor W. Tilley	Smyth County	Secretary
Mabel G. Hurt	Tazewell County	Secretary
Madge V. Howell	Richmond City	Secretary
Agnes Reid Pickral	Pittsylvania County	Secretary
Mary Kathryn Church	Richmond City	Secretary
Margaret E. Bennett	Colonial Heights	File Clerk
Helen B. Bowles	Goochland County	Receptionist

## 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-

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\*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 APPEALS

- Adkins, John P. v. Commonwealth.* From the Circuit Court of Goochland County. Grand larceny. Reversed.
- Carolina & N. W. R. R. v. Commonwealth.* From the State Corporation Commission. Upheld the validity of tax upon certain intangible personal property. Affirmed.
- Commonwealth of Virginia v. Davis, Chas. J. R. Ex'or.* From Circuit Court, City of Richmond. Correction of erroneous assessment of inheritance tax. Reversed and remanded.
- Council, Raymond Thomas v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* From the Hustings Court of the City of Richmond, Part II. Dismissal of writ of habeas corpus. Affirmed.
- Davis, F. A., State Highway Commissioner, v. J. E. Marr, et al.* Appeal from Circuit Court of Princess Anne County. Injunction against maintenance of highway signs. Judgment reversed.
- Distefano, Anthony v. Commonwealth.* From Circuit Court of Wise County. Non-support of his minor children. Reversed.
- Farrar, Russell E. v. Commonwealth.* From the Corporation Court of the City of Lynchburg. Sodomy. Reversed.
- Fleenor, Ralph Edward v. Commonwealth.* From the Corporation Court of the City of Bristol. Seduction. Reversed.
- Freeze, Joseph Z. v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Petition for writ of habeas corpus. Denied and dismissed.
- Gallimore, Wendell Thornton v. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Petition for writ of habeas corpus granted and returnable to Circuit Court of Pulaski County.
- Harrison, Albert S., Jr., Attorney General, v. Sidney C. Day, Jr., Comptroller.* Original petition for mandamus. Constitutionality of statutes closing public schools under certain circumstances; Section 129 of the Constitution of Virginia. Mandamus denied.
- Harrison v. Day.* Original petition for writ of mandamus. Constitutionality of Produce Market Loan Fund Act; Sections 3-79.19 through 3-79.27 of the Code of Virginia of 1950; also Section 185 of the Constitution of Virginia. Mandamus awarded.
- Kincaid, Clem v. Commonwealth.* From Circuit Court of Highland County. Reckless driving. Reversed.
- Hubbard, Samuel R., Jr. v. Commonwealth.* From Circuit Court of Orange County. Giving worthless checks and grand larceny of an automobile by false pretenses. Modified and affirmed.
- Lee, Billy Bodkin v. Commonwealth.* From Circuit Court of Rockingham County. Second conviction of petty larceny. Reversed.
- Mason, William Paul v. Commonwealth.* From Circuit Court of Loudoun County. Armed robbery. Reversed.
- Richmond Greyhound Lines, Inc. v. State Highway Commissioner.* Petition for writ of mandamus. Denied.
- Ryan, Wm. D. v. S. D. May, State Highway Commissioner.* Appeal from Circuit Court of Arlington County. Appeal by landowner in condemnation proceedings. Judgment affirmed.
- Signon, Henry James v. Commonwealth.* From Circuit Court of Appomattox County. Illegal manufacture of alcoholic beverages. Reversed.
- Smyth, W. Frank, Jr., Supt., Virginia State Penitentiary, v. Harry Morrison.* From Circuit Court of Hanover County. Habeas corpus proceedings. Reversed and dismissed.
- Snead, Gilbert v. Commonwealth.* From Circuit Court of Albemarle County. Grand larceny. Dismissed for failure to comply with the rules of the Supreme Court of Appeals and affirmed.
- Southern Railway Company v. Commonwealth.* From the State Corporation Commission. Upheld the validity of tax upon certain intangible personal property. Affirmed.

- Strawderman, Kirby v. Commonwealth.* From Circuit Court of Rockingham County. Statutory Rape. Reversed and remanded.
- Thomas, Nathan v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Petition for writ of habeas corpus denied and dismissed.
- Trent, Lowry v. Frederick L. Hoback, Judge, Circuit Court of Roanoke County.* Petition for mandamus denied and dismissed.

#### CASES PENDING IN THE SUPREME COURT OF APPEALS

- Adams, Ollie, Jr. v. Commonwealth.* From Corporation Court of City of Norfolk. Murder.
- American Druggists' Insurance Co. v. Commonwealth.* From State Corporation Commission. Refusal of rate deviation.
- Campbell, George T. v. Commonwealth.* From Circuit Court of Nelson County. Assault upon A. B. C. Investigator.
- Dillon, Arthur Arnold v. F. A. Davis, State Highway Commissioner.* Appeal from Circuit Court of Franklin County. Appeal in condemnation proceedings.
- Harrison, W. T. v. F. A. Davis, State Highway Commissioner.* Appeal from Circuit Court of Franklin County. Appeal in condemnation proceedings.
- May, S. D. State Highway Commissioner, v. Frank B. Bradley.* Circuit Court of Hanover County. Suit for specific performance of contract to convey land.
- May, S. D., State Highway Commissioner, v. Bernard W. Dewey, et al.* Appeal from Circuit Court of Arlington County. Appeal from judgment in condemnation proceedings.
- May, S. D., State Highway Commissioner, v. Earl S. Willow, et al.* Appeal from Circuit Court of Lunenburg County. Appeal from decree granting a writ of mandamus against the State Highway Commissioner to institute condemnation proceedings.
- Satterwhite, Billie H. v. Commonwealth.* Appeal from Hustings Court, Part II, City of Richmond. Rape.
- Vick, William H. v. Commonwealth.* From Circuit Court of Norfolk County. Appeal from revocation of probation.

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

- Railway Express Agency v. Commonwealth of Virginia.* From the Supreme Court of Appeals of Virginia. Constitutionality of franchise tax. Affirmed.
- Service Storage and Transfer Company, Inc. v. Commonwealth of Virginia.* Certiorari to the Supreme Court of Appeals of Virginia. Authority of Corporation Commission to construe provision of certificate of convenience and necessity issued by I.C.C. Reversed.

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

- Commonwealth of Virginia v. State of Maryland.* Original jurisdiction. Validity of unilateral abrogation of Compact of 1785 by Maryland. Referred to Special Master.
- School Board of Prince Edward County, et al. v. Allen Ulysses, et al.* From the United States Court of Appeals for the Fourth Circuit. Segregation in schools.

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

- Allen, Doris Marie, et al. v. School Board of City of Charlottesville, et al.* Segregation in schools. Order of District Court vacated and case remanded.
- Allen, Ulysses, et al. v. School Board of Prince Edward County, et al.* Segregation in schools. Reversed and remanded.

- Beckett, Leola Pearl, et al. v. School Board of City of Norfolk, et al.* Segregation in schools. Affirmed in part and remanded.
- Hamm, E. Leslie, et al. v. County School Board of County of Arlington, et al.* Segregation in schools. Affirmed in part and remanded.
- Jones, Otis E., et al. v. School Board of City of Alexandria, et al.* Segregation in schools. Affirmed.
- Kilby, Betty E., et al. v. School Board of Warren County, et al.* Segregation in schools. Affirmed.
- Snider, Frank Jimmy, Jr. v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Habeas Corpus. Remanded with directions. Pending.

#### CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS

- Adkinson, Sharon, et al. v. School Board of City of Newport News, et al.* Segregation in Schools. Plaintiffs' request for injunction granted.
- Allen, Doris Marie, et al. v. School Board of City of Charlottesville, et al.* Segregation in schools. Plaintiffs' motion for relief granted in part and denied in part.
- Allen, Ulysses, et al. v. School Board of Prince Edward County, Virginia, et al.* Segregation in schools. Plaintiffs' motion for relief denied.
- Beckett, Leola Pearl, et al. v. School Board of City of Norfolk, et al.* Segregation in schools. Plaintiffs' motion for relief granted in part, denied in part.
- Beckett, Leola Pearl, et al. v. J. Lindsay Almond, Jr., Governor, et al.* Suit to restrain enforcement of statutes closing public schools. Statutory three-Judge-Court dissolved.
- Goldsmith, Wallace C. v. Board of Law Examiners.* Action for mandamus compelling issuance of license to practice law. Pending.
- Hamm, E. Leslie, et al. v. School Board of Arlington County, et al.* Segregation in schools. Plaintiffs' motion for relief granted in part, denied in part.
- Harrell, C. Lydon, III, et al. v. J. Lindsay Almond, Jr., Governor, et al.* Suit to restrain enforcement of statutes closing public schools. Pending.
- James, Ruth Pendleton, et al. v. J. Lindsay Almond, Jr., Governor, et al.* Suit to restrain enforcement of statutes closing public schools. Injunction granted.
- Jones, Otis E., et al. v. School Board of City of Alexandria, et al.* Segregation in schools. Plaintiffs' motion for relief granted in part, denied in part.
- Kilby, Betty E., et al. v. School Board of Warren County, et al.* Segregation in schools. Plaintiffs' motion for relief granted.
- Reid, Harry A., et al. v. City of Norfolk, Virginia, et al.* Suit to restrain enforcement of statute requiring segregation in public assemblages. Pending.
- Warden, Lorna Rane, et al. v. School Board of City of Richmond, et al.* Segregation in schools. Pending.

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

- American Radiator and Standard Sanitary Corporation v. Commonwealth.* Circuit Court of the City of Richmond. Petition for correction of erroneous tax assessments and refund of taxes. Assessments expunged in part and refunds granted.
- Aydlett, Fred W. et al. v. J. Lindsay Almond, Jr., Governor.* Court of Law and Chancery, City of Norfolk. Damages caused by school closing.
- Brooks, Peggy Taylor, et al. v. Charles H. Smith, Director, Virginia Supplemental Retirement System.* In the Circuit Court, City of Richmond. Petition for declaratory judgment construing terms of Virginia Supplementary Retirement Act. Pending.
- Bruce-Flournoy Motor Corporation v. Commonwealth.* Circuit Court, City of Norfolk. Petition for correction of tax assessments. Assessments expunged. Rehearing pending.
- Capitol Pictures Company v. Division of Motion Picture Censorship.* Circuit

- Court, City of Richmond. Appeal from decision of the Division denying a license to exhibit the motion picture "Garden of Eden". Pending.
- Commonwealth of Virginia, Department of Agriculture and Immigration v. Byrd Packing Company, Incorporated, and Carlton L. Byrd and 8293 cases of 303 canned tomatoes.* Circuit Court of Accomack County. Judgment for defendant.
- Commonwealth of Virginia, ex rel., Milk Commission, v. Early Dawn Cooperative Dairy.* Hustings Court of the City of Richmond. Petition for injunction. Granted.
- Commonwealth of Virginia, ex rel., State Department of Health v. Oliver F. Parks, et al., etc.* Circuit Court of Accomack County. Specific performance of joint will. Pending.
- Commonwealth of Virginia, ex rel., State Milk Commission v. Birtcherd Dairy, Incorporated.* Circuit Court, City of Richmond. Petition for temporary injunction. Injunction granted.
- Commonwealth of Virginia v. School Board of Tazewell County.* Circuit Court, City of Richmond. Writ of mandamus. Failure to comply with State Water Control Law. Compliance ordered.
- Commonwealth of Virginia v. Town of Richlands.* Circuit Court, City of Richmond. Writ of mandamus. Failure to comply with State Water Control Law. Compliance ordered.
- High's Dairy Products, Incorporated, v. State Milk Commission.* Circuit Court, City of Richmond. Appealed contesting validity of: 1. Arlington-Alexandria Order No. 11; 2. Arlington-Alexandria Order No. 13; 3. Arlington-Alexandria Order No. 14. Petitions for appeal dismissed.
- Holland, R. E. v. Commonwealth.* Circuit Court, City of Richmond. Petition for correction of erroneous tax assessments. Pending.
- Hoover, H. C. v. S. D. May, State Highway Commissioner.* Circuit Court of Smyth County. Breach of contract.
- Long, Glenn v. State Highway Commissioner.* Circuit Court of Pulaski County. Petition for writ of mandamus. Awarded.
- M. C. L. Corporation v. State Milk Commission.* Circuit Court of the City of Richmond. Appeal contesting the validity of Charlottesville market order. Dismissed.
- Modern Film Distributors v. Division of Motion Picture Censorship.* Circuit Court, City of Richmond. Appeal from decision of the Division denying a license to exhibit the motion picture "Street Corner". Pending.
- Murray Productions, Incorporated v. Division of Motion Picture Censorship.* Appeals from the decisions of the Division denying licenses to exhibit the motion pictures "Lecture Reel" and "Wasted Lives". Appeals dismissed.
- Radio Roanoke, Incorporated v. Commonwealth.* Court of Law and Chancery, City of Roanoke. Petition for correction of erroneous tax assessments. Pending.
- Shoiland, John E. v. Virginia Real Estate Commission.* Hustings Court, City of Richmond, Part II. Validity of certain practices under Virginia Real Estate Law. Pending.
- Spalding, Roberta M., Commissioner of Revenue, v. Commonwealth of Virginia.* Circuit Court of Rappahannock County. Appeal from decision of Compensation Board. Increase in compensation granted in part.
- State-Planters Bank, etc. v. Julia B. Donohue.* Chancery Court, City of Richmond. Construction of will. Medical College of Virginia legatee. Pending.
- Thomas, Harry E., ex'or., of Estate of Crandal Mackey v. Commonwealth of Virginia.* Circuit Court of Arlington County. Petition for correction of erroneous inheritance tax assessment. Pending.
- Times Film Corporation v. Division of Motion Picture Censorship.* Circuit Court City of Richmond. Petition for injunction challenging the constitutionality of Chapter 11 of Title 2 of the Code of Virginia. Pending.
- Tribby, Nicholas, Estate of Warner, v. Broadhus, etc.* Circuit Court of Loudoun County. Suit involving establishment of a charitable trust. Pending.

## HABEAS CORPUS CASES

- Allen, Fred v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* U. S. District Court (Norfolk). Petition denied and dismissed.
- Anderson, John Lee v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Corporation Court of Danville. Petition denied and dismissed.
- Bolling, Joe v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Supreme Court of Appeals of Virginia. Petition denied and dismissed.
- Brown, George, Jr. v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* United States District Court (Norfolk). Petition dismissed.
- Brown, George, Jr. v. W. Frank Smyth, Jr., Supt. Virginia State Penitentiary.* United States Court of Appeals for the Fourth Circuit. Pending.
- Bunch, Linwood v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Hustings Court, City of Richmond, Part II. Pending.
- Carter, Walter J. v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Supreme Court of Appeals of Virginia. Petition dismissed.
- Council, Raymond v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Supreme Court of Appeals of Virginia. Petition denied and dismissed.
- Crawford, Moses v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* U. S. District Court for the Eastern District of Virginia. Pending.
- DeJesus, Leonardo v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* U. S. District Court for the Eastern District of Virginia. Pending.
- Eddy, Jesse Everett v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Law and Equity Court, City of Richmond. Petition dismissed. Petition for appeal denied.
- Freeze, Joseph v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Supreme Court of Appeals of Virginia. Petition dismissed.
- Honaker, Floyd v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Circuit Court of Halifax County. Petition dismissed.
- Johns, Raleigh v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* U. S. District Court for the Eastern District of Virginia. Pending.
- Jones, Anderson v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Circuit Court of Lunenburg County. Petition dismissed.
- Jones, Anderson v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* U. S. Court of Appeals for the Fourth District. Pending.
- Jones, John R. v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Circuit Court of Chesterfield County. Pending.
- Miller, Shipe and Hayes v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Circuit Court of Frederick County. Pending.
- Moore, Willard C. v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* United States Supreme Court. Petition dismissed.
- Morrison, Harry v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* U. S. District Court for Eastern District of Virginia. Petition dismissed, but may be appealed by petitioner.
- Myers, Warren v. Blalock, etc.,* United States Court of Appeals for the Fourth Circuit. Pending.
- Napier, Russell v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Supreme Court of Appeals of Virginia. Pending.
- Reed, Aluster v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* U. S. District Court for Eastern District of Virginia. Pending.
- Smyth, W. Frank, Jr., Supt., etc. v. Harry Morrison.* Supreme Court of Appeals of Virginia. On appeal from Circuit Court of Hanover County. Reversed and petition dismissed.
- Thomas, Nathan v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Supreme Court of Appeals of Virginia. Petition dismissed.
- Ware, Walter v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Circuit Court of King William County. Petition dismissed.
- West, Frank v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Circuit Court of Middlesex County. Petition dismissed.
- Wilson, Kenneth v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary.* Corporation Court, City of Norfolk. Petition dismissed.

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

- Johnson, Robert M. v. City of Richmond and/or Commonwealth of Virginia.* Petition for award of compensation. Dismissed as to the Commonwealth. Appealed to full Commission. Pending.
- Wilhoit, Sinclair G. v. Medical College of Virginia.* Petition for award of compensation. Denied.

### 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

- Arnold, Emmett Mathews v. C. H. Lamb, Commissioner, etc.* Circuit Court of the City of Norfolk. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Operator's license surrendered; appeal dismissed and case stricken from the docket.
- Baker, Keith Marshall, Jr. v. C. H. Lamb, Commissioner, etc.* Circuit Court of Nelson County. This case involves the validity of license tax imposed under Section 46.1-154. Commissioner's action affirmed.
- Barker, Lawrence Arthur, Jr. v. C. H. Lamb, Commissioner, etc.* Circuit Court of Henrico County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Judgment for the Commissioner.
- Brewster, Princess Lee v. Commissioner of Motor Vehicles, etc.* Circuit Court of Henry County. Operator's license surrendered to the Division. Pending.
- Brown, Oliver, Jr. v. C. H. Lamb, Commissioner, etc.* Corporation Court of the City of Norfolk, Part II. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Commissioner's action affirmed.
- Commonwealth of Virginia, ex rel. v. Felts Transport Corporation,* Circuit Court of the City of Richmond. Action to collect gasoline tax (Sections 58-711 and 58-713). Claim compromised under Section 2-92 of the Code; action dismissed agreed.
- Commonwealth of Virginia, ex rel. v. Francis Neal Bladen.* Corporation Court of the City of Alexandria. Appeal under Section 46.1-437 from an action of the Commissioner revoking operator's license. Case continued and order of stay vacated. Operator's license surrendered.
- Commonwealth of Virginia, ex rel. v. John Eldridge Willett, T/A Willett Brothers Transportation.* Circuit Court of the City of Richmond. Action to collect gasoline tax (Sections 58-711 and 58-713). Claim compromised under Section 2-92 of the Code; action dismissed agreed.
- Commonwealth of Virginia, ex rel. v. Sam Clinton Heltzel, Sr.* Circuit Court of Rockingham County. Appeal under Section 46.1-367. Judgment for the Commonwealth.
- Commonwealth of Virginia v. Stanley Kenneth Fass.* Circuit Court of Norfolk County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Commissioner's action reversed.
- Evans, Beauregard Nathaniel v. C. H. Lamb, Commissioner, etc.* Circuit Court of the City of Richmond. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Operator's license surrendered; appeal dismissed.
- Fountain, Wilber Frank v. C. H. Lamb, Commissioner, etc.* Corporation Court of the City of Alexandria. Appeal under Section 46.1-437 from an action of the Commissioner suspending chauffeur's license. Commissioner's action affirmed.
- Heltzel, Sam Clinton, Sr. v. C. H. Lamb, Commissioner, etc.* Circuit Court of Rockingham County. Suit to enjoin Commissioner from examining licensee under Section 46.1-383. Relief denied—judgment for the Commissioner.
- Hester, Clarence Albert v. C. H. Lamb, Commissioner, etc.* Circuit Court of Mecklenburg County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Pending.

- Hudgins, Jackson Garrett v. Commonwealth of Virginia, etc.* Circuit Court of the City of Norfolk. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Commissioner's action affirmed.
- Johnson, Eli v. C. H. Lamb, Commissioner, etc.* Circuit Court of Caroline County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Pending.
- Johnson, Henry Harrison v. C. H. Lamb, Commissioner, etc.* Circuit Court of the City of Norfolk. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license—afflicted with physical infirmities or disabilities. The court modified the order of suspension permitting Johnson to drive during daylight hours only while wearing glasses.
- Keys, Golden v. C. H. Lamb, Commissioner, etc.* Circuit Court of the City of Norfolk. Appeal under Section 46.1-437—revoked operator's license and registration. Case dismissed.
- Leech, Howard Gilmore v. C. H. Lamb, Commissioner, etc.* Circuit Court of Rockbridge County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license—afflicted with neurological or physical infirmities or disabilities. Pending.
- Loving, Eddie Wilson v. C. H. Lamb, Commissioner, etc.* Circuit Court of Caroline County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license under Section 46.1-449. Appeal dismissed and stricken from the docket.
- Maroulis, William D. Draper v. C. H. Lamb, Commissioner, etc.* Circuit Court of Princess Anne County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Action of the Commissioner reversed.
- Meadows, Aubrey Jefferson v. C. H. Lamb, Commissioner, etc.* Circuit Court of Fairfax County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Pending.
- Richardson, Eddie Monroe and James Franklin Murray v. C. H. Lamb, Commissioner, etc.* Hastings Court, Part II, City of Richmond. Suit to enjoin Commissioner from revoking driving and registration privileges under Section 46.1-167.2. Temporary injunction entered. Pending.
- Rorrer, Raymond Taylor v. C. H. Lamb, Commissioner, etc.* Circuit Court of Henry County. Appeal under Section 46.1-437 from an action of the Commissioner suspending driver's license. Order of stay vacated and operator's license surrendered to the Clerk of the Court. Pending.
- Sherwood, Frank M. and Helen Langan Sherwood v. C. H. Lamb, Commissioner, etc.* Circuit Court of Fairfax County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's licenses. Pending.
- Wilson, George Lee v. Chester H. Lamb, Commissioner, etc.* Hastings Court of the City of Richmond, Part II. Application for mandamus to issue operator's license. Validity of the revocation of operator's license at issue. Pending.

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

- Adams, Clarence, et al. v. Unemployment Compensation Commission of Virginia and Wise Coal and Coke Company.* Circuit Court of Wise County. Pending.
- Cox, Glenn C., et al. v. Unemployment Compensation Commission of Virginia and Banner Fuel Corporation.* Circuit Court of Wise County. Pending.
- Funkhouser, Violet v. Unemployment Compensation Commission of Virginia and American Viscose Corporation.* Circuit Court of Warren County. Pending.
- Jenkins, Silas, et al. v. Unemployment Compensation Commission of Virginia and Norton Coal Company.* Circuit Court of Wise County. Pending.
- Lock, Daniel D. v. Unemployment Compensation Commission of Virginia, et al.* Hastings Court, City of Richmond. Pending.

*Martin, Everett J. v. Unemployment Compensation Commission of Virginia and William S. Newbill Roofing Company.* Hustings Court, City of Portsmouth. Pending.

*Sams, Earl K. et al. v. Unemployment Compensation Commission of Virginia and Wise Coal and Coke Company.* Circuit Court of Wise County. Pending.

*Unemployment Compensation Commission of Virginia v. Alexandria Cleaners & Launderers, Inc., and 254 other similar suits.* Circuit Court, City of Richmond. Some contested, some were not.

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

1958

June 2	William Y. Morris
August 25	Cleveland Smith Whittaker
November 10	Hartwell B. Parker
December 17	William Charles Boyd
December 3	Albert D. Royer, alias Martin V. Nuttman
December 23	Dewey Bochette
December 30	William J. Hickey

1959

February 18	Floyd Wood
April 15	Glen Keeton
May 11	Clyde Morris
May 20	Helen B. Conley
April 30	Luther E. Pritchard, Jr., Charles A. Mims, Richard M. Huneman, Robert B. Huneman, Steven B. Rhodes and John R. Huneman
June 17	Richard Mason Cannon
June 25	Roy V. Peterson
June 30	Joseph A. Kirwin



# OPINIONS

## ADMINISTRATORS—Final Settlement of Estate Does Not Terminate Authority to Act—Clerk May Certify Appointment, Qualification, Whether Appointment Revoked and Whether Resigned. (329)

June 1, 1959.

HONORABLE ROBERT M. OLDHAM  
Clerk of Circuit Court of  
Accomack County

This is in reply to your letter of May 29, 1959, which reads as follows:

"I have been requested to certify that an administrator is still officially administrator, even though qualification was made on the estate in 1935 and the normal accounts have been filed.

"I know personally that the administrator is still living and my records do not show that he has been excused or relieved of his duties as such.

"The question is as follows: In my certificate of the copy of the qualifications, am I correct in stating that the administrator is still acting as such? The administrator desires that I so state and tells me that he is still acting as such."

In making your certificate you should merely certify that the person involved was appointed administrator of the estate in question, giving the date of the appointment, and stating that he duly qualified and that the appointment of such person as administrator has never been revoked and that the records of your office do not show that he was resigned as administrator.

It seems to be the law in Virginia that a final settlement by an administrator does not terminate his authority to act as such. In the recent case of *First National & Exchange Bank of Roanoke, Executor, vs. Seaboard City National Bank of Norfolk*, reported in 200 Va. 681, this point was considered and the Court made the following statement:

"Appellant's second question relates to the time of final settlement of Francis Richardson's estate. It contends that final settlement of the estate, referred to in paragraph 9 of his will, occurred not later than September 17, 1945, when the decree was entered confirming the administrator's report, with proper vouchers attached, and dismissing the cause from the docket. It argues that the decree, in effect, determined that all of the assets had been disposed of and that the estate was finally settled or closed; that at that time appellant's decedent was alive, and she was entitled to share in this estate. With this contention we cannot agree.

"When the decree was entered, the estate had a contingent remainder interest in the estate of Charles Richardson. Apparently this fact was unknown to the court and the administrator. Moreover, there were unpaid creditors of the estate which the court noted. In view of these circumstances, it cannot be said that the estate then actually finally settled. If there had been a final settlement on September 17, 1945, there would be no estate for distribution now.

"In Lamb's Virginia Probate Practice, § 224, p. 357, the learned chancellor states:

'But in the Virginia probate law and practice the powers of a personal representative of a decedent do not come to an end in any such fashion, automatically upon settlement of final accounts or in any other event; nor are they here, as they are in many other jurisdictions, terminated by the entry of an order of discharge. There is no such thing as an order declaring the estate fully administered and discharging the personal representative from further duties and responsibilities. In this respect a fiduciary acting as personal representative of a deceased person's estate is wholly unlike other fiduciaries. His continued possession of his plenary powers *indefinitely* may be characterized as unique.'

"On the same page, the author quotes a memorandum of the late Judge James C. Lamb from 9 Virginia Law Register, p. 356:

'\* \* \* The effect of a full and final settlement of his accounts is, in time, of course, to discharge him from responsibility for the assets properly received and administered. But he is still administrator and still has the right and duty to collect and administer any assets which may be afterwards discovered.'"

In this connection, the Honorable Brockenbrough Lamb, Judge of the Chancery Court of the City of Richmond, in his recent book entitled "Virginia Probate Practice", at page 356, states:

"Perhaps the most striking difference between the Virginia probate law and the probate law of other states is found in the continuing power of the *personal representative of a decedent*."

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**AGRICULTURE—State Apple Commission—Referendum—Qualifications of Voters  
—No Person May Cast More Than One Vote. (216)**

February 27, 1959.

HONORABLE PARKE C. BRINKLEY  
Commissioner of Agriculture and  
Immigration

This is in reply to your letter of February 24, 1959, in which you request my opinion as to whether a person who is a packer and taxpayer under Article 2 of Chapter 20 of Title 3 of the Code of Virginia of 1950, as amended, and also a taxpayer under Article 1.1 of Chapter 20 of Title 3 is entitled to two votes in a referendum for members of the State Apple Commission or is limited to one vote.

I am of the opinion that a person who may qualify under both of the acts which you cite is entitled to only one vote.

The sections of these acts which are determinative of this question and to which I wish to specifically call attention are Sections 3-512 (9) and 3-514. These two sections insofar as here germane are as follows:

"Section 3-512.9. Any taxpayer in an apple producing district who is liable in such district for, and pays, the tax imposed by this act *shall have the right to vote* in a referendum held to fill vacancies occurring on

the Commission in such district. The referendum shall be held as provided in Article 2 of this Chapter." (Italics supplied.)

"Section 3-514. Appointment, qualifications, terms, chairman and compensation of Commission.

\* \* \*

"Any packer in such district who is liable in such district and pays the tax imposed by this act *shall have the right to vote* in the referendum held to fill such vacancy. (Italics supplied.)

\* \* \*"

The acts under consideration provide two methods or categories under which a person may vote in the referendum. Some persons may, due to the scope of their operations, qualify to vote in both categories, while others may qualify in only one category. Neither act contains any language which could be interpreted as authorizing any person to cast more than one vote in a single referendum.

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**AGRICULTURE—State Apple Commission—Regulations on Referenda and Nomination of Officers—Administrative Agencies Act Not Applicable. (199)**

February 16, 1959.

HONORABLE PARKE C. BRINKLEY  
Commissioner of Agriculture and  
Immigration

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

"The State Apple Commission established under the provisions of Article 2 of Chapter 20 of Title 3 of the Code of Virginia of 1950 contemplates the adoption of rules and regulations concerning the nomination of candidates and governing the conduct of referendums and voting for its members in accordance with Section 3-514 of the Code of Virginia of 1950, as amended.

"Please advise if the Commission in adopting these rules and regulations is subject to the provisions of the Administrative Agencies Act which appears in the Code as Chapter 1.1 of Title 9 (Sections 9-6.1 to 9-6.14) (Chapter 703 Acts of the General Assembly of Virginia of 1952)."

Chapter 703 of the Acts of 1952, to which you refer, defines in part a "rule" to which the Chapter is applicable as "\* \* \* any regulations (including amendments and repeals) of general application and future effect affecting private rights, privileges or interests, promulgated by an agency to implement, extend, apply, interpret or make specific the legislation enforced or administered by it, but does not include regulations solely concerning internal management of the agency \* \* \*."

The rules to be adopted by the Commission under Section 3-514 of the Code of Virginia of 1950, as amended, will concern only the conduct of referendums and the voting for members of the Commission. It is, therefore, my opinion that these rules concern only the internal management of the Commission and will not come within the definition of a "rule" as established by Chapter 703 of the Acts of 1952 and the Commission in adopting them will not be subject to the provisions of the Act.

**AIRPORTS—Eminent Domain—Joint Commission—Flight Easements May Be Acquired. (52)**

August 27, 1958.

HONORABLE FOREST T. TAYLOR  
Commonwealth's Attorney for  
Augusta County

This is in reply to your letter of August 26, 1958, which reads, in part, as follows:

"I would appreciate it very much if you will let me have an opinion as to the constitutionality of Paragraph 3 of the statute enacted on March 29, 1958, on eminent domain, Acts of Assembly, Chapter 396, Pages 528-9, that is, whether or not the Shenandoah Valley Joint Airport Commission can condemn flight easements through the air space over and beyond the airport boundaries, where growing trees must be cut down, in the manner prescribed for railroads and corporations by Title 25 of the Code of Virginia, in view of the specific wording of Section 5-23 of the Code of Virginia."

I am enclosing a copy of an opinion issued by this office on September 18, 1957, which discusses the question involved prior to the amendment contained in Section 3 of Chapter 396 of the Acts of 1958. This amendment broadens the scope of the powers of eminent domain and specifically authorizes condemnation of land and property beyond the immediate airport boundaries. In the enclosed opinion we held that the limitations contained in Section 5-23 of the Code did not affect the validity of the provisions of Chapter 628 of the Acts of Assembly of 1956. This ruling, it would seem, is applicable to Section 3 of Chapter 396.

I do not believe that a constitutional question is presented by the differences existing between Section 5-23 and the Act relating to the Shenandoah Valley Joint Airport Commission.

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**AIRPORTS—Smyth-Wythe Airport Authority—Taxation—Real Property Tax Exempt—No Recordation Tax on Deed Conveying Property to. (132)**

November 12, 1958.

HONORABLE LLOYD E. CURRIN  
Clerk, Circuit Court of Smyth County

This is in reply to your letter of November 7, 1958, in which you state that under the provisions of Chapter 3 of Title 5 of the Code, as amended by Chapter 523 of the Acts of 1958, there was recently formed in your county an Airport Authority known as Smyth-Wythe Airport Authority. This Authority is composed of the counties of Smyth and Wythe and the towns of Wytheville, Marion and Rural Retreat.

You state that a deed conveying certain property to the Authority has been presented to your office for recordation and you wish to know whether or not you should charge a recordation tax. In my opinion, this instrument is exempt from the recordation tax under the provisions of Section 58-64 of the Code.

You also asked whether or not the property purchased by the Airport Authority is subject to real estate taxes. You are advised that in my opinion the property is exempt from taxation under the provisions of Section 58-12 of the Code.

**Alcoholic Beverage Control Laws—Illegal Transportation—Forfeiture of Alcoholic Beverages so Transported. (150)**

December 15, 1958.

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

This is in reply to your letter of December 8 in which you state that the Sheriff's office of Carroll County seized two automobiles in each of which nine (9) pints of whiskey were being transported. You asked whether the automobiles and all of the whiskey carried in each vehicle are subject to confiscation and forfeiture under Section 4-56, as amended, of the Code of Virginia.

I infer from your letter that each of the automobiles was occupied only by the driver thereof, or that only the driver claimed ownership of the nine (9) pints found in each car. I also infer that the whiskey being transported was legally acquired and that neither driver had a permit to transport the same issued by the Alcoholic Beverage Control Board.

My predecessor in office rendered an opinion dated May 10, 1949, to Honorable W. Carrington Thompson, Commonwealth's Attorney for Pittsylvania County, in which the language of the first paragraph "(a)" of Section 4-56 was interpreted. The opinion stated in part:

"With respect to the transportation of legally acquired alcoholic beverages, it is my opinion that the vehicle is subject to forfeiture whenever more than one gallon is being transported without a permit. You suggest that it is necessary to transport over ten pints of such beverages before the vehicle is subject to forfeiture on the ground that, since the transportation is not illegal unless in excess of a gallon, the illegal transportation does not involve amounts in excess of one quart until at least ten pints are involved. However, Section 49-a does not declare the first gallon to be legal, but declares that transportation in quantities in excess of one gallon is illegal. Therefore, when the amount exceeds one gallon the whole transportation is illegal and under Section 38-a the entire lot of whiskey would be subject to forfeiture. Since the vehicle is subject to forfeiture when alcoholic beverages in amounts in excess of one quart are being transported, transportation of any amount in excess of one gallon (which by Section 49-a is made illegal) would subject the vehicle to forfeiture. I call your attention to Section 49-c, where under certain circumstances transportation of any amounts in taxicabs is rendered illegal. Transportation in excess of one quart would render such a vehicle liable to forfeiture. This is a further indication that the amount referred to in Section 38-a is a total amount of only one quart and not a quart in excess of the gallon mentioned in Section 49-a (though under this last section it must be one gallon before being illegal). If the Legislature had intended to allow the transportation of one quart in addition to the one gallon mentioned in Section 49-a before requiring the forfeiture of the vehicle, the language used in Section 38-a would have been 'in excess of ten pints'. The fact that the language 'in excess of one quart' was used is but an indication that this language also refers to illegally acquired beverages."

As you know, "Section 49-a" referred to in the opinion is now codified as Section 4-72 of the Code and "Section 38-a" is now Section 4-56. Neither of these sections has been amended since the time of the opinion in such manner as to affect the conclusion reached therein. I enclose a copy of this opinion which is printed in the 1948-49 issue of the Report of the Attorney General.

I am of the opinion that Section 4-53 of the Code requires forfeiture of *all* alcoholic beverages transported in violation of the A.B.C. Act. In order to constitute the crime of illegal transportation, it is necessary that more than one gallon be transported without permit and, when this is the case, the entire amount transported is contraband and subject to forfeiture.

**ALCOHOLIC BEVERAGE CONTROL LAWS—Local Option Elections—Payment of Costs Incurred—Expenses. (139)**

November 24, 1958.

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

This will acknowledge receipt of your letter of November 13, in which you ask for the opinion of this office on the following question:

"There has been a petition filed for a Local Option Election in Giles County, Virginia, in conformity with Section 4-45 of the Code of Virginia. The Court in accordance with Section 4-45.2 of the Code of Virginia has referred this matter to a Master in Chancery for an investigation and report.

"I would like to be advised as to who is to pay the Master in Chancery for his services both in case the election is called and if the election is not called."

Section 4-45.2 of the Code of Virginia, to which you refer, states specifically:

"In order to determine the validity of any petition filed under § 4-45, or under one of the statutes continued by § 4-45.1, the court or judge may, before calling the election, refer the petition to a master in chancery for an investigation and report as to (1) the qualification as voters of the county, city or town of the persons whose names appear thereon, (2) the genuineness of the signatures to such petition, (3) the number of qualified voters signing such petition and/or (4) any other matter or inquiry deemed pertinent by the court or judge. *The costs of the reference, including a fee for the master in chancery as fixed by the court or judge, shall be taxed as a part of the costs of the proceeding.*" (Italics supplied.)

Further, Section 4-45.3, which follows, provides a method of determining the population of a city or town where no preceding decennial census figures are available, concluding with the sentence:

"Such population may be determined as in equity causes upon a reference to a master and the costs of the reference including his fees shall be paid as part of the costs of election."

It is my opinion that the plain language of Sections 4-45, 4-45-2, and 4-45.3 clearly indicates that a valid petition is a prerequisite to the holding of any such local option election; that certain procedures are provided to determine the validity of the petition with regard to the requisite number of qualified voters; and that the filing of the petition and determination of its validity are to be treated as a proceeding in chancery for the purpose of determining by whom the costs shall be paid. It follows that if the petition is valid and an election is held, the costs, including any fee awarded a master in chancery, are to be paid, pursuant to Section 24-177 of the Code, by the particular political subdivision in which the election is held.

On the other hand, where no election is ordered or held due to invalidity of the requisite petition for the same, I am of the opinion that the costs incurred as a result of the filing of such petition should be borne by the petitioners, who are, in effect, parties to the cause.

**ALCOHOLIC BEVERAGE CONTROL LAWS—Possession and Consumption of Alcoholic Beverages—Private Dances on Leased Premises Where no Refreshments Offered for Compensation. (359)**

June 26, 1959.

HONORABLE ROBERT LEE SIMPSON  
Commonwealth's Attorney for  
Princess Anne County

This is in reply to your letter of June 4, 1959, which I quote in full as follows:

"The Virginia Beach Hotel, Motel, Cottage and Apartment Association, is a non-profit corporation, operating under a charter granted by the Corporation Commission of Virginia.

"The association, which has been in existence for a period in excess of twenty years, has a current member roster of approximately 58, which membership is confined to those persons actively engaged in operating hotels, motels, cottages, and apartments at Virginia Beach.

"The association proposes to lease quarters from time to time, including the Convention Center, owned and operated by the City of Virginia Beach, for the purpose of holding and conducting private dances for the entertainment and amusement of its members and their guests only. These dances will be strictly private and not open to the public. The consumption of beer and wine will not be permitted or allowed and food will not be served.

"We respectfully request an opinion as to whether or not there would be a violation of any Virginia Law or of any provision of the A.B.C. Act, if the association members and their guests should take to these private dances their own legally acquired spirituous liquors, for consumption upon the premises so leased."

It is understood that you seek an answer to your inquiry only insofar as the Convention Center is concerned.

The laws of Virginia pertaining to the use and possession of alcoholic beverages are, with inapplicable exceptions, set forth in the Alcoholic Beverage Control Act. The Virginia Beach Convention Center is not an establishment licensed pursuant to Section 4-25 of that Act. Thus, many provisions of the Alcoholic Beverage Control Act, applying to licensees only, may be disregarded.

Subject to one reservation, it appears that no potential violations of the Alcoholic Beverage Control Act are disclosed by the factual situation which you have outlined. That reservation has to do with the provisions of Section 4-61 and is mentioned because you failed to state that the serving of refreshments for compensation would not take place at the dances in the Convention Center. Section 4-61 defines a place where this is done as a "restaurant" and, in the case of unlicensed places other than residences, prohibits absolutely the keeping of alcoholic beverages upon the premises.

Other than the possible applicability of Section 4-61, a review of the A.B.C. Act discloses no provision which would appear to be violated, directly or indirectly, by the members of the Association in conducting such an affair as you have described. No club is involved so Section 4-61.1 is not pertinent. Section 4-81, having to do with the operation of a common nuisance, presupposes other violations. Section 4-78, prohibiting public drinking, is inapplicable by reason of the fact that at the time of the contemplated dance, the Convention Center will not, according to your letter, be a public place, as defined in Section 4-2 (20), to which the public has or is permitted to have access.

In short, there appears to be no statutory provision which would be violated by the mere possession and consumption of their own legally acquired distilled spirits by persons attending a private function under the circumstances which you have outlined.

**ALCOHOLIC BEVERAGE CONTROL LAWS—Prohibited Interest in Premises to Be Occupied by Retail Licensee—Licensed Bottler May Not Retain Ownership of Premises Occupied by Beer Retailer. (321)**

May 27, 1959.

HONORABLE EUGENE A. LINK  
Commonwealth's Attorney for the  
City of Danville

This is in reply to your letter of May 11, 1959, in which you state:

"A and B are general partners on an equal basis in the bottling of wines under various brand names under the authority of license granted under the provisions of Title 4, Code of Virginia.

"A, B and C are owners of hotel property, their interest being respectively one-fourth, one-fourth and one-half. On the ground floor of said hotel property there is located a restaurant, which is leased under a one-year lease, rent being fixed at \$150 per month. A, B and C do not share in the profits or losses of D in the restaurant business and they have no direct or indirect control or interest in the management of said restaurant.

"D has requested of A, B and C permission to obtain a retail on-premises beer license. The questions posed are as follows:

"1. Are A and B prohibited by Section 4-79(a) from allowing D to apply for and obtain a retail on-premises beer license?

"2. Assuming the applicability of Section 4-79(a) to the factual situation posed, is Section 4-79(a) valid?"

As you know, § 4-79, as amended, reads in pertinent part as follows:

"If any manufacturer, bottler or wholesaler of alcoholic beverages, whether licensed in this State or not, or any officer or director of any such manufacturer, bottler or wholesaler, shall have any financial interest, direct or indirect, in the business for which any retail license is issued, under the provisions of this chapter, *or in the premises where the business of any person to whom such retail license has been issued is conducted*, or either directly or indirectly shall sell, rent, lend, buy for, or give to any person who holds any retail license issued under the provisions of this chapter, or to the owner of the premises on which the business of any such person so licensed is conducted, any money, equipment, furniture, fixtures or property, with which the business of such retailer is or may be conducted, he shall be guilty of a misdemeanor." (Italics supplied.)

Section 4-25, as amended, of the Code of Virginia, specifies the type of license which may be granted by the Virginia Alcoholic Beverage Control Board, subject to revocation as provided in § 4-37. I take it that the license held by Messrs. A and B as partners is a winery license issued for under § 4-25(b). In any event, Messrs. A and B operate as a "bottler" of alcoholic beverages within the purview of § 4-79(a).

Section 4-32 of the Code of Virginia should be read together with § 4-79, as amended. The former section prohibits the issuance of a retail on-premises beer license to "any manufacturer, bottler or wholesaler of alcoholic beverages, whether licensed in this State or not, \* \* \*." It is clear that the intent and purpose of the Virginia Alcoholic Beverage Control Act is to prevent any interlocking ownership or control by a manufacturer, bottler or wholesaler of alcoholic beverages over either the business of a retail seller of alcoholic beverages or the prem-

ises occupied by such retail licensee. The language of § 4-79 is specific in describing the prohibited matters involved, and I am of the opinion that the case which you state falls squarely within the prohibition expressed in § 4-79(a).

The test of any regulatory legislation is its reasonableness. To my mind, the application of § 4-79(a) to the instant case is eminently reasonable. The intent of the General Assembly is clear, especially so when we read § 4-32 together with § 4-79(a). A statute prohibiting any person from having at the same time a financial interest in both the wholesaling and retailing aspects of the alcoholic beverage business is a reasonable method of eliminating the potential evils which may arise from the simultaneous production of alcoholic beverages and their sale at the retail level.

It is my opinion, since I believe § 4-79(a) to be valid and constitutional, that if D is successful in obtaining a retail on-premises beer license, Messrs. A and B will be in violation of § 4-79(a) if they retain ownership of the hotel property on which the restaurant occupied by D is situated.

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**ALCOHOLIC BEVERAGE CONTROL LAWS—"Sterno" or Canned Heat—§ 4-48**  
**Vest Control of Sale—A.B.C. Board Regulation Authorizes Sale Without License.**  
 (226)

March 4, 1959.

HONORABLE BAXLEY T. TANKARD  
 Commonwealth's Attorney for  
 Northampton County

This is in reply to your letter of February 24, 1959, in which you state as follows:

"Numerous complaints have been made to my office concerning the evils resulting from the sale of 'sterno' or canned heat in Northampton County. Particularly I have been requested to advise if a high license tax might be imposed upon those persons who sell such a product. I will, therefore, appreciate your views in this regard. Further, if you have any other ideas as to how the sale of 'sterno' might be controlled, I will appreciate them.

"I note that Section 4-48 of the 1950 Code of Virginia, as amended, gives the A.B.C. Board certain powers in this regard and I am today writing that Board to see if it has adopted any regulations on this subject."

As you state, § 4-48 of the Code of Virginia vests in the Virginia Alcoholic Beverage Control Board the power to permit the manufacture, sale, delivery and shipment of "sterno" without requiring a license therefor. I understand that the Board has adopted a regulation, designated as Section 41 of the Regulations of the Board, which authorizes the manufacture, sale and delivery of "sterno" without any license being required therefor, or restrictions being imposed thereon.

Section 4-2(2) of the Code includes this product in its definition of "alcoholic beverages," in the language:

"\* \* \* every liquid or solid, patented or not, containing alcohol, spirits, wine or beer and capable of being consumed by a human being.  
 \* \* \*"

Likewise, § 4-96 of the Code forbids any county, city or town to pass or adopt any ordinance or resolution regulating or prohibiting the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising

or dispensing of alcoholic beverages in Virginia, except as otherwise provided in §§ 4-38 or 4-97.

Section 4-38 gives to the governing body of each city and town in the State the power to provide by ordinance for the issuance of city and town licenses, "and to charge and collect license tax therefor, to persons licensed by the Board to manufacture, bottle or sell alcoholic beverages within such city or town." This section goes on to list the types of licenses and the maximum license tax allowed for each type. Since no license is required for the sale of "sterno," only in subsection (e) do we find any statutory language under which "sterno" might be included.

In § 4-38(e) we find a specific grant to the governing body of each city and town allowing it to include alcoholic beverages in the base for measuring local wholesale merchants', local retail merchants' and local restaurant license taxes. The section goes on to state that proceeds of sales of alcoholic beverages may be taxed in addition to the local alcoholic beverage license taxes authorized by the Alcoholic Beverage Control Act.

I do not feel that a city or town should attempt, by ordinance or resolution, to have a license tax rate for a merchant who sells "sterno" different from the license tax rate for a merchant who does not sell "sterno". I feel that the language of the Alcoholic Beverage Control Act quite clearly imposes the responsibility for the adoption of regulations controlling the sales of "sterno" and canned heat on the Virginia Alcoholic Beverage Control Board, and that any change in the present status of "sterno" and similar substances should be by means of the Board's adopting a regulation requiring a license to sell such substance.

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**ALCOHOLIC BEVERAGE CONTROL LAWS—Transportation of Alcoholic Beverages in Taxicab—Owner of Taxicab May Be "Passenger" Within Purview of § 4-74. (319)**

May 26, 1959.

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

This is in reply to your letters of March 6, 1959 and April 7, 1959, in which you request my comments regarding an hypothetical question, which I quote as follows:

"Can the owner and operator of a group of taxicabs, while riding with one of his drivers, be classified as a fare-paying passenger in the light of the language of Section 4-74 of the Alcoholic Beverage Control Act; when the driver derives his compensation solely from a percentage of the fares he collects and when the owner-operator of the taxi pays his driver a regular fare for the trip?"

As you are aware, Section 4-74 of the Alcoholic Beverage Control Act reads as follows:

"The transportation of alcoholic beverages in any motor vehicle which is being used, or is licensed, for the transportation of passengers for hire is prohibited, except when carried in the possession of a passenger who is being transported for compensation at the regular rate and fare charged other passengers. Any person violating this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished accordingly."

In my opinion, the answer to your question is in the affirmative. There is no reason why an owner of a taxicab cannot qualify as a "passenger" entitled to transport alcoholic beverages in such vehicle, if he pays the operator the regular fare charged other passengers for a similar trip.

The statute being penal in nature, any person accused of violating it would have the benefit of the statutory construction most favorable to him. The language of the statute is clear and unambiguous and sets forth the elements of the offense, and the nature of the exception, with sufficient certainty to constitute proper notice to the public. The test to be applied is whether the owner of the alcoholic beverages being transported pays his fare at the regular rate.

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**ATTORNEYS AT LAW—Employment by School Board—City Council to Pay or Appropriate for Fee—Law Partner of Mayor—Mayor May Not Share in Compensation. (327)**

May 28, 1959.

HONORABLE L. F. SHELburnE, *Superintendent*  
Board of Education of  
City of Staunton

This is in reply to your letter of May 25, 1959, which reads as follows:

"The School Board of the City of Staunton anticipates the necessity for securing legal counsel within the reasonably near future and the person whom the Board might like to employ is a partner to the Mayor of the City. I was requested by the Chairman of the School Board to write you asking whether this connection of our proposed Attorney with a City Official would preclude his serving in a legal capacity for us. As I understand it, the City Council will either pay his fee or make appropriation to the School Board for his fee. There is, of course, both the legal question and the question of professional ethics that we would like to have settled.

"Any assistance you can render us in this would be very much appreciated."

Section 15-508 of the Code of Virginia prohibits a member of a city council or any other paid officer of the city, during the term for which he is elected or appointed, from being interested, *directly or indirectly*, in any contract for services to be performed for the city for pay under any contract.

In the case presented, although the Mayor would not be the actual party contracting to render the legal services in question, if he in any way shares in the compensation being paid to a member of his law firm, then the employment would be in violation of Section 15-508.

If the arrangement with the attorney under consideration is such that the transaction will be completely disassociated from the law firm—that is, that no part of the compensation for the attorney's services inures to the benefit of the Mayor or to the partnership constituting the law firm in which the Mayor is a member, then, in my judgment, the statute will not be violated.

With respect to the ethical feature suggested by you, I feel that this is a matter to be determined by the attorneys involved, and shall refrain from expressing an opinion.

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**AUDITOR OF PUBLIC ACCOUNTS—Papers in Civil Cases Settled or Dismissed in Courts Not of Record—Authorized to Direct Retention Until Audit Completed. (21)**

July 22, 1958.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

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

"Under the provisions of Chapter 578, page 872, Acts of Assembly of 1958, and specifically Section 16.1-91 of that Act, it is provided that a court not of record need not prepare a civil docket in a civil action where the judge or clerk has been notified that the matters in controversy have been settled or that the proceeding is to be dismissed. The section further provides that any papers served upon the defendant or defendants and returned to such court in any such settled or dismissed case shall be returned to the defendant. The section provides also that the \$3.00 court fee required to be paid into the court under Section 14-133 is to be retained by the court.

"Under the provisions of law, the Auditor of Public Accounts is required to audit these courts, and the fees which are earned by the courts are paid into the State Treasury as State revenue. You will observe that the section is silent as to the period of time within which the civil papers in settled or dismissed cases are to be returned to the defendant. These papers are vitally necessary to a satisfactory audit of the court fees and revenue of these courts. I am sure that you can understand the difficulty in accounting for revenues for these dismissed cases when no docket or none of the civil papers would be available to the auditor for purposes of determining what sums were collected in such cases. It would seem therefore, in light of the duties placed upon the Auditor of Public Accounts with respect to the audit of these courts, that it would be mandatory that these papers be held for the use of the auditor and that they should not be returned to the defendants until after the auditor has completed his examination. After such time, these papers then could be returned to the defendants.

"I would appreciate it if you would advise me if it should be mandatory that these papers be held and not returned to the defendants until after the annual audits of these courts not of record have been made. Your usual prompt and kind attention, I assure you, will be very gratefully appreciated."

It is true as you have stated in your letter that Section 16.1-91 does not describe any limitation of time within which the papers in a settled or dismissed case shall be returned to the defendant. Therefore, this requirement must, in my opinion, be construed so as not to hinder or obstruct your office in the performance of its constitutional and statutory duties. You are charged under Section 115 of the Constitution and Title 2 of the Code with the duties of auditing all accounts of public officials involving the handling of State funds. You are also directed under Section 2-128 to devise and establish a system of bookkeeping and accounting to be followed by all county, city and town officials handling the revenues of the State. I understand that in the system of accounting and bookkeeping established by you for courts not of record the original paper which has been served and returned to the court is the basic and most important record kept by the court showing the receipt and disposition of fees by the court.

In view of the duties devolving upon your office, I am of the opinion that you have the authority to direct that the courts not of record shall maintain and preserve in their offices the papers in all settled or dismissed cases until such time as you have made an audit covering the period of time during which the suits were commenced and have made your report approving the financial transactions during such period.

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**BONDS—Investment of Proceeds—Bonds Issued Under Old Statute—Effect of Chapter 278 Acts of Assembly, 1958. (8)**

July 14, 1958.

HONORABLE COLIN C. MACPHERSON, *Treasurer*  
Arlington County

This is in reply to your letter of July 9, 1958, in which you request my opinion

concerning the effect of the enactment by the 1958 Session of the General Assembly of Chapters 278 and 640 of the Acts of Assembly.

Chapter 278 amended and re-enacted § 15-605.10 of the Code of Virginia, which section related to investment of the proceeds of certain bond issues pending the application of those proceeds to the authorized purpose for which the bonds were issued. This chapter was approved on March 11, 1958, and did not contain an emergency clause. Therefore, this chapter went into effect on June 27, 1958.

Chapter 640 repealed §§ 15-586 through 15-666.12 of the Code of Virginia which were the general laws of Virginia relating to the issuance of bonds and other funded indebtedness of counties, cities and towns, and added a new chapter numbered 19.1 to Title 15 of the Code, which chapter provides for Code §§ 15-666.13 through 15-666.68. Chapter 640 was approved on April 1, 1958, and did not contain an emergency clause, therefore, it also became effective on June 27, 1958. Chapter 640, however, contains the following provision:

"The governing body of any county, city or town which has heretofore done or taken any acts or proceedings for the issuance of bonds under the provisions of Chapter 19, Title 15, Code of Virginia, 1950, as amended, as it stood prior to the passage of this Act may complete such acts and proceedings and issue such bonds in the same manner as if this Act had not been passed or pursuant to the provisions of Chapter 19.1 of this Act."

I am of the opinion that Chapter 278 of the Acts of Assembly of 1958 is of no effect or validity except in the instance where the governing body of a county, city or town prior to June 27, 1958, has done or taken some act or proceeding for the issuance of bonds under the provisions of §§ 15-586 through 15-666.12 of the Code. In this case the county, city or town may continue to follow the provisions formerly found in those sections of the Code, including § 15-605.10 as amended by Chapter 278. The provisions found in Chapter 278 are not applicable to the proceeds of any bonds issued pursuant to the new Chapter 19.1 of Title 15 of the Code of Virginia, i.e. §§ 15-666.13 through 15-666.68.

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**BONDS—Lost Coupons—Absent Statutory or Indenture Provision State Treasurer May Not Make Payment. (124)**

November 6, 1958.

HONORABLE E. B. PENDLETON, JR.  
Treasurer of Virginia

This is in reply to your letter of October 22, 1958, in which you state that a bank of Roanoke, Virginia, has apparently lost some coupons clipped from Virginia State College bonds, dated January 1, 1951. You request my opinion as to whether or not the State Treasurer may make payment to this bank without presentation of these coupons and, if so, the procedure to be followed in making payment.

These bonds were apparently issued under the provisions of Chapter 3 of Title 23 of the Code of Virginia. I can find no provision in that chapter providing for or authorizing the payment of coupons which are not actually presented to the State Treasurer. Of course, there may be a provision contained in the bonds or in the trust indenture accompanying the bonds relating to the payment of lost coupons. If there is such a provision, then, of course, the coupons should be paid in the method prescribed by the bond or the trust indenture. In the absence of any statutory provision, and in the absence of a provision relating to the payment of lost coupons in the bond or the trust indenture, I am of the opinion that the Treasurer may not make payment to the bank until the coupons are presented. Under the circumstances in this case and other similar cases, it is manifest that a hardship is created by the loss of coupons, such as these, and, therefore, this matter might well be the subject of legislation to relieve this loss and any losses which might occur in the future.

**BONDS—School Bond Issuance and Levies for—Legislation Enacted at 1959 Extra Session Did Not Affect. (294)**

May 4, 1959.

HONORABLE ALONZO BEAUCHAMP  
Commonwealth's Attorney for  
Russell County

This is in reply to your letter of May 1, 1959, in which you inquire as to whether or not any legislation was enacted at the recent extra session of the Virginia General Assembly which would in any way affect the issuance of school bonds and the obligation of the localities with respect to the levying of taxes for the purpose of paying the principal and interest on said bonds.

You are advised that in my opinion the General Assembly did not enact any law of this nature. All of the Virginia statutes relating to the issuance of such bonds and the obligations of the localities with respect to payment are the same as they were prior to the recent session.

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**CHURCHES—Real Estate—May Not Hold More Than Four Acres in Town—Town Council Without Authority to Allow Increase. (207)**

February 24, 1959.

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

This is in reply to your letter of February 19, 1959, which reads as follows:

"I should like very much to have your opinion in connection with Section 57-12 of the Code of Virginia which limits the quantity of real estate which a church may own in a city or town. A church in the town of Kilmarnock proposes to acquire slightly more than four acres of land within the town and the question arises as to whether or not the town council under Section 57-12 may by ordinance authorize the trustees to take and hold a parcel of land within the town not exceeding ten acres.

"The limitation of four acres is applicable to both a city or a town and the question here presented is whether or not a town council by implication may by ordinance do that which a city council may do with respect to authorizing church trustees to take and hold not exceeding ten acres of land within a town."

In my opinion the Town Council would not have authority by ordinance to authorize the trustees to take and hold more than four acres of land. Of course, the trustees may own four acres of land without any official action on part of the Town Council. The exception contained in the proviso found in Section 57-12 of the Code is definitely limited to church property within a city.

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**CITIES AND TOWNS—Elections—Charter Provisions Fixing Election Dates Valid. (76)**

September 22, 1958.

HONORABLE WILLIAM J. HASSAN  
Commonwealth's Attorney  
Arlington County

This is in reply to your letter of September 12, 1958, in which you state that you have been requested by the Advisory Committee studying the advisability of the incorporation of Arlington County as a city to submit two seemingly conflicting opinions, which have been rendered in the past by this office, to me for construction

and interpretation. The two opinions in question are (1) opinion rendered on April 20, 1950 to Honorable W. L. Prieur, Clerk of Courts of Norfolk, found on pages 46-47 of the opinions of the Attorney General of 1949-50 and, (2) opinion rendered on August 14, 1956 to Honorable Levin Nock Davis, Secretary, State Board of Elections, found on pages 46-47 of the opinions of the Attorney General for the years 1956-57. Both of these opinions concern the question of whether the General Assembly may, by a duly enacted charter provision, provide a different time for the conducting of a town or city election from that prescribed by the general election laws and a different method of placing candidates' names on the ballots from that prescribed by the general election laws. You state that the Advisory Committee is not so much concerned over special laws relating to elections in a municipal charter as it is with the fundamental question: May a provision of a municipal charter with respect to subjects listed in Section 63 of the Constitution differ from the general law on this subject?

If there is contained in a municipal charter a provision providing for the *organization and government* of the municipality which is contrary to a general law provision, such charter provision would take precedence over the general law provision. This is permitted under Section 117 of the Constitution. Of course, passage of the legislation would have to be in the manner provided in Article 4 of the State Constitution.

There are a number of cases dealing with the general subject. In *Campbell v. Bryant*, 104 Va. 509, involving the charter of the Town of Madison Heights, our Supreme Court said:

"Section 117 of the Constitution provides, that general laws for the organization and government of cities and towns shall be enacted by the General Assembly, and that no special act shall be passed in relation thereto, except in the manner prescribed in article 4 of the Constitution. What special acts may be passed in relation to cities and towns under art. 4 of the Constitution, need not now be considered, for it is clear that cities and towns not in existence when the Constitution went into effect can only be organized and governed in accordance with the general laws. This provision of our present fundamental law prohibiting special legislation and providing that general laws for the organization of cities and towns shall be enacted, and that no special act shall be passed in relation thereto, is second to no other provision of the Constitution in value and importance, and cannot be too carefully observed or strictly enforced.

"Of course the Legislature can, as formerly, grant charters creating cities and towns, but when such charters are granted the city or town so chartered must be organized and governed in accordance with the general laws, otherwise the charter would be obnoxious to the constitutional provision forbidding special legislation.

"The charter of the town of Madison Heights, as set forth in the act of March 14, 1904, is obnoxious in numerous particulars to the constitutional inhibition against special legislation. It is not necessary to point out in this opinion all of the material respects in which the powers sought to be conferred upon towns by the existing general law. One or two examples may be mentioned.

"Clause 20 of the act provides, that the election of mayor and councilmen of Madison Heights shall be on the first Tuesday, in June, 1904, and every two years thereafter; whereas, under the general law, town elections for mayor and councilmen must be held on the second Tuesday in June. Va. Code, 1904, sec. 1021."

Subsequent cases are *Miller v. Pulaski*, 109 Va. 137; *Town of Narrows v. Giles County*, 128 Va. 572; *Portsmouth v. Weiss*, 145 Va. 94; *Fallon v. City of Roanoke*, 190 Va. 564.

It is difficult to reconcile some of the statements made in the cases subsequent to *Campbell v. Bryant* with the language from that case. *Campbell v. Bryant* is

apparently not considered in any of the cases except the Narrows case where a section of the Town charter relating to road taxes was the principal question before the Court. The statement contained therein at pages 585 and 586 relating to a charter provision fixing the time for holding the town election different from the general law cannot be reconciled with *Campbell v. Bryant*. The conclusion by Judge Burks, it is apparent, is mere dictum and I am unable to believe that he intended to overrule *Campbell v. Bryant* with respect to the election subject. My reason is that the time for holding an election does not, in my opinion, apply to the organization and government of a municipality. Organization is a term relating to the type of government such as the manager form. The term government as used in Section 117 of the Constitution, in my opinion, relates to the power and functions of the governmental body. The time for the election of the officials composing the governmental body is not, in my judgment, a provision coming within the scope of Section 117 of the State Constitution.

Therefore, I feel that I should adhere to the opinion dated August 14, 1956, with respect to the constitutionality of charter provisions fixing election dates contrary to the provisions of general law.

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**CITIES AND TOWNS—Incorporation of County as—General Assembly May Provide for Transition of County Into City by Enacting Charter—No General Law Provisions—Highway Funds if Charter Issued. (356)**

June 25, 1959.

HONORABLE JOHN C. WEBB  
Member of the House of Delegates

This is in reply to your letter of June 23, 1959, which reads as follows:

"Thank you for your letter of June 17, 1959, in which you gave me answers to questions regarding urban county governmental problems.

"The answers you have given, now necessitate the following questions, to which I would be most appreciative of your answers:

"1. Could the present County of Fairfax be incorporated as a CITY by petition to the Circuit Court of this County, or would the General Assembly have to pass a charter bill for this purpose?

"2. Could the present County of Fairfax be incorporated as a TOWN by petition to the Circuit Court of this County, or would the General Assembly have to pass a charter bill for this purpose?

"3. In the event the County of Fairfax incorporates as a CITY, would the State Highway Department continue to build and maintain primary and secondary roads within the incorporated limit?

"4. In the event the County of Fairfax incorporates as a TOWN, would the State Highway Department continue to build and maintain primary and secondary roads within the incorporated limit?

"The foregoing questions are proposed in order to clearly define steps the County of Fairfax must take if it seeks incorporation. The highway questions are, of course, designed to let us know what our financial obligations would be with respect to highways and roads, if we do incorporate."

I shall answer your questions in the order presented:

1. Under the present statutes there is no provision for the transition of a county into an incorporated city. The general law with respect to

the incorporation of cities is contained in Chapters 6 and 7 of Title 15 of the Code. Chapter 6 sets forth the procedure for petitioning a court to establish a city of the second class in a situation where an existing town has a population of 5,000 or more. Chapter 7 is the general law with respect to the transition of a city of the second class to a city of the first class where it can be established that the population of a city has attained a population of 10,000 or more.

2. Chapter 5 of Title 15 contains the procedure for the incorporation of a thickly settled community. Under this Chapter if the community has a population in excess of 300 and not in excess of 5,000, the Court has jurisdiction to establish the town. Due to the number of people residing in the rural area of the county of Fairfax, I think that any community that would be incorporated so as to include the county as a whole (exclusive of existing towns and cities), would certainly be in excess of 5,000. Under Section 116 of the Constitution every incorporated community in excess of 5,000 is a city of either the first or second class, dependent upon the size of the population.

3 and 4. Under Section 33-32 of the Code, funds already allocated by the State Highway Commission for expenditure in Fairfax County will be expended as if the county had not become an incorporated city. Thereafter, the responsibility for construction and maintenance of primary and secondary roads within the municipality would depend upon its population. If the population exceeds 3,500, the State Highway Commission would make payment to the municipality for the purpose of maintenance and construction pursuant to Sections 33-113 and 33-113.2 of the Code.

In the event the population of the municipality does not exceed 3,500, the State Highway Commission will continue to maintain and construct the roads in the primary system pursuant to Section 33-113.1 of the Code. The secondary system of State highways would be maintained and constructed by the State Highway Commission pursuant to Sections 33-44 and 33-46 of the Code. Additional roads within the municipality could be maintained and constructed from State highway funds, dependent upon the applicable provisions of Sections 33-50.1, 33-50.2 and 33-50.4 of the Code.

My answers to questions 1 and 2 are based upon the existing general statutes relating to the organization of towns and cities by judicial proceedings. I am of the opinion that under the provisions of Article VIII of the Constitution the General Assembly may enact additional laws of general application establishing other procedures for the creation of towns and cities. The validity of such laws applying only to certain qualifying counties would depend upon whether or not the classification and standards are deemed to be reasonable.

The General Assembly may provide for the transition of a county to a city by the enactment of a charter in accordance with the provisions of Article VIII of the Constitution.

Should you desire further advice as to the administration of the Code sections referred to in the answer to questions 3 and 4, I believe the Highway Commission could give you a clearer statement than I could furnish.

You will recall that the county of Warwick was incorporated into the City of Warwick. The Act establishing the procedure in this instance is Chapter 706, Acts of 1952.

Chapter 582, Acts of 1950, contains a procedure that might be considered if it is desired to consolidate into a single city the county of Fairfax and the cities and towns located therein.

Other Acts which might be helpful in this matter are Chapter 553, Acts of 1956, and Chapter 141, Acts of 1958.

These Acts relating to Warwick and Newport News are cited merely for the purpose of pointing to legislative precedents that might be helpful in the study being made by your county officials.

**CITIES AND TOWNS—Land Subdivision Act—Subdivision Ordinance Not Automatically Extended to Annexed Territory. (77)**

September 22, 1958.

HONORABLE CHARLES G. STONE  
Commonwealth's Attorney  
Fauquier County

This is in reply to your letter of September 17, 1958, in which you state that the Town of Warrenton is contemplating enacting a subdivision ordinance pursuant to the Virginia Land Subdivision Act, Article 2, Chapter 23, Title 15 of the Code of Virginia. You state that it is felt that the Board of Supervisors of Fauquier County will give their approval to the proposed subdivision regulations; that the regulations will be effective in the Town of Warrenton and within a radius of two miles from the corporate limits of the town. You request my opinion on the following question: If the subdivision regulations are adopted by the town now and, at some later date, the town annexes additional territory to the corporate limits, whether or not the subdivision ordinance would then automatically be extended two miles beyond the new corporate limits. As you stated in your letter, there are apparently no reported decisions of our Supreme Court of Appeals on this point, nor can I find any prior opinions of this office on this particular question.

I am of the opinion that if the subdivision ordinance is adopted now, the annexation of new territory to the town would not automatically extend the area within which this subdivision ordinance would be effective. I have reached this conclusion for the following reasons:

1. A land owner owning property three miles outside of the town limits at the present time, after the annexation might find his land within a distance of two miles of the town limits. Under the notice given at the time of the adoption of the subdivision ordinance, he would have no cause to appear at a hearing on the ordinance, since his property is not within the two-mile distance of the town limits. If the annexation proceedings automatically extended the jurisdiction of the subdivision ordinance, it would have the effect of placing a regulation on his property of which he had no notice of a hearing and no opportunity to appear in opposition to the ordinance or any provisions thereof.

2. I do not feel that the provisions of an ordinance which are effective outside of the town may be extended to other areas outside of the town by a collateral proceedings, such as an annexation suit. The law requires certain provisions as to notice, and as to the approval or disapproval by the board of supervisors of the county, and if the jurisdiction of the subdivision ordinance were extended automatically by the annexation of new territory to the town, neither the residents of the new area affected nor the board of supervisors of the county would have an opportunity to be heard on the matter.

3. Section 15-794.1 of the Code of Virginia makes it a misdemeanor for the owner of any tract of land within the jurisdiction of the subdivision ordinance to subdivide a tract of land without complying with all the provisions of Article 2 of Chapter 23 of the Code, and all regulations prescribed by the subdivision ordinance. All criminal statutes must be strictly construed; therefore, I am of the opinion that the area within which a criminal statute is effective cannot be extended by a collateral proceeding, such as an annexation suit, and that the area within which the statute is effective can be enlarged only in the manner prescribed by Article 2 of Chapter 23 of the Code of Virginia.

**CITIES AND TOWNS—Maximum Salaries of City Officers—Newport News and Norfolk Are Adjoining Within Purview of § 14-75. (86)**

October 8, 1958.

HONORABLE C. B. COVINGTON, JR., *Treasurer*  
City of Newport News

This is in reply to your letter of October 3, 1958 in which you request my opinion as to whether or not the Cities of Newport News and Norfolk could increase the maximum salary of the officers of the two cities under the provisions of § 14-75 of the Code of Virginia, which section reads as follows:

"The maximum limits of the salaries provided by this article are hereby increased to the extent of fifteen hundred dollars in the case of officers in the counties adjoining one or more cities of more than twenty-five thousand inhabitants, whether such cities be within or without this State, and in case of cities adjoining or within one mile of another city or county of more than one hundred thousand inhabitants."

I am of the opinion that the City of Newport News adjoins the City of Norfolk and that the City of Norfolk likewise adjoins the City of Newport News so as to bring these two cities within the provisions of § 14-75 for the purposes of maximum limits of salaries of city officers.

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**CITIES AND TOWNS—Ordinances—Dog Laws—Cities May Adopt Regulations More Stringent Than State Laws Where Charter Permits. (40)**

August 13, 1958.

HONORABLE KIRK L. WOODY  
Civil and Police Justice  
City of Hopewell

This is in reply to your letter of August 7, 1958, in which you request my opinion as to whether or not § 19 of Chapter 3 of the Code of the City of Hopewell is a valid and enforceable ordinance. The ordinance reads as follows:

"At any time not exceeding four ten day periods, or such lesser time as the City Manager may designate per year, the City Manager may proclaim that all dogs within the City of Hopewell must be confined to the homes or lots of their owners for a period of ten days or such lesser time as the City Manager may designate while the State Game Wardens are canvassing the City for unlicensed and unclaimed dogs. The City Manager, in proclaiming the confinement of dogs for such ten day period or such lesser time as he may designate, shall do so by having notice thereof published in a newspaper of general circulation in the City of Hopewell at least twice a week for two weeks preceding the date of confinement.

"Any person violating the provisions of this Section shall be penalized in accordance with Section 5 of Chapter 1 of the Code of the City of Hopewell.

"An emergency is declared to exist and this ordinance shall be in full force and effect from its passage."

Section 11 of Chapter III of the Charter of the City of Hopewell—Chapter 431 of the Acts of the General Assembly of 1950—provides the following power for the City of Hopewell:

"To prevent the running at large of animals and fowl in said City and to regulate and control the keeping and raising of animals and/or fowl therein."

I am of the opinion that this provision of the charter gives ample authority to the City for the adoption of Section 19 of Chapter 3 of the Code of the City pertaining to the confinement of dogs on order of the City Manager.

You ask if this city ordinance is in violation of or inconsistent with State law on this subject. The applicable State law concerning the confinement of dogs is found in §§ 29-194, 29-194.1, 29-195 and 29-196 of the Code of Virginia. While Section 19 of Chapter 3 of the Code of the City of Hopewell differs from the provisions in the sections of the Code cited above, I am of the opinion that this ordinance of the City is not inconsistent with these sections. In the case of *King v. County of Arlington*, 195 Va. 1084, the Supreme Court of Appeals of Virginia held that in the field of regulation of dogs the State has not preempted the field, and further held that a county or city could enact more stringent regulations for the keeping of dogs than that found in the State laws.

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**CITIES AND TOWNS—Sanitary Sewer System of Town May Be Extended Beyond Town Limits Where Charter Authorizes Operation of Water and Sewer Systems as Single Undertaking. (32)**

August 4, 1958.

HONORABLE EDWARD H. RICHARDSON  
Commonwealth's Attorney  
Roanoke County

This is in reply to your letter of June 17, 1958, and has reference to our telephone conversations since that date, in which you request my opinion as to whether or not the town of Salem has the authority to operate sanitary sewers outside the corporate limits of the town.

Section 4(9) of Chapter 201 of the Acts of Assembly of 1956, which is an amendment to the charter of the town of Salem and which relates to the powers of the town of Salem, provides, in part, as follows:

"To own, operate and maintain water works \* \* \* for the purpose of providing an adequate supply for said town and of piping or conducting the same; to lay all necessary mains; and service lines, either within or without the corporate limits of said town for the distribution of water to its customers and consumers both within and without the corporate limits of the said town, and to charge and collect water rents therefor;  
\* \* \*"

Section 4(15) of the same Act of the General Assembly reads as follows:

"To establish, construct and maintain sanitary sewers, sewer lines and systems, and to require abutting property owners to connect therewith and to establish, construct, maintain and operate sewerage disposal plants, and to acquire by condemnation or otherwise within or without the town, all lands, rights of way, riparian and other rights and easements necessary for the purposes aforesaid, and to charge and collect reasonable fees or assessments or costs of service for connecting with and using the same."

Section 4-A of Chapter 103 of the Acts of Assembly of 1954, which chapter amends the charter of the town of Salem, provides, in part, as follows:

"\* \* \* the council shall have power to, from time to time, enlarge, extend and improve, and to maintain and operate, as a single specific undertaking, a water supply system to provide a supply of water to the town and its inhabitants, and a sewage disposal system, suitable to collect and discharge all sewage and water borne-wastes, and to charge and collect rents, rates, fees and other charges for direct or indirect connection with, or for water furnished by, or for the collection and disposal of sewage by, such specific undertaking. \* \* \*."

The above-quoted provisions of the charter of the town of Salem give the town of Salem specific statutory authority to supply water to consumers within and without the town of Salem and also to operate the water supply system and the sewage collection system as a single undertaking. It does not give the town of Salem specific statutory authority to operate a sanitary sewer system outside the town limits.

In the case of *Mount Jackson v. Nelson*, 151 Va. 396, the Supreme Court of Appeals of Virginia, in a case involving the right of the town of Mount Jackson to extend its water lines outside the town limits and to supply customers who were not inhabitants of the town with water where there was no statutory authority for supplying water outside the town limits, held:

"It is a common custom for municipal corporations in Virginia to furnish water to those who live beyond their limits. This is a source of profit to them, contributes to the sanitation of the outlying districts and indirectly to that of the town themselves. To discontinue this would, in many instances, be disastrous, and would redound to the injury of all concerned without corresponding benefit of any kind to anybody. When to sell and when not to sell must be left as other matters of business are left to their sound judgment." (151 Va. at pp. 407-408)

Today, with the emphasis that is being placed on preventing stream pollution and preventing health hazards from the discharge of untreated sewage, it is generally conceded that the supplying of water to domestic consumers and the collection of their sanitary sewage is very closely interrelated, and that these two functions are virtually impossible to separate. In view of the provisions found in the amendment of the charter of the town of Salem in Chapter 201 of the Acts of Assembly of 1956 and Chapter 103 of the Acts of 1954, I am of the opinion that the ruling of the Supreme Court of Appeals in the case of *Mount Jackson v. Nelson*, *supra*, may be extended to apply to sanitary sewer systems. Therefore, I have reached the conclusion that the town of Salem may extend sewer lines and provide sewage collection service outside the town limits of the town of Salem so long as its sewage treatment facilities have sufficient excess capacity after providing treatment for the sewage from the town of Salem to properly treat the additional sanitary sewage from without the town.

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**CITIES AND TOWNS—Veto Power of Mayor Does Not Extend to Administrative Appointments of City Attorney and Clerk of Council. (60)**

September 5, 1958.

HONORABLE MINETREE FOLKES, JR.  
Member of the House of Delegates

This is in reply to your letter of September 4, 1958, which reads as follows:

"I will greatly appreciate an opinion on the question raised by Mayor Fred R. Shepherd of Colonial Heights in a letter to you dated September

3rd regarding the right of the Mayor to veto the election of City officials who were elected by the City Council pursuant to Chapter 144 of the Acts of Assembly of 1950."

The letter from the Honorable Fred R. Shepherd of Colonial Heights, to which you refer, is as follows:

"Pursuant to provision of Chapter 144 of the Acts of Assembly of 1950 (Colonial Heights City Charter) Section 18 an organizational meeting of the City Council was held on September 2, 1958. This meeting by agreement of all members had been postponed from September 1, 1958, because of the legal holiday. The Council thereupon rejected the employment of our City Attorney who has served the City for the past 30 years by a vote of 3 to 2. Thereafter by resolution the Council voted 3 to 2 to elect a new City Attorney. For numerous valid and justifiable reasons I thereupon exercised my constitutional veto as provided in Section 123 of the Constitution of Virginia Code Section 15-410 against the resolution electing the new particular City Attorney. Thereafter, the Council took no further action with respect to electing a City Attorney. Copies of my objections to the resolution will be returned to the Clerk as provided by Section 123 of the Constitution of Virginia. It is noted further that under current Virginia decisions an election is an act of choosing and that under Section 19 of said City Charter that the only way the Council can act is by ordinance or resolution except in dealing with parliamentary procedure.

"The matter will again come up for reconsideration at the next Council meeting. Should a 2/3rds vote at that time be cast, then the resolution will be passed over my objection. If no 2/3rds vote is cast and the Council is then deadlocked, the City will be in the position of having no City Attorney. A similar situation has occurred with respect to employment of a Clerk of Council. It would be most helpful if you would be kind enough to advise me of your opinion on the following two questions:

"1. In view of the foregoing situation and in the event that after reconsidering the matter the Council fails to pass a resolution electing the particular City Attorney by a 2/3rds vote over my objection or to elect a different City Attorney, then will the City Attorney whose office expired on August 31, 1958, continue office?

"2. In the event of a situation where the present Council becomes deadlocked and refuses to elect a City Attorney other than the particular City Attorney I have already vetoed, does the Mayor have the power to appoint an acting City Attorney if deemed necessary for the welfare of the City or can the Circuit Court exercise any control or appoint an acting or permanent City Attorney or City Clerk?"

I am enclosing copy of an opinion issued by this office during the time that Governor Almond was Attorney General which relates to the matters raised by you and Mayor Shepherd. While this opinion, which is dated November 23, 1956 and addressed to Senator Thomas H. Blanton of Bowling Green, concerns the authority of the Mayor of the Town of Bowling Green to veto the appointment of a town official made by the town council pursuant to charter provisions, it, nevertheless, involves the same fundamental principles as appear in this instance.

Section 18 of the Charter of the City of Colonial Heights is as follows:

"Upon the passage of this act, and thereafter on the first day of September following each regular municipal election and organization of the council, or as soon thereafter as may be practicable, the council shall elect a city clerk, a city attorney and a chief of police, and such other officers as may come within their jurisdiction, each of whom shall serve at the pleasure of the council; provided, that the council may elect the city clerk, and city attorney for terms of one year each, beginning September first, subject to removal by the council for cause; and in no event shall the council elect any officer for a term extending beyond the thirty-first day of August next succeeding each regular biennial municipal election for members of the council. Said council may by resolution delegate the mayor of said City as the Chief of Police to serve at its pleasure."

The last sentence of Section 16(c) of this charter is as follows:

"All elections by the council shall be viva voce and the vote recorded in the journal of the council."

Under Section 17 of the charter the Mayor would have the right to vote on a question involving the election of the officials under consideration here in case of a tie. Since there was not a tie in this instance but the vote was 3 to 2, I am unaware of any constitutional or statutory provision under which the Mayor would have the right to vote or exercise the veto power.

The proceedings had in connection with the election of officials set out in Section 18 of the City Charter are not in the nature of legislative enactments. The veto power contained in Section 123 of the State Constitution has not, insofar as I have been able to determine, ever been construed to extend to elections of town officials by the council. The contrary was held in the case of *Commonwealth v. Cole*, decided by the Circuit Court of Fredericksburg on October 14, 1904. A writ of error was refused in that case. The Circuit Court held "the Mayor had no veto power in case of elections." The case involved the proceedings incident to the election of the president of the council. The court further said:

"That an ordinance, or a resolution having the effect of an ordinance, is not one and the same thing, as an election to the presidency of a council at its initial or organization meeting, seems to me to be clear."

Section 50 of the Charter of the city of Colonial Heights is as follows:

"Except as otherwise provided by general law or by this charter, all officers elected or appointed under the provisions of this charter shall take the oath of office and execute such bond as may be required by general law, by this charter, or by ordinance or resolution of the council, and file the same with the City Clerk, before entering upon the discharge of their duties, and if the requirements of this section have not been complied with by an officer within thirty days after the term of office shall have begun or after his appointment to fill a vacancy, then such office shall be considered vacant."

Until such time as the officers who have been elected by the council qualify in the manner prescribed by the city charter, I am of the opinion that the incumbents continue to hold office under Section 33 of the Constitution.

In view of my opinion in connection with this matter, the situation presented in question 2 of Mayor Shepherd's letter will, it would seem, not arise and, therefore, I shall not express an opinion with regard to the question.

I realize that Mayor Shepherd did not specifically request an opinion with re-

spect to his authority to veto the election of the city officers in question. However, since this office had previously rendered an opinion in regard to that subject and, also, since the questions presented are dependent upon the authority of the Mayor to exercise the right of veto in such cases, we have felt compelled to discuss that point.

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**CIVIL PROCEDURE—Confession of Judgment—May Serve Copy of Order on Resident Debtor—Notice Not Served Within Statutory Period—Attorney in Fact May Again Confess Judgment—Plaintiff Must Again Pay Writ Tax and Other Fees. (259)**

April 10, 1959.

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

This is in reply to your letter of April 7, 1959, which reads as follows:

“Your attention is referred to Section 8-362 of the Code which provides for service on the defendant when judgment is confessed by an attorney-in-fact. We have several docketed judgments under this section with return by the officer stating that the defendant cannot be found, nor any member of his family, such return being within sixty days from the entry of the judgment.

“The question now arises ‘how can the creditor proceed to get a good judgment on the note in question when the defendant is not a non-resident.’ The statute says ‘failure to serve a copy of such order within sixty days from the date of entry thereof shall render such judgment void as to any debtor not so served.’ In other words, the creditor has a judgment docketed in the judgment lien docket but the same is of no effect according to the statute because no service was had within sixty days. Can the judgment creditor start all over again, and if so, would he have to pay the writ tax and fees, or, what can he do? As I see it, the clerk has no right to issue any alias notice, and I feel that his authority ends when he issues the first certified copy of the order to be served.”

I am of the opinion that the certified copy of the order entered under Section 8-362 of the Code may be served upon a resident debtor in the manner provided in Sections 8-51 and 8-56 of the Code.

The certified copy of the order is, in my opinion, a process within the meaning of that term as used in the statutes and as defined in Section 1-13.23:1 of the Code. Constructive service in any manner allowed under Section 8-51 would seem to be sufficient.

With respect to your inquiry as to the right of the creditor to have the attorney in fact confess judgment again in case the notice under Section 8-362 has not been served within the statutory time, it does not appear that this question has been determined by our Supreme Court of Appeals. However, since a judgment entered under this section is void unless the notice is served within the statutory period, I am of the opinion that in such case the entire proceeding had is a nullity and the attorney in fact would not be estopped from confessing judgment again. Of course, in such a case, the plaintiff would be required to pay the regular writ tax and other fees provided in such cases as though no previous confession had been made.

**CIVIL PROCEDURE—Garnishments—Garnishee Debtor May Make Payments to Sheriff—Sheriff Required to Accept. (148)**

December 9, 1958.

HONORABLE HENRY O. WINN  
Sheriff of Pittsylvania County

This is in response to your letter of December 4, 1958, in which you ask the following questions:

1. "Since garnishment proceeding is returnable to the court from which issued, should the money be paid directly to the court by the garnishee debtor instead of to me as sheriff?"
2. "Is it proper for the garnishee debtor to make deductions of nominal amounts and make partial payments to the sheriff before making answer to the court on the summons?"
3. "Also should the garnishee debtor pay the money so held from the wages of the judgment debtor to the court upon making answer on the date the garnishment is returnable, or
4. "Should the money be paid to the sheriff in partial payments as deducted before date of return to the court of the garnishment?"
5. "In other words, am I required to accept the money from the garnishee debtor on the execution before the garnishee summons has been answered and heard by the Court?"

Garnishment is a creature of statute, and the provisions of Article 7, Chapter 19 of Title 8 of the Code of Virginia are controlling herein. Section 8-444 of the Code provides that the court may enter judgment against the employer in accordance with the applicable provisions of law, and it is a natural consequence that the order itself would be controlling as to the proper manner in which payment should be made. I am advised that it is the usual procedure for the order to require the employer to make payment to the court.

The conditions under which payment may be made to the sheriff or other officer serving the summons are set forth in § 8-448 of the Code which reads as follows:

"Any person, summoned under § 8-441, may, before the return day of the summons, deliver and pay to the officer serving it, what he is liable for; and the officer shall give a receipt for, and make return of, what is so paid and delivered."

You will note that the foregoing section authorizes the garnishee to pay the officer the amount he is liable for, that is, the amount owing by his (not exceeding the amount necessary to satisfy the execution) to the execution debtor, less the allowable exemptions (§§ 8-445 and 24-29 of the Code) where wages are involved. If the garnishee pays all that he is liable for by reason of the execution, he is not liable for costs. § 8-449. Such payment by the garnishee may, of course, be less than the obligation of the debtor as shown by the execution, in which event, if the garnishee becomes indebted to the judgment debtor again during the life of the execution, he may make further payment to the officer to the extent of his liability at that time.

I am, therefore, of the opinion that the employer may make payments to the officer in the manner stated above, and the officer must accept them.

**CLERKS—Chattel Deed of Trust Upon Livestock—Should Be Recorded in Agricultural Chattel Deed of Trust Book. (90)**

October 9, 1958.

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

This is in reply to your letter of October 7, 1958, in which you enclosed a copy of a deed of trust on certain cattle which you have received for recordation, and you request my opinion as to whether this deed of trust, and others similar to it, should be recorded in the Agricultural Chattel Deed of Trust Book or in the Miscellaneous Lien Book. The deed of trust, a copy of which you enclosed in your letter, conveys in trust twenty head of cattle to secure the payment of a note held by a bank.

Section 43-44 of the Code of Virginia provides as follows:

“Any person, association, partnership or corporation may give as security for any funds borrowed or to be borrowed or for any pre-existing indebtedness a chattel deed of trust upon livestock, poultry, farm machinery, farm equipment and upon annual and perennial crops and plant products, including fruit, either grown or growing at the time of the execution of the deed of trust or to be planted or grown within one year thereafter. For the purpose of this chapter all such crops shall be deemed to be personal property.”

I am of the opinion that the deed of trust in question comes within the scope of the above-quoted section of the Code in that it is a chattel deed of trust upon livestock. Section 43-53 of the Code provides in part as follows:

“The clerk of the circuit court in each county shall maintain a separate book to be known as the agricultural chattel deed of trust book in which he shall docket each instrument filed pursuant to this chapter \* \* \*.”

Therefore, I am of the opinion that the deed of trust in question, and others similar to it, should be recorded in the Agricultural Chattel Deed of Trust Book rather than the Miscellaneous Lien Book.

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**CLERKS—Civil Procedure—Judgments of Courts Not of Record—May Issue Execution Prior to Docketing When on File—Clerk of Court Not of Record May Not Issue Garnishment After Two Years. (167)**

January 8, 1959.

HONORABLE S. L. FARRAR, JR.  
Clerk of the Circuit Court of  
Amelia County

This is in reply to your letter of January 7, 1959, which reads as follows:

“Section 16.1-115 of the 1950 Code as amended in 1958, provides, among other things, that papers in civil matters be retained by the County Courts after the action is concluded for a period of six months, after which they are to be delivered to the Clerk of the Circuit Court for filing and indexing.

“Then Section 16.1-116 provides that when the papers have been so returned to the Clerk of the Circuit Court for filing, executions upon and

abstracts of judgment may be issued by the clerk of the circuit court, but that for a period of two years from date of judgment the Court not of record (County Court) may also issue executions upon and abstracts of the judgment.

"There are two questions I would like cleared. (1) If I was requested, as clerk of circuit court, to issue an abstract or an execution on a judgment six months or more old and on proper file in my office am I required, or should I, first docket this judgment on the judgment lien docket if it has not been so done. (2) How long does the court not of record (County Court) have the authority to issue garnishments on a judgment? Section 16.1-116 gives the court not of record two years from date of judgment to issue executions or abstracts but is silent as to garnishments."

With respect to question (1), I am of the opinion that you are not required to docket the judgment prior to the issuance of an execution thereon. The purpose of docketing a judgment is to give notice of the lien created by the judgment. The power to issue executions on the judgment never depends upon it being recorded in the judgment lien docket.

Section 8-373 of the Code requires the Clerk of every circuit court to docket, upon the request of any person interested therein, any judgment rendered by a trial justice of which an abstract is delivered to him certified by the trial justice (now county court judge) who rendered it. Similar principles would govern the issuance of abstracts by the clerk of the circuit court.

With respect to question (2), no garnishee may be issued except when an execution has been issued upon the judgment. See Code Section 8-441. The garnishment is a process by which a judgment creditor enforces the lien created by the issuance of an execution. Therefore, since the county court does not have authority to issue an execution after the two year period prescribed by Section 16.1-116 of the Code, it follows that after that time he cannot issue a garnishee that is supported by an execution issued by him.

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**CLERKS—Fees—Recordation of Certificates of Deposit and Filing of Plats in State Highway Plat Book—Fees Fixed by Statute. (138)**

November 24, 1958.

HONORABLE ROBERT M. OLDHAM  
Clerk, Circuit Court of Accomack County

This will acknowledge receipt of a copy of your letter of November 18, 1958 addressed to Mr. George D. Felix, Right of Way Engineer for the Department of Highways, relating to the fees to be paid the clerk for recording Certificates of Deposit pursuant to § 33-70.3 and § 33-70.4 of the Code. As you likely know, the 1958 session of the General Assembly amended the law quite radically relating to the recordation of Certificates of Deposit in connection with the acquisition of rights of way by the State Highway Commissioner. Section 33-70.8 of the Code, as amended, provides a fee of \$2.50 to be paid the clerk for recording each Certificate of Deposit. Section 17-69.1 of the Code provides a fee of .50 for the filing of each highway plat in the "State highway plat book." This latter provision has been in the Code since 1950.

The aforementioned fees having been specifically designated by the General Assembly, no discretion remains in the clerk or in the State Highway Commissioner to fix fees for such service. In the event the fees prescribed should prove to be unrealistic or inequitable, the adjustment must be effected by legislative enactment.

In view of the number of inquiries being made in this regard, both to this office and the State Highway Department, I am taking the liberty of sending a copy of this letter to the Clerk of each Court where such certificates are recorded, the State Highway Commissioner, the President of the Clerks' Association, and the Auditor of Public Accounts.

**CLERKS—Offices—Closing on Holidays—§ 17-41 Controls. (147)**

December 8, 1958.

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

This is in reply to your letter of December 6, 1958, which reads as follows:

"Enclosed find a clipping from the *Times-Dispatch* as of yesterday in regard to December 26 being proclaimed a state holiday for courts of record, and in this connection I refer you to Section 17-41 of the Code.

"I understand many of the clerks of courts close their offices when the governor proclaims a holiday, and I would like to be advised whether on such occasions I have a right to close my office."

Section 17-41 of the Code provides as follows:

"The clerk's office of every court shall be kept open on every day, except Sunday, the Fourth of July, Thanksgiving Day and Christmas Day, during convenient hours, for the transaction of business; provided that:

"(1) In cities it may be closed on New Year's Day, Memorial Day, Labor Day and Armistice Day, and the judge of the circuit court of any county may authorize the clerk to close the office on any such day or days;

\* \* \* \* \*

"(3) In cities having a population of one hundred forty thousand or more, and in cities having a population of not less than eighty thousand nor more than ninety thousand, the clerk's office of any court may be closed on all days which are made legal holidays under the provisions of § 2-19;

"(4) The judge of the circuit court of any county adjoining a city having a population of one hundred forty thousand or more, may authorize the clerk to close the office on all days which are made legal holidays under the provisions of § 2-19;"

In light of these provisions I am of the opinion that the only clerk's office of a county which may be closed on December 26th is the clerk's office located in a county adjoining a city having a population of 140,000 or more and such clerk's office may be closed only upon authorization of the judge of the circuit court of such county.

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**CLERKS—Recordation—Powers of Attorney—From Surety Company to Agent Authorizing Execution Notary's Bond—General—Should Be Acknowledged and Recorded. (346)**

June 15, 1959.

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

This is in reply to your letter of June 12, 1959, which reads as follows:

"Section 38.1-653 of the Code reads as follows: 'Power of attorney to be

recorded.—Every power of attorney from a fidelity and surety company to an agent constituting such agent an attorney in fact to execute any bond or other obligation in the name and on behalf of the company as surety, shall, *unless the same be special and limited to one transaction, or to definitely stated transactions*, be duly acknowledged for recordation and recorded in the deed book in the clerk's office of the county or corporation, or in the counties and corporations, in which the powers delegated by it are to be exercised.'

"With special reference to the underscored portion above, a power of attorney has been presented to me, *not for recordation under the above section*, but for the purpose of attaching to the bond of a notary public to show specific authority of the agent to execute the same on behalf of an insurance company. The same specifies authority to the agent ". . . to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed, bonds, undertakings, recognizances and other contracts of suretyship and indemnity, including agreements of co-suretyship and reinsurance, as follows:

'any and all bonds, undertakings, recognizances and other contracts of suretyship and indemnity not exceeding the amount of Two Hundred Thousand Dollars (\$200,000.00) in any single instance.' "

"The question is: Is this power sufficient under the Code provision as underscored above. In other words, can such power of attorney as quoted above be considered a special power of attorney to execute a notary bond for one John Smith, or, should the same have to be recorded as a general power of attorney in accordance with the above section.

"This would seem to be a minor matter, but as there will probably be other instances posing the same question, I should like an official opinion."

I am of the opinion that the power of attorney in this instance does not come within either of the exceptions appearing in Section 38.1-653 of the Code, which exceptions you have underscored. The underscored portion of the Code section contemplates a situation such as we would have here if the Power of Attorney were confined to the delegating to the agent the authority to execute the bond required by the person involved, giving his name and the amount of the bond.

Specifically, with regard to your inquiry, I am of the opinion that the Power of Attorney in this instance may not be considered as a "special power of attorney to execute a notary bond for one John Smith." I am of the opinion that the power of attorney which was presented to you is general in its application and under the Code section cited should be acknowledged and admitted to record.

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**CLERKS—Recordation Fees—Conveyances to County—Clerk's Fee Should Be Paid. (293)**

May 4, 1959.

HONORABLE O. B. CHILTON  
Clerk of Lancaster County Circuit Court

This is in reply to your letter of May 1, 1959, which reads as follows:

"I desire to obtain an opinion from you as to whether or not the County Clerk can lawfully charge the Board of Supervisors of his County for recording deeds wherein the County is grantee."

I am of the opinion that the Clerk's usual fee should be paid by the county. The Clerk's fee is his compensation for services actually rendered.

Of course, you are familiar with Section 58-64 of the Code which exempts a deed of this nature from the recordation tax imposed under Section 58-54 of the Code.

**CLERKS—Recordation of Deeds—Acknowledgments—Duty of Clerk to Examine for Compliance With Law—Taxation—Recordation—Notice of Lease Pending—Subject to Tax as Contract or Lease. (326)**

May 28, 1959.

HONORABLE G. STUART HAMM, JR., *Clerk*  
Corporation Court of the  
City of Charlottesville

This is in reply to your recent letter in which you posed two questions:

*"First:* How far is a Clerk liable for recordation of a deed which was acknowledged before an *attorney at law* who has authority to acknowledge deeds in the state in which the instrument was acknowledged?

*"In other words,* is it the duty of the clerk to examine each deed presented to him for recordation to see that the acknowledgments are acknowledged before officers authorized to take acknowledgments under our State Statutes?

*"Second:* Is there a recordation tax on a NOTICE of Lease pending?

*"There has been presented to us such a notice in which the property leased is described in the notice but there are no terms or consideration given in said notice. The obvious purpose of this notice is to avoid payment of the state recordation tax. Is it the duty of the clerk to inquire as to the consideration and tax the instrument accordingly or is there no tax on such an instrument?"*

In reply to your first question, your attention is directed to Article 2, Chapter 6, Title 55 of the Code of Virginia, with particular reference to § 55-113. This section enumerates those officers whose certificates that a writing has been acknowledged before them are acceptable as proper acknowledgments for the purposes of recordation in the Commonwealth. It reads, in pertinent part:

*"Such court or clerk as is mentioned in § 55-106 shall admit any such writing to record as to any person whose name is signed thereto,*

*"(1) Upon the certificate of such clerk or his deputy, or of a justice of the peace, a notary public, a commissioner in chancery, or a clerk of any court of record within the United States or in Porto Rico, or any territory or other dependency or possession of the United States, that such writing had been acknowledged before him by such person. \* \* \**

*"(2) Upon the certificate of acknowledgment of such person before any commissioner appointed by the Governor, within the United States, so written or annexed, \* \* \**

*"(3) Or upon the certificate of such clerk or his deputy, or of a justice of the peace, a notary public, a commissioner in chancery, or a clerk of any court of record within the United States, or in Porto Rico, or any territory or other possession or dependency of the United States, or of a commissioner appointed by the Governor, within the United States, that such writing was proved as to such person, before him, by two subscribing witnesses thereto. \* \* \**

*"When authority is given in § 55-106 or in this section to the clerk of a court in or out of this State, but within the United States, such authority may be exercised by his duly qualified deputy."*

In addition, §§ 55-114 and 55-115 of the Code list certain other individuals in foreign countries and in the armed services whose certificates that writings have been acknowledged before them are acceptable in the Commonwealth. An attorney at law, even though authorized by another state to take acknowledg-

ments of persons in that state, is not one of those listed in the Article above mentioned. It follows that any such certificate of acknowledgment does not comply with the requirements of our statutes and the writing to which such certificate is affixed is not "duly" acknowledged.

You might utilize the provisions of § 55-111, which orders a clerk, when required by any person interested, to preserve a writing which should be admitted to record if properly acknowledged and which has remained or shall remain in the clerk's office for six months without a proper acknowledgment being appended thereto. It is my opinion that it is the duty of the clerk to examine each deed and determine whether the certificate of acknowledgment attached has been made by an officer so authorized under the statutes of the Commonwealth of Virginia.

As to your second question, I have not had an opportunity to examine the instrument which you have referred to as "Notice of Lease Pending." I gather from the information you gave me that it is essentially a notice that the parties to the lease intend to enter into a lease of certain property which is described in the notice. I am not aware of any previous inquiry relating to a paper of this type.

The General Assembly has determined that certain writings, including but not limited to deeds, deeds of trust, conditional sales, contracts, leases, etc., shall be admitted to record when duly acknowledged, but I find no statute pertaining to any such paper writing as that described by you. If it be a memorandum or note of a promise, contract, agreement, representation or assurance made with respect to real estate, then it should be admitted to record and taxed accordingly. I find no exception in § 58-58 of the Code of Virginia which would relieve this instrument from the recordation tax if it is a contract relating to real property. On the other hand, if it is not by its terms or effect a contract relating to real property, then I am of the opinion that the clerk is not required to admit the same to record. The best solution which I can offer is that if the parties insist on recordation of this writing, you should require them to pay the same recordation tax as if it were a deed of lease or contract relating to real property.

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**COLLEGES AND UNIVERSITIES—Appropriation for "Capital Outlay Purposes"  
May Be Expended Only for Physical Additions and Betterments—May Not Be  
Utilized as Contribution to Student Loan Fund. (180)**

January 23, 1959.

HONORABLE CHARLES K. MARTIN, JR., *President*  
Radford College

This is in reply to your letter of January 17, 1959, in which you enclosed a letter from Dr. Walter S. Newman to the Governor of the Commonwealth, and the Governor's reply authorizing Radford College to participate in the Student Loans provided in the National Defense Education Act of 1958.

With reference to the National Defense Education Act of 1958, your letter states in pertinent part:

"Under this Act, Radford College must contribute one-ninth of the amount provided by the Federal Government to establish this loan fund. This is termed by the government as a capital contribution.

"This General Assembly in 1956 passed a bill authorizing the Board of Visitors of Virginia Polytechnic Institute to sell property it owned in Pulaski. The General Assembly, in this bill, provided that these funds could be used only for capital expenditures. The Federal Government terms the institutions' contributions to this loan fund as a capital contribution.

"In your opinion, would the use of these proceeds for this purpose be termed as a capital expenditure?"

When you refer to the bill passed by the General Assembly in 1956 authorizing the sale of certain property in Pulaski County, I assume you refer to Chapter 157, Acts, 1956. This act specifies the disposition of the proceeds of the sale of the Pulaski County real estate as follows:

"The proceeds from any such sale or conveyance is appropriated to Radford College, Woman's Division, Virginia Polytechnic Institute, and shall be used for capital outlay purposes."

Examination of the National Defense Education Act of 1958 (Pub. L. 85-864, 72 Stat. 1581, 20 U. S. C. A. § 401, et seq.) reveals that the act is designed to provide assistance to students and to states and their subdivisions, in order to insure trained man power to meet the national defense needs of the United States. In general, the act provides for the execution of agreements between the Commissioner of Education and the various educational institutions whereby "student loan funds" are established into which the Federal Government and the institution deposit funds to be loaned to bona fide students of the institution under certain terms and conditions. (20 U. S. C. A. § 424, et seq.) In general, the Federal Government contributes 8/9ths and the institution contributes 1/9th of the total amount in the fund.

The moneys which comprise the student loan fund are loaned to qualifying students under the control of the institution and are to be repaid with interest over a period of time after the student completes his education. In § 425 of 20 U. S. C. A., I note that if a borrower dies or becomes permanently disabled prior to repayment of his loan, the balance of the loan is cancelled and, if a borrower serves as a teacher in a public school or institution, up to 50% of the principal amount of the loan, plus interest, is cancelled at the rate of 10% per year of such service. Further, after June 30, 1966, the act calls for a capital distribution of the balance in each student loan fund, which distribution is made in the same ratio as deposits in the fund were originally made.

It is my opinion that the proceeds of sale of the real property in Pulaski County, which is the subject of Chapter 157, Acts of 1956, may not be used by the Board of Visitors of Virginia Polytechnic Institute as Radford College's contribution to a student loan fund established under the National Defense Education Act. The limitation by Chapter 157 to "capital outlay purposes" must be interpreted as a limitation of use of the proceeds to "additions and betterments" to Radford College in the sense that these terms are used in the various budgets and appropriations acts adopted by the General Assembly. A study of the Budget for the biennium 1958-60 reveals that "Making Loans to Students" invariably is followed by the term "expense of operation," while "Additions and Betterments" is followed by "Capital Outlays," and the items under the latter caption include only provisions for "Equipment" and "Land and Structures." The Appropriation Act recently enacted (Acts, 1958, Chapter 642) generally follows the same pattern, and the items which are referred to as capital outlay items include only items of equipment, land and structures.

In short, "capital outlay purposes" can mean only money spent for additions and betterments, and not for the establishment of a fund from which to make loans to students. The establishment of such funds is considered an expense of operation.

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**COLLEGES AND UNIVERSITIES—Bonds—Treasury Board Is Statutory Paying Agent—May Designate Treasurer and Bank Co-Paying Agents. (224)**

March 3, 1959.

HONORABLE E. B. PENDLETON, JR.  
Treasurer of Virginia

This is in reply to your letter of February 26, 1959, in which you state:

"Section 23-19 of the Code of Virginia provides in part as follows:

“ . . . All such bonds shall be issued and sold through the Treasury Board which is hereby designated the issuing, sales, and paying agent of such institutions under this chapter . . . ”

“Will you please advise us whether the Treasury Board can delegate a bank as paying agent rather than the State Treasurer; and, if a bank is required to be named as paying agent, whether the State Treasurer should also be named as the principal paying agent.”

Section 23-19 of the Code, to which you refer, pertains to the issuance of bonds by certain educational institutions which are constituted as governmental instrumentalities. The Treasury Board is specifically designated as the paying agent of such institutions, but I do not feel that the language of the statute in question limits the general powers conferred upon the Treasury Board under § 2-149.2 of the Code of Virginia. It is my opinion that the Treasury Board may, by appropriate resolution, appoint or designate a bank to serve under its supervision as a paying agent of such educational institutions in servicing a bond issue.

I find nothing in the applicable statutes to forbid the Treasury Board from employing reliable corporate banking institutions to perform the ministerial functions of acting as depository for the proceeds of the sale of the bonds and of the revenues subsequently received and allocated to pay off such liabilities. It has been the custom in the past for the Treasury Board to delegate to one of its members, the State Treasurer, performance of many of its ministerial duties. I can see no legal difficulty arising from the appointment of the State Treasurer and a bank which is satisfactory to the Board as co-paying agents, since the Board is in no way relieved of its responsibility under the statute in question.

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**COLLEGES AND UNIVERSITIES—Real Property—Contract for Use and Occupancy—Temporary Arrangement Valid—Medical College of Virginia. (175)**

January 22, 1959.

HONORABLE L. M. KUHN  
Director of the Budget

This is in reply to your letter of January 20, 1959, relating to the transaction between the Medical College of Virginia and Harry Shaia and wife, about which I wrote to you on December 29, 1958, in response to Governor Almond's request of December 22, 1958. Subsequent to my letter of December 29th, the College and Shaia revised their agreement so as to eliminate the clause providing for a lease for a minimum term of ten years. This was approved by Mr. Patty in a memorandum of January 13th to General Tompkins and Mr. Carter Lowance, copy of which was mailed to you. I am in accord with the conclusion reached in this memorandum.

The memorandum contains the following language:

“You left with me on yesterday a contract dated January 8, 1959, which is proposed to be executed between the Medical College of Virginia and Harry Shaia and Zackia Shaia, his wife. This document is designated as a lease from the Medical College to Harry Shaia and his wife. The question presented is whether or not under the statutes and the Charter of the Medical College such contract may be entered into.

“Upon examination of this instrument it would appear that the Medical College of Virginia desires to acquire certain property owned by Mr. and Mrs. Shaia and now occupied by a restaurant known as ‘Skull and

Bones' and operated by Richard H. Shaia and Edward Shaia. As consideration for the property being acquired, the College agrees to permit Harry Shaia and wife to erect on a vacant lot now owned by the College at 12th and Marshall Streets, a building suitable for restaurant purposes and to permit Richard Shaia and Edward Shaia to operate a restaurant in the new building being erected on the vacant lot. The contract further provides that if the College elects at any time to terminate this arrangement prior to March 31, 1990, the Medical College will reimburse the Shaias in accordance with the provisions of paragraph 12 of the contract.

"Although the contract is designated as a lease, I am of the opinion that it is not a lease within the ordinary and accepted definition and usage of that term. The instrument is more in the nature of a contract permitting the Shaias to make certain improvements on vacant property owned by the College and permits the College, after reasonable notice, to take possession of the improvements and enjoy the occupancy and use of the building upon the payment of reasonable compensation to the Shaias as reimbursement for their investment in the property and their surrender of the property they now occupy.

"The contract under discussion here is distinguishable from the arrangement proposed in the agreement which was submitted to this office and in connection with which we rendered an opinion to Mr. Kuhn under date of December 29, 1958.

"Accordingly, this revised so-called lease is approved."

This revised contract is drawn in such a way as that the College may, if it desires, treat the occupancy of the lot in question as a temporary arrangement, which apparently is permissible under paragraph (9) of Section 23-50 of the Code wherein the board of visitors is given certain powers with respect to the management of the affairs of the corporation and the control of its property.

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**COLLEGES AND UNIVERSITIES—Revenue Bond Project—Medical College of Virginia Parking Garage. (48)**

August 22, 1958.

HONORABLE W. F. TOMPKINS, *Comptroller*  
Medical College of Virginia

This is in reply to your letter of August 15, 1958, in which you state that the Medical College of Virginia proposes to construct a parking garage on the property owned by the College. This project is to be financed by sale of revenue bonds to three Richmond banks; the bonds to be repaid solely from revenues collected in connection with the operation of the garage. In addition thereto, the banks desire, and the College proposes to deposit additional collateral to secure these bonds, this collateral consisting of certain securities owned by the College which are part of the unrestricted endowment funds of the Medical College. This project and the financing thereof is being carried out pursuant to the provisions of Chapter 3 of Title 23 of the Code of Virginia, §§ 23-14 through 23-30. Section 23-19(e) provides in part as follows:

"(e) The power and obligation of an institution to pay any bonds issued under this chapter shall be limited. Such bonds shall be payable only from the revenues and receipts derived directly or indirectly from the project for the erection of which the bonds are issued. Such bonds shall in no event constitute an indebtedness of the institution, excepting to the extent of the collection of such revenues and receipts and such institution shall not be liable to pay such bonds or interest thereon from

any other funds; and no contract entered into by the institution pursuant to subdivision (b) of this section shall be construed to require the costs or expenses of operation and maintenance of the project for the erection of which the bonds are issued to be paid out of any funds other than the revenues and receipts derived directly or indirectly from such project.

\* \* \*

As you can see from the above-quoted provision, bonds issued pursuant to this chapter to finance this project shall be paid solely from the revenues and receipts derived from the project. The Medical College cannot pay the bonds or interest thereon from any fund—this phrase “any other funds,” includes the unrestricted endowment funds. Therefore, if the Medical College deposited additional collateral to secure these bonds in the form of securities now owned by the Medical College, the banks could not use this collateral to pay the principal or the interest on the bonds in the event the revenues collected from the project were insufficient to pay the principal and interest on the bonds. Likewise, I am of the opinion that the Medical College may not borrow money for a project, such as this, on open or short-term notes pledging securities owned by the College as collateral for such notes. The only authority conferred upon the Medical College of Virginia by the General Assembly to borrow money for capital outlay projects is that found in Chapter 3 of Title 23 of the Code of Virginia. The only method for financing capital outlay projects provided by that chapter is the issuance of revenue bonds.

I am of the opinion, therefore, that the Medical College of Virginia may not pledge securities which are a part of the unrestricted endowment funds of the College as additional collateral to secure any loan for capital outlay projects other than that specifically provided for by § 23-19(h) of the Code of Virginia, which provision was enacted by the 1958 Session of the General Assembly. The provisions of § 23-19(h) permit the pledging of securities from the unrestricted endowment funds of the College for debt service reserve if the Medical College has obtained a loan from the United States of America or any federal agency. The facts outlined in your letter of August 15, 1958, are such that § 23-19(h) would not apply in this case.

Section 23-19(g) of the Code provides as follows:

“(g)” The institution shall have power out of any funds available therefor to purchase any bonds issued by it at a price not more than the principal amount thereof and the accrued interest. All bonds so purchased shall be cancelled unless purchased as an endowment fund investment. This paragraph shall not apply to the redemption of bonds.”

Under this provision I am of the opinion that the Medical College may issue revenue bonds for the parking garage project, purchase any or all of these bonds with funds belonging to the unrestricted endowment fund as an investment. These bonds may be held to maturity as an endowment fund investment, or they may be sold at a later date to other investors in the same manner as other investments and securities of the endowment fund are sold or exchanged.

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**COLLEGES AND UNIVERSITIES—Revenue Bond Project—Parking Garage at Medical College of Virginia—Bonds Must Be Issued Prior to Construction, Etc.**  
(85)

HONORABLE L. M. KUHN  
Director of the Budget

October 8, 1958.

This is in reply to your letter of September 30, 1958, with which you enclosed a letter dated September 1, 1958 from General Tompkins to you with a memorandum

dated September 17, 1958, all relating to the construction and financing of a parking garage at the Medical College of Virginia.

The memorandum enclosed is substantially correct in that it was agreed:

(1) The Medical College of Virginia cannot pledge securities owned by the Medical College or by the unrestricted endowment fund of the Medical College to secure bonds issued pursuant to §§ 23-14 through 23-30 of the Code of Virginia to provide funds for the construction of the project.

(2) The Medical College may sell securities held by the unrestricted endowment fund and use the proceeds realized from the sale of these securities to construct the parking garage at the college.

(3) If securities held by the unrestricted endowment fund are sold and the proceeds therefrom used to construct the parking garage, then the net income from the operation of the parking garage may be assigned to the unrestricted endowment fund, and, in effect, the garage becomes an asset of the unrestricted endowment fund.

(4) The Medical College may issue revenue bonds pursuant to §§ 23-14 through 23-30 of the Code in order to raise the necessary funds to construct the parking garage, and these revenue bonds may be purchased by the unrestricted endowment fund of the Medical College and held by the endowment fund as an investment. At some later time, while the bonds are still outstanding and held by the unrestricted endowment fund, if the trustees of the endowment fund desire to sell those bonds, they may do so and invest the proceeds of the bonds in other securities for the unrestricted endowment fund. The Medical College may not borrow money from the unrestricted endowment fund and construct the parking garage and then at some later date issue revenue bonds, sell said bonds and reimburse the unrestricted endowment fund the funds which have been borrowed or advanced to construct the parking garage. If revenue bonds are to be issued, they must be issued at the time the construction of the project commences.

(5) The Medical College may substitute collateral now outstanding on its existing bank loan in place of the \$386,000 invested in government bonds now deposited as collateral if the Medical College should be of opinion that it is desirable or advantageous to sell these government bonds.

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**COLLEGES AND UNIVERSITIES—State Nursing Scholarships—Contract with State Department of Health—Medical College of Virginia May Not Withhold Scholastic Transcript Until Nurse Completes Repayment. (223)**

March 3, 1959.

HONORABLE R. BLACKWELL SMITH, JR., *President*  
Medical College of Virginia

I acknowledge receipt of your letter of March 2, 1959, in which you state that the Medical College of Virginia participates in the training of nurses who have been awarded scholarships under the provisions of Sections 23-35.9 through 23-35.13 of the Code of Virginia. Your letter is in part as follows:

"In the state nursing scholarships, a condition is that the student repay the scholarship by one year's service in Virginia for each year she held such scholarship, or else that it be discharged by cash payment.

"The contract governing the State nursing scholarships is between the State Department of Health and the student. May the Medical College of Virginia withhold the student's scholastic transcript until such time

as the student has made repayment, either by service or cash, in time or amount equivalent to the duration of the scholarship?

"Copy of application form used for these scholarships is enclosed. The students are not required to execute promissory notes covering the amount of the scholarships involved."

I am unable to find any language in the applicable sections of the Code upon which to justify an affirmative answer to your question. I do not feel that Section 23-35.11 could be construed to authorize such a condition to be included in the contract between the State Board of Health and the student nurse.

In my opinion, a student nurse attending a nursing school with the aid of such scholarship would be entitled to a scholastic transcript under the same circumstances as a student who has paid her tuition out of her personal funds.

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**COLLEGES AND UNIVERSITIES—Student Loans—Note of Minor Borrower Under National Defense Program Should Be Endorsed by Adult. (198)**

February 18, 1959.

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

This is in response to your letter of February 14, 1959, in which you make reference to the "National Defense Education Act," Public Law 85-864. Provision is made therein for a National Defense Student Loan Program, and you advise me that V. P. I. has received the permission of Governor Almond to participate in this program. An institution of higher learning (such as V. P. I.) is required to contribute an amount equal to not less than one-ninth of the amount of the federal contribution to a Fund from which student loans are made. (20 U.S.C. 424(2)B.) You advise me that this amount has been raised from private sources and that no funds of the Commonwealth have been contributed to the Fund. Your letter reads in part as follows:

"The regulation issued under this Act provide that the borrower shall be required to sign a promissory note payable to the participating institution. It provides further that the loan shall be made without security by the endorsement of a co-signer, except in those jurisdictions where other procedure may be required to create a legally binding obligation. The regulations call attention to the fact that most states require that a promissory note executed by a minor cannot be held valid without the co-signature of a parent or guardian and, therefore, each institution shall ascertain the legal requirements which should be followed in their state.

"I would appreciate your advising me the legal requirements in this connection which we should comply with in accepting a promissory note for a loan to a student under the National Defense Student Loan Program."

The regulation referred to in your letter was apparently promulgated pursuant to the provisions of 20 U.S.C. 425(b) (5) which reads as follows:

"Such a loan shall be made without security and without endorsement, except that, if the borrower is a minor and the note or other evidence of obligation executed by him would not, under the applicable law, create a binding obligation, either security or endorsement may be required."

The decision of the Supreme Court of Appeals of Virginia in the case of *Mustard v. Wohlford*, 56 Va. 329, firmly established the doctrine that the acts and contracts

of infants generally are voidable, and that an infant has the right of election to avow or disaffirm. I am, therefore, of the opinion that any promissory note executed by a recipient of a loan from this Fund who is a minor should be endorsed by his parent, guardian or any person who has attained his or her majority in order to assure that a binding obligation for repayment of the loan is had.

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**COLLEGES AND UNIVERSITIES—Virginia Military Institute—Campus Police—  
man Appointed Deputy Sheriff—May Be Appointed Conservator of the Peace—  
Not Special State Police Officer. (121)**

November 6, 1958.

COLONEL J. C. HANES  
Business Executive Officer  
Virginia Military Institute

This is in reply to your letter of November 3, 1958, in which you state that there is a need for civil campus police at V. M. I. and that recently you have employed a retired police officer for the Town of Lexington to serve on a part-time basis as a police officer on the campus of V. M. I. You state that upon the advice of the Commonwealth's Attorney of Rockbridge County this officer was appointed a deputy sheriff of Rockbridge County by the Judge of the Circuit Court. You request my opinion as to the official status of this man.

I am of the opinion that this police officer is a deputy sheriff of Rockbridge County and, as such, has jurisdiction to enforce the laws of the State and the ordinances of the county and town. V. M. I. could, under the provisions of § 18-17 of the Code of Virginia, request the Circuit Court of Rockbridge County to appoint one or more persons as conservator or conservators of the peace whose jurisdiction would extend over the grounds of V. M. I. In either instance the police officer would not be a special State police officer. The only provision for appointing special State police officers is found in § 52-23 of the Code of Virginia, and I do not feel that the provisions of that section contemplate the appointment of a special police officer for a college or university as a special State police officer.

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**COLLEGES AND UNIVERSITIES—Virginia Polytechnic Institute—Airport  
Premises Liability Insurance Should Be Carried. (119)**

November 6, 1958.

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

This is in reply to your letter of November 3, 1958, in which you request my opinion as to whether or not V. P. I. should carry airport premises liability insurance covering aircraft not owned by V. P. I. while these aircraft are housed or kept at the airport owned and operated by V. P. I. You state that a monthly charge is made for keeping these aircraft at the airport.

I am of the opinion that, since this is a proprietary activity by V. P. I., the school should either carry liability insurance to cover this operation or should require all persons keeping aircraft at the airport to sign an agreement releasing V. P. I., its agents and employees from any liability for damage which may occur to these aircraft.

**COMMISSION ON THE AGING—Appointive Members Entitled to Per Diem Compensation Although State Employees. (62)**

September 8, 1958.

HONORABLE JOHN E. RAINE, *Chairman*  
Commission on the Aging  
Richmond, Virginia

This is in reply to your letter of August 28, 1958, in which you request my opinion as to whether or not two appointive members of the Commission on the Aging who are employees of State departments or institutions are entitled to receive the sum of \$10.00 per diem as provided in § 4, Chapter 560 of the Acts of Assembly of 1958.

The membership of the Commission on the Aging, in addition to yourself, is composed of two groups. The first are enumerated State officers who are designated as ex officio members. Section 3 of Chapter 560 provides that these ex officio members shall serve without additional compensation. The second group are the five appointive members, and § 4 of Title 560 provides that the five appointive members shall receive a per diem of \$10.00 per day for each day spent in the service of the Commission.

I can find no provision in the Act which provides that, if they are employees of the State or the agencies, departments or institutions thereof, they shall not be entitled to this per diem. Therefore, I am of the opinion that all five appointive members of the Commission are entitled to receive the \$10.00 per day per diem regardless of whether they are employed by the State or one of its agencies, departments or Institutions.

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**COMMONWEALTH'S ATTORNEYS—Annexation Proceedings—May Contract with Board of Supervisors to Represent County and Receive Additional Compensation. (342)**

June 10, 1959.

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

This is in reply to your letter of June 8, 1959, which reads as follows:

"The Town of Smithfield has instituted annexation proceedings against Isle of Wight County. The Board of Supervisors has employed special counsel to assist in representing the county in this proceeding. Such special counsel and myself have been designated to represent the county in such proceedings pursuant to Section 15-504 of the Code.

"I will appreciate your opinion as to whether or not it is part of my duty as Commonwealth's Attorney to represent the Board in the above mentioned annexation proceedings or whether or not I may be paid additional compensation for such services by the Board of Supervisors."

Section 15-152.5 of the Code requires that in any annexation proceeding notice shall be served on the Commonwealth's Attorney and each member of the governing body of the county wherein the territory sought to be annexed lies. It would seem, therefore, that the statute contemplates that the Attorney for the Commonwealth, as one of the duties of his office, is required to represent the county in such cases. Furthermore, I am of the opinion that if this duty is not imposed upon the Commonwealth's Attorney under the annexation statutes, it is imposed

under Section 15-9 of the Code which authorizes the board of supervisors of a county to employ counsel *to assist the Attorney for the Commonwealth* in any suit against the county in all cases in which no other provision is made.

I am of the opinion that under Section 15-504 of the Code you may contract with the governing body of the county for special compensation for this service in addition to your regular salary. The prohibitions of this section do not apply in such cases due to the following provision contained therein.

"This section shall not apply to attorneys for the Commonwealth employed by the governing bodies of counties under the provisions of §§ 58-762, 58-1016 or 58-1102 to collect taxes which are a lien on real estate; nor to contracts for additional compensation to be paid an attorney for the Commonwealth for services rendered in connection with proceedings under chapter 8 (§ 15-125 et seq.) of this title."

Sections 15-125, et seq., referred to in the above provision, have been repealed and Sections 15-152.2 et seq. enacted instead, but these sections are found in Chapter 8 of Title 15 and relate to annexation proceedings which is the subject covered by former Sections 15-125 et seq.

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**COMMONWEALTH'S ATTORNEYS—Commitment of Patients to Mental Hospitals—No Provision for Additional Compensation. (157)**

December 23, 1958.

HONORABLE J. G. JEFFERSON, JR., *Judge*  
Circuit Court of Amelia County

This is in reply to your letter of December 22nd, which reads as follows:

"Section 37-125.1 and following sections of the Code of Virginia provides for payment of part of the expenses of persons who have been committed to the hospital for mentally ill, etc., if no agreement can be reached with the committee or other persons responsible. Section 37-125.6 and .7 provide for the matter to be brought into court for determination by the court of the amount that is to be paid, and Section 37-125.7 provides that the commonwealth attorney of the county in which the patient resides to bring these proceedings.

"These sections do not provide any compensation for the commonwealth attorney for instituting and conducting these proceedings and I would appreciate it if you would let me know if there is any provision in law for the commonwealth attorney to be paid. I thought you probably had had this matter up and have looked up the law."

I am unable to find any provision for the payment of extra compensation to a Commonwealth Attorney for performing the duties required of him under Section 37-125.7 of the Virginia Code. The compensation, or annual salary, of such officer is fixed in accordance with the provisions of Section 14-66 of the Code.

Section 110 of the State Constitution provides that the duties and compensation of the Commonwealth Attorney shall be as prescribed by general law. In my opinion, the service required of this officer under Section 37-125.7 of the Code is a service incidental to his office, and for such service he is not entitled to any compensation beyond his annual salary.

**COMMONWEALTH'S ATTORNEYS—Highway Condemnation—Questionable Whether Should Represent Landowners as Private Counsel. (94)**

October 15, 1958.

HONORABLE DICK B. ROUSE

Commonwealth's Attorney for the City of Bristol

Please pardon this belated reply to your letter of September 16, 1958. Other pressing duties of office have prevented earlier consideration of your inquiry.

You asked to be advised as to whether there is any reason why you should not appear as counsel for persons whose property is being condemned within the City of Bristol and adjoining counties for road purposes.

I am unaware of any statute which would expressly prohibit the attorney for the Commonwealth from representing clients whose property is being acquired by the Commonwealth of Virginia for highway purposes. However, your inquiry raises a question which preferably may be the subject for an advisory opinion of the Legal Ethics Committee for the Virginia Bar.

As you know, highway construction within cities, other than on the Interstate System of Highways, is often undertaken as a joint project between the Commonwealth and the municipality. In such instances, the interest of the attorneys representing the landowner would of necessity be adverse to the interest of the city participating in the acquisition of right of way. Therefore, it may be construed that the attorney for the Commonwealth for such city would have a conflict of interest if he undertook to represent the landowner from whom the right of way is to be acquired.

Your attention is also invited to Section 15-508 of the Code which prohibits the attorney for the Commonwealth from becoming interested, directly or indirectly, in any contract with the city. It is conceivable that the representation of a property owner who contracts with the city for a right of way would fall within the purview of that section.

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**COMMONWEALTH'S ATTORNEYS—Voluntary Disqualification—Court May Appoint Attorney to Prosecute—Compensation of Appointee Set by Judge. (317)**

May 26, 1959.

HONORABLE REGINALD H. PETTUS

Commonwealth's Attorney for  
Charlotte County

This is in reply to your letter of May 25, 1959, which reads as follows:

"Section 10-79 of the Code requires the Commonwealth's Attorney to prosecute all violators of the seed tree act.

"The defendant in a warrant in this county is one with whom I am so closely associated that I feel it proper that I disqualify myself. I have requested the Judge to appoint someone in my place but he has stated that he has no authority to pay anyone under these circumstances.

"Please advise me what you think would be proper for me to do under the circumstances."

Sections 19-4 and 19-5 of the Code are applicable. The latter section provides that the attorney appointed in such cases "shall receive such compensation as the judge \* \* \* deems reasonable, in addition to his actual expenses" and that "such compensation and expenses shall be paid by the State and the county \* \* \* in which such service is rendered, in the same proportions in which the salaries and expenses of the Commonwealth's attorneys are paid under existing laws."

It would seem that under the statutes cited the court may appoint an attorney to prosecute this case. The court can enter an order fixing the fee of the attorney and directing the proper State and county officials to make payment.

**COUNTIES—Adoption of Optional State Law—Compulsory School Attendance Law—Board of Supervisors Puts in Effect by Adopting Ordinance After Recommendation by School Board. (299)**

May 11, 1959.

HONORABLE A. L. PHILPOTT  
Member of the House of Delegates

This is in reply to your letter of May 6, 1959, in which you pose the following question:

“With reference to the enabling legislation recently adopted, does a county board of supervisors have the authority, in enacting the ordinance dealing with compulsory school attendance to set forth in such ordinance certain provisions which would establish a standard definition of conscientious objection? In this connection, may the ordinance specifically set forth what will not be considered conscientious objection?”

Your question is directed to Chapter 72, Acts, Extra Session, 1959, approved April 28, 1959, which Act enables counties, cities and certain towns to provide for the compulsory attendance of children between the ages of seven and sixteen upon the public schools of this Commonwealth. Section 24 of the Act reads as follows:

§ 24. This Act shall be in force in every county, city or town, if such town be a separate school district, when it has been recommended by resolution of the county, city or town school board and duly adopted by the governing body of such county, city or town in the same manner as local ordinances are adopted. The operation of this Act may be suspended in any county, city or town if such town be a separate school district, by the governing body thereof in the same manner as local ordinances are repealed.”

The language of this statute indicates that the only action to be taken by the local governing body is the adoption of an ordinance putting the Act into effect within the political subdivision. This Act does not authorize the governing body of a locality to enact any ordinance having the force and effect of law. It merely authorizes the proper officials of a locality to take action which will make the State law enforceable in the particular county, city or town. It follows that your questions must be answered in the negative.

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**COUNTIES—APPROPRIATIONS—Public Welfare Funds—Board of Supervisors Cannot Be Forced to Appropriate—State Moneys Distributable to County May Be Withheld. (332)**

June 2, 1959.

HONORABLE T. E. CAMPBELL  
Clerk of Caroline County

This is in reply to your letter of May 29, 1959, in which you refer to Sections 58-839 and 58-844 of the Code of Virginia, as amended by Chapter 52, Acts of Extra Session of 1959, with special reference to the following:

“\* \* \* The laying or making of a levy in an amount sufficient to cover or pay all estimated and contemplated expenditures for the fiscal year shall not be construed as imposing any obligation or duty on the board of

supervisors or other governing body to appropriate any amount whatsoever. No part of the funds raised by the general county levies or taxes shall be considered available, allocated or expended for any purpose until there has been an appropriation of funds for that expenditure or purpose by the board of supervisors or other governing body either annually, semi-annually, quarterly, or monthly. There shall be no mandatory duty upon the board of supervisors or other governing body of any county to appropriate any funds raised by general county levies or taxes except to pay the principal and interest on bonds and other legal obligations of the county or district and to pay obligations of the county or its agencies and departments arising under contracts executed or approved by the board of supervisors or other governing body, unless otherwise specifically provided by statute."

You present the following question:

"Since you have this law, how can the local superintendent of public welfare, or the state department of welfare and institutions force the supervisors to appropriate local funds for public welfare, or withhold the county's allocations from state funds to make up the sum the public welfare department requested from local funds, which seem to me, if allowed, amounts to the same thing as forcing the supervisors to make the appropriation from local funds?"

In my opinion, the amendments to the Code sections cited do not affect the welfare statutes under which the State Board of Welfare and Institutions has authority to provide for the payment of public assistance in certain categories and to direct the State Comptroller to withhold from time to time funds to which the county or city may be entitled, such as their distributive share of A.B.C. funds. It is true that under these sections, as amended, there can be no expenditure of local general revenues unless the local governing body has made an appropriation.

The amendments cited are declaratory of a principle of law that the revenues derived from local taxation are generally subject to appropriation by the taxing authority before they may be expended.

The General Assembly in Title 63 of the Code has established a system of public welfare under the general supervision of the State Board in cooperation with the Local Boards. If the local governments fail or refuse to bear their responsibilities as established by the cooperative action of the State and Local Boards, then the State Board assumes the responsibility and deducts the locality's share from the various State funds in which the locality would ordinarily be entitled to participate. Code Sections 63-136, 63-158 and 63-200.

I am enclosing copy of an opinion relating to certain phases of the responsibility of the local governments under the welfare statutes, which may be of some help to your Board of Supervisors. This opinion is published in the Attorney General Report for 1950-51, at page 227.

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**COUNTIES—Appropriations to Volunteer Fire Departments—May Not Be Made Until Unit Capable of Rendering Service. (237)**

March 17, 1959.

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

This is in reply to your letter of March 16, 1959, which reads as follows:

"Will you kindly give me your opinion of the following question: Does the County Board of Supervisors have authority to make an appropriation to a proposed voluntary fire department which has never been organized and for which no charter has been obtained? I have given as my opinion that no appropriation can be made until the voluntary fire department is organized and has come into existence. Will you please correct me if I am in error."

Section 15-16.1 authorizes local governing bodies to make appropriations "to any association or other organization furnishing voluntary fire fighting services within or without the boundaries of the respective counties, cities and towns."

In my opinion no appropriation may be made under this section until there is actually existing an organization capable of rendering fire-fighting service. It does not appear that the organization would necessarily have to be a corporate entity in the sense that a charter would be required, unless under the plan of organization no other method is contemplated. An appropriation, of course, may be made only to a group duly established for the purpose contemplated by the statute.

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**COUNTIES—Automobile Graveyards—Regulation of—State Preempted Field Except for Licensing and Regulation of Maintenance and Operation—County May Act in These Fields. (266)**

April 14, 1959.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney for  
Montgomery County

This is in response to your letter of April 7, 1959, in which you ask several questions relative to the statutes governing "automobile graveyards."

As pointed out in your letter, § 33-279.3 of the Code does not itself provide a penalty for the violation of the several prohibitions contained therein. I am enclosing a copy of an opinion dated March 26, 1959, to Honorable B. W. Seay, Judge of the County Court, Palmyra, Virginia, wherein I expressed the view that a violation of the aforementioned section would be a misdemeanor.

You also ask the effect of the action of the General Assembly in amending § 15-18 at the 1958 Session (Chapter 552). This amendment made substantial changes in § 15-18 and added the new § 33-279.3 to the Code. Prior to this enactment of the Legislature, the board of supervisors of a county was specifically empowered to enact an ordinance requiring the owner of an "automobile graveyard" to erect a fence or hedge around his place of business if any part of it was within one thousand feet of a State highway. This ordinance was enforced by the State Highway Commissioner. The 1958 amendment removed the paragraph empowering the board of supervisors to enact such an ordinance, and substituted in its place the new Code § 33-279.3.

This new section contains several prohibitions and requirements relative to "automobile graveyards." I am of the opinion that, by this action, the State has preempted the field relative to fencing and location of "automobile graveyards."

The governing body of a county, city or town is authorized by § 15-18, as amended by Chapter 552, to "adopt ordinances imposing license taxes upon and otherwise regulating the *maintenance and operation* of places commonly known as automobile graveyards," and to prescribe fines and other punishment for the violation of such ordinances as distinguished from the power to enact ordinances relative to the location of automobile graveyards established after the effective date of the act and fencing of automobile graveyards which were in existence prior to the date the act became effective. The act does not require the fencing

of an automobile graveyard established under paragraphs (b) and (c) of § 33-279.3, nor does it authorize the counties, cities or towns to enact ordinances relating to the location and fencing of automobile graveyards on State highways. I am of the opinion, therefore, that the board of supervisors may only enact ordinances which would impose a license tax upon an automobile graveyard or which would regulate the maintenance and operation of such places.

This is not to be construed as holding that the act deprives the localities of such powers as they may have under the zoning statutes and city and town charters relating to zoning.

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**COUNTIES—Boats and Boating—May Adopt Ordinance Regulating Traffic and Speed on Lakes Used by Public—May Prescribe Penalties for Violation. (112)**

October 31, 1958.

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

This is in response to your letter of October 24, 1958, which reads as follows:

"Prince William County has two private lakes in it which, of course, are not navigable waters but on one of which persons operate boats. Many complaints have been made to our Board of Supervisors about reckless operation of such boats and, in my opinion, the use of boats on these waters has become so extensive that it takes on proportions of the general welfare.

"I would like your opinion as to whether Prince William County can under the general welfare provisions of Section 15-8 adopt an ordinance regulating traffic and speed of boats on such private lake or lakes and prescribe penalties for violation."

If the county is authorized to pass such an ordinance it must do so pursuant to the powers vested in it by § 15-8(5) of the Code of Virginia. The determination as to the validity of an ordinance enacted pursuant to this provision of the Code is dependent upon the particular facts and circumstances pertaining thereto. If the Board of Supervisors finds as a fact that the operation of motor boats in a reckless manner and at excessive speed endangers the public health and safety, then I am of the opinion that the County may enact such an ordinance as outlined in your letter if the lakes in question are used by the general public.

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**COUNTIES—Bounties on Hawks and Owls—May Authorize Where Necessary to Protect Poultry or Game Birds. (126)**

November 7, 1958.

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

This is in response to your letter of October 31, 1958 inquiring if a county can authorize payment of bounties on hawks and owls, pursuant to Section 29-159, Code of Virginia, if it has passed a resolution pursuant to Section 29-132, as amended, deeming it necessary to permit the killing of hawks and owls to protect poultry, or game birds in such county.

As said Section 29-159 authorizes payment of bounties on hawks and owls (after enactment of an appropriate resolution), I am of the opinion that a county can authorize payment of such bounties after it has passed a resolution pursuant to said Section 29-132 deeming it necessary to permit the killing of these species to protect poultry or game birds in such county.

**COUNTIES—Budgets—Appropriations—Board of Supervisors May Rescind Action Adopting Budget—May Appropriate on Month-to-Month Basis Where Budget Already Approved. (304)**

May 18, 1959.

HONORABLE HAROLD H. PURCELL  
Member of the Senate

This is in reply to your letter of May 16, 1959, addressed to Mr. Clarence F. Hicks, formerly of this office, who is now in private practice. In your letter you state the following:

"I have been requested by the Board of Supervisors of Spotsylvania County, Virginia, to ascertain from you whether or not they can appropriate on a month-to-month basis, since their budget has already passed, and further can they amend the provisions of their present budget to provide that the school appropriations are for educational purposes, since it has already been passed, and what you would recommend to them so that they can in general comply with the recent Statute passed by the Emergency Session of the General Assembly."

Please be advised that, under the terms and provisions of § 15-577, as amended, of the Code of Virginia [Acts, Extra Session, Chapter 69], the General Assembly authorized county boards of supervisors to make monthly appropriations for expenditures. It follows that the County Board of Supervisors of Spotsylvania can appropriate on a month-to-month basis, even though it has already approved its budget for the coming fiscal year. Section 15-577, as amended, should be read together with the provisions of §§ 15-839 and 15-844, as amended, of the Code, [Acts, Extra Session, 1959, Chapter 52].

Your second question, whether the present budget as adopted can be amended, is also answered in the affirmative. It is suggested that the Board of Supervisors adopt a resolution rescinding the budget which it has previously approved and advertised; readvertise a new contemplated budget for informative and fiscal planning purposes only, in accordance with the provisions of §§ 15-575, 15-576 and 15-577, as amended, of the Code, [Acts, Extra Session, Chapter 69]; and hold another public hearing on the same.

In the synopsis of the new contemplated budget, the Board of Supervisors may follow the form enclosed, with appropriate modifications. You will note on the second page of this form that funds devoted to educational purposes are broken down into two categories, the first comprised of funds derived from sources exclusive of State and Federal funds, and the second category being expected receipts from the State.

I trust that the foregoing is sufficient information for your purposes. If you have any further question, please do not hesitate to call on me.

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**COUNTIES—Budgets—Educational Purposes—May Rescind Previous Approval—Readvertise Contemplated Expenditures, Etc.—Certain Detail Required—How to Compute Estimate for Educational Purposes. (306)**

May 18, 1959.

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

This is in reply to your letter of May 13, 1959, in which you state as follows:

"The Appomattox County Board of Supervisors has just requested me to write for the opinion of your office relative to the following problems.

Therefore, I will appreciate it if you will, as soon as possible, give me the benefit of your advice concerning the following particulars: The Appomattox Board passed a resolution relative to the budget, copy of which is herewith enclosed. The phrase, 'proposed budget estimates of revenue', was used by the Board. This was passed prior to the enactment by the Special Session of the new legislation affecting budgets. Also, in the itemized budget, as shown on the records of the Board, the phrase, 'for school purposes', was used concerning that portion affecting educational purposes. Of course, the budget, as adopted, disclosed the sources of revenue and recited a detailed or itemized proposed disposition or expenditures of the county revenues.

"Therefore, the questions we would like to have you answer for us are as follows: (1) If the Board decides to re-advertise the proposed budget estimates, is it necessary to include the sources of revenue (I am referring to action under the new procedure)?; (2) Will it comply with the new rule if only a total of expected revenue is shown, and only a total of general expenditures is shown, and only a total of the proposed estimated funds to be spent for educational purposes be shown?; (3) Under the new procedure, is it necessary in our estimated budget that we set up a specific fund for educational purposes?; (4) Is it necessary in our estimated budget that we set up a specific fund for scholarships regardless of the amount?; and (5) If an itemized proposed or estimated budget has already been advertised prior to the enactment of the new law with language as shown on the enclosed resolution, is it necessary to re-advertise the short form estimated budget?"

In reply to your first two questions, please be advised that under §§ 15-575, 15-576 and 15-577, as amended, of the Code of Virginia, which sections are contained in Chapter 69 of the Acts of Assembly, Extra Session, 1959, if the Board decides to consider a new contemplated budget, it should set it up in such manner as to show "a complete itemized and classified plan of all contemplated expenditures and all estimated revenues and borrowings" for the ensuing fiscal year. Further, when the Board readvertises the new contemplated budget, it may publish, a "brief synopsis of the budget," which should be in somewhat greater detail than merely showing the total of the expected receipts and the total of the expected expenditures. I am enclosing a copy of a suggested synopsis for publication which may be used as a guide, with appropriate modifications.

As to your third question, you will find in the enclosed sheets on the second page thereof a suggested form or breakdown between moneys derived for educational purposes from sources other than State and Federal funds, and moneys derived from State funds. It is suggested that this form be used where the Board of Supervisors does not intend to consider a contemplated budget showing funds estimated to be expended "for public school purposes."

Your fourth question dealing with whether the estimated budget should contain a "specific fund for scholarships regardless of the amount" involves considerations of the number of children in the county between the ages of six and twenty who do not, or may not be expected, to attend public schools. In working out the budget, both the number of children involved and the amount necessary to provide scholarships for them must be considered and added into the figures obtained for the two "for educational purposes" items, and no mention should be made of any specific fund for scholarships.

As to your fifth question, I would suggest that the Board of Supervisors adopt a resolution rescinding its previous approval of the current budget, readvertise in the new language and hold a public hearing on the new contemplated budget.

I am enclosing a copy of an opinion rendered to Honorable E. Hagan Richmond, Commonwealth's Attorney for Scott County, on May 7, 1959, which explains this procedure in general.

**COUNTIES—Budgets—Separate School Levy—Board May Rescind Previous Action—Consider Estimated Budget and Lay General Levy—Must Provide Funds for Tuition Grants. (297)**

May 7, 1959.

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

This is in reply to your letter of May 5, 1959, which reads as follows:

"I received a memorandum from your office under date of April 30th, advising that the special session of the General Assembly enacted numerous laws as emergency legislation and are now effective, concerning appropriations to school boards.

"Please be advised that we had no information of these changes until the last few days. The Board of Supervisors of Scott County laid its levy for schools on April 25th, and laid a levy of \$3.00 for school purposes. This means that the schools of Scott County will receive the amount of money collected during the year from a levy of \$3.00.

"Please advise me as promptly as possible as to whether or not our Board of Supervisors has complied with the law. If we have not complied with the law, please advise what we would have to do to comply with the law so we could call a special meeting as promptly as possible.

"We would much prefer proceeding as we have already done, that is by laying a \$3.00 levy for school purposes, and we do not want to make any changes unless it is mandatory."

In my opinion it is not necessary for your Board to rescind the action taken on April 25th. I think that the \$3.00 levy for school purposes, assuming that the statutory provisions were complied with, is valid. Of course, since the Board has acted under the procedure set out in the statutes prior to the amendments made at the recent extra session of the General Assembly, it is very doubtful that the Board could exercise any control over the school funds during the next fiscal year, which would be possible under the procedure established by the recent amendments.

I do not suppose that in the levy laid for general county purposes any provision is made for possible payments of scholarship grants. You will receive in a few days copy of the Acts relating to school matters and I wish to call your attention to Chapter 53 which will become effective July 24th of this year in which the governing body of the county is required to make funds available to provide scholarships to children of school age residing in the county, provided such children desire to attend a nonsectarian private school located in or outside of the county or a public school located outside of the county.

I also call attention to Chapter 52 of the recent Acts which amends Section 58-839 of the Code and which provides that "No part of the funds raised by the general county levies or taxes shall be considered available, allocated or expended for any purpose until there has been an appropriation of funds for that expenditure or purpose by the board of supervisors or other governing body either annually, semiannually, quarterly, or monthly."

Sections 58-921, 58-925 and 58-928 relating to the payment of warrants by the treasurer of the county, have been amended and these amendments become effective July 1, 1959. I understand that the auditor of public accounts will advise the treasurers with respect to their responsibilities under these amendments.

Of course, if the board of supervisors of your county wishes to do so, it may, in our opinion, rescind the action taken on April 25th and proceed to prepare a budget under the amended provisions of Sections 15-575, 15-576 and 15-577, and in lieu of laying a specific school levy provide for a general county levy for all purposes and thus be in better position to exercise the control over the funds that are contemplated and envisioned by the amendments made at the extra session. All of the amendments relating to school and county budgets will be furnished the county officials within a very short time.

If I can be of any further service in this connection, please call on me.

**COUNTIES—Change in Form of Government—May Expend Public Funds to Explore Advisability—Costs of Meals May Be Incidental. (212)**

February 25, 1959.

HONORABLE ROBERT C. FITZGERALD  
Commonwealth's Attorney for  
Fairfax County

This is in reply to your letter of February 20, 1959, to which you attached a copy of a resolution adopted by the governing body of Fairfax County on October 15, 1958, creating an agency of the county known as the "Commission on Urban County Government." Under this resolution \$200.00 per month was appropriated as an expense fund for the Commission, which it is authorized to expend in a way which will facilitate both formal and informal discussions of the problems the Commission is asked to solve.

The two concluding paragraphs of your letter are as follows:

"In attempting to accomplish its mission, the Commission is of the opinion that it would facilitate discussions of the problems concerning the relationship of towns in the county to the county to be able to invite officials of the various towns to dinner meetings, the cost of dinners for those attending to be paid from the aforesaid fund. We may assume that the Board of Supervisors agrees to such expenditure.

"Section 15-12 and (by virtue of Section 15-10) sections 15-13 and 15-13.1 would appear to give sufficient authority for such expenditure, but since the question seems to be novel, I would appreciate your opinion in the matter."

Section 15-12 of the Code is as follows:

"The board of supervisors of any county may appropriate out of the general levy, except the school fund, in their discretion, a sum not exceeding one per centum of their annual revenues, from all sources, in advertising and giving publicity to the resources and advantages of their county."

As I construe this section it authorizes the expenditure of general funds within the limit specified for *advertising* and giving *publicity* to the *resources* and *advantages* of the county. I am unable to see the applicability of this section to the program with which the Commission is charged. That program, it seems, is concerned with the kind of government the county may have, rather than advertising the resources and advantages of the county. Section 15-13 is similar to Section 15-12 but applies to cities and towns. Section 15-13.1 is applicable only where two or more political subdivisions of the State unite in a common project. This section would be of no advantage to a county qualifying under Section 15-10 the Code and acting alone. The primary purpose of this section, as I understand it, is to enable the formation of such organization as Virginia League of Municipalities, and the like.

Under the provisions of Title 15 of the Code, counties may in accordance with the procedures therein provided adopt another form of government. It would seem, therefore, that a county may properly expend public funds in the process of exploring the advisability of establishing a different type of local government.

Such expenditures would, it seems, be limited to things necessary to a factual determination or appraisal of the benefits that may be obtained. If the furnishing of meals is an incidental expense in this connection, I am inclined to believe such expense would be within the scope of the Board's authority.

**COUNTIES—Charitable Contributions—Crippled Children's Hospital in Richmond Qualified Recipient. (71)**

September 17, 1958.

MR. LEE STANLEY  
Deputy Clerk  
Board of Supervisors of Wise County

This is in reply to your letter of September 12, 1958, in which you request my opinion as to whether or not the Board of Supervisors of your county may make an appropriation to the Crippled Children's Hospital in Richmond, Virginia, from the general fund of the county.

Section 15-16.1 of the Code of Virginia reads as follows:

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

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

As you can see from that section, the board of supervisors of a county may make donations of property or money to any charitable or nonprofit organization conducting a hospital within or without the boundaries of the county. I am of the opinion that the Crippled Children's Hospital in Richmond, Virginia, comes within the definition of a charitable or non-profit organization conducting a hospital and, therefore, it would be permissible for the Board of Supervisors to make a contribution of money from the general fund of the county to the hospital.

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**COUNTIES—Contracts of Board of Supervisors—Void Contract with Firm of Engineers, One of Whom Unlicensed in Virginia, May Be Rescinded and New Contract with Licensed Member Entered Into. (41)**

August 13, 1958.

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

This is in reply to your letter of August 6, 1958, in which you request my opinion on the following matter:

"During 1957, our Prince William County Board of Supervisors entered into a contract for engineering consulting services with a firm of engineers, assuming that the two members of the firm were both licensed and registered under the laws of the State of Virginia. Later on, it was discovered that one of the members of the firm was not actually licensed or registered. The work under the contract has not yet been completed although it is very near completion.

"Since one of the members of the firm was not licensed, of course, it renders the contract for engineering services null and void, but the plans actually prepared by the licensed engineer, member of the firm, have

been utilized, and the sewer system and catch lines built according to the plans and specifications are acceptable. Certain payments were made under the contract before it was discovered that one of the members of the firm was not licensed. Since this discovery, no further payments have been made.

"Now we would like your opinion as to whether the action of our Board of Supervisors entering into a void contract could be rescinded and upon the refunding to the Board for the Sanitary District of all payments made under the void contract, could a new contract be executed with the duly licensed member of the firm agreeing to pay him individually the full consideration which was in the inception determined by all parties concerned to be fair and reasonable."

If the engineering consulting work in connection with the sewage treatment plant for Dumfries Sanitary District has not been completed at this time, I am of the opinion that the Board of Supervisors may enter into a contract with the duly licensed engineer to complete the project originally contracted for under the void contract. In determining the fair amount of consideration to be paid for this service, the Board of Supervisors could take into consideration the previous work and service which this duly licensed engineer has rendered on this project. My opinion in this matter is concurred in by the following statement which is found in Williston on Contracts, Vol. 6, § 1772, at page 5031:

"While ratification as a means of making binding what was originally void for illegality or of creating a new obligation without consideration has been elsewhere criticised, there is no difficulty if the corporation has complied with the law, in an adoption by the parties of the terms of a bargain made before such compliance, if both parties thereby assume some detrimental performance."

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**COUNTIES—County Holding Stock in Non-Profit Sewer Corporation May Not Contract for Electric Power Furnished Corporation—May Not Pay Entire Charge and Receive Partial Reimbursement. (92)**

October 10, 1958.

HONORABLE WM. CLARK COULBOURN  
Commonwealth's Attorney  
Mathews County

This is in reply to your letter of October 10, 1958, which is, in part, as follows:

"I will appreciate your giving me your opinion on the following situation:  
"The Mathews Corporation is a non-profit corporation formed for the purpose of furnishing sewage disposal facilities for residents and business houses of the village of Mathews. Its equipment consists of sewer lines and a disposal plant. Each subscriber to its service is charged \$500.00 per toilet for the original connection and thereafter a rental of \$3.00 per toilet. The subscribers are issued stock on the basis of \$500.00 per toilet. The only expenses of the Corporation are the upkeep of the sewage system, the electric power used for the motors in the disposal plant and a small salary paid to a caretaker.

"The County of Mathews maintains eight toilets on the Court Green which are connected with the sewage system of the Mathews Corporation

and the County holds eight shares of stock in the Corporation. The Virginia Electric and Power Company has recently made an offer to the Board of Supervisors and to the Mathews Corporation to furnish the Mathews Corporation with electric power at the County rate if the Virginia Electric and Power Company is permitted to enter a contract with and bill the County directly for such power, the County being reimbursed by the Mathews Corporation for its share of the bill. This will result in a saving in power costs of about 50% which will enure to the benefit of the County. To protect the County against any possible loss through this arrangement the Mathews Corporation is willing to place a sufficient sum of money in escrow with the Farmers Bank of Mathews."

It would seem that the plan contemplated by the County would be in violation of Section 185 of the State Constitution. This section is, in part, as follows:

"Neither the credit of the State, nor of any county, city, or town, shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation, nor shall the State, or any county, city, or town subscribe to or become interested in the stock or obligations of any company, association, or corporation, for the purpose of aiding in the construction or maintenance of its work; \* \* \*."

The contract proposed to be made by the County with the Virginia Electric and Power Company would not be for the sole benefit of the County but would be largely for the benefit of the Mathews Corporation. The facts in this case are different from those set out in *Holston Corporation vs. Wise County*, 131 Va. 142, 109 S. E. 180. In that case it was stated, in part, as follows:

"The contract in question did not directly or indirectly in any way whatsoever grant 'the credit' of the county 'to or in aid of any person, association or corporation'. *That would have been true if the object of the contract had been to benefit the contractors in any way*, as, for example, to enable any of them to obtain the stone on the credit of the county, when upon their own credit they could not have obtained it; or to enable any of the contractors to make a greater profit by obtaining the stone at a reduced price because of the pledge of the credit of the county. \* \* \*"

This section of the Constitution is involved in the case of *Almond vs. Day*, 197 Va. 782, 191 S. E. (2) 660. In that case the Court said:

"\* \* \* The moving consideration and motivating cause of a transaction are the chief factors by which to determine if it is prohibited by § 185. Whether or not a transaction contravenes the 'credit clause' in § 185 depends upon its animating purpose and the object that it is designed to accomplish."

While there is an incidental benefit to the County, the major benefit is derived by the Mathews Corporation.

For the reasons set forth herein, I am of the opinion that the proposed arrangement between the County and the Power Company is prohibited by Section 185 of the Constitution.

**COUNTIES—Drainage—May Appropriate From General Fund to Correct Local Problem Where Serious Menace to Health of Large Number of Residents. (66)**

September 12, 1958.

HONORABLE NELSON R. THURMAN  
Member of the House of Delegates

This is in reply to your letter of September 5, 1958, in which you request my opinion as to whether or not the Board of Supervisors may appropriate funds from the general funds of the county to correct a serious drainage problem which exists in one of the residential areas of the county.

I know of no specific provision of the Code of Virginia whereby the board of supervisors is permitted to expend public funds to correct a drainage problem affecting one or two or three homes of private citizens. If the county has done any act which has caused this drainage problem to exist, then, of course, it would be responsible for alleviating the problem. If the problem is so great that the Board of Supervisors finds that it constitutes a serious menace to the health or safety of a large number of citizens or residents of the county, then it could probably appropriate money in correction of such a problem, pursuant to the general powers conferred upon the board of supervisors by §§ 15-8 or 15-10 of the Code of Virginia.

I am returning the letter which you enclosed with your letter.

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**COUNTIES—Employment of Legal Counsel—May Engage to Represent Before Corporation Commission Where Residents Complain of Inadequacy of Water Supply. (115)**

October 31, 1958.

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

This is in reply to your letter of October 24, 1958, in which you state that residents of certain areas of Prince William County have filed complaint with the State Corporation Commission concerning the inadequacy of the public water supply system. You state that the Board of Supervisors felt that the matter was so important and related to the public health and welfare of such a large area of the county that the services of additional attorneys were engaged to appear before the State Corporation Commission on the matter. You request my opinion as to whether or not the Board of Supervisors may pay for these legal services from the general fund of the county.

I am of the opinion that the Board of Supervisors could employ and pay legal counsel to appear before the State Corporation Commission in a matter such as this, pursuant to the provisions of § 15-9 of the Code of Virginia. I am enclosing a copy of an opinion rendered on September 30, 1948 to Honorable L. C. Harrell, Jr., Commonwealth's Attorney for Greensville County, relating to the employment of counsel to appear before the Interstate Commerce Commission to oppose the abandonment of a railroad.

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**COUNTIES—Fire Districts—May Include Area of Magisterial District—§ 27-26 Controls Levy. (170)**

January 15, 1959.

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

This is in reply to your letter of January 14, 1959, which reads as follows:

"Several people in one of our magisterial districts are asking our Board of Supervisors to lay a fire levy in that district and the question has been raised whether such a levy can be confined to one magisterial district and, in any event, whether any such levy can be laid anywhere except in a sanitary district as now provided in Code Section 21-118 (6)."

Under the provisions of Section 27-26 of the Code, as amended by Chapter 117, Acts of 1956, the governing body of the several counties may create and establish by definite metes and bounds, fire zones or districts in such counties, within which may be located and established one or more fire departments, to be equipped with apparatus for fighting fires and protecting property within such zones or districts from loss or damage.

This section authorizes the levy of a tax not exceeding ten cents on the hundred dollars of the assessed value of the real and personal property within the zone or district.

I am of the opinion that under this section the governing body of the county could establish a fire district so as to include all of the area of a magisterial district.

I am of the opinion that Section 21-118 (6) is applicable only to a sanitary district. Under this section the limitation of ten cents per hundred dollars of valuation is not provided due to the fact, I suppose, that the levy imposed under that section would not be solely for fire protection but would be laid for all the purposes included in subsection (6) of Section 21-118.

Whenever the levy is for fire protection only, it would seem that Section 27-26 is the applicable statute.

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**COUNTIES—Fire Districts—May Include Magisterial District and Exclude Town Within Such Magisterial District. (240)**

March 19, 1959.

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

This is in reply to your letter of March 18, 1959, which reads as follows:

"On January 15, 1959, you wrote me advising me that in your opinion under Section 27-26 of the Code, our Board of Supervisors could set up a magisterial district as a fire district. Our Board of Supervisors has decided to set up two of the magisterial districts as fire districts, but the question has now been raised as to whether an entire town in one of the magisterial districts can be excepted from the fire district established by that particular magisterial district.

"My opinion is that the town *can* be excepted because it is already segregated as to assessment, but I would like your opinion on whether I am right about it."

Section 27-26 provides that the governing body of counties "may create and establish by *defined metes and bounds*, fire zones or districts in such counties \* \* \*." There is no language in this or any other section relating to this matter which would prohibit such zone or district from being laid off in such manner as to exclude a town. The ordinance establishing the metes and bounds may, in my opinion, be drafted in such manner that the description of the fire zone boundary where it touches the town will be identical with the description of the corporate limits of the town, thus excluding the town, even though it may be entirely surrounded by the fire zone.

**COUNTIES—General Levy—Applicable to All Taxable Property in Class Including Property Located in Towns—Town Separate School District—Pro Rata Share Determined Under § 22-141—Town May Lay Additional School Levy. (298)**

May 8, 1959.

HONORABLE B. C. GARRETT, JR.  
Clerk of Circuit Court of  
King William County

This is in reply to your letter of May 6th in which you state that your county has heretofore laid a special school levy applicable only to the taxable property outside the town of West Point, and raise some question as to the practical aspects of a general levy which would, you state, create an undue burden on the town.

Under Section 168 of the State Constitution the levies imposed by your county for general and school purposes are required to be uniform upon the same class of subjects within the territorial limits of the county. The territorial limits of the county includes all incorporated towns located within the county.

Section 22-141 of the Code requires the county to turn over to the towns constituting separate school districts their *pro rata* share of the taxes collected.

If the county adopts a unit or general levy for all purposes the town of West Point's *pro rata* share will be determinable and payable to the town under this Code section. Of course, if the town of West Point desires to supplement its school fund, it can lay a town levy sufficient to produce the amount needed, or make the necessary appropriation out of its general fund.

You refer to the case of *Brunswick County v. Peebles*, 138 Va. 348, and state that this case merely affirms the right of the governing body of the county to impose a school levy upon the property situated in a town operating a separate school district. The case of *Woolfolk v. Driver*, 186 Va. 174 seems to expressly hold that levies laid by a county board shall extend to property located within the towns under Section 168 of the State Constitution. This would apply to a special levy for school purposes as well as to a general levy from which appropriations for school or educational purposes are to be made.

We are studying the statutes which were passed at the recent session of the General Assembly and construing them as various questions are presented. Should you desire further advice, please let me know.

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**COUNTIES—Industrial Development—Board of Supervisors May Appropriate Limited Amount for Advertising and Publicity—May Not Render Direct or Indirect Aid to any Industry. (234)**

March 16, 1959.

HONORABLE WALTER N. ROGERS  
Member of Board of Supervisors of  
Page County

This is in reply to your letter of March 14, 1959, which reads as follows:

"Will you please advise if we members of the Board of Supervisors may appropriate a sum of money from the general county fund toward the industrial development of Page County."

Section 15-12 of the Code authorizes Boards of Supervisors to appropriate out of the general levy, except the school fund, a sum not exceeding one percentum of the annual revenues, from all sources, in advertising and giving publicity to the resources and advantages of their county.

I wish to call your attention to Section 185 of the Constitution of Virginia, which reads in part as follows:

“Neither the credit of the State, nor of any county, city, or town, shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation, nor shall the State, or any county, city, or town subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work; \* \* \*.”

This section of the Constitution would prohibit the Board of Supervisors from rendering any direct or indirect financial aid to any industry in the county.

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**COUNTIES—Industrial Development—Employment of Consulting Engineers for Industrial Survey—Board of Supervisors May Expend Public Funds Within Statutory Limit. (271)**

April 17, 1959.

HONORABLE ALTON I. CROWELL  
Commonwealth's Attorney for  
Pulaski County

I acknowledge receipt of your letter of April 16, 1959, to which you attached a photostatic copy of a letter to you dated April 15, 1959, from the Honorable Roby K. Sutherland, Treasurer of Pulaski County, which reads as follows:

“Yesterday afternoon the Board of Supervisors considered the question of appropriating a sum of money for obtaining the services of the Fantus Company for the purpose of making an industrial survey of this area. The question arose as to whether or not the Board could legally and properly appropriate county funds for this purpose, and I was requested to bring this matter to your attention for an opinion on the subject.

“If you think well of the suggestion, you might write to the Auditor of Public Accounts and/or the Attorney General in an effort to determine whether such an expenditure would be approved.”

You desire my opinion with respect to this matter.

On April 16, 1959, we considered this question and rendered an opinion to the Honorable A. Erwin Hackley, Commonwealth's Attorney for Luray, Virginia, copy of which I enclose herewith. You will note that the enclosed opinion, in addition to answering the question raised by Mr. Sutherland, answers various other questions which are pertinent.

I am of the opinion, therefore, that your county Board of Supervisors may expend public funds within the limits set forth in the enclosed opinion to Mr. Hackley for the purposes set forth in your inquiry.

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**COUNTIES—Industrial Development—Expense of Survey of Resources Authorized—May Employ Consulting Engineers—Board of Supervisors May Appropriate from General Levy Except School Fund—§ 15-12 Controls—Members of Board May Serve on Committee. (269)**

April 16, 1959.

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

This is in reply to your letter of April 14, 1959, which reads as follows:

"The Board of Supervisors of Page County, Virginia, which met in regular session on yesterday, April 13, 1959, has requested that I obtain an opinion from you in regard to the following questions:

"1. Under Section 15-12 of the Code of Virginia, or under any other authority, does the Board of Supervisors have power to appropriate money toward the hiring of a New York firm of consultant engineers to make a survey of the economic and labor conditions and other advantages of Page County for the purpose of advising the county as to what industries are best suited for this locality and to aid in the securing of such industries?

"2. Should the answer to 'Question Number 1' be in the affirmative, would the 1% of the general levy mentioned in said Section 15-11 include funds coming to the county as their share of the State A.B.C. funds?

"3. Also assuming the answer to 'Question Number 1' to be in the affirmative, would the 1% include funds collected from the sale of motor vehicle license tags, which funds under the Statute must first go into the general county funds, but which have been appropriated by the Board of Supervisors of Page County for capital outlay school funds for the building of new schools in the county?

"4. Still further assuming the answer to 'Question Number 1' to be in the affirmative and that the appropriation to be made by the Board of Supervisors of Page County for the hiring of such consultant engineers to be not of a sufficient amount to pay for the entire services of said firm, the remainder of said necessary funds for hiring said consultant engineers to be raised from the local towns within the county or from private sources, must the appropriation by the Board of Supervisors be made directly to said firm or could said appropriation be turned over to a committee composed of various members from throughout the county, which committee might possibly have a representative of one or more members of the Board of Supervisors?

"5. And still assuming the answer to 'Question Number 1' be in the affirmative, can the present Board appropriate a sum for the next three years, for instance a sum of \$1,500.00 a year for three years, for the purposes of hiring said firm?"

Section 15-12 of the Code is as follows:

"The board of supervisors of any county may appropriate out of the general levy, except the school fund, in their discretion, a sum not exceeding one per centum of their annual revenues, from all sources, in advertising and giving publicity to the resources and advantages of their county."

The expenditure of public funds authorized under this section is for the purpose of advertising and giving publicity to the resources and advantages of the county. I am of the opinion that the expenses incident and necessary to making a survey of the resources and advantages so as to prepare the advertising material is authorized under this section. Competent advice as to what the county has to offer would be, in my opinion, necessary and incidental to any advertising program. Therefore, I answer your question 1 in the affirmative.

With respect to question 2. The one per centum that may be spent out of the general levy, is not one per centum of the amount produced by the general levy, but it is one per centum of the "annual revenues, from all sources." Illustrating, if the total of the revenues of the county from all sources is \$500,000.00, then the amount that may be expended out of the funds produced by the general levy (excluding school funds) would be \$5,000.00. The amount received from A.B.C. funds would be included in the total revenues for determining the amount on which to calculate the one percentum. Likewise, revenues from school levies, would be

included. The one per centum, determined in the manner used in the illustration, would, in my opinion, have to be appropriated out of the county levies on property authorized under Section 111 of the Constitution.

With respect to question 3, the revenue from automobile license tag sales would be included in the amount used as a basis for determining the one per centum. Although this money goes into the general fund, it is not raised by general levy on property, and, therefore, is not available for the purposes of expenditure under Section 15-12.

Answering question 4, attention is directed to Sections 15-253, 15-256 and 15-257 relating to the payment of claims against a county. In the instant case, the appropriation could be made for the purpose stated in your letter, but its disbursement would necessarily have to be in accordance with the statutes cited. I can see no reason why a member of the Board of Supervisors could not be a member of a committee established for the purpose of supervising the matter so long as the member receives no compensation for his services.

Your question 5 must be answered in the negative. I enclose the following opinions which relate to the principle involved:

Opinion dated March 18, 1948, published in Reports of Attorney General for 1947-'48, at p. 11

Opinion dated November 8, 1951, published in Reports of Attorney General for 1951-'52, at p. 15

Opinion dated June 29, 1950, published in Reports of Attorney General for 1949-'50, at p. 31

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**COUNTIES—Insurance—May Contract for and Hold Policies in Mutual Companies Provided Maximum Premium Fixed and No Liability in Any Event for an Additional Premium. (358)**

June 26, 1959.

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

This is in reply to your letter of June 24, 1959, in which you request my opinion "as to whether or not a county can become a member of a mutual insurance company as the specimen contracts so provide." The specimen policies submitted by you provide that a policy holder is a member of the company, entitled to vote at its meetings. These policies are non-assessable, which is permitted for companies which qualify under Section 38.1-95.1 of the Code. Inasmuch as membership in these companies does not create any actual or potential liability upon the county, I am of the opinion that the Board of Supervisors may purchase this type of insurance. Under Section 38.1-77 of the Code, it is required that every member of a mutual company shall have voting power as provided in the by-laws of the company. This voting power is a mere right and not an obligation upon the policyholder.

I find that the late Justice Abram P. Staples, while Attorney General, was of the opinion that governmental agencies and municipal corporations could contract for and hold policies of insurance in mutual companies where the maximum premium is fixed and there is no liability in any event to pay an additional premium.

**COUNTIES—Lease of Real Property—Lease May Provide for Removal of Lighting System at Option of Lessee. (96)**

October 15, 1958.

HONORABLE J. B. MASON  
Commonwealth's Attorney for  
Amelia County

Supplementing my letter of September 8, 1958, in reply to your letter of September 1, 1958, you are advised that in my opinion the Board of Supervisors would have authority to include a provision in the lease to the Amelia County Athletic Field Association granting permission to said Association to install a lighting system on the property involved with the reservation to the effect that the system may be removed at the option of the Association.

In accordance with your request over the telephone today, I am enclosing you a copy of an opinion rendered to the Honorable John H. Powell, Suffolk, Virginia, relating to the obligation of the County to bear the reasonable telephone expenses incurred by the County Judge.

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**COUNTIES—Lease of Real Property—May Lease Athletic Field with Approval of Court (61)**

September 8, 1958.

HONORABLE J. B. MASON  
Commonwealth's Attorney  
Amelia County

This is in reply to your letter of September 1, 1958, in which you request my opinion as to whether or not the Board of Supervisors has authority to lease certain property belonging to the County, which property has in the past been used for athletic contests and horse shows, to an incorporated county athletic association for a period of ten years.

I know of no specific provision in the Code of Virginia covering a lease of county property such as this. However, the Board of Supervisors, with the approval of the Judge of the Circuit Court of the County, could sell this property. I am of the opinion that they could in a similar manner dispose of a lesser interest in the property, viz., a leasehold estate for ten years, with the approval of the Judge of the Circuit Court.

I am enclosing a copy of an opinion rendered on June 3, 1958 to the Commonwealth's Attorney for Highland County concerning the lease of county-owned property. I am of the opinion that this opinion is applicable to the question which you present—that the Board of Supervisors may enter into a lease with the County Athletic Field Association for a term of ten years, pursuant to the provisions of § 15-692 of the Code of Virginia.

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**COUNTIES—Levies—Funds for Educational Purposes—Distribution to Towns Comprising Separate School Districts—§ 22-141 Explained. (308)**

May 19, 1959.

MRS. ANNE H. MILLER  
Treasurer of  
Washington County

This is in reply to your letter of May 12, 1959, to the Honorable J. Gordon Bennett, Auditor of Public Accounts, which he has referred to this office. Your letter reads as follows:

"As you know, we not only have a separate town school district in our county but also a small portion of the town of Saltville lies in Washington County and the town of Saltville is a separate school district. We have always been paying over to these two towns at the end of each month the proportionate amount of our monthly tax collections that represented the school tax levy on property within the two towns. In this current school year, for the first time, the County Board of Supervisors appropriated to the school fund an amount in excess of the A.B.C. money. Since this excess came out of general county fund levy, the town of Abingdon has asked for its pro-rata share. It has also asked for its pro-rata share of the appropriation (in excess of A.B.C. money) set up in the new budget which was approved in April.

"It appears under Section 22-141 (Chapter 79) that the County School Board shall require the County Treasurer to pay to the Town Treasurer a pro-rata share of this appropriation. Please tell me how the County School Board requires the Treasurer to make the payment; who determines what is the pro-rata share due the town; and what formula is used to determine the amount. I would also like to know whether the pro-rata share due the towns comes out of the school fund, or whether the Board of Supervisors is required to pay to the towns their pro-rata share over and above the appropriation that has already been paid to the county school fund."

As I understand your letter, the county provides for a specific school levy and pays over to the respective treasurers of the two towns the amount of tax derived from taxable property located within each town. The county also makes appropriations from its general fund to supplement the school fund of the county, but that no distribution is being made to the towns of their pro rata share of the general fund appropriation.

Section 22-141 of the Code, as amended, in so far as it relates to the questions presented by you, reads as follows:

"§ 22-141(a): For the benefit of each town school district operated by a school board of three members, the county school board shall require the county treasurer to pay over to the town treasurer, if and when properly bonded, the following funds to be used for public school and/or educational purposes within such special town school district:

- (1) From the amount derived from a county school levy and/or appropriations for public school and/or educational purposes, a sum equal to the pro rata amount from such levy or appropriations derived from such town."

Under this section any town which qualifies is entitled to receive (1) its pro rata share of the taxes collected specifically for public school or educational purposes and, (2) its pro rata share of school funds appropriated out of the general fund receipts derived from taxable property, as explained in the succeeding paragraphs.

The share due the town out of the specific school levy is the amount collected under such levy from taxes on real estate and tangible personal property located within the town.

The share due the town from the general fund is its pro rata share of the general fund receipts derived from the taxable property within the town, including real estate, tangible personal property, merchants' capital and machinery and tools. The pro rata share is determined by allocating to the town the same per centage of general revenue receipts as is appropriated to the county schools. Illustrating, if the appropriation for county schools and/or educational purposes is 10% of the revenues received from such sources and the amount of such revenue received

from property located within the town is \$20,000, then the town will be entitled to \$2,000 from the county to be used for public school and/or educational purposes.

The statute provides that the county school board *shall* require the county treasurer to pay over to the town treasurer the funds to which the town as a separate school district is entitled. It would seem that the proper procedure for the county school board to follow is to adopt an appropriate resolution and furnish a certified copy thereof to the county treasurer.

The statute is silent as to what official shall determine the pro rata share due the town, but it would seem that this would be a proper function of the county treasurer's office, since the treasurer's records, I assume, reveal the source of all revenue receipts.

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**COUNTIES—Levies—Funds for Educational Purposes—Distribution to Towns  
Comprising Separate School Districts—Calculation of Distributive Amounts.  
(308-a)**

May 25, 1959.

MRS. ANNE H. MILLER  
Treasurer of  
Washington County

This is in reply to your letter of May 20, 1959, which reads as follows:

"Thank you for your reply to my letter of May 12 to the Honorable J. Gordon Bennett, Auditor of Public Accounts, in regard to certain questions arising from the separate town school districts in our county. Two of my questions in paragraph two of my letter were not clearly stated and for that reason you did not answer them specifically.

"In this present fiscal year, the Board of Supervisors appropriated to the county school fund some \$20,000.00 over and above the amount of money collected on the \$4.00 school operating levy (on property located outside the towns having separate school districts) and the A.B.C. money. For the coming fiscal year, the Board of Supervisors has set up in its budget an appropriation of approximately \$85,000.00 to the county school fund over and above the amount of the school operating levy and the A.B.C. money. Now I am particularly concerned with two questions:

"1.—Is the pro rata share due the towns determined by the ratio that the assessed value of the town concerned bears to the total assessed value of the county; or is it determined by the ratio that the assessed value of the town bears to the total assessed value of the county exclusive of the assessed value of the two towns concerned; or is it determined by some other formula?

"2.—Does the amount of money determined to be the town's share for this present fiscal year come out of the \$20,000.00 that has been transferred from the general county fund to the county school fund; or is the town's share in excess of the \$20,000.00?

"I presume that whatever is determined to be the correct procedure for this present fiscal year will also be correct for the coming fiscal year."

With respect to your question No. 1, I am of the opinion that the pro rata share due the towns is not determined by either formula stated in your question. The correct basis for determining the share of the towns is set out in my reply to your question No. 2. Any appropriation made under this formula from the general fund for public school purposes or educational purposes would be in keeping with the provisions of Section 22-141 of the Code.

As I understand your question No. 2, the Board of Supervisors supplemented the fund for county school purposes by making an appropriation of \$20,000.00 out of the general fund of the county treasury. If this understanding is correct, then, in my opinion, the town is entitled to receive a percentage of general fund collections from town property equal to the percentage of general revenue collections from property located in the county, exclusive of such property located within the towns.

We will assume that the general fund of the county is derived from—

(1) Property situated in Abingdon.....	\$ 30,000.00
(2) Property situated in Saltville.....	20,000.00
(3) Property situated in the rural part of the county.....	50,000.00
<b>TOTAL GENERAL REVENUE.....</b>	<b>\$100,000.00</b>

The Board has appropriated \$20,000.00 for county schools, or 40% of the general revenue derived from taxable property situated in the rural areas. Therefore, the same ratio should be used in determining the share to each town which operates a separate school district.

Under this formula, the town of Abingdon would be entitled to 40% of \$30,000.00, or—\$12,000.

The town of Saltville would be entitled to 40% of \$20,000.00, or —\$8,000.00.

In determining the amount collected from each town, the interest and penalties collected should be taken into consideration. This is in accord with a ruling of this office to Honorable Volney H. Campbell, dated June 5, 1953, and published in the Report of the Attorney General for 1952-53, at page 227.

**COUNTIES—May Authorize Payment of Utility Bills at Other Locations Within County—Treasurer May Appoint Deputies to Receive Payments. (75)**

September 18, 1958.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

In reply to your letter of September 18, 1958, with respect to the conference had between you and the Treasurer of Chesterfield County relative to the procedure adopted by that County's Board of Supervisors permitting the customers of the County's water utilities to pay these charges to service stations, drug stores, banks, etc., I am enclosing copy of two opinions relating to the principle involved, which were furnished to Honorable Stanley A. Owens, Commonwealth's Attorney for Prince William County, on April 17 and April 24, 1958.

I believe that these two opinions answer the questions presented by you.

It would seem that the treasurer could appoint some person as his deputy at each of the places designated for the payment by the customers of these utility bills. The treasurer would have the sole discretion as to who would be appointed as his deputy and such deputy, of course, would have to qualify in the same manner as any other deputy treasurer.

Under the arrangement contemplated by the resolution of the Board of Supervisors the treasurer would still be liable for strict accountability of all such funds collected.

**COUNTIES—Motor Vehicle License Tax—Violation of Ordinance Offence Against County—Fines and Costs Paid to County—State Police May Arrest for—May Be Imposed on “Resident” as Soon as He Becomes Same. (98)**

October 20, 1958.

HONORABLE A. NELSON WALLER, *Judge*  
Spotsylvania County Court

This is to acknowledge receipt of your letter of October 7, 1958, in which you ask my opinion concerning several questions relating to a county ordinance imposing automobile license taxes on the residents of such county.

I shall answer your questions seriatim:

1. Should a charge under this ordinance be written on a state warrant or on a county warrant.

ANSWER: As this is a violation of the county ordinance, the charge should be written on a county warrant.

2. The fines and costs collected under this ordinance should they be paid to the Commonwealth or to the county.

ANSWER: Section 46.1-65 provides that the taxes and licenses imposed upon motor vehicles, etc., by the counties shall be applied to general county purposes, therefore, the fines and costs collected under this ordinance shall be paid to the county.

3. Can a State Trooper issue a summons for a violation of this ordinance.

ANSWER: State Troopers are vested with the authority to execute warrants of arrest for violation of county ordinances by Section 56-22 of the Code. However, the execution of any such warrant is not obligatory, but rests entirely in the discretion of the Superintendent of State Police and the police officers appointed by him. Colonel C. W. Woodson, Superintendent of State Police can advise you the policy which is being followed in this particular.

4. When a person has purchased a county license tag in one county, then moves to Spotsylvania County should he be required to purchase a new tag in Spotsylvania County. If your answer is negative, what should be the length of residence required before purchasing the new tags. (There is no provision in the ordinance for this situation.)

ANSWER: Section 46-64 of the Code which was amended and reenacted as an emergency measure by Chapter 482, Acts of 1958, contained this provision:

“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.”

This office ruled on August 29, 1958 in a letter to the Honorable R. R. Gwathmey, that the said Chapter 482 was repealed by Chapter 541 (new Motor Vehicle Code). I can find no such provision in Sections 46.1-65 and 46.1-66 of the Code and, therefore, there appears to be no prohibition against a county from imposing an automobile license fee upon one of its residents who heretofore has resided in another county or city.

Sections 46.1-65 and 46.1-66 of the Virginia Code do not mention the term “resident,” but, I understand that the Motor Vehicle License Tax ordinances

adopted by cities and counties make the tax applicable *to the residents of the same*. The Spotsylvania ordinance is of like character. The question to be determined in each case is whether or not a person, who changes his place of abode from one county to another during the tax year and after having paid a similar tax in the county of his former residence, is deemed a "resident" of the county to which he moves within the purview of the Motor Vehicle License Tax ordinance of the latter county.

Resolution of this question will depend upon the construction placed on the particular ordinance by the appropriate officials of the county. However, so long as the proration provision of Section 46.1-65 is observed, I do not believe that there is any statutory prohibition against the imposition of the Motor Vehicle License Tax in the situation under consideration immediately upon the individual's becoming a resident of the county to which he moves.

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**COUNTIES—Motor Vehicle Tax—County and Town Tax Revenues Must Be Applied to General County or Town Purposes—Neither County nor Town May Contribute or Make Refund to Other. (93)**

October 14, 1958.

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

This is in reply to your letter of October 13, 1958, in which you present the following questions:

"The Town of Appomattox, which is located in the County of Appomattox, is at the present time assessing a \$3.00 tax on all motor vehicles situated in the town; the County wants to know if the Town Council of the Town of Appomattox would discontinue this motor vehicle tax and then the County levy a \$5.00 tax on all vehicles in Appomattox County, would it be lawful for the Board of Supervisors to refund to the Town or make a contribution to the Town of \$3.00 of the \$5.00 tax levied?

"The second question they would like to know is could the Town of Appomattox increase its motor vehicle tax to \$5.00 and give to the County \$2.00 of the \$5.00 tax provided the County levied a \$5.00 tax on all other car owners of the County of Appomattox."

Section 46.1-65(b) of the Code provides as follows:

"The revenue derived from all county, city or town taxes and license fees imposed upon motor vehicles, trailers or semitrailers shall be applied to general county, city or town purposes, as the case may be, except that in any county having a population of more than eleven thousand four hundred but less than eleven thousand nine hundred this revenue shall be paid into the school fund of such county."

In view of this provision, I am of the opinion that both of your questions must be answered in the negative. The above section provides that "the revenue derived from *all* county, city or town taxes and license fees imposed upon motor vehicles, etc., shall be applied to *general* county, city or town purposes, as the case may be, \* \* \*."

The proposed method of distribution of the taxes so collected would manifestly be contrary to this provision.

**COUNTIES—Ordinances—Compulsory School Attendance—Board of Supervisors May Not Enact Without Statutory Authority. (192)**

February 5, 1959.

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

This is in reply to your letter of February 3, 1959, which reads as follows:

"It would be appreciated if you would advise me as to whether the Board of Supervisors of Wythe County has authority under its general powers to adopt an Order for compulsory school attendance in Wythe County."

Section 138 of the State Constitution is as follows:

"The General Assembly may, in its discretion, provide for the compulsory education of children of school age."

Under the authority of this section, the General Assembly enacted various statutes providing for compulsory attendance in the schools. These statutes, however, were repealed, effective January 31, 1959, under the provisions of House Bill No. 5, which was passed during the recent session of the General Assembly.

There is no provision in Section 15-8 of the Code pertaining to the general powers of counties under which a county is authorized to adopt and enforce a compulsory attendance ordinance.

In light of Section 138 of the Constitution, I am of the opinion that no valid ordinance providing for compulsory attendance in the public schools of this State may be enforced unless authority to enact such ordinance is granted by the General Assembly.

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**COUNTIES—Ordinances—May Not Be Adopted Prior to Second Regular Meeting of Board of Supervisors After Introduction But May Be Adopted at Subsequent Meeting. (39)**

August 11, 1958.

HONORABLE L. MELVIN GILES  
Commonwealth's Attorney  
Pittsylvania County

This is in reply to your letter of August 8, 1958, which reads as follows:

"The Board of Supervisors of Pittsylvania County, Virginia, adopted a Motor Vehicle License Ordinance pursuant to Title 15, Section 8, Code of Virginia of 1950, as amended, during the year of 1956. In order to bring the ordinance up to date and to incorporate the changes made by the Session of the General Assembly of 1958, a new ordinance was introduced at the regular meeting of the Board on May 7, 1958 and was duly published in the *Star-Tribune*, a county newspaper, for four consecutive weeks. The Board of Supervisors intended to adopt said ordinance on Wednesday, August 6, 1958, but inadvertently failed to do so and the meeting was adjourned.

"All the requirements of Title 15, Section 8 of the Code of Virginia of 1950, as amended, have been fully complied with including: (1) Introduction of the ordinance at a regular meeting of the Board of Supervisors, Pittsylvania County, Virginia, (2) Published in a local newspaper for four successive weeks, (3) Posting of copies of the said ordinance on the front door of the Court House and at each post office in the County. Also, at the beginning of the ordinance there was a statement to the effect that it was to the intention of the Board of Supervisors to adopt the said ordinance at the regular meeting of the Board to be held on Wednesday, August 6, 1958.

"I would like an informal opinion from you on whether or not the Board may formally adopt the ordinance at its regular meeting to be held on Wednesday, September 3, 1958. I have discussed this matter with Mr. R. D. McIlwaine, III, of your office and we feel like the Board does have the authority to adopt the said ordinance at its next regular meeting. However, an expression from your office will be of great value to the Board of Supervisors of Pittsylvania County, Virginia and to this office."

I am of the opinion that the ordinance in question may be adopted at the September meeting of the Board of Supervisors. Under paragraph (a) of Section 15-8 of the Code, it is provided 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;"

It will be noted that under this provision an ordinance of this nature may not be adopted *prior* to the second regular meeting following introduction. I do not construe this language to mean that the ordinance would necessarily have to be adopted at the second regular meeting.

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**COUNTIES—Ordinances—Where no Provision Limiting Duration, Failure to Enforce Does Not Repeal. (289)**

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

April 30, 1959.

This is in reply to your letter of April 29, 1959, advising that on January 25, 1946, the Board of Supervisors of your county enacted an ordinance pertaining to rabies; that the ordinance has never been repealed, and that the Board has recently directed that its provisions be enforced. You state that the Game Warden of your county takes the position that in view of the fact that the ordinance has never been enforced, it is no longer effective. You state that you are of the opinion no action by the Board with respect to the ordinance is necessary in order for it to be enforceable, and request my opinion on this point.

I do not have the text of the ordinance before me, nor do I have a copy of the resolution by which it was enacted. If the ordinance was properly enacted in 1946, and does not contain any language limiting its duration, I am of the opinion that it continues to have its original effectiveness until it is repealed in the manner provided by statute. I assume the ordinance was enacted pursuant to Section 29-196 of the Code, which in 1946 was Section 3305 (70 a) of Michie's Code. Mere neglect to enforce an ordinance validity enacted does not operate to effect its repeal.

**COUNTIES—Purchase of Bus—Board of Supervisors May Not Purchase Bus to Transport Students to Clinch Valley College. (142)**

December 3, 1958.

MR. GLYN R. PHILLIPS  
Commonwealth's Attorney  
Dickenson County

This is in reply to your letter of November 25, 1958, in which you request my opinion as to whether or not the Board of Supervisors of Dickenson County may purchase a school bus for the purpose of transporting students from Dickenson County to and from Clinch Valley College in Wise County.

I can find no authority for the Board of Supervisors to purchase or operate a bus service from Dickenson County to Clinch Valley College in Wise County. The County would in effect be going into the transportation business.

I am enclosing a copy of an opinion of this office rendered on February 3, 1938 to Honorable Charles W. Crush, Christiansburg, Virginia, relative to the use of county school buses to transport students from Radford College to Virginia Polytechnic Institute.

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**COUNTIES—Sanitary Districts—Should Not Embrace Territory of Incorporated Towns—Validating Statutes Confirm Inclusion Where District Created Prior to January 1, 1958. (355)**

June 24, 1959.

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

This is in reply to your letter of June 23, 1959, in which you refer to an opinion issued by this office dated May 28, 1959, to Honorable J. Gordon Bennett, in which we took the position that sanitary districts created under the provisions of Chapter 2 of Title 21 of the Code could not include territory located within an incorporated town.

You have directed my attention to Section 21-121.1 of the Code, which reads as follows:

"All proceedings had in the creation of sanitary districts in the State prior to June 30, 1954, whether under general law or by special act, are validated and confirmed, and all such districts so created or attempted to be created, under existing general law or by special act, are declared to be validly created and established, notwithstanding any defects or irregularities in the creation thereof, including any curable unconstitutionality of a procedural character, such as failure of the act to correspond with title and such constitutional questions."

You state that you are particularly concerned with Occoquan-Woodbridge Sanitary District, which was created prior to June 30, 1954, and that this sanitary district includes the town of Occoquan.

In addition to Section 21-121.1, which I have quoted above, I find that Section 21-121 was amended at the 1958 session of the General Assembly (Chapter 588) so as to validate and confirm all proceedings had in the creation of sanitary districts in the State prior to January 1, 1958.

While I adhere to my view as stated in my opinion of May 28, 1959 that Chapter 2 of Title 21 of the Code does not contemplate the creation of sanitary districts so as to embrace territory in an incorporated town, I am of the opinion that the validating statutes quoted herein are sufficiently broad to validate the sanitary district to which you referred and which includes the town of Occoquan.

**COUNTIES—Sanitary Districts—Towns May Not Be Embraced Within. (323)**

May 28, 1959.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of May 26, 1959, which reads as follows:

“Under date of May 21, 1959, I received a letter from Mr. C. A. Sinclair, Treasurer of Prince William County, Virginia, which reads in part as follows:

“ ‘Please advise me whether or not an incorporated town can be made a part of a sanitary district; and, if so, whether the public utilities located within the town and built with funds from a bond issue voted in the Sanitary District would be subject to rules and regulations adopted by the town council or rules and regulations adopted by the Board of Supervisors.’

“Inasmuch as Mr. Sinclair’s question involves a point of law, I should appreciate it if you would give me your opinion with respect to the question which he raises. Your usual kind and co-operative assistance, I assure you, will be most gratefully appreciated.”

Sanitary districts may be created under the provisions of Chapter 2 of Title 21 of the Code. In my opinion, the statutes do not authorize the establishment of such districts so as to embrace a town. The authority to be exercised under these statutes is necessary where areas become thickly settled and have no legal method whereby sanitary needs for the protection of the citizens may be enforced. Whenever such a community becomes a municipal corporation either by a charter granted by the General Assembly or pursuant to Chapter 5, Title 15 of the Code, the governing body of the town may provide for all necessary sanitary facilities, and levy a tax for the same. I am of the opinion, therefore, that sanitary districts may be established by a county governing body in the areas outside incorporated communities, but that they have no authority to extend such districts to include towns. Under Section 21-119.1 whenever a sanitary district becomes a town, the board of supervisors may transfer the district to the town, subject to the approval of the holders of sanitary district bonds, if any are outstanding.

The statutes authorizing the establishment of sanitary districts by counties do not expressly prohibit the inclusion of towns within such districts, but, in my opinion, it is not the intent of the statutes to authorize their establishment in areas where under existing laws or charter provisions that power is already vested in a competent governing authority.

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**COUNTIES—Sheriff of Norfolk County May Appoint Civil Defense Auxiliary Police as Special Police Officers to Serve Without Pay in Emergencies. (46)**

August 19, 1958.

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

This is in reply to your letter of August 14, 1958, in which you request my opinion as to the validity of a proposed ordinance to be adopted by the Board of Super-

visors of Norfolk County relating to the appointment of Civil Defense Auxiliary Police as special police officers. The proposed ordinance reads as follows:

*"The Sheriff of Norfolk County or any person designated by the Sheriff may appoint for a specified time as many special police, without pay, from among the trained personnel of the County's civilian defense auxiliary police as may be deemed advisable for service in connection with any emergency or disaster, civil or military. During the term of service of such special police, they shall possess all the powers and privileges and perform all the duties of police officers of the Police Department of the County of Norfolk. Said special police must wear such identifying emblem as may be prescribed by the Sheriff and it shall be unlawful for any said special policeman to attempt to carry out any order, rule, or regulation promulgated under the authority conferred by this ordinance when he is not wearing said identifying emblem."* (Italics supplied.)

I am assuming that Norfolk County police force has been appointed by the Sheriff of Norfolk County pursuant to Chapter 36 of the Acts of Assembly, 1950, as amended by Chapter 189 of the Acts of Assembly of 1956. Section 1 of Chapter 36 of the Acts of Assembly of 1950, as amended, provides in part:

*"The sheriff of the county shall appoint a special police force for so much of the county as is not embraced within an incorporated town located therein. \* \* \* The sheriff may, subject to the approval of the governing body of the county, allow compensation to members of such police force not less than \$200.00 a month which, together with any expenses incurred in the execution of their duties, including the cost of such radio equipped police cars as the sheriff deems are necessary, shall be paid out of the county levy."*

I am of the opinion that, pursuant to the authority which has been granted to the Sheriff of Norfolk County, he may appoint special police officers from among the trained personnel of the Civil Defense Auxiliary Police. Since the Acts of Assembly provide that only the sheriff may appoint special police officers, I am of the opinion that the portion of the proposed ordinance which I have italicized is in conflict with Chapter 36 of the Acts of Assembly of 1950 as amended by Chapter 189 of the Acts of Assembly of 1956 and, therefore, the proposed ordinance should be amended by deleting this provision. I am further of the opinion that the governing body may provide that temporary special police officers shall serve without pay. This provision is not in conflict with the statutory provisions relating to the minimum salary of special police officers, as the salary provision refers to special police officers appointed on a permanent basis rather than to officers appointed on a temporary basis to serve in case of civil or military emergencies and disasters.

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**COUNTIES—Special County Government—Powers of General Assembly Under Section 110, Constitution—May Not Prohibit Towns from Becoming Cities—Annexation—Extension of Utilities—May Not Prohibit Incorporation of Towns. (349)**

June 17, 1959.

HONORABLE JOHN C. WEBB  
Member of the House of Delegates

I am in receipt of your letter of June 4, 1959, in which you state that a commission on urban county government has been established in Fairfax County and that Mr. James Keith, a member of the Board of Supervisors of Fairfax County and the

commission, has requested you to obtain my opinion upon certain questions, which have been set out below and answered seriatim.

(a) In creating a complete form of county government under Section 110 of the Constitution could an Optional Forms Act contain a provision prohibiting existing towns from becoming cities?

In light of the fact that Section 116 of the Virginia Constitution prescribes that all incorporated communities having within defined boundaries a population of 5,000 or more shall be known as cities, and all incorporated communities having within defined boundaries a population of less than 5,000 shall be known as towns, I am of the opinion that an enactment of the General Assembly providing for a complete form of county organization and government under Section 110 of the Constitution could not prohibit existing towns from becoming cities.

(b) In creating a complete form of county government under Section 110 of the Constitution, could the right of annexation now held by existing towns be curtailed or abolished?

Section 126 of the Virginia Constitution provides 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.”

While general laws curtailing the right of annexation of existing towns may be enacted, I do not think that Section 126 of the Constitution authorizes the General Assembly to establish one rule to govern annexation by towns of territory in counties operating under the government established under Article VII of the Constitution and another rule to govern annexation by towns of territory located in counties operating under one of the other forms of government established under the terminal paragraph of Section 110 of the Constitution.

(c) In creating a complete form of county form of government under Section 110 of the Constitution, could the right of existing cities and towns to extend their utility services into the county be curtailed or abolished, except with the approval of such extensions by the County Board of Supervisors?

I have been unable to discover any provision of the Constitution which would forbid the General Assembly to enact laws curtailing or abolishing the right of cities and towns to extend their utility services into the county without the approval of such extensions by the governing body of the county.

(d) Under present law, could the incorporation of new towns or cities in Fairfax County be prohibited by statutory enactment, or would Constitutional amendments be necessary?

Under Section 117 of the Virginia Constitution, the General Assembly is required to enact general laws for the organization and government of cities and towns, which has been done in Chapter 5, Title 15 of the Virginia Code. Communities may also be incorporated under this constitutional provision by special acts, which has frequently been done by legislative charters. With respect to this constitutional provision, the Supreme Court of Appeals of Virginia has said, *Norfolk County v. Duke*, 113 Va. 94, 99:

"The Constitution requires the General Assembly—does not merely permit, but commands that body—to enact general laws for the organization and government of cities and towns."

In my opinion any act of the General Assembly exempting certain counties from the general laws applicable to the organization of cities and towns solely because of such counties' having a special type of government pursuant to the terminal paragraph of Section 110 of the Virginia Constitution would be in violation of Section 117 of the Virginia Constitution.

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**COUNTIES—Special School Levy—May Not Exempt Town Property Even Where Separate School District—Method of Proration Under § 22-141—Separate School District May Be Abolished. (307)**

May 19, 1959.

HONORABLE J. P. BEALE  
Commissioner of the Revenue  
Westmoreland County

This is in reply to your letter of May 14, 1959, which reads as follows:

"I am seeking your honored opinion on the situation now confronting Westmoreland County.

"In the past the Town of Colonial Beach, which has a separate school district from the County of Westmoreland, has levied a General Fund Tax of \$2.40, of which the cost of their schools has been paid. In addition to this the people of the Town of Colonial Beach pay in to the County's General Fund Budget \$.75 on each \$100 of value. The problem which now confronts us is that if we have to do away with our school levy and include our school and general fund levies into one over-all levy of \$2.80, this will mean that the Town of Colonial Beach will pay in to the County of Westmoreland \$2.80 on each \$100 of value, of which they will be refunded \$2.05 to operate their schools. The amount needed to operate their schools at present is \$1.20, which will result in a surplus of \$.85 being put in a separate fund which they can only use to retire the school debt or for school purposes. This means that they will have to increase their own General Fund Budget at least \$.85 in order to meet the budget for the operation of the Town. This will make these people pay in the neighborhood of \$4.00 on each \$100 of value.

"In the past their merchants have paid on merchants' capital in to the Town of Colonial Beach \$.50 on each \$100 of value, and to the County \$.75, which is our general fund levy. By having a general fund levy of \$2.80 which the Town of Colonial Beach will have to pay in to the County's General Fund Budget, it will more than double the amount of tax that the merchants have been paying on merchants' capital. They are now already paying a license to the Town of Colonial Beach which is as high as the state license costs.

"The tremendous problem with this whole situation is the fact that of their overall population, more than 30% are aged, retired people living on small government pensions or Social Security who are unable to pay this increase in taxes worked on the new plan which was explained in the conference of May 6, 1959, held in the State Building. If the way that we have worked our taxes ever since Colonial Beach has had a separate school district—which dates back for a considerable period of time—is contrary to law, then I am indeed sorry. However, the hardship that

will be brought about under the new ruling would be even more of an injustice to the people of Colonial Beach than they have ever experienced before.

"I ask you most sincerely if this practice, which has been set forth by the Attorney General's Office as being law, could not possibly have some serious consideration in a situation of this kind.

"Please advise us of what we must do in a case of this kind and what we can do to help our problem."

The provisions of law with respect to the allocation of county funds to towns constituting a separate school district were not affected by the legislation enacted at the special session of the General Assembly of 1959. The statute was amended only so as to make it applicable to the allocation of funds for educational purposes. The statute in question is Section 22-141 of the Code.

Under this section the county school board is directed to require the county treasurer to pay over to the town treasurer, if and when he is properly bonded, the funds set out in that section to be used for public schools, and/or educational purposes, the amount to be a sum equal to the pro rata amount from a specific county levy for such purposes, or appropriations derived from the town.

While it appears that in the past some of the counties have been laying a specific levy for school purposes, exempting the town property from such levy, such procedure was not based on any opinion issued by this office, and was clearly in violation of Section 168 of the State Constitution which requires that the levy of taxes by a county shall be uniform upon all of the property subject to such tax within the jurisdiction of the taxing authority. The cases of *Brunswick County v. Peebles*, 138 Va. 348, and *Woolfolk v. Driver*, 186 Va. 174 sustain this position, and this office is, of course, bound by these decisions.

In the latter case we find this language:

"For a number of years the Board of Supervisors of Caroline County has been laying annual levies in substantially these words, which were used in the levy for 1945-46:

" 'It is ordered that for the payment of the county levy for the year ending June 30, 1946, that there shall be collected a county levy for general purposes of twenty-five cents on each one hundred dollars value of all real estate and tangible personal property, including stocks of merchandise (except in the towns of Bowling Green and Port Royal), to be collected and paid out by the Treasurer for county purposes, on warrants on checks drawn by the clerk of this board, signed by the chairman and countersigned by the clerk of this board, and it is ordered that the commissioner of revenue enter upon his books a levy of one dollar on each one hundred dollars value of all real estate and tangible personal property, including stocks of merchandise for school purposes.'

"These exemptions bestowed upon the Towns of Bowling Green and Port Royal are not only void, but they might as well never have been written."

If your county adopts a unit, or general, levy for all purposes, the town of Colonial Beach's pro rata share will be determinable under this section, and its share will be determined by taking into consideration the funds derived from the taxable property within the town, including real estate, tangible personal property, merchants' capital, and machinery and tools. Illustrating, if the appropriation for county schools, and/or educational purposes, is 80% of the revenues

received from such sources and the amount of such revenue received from property located within the town is \$300,000, then the town will be entitled to \$240,000 from the county, which amount when received by the town may not be diverted by the governing body of the town to other purposes than public school or educational purposes. This, as I have pointed out, has been the formula all along with respect to the division of such funds.

It would seem that in any county where there is a town constituting a separate school district, it is important that the governing bodies of the two political subdivisions cooperate in an effort to adjust the rates in so far as may be possible so as to create no greater hardship upon the town's taxpayers and business enterprises than is necessary.

I call attention to Section 22-43.1 of the Code which authorizes the abolition of the special school district by the governing body of the town of Colonial Beach, with the approval of the county school board and the State Board of Education. I express no opinion on the advisability of such action, but do feel this statute should be brought to your attention.

It would require a constitutional amendment to relieve the town property from being subject to the county levies discussed herein. Whether or not Section 22-141 of the Code should be revised is a matter for legislative determination.

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**COUNTIES—Towns—Area Industrial Development Program—Counties May Participate if Functions Within Scope of § 15-20—Towns Controlled by Charter—Counties May Not appropriate for More Than Fiscal Year. (253)**

April 1, 1959.

HONORABLE THOMAS E. WARRINER, JR.  
Commonwealth's Attorney for  
Brunswick County

I acknowledge receipt of your letter of March 28, 1959, in which you state, in part, as follows:

"A six-county organization for industrial development is planning to ask Boards of Supervisors and Town Councils in the localities to include in their annual budgets a substantial item, estimated at \$10,000.00 per county per year, to be appropriated for the establishment and maintenance of an Area Industrial Development Office and Program. It is contemplated that the plan will improve the economy in the six counties.

"I am told that in order to obtain funds for a sufficiently long period to produce results, they will ask the Boards of Supervisors and Town Councils to 'commit' themselves to such financing for a five-year period.

"Since Brunswick County and the Town of Lawrenceville, as well as other municipalities and counties, will need assurance, if the plan is acceptable to them, that they have the right to appropriate such funds, I would appreciate an opinion on the legality of such appropriation and phrase my question in two parts as follows:

"(1) Do the Boards of Supervisors and Councils have the right to make substantial appropriations annually for an Industrial Development Program such as is summarized above?

"(2) Do the Boards of Supervisors and Town Councils have the right to 'commit' themselves to support of such a program for a five-year period?"

Section 15-12 of the Code authorizes boards of supervisors to appropriate funds for the purpose of advertising and giving publicity to the resources and advantages of the county.

This section is as follows:

"The board of supervisors of any county may appropriate out of the general levy, except the school fund, in their discretion, a sum not exceeding one per centum of their annual revenues, from all sources, in advertising and giving publicity to the resources and advantages of their county."

Under Section 15-13.2 of the Code any two or more political subdivisions of the State are authorized to enter into agreements with one another for the joint exercise of any powers they are capable of exercising separately.

If the functions of the proposed Area Industrial Development Office and Program come within the scope of Section 15-12 of the Code, I am of the opinion that counties may participate.

The powers of the towns to participate in such undertakings are generally contained in the charters. The advice of the town attorney should be sought by the council of any town that plans to participate in the proposed project.

This, I believe, answers your question (1).

With respect to question (2), the governing body of a county has no authority to bind the county to pay obligations falling due beyond the termination of a fiscal year. Section 115a of the State Constitution provides in substance that no county shall contract any debt except to meet casual deficits in the revenue, or in anticipation of the collection of revenues for the current year, or to redeem a previous liability, unless made subject to a referendum.

In the case of *American-LaFrance v. Arlington County*, 164 Va. 1, 178 S. E. 783, the Supreme Court of Appeals held that the above constitutional provisions applies not only to actual borrowing of money, but to the contraction of other debts payable in the future.

Any agreement between the localities participating in the proposed undertaking should, it would seem, contain a provision to the effect that the obligation of the participating counties is dependent upon the continuing approval of the governing bodies of the counties.

The provisions of Section 115a of the Constitution do not apply to municipalities.

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**COUNTY AND MUNICIPAL COURTS—Allowances for Mental Examinations Performed by Physicians Under Court Order—Not Payable Out of State Funds Unless Authorized by Court of Record. (187)**

February 2, 1959.

HONORABLE EDW. H. RICHARDSON  
Commonwealth's Attorney for  
Roanoke County

This is in reply to your letter of January 20, 1959, which reads as follows:

"Section 19-207 of the 1950 Code of Virginia provides for the method of payment to the expert or physician skilled in the diagnosis of insanity or feeble mindedness, when appointed by the Court to make an examination of the mental condition provided for in Section 19-202.

"In 1954 the Legislature amended Section 19-202 by adding the last sentence thereto 'As used in this section the term 'Court' shall be construed to include Courts not of record and Courts of record.'

"Both the Roanoke County Court and the Juvenile and Domestic Relations Court of Roanoke County have ordered examinations pursuant to Section 19-202 as amended. The question has arisen as to the au-

thority of the Judge of these Courts to order payment to the physicians or experts ordered to make the examination.

"I am informed that the Comptroller has refused to make payment upon order issued by the Judges of Courts not of record. Since at the time these payments are ordered the defendant is not before the Circuit Court of the County, and at times never appears before that Court, I would like to know what is the proper procedure for payment for services rendered, when such services are ordered by Courts not of record."

It is true, as pointed out in your letter, that the General Assembly in 1954 amended Section 19-202 so as to give county courts the powers set forth in that section. The effect of the amendment is expressly limited to the powers conferred upon courts under this section and does not extend to the other sections of Article 5 of Chapter 9 of Title 19 of the Code. Therefore, the language of the amendment suggests that it was not to be considered as applicable to the other sections in this article.

We have discussed this matter with the Honorable Sidney C. Day, State Comptroller, and he has pointed out that there are other statutes under which allowances are made out of State funds for expenses incurred in county courts which are payable only upon the certificate of a court of record.

It would seem that Section 19-207 must be read in connection with Section 2-172, which reads as follows:

"The judge of every court of this Commonwealth making an allowance for the payment of any sum out of the State treasury within ten days after adjournment of such court shall certify to the Comptroller a list of all allowances made during the term of such court, and the date of the making of such allowance, the amount thereof, and to whom made; and a like certificate of all allowances made by such court shall be made off by the clerk of such court within ten days after adjournment of such court, under the seal of the court, and forwarded to the Comptroller. The form of such certificate shall be prescribed by the Comptroller, and it shall be made on blanks which shall be prepared by him and furnished the judges and clerks of the several courts of the Commonwealth. Such form may be so prepared as to include more than one allowance made at the same term of any court. The Comptroller shall not draw any warrant on the State Treasurer in satisfaction of any allowance made by any court of the Commonwealth until he shall have received notification of the allowance by the court of such claim."

I think that the term "Court" as used in Section 2-172 means a court of record.

I am of the opinion, therefore, that the State Comptroller is not required to pay the allowances permitted under Section 19-207 unless the authorization therefor is received from a court of record.

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**COUNTY AND MUNICIPAL COURTS—Civil Procedure—Fees—Action Dismissed at Request of Plaintiff Before Hearing—No Service of Warrant Had—No Refund of Fees—Where Motion for Judgment Used and No Service Had Fee Refunded. (324)**

May 28, 1959.

HONORABLE ROBERT C. GOAD  
Commonwealth's Attorney for  
Nelson County

This is in reply to your letter of May 25, 1959, which reads as follows:

"I will appreciate your opinion on the refunds due a plaintiff under Section 14-133, in County Court civil cases, if the warrant is dismissed by the plaintiff before a hearing, or if the Sheriff does not obtain service on the defendant."

Section 14-133 is, in part, as follows:

"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 case of error or as herein provided: \* \* \*"

I am of the opinion that no refund is due the plaintiff in either of the cases stated by you. Of course, if a suit is commenced by notice of motion, then the following language found in this Code section is applicable:

"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."

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**COUNTY AND MUNICIPAL COURTS—Civil Procedure—Garnishee May Make Payment to Sheriff Prior to Return Day. (69)**

September 12, 1958.

HONORABLE STUART F. HEAD, *Judge*  
County Court of Albemarle County

This is in reply to your letter of September 10, 1958, in which you state that garnishee defendants in your county have insisted upon paying the sum for which they might be liable for a principal defendant's obligation to the judgment creditor into the County Court. You request my opinion as to whether the Court or the Sheriff should collect and receive payment of the moneys from garnishee defendants on account for the judgment creditor.

Section 8-448 of the Code of Virginia provides: "Any person, summoned under § 8-441, may, before the return date of the summons, deliver and pay to the officer serving it, what he is liable for; and the officer shall give a receipt for, and make return of, what he has so paid and delivered."

I am of the opinion that the garnishee defendant, if he desires to deliver and pay the sum for which he is liable on a garnishee proceedings before the return date of the summons, should make payment to the sheriff serving the garnishee summons. I am of the further opinion that on or before the return date of the garnishment summons, the garnishee defendant may file an answer under § 8-445 and may make payment into the court wherein the garnishment summons is returnable.

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**COUNTY AND MUNICIPAL COURTS—Clerk of County Court—Fines for Violations of Local Ordinances—Paid Directly to Town or County Treasurer as Case May Be. (205)**

**Dog Laws—Fines for Violation License Ordinance—Violation of State Law—Fine Paid to Commonwealth. (205)**

February 20, 1959.

HONORABLE T. E. CAMPBELL, *Clerk*  
Circuit Court of Caroline County

This is in reply to your letter of February 18, 1959, in which you request my

opinion in answer to three questions concerning the disposition of fines collected for violations of town and county ordinances.

Your first question is as follows:

"1. The clerk of my county court has been filing all warrants in criminal cases with me, but been paying directly to the town treasurer and county treasurer all fines collected for violations of town and county ordinances. It seems to me that the clerk of the county court should pay these fines to me, and I should make disbursements to the town and county treasurers, under Sec. 19-310 of the Code."

I am of the opinion that all fines collected by the county court for violations of town or county ordinances should be paid by the clerk of that court directly to the proper town or county official, in your case the Town Treasurer and County Treasurer, respectively. Section 14-54 of the Code dealing with fines and fines collected by the trial justice court (now county court) reads in pertinent part:

"All fees paid to and collected by the trial justice, the substitute trial justice, the trial justice clerk, deputy clerk or a substitute trial justice clerk, but not including fees belonging to officers other than the trial justice, his clerk or clerks, shall be paid promptly to the clerk of the circuit court, who shall pay same into the State treasury. \* \* \* *Fines collected for violations of city, town or county ordinances shall be paid promptly into the treasury of the city, town or county whose ordinance has been violated.* All fines collected for violations of the laws of the Commonwealth shall be paid promptly to the clerk of the circuit court, who shall pay the same into the State treasury." (Italics supplied.)

Your second question is as follows:

"2. If a *county officer* makes an arrest in a town for the violation of a county ordinance, which parallels a town ordinance and a state law, who gets the money for the fine, the town or the county? Sec. 46.1-182."

In such cases I am of the opinion that the type of warrant under which the arrest is made would determine the recipient of the fine. If the officer makes an arrest anywhere within the county on a county warrant for violation of a valid county ordinance, the fine collected is paid over to the county treasurer or director of finance, as the case may be.

Your third question is as follows:

"3. Who gets the fines for arrest made by the dog warden when dog owners fail to purchase licenses for their dogs? The dog warden is a county employee."

Since I can find no provision in the Code of Virginia which gives a county authority to enact ordinances paralleling the dog laws of the State, I am of the opinion that anyone charged with failure to purchase a requisite license for a dog should be tried on a warrant charging violation of a State law, and all fines and costs collected would go to the Commonwealth.

**COUNTY AND MUNICIPAL COURTS—Clerks' Fees—Fixed at \$3.00 in Civil Cases for All Services Except Continuances—No Separate Fees for Executions, Abstracts of Judgment or Marking Judgments Satisfied. (336)**

June 4, 1959.

HONORABLE CHARLES F. GARBER  
Clerk of County Court of  
King William County

This is in reply to your letter of June 2, 1959, which reads as follows:

"It has been my custom in the past to charge a separate fee for issuance of execution, abstract of judgment and marking judgments satisfied, in this Court. The question has now been raised as to the propriety of charging these fees under Section 14-133 of the 1958 supplement to the 1950 Code of Virginia.

"Will you kindly advise me whether or not [it] is proper now to make charges for these services in Civil Cases?"

Section 14-133 of the Code, as amended by Chapter 555 of the Acts of 1958, provides a fixed fee of \$3.00 in all civil cases in county and municipal courts. The only exception to this fixed amount is sub-section (2) of this Code section which allows a fee of fifty cents for continuances under certain conditions set forth therein.

The last paragraph of this Code section is as follows:

"The fees prescribed in this section shall be the only fees charged in civil cases for services performed by such judges and clerks, and when the services referred to herein are performed by justices of the peace such fees shall be the only fees charged by such justices for the prescribed services."

Prior to the amendment of this Code section, it did provide for various fees in connection with civil cases pending in a county court, but all of the provisions contained in Section 14-133 prior to the amendment of 1958 were repealed and in lieu thereof the section was entirely re-written.

For the reasons set forth above, I am of the opinion that the charge by you of a separate fee for issuance of executions, abstracts of judgment and marking judgments satisfied, is not authorized by the statute.

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**COUNTY AND MUNICIPAL COURTS—Costs—Juvenile and Domestic Relations—Items Specified in §§ 14-122, 14-130 and 14-132. (248)**

March 26, 1959.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

I am in receipt of your letter of March 18, 1959, in which you state that a number of judges of the various juvenile and domestic relations courts of the Commonwealth have inquired of you, from time to time, concerning the proper costs which should be taxed in juvenile and domestic relations cases. You request to be advised as to the specific costs which should be so taxed.

While I have been unable to discover any provision of the Juvenile and Domestic Relations Court Law, codified as Section 16.1-139 et seq., Code of Virginia (1950) as amended, which enumerates the costs to be charged by juvenile and domestic relations courts, I am of the opinion that the items specified in Sections 14-122, 14-130 and 14-132 of the Virginia Code should be taxed as costs by such courts in appropriate cases.

In this connection, I am forwarding to you an opinion of this office, dated February 7, 1958, to the Honorable R. B. Davis, Judge of the Municipal Court of Bristol, Virginia, setting forth the circumstances under which the fees prescribed by Section 14-130 of the Virginia Code should be assessed by a juvenile and domestic relations court.

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**COUNTY AND MUNICIPAL COURTS—Costs—Writ of Possession—Component of Action in Detinue, Etc.—Fee for Issue Included in Original \$3.00. (249)**

March 27, 1959.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of March 19, 1959, in which you enclosed a copy of a letter to you from the Honorable S. R. Buxton, Jr., Judge of the Civil Court of the City of Newport News, which states the following:

“This is in regard to costs of court for civil cases in courts not of record. Under Code Section 14-133, as amended, should a fee of \$3.00 be charged for a writ of possession? Such proceeding is not named in the statute, but would it fall into the class of ‘other civil proceedings’ as mentioned in the statute?”

You ask my opinion of the questions posed by Judge Buxton. Section 14-133 in pertinent part reads as follows:

“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 the case 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 § 16.1-115.

\* \* \* \* \*

“The fees prescribed in this section shall be the only fees charged in civil cases for services performed by such judges and clerks, and when the services referred to herein are performed by justices of the peace such fees shall be the only fees charged by such justices for the prescribed services.”

A writ of possession is similar to a writ of fieri facias in that it is a type of execution. It may be issued on a judgment for the recovery of specific property, real or personal, in cases of unlawful entry and detainer or of detinue. See Code of Vir-

ginia, §§ 8-402 and 16.1-98; Burks Pleading and Practice, 4th Edition, § 132. The term "process," as used in the Code of Virginia, is construed "to include subpoenas in chancery, notices to commence actions at law, process in statutory actions and scire facias." (Code, § 1-13.23:1.)

I am of the opinion that a writ of possession does not fall in the class of "other civil proceeding" as set out in § 14-133, but rather is a component of proceedings in detinue and unlawful detainer. Further, it is my opinion that the original fee of \$3.00, which § 14-133 authorizes for such actions, is the only fee which the court not of record may collect where a writ of possession is issued, except the continuance fee allowed under paragraph (2) of this section.

I am enclosing a copy of an opinion rendered to Honorable L. Brooks Smith, Judge of the County Court of Accomack County, on December 15, 1958, which explains that the 1958 amendment to § 14-133 of the Code (Acts, 1958, Ch. 555) had the effect of repealing all provisions of the section which were omitted, among which was paragraph (6) which provided for a fee of fifty cents for issuing a writ of possession.

**COUNTY AND MUNICIPAL COURTS—County Judge May Serve as Justice of Town Court Where Town Charter Permits and Board of Supervisors and Town Council Authorize. (35)**

August 5, 1958.

HONORABLE GEORGE A. ALDHIZER, II  
Member of the Senate

This is in reply to your letter of July 31, 1958, which reads as follows:

"The Trial Justice for the Town of Elkton is resigning as of August 2nd and there is no person available to fill this office who is a qualified voter of the Town of Elkton.

"Your attention is directed to Section 77 of the charter of the Town, page 736 of the Acts of the General Assembly of 1954. The Town would like to appoint the County Judge of Rockingham County as Trial Justice for the Town, and of course, his salary would be paid by the Town.

"There is some question in our minds as to whether or not the charter provision contained in Section 77 is broad enough to allow such appointment, and we would like to have your opinion on the matter.

"In event you should feel that the charter provision is not sufficiently broad, as an alternative the Town would like to have the County Judge set in Elkton as County Judge and try violations of the Town ordinances. Of course, his salary while setting in Elkton would be paid by the Town.

"Naturally, the Town is interested in receiving the proceeds of all fines."

The last paragraph of Section 77 of the Charter of the Town of Elkton is as follows:

"The town of Elkton may combine with the county of Rockingham for the use of one trial justice and one substitute trial justice for such combined town and county, in such manner as may be provided by the laws of the State of Virginia relating to trial justices; and if the town of Elkton and the county of Rockingham shall at any time combine for the use of one trial justice and one substitute trial justice for the said town and the said county, the laws of the State of Virginia relating to trial justices, so far as applicable, shall control and not this section of this charter."

It appears from the language in Section 77 of the Town Charter that the trial justice court created therein is a court of limited jurisdiction as distinguished from a court of general jurisdiction. Therefore, Section 16.1-67 of the Code would not, in my opinion, be applicable in this instance. If the town may combine with the county for the use of a single trial justice for both jurisdictions, it will have to be under the authority found in the charter and quoted above. It will be noted that this section states that the Town of Elkton may combine with the County of Rockingham for the use of one trial justice for the town and county *in such manner* as may be provided by the laws of the State of Virginia relating to trial justices. Section 16.1-64 of the Code prescribes the method under which two or more counties or two or more cities may unite in employing a single judge and Section 16.1-65 prescribes the method under which certain cities may unite with a county or counties. I believe that the governing bodies of the county of Rockingham and the Town of Elkton, by proper resolutions, may approve such an arrangement. Under such situation the judge of the county court, when hearing cases involving violations of the town ordinances or the collection of town taxes or assessments, or any other debts due and owing to the town, would pay the fees, costs and fines collected by him into the town treasury for the use and benefit of the town. It appears that in addition to the resolutions passed by the Board of Supervisors and Town Council, it will be necessary for the judge of the circuit court of Rockingham County to enter an appropriate order appointing the judge of the county court as trial justice of the Town of Elkton.

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**COUNTY AND MUNICIPAL COURTS—Fees—Cases Instituted Before Effective Date of \$3.00 Flat Fee, but Tried After—Amount of. (5)**

July 10, 1958.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of July 8, 1958, which reads as follows:

"I have had a number of judges of courts not of record to call me since Chapter 555 of the Acts of Assembly of 1958 was enacted by the General Assembly making inquiry as to what costs should be taxed in civil processes which were begun in their courts prior to June 27, 1958, although the cases were not adjudicated until subsequent to that date.

"As you, of course, know, Chapter 555 of the 1958 Acts completely re-enacted Section 14-133. The re-enacted section requires that a court fee of \$3.00 be paid in each civil case and that this fee is the only amount which can be collected for services by the court in civil processes except for a fee of 50 cents for each continuance after the first continuance. Before Section 14-133 was re-enacted, there was provided a docketing fee of \$1.25, and in addition thereto, other fees were to be assessed for additional services rendered in connection with each case. Prior to June 27, 1958, the original fee collected when a civil matter was instituted in a court not of record was the docket fee of \$1.25.

"I would appreciate it if you would review Section 14-133 before it was re-enacted, and Section 14-133 as re-enacted, and advise me whether the courts should continue to collect for services rendered by them in cases instituted before June 27, 1958 but not adjudicated until after that date the fees provided for the services rendered by the courts by section 14-133 before its re-enactment. In the event your answer to this question is in the negative, would you please advise me what fees the courts should collect in cases instituted before June 27, 1958 but not finally adjudicated until subsequent to that date."

The amendment to Section 14-133 of the Code had the effect of repealing all provisions of this section which were omitted. The only fee which may be collected after the effective date of the amendment in connection with any pending case is three dollars and the continuance fee allowed under paragraph (2) of the section, as amended.

In connection with cases which were commenced but not tried prior to June 27, 1958, I am of the opinion that any fees collected at that time must be applied as a credit on the fixed fee of \$3.00. The trial judge should, in cases brought before the \$3.00 provision became effective, require the payment of \$3.00, less the amount paid at the institution of the suit, before hearing the case.

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**COUNTY AND MUNICIPAL COURTS—Judges—Substitute Judge May Appear Before Court in Which He Serves—May Not Appear as Counsel in Cases Which Were Before Him as Judge. (330)**

June 2, 1959.

HONORABLE ROBERT LEE SIMPSON  
Commonwealth's Attorney for  
Princess Anne County

This will reply to your letter of May 26, 1959, in which you inquire whether or not there is any legal prohibition or limitation which would prevent a substitute judge of a county court, who is a practicing attorney, from appearing before such court as counsel in civil or criminal cases other than those which were before him while he was acting as substitute judge.

I am constrained to believe that your inquiry should be answered in the negative. While Section 16.1-10 of the Code of Virginia (1950) as amended, imposes certain limitations upon the practice of judges of courts not of record who are also attorneys, this provision does not specifically embrace substitute judges within its terms and, in my opinion, would not be applicable to substitute judges. In this connection, I am forwarding to you an opinion of this office, dated July 14, 1934, rendered by the Honorable Abram P. Staples, then Attorney General, to the Honorable Harold F. Snead, then a substitute trial justice, in which a question substantially identical to that which you present was considered in light of the then existing provisions of law and a similar conclusion reached.

In light of the foregoing, I am of the opinion that there is no legal prohibition which would prevent a substitute judge of a county court, who is a practicing attorney, from appearing before such court as counsel in cases of the type under consideration.

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**COUNTY AND MUNICIPAL COURTS—Judge of County Court May Serve as Substitute Judge of County Court of Adjoining County—May Be Paid Per Diem for Service as Substitute. (51)**

August 25, 1958.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of August 18, 1958, in which you, as Secretary of the Committee of Judges fixing the salaries and expenses of the judges of county courts, request my opinion as to whether or not a county judge of one county may be appointed and serve as substitute judge of the county court of an adjoining county and, if so, whether he is entitled to receive in addition to his salary as judge of a county court of one county the per diem rate of 1/25th of the salary of the judge of the county court for whom he serves as substitute judge.

Section 16.1-20 of the Code provides that for each court not of record there shall be a substitute judge, which substitute judge shall be appointed in the same manner as the judge of the court, and that the same person may be appointed and serve as substitute judge of two or more courts not of record. Section 16.1-12 of the Code provides that every judge, associate judge and substitute judge of a court not of record shall reside within the boundaries of the area in which he serves, provided that any such judge who presides over more than one court not of record may qualify under the provisions of this section by meeting the residential requirements as to any political subdivision which he serves. Section 16.1-64 of the Code provides that two or more counties may, with the approval of their board of supervisors and of the judges of the courts of record to which appeals from the court not of record therein lie, unite in the employment of a single judge to preside over all or any of the courts not of record of such counties. Section 16.1-66 provides that, if the counties uniting in the employment of a single judge desire to employ a single substitute judge for the several courts, this may be done under the same conditions and in the same manner set out for employment of a single judge for such courts. Although the statute does not specifically provide that the judge of the county court of one county may be appointed as substitute judge of the county court of the second county, I am of the opinion that a person may serve as judge of the county court of one county and substitute the judge of the county court of the second county, provided the board of supervisors of each county give their approval and the judge of the circuit court of each county also gives his approval. If the judge of a county court of one county is properly appointed as substitute judge of a county court of a second county, I am of the opinion that he is entitled to be paid, in addition to his salary as judge of the county court of the first county, the per diem rate fixed by statute for substitute judge of the county court of the second county.

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**COUNTY AND MUNICIPAL COURTS—Fees—Effect of Statute Providing Blanket Fee in Civil Cases. (151)**

December 15, 1958.

HONORABLE L. BROOKS SMITH  
Judge, County Court of  
Accomack County

This is in reply to your letter of December 10th, which reads as follows:

"Will you be so kind as to give me an opinion on the following situation, to-wit;

"Sec. 16.1-116 of the 1958 Code provides for Courts not of Record issuing executions and abstracts of judgments, after the original judgment was entered.

"Sec. 14-133 of the 1956 Code provided, by sub-section 13 and 14, that for issuing additional executions a fee of 50 ct. should be collected, (and 25 ct. for an abstract), but this portion of section 14-133 was left out of the 1958 version and a flat fee of \$3.00 was provided for costs in a civil warrant.

"It would thus be my understanding that this Court should not charge for additional executions and abstracts, aside from the original three dollars, when called upon to issue same from time to time for parties still trying to collect a judgment. (The same would seem to be true as to affidavits, bonds etc., taken in a civil case at the time of issuing,—that there would be no fee charged for these services, except the aforementioned three dollars.) Am I correct in this opinion?"

This office has heretofore ruled in an opinion furnished the Honorable J. Gordon Bennett on July 10, 1958, that the amendment to Section 14-133 of the Code had

the effect of repealing all provisions of this section which were omitted. The only fee which may be collected after the effective date of the amendment in connection with any pending case is \$3.00 and the continuance fee allowed under paragraph (2) of the section, as amended.

I am of the opinion, therefore, that the conclusions reached by you are entirely correct.

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**COUNTY AND MUNICIPAL COURTS—Fees—Suit by Notice of Motion for Judgment Where Process Served on Any Defendant Is \$3.00. (95)**

October 15, 1958.

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

This is in reply to your letter of October 11, 1958, which reads as follows:

"Section 14-133 of the Code of Virginia as amended provides for a fee in civil cases of \$3.00 for civil warrants, notice of motion etc. and in the second paragraph provides that the Justice of Peace may deduct \$1.25 for his services and remit the balance to the court.

"The member of our bar take the position (and I agree with them wholeheartedly) that the legislative intent was to charge only \$1.75 for a notice of motion for judgment in the county court.

"Would you please give us an opinion as to whether the County Court should charge \$1.75 or \$3.00 for docketing a notice of motion for judgment."

We have considered the question presented by you and we have advised the Auditor of Public Accounts by telephone that in our opinion the fixed court fee in connection with a suit by notice of motion for judgment is \$3.00. You will note that the first two paragraphs of Section 14-133 are as follows:

"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 case 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 § 16.1-115."

These paragraphs in our judgment provide for a fee of \$3.00 in all of the types of cases set forth therein. When a suit is brought by notice of motion for judgment, it is specifically provided in paragraph 3 of this section that "any sheriff, city sergeant, or other officer serving process shall collect the foregoing court fee (meaning \$3.00) before serving any notice of motion for 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, \* \* \*."

It will be noted further when no service of the process is had on any defendant named in the notice of motion for judgment, the officer shall return the notice of

motion for judgment along with the court fee collected by him to the plaintiff or his counsel. It is further provided that the \$3.00 court fee shall not include the fee payable to the officer for serving the process.

In view of these statutory provisions, I am of the opinion that in every suit brought by a notice of motion for judgment where process is served on any defendant the court is entitled to a fee of \$3.00.

I am enclosing another opinion issued in connection with this section which may be of some benefit to you in construing this section.

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**COUNTY AND MUNICIPAL COURTS—Office and Telephone for County Courts—  
To Be Provided by County. (7)**

July 11, 1958.

HONORABLE VALENTINE W. SOUTHALL  
Commonwealth's Attorney of  
Amelia County

This is in reply to your letter of July 9, 1958, which reads as follows:

"Section 16.1-48 of the 1958 Cumulative Supplement says 'Each County shall provide suitable quarters for the court and its clerk—' referring to the County Court.

"This Section is not too clear to me and, therefore, I wish that you would advise me whether or not, under this Section or any other Section, the County is supposed to furnish the County Judge with an office.

"Also, please advise me whether, under Section 16.1-49 of the Supplement or any other Section, the County is required to furnish the County Judge with a telephone.

"My question, in both instances, should be so phrased as to ascertain not only if it is a requirement but, if not, would it be permissible and proper for the County to furnish the County Judge with an office and telephone service?

"Our Board meets next Monday and, if convenient to you, I would like to get your opinion on these questions before then."

Section 16.1-48 of the Code provides that:

"Each county shall provide suitable quarters for the court and its clerk, and a suitable room or rooms for the sessions of the court at the places designated for such purpose, except that if the court is held in a city or town other than the county seat such city or town shall provide a suitable place for the court to be held. Such county shall also provide all necessary furniture, filing cabinets and other equipment necessary for the efficient operation of the court."

Under this section, in my opinion, a county is required to provide a suitable office for the Judge of the County Court and in addition, a suitable place for the holding of Court. In this connection I am enclosing a copy of an opinion dated October 8, 1954 and found in the Reports of the Attorney General for 1954-55, at pages 242-244. While the enclosed opinion relates to Trial Justices, it is in the main applicable to County Courts and Judges of such Courts.

I am enclosing an opinion rendered on June 4, 1957 and found in Reports of Attorney General for 1956-57, at page 75, which answers the question presented by you with respect to telephone facilities.

Section 16.1-49 to which you refer requires the State to furnish certain supplies and is not applicable to your County.

**COUNTY AND MUNICIPAL COURTS—Pleading and Practice Court Not of Record May Require Bill of Particulars in Any Case. (36)**

August 6, 1958.

HONORABLE JOHN H. COLE  
County Judge  
Sussex County

This is in reply to your letter of July 29, 1958, which reads as follows:

"I would appreciate it very much if you would advise me whether or not I have legal authority to require a plaintiff in an action brought in my court upon a civil warrant for a small claim to furnish the defendant with a bill of particulars of the claim.

"I have taken the position and so ruled in a case that I have no such legal authority and it is not incumbent upon me to do so for the following reasons:

"Under sub-section (2) of Section 16-92 of the Code it is provided: 'On motion of either party the adverse party may be required to file particulars of the claims on the grounds of defense as provided in Section 8-111; ———.' But this Section was repealed by Acts of 1956 and now carried as Title 16.1. There is no law with reference to a bill of particulars in Title 16.1 and it contains nothing so far as I have been able to ascertain to take the place of subsection (2) of Section 16-92.

"I am mindful of the fact that under Title 16.1-81 actions in my court may be brought by motion for judgment and Section 16.1-82, among other things, provides: '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 provided by Rules of Court for civil actions in courts of record.'

"Had the action I have in mind been brought by motion for judgment instead of a civil warrant for a small claim then I think I would have had authority to require a bill of particulars of the plaintiff on motion of the defendant, but it having been brought upon a civil warrant I think I have no authority to require a bill of particulars for the reasons above stated and for the further reason that my court is a court not of record."

I am of the opinion that Section 16.1-93 is sufficiently broad to authorize a court not of record to require the filing of a bill of particulars in any case. This section is as follows:

"Every action or other proceeding in a court not of record shall be tried according to the principles of law and equity, and when the same conflict the principles of equity shall prevail. No warrant, motion or other pleading shall be dismissed by reason of a mere defect, irregularity or omission in the proceedings or in the form of the pleadings when the same may be corrected by an order of the court. The court may direct such proceedings and enter such orders as may be necessary to correct any such defects, irregularities and omissions, and to bring about a trial of the merits of the controversy and promote substantial justice to all parties. The court may make such provisions as to costs and continuances as may be just."

In my opinion whenever the defendant named in a warrant claims that the warrant does not clearly state the grounds of action the Court may require a more specific statement. I do not feel that the provisions of Section 8-111 are limited to courts of record. Subsection (2) of Section 16-92, which, as you stated, has been repealed, was not really necessary in order to authorize a trial justice to require a bill of particulars. I am of the opinion that the granting or refusal to order the filing of a bill of particulars is within the sound discretion of the court.

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**COUNTY AND MUNICIPAL COURTS—Substitute Judge to Serve Two or More Counties—Residence—May Reside in Any County in the Area in Which He Serves. (301)**

May 12, 1959.

HONORABLE DANIEL WEYMOUTH  
Judge, Twelfth Judicial Circuit

This is in reply to your letter of May 11, 1959, which reads in part, as follows:

"Pursuant to Section 16.1-64 of the Code of Virginia of 1950, as amended, Richmond, Westmoreland and Essex Counties have the same County Court Judge. The resolutions of the governing bodies of these counties call for a substitute judge also for the three counties. So far we have been unable to get a suitable attorney residing in any one of the three counties to act as substitute judge. We believe we can get one from Northumberland County. He is the present substitute judge for Lancaster and Northumberland Counties. Northumberland County is adjacent to Westmoreland and Richmond Counties but not adjacent to Essex.

\* \* \* \*

"As I see it there are several question involved. The main ones are:

1. Does the substitute judge, when appointed from an adjoining county, have to come from a county adjoining all three counties in the joint set-up or is it only necessary that his county of residence touch one of such counties?

2. Can a substitute judge of Lancaster and Northumberland Counties, otherwise qualified, also be substitute judge for Essex, Westmoreland and Richmond Counties? All five counties are in the Twelfth Circuit.

"Again, 16.1-9 provides: 'Any attorney appointed from an adjoining county or city shall be exempt from the residence requirements of 16.1-12.'

"Does the word 'exempt' in 16.1-9 preclude the application of any part of 16.1-12 in connection with an appointment of a non-resident under 16.1-9. Or, does the word 'exempt' merely mean that the burdens imposed as to residence are relieved, excused or exempt? If this latter view is accepted it would seem that under 16.1-12, when read together with 16.1-9 the judge or substitute judge in our case could come from Northumberland County—meeting the residence requirements by touching one of the political subdivisions served.

"Your opinion with reference to the questions propounded will be appreciated."

I am enclosing a copy of an opinion furnished to the Honorable J. Gordon Bennett on August 25, 1958, which relates to the questions presented by you.

With respect to your question (1), I am of the opinion that a negative answer to the first part of the question is proper. I can find no language in any of the applicable Code sections which indicates that the adjoining county must be adjacent to each of the counties in the jurisdiction served by the judicial officer. It is sufficient if the county in which the judge lives touches any of the counties in the jurisdiction to which he is appointed, if, indeed, such a condition is required in a case such as you have presented.

I feel sure that a substitute judge for the jurisdiction composed of Lancaster and Northumberland Counties is eligible for appointment as substitute judge for the jurisdiction composed of Westmoreland, Richmond and Essex. The opinion furnished to Mr. Bennett, copy of which is enclosed, applied to a judge of one jurisdiction serving as assistant judge in another. The same principle is involved where the non-resident appointee is a substitute judge.

Section 16.1-9 relates to a situation where an attorney, who is not already a judge or substitute judge, is appointed to such office to serve in a jurisdiction adjacent to the county in which the attorney resides. I do not feel that this section is applicable to the matter under consideration here. The sentence quoted by you means that such an appointee would not have to "reside within the boundaries of the area in which he serves."

Under the situation envisioned in Section 16.1-9 an attorney appointed from an adjoining county would not have any authority as judge, or substitute judge, in his home county. It is not necessary to determine the point here, but there is serious doubt in my mind whether under Section 16.1-12 it is necessary that a substitute judge already serving in one jurisdiction must reside in a county adjacent to a county located in the second jurisdiction to which he is subsequently appointed. Under this section, it would seem that if the substitute judge resides in any county in the area in which he serves, the requirements of the statute will be met. In the present case he would serve in five counties and residence in either of the counties would appear to be all that is necessary.

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**CRIMINAL LAW—Double Jeopardy—May Be Convicted of Fourth Offense of Public Drunkenness Within Year Even if Tried Immediately After Third Conviction—Increased Penalty May Be Imposed Under § 18-114. (309)**

May 20, 1959.

HONORABLE ALONZO BEAUCHAMP  
Commonwealth's Attorney for  
Russell County

This is in response to your letter of May 19, 1959, inquiring if, pursuant to Section 18-114, Code of Virginia, a defendant would be put in double jeopardy by trial upon a charge for a fourth offense for drunkenness in the following situation:

"In the first, he is charged with the third offense of public drunkenness, and was fined \$25.00 and given six months at Bland Correctional Institution.

"In the second case, he is charged with a fourth offense of public drunkenness, which is based upon the same three convictions of public drunkenness under the first warrant, and was given the same punishment as in the first case."

Section 18-114, as amended, reads as follows:

"If any person arrived at the age of discretion profanely curse or swear or get or be drunk in public he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one nor more than ten dollars.

"If any person shall be convicted for being drunk in public three times within one year in this State, upon the third or any subsequent conviction for such offense within the period of one year, such person may be punished by imprisonment in jail for not more than six months or by a fine of not more than twenty-five dollars, or by both such fine and imprisonment.

"Counties, cities and towns may pass or adopt ordinances or resolutions prohibiting and punishing the conduct and acts embraced in this section."

It is assumed that the offenses charged were separate and that the third offense under the first warrant will be tried prior to the trial of the fourth offense upon the second warrant. Assuming that a conviction is secured upon the charge for the third offense of public drunkenness, it would appear that he could then be tried for the fourth offense.

The purpose of said Section 18-114 appears to permit the court to impose increased penalties "upon the third or any subsequent conviction for such offense within the period of one year." The foregoing language does not appear to limit such increased penalty just to such third offense, but appears to envision such additional punishment to "any subsequent conviction" thereafter. The foregoing construction appears to be consistent with the purposes behind the legislation. It does not appear that the fact that two separate offenses happen to be tried near the same time would alter the situation so long as a conviction is had upon the first charge which embraces a third offense.

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**CRIMINAL LAW—Failure to Keep Railroad Right-of-Way Clear of Combustible Material—Courts of Commonwealth Have Jurisdiction—Doubtful Whether Corporation Commission Has. (236)**

March 17, 1959.

HONORABLE JOHN G. SOWDER  
Commonwealth's Attorney for  
New Kent County

This is in reply to your letter of March 16, 1959, which reads as follows:

"I have been consulted in regard to the possible issuance of an arrest warrant for the violation of Section 56-426, Code of Virginia, which reads as follows: 'Every railroad Company shall keep its right-of-way clear and free from weeds, grass, and decayed timber, which from their nature and condition are combustible material, liable to take and communicate fire from passing trains to abutting or adjacent property.'

"I should appreciate an opinion from you as to whether or not it is the duty of the State Corporation Commission, under the Constitution and particularly under Code Section 12-14, to enforce the section quoted above, or whether it is the duty of the State Courts to do so. If you are of the opinion that this duty is on the State Courts, who should be charged with the violation and how and upon whom should the criminal warrant be executed?"

I am enclosing an opinion issued by former Attorney General Abram P. Staples under date of September 26, 1946, and published in Attorney General Reports

for 1946-47, at page 43, which relates to a similar question. Section 3991 of the Code referred to in this opinion is now Section 56-426.

The penalty for violation of Section 56-426 is as contained in Section 56-449.

I have discussed this matter with counsel for the State Corporation Commission and he states that there is some doubt in his mind as to whether or not the State Corporation Commission would have jurisdiction in a matter of this nature. However, even if the Corporation Commission does have jurisdiction that would not take away from the courts the jurisdiction they have in connection with criminal violations.

I believe that the opinion which I am enclosing sufficiently answers the questions presented by you.

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**CRIMINAL LAW—Larceny—Husband May Commit Larceny of Wife's Property—  
Evidence—Testimony of Wife Admissible Under § 8-288. (270)**

April 17, 1959.

HONORABLE CHARLES B. EARMAN, JR.  
Commonwealth's Attorney for  
Rockingham County and the City of Harrisonburg

This is in response to your letter of April 13, 1959, which reads in part as follows:

"Since Section 55-35 of the 1950 Code of Virginia has been enacted, can a husband be guilty of larceny of his wife's property?

"If so, is it admissible for the wife to testify against her husband who is charged with such an offense under the provisions of Section 8-288 of the 1950 Code of Virginia, as amended?"

At common law, because of the unity of husband and wife, a husband could not commit larceny by taking and carrying away the property of his wife. The question, therefore, arises as to the effect of the so-called married women's laws, §§ 55-35, et seq., which are in derogation of the common law principle enunciated above. Although the Supreme Court of Appeals of Virginia has not had occasion to rule on the specific question presented, the following language from its opinion in *Edmonds v. Edmonds*, 139 Va. 652, 658, is pertinent to this inquiry:

"\* \* \* It follows that a husband in Virginia may be a trespasser upon his wife's lands whenever she is not occupying them, if he goes there against her will or her commands; that she may prosecute him for criminal trespass; or may hold him to account in connection with any transaction with reference to her lands, as if he were a stranger. \* \* \*"

The decisions of the highest tribunals of the several states in cases involving the larceny by the husband of personalty belonging to the wife are not in agreement. Although there is a division of authority, I am of the opinion that the better view was expressed by the Supreme Court of Indiana in *Buller v. Sussman*, 46 N. E. 2d. 243, when it said:

"At common law, husband and wife were considered as one person and one spouse could not commit larceny of the goods of the other; but by a statute in force in this state since 1881, a married woman has been authorized to take, acquire, and hold personal property and to sell, barter, exchange, and convey the same as if she were unmarried. It follows that by virtue of this statute the appellant took an unqualified title in the

diamond ring which she inherited from her mother; that her husband had no interest therein; and that he might have been held criminally liable for the larceny thereof."

Moreover, the Supreme Court of Appeals of Virginia has had occasion to consider the effect of the married women's statutes in *Vigilant Insurance Company v. Bennett*, 197 Va. 216, which dealt with a tort committed by the wife against the husband's property. This language is pertinent herein:

"From the language of §§ 55-35, 55-36, and 55-37, it appears that as to their property rights the legislature intended wholly to sever the common law unity of husband and wife and remove all disabilities and impediments preventing one spouse from suing the other for wrongs to their respective properties. When read together, these sections empower each spouse to maintain actions at law for wrongful invasions of their respective property rights as if they had never been married."

While the matter is not entirely free from doubt, I am of the opinion that a husband could be guilty of the larceny of his wife's automobile (property).

In view of the foregoing, your second question must be answered. Section 8-288 of the Code provides in part:

"In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other, except in the case of a prosecution for an offense committed by one against the other \* \* \*."

I am constrained to believe that the crime of larceny when committed by the husband of the wife's property is "an offense committed by one against the other." In view of the above statement, I am of the opinion that in such a prosecution, the wife may testify if *she so desires* against her husband without his consent. This should not be construed to mean that the wife *can be compelled* to testify against her husband in this type of criminal prosecution.

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#### CRIMINAL LAW—Location of Automobile Graveyards—Violation of Statute Is Misdemeanor. (247)

March 26, 1959.

HONORABLE B. W. SEAY  
Judge, County Court of  
Fluvanna County

This is in reply to your letter of March 25, 1959, which reads as follows:

"The Civic Organizations of this County are much concerned about several unsightly automobile graveyards that are located on or near some of the state highways in our County.

"In checking the statutes, I find that sec. 33-279.3 of the Code as enacted by the General Assembly, session 1958, defines these graveyards and places certain requirements and limitations regarding same, but does not prescribe any penalty for a violation of these requirements.

"I will greatly appreciate the favor if you will clarify this matter for me, so that I will know how to proceed if it should become necessary to bring action against any offender under the above mentioned section."

It will be noted that paragraphs (b) and (c) of Section 33-279.3 contain two prohibitions with respect to the establishment of automobile graveyards, paragraph (b) prohibiting the establishment of such a graveyard within 500 feet of any *State highway* and paragraph (c) prohibiting the establishment of an automobile graveyard within 1,000 feet of any *primary State highway*, subject to the zoning exception contained therein.

Paragraph (d) applies to automobile graveyards established and in use prior to the effective date of the statute.

As you point out, this section of the Code does not state that a violation of any of the prohibitions contained therein would constitute a criminal offense and no punishment is prescribed for such violations.

If under the facts in any case a court should be of the opinion that there has been a violation under this Act, the provisions of Section 18-1 and 19-265 of the Code would, in my opinion, be applicable, provided such violation can be construed as a criminal violation.

On the point as to whether there would be a criminal violation, I am enclosing copy of an opinion furnished the Commonwealth's Attorney of Westmoreland County on March 31, 1955, and published in the annual report of the Attorney General for 1954-55, at page 113. I also enclose a copy of an opinion furnished the Commonwealth's Attorney of Smyth County on September 26, 1955, which is published in the Reports of the Attorney General for 1949-50, at page 81.

Section 28-51 of the Code referred to in one of these opinions, is as follows:

"No person shall haul, drift, or fish any seine, or set any gill net, pound net, or fixed device of any kind within the waters, bounds, or berth of any regularly hauled fishing landing, or opposite to and within a quarter of a mile of any part of the shore of the owner of any such fishery."

This section is to some extent similar to the automobile graveyard section and this office held, you will note, that a violation of Section 28-51 constituted a criminal offense, classified as a misdemeanor, and was, therefore, punishable under Section 19-265.

I am of the opinion that if it can be established in any case that there has been a violation of section 33-279.3, such violation would be a misdemeanor, punishable under Section 19-265.

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**CRIMINAL LAW—Obtaining Money or Property with Intent to Defraud—Larceny—Hard Luck Story of Sales Agent Not Intent to Defraud Where Purchaser Actually Receives Merchandise. (227)**

March 5, 1959.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney for  
Montgomery County

This is in reply to your letter of March 3, 1959, which reads as follows:

"I will appreciate an opinion interpreting the meaning of Code Section 18-180 of the 1950 Code of Virginia, which reads as follows:

'If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which

may be the subject of larceny, he shall be deemed guilty of larceny thereof; \* \* \* \*'

"Would or would not a person be violating this statute if a magazine sales woman came to a residence stating that her mother and father had been killed when she was a young girl and that she had been in an orphanage for a number of years and just released, the girl being age twenty, and that she was trying to get a nurse's training and was selling magazines to have enough money to carry out her purpose. The housewife stating that she did not want any magazines but that due to her condition and feeling sorry for her because of the story told, would help her out and of course, subscribe to a magazine and paid the person for it. The sole moving force for purchasing the magazine was because of the hard luck story told by the magazine sales woman.

"Even though the person purchasing the magazine will get the magazine, which is from a legitimate company operating as such, on a warrant sworn out by the purchaser after finding out the story pitch was an outright lie, would this be obtaining money under false pretenses with intent to defraud, under Section 18-180 of the Code?"

In my opinion there was no violation of Section 18-180 of the Code. The statement made by the saleswoman could not be considered as a "false token," since it is clear, and I am sure well established, that mere words do not amount to a token.

If it may be conceded that the statement alleged to have been made by this woman is, in a technical sense, a false pretense within the meaning of that phrase, it cannot be said that the statement was made with intent to defraud. There was actually no fraud committed, since it appears that the purchaser will receive the magazines as represented by the sales lady. I think it is well settled that in order to constitute the offense of false pretense or obtaining anything of value by false representations, there must be an intent to swindle the person who is intended to be the victim.

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**CRIMINAL LAW—Shooting or Throwing Missiles at Vehicles—Statute Prohibiting Applicable to Private Passenger Automobiles. (19)**

July 17, 1958.

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

This is to acknowledge receipt of your letter of July 15, 1958 in which you state:

"Would you give me an opinion whether Section 18-210 would apply to ordinary automobiles carrying nonpaying passengers or only to public utilities."

Section 18-210 of the Code is as follows:

"If any person maliciously shoot at, or maliciously throw any stones or other missiles at or against, any train or cars on any railroad or other transportation company or any vessel or other water craft, or any motor vehicle or other vehicles carrying passengers, or so shoot or throw into any dwelling house or other building when occupied by one or more persons, where-

by the life of any passenger, or other person on such train or car, or on such vehicle, or other water craft, *or in such motor vehicle or other vehicle carrying passengers, or in such building*, may be put in peril, the person or persons so offending shall, upon conviction thereof, be punished by confinement in the penitentiary not less than two nor more than ten years; and, in the event of the death of any passenger or other person, resulting from such malicious shooting or throwing, the person so offending shall be deemed guilty of murder, the degree to be determined by the jury. If any such act be committed unlawfully, but not maliciously, the person so offending shall, upon conviction thereof, be punished by confinement in the penitentiary not less than one nor more than three years, or, at the discretion of the jury, be confined in jail not to exceed twelve months and fined not less than one hundred dollars nor more than five hundred dollars."

This section was formerly Section 4473 of the Code of 1919. The italicized portions were added in 1926 and 1936 which broadened the application of the statute.

The term "passenger" as used therein applies to anyone travelling in the automobile and not confined to persons who have paid or agreed to pay compensation and his passage. There are many definitions of the term "passenger" and I note from Webster's New International Dictionary that it is defined as "traveler."

I am, therefore, of the opinion that the above section of the Code would apply to an ordinary automobile carrying nonpaying passengers.

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**CRIMINAL LAW—Shoplifting—Probable Cause to Believe Crime Committed Necessary—Suspect May Be Detained for Reasonable Time in Reasonable Manner.**  
(104)

October 23, 1958.

HONORABLE EUGENE B. SYDNOR, JR.  
Member of the Senate

This is in response to your letter of October 16, 1958, in which you make reference to Senate Bill No. 56, which is Chapter 114, Acts of the Assembly, 1958, (sometimes termed the shoplifting bill). Chapter 114 is codified as Secs. 18-187.1 to 18-187.3 of the Code of Virginia, and reads as follows:

"Sec. 18-187.1.—Whoever, without authority, wilfully conceals the goods or merchandise of any store, while still upon the premises of such store, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law."

"Sec. 18-187.2.—A merchant, agent or employee of the merchant, who causes the arrest of any person pursuant to the provisions of Sec. 18-187.1, shall not be held civilly liable for unlawful detention, slander, malicious prosecution, false imprisonment, false arrest, or assault and battery of the person so arrested, whether such arrest takes place on the premises of the merchant, or after close pursuit from such premises by such merchant, his agent or employee, provided that, in causing the arrest of such person, the merchant, agent or employee of the merchant, had at the time of such arrest probable cause to believe that the person committed wilful concealment of goods or merchandise."

"Sec. 18-187.3.—As used in this article 'agents of the merchant' shall include attendants at any parking lot owned or leased by the merchant, or generally used by customers of the merchant through any contract or agreement between the owner of the parking lot and the merchant."

You ask the following question:

"How far can we legally go under this statute in detaining suspects whom we have probable cause to believe are guilty of shoplifting?"

The answer to your question depends mainly on the interpretation of the term "probable cause", which is contained in Section 18-187.2 of the Code. This term is somewhat difficult to define, but this language from *Virginia Electric and Power Company v. Wynne*, 149 Va. 882, 892, seems to be controlling herein:

"\* \* \* 'No accurate definition can be given of probable cause, but belief in the charge, on facts, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence will suffice. The prosecutor must believe in the guilt of the accused, and there must be reasonable grounds on which to base the belief. Both must concur, at least many of the cases so hold, but upon this point there is some conflict.

"What constitutes probable cause is a question for the court, but where there is any conflict in the evidence it is for the jury to determine whether in the particular case such probable cause existed. The test of probable cause is to be applied as of the time when the action complained of was taken.' "

It is manifest from the above language that each case must be governed by the particular facts pertaining thereto. There is, therefore, no concrete rule by which a merchant can be guided to bring himself within the exemption from civil liability set forth in Sec. 18-187.2. He must view each particular incident in the light of the surrounding circumstances with the knowledge that unless he has at that particular instant probable cause to believe that the person is committing wilful concealment of goods, or merchandise, he will not come within the purview of Section 18-187.2 of the Code.

In so far as the detention of a suspected misdemeanant is concerned, this matter also must be governed by the circumstances of each particular incident. The following statement, found in *Montgomery Ward and Company v. Freeman*, 199 F. (2d) 720, 723, seems to set forth the general principles involved:

"This testimony on behalf of the defendant presented a situation which justified the application of the rule of law in effect in Virginia and elsewhere that if an owner, acting in the exercise of his right to protect his property, has reasonable grounds to believe that another is stealing it, he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner. See *W. T. Grant & Co. v. Owens*, 149 Va. 906, 922, 141 S. E. 680; \* \* \*."

Assuming, therefore, that the merchant has "probable cause" to suspect that a person has committed wilful concealment of goods or merchandise, he may detain such suspected misdemeanant for a reasonable time and in a reasonable manner.

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**CRIMINAL LAW—Uttering Check With Insufficient Funds on Deposit—Intent to Defraud Necessary Element. (228)**

March 5, 1959.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney for  
Montgomery County

This is in reply to your letter of March 4, 1959, in which you request my opinion as to whether or not a person would be guilty of a violation of Sections 6-129 and 6-130 of the Code under the following facts:

"A person loans another Three Hundred Dollars with no security given for said loan. In the month of August, 1958, the person who had borrowed the money gave the one loaning the same to him his check for Three Hundred Dollars without any reservations. Said check came back from the bank marked 'insufficient funds.'

"The debtor was further indulged until December, 1958 when the debtor gave the person loaning him the money another check for Three Hundred Dollars to take the place of the bad check, and the check given in December was returned from the Bank marked 'insufficient funds.' The debtor was given five days notice in writing under Section 6-130. No response was had and the person holding the bad check proceeded criminally under Section 6-129."

I am enclosing copy of an opinion dated June 17, 1953, reported in Attorney General Reports for 1952-53, at page 32. I believe that this opinion contains the answer to your question. As you of course know, the intent to defraud is an indispensable element of the crime. Applying the state of facts presented by you to the enclosed opinion and to the cases cited therein, I am constrained to believe there would be serious doubt that the provisions of these code sections have been violated.

The fifth paragraph of your letter is as follows:

"Would this not be the proper procedure if a criminal warrant was issued or would this be *wholly* a civil matter and not a criminal matter?"

With respect to this paragraph it is manifest that the only proper procedure for the person who lent the money to pursue in order to collect his debt would be by civil action. The purpose of the criminal statute is not to aid and assist a creditor in the collection of an account.

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**CRIMINAL PROCEDURE—Capias Pro Fine—Summons for Speeding—Justice of Peace Accepted \$10.00 and Costs for Bail—Justice May Remit to Court by Check—No Basis for Invoking Bail Statute After Summons. (272)**

MR. G. DONALD GARTRELL, JR.  
Justice of the Peace for  
Loudoun County

April 17, 1959.

This is in response to your letter of April 11, 1959, in which you advise of a situation where a speeding summons was issued by the State Police and the accused apparently released. Thereafter, the accused went to a justice of the peace who took \$10.00 and costs for bond and mailed this sum in the form of a non-certified check to the appropriate court. Thereafter, the court issued a *capias pro fine*, advised that the remittance was inadequate, that the check was not certified, and stated that since the accused had been given a summons, he was not eligible for bail. You inquire as to the correctness of the position of the court in the above matters.

The amount of the fine is not stated but apparently it is more than the \$10.00 and costs remitted. Accordingly, the court has authority to issue the *capias pro fine*.

As your letter indicates that the justice of the peace was bonded to receive a cash bond pursuant to Section 19-106, Code of Virginia, and there is no specific requirement that he remit the money by a certified check, it appears that the money could be remitted by a non-certified check. This office is not advised

as to the various facts involved; therefore, it would be inappropriate to discuss the adequacy of the amount of the remittance.

This office has previously ruled, in an opinion dated July 8, 1953, to Judge Compton, a copy of which is enclosed, as it appears in the 1953-1954 Report of the Attorney General at page 114, that when a summons is issued and the person charged is released on his own recognizance, there is no basis for invoking the bail statute. This opinion appears to cover this question presented in your letter.

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**CRIMINAL PROCEDURE—Costs—Jury—Two or More Defendants Tried at Same Time—Cost of Jury Prorated—One Defendant Tried for Two or More Offenses—Cost of Jury Assessable if Convicted of Any One—Defendant Waives Jury and Commonwealth Requests—Upon Conviction Defendant Pays Cost of Jury. (351)**

June 18, 1959.

HONORABLE FRANCIS A. TAYLOR, *Clerk*  
Circuit Court of Hanover County

This is in response to your letter of June 16, 1959, inquiring as to the "per cent each defendant must pay of the total jury cost at a Circuit Court on any given day, \* \*" under the circumstances where (1) two or more defendants are tried before the jury at the same time, (2) one defendant is tried before a jury upon two or more offenses at the same time, and (3) the jury is waived by the defendant but requested by the Commonwealth and a conviction results.

Section 19-296 of the Code of Virginia provides in part that the clerk shall make up a statement of all the expenses incident to the prosecution which will apply against the accused in the event of a conviction.

On February 19, 1957, an opinion from this office to the clerk of the Circuit Court of Shenandoah County, contained in the 1956-57 Report of the Attorney General at page 85, determined that the cost of the jury should be prorated where defendants in two or more cases are tried the same day and by the same jury. Accordingly, this office is of the opinion that the total jury cost of any given day should be prorated between such defendants who are tried before a jury at the same time and convicted. Any defendant found not guilty would not be placed with the defendants against whom the cost would be prorated.

In a situation where one defendant is tried before a jury for several offenses at the same time, this office is of the opinion that such defendant, if convicted of any of the several offenses being tried, would pay the total jury cost.

This office is of the further opinion that where a defendant pleads not guilty and the Commonwealth does not waive trial by jury, and the defendant is convicted by the jury, the defendant would be required to pay the total jury cost. The fact that the Commonwealth would not agree to waive trial by jury appears to have no bearing upon the liability of the cost incident to the prosecution resulting in a conviction.

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**CRIMINAL PROCEDURE—Expenses of Witness for Indigent Defendant—Court May Allow Payment from Appropriation for Criminal Charges. (117)**

November 3, 1958.

HONORABLE C. E. MORAN, *Clerk*  
Corporation Court  
City of Charlottesville

This is in reply to your letter of October 20, 1958, in which you state that at a recent murder trial, the Superintendent of Southwestern State Hospital was

summoned as a witness on behalf of the indigent defendant, which defendant, being unable to employ counsel, was represented by a court-appointed attorney. You state that Dr. Blalock has filed a claim with you for expenses incurred in testifying in the Corporation Court of the City of Charlottesville in response to this summons. You request my opinion as to whether or not this claim for expenses for services rendered the defendant in a criminal case is a proper claim to be paid by the State.

Section 19-291 of the Code provides that officers or any other persons rendering services in a criminal case may be compensated for services rendered whatever the court may allow as reasonable. Such allowance shall be paid out of the State Treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service. While it is true that the State does not ordinarily pay for the attendance of witnesses for the defendant in a criminal case, I am of the opinion that, under the recent decisions of the Supreme Court of the United States involving due process of law, the denial by the State of necessary financial assistance to an indigent defendant to secure witnesses in a capital case, such as this, might result in reversal of a judgment of conviction. I am of the further opinion that the procedure outlined in § 19-291 of the Code may be followed and that the approval of the judge should be obtained before these expenses are paid.

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**CRIMINAL PROCEDURE—Fines—Payment to City Sergeant After Issue of Capias Pro Fine Discharges Defendant's Obligation. (91)**

HONORABLE S. A. CUNNINGHAM, *Judge*  
County Court, Louisa County

October 10, 1958.

This is in reply to your letter of October 8, 1958, in which you state that on October 20, 1956, a fine was imposed in your Court against a citizen of Norfolk, Virginia, for a traffic violation and that the fine and costs were not paid. Subsequently, on January 8, 1957, the capias pro fine was issued and sent to the City Sergeant of Norfolk for collection. No return was made on this capias and additional capias was issued and returned by the City Sergeant of Norfolk to your Court, marked "Not found."

A subsequent capias pro fine was issued and the defendant produced a photostatic copy of a check dated in June of 1957, payable to the City Sergeant of Norfolk and stated that this check was in payment of the fine and costs in question. It appears that the accounts of the City Sergeant of Norfolk have been audited recently and the Auditor of Public Accounts has advised you that the records of the City Sergeant show that he made collection from the defendant upon the capias. You have requested my opinion as to whether or not the defendant in question is now relieved of any further liability for the fine and costs by reason of the fact that he made payment thereof to the City Sergeant of the City of Norfolk under the capias pro fine.

In my opinion the defendant has satisfied his obligation and no further collection in connection with the fine in question may be made from the defendant.

I call attention to Section 19-328 of the Code which reads as follows:

"Every sheriff or other officer receiving money under a writ of fieri facias or capias pro fine shall pay the fine and all costs, payable out of the State treasury, to the clerk of the court from which such process issued, on or before the return day of such process; and if such sheriff or other officer fail to pay the fine and costs, or fail to return such writ of fieri facias or capias pro fine, he shall, for every such failure, unless good cause be shown therefor, forfeit twenty dollars; and the clerk shall,

within ten days from the return day of such process, report the failure to pay such fine and costs, or to return such process, to the attorney for the Commonwealth, who shall proceed at once against such officer in default to recover such fine and costs and the forfeiture aforesaid."

It would seem that under this section the liability for the payment of a fine, once it has been paid by the defendant under proper process to an officer, shifts from the defendant named in the process to the officer.

Mr. Butler was covered by a surety bond issued by The Fidelity and Casualty Company of New York payable to the Commonwealth. I would suggest that you determine from the State Auditor the name and address of the Agent in Norfolk who wrote the bond and file your claim with this Agent. I understand that Mr. Bennett has filed a copy of his report with The Fidelity and Casualty Company, and I assume this report includes this item and that you will eventually receive settlement of this fine from the bonding company.

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**CRIMINAL PROCEDURE—Recognizance Bond Inadvertently Forfeited—Commonwealth's Attorney May Endorse Consent Decree—Final Discretion Rests in Governor. (120)**

November 6, 1958.

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

This is in response to your letter of November 3, 1958, which reads as follows:

"In connection with the above captioned case, the question has arisen as to the proper procedure for obtaining release of a judgment erroneously entered on the forfeiture of a recognizance bond.

"It appears from the records that when the case against the defendant was called for trial in the Trial Justice Court of Princess Anne County, Virginia, on September 3, 1954, the defendant was not present and the Judge made a notation on the warrant that a *capias* should be issued for the defendant's arrest and that his recognizance bond should be forfeited. Apparently, the defendant appeared in court late and the Judge's notation as to the issuance of a *capias* was scratched through, but not that portion of the notation relating to forfeiture of the recognizance bond. The records clearly show that the case against the defendant was disposed of by the usual process of his being bound over to the Grand Jury, the return of a true bill and a jail sentence after trial.

"It appears clear from the records that the Judge of the Trial Court inadvertently failed to strike out the portion of his notation regarding the forfeiture of the recognizance bond and that the judgment entered thereon should be released.

"Counsel for the judgment debtor wishes to file proceedings in the Circuit Court of Princess Anne County, obtain service on me as Commonwealth's Attorney, and have me on behalf of the Commonwealth of Virginia to agree to a consent decree releasing the judgment.

"I am unable to find any specific statutory authority for the Commonwealth's Attorney consenting to the releasing of such a judgment, and would appreciate your opinion as to whether or not I can exercise such authority."

I assume that this contemplated action will be brought pursuant to the provisions of § 19-338, et sec. of the Code of Virginia. The duties imposed upon the Attorney for the Commonwealth in such a case are set forth in § 19-339 of the Code, which reads as follows:

"The attorney for the Commonwealth, at or before the hearing of such petition, shall file an answer to the same. He shall cause to be summoned such witnesses and shall introduce all such testimony as may be necessary and proper to protect the interest of the Commonwealth; and the petitioner may cause to be summoned such witnesses and shall introduce all such testimony as may be necessary and proper to protect his interest."

This section of the Code apparently vests the attorney for the Commonwealth with the discretion to take such action as he deems necessary to protect the interests of the Commonwealth. You express the opinion in your letter that the bail was forfeited due to an error committed by the Trial Justice. I am, therefore, of the opinion that, if you deem it proper under the circumstances, you may agree to a consent decree. I hasten to point out that this does not in and of itself release the judgment. The provisions of Article 6, Chapter 13 of Title 19 of the Code must be followed, and the final discretion in this matter is vested in the Governor.

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**CRIMINAL PROCEDURE—Warrants—Arrest Under by Police Officer Outside Bailiwick—Time of Issue of Warrant Is Test Under § 19-73. (196)**

February 13, 1959.

HONORABLE L. H. SHRADER, *Judge*  
Juvenile and Domestic Relations Court of  
Amherst County

This is in response to your letter of February 10, 1959, which reads in part as follows:

"Please advise that if a warrant is issued in the City of Lynchburg against a person who has committed a misdemeanor in the presence of an officer and the person has left the jurisdiction of the City of Lynchburg, can a police officer from the City of Lynchburg with a warrant issued by the City of Lynchburg within two or three hours after the commitment of the offense go into the County of Amherst and make the arrest in the presence and with the help of a State Trooper and a Deputy Sheriff without first having the warrant endorsed by a County official, such as the County Judge or a Justice of the Peace?"

It is a well established principle that a police officer of a city has only such authority as granted to him by statute to make an arrest outside of the corporate limits of such city. Your attention is directed to § 19-73 of the Code of Virginia which provides that a police officer of a county, city or town may, under certain specified circumstances, make an arrest outside the confines of his bailiwick. The first paragraph of § 19-73 is controlling herein, and reads as follows:

"If a person charged with an offense shall, after or at the time the warrant is issued for his arrest, escape from or out of the county or corporation in which the offense is alleged to have been committed, the officer to whom the warrant is directed may pursue and arrest him anywhere in the State; or a justice of the peace, a trial justice other than a civil and

police justice or a clerk of a trial justice, other than a clerk of a juvenile and domestic relations court, of a county or corporation other than that in which the warrant was issued, on being satisfied of the genuineness thereof, may endorse thereon his name and official character, and such endorsement shall operate as a direction of the warrant to an officer of such justice's or clerk's county or corporation."

I am unable to determine from the facts set forth in your letter the time at which the person named in the warrant left the City of Lynchburg. If such person left the corporate limits of Lynchburg after the warrant was issued, I am of the opinion that the Lynchburg police officer was authorized to make the arrest. However, if the person left the City before the warrant was issued, then I am of the opinion that the warrant should have been endorsed as required by § 19-73 of the Code.

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**CRIMINAL PROCEDURE—Witnesses—Bringing From Out of State—Most Practical Method for. (14)**

July 16, 1958.

HONORABLE HORACE I. MORRISON  
Commonwealth's Attorney  
King George County

This is in reply to your letter of July 14, 1958 in which you request my opinion as to what would be the most practicable way to bring a witness to Virginia from another state to testify in a criminal case.

If the witness will attend voluntarily, as you indicate he will in this case, I would suggest that you request the Judge of the Circuit Court of your county to authorize expenditure from the criminal fund of the State the necessary expenses to bring this witness to Virginia to testify, pursuant to the provisions of §§ 19-287 19-288 and 19-291 of the Code of Virginia. After the Judge has authorized this expenditure, mail a summons to the witness with the request that he accept service and return the summons.

I enclose copy of an opinion rendered by this office on June 30, 1954 to the Honorable J. Gordon Bennett, Auditor of Public Accounts, in which this office ruled that a witness could be transported out of the State of Virginia to identify a person suspected of committing a crime in Virginia. I feel that under the same line of reasoning a witness may be reimbursed for his expenses, pursuant to §§ 19-287, 19-288 and 19-291 for traveling to the State of Virginia to testify in a criminal case, if the Judge of the Circuit Court authorizes such expenditure.

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**DOG LAWS—Compensation for Livestock Killed by Dog—Sheep Killed Within Corporate Limits Paid for Out of City Dog Fund. (263)**

April 14, 1959.

HONORABLE J. FORESTER TAYLOR, *Judge*  
Civil and Police Court of the  
City of Staunton

This is in response to your letter of April 11, 1959, inquiring if the city or the county dog fund is liable for damages pursuant to Section 29-209, Code of Virginia, where a sheep is killed within the corporate limits but was assessed for taxation in the adjoining county. You suggest that the city would appear to be liable since the source of compensation is the dog license fund (see, also, Sections 29-205 and 29-206) rather than the funds derived from personal property taxes.

This office concurs in your view that the dog fund of the city rather than that of the county would be liable where the killing of sheep occurred within the city's corporate limits. This would appear to be supported by the fact that the damage to such livestock was inflicted inside the city limits and that the source of the compensation to be used in such cases would be the dog license fund.

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**DOG LAWS—County Dog Warden System—Dog License Taxes—Not Prorated  
County and State. (179)**

January 22, 1959.

HONORABLE CHESTER F. PHELPS  
Executive Director  
Commission of Game and Inland Fisheries

This is in reply to your letter of January 19, 1959, which reads in part as follows:

"The board of supervisors of a county, having decided to utilize the provisions of § 29-184.2, has adopted an ordinance fixing the amount of dog license taxes, which ordinance will become effective on February 1, 1959. Likewise, the judge of the circuit court has appointed a county dog warden whose term of office is to begin February 1, 1959 and end June 30, 1959.

"It is claimed that, under the circumstances, the county treasurer is not required to remit to the State Treasurer, pursuant to the provisions of § 29-206 of the Code, any portion of the funds collected for dog license taxes for the license year 1959. Since the sums paid into the treasury are credited by the Comptroller to the game protection fund, pursuant to § 29-207 of the Code, this office would appreciate your opinion as to whether any portion of the funds derived from the collection of dog license taxes for the license year 1959 must be remitted by the treasurer of the county in question to the State Treasurer."

As you know, when a county adopts a dog license ordinance in accordance with the provisions of § 29-184.2 of the Code and fixes the amounts of county dog license taxes, the "State" dog license taxes prescribed by § 29-184 are no longer in effect, but the license year (January first to December thirty-first, inclusive) and place of payment of the tax (at the office of the [county] treasurer) remain unchanged. Under both sections of the Code each owner of a dog which is four months old or over must procure the requisite license and pay therefor the annual tax on or before each January first, or as soon thereafter as the dog reaches the age of four months.

It is my opinion that in the case you propound the county treasurer is required to remit to the State Treasurer fifteen per centum of the gross receipts from the sales of 1959 dog licenses made prior to February 1, 1959. No portion of gross receipts from the sales of 1959 dog licenses made on or after February 1, 1959 is required to be paid over to the State Treasurer, so long as the county dog license ordinance remains in effect and the county utilizes the services of a dog warden or wardens.

Of course, where the effective date of the county dog license ordinance and the appointment of a county dog warden is January 1 of any year, the county treasurer is not required to remit any portion of the proceeds of sales for that year made in November and December of the preceding year. See an opinion, dated December 30, 1958, rendered to Honorable J. Gordon Bennett, Auditor of Public Accounts, a copy of which is enclosed.

**DOG LAWS—County License Tax—Fines for Failure to Purchase License Tags—Must Be Remitted to Commonwealth. (258)**

April 10, 1959.

HONORABLE H. P. DUNNINGTON  
Treasurer of Caroline County

I am in receipt of your letter of March 25, 1959, in which you call my attention to a ruling of this office, dated February 20, 1959, to the Honorable T. E. Campbell, Clerk of the Circuit Court of Caroline County, in reply to his inquiry concerning the disposition of fines, imposed upon owners of dogs who fail to purchase proper licenses for their animals, in those cases in which such owners are arrested by a dog warden who is an employee of the county. The ruling in question answered this inquiry in the following language:

"Since I can find no provision in the Code of Virginia which gives a county authority to enact ordinances paralleling the dog laws of the State, I am of the opinion that anyone charged with failure to purchase a requisite license for a dog should be tried on a warrant charging violation of a State law, and all fines and costs collected would go to the Commonwealth."

You request my opinion upon the following observation, quoted from your communication, which has recently come to your attention:

"In accordance with the authority vested in the governing body of a County under Section 29-184.2 of the 1950 Code of Virginia, as now or subsequently amended, and all regulations, provisions and punishments shall apply *mutatis mutandis* as prescribed by law—and the Treasurer and Dog Warden, and such Deputy Dog Wardens as a County may require, are authorized and directed to perform their duties under a County Ordinance imposing a County License Tax—violation of the provisions of this Ordinance shall be prosecuted on County Warrants and all fines deposited to the General County Fund."

Section 29-184.2 of the Virginia Code authorizes the governing bodies of various counties to vest the enforcement of the dog laws in dog wardens and deputy dog wardens appointed as prescribed therein. Subsection (c) of this statute provides that, in such counties, the amount of the dog license tax—not in excess of \$5.00 per dog—shall be fixed by ordinance of the governing body, that the tax imposed by Section 29-184 shall not thereafter apply in such counties and that no part of the funds collected for dog licenses need be remitted to the State Treasurer. While this provision empowers the governing bodies of the counties in question to fix the amount of the dog license tax, I do not believe that it is sufficiently broad to authorize such counties to parallel the dog laws of the State, including Section 29-184, nor do I believe that such authority is conferred by Section 29-184.2(d) which prescribes that the provisions of the dog laws of the State shall apply *mutatis mutandis* to any such county and dog wardens and deputy dog wardens therein. Thus, I am constrained to adhere to the ruling of February 20, 1959, that all fines of the type under consideration should be remitted to the Commonwealth.

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**DOG LAWS—County May Not Parallel General State Laws—Licenses—May Provide County License by Ordinance. (89)**

October 9, 1958.

HONORABLE RICHARD C. RICHARDSON  
Commonwealth's Attorney  
New Kent County

This is in reply to your letter of September 29, 1958, in which you request my

opinion in answer to two questions relating to § 29-184.2 of the Code of Virginia. Your first question is as follows:

"If New Kent County elects to have a dog warden and enacts an ordinance imposing a county license upon dogs, as provided for in § 29-184.2 of the Code, would the Board of Supervisors be authorized to provide in its license ordinance a provision declaring it to be unlawful to own unlicensed dogs and to provide penalties for such violation?"

On September 30, 1958, I rendered an opinion to Honorable Chester F. Phelps, Executive Director of the Commission of Game and Inland Fisheries, in which, in answer to a similar question, I ruled as follows:

"I can find no provision in the Code of Virginia which gives a county authority to enact ordinances paralleling the dog laws of the State. I am of the opinion, therefore, that, under the present laws of this State, anyone charged with violating the dog laws should be tried on a warrant charging violation of a State law, and all fines and costs would go to the State."

I am of the opinion that the board of supervisors does not have authority to provide by ordinance that it shall be unlawful to own an unlicensed dog and to provide penalties for the violation of such ordinance. If a person owns a dog that does not have the required county tag, that person would be guilty of a violation under the provisions of § 29-213 of the Code of Virginia.

In your second question you ask which of the methods provided in § 15-8 of the Code of Virginia for the enactment of a county ordinance is applicable to a county ordinance imposing a license upon dogs.

I am of the opinion that the following provision found in § 15-8 of the Code should be followed by the board of supervisors in enacting the county ordinance imposing licenses upon dogs:

"No such ordinance or by-law shall be passed until after notice of an intention to propose the same for passage shall have been published once a week for two successive weeks prior to its passage in some newspaper published in the county, and if there be none such, in some newspaper published in an adjoining county or a nearby city and having a general circulation in the county, and no such ordinance or by-law shall become effective until after it shall have been published in full once a week for two successive weeks in a like newspaper."

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**DOG LAWS—Dog Fund—Allowance for Secretary of County Game Warden—Board of Supervisors May Not Make Direct Allowance to Secretary. (211)**

February 24, 1959.

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

This is in response to your letter of February 18, 1959, which reads as follows:

"The Board of Supervisors of Isle of Wight County supplements the salary of the Game Warden of said County from the dog fund pursuant to

the provisions of Section 29-209 of the Code. The Game Warden has requested the Board of Supervisors to make monthly allowances on the salary of a secretary who prepares his monthly reports, but the question has arisen as to the authority of the Board so to do.

"In view of Sections 29-36 and 29-209 of the Code and the Opinions of the Attorney General 1949-1950, page 22, and 1954-1955, page 116, I will appreciate your opinion as to whether or not the Board of Supervisors has authority to pay a part or all of or make monthly allowances on the salary of the Game Warden's secretary from the dog fund or the general fund of the County."

Section 29-209 of the Code of Virginia provides that:

"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.  
\* \* \*"

This section permits the county or city to pay an allowance to the game warden for services rendered to such city or county if there are funds remaining in the dog fund after certain other payments are made. As pointed out by you in your letter, my predecessor in office ruled in an opinion to Honorable Chester J. Stafford, Commonwealth's Attorney for Giles County (Opinions of the Attorney General, 1949-50, page 22), that the board of supervisors does not have the authority to supplement the salary of the game warden out of the general funds, but must make such payments out of the dog fund. I am in full agreement with this opinion.

I can find no authorization for the county to make payments to the secretary of the game warden for services rendered to the game warden. I am, therefore, of the opinion that the county may not make direct payments to the secretary of the game warden from either the dog fund or from the general funds of the county.

I am of the opinion, however, that the board of supervisors could, in arriving at the amount of the allowance to be paid the game warden from the dog fund, take into consideration the necessary expenses incurred by the game warden in rendering his services to the county.

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**DOG LAWS—Dog License Tax—Dogs Transferred to Another County After Payment of Tax—Only One Payment Required. (219)**

February 27, 1959.

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

This is in reply to your letter of February 24, 1959, which reads as follows:

"I shall appreciate an opinion on the following facts:

"It has been brought to my attention that a resident of Henry County, who owns dogs, purchased his 1959 dog licenses from The Treasurer of Henry County, and soon thereafter, the same dogs were transferred to Franklin County to a friend of the owner for the purpose of keeping the dogs in Franklin County to train.

"I would consider the person in charge of the dogs in Franklin County to be the custodian for the owner in Henry County, and I would like to know if tags would have to be purchased again for these same dogs in Franklin County, since they are in Franklin County and will probably be for some time.

"Section 29-188 of the Code of Virginia, which I presume is applicable to this matter is not clear to me."

I am enclosing copy of an opinion issued by this office on June 25, 1956, which is published in the Reports of Attorney General for 1955-56, at page 53, which relates to the question presented by you.

Following the principles laid down in this opinion, it is my view that no additional tags are required for these dogs. I think it is the intention of the statute that only one tag need be purchased during any license year for any particular dog.

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**DOG LAWS—Dog Wardens—County Adopts System by Resolution—May Supplement Pay from Other Funds—May Not Parallel General State Dog Laws. (81)**

September 30, 1958.

HONORABLE CHESTER F. PHELPS  
Executive Director  
Commission of Game and Inland Fisheries

This is in reply to your letter of September 24, 1958, in which you request my opinion in answer to three questions concerning county dog wardens appointed under the provisions of § 29-184.2 of the Code of Virginia. Your first question is as follows:

1. Does § 29-184.2 of the Code direct expressly, or by implication, the enactment of any ordinance other than the license ordinance which shall then supplant the State license requirements for dogs?

In addition to the license ordinance, I am of the opinion that the board of supervisors of the county should adopt a resolution providing for a county dog warden and requesting the judge of the circuit court to appoint a person as dog warden for the county.

Your second question is as follows:

2. If the county does not derive sufficient funds from licenses to pay the salary and expenses of the dog warden from the special fund collected from the licenses, may the county pay the additional amount required for salary and expenses from some other source?

Section 29-184.2 of the Code contains the following provision:

"The dog warden and deputy dog warden shall be paid such compensation as the governing body of the county may prescribe. \* \* \*

"The funds collected for dog license tax shall be paid into a special fund and may be disposed of as provided in this section and in §§ 29-206 and 29-209, except the county treasurer shall not be required to remit any portion of such funds to the State Treasurer nor shall the governing body be required to supplement the salary of the game warden. The county shall pay the salary and expenses of the dog warden and deputy dog warden from such special fund. Any sum remaining shall be left to accumulate in said fund for a period of not less than three years, and not more than 50% of such accumulated fund shall be transferred from said special fund to any other fund, except as herein provided, in any one fiscal year."

I am of the opinion that the salary and expenses of the dog warden shall be paid from the special fund provided for in § 29-184.2 of the Code so long as there is sufficient money in that fund to pay the salary and expenses; however, if there is not sufficient money in the special fund to pay the salary and expenses of the dog warden, then I am of the opinion that the Board of Supervisors may authorize such additional amount as is necessary to pay the salary and expenses of the dog warden to be paid from the general fund of the county.

Your third question is as follows:

3. Since the county, with the dog warden, is assuming the entire responsibility for enforcing the dog laws, should, or may, the county enact ordinances paralleling all the present dog laws and then try any violations of the dog laws on county warrants with the county retaining the fines and costs collected from the prosecutions of violations of the dog laws?

I can find no provision in the Code of Virginia which gives a county authority to enact ordinances paralleling the dog laws of the State. I am of the opinion, therefore, that, under the present laws of this State, anyone charged with violating the dog laws should be tried on a warrant charging violation of a State law and all fines and costs collected would go to the State.

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**DOG LAWS—Dog Wardens—County Officer and Must Be Resident—Serving More Than One County Must Reside in One of Those Served. (68)**

September 12, 1958.

HONORABLE J. EDGAR POINTER, JR.  
Commonwealth's Attorney  
Gloucester County

This is in reply to your letter of September 9, 1958, in which you request my opinion concerning the provisions of § 29-184.2 of the Code of Virginia relating to the appointment of dog wardens in the majority of the counties of the State. This section provides that a county may have a dog warden to enforce the dog laws, and that the judge of the circuit court shall appoint the dog warden on or before the thirtieth day of June of each year for a one-year term, commencing on the first day of July of that year and expiring on the thirtieth day of June in the following year. You request my opinion as to whether or not a dog warden may be legally appointed by the Judge of the Circuit Court of Gloucester County this year, since the statutory date for such appointment has passed.

I am of the opinion that, if the Board of Supervisors passes a resolution or ordinance providing for the office of dog warden as provided for under § 29-184.2 of the Code, the Judge of the Circuit Court may make the appointment of a dog warden for a term to expire on June thirtieth, 1959, since this is the initial appoint-

ment under the provisions of § 29-184.2. The statutory date provided by this section for the appointment of a dog warden is not applicable in the case of the initial appointment to the position of dog warden. The statutory provision as to this date would be applicable for all appointments in succeeding years.

Your second question reads as follows:

"2. Is it necessary under the provisions of this statute that a dog warden or deputy dog warden be a resident of the county for which he is appointed or could one warden or deputy warden serve more than one county?"

I am of the opinion that this dog warden is an officer of the county, and pursuant to the provisions of § 15-487 of the Code of Virginia, is required to have resided six months next preceding his appointment in Gloucester County, provided, however, he would not have to reside in the county if Gloucester County and one or more other counties could have a single officer to serve as dog warden for two or more counties. The counties concerned must comply with the provisions of Article 2 of Chapter 16 of Title 15 of the Code in order for one officer to serve more than one county. As you can see from this Article, there would have to be a referendum conducted in the counties desiring to have the same person as dog warden.

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**DOG LAWS—Dog Warden—May Be Appointed Special Police Officer—County May Abolish Office and Repeal Local License Tax. (111)**

October 30, 1958.

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

This is in reply to your letter of October 13, 1958, in which you request my opinion in answer to three questions relating to the appointment of a county dog warden, pursuant to the provisions of § 29-184.2 of the Code of Virginia. Your first question reads as follows:

"(1) If there is appointed a dog warden for the County pursuant to the provisions of Section 29-184.2 (such dog warden to be paid such compensation as may be prescribed by the Board of Supervisors) can the Board also legally charge this dog warden with the responsibility of assisting in the enforcement of the County Motor Vehicle License Tag Ordinance as one of his regular duties?"

I am of the opinion that, if the Board of Supervisors wishes for the county dog warden to have the additional duty of assisting in the enforcement of a county motor vehicle license tax ordinance, it should have the dog warden appointed a special police officer of the county with the power to enforce the county motor vehicle license tax. The Circuit Court would make the appointment of special police officer, pursuant to the provisions of §§ 15-562 through 15-571 of the Code of Virginia. Of course, the dog warden, if also appointed special police officer for the enforcement of the county motor vehicle license tax, would be entitled to additional compensation for this additional duty, which additional compensation could not be paid out of the special fund derived from the revenue collected from the sale of county dog licenses.

Your second question reads as follows:

"(2) In the event that the Board of Supervisors does hereafter have a dog warden appointed as provided for by Section 29-184.2 of the Code of Virginia, and it later should develop that the Board desires no longer to employ a dog warden but desires to return to the situation in which the County Game Warden enforces the dog laws, as at present, can the Board return to the present system wherein the game warden enforces the dog laws, and what would such return to the present system require?"

I am of the opinion that the county could abolish the position of county dog warden and cease to impose a county dog license by enacting the appropriate ordinances. Upon the ordinances becoming effective, the residents of the county would again purchase State dog licenses and the dog laws would be enforced by the game warden.

Your third question reads as follows:

"(3) Does the County Board of Supervisors have the power to pass ordinances making it an offense against County law for an individual to fail to purchase a State dog license? For instance, Section 29-184 of the Code provides that it is against the State law for a person to own an unlicensed dog, and Section 29-213 provides the penalty for violating Section 29-184. Does the Board of Supervisors have the power to pass a County ordinance making it an offense against county law for a person to fail to comply with the provisions of Section 29-184 and setting a penalty therefor, the penalty not being in excess of the penalty prescribed by Section 29-213?"

On September 30, 1958, I rendered an opinion to Honorable Chester F. Phelps, Executive Director of the Commission of Game and Inland Fisheries, in answer to a similar question. I am enclosing a copy of that opinion.

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**DOG LAWS—Dog Wardens—Statutory Dates for Appointment Not Applicable to Initial Appointment. (63)**

September 10, 1958.

HONORABLE A. L. PHILPOTT  
Member of the House of Delegates

This is in reply to your letter of September 5, 1958, in which you request my opinion concerning the provisions of Chapter 479 of the Acts of Assembly of 1958, which act amends and re-enacts § 29-184.3 of the Code of Virginia relating to the appointment of dog wardens in certain counties, including Henry County. This act provides that Henry County may have dog wardens to enforce the dog laws and that the Judge of the Circuit Court shall appoint from a list of not less than three nor more than five persons nominated by the Board of Supervisors the dog warden. It further provides that the list of nominations by the Board of Supervisors shall be submitted to the court not later than June 15 of each year; that the court shall make the appointment on or before June 30th of each year for a term of one year, commencing on the first day of July and expiring on June 30th of the following year. You state that the Board of Supervisors of Henry County wishes to invoke the authority granted by Chapter 479 of the Acts of Assembly of 1958 and have a dog warden appointed for the County. You request my opinion as to whether or not the Board of Supervisors may now submit a list of nominations for the position of dog warden and the Circuit Court of Henry County may now appoint a dog warden this year, since the statutory dates for such nominations and appointment have passed.

I am of the opinion that the Board of Supervisors may submit a list of nominations for the position of dog warden to the Circuit Court and the Circuit Court may make the appointment of a dog warden for a term to expire on June 30, 1959, since this is the initial appointment under the provisions of this act for Henry County. The statutory dates provided in the act for the nominations and appointment are not applicable in the initial appointment to the position of dog warden. The statutory provisions as to these dates would be applicable for all appointments in succeeding years.

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**DOG LAWS—Licenses—County May Not Require Tattoo Mark as Prerequisite to Issuance of License. (65)**

September 12, 1958.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney  
Montgomery County

This is in reply to your letter of September 11, 1958, in which you request my opinion as to whether or not the Board of Supervisors of Montgomery County has the legal right to require by ordinance that before a dog license may be issued by the Treasurer of the County to an owner of a dog, the dog shall have a tattoo mark in its ear.

Section 29-188 of the Code of Virginia provides the manner in which a person may obtain a dog license. That section reads as follows:

"Any person may obtain a dog license by making oral or written application to the treasurer of the county or city in which such person resides, accompanied by the amount of the license tax and certificate of vaccination if any be required under chapter 9.1 of this title. The treasurer or other officer charged with the duty of issuing dog licenses shall only have authority to license dogs of resident owners or custodians who reside within the boundary limits of his county or city and may require information to this effect from any applicant. Upon receipt of proper application and certificate of vaccination if any be required under chapter 9.1 of this title the treasurer or other officer charged with the duty of issuing dog licenses shall issue a license receipt for the amount on which he shall record the name and address of the owner or custodian, the date of payment, the year for which issued, the serial number of the tag, whether male, unsexed female, female or kennel, and deliver the metal license tags or plates herein provided for."

As you can see from reading the above section of the Code, there is no provision whereby a county may require a dog to have a tattoo mark in its ear before a dog license may be issued. Therefore, I am of the opinion that the Board of Supervisors of Montgomery County may not impose this additional requirement in order for a person to obtain a dog license.

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**DOG LAWS—License Tax—County Adopting Dog Warden System Effective January 1—Proceeds of All Sales of Dog Licenses Go to County. (160)**

December 30, 1958.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of December 23, 1958, in which you state that a dog warden has been appointed to take office in Clarke County as of January 1,

1959. You further state that dog license tags for the calendar year 1959 have been sold in Clarke County during the months of November and December by the Treasurer, and you request my opinion as to whether the proceeds from the sale of 1959 dog licenses during the months of November and December, 1958, will accrue entirely to the county or whether a portion of these proceeds should be paid into the State Treasury.

Section 29-184.2 of the Code of Virginia provides that if a county enacts a local dog license ordinance and appoints a county dog warden, then all proceeds from the sale of the dog license tags shall be paid into a special fund of the county and no part of it shall be remitted to the State Treasury.

The dog license tags sold in Clarke County during the months of November and December, 1958, were for the license year running from January 1, 1959 until December 31, 1959; therefore, I am of the opinion that all of the proceeds from the sale of dog license tags in Clarke County during the months of November and December, 1958, should be paid into a special fund of the county, and no part of these proceeds should be remitted to the State Treasury, since the county dog warden takes office at the beginning of the tax year for the dog licenses.

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**DOG LAWS—Local Licenses—County May Impose Dog Kennel License Tax. (101)**

October 21, 1958.

HONORABLE C. H. DAVIDSON, JR.  
Commonwealth's Attorney  
Rockbridge County

This is in reply to your letter of October 14, 1958, in which you enclosed a proposed ordinance for a county dog license tax for Rockbridge County, pursuant to the authority conferred upon the Board of Supervisors of the County by § 29-184.2 of the Code of Virginia. I have carefully read this ordinance and, in my opinion, it would comply with the provisions of § 29-184.2 of the Code.

You also request my opinion as to whether or not the county may impose a tax on dog kennels at so much per kennel, under the provisions of § 29-184.2 of the Code.

I am of the opinion that, while § 29-184.2 does not mention kennels, the county may impose a license upon dog kennels so long as the amount of the license does not exceed the rate of \$5.00 per dog kept at the kennel.

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**DOG LAWS—Local Licenses—County Must Adopt Ordinance Imposing Dog License Tax. (99)**

October 21, 1958.

HONORABLE J. C. KNIBB  
Commonwealth's Attorney  
Goochland County

This is in reply to your letter of October 17, 1958, in which you request my opinion concerning the appointment of a county dog warden pursuant to the provisions of § 29-184.2 of the Code and the imposition of a county dog license tax. You ask specifically if a county adopting the county dog warden system of enforcing the dog laws must enact an ordinance fixing the amount of the dog license, if the Board of Supervisors intends for the amount of the dog license to remain the same as that provided for in § 29-184 of the Code.

I am of the opinion that the Board of Supervisors must enact a county ordinance imposing a license on dogs if it wishes for the revenue collected from the issuance of

license of dogs to go into the county treasury rather than the State treasury. This county ordinance must be enacted, even though the amount of the license under the county ordinance is to be the same as the amount prescribed in § 29-184 of the Code for the State license.

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**DOG LAWS—Running at Large—City Ordinance May Be More Stringent than General State Law. (156)**

December 23, 1958.

HONORABLE G. GARLAND WILSON  
Commonwealth's Attorney  
City of Radford

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

"I would like your opinion on the validity of a dog ordinance regulating and prohibiting the running at large of dogs in the City of Radford.

"I am enclosing herewith a copy of the dog ordinance, and it is my opinion that the same insofar as it undertakes to prohibit the running at large of dogs is invalid for the following reasons:

"(a) The ordinance undertakes to define running at large in terms which is in conflict with those set forth in 29-194 of the 1954 amendment to the Code of Virginia.

"(b) The ordinance does not give or require notice to be given to the dog owner as required by the statute.

"(c) The penalties provided for a violation of the ordinance is from \$5.00 to \$50.00, and the statute provides for \$5.00 to \$25.00 fines."

Paragraph 14 of § 2 of the Charter of the City of Radford (Acts of Assembly of 1956, Chapter 198) provides the following power for the City of Radford:

"Fourteenth: To prevent the running at large in said city of all animals and fowls, and to regulate the keeping or raising of same within said city, and to subject the same to such levies, regulations and taxes as it may deem proper."

I am of the opinion that this provision of the charter is sufficient to vest the City of Radford with the authority to adopt the ordinance which you enclosed. I am of the further opinion that this city ordinance is not in conflict with the provisions of § 29-194 of the Code of Virginia, as amended, in view of the authority contained in the city charter relative to this matter. In the case of *King v. County of Arlington*, 195 Va. 1084, the Supreme Court of Appeals of Virginia held that, in the field of regulation of dogs, the State had not preempted the field, and further held that a county or city could enact more stringent regulations for the keeping of dogs than those found in the provisions of the Code of Virginia.

**DOMESTIC RELATIONS—Extradition for Non-Support—Virginia Policy Requires Certificate of Necessity from Local Judge and Institution of Proceedings Under Uniform Reciprocal Enforcement of Support Act. (105)**

October 23, 1958.

MRS. FLORENCE C. PERKINSON, *Superintendent*  
Department of Public Works,  
Dinwiddie County

This will acknowledge receipt of your letter of October 21, 1958, regarding extradition for non-support.

You advise that you have been given conflicting information with regard to whether or not a man may be extradited for non-support. You do not advise as to the source of your advice. Generally speaking, the Governors of a number of States have a policy of requiring that proceedings under the Uniform Reciprocal Enforcement of Support Act be first instituted (or a reason given for not using such procedures) before requisition papers will be processed. The foregoing is the general policy of the office of the Governor of Virginia, which I understand also requires that the local juvenile and domestic relations judge certify that extradition is necessary in each particular non-support matter.

The Florida authorities may or may not honor requests for extradition where no proceedings have been instituted under the Uniform Reciprocal Enforcement of Support Act. I am not advised as to the policy followed by the State of Florida.

It is suggested that you consult with your local Commonwealth's Attorney in regard to this matter, and if any further questions arise, I shall be happy to give such advice and assistance as I can.

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**DOMESTIC RELATIONS—Support of Children Born Out of Wedlock—Mother May Institute Proceedings Against Putative Father—Proceedings Criminal in Character. (339)**

June 5, 1959.

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney for  
Montgomery County

This will reply to your letter of June 4, 1959, in which you call my attention to certain provisions of Section 20-61.1 of the Code of Virginia (1950) as amended, and inquire whether or not this statute authorizes "a mother of a child born out of wedlock to proceed in Court against the person she claims is father of her child for non-support of her illegitimate child seeking support from him."

Section 20-61.1 of the Virginia Code prescribes:

"Whenever in proceedings hereafter under this chapter concerning a child whose parents are not married, a man admits before any court having jurisdiction to try and dispose of the same, that he is the father of the child or the court finds that the man has voluntarily admitted paternity in writing, under oath, the court may then enter and enforce judgment for the support, maintenance and education of such child as if the child were born in lawful wedlock.

"Notwithstanding the provisions of Sec. 19-241.1 or any other law, the judge or other court officer before whom a man has admitted paternity of any child, whose support is the subject of any proceeding brought under the provisions of this chapter, may testify, in any court having jurisdiction to conduct proceedings under this chapter, as to any admission of paternity made by such man in his court and as to any other facts directly affecting the relevancy or probative value of such admission."

In light of the fact that the statute in question authorizes the judge of a court having jurisdiction to try and dispose of support proceedings under Chapter 5 of Title 20 of the Code to enter and enforce judgment for the support, maintenance and education of a child whose parents are not married, *if a man admits before a court having such jurisdiction that he is the father of the child*, I am of the opinion that the mother of a child born out of wedlock may institute support proceedings in the circumstances you describe. However, proceedings under Chapter 5 of Title 20 of the Code are criminal, rather than civil, in character, *Heftin v. Heftin*, 177 Va. 385, and the putative father of a child involved in such proceedings could not, in my opinion be compelled to take the stand as a witness and testify under oath.

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**ELECTIONS—Armed Services Personnel—Mail Voting Statutes Not Suspended—Voting Privileges Limited to Bona Fide “Domiciliary Resident” Citizens of State Not Exempt from Local Taxation. (233)**

March 12, 1959.

HONORABLE LINWOOD B. TABB  
Commonwealth's Attorney for the  
City of Norfolk

This will acknowledge receipt of your letter of March 6, 1959, which reads as follows:

“We would like to have you consider Title 24-23.1 of the 1950 Code of Virginia, as amended, and express your official opinion as to the following query.

“Section 24-23.1 provides as follows: ‘Voter in active service; registration and poll tax waived; affidavit—Whenever a majority of the judges of election of any precinct are satisfied, by such evidence as they may deem proper, that a person offering to vote in person in any election, is in active service as a member of the armed forces of the United States *in time of war*, and that such person is otherwise qualified to vote, they shall permit such person to vote in such election (and also in any second primary election that may be held in connection therewith) without being required to register or to pay any poll tax; provided, however, that such person shall execute and file with the judges of election an affidavit, subscribed and sworn to before a judge of election, substantially as follows: . . . etc.” (following this is the affidavit to be executed by the person desiring to vote).

“Firstly, the question is whether or not the United States is at present ‘in time of war’ within the qualification of this section?

“Secondly, in the event the first question should be answered in the affirmative and if it is your opinion that the United States is ‘in time of war’, would not the execution of the affidavit as required by this section of the Code preclude the affiant from claiming exemption from the tangible property tax of the State of Virginia under the provisions of Section 514 of the Soldiers and Sailors Civil Relief Act, as amended?”

The provisions of Section 24-23.1 and the other sections of Chapter 2.1 of Title 24 of the Code were enacted at the same session and become effective at the same time as Chapter 13.1 of Title 24, and both of these acts relate to the voting rights of service personnel. Chapter 2.1 applies to voting in person and Chapter 13.1 applies to voting by mail. This latter Chapter in Section 24-345.14 provides as follows:

"This chapter shall remain in force from its passage but may be suspended during any such time as the Governor by declaration finds that members of the armed forces from the State do not require the same."

The Governor has not exercised his authority to suspend the mail voting statutes. As you can see by an examination of both acts, they are companion acts relating to the same subject. The phrase "in time of war" is used in both acts. Although Chapter 2.1 does not contain a suspension clause similar to that contained in Section 24-345.14, I feel that both statutes should be considered as having the same efficacy, and that this office should not attempt to rule that one act is no longer in force because there may no longer be a "time or war" without the same ruling with respect to the other act.

Chapter 2.1, as you know, was amended by Chapter 351, Acts of 1958, so as to provide that the person making the affidavit makes oath that he is a "domiciliary resident" of the State and that by exercising the privilege of voting the affiant acknowledges and accepts "all the responsibilities and obligations of full citizenship of the Commonwealth of Virginia."

This amendment, it would seem, is intended to limit the voting privileges of Chapter 2.1, Title 24, to persons who affirmatively assert, under oath, that they are *bona fide* citizens of the State subject to all the obligations of any other citizen, which, of course, includes liability for taxes upon their taxable property located within the jurisdiction of the political subdivision in which they offer to vote.

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#### ELECTIONS—Ballots—Seal of Electoral Board—Manner in Which May Be Affixed. (12)

July 15, 1958.

HONORABLE H. STUART CARTER  
Member of the House of Delegates

I acknowledge receipt of your letter of July 11, 1958, which reads as follows:

"This letter is written on behalf of a member of the Bristol Electoral Board. The Board is charged with the responsibility by § 24-225 of the Code of Virginia to affix the seal of the Board to all official ballots. This member of the Electoral Board has been advised that some cities print the seal of the Board on the ballots. Heretofore the Bristol Electoral Board has been affixing the seal to the ballots by the use of an impression type seal.

"It will, therefore, be greatly appreciated if you will render an opinion as to whether or not a printed seal placed on the ballot by the printer is a compliance with the election laws of Virginia.

"On October 23, 1950, the Attorney General rendered an opinion advising that a stamp seal similar to the type used by United States Post Offices is a proper compliance with the law."

I concur in the opinion issued by this office on October 23, 1950, to which you refer, holding that it is not necessary that an impression type seal be used. See Attorney General Reports 1950-51, p. 96.

I do not know of any reason why the printer could not apply the seal. This seal must be stamped on the reverse side of the ballot and this operation would have to take place in the presence of a member of the Electoral Board or such other person as is designated under Section 24-225 of the Code.

The seal may not be affixed by the printer at the time the ballots are printed. After the ballots have been printed, which, subject to the exception contained in

Section 24-220, has to be done in the presence of a member of the Board—Section 24-219—the ballots must be securely wrapped and sealed and handled in the manner prescribed by Section 24-220.1 of the Code. Then the procedure required by Sections 24-223 and 24-224 must be carried out. After compliance with these provisions the Board may, in its discretion, after it has satisfied itself that the correct number of ballots has been printed and delivered to it, employ the printer to affix the official seal in the presence of a member of the Board or other person as authorized by Section 24-225 of the Code.

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**ELECTIONS—Bond Referendum—Town—Commissioners to Canvass Votes—Where Results Certified. (17)**

July 17, 1958.

HONORABLE LEVIN NOCK DAVIS  
Secretary  
State Board of Elections

This is in reply to your letter of July 17, 1958, enclosing a letter to you from Philip Kohen, Attorney for the Town of Buchanan.

As I understand the matter, the Town of Buchanan held a bond issue election on July 8, 1958, pursuant to the provisions of Article 5, Chapter 19 of Title 15 of the Code. The question involved is who should compose the commissioners of election for the purpose of canvassing the returns after the poll books and the certificates of the judges of election have been delivered to the clerk of the circuit court.

Section 15-625 of the Code provides as follows:

“The poll books and the certificates of the judges of election shall be delivered by one of the judges of election from each precinct in the city or town to the clerk of the court to which election returns are made in regular elections, and canvassed as returns are canvassed in regular elections, and the result thereof certified by the clerk of the court to the council of the city or town, and to the judge of the court ordering the election.”

This section, you will note, provides that the poll books and the certificates of the judges of election shall be “canvassed as returns are canvassed in regular elections.”

The election in question was a special election and Section 24-141 of the Code is applicable. The terminal paragraph of this section is as follows:

“The ballots shall be counted and returns made and canvassed as in other elections, and the results certified by the commissioners of election to the clerk of the court, or the court or judge or other authority calling or authorizing such election, as the case may be, who shall make such order or certification as may be proper to accomplish the purpose of such election or referendum.”

This provision provides that the results shall be certified by the commissioners of election to the clerk of the court or judge or other authority calling or authorizing such election. This provision does not indicate whether the commissioners in such cases shall be those appointed under Section 24-200 or Section 24-56. This latter section provides that in town elections the three judges appointed by the Electoral Board shall also act as commissioners of election.

I am constrained to take the position that either group of commissioners may act. Actually, the legal effect of the vote will become a question for the court to determine. The essential matter is to have the facts, duly certified, before the court. The Commissioners should, out of an abundance of caution, certify the results to both the clerk and the court, or judge thereof, who ordered the election.

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**ELECTIONS—Candidates—Refund of Filing Fees—Unopposed Candidate Entitled to Refund Though Name Printed on Primary Ballot at His Request. (267)**

April 16, 1959.

HONORABLE LEVIN NOCK DAVIS  
Secretary  
State Board of Elections

This is in reply to your letter of April 16, 1959, in which you request my advice as to whether or not an unopposed candidate who makes a request to have his name printed on a primary ballot as authorized under Section 24-350 of the Code is entitled to have his filing fee returned to him pursuant to the provisions of Section 24-401.

Section 24-350 of the Code was amended by Chapter 337 of the Acts of 1942 so as to permit any candidate, even though declared a nominee, to have his name printed on the primary ballot. Prior to the amendment of 1942 this section, which was then Section 246 of the Code of 1919, did not contain any such provision. Section 24-401 of the Code, formerly a part of Section 249 of the Code of 1919, as amended by Chapter 40 of the Acts of 1918, provides for the refund of the filing fee paid by a candidate in the event he has no opposition and is the declared nominee. When Section 24-350 was amended by the Acts of 1942 as set forth above, no amendment was made to Section 249 (now Section 24-401). Therefore, it is manifest that the General Assembly by its failure to amend the refund section, did not intend that the right for refund should be affected by the amendment to Section 24-350.

Therefore, I am of the opinion that any candidate who is declared the nominee under Section 24-350 because of the failure of another candidate to file for the same office, is entitled to a refund of the filing fee under Section 24-401, even though such candidate requests that his name be printed on the official primary ballot.

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**ELECTIONS—Candidates—Residence—For Board of Supervisors Must "Have Resided" in District for 30 Days—Means Actual Physical Abode. (252)**

April 1, 1959.

HONORABLE O. B. CHILTON  
Clerk of Circuit Court of  
Lancaster County

This is in reply to your letter of March 27, 1959, which reads as follows:

"We have in Lancaster County a person who wants to run for Board of Supervisors and this is his problem. About six or seven years ago he was a member of White Chapel Magisterial District, which he was also registered and voted in the said district. Now in the past years he has been living in Mantua Magisterial District, in fact it is his home now, but he has never changed or had his name transferred to the district in which he now lives. What he wants to know is this. Can he live in one district,

votes in another district, run for Board of Supervisors in the district which he votes, but it is not his home, he lives in another district. Can this be done?"

As I understand your letter, the person in question formerly resided in White Chapel Magisterial District, but he now has his place of residence in the Mantua Magisterial District but continues to vote at the precinct in White Chapel District. The question presented is whether this person is eligible to be a candidate for and hold the office of Supervisor in the district where he votes although he maintains his actual residence in another district.

In my opinion this person is not eligible for the office of Supervisor in the White Chapel Magisterial District. Section 15-487 of the Code provides as follows:

"Every district officer shall, at the time of his election or appointment, have resided in the district for which he is elected or appointed thirty days next preceding his election or appointment \* \* \*."

I am of the opinion that place of residence, or rather the phrase "have resided" as contained in this section of the Code has reference to the actual physical abode as distinguished from the place of legal domicile. 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 Section 32 of the State Constitution and the statutory provision cited herein, I am of the opinion such persons fail to qualify.

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**ELECTIONS—Cities—Candidates for City Office—Notice and Petition Filed with Clerk of Circuit Court at Least Sixty Days Prior to Election—Charter Provision in Conflict with General Law Disregarded. (204)**

February 18, 1959.

HONORABLE WILLIAM S. HOLLAND  
Clerk of the Circuit Court of  
City of Suffolk

This is in reply to your letter of February 17th in which you request my advice as to the procedure to be followed in order for a candidate for council of the city of Suffolk to have his name placed on the official ballot for the election to be held in that city on June 9, 1959. Your questions are presented as follows:

"The question is what procedure must a candidate for councilman now follow in order to be qualified for election in the election of councilmen to be held in Suffolk on June 9th of this year? On what date and with whom must he file his petition and notice of candidacy? Should he comply with the requirements of the Suffolk Charter or is there some other applicable law which he must follow?"

You have referred to the charter of your city which is found in Chapter 64 of the Acts of 1922. You refer specifically to the provisions contained in Sections 12 and 13 of the charter.

You are correct in your statement that the recent amendment of Section 24-345.3 (House Bill No. 25, Extra Session, 1959) failed to restore in that section the requirement that candidates for city offices (other than party nominees) shall file their notice of candidacy "within ten days after the first Tuesday in April." The

recent amendment did restore the provision with respect to candidates for county offices at the November election.

In my opinion candidates for council should comply with the provisions of Sections 24-131 and 24-133 of the Code. This procedure requires candidates to give notice to the Clerk of the Circuit Court of the city of Suffolk at least sixty days before June 9, 1959. This notice should be in all respects in the same form as that described in Section 24-130. Each notice of candidacy, as required by Section 24-133, must be accompanied by a petition signed by at least fifty qualified voters of the city, witnessed by a person whose affidavit to that effect is attached to the petition.

I am enclosing an opinion rendered by this office on April 26, 1956, to the Galax Electoral Board and published in the Attorney General Reports, 1955-56 at page 62. This opinion relates to a charter provision that is in conflict with general law. I believe this opinion is applicable to your city. Therefore, the charter provisions should be disregarded.

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**ELECTIONS—Death of Candidate—§ 24-392 Controls Qualification of Successor—Mail Ballots—Commissioner of Revenue. (290)**

April 30, 1959.

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

This is in reply to your letter of April 29, 1959, to which is attached a letter dated April 27, 1959, from Mr. T. Lewis Morris, Secretary of the Electoral Board of Amelia County, Virginia, which letter reads as follows:

“For the Commissioner of Revenue, Amelia County the following names have been certified to me. Alton H. Perdue—Amelia, Va., and William A. Mortimer—Amelia, Va.

“The incumbent, Alton H. Perdue, died April 25, 1959. Will you pass to me the ruling that would affect this situation concerning the printing of the ballots and also what effect this would have on absentee ballots. No ballots have been printed at this time for the July 14th Primary.”

Section 24-392 of the Code prescribes the procedure to be followed in a case such as has been presented by Mr. Morris. Any person who desires to become a candidate for nomination in place of the deceased candidate may qualify by following the procedure set out in this section.

The death of one of the candidates prior to the printing of the ballot should have no effect upon the handling of applications for mail ballots. Since no ballots have been printed, I would assume they will not be printed until a new candidate has qualified or until the time for qualification has elapsed.

It will be observed that the last paragraph of Section 24-392 is as follows:

“Whenever any additional candidate shall qualify pursuant to this section, no ballots theretofore cast by mail vote for a candidate for such office shall be counted, but any person who has so voted shall be entitled to receive a new ballot and to vote for his choice among all the candidates for such office.”

Under this provision, if any person has voted by mail for a candidate for the office of Commissioner of the Revenue and an additional candidate subsequently qualifies and new ballots are printed, such person would be entitled to receive a new ballot. However, if a person has cast his vote by mail prior to the addition of another candidate for Commissioner of the Revenue and such person does not

receive a new ballot, this section is not to be construed as providing that his vote for candidates for nomination for other offices appearing on the ballot shall not be counted. The only part of the ballot that would not be counted is that relating to the office affected by the death, in this instance, Commissioner of the Revenue.

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**ELECTIONS—Duties of Registrar—Notice of Refusal to Register—"At Once" in § 24-73 Interpreted to Mean "With Reasonable Promptness." (229)**

March 6, 1959.

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

This is in reply to your letter of March 4th, which reads as follows:

"I would appreciate your opinion and construction of Section 24-73 Code of Virginia as to when the Registrar should notify an applicant for registration, after application is filed. Does 'at once' as used in the statute mean that the registrar should verbally or in writing advise the applicant immediately upon completion of application or does the Registrar have the right to delay his decision until a later date?"

Section 24-73 of the Code provides as follows:

"If a person is refused registration, he shall be at once notified of such refusal."

It will be noted that the statute is silent as to the method of giving notice. It would seem, however, that the best practice would be for the Registrar to give written notice to the person who has been refused registration, although I cannot state that notice in writing is mandatory. Under Section 24-112 a person who has been denied registration shall have the right of appeal to the Circuit Court of the county or the Corporation Court of the city in which he has offered to register and it would seem reasonable that he would be entitled to written notice from the Registrar as a basis for his petition.

With respect to the time when the notice should be given, I think the Registrar is entitled to reasonable time to examine and consider the applications. The term "at once" has been held to be synonymous with "as soon as possible," and is usually construed to mean within such reasonable time as shall be required under all circumstances for doing a particular thing.

It is conceivable that at times, especially on regular registration days, the number of applicants presenting themselves for registration would be so great as to make it impracticable for the Registrar to pass upon each application as it is made. Usually a Registrar would be in position to give the notice on the same day that the application was made, but it is conceivable that he would not be in position to pass upon the application on that day. The statute, in my opinion, contemplates that the Registrar shall notify the applicant, in case his application has been rejected, with reasonable promptness.

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**ELECTIONS—Justices of Peace—Statute Provides Three for Magisterial District—Voter May Vote for Three or Less Where More Than Three Names on Ballot. (243)**

March 24, 1959.

HONORABLE F. L. WYCHE  
Commonwealth's Attorney for  
Prince George County

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

"The statute in Virginia provides for the election of three justices of the peace for each magisterial district in the county. Will you please advise me how many votes may be cast by a voter in a magisterial district when more than three names appear on the ballot as candidates for the office of justice of the peace?"

"I assume that each voter may vote for as many as three of the candidates for the office of justice of the peace whose names appear on the ballot, but I find no authority for this assumption."

Each voter in a situation such as you present may vote for as many as three candidates for the office. Of course, if he so desires, he may vote for less than three—either one or two—in which event his ballot would be valid. In case there are more than three candidates, his vote cannot be for more than three.

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**ELECTIONS—Local Offices—Run-Off Where No Majority—Expenses Borne by Candidates. (286)**

April 28, 1959.

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

This is in reply to your letter of April 25, 1959, which reads as follows:

"I have recently heard some talk in our County of having a second primary in two of the magisterial districts in the County for Supervisors in the event that one of the candidates did not get a majority of the votes in the first primary. As I understand the Democratic Committee did provide for the second primary if the circumstances call for one and the candidate so desires.

"I have checked the election laws and find that Section 24-397 provides that the County Treasurer is not required to pay the expenses of more than one primary for County offices but that the *candidates* themselves must pay the cost of a second primary. Does this mean that in case of a second primary the candidate who received the second highest number of votes, in the event that the high man did not get a majority of the votes cast, can call for a second primary and the two candidates will share in the cost or will the candidate who calls for the second primary have to pay the cost alone?"

I am enclosing copy of an opinion furnished by this office under date of May 11, 1955 and published in Reports of Attorney General for 1954-55, at page 104. In this opinion the procedure with respect to arranging for a second primary in case no candidate receives a majority of the votes cast in the first primary is discussed.

It will be noted that the county committee is required to adopt a resolution providing for the second primary prior to the holding of the first primary if the committee feels that a second primary is advisable.

The candidates themselves do not have the right to require a second primary to be held.

In the event a second primary should be held the expenses incident to the primary should be borne equally by each of the candidates running in the second primary.

**ELECTION—Poll Taxes—Duties of Treasurer Where Payment Made by Agent—Must Be Satisfied as to Authority of Agent—Payment Must Be Out of Assessed Person's Funds. (190)**

February 3, 1959.

HONORABLE HARRY C. STUART  
Member of the State Senate

This is in reply to your letter of January 30, 1959, which reads as follows:

"Under Section 24-120 of the Code, the treasurer of each county and city is required to file with the clerk of the circuit court of his county or the corporation court of his city, a list of all the persons in his county or city who have paid not later than six months prior to an election the poll taxes assessable under the Constitution during three years next preceding that in which such election is to be held. Section 21 of the Constitution provides that such poll taxes shall be personally paid by the taxpayer.

"I will appreciate it if you will furnish me with an opinion with respect to the duties of the treasurer under Section 24-120 in cases where the poll tax payment has been delivered to the treasurer through an agent."

This office has on several occasions ruled that payment of poll tax may be made by a duly authorized agent. This opinion is based on the holding of the Supreme Court of Appeals in the case of *Tilton v. Harman*, 109 Va. 503. In that case it was held that such payments are proper if the payment is made by the taxpayer "out of his own estate or funds." In this connection I am enclosing copies of the following opinions written by the late Abram P. Staples, during his tenure of office as Attorney General:

February 12, 1943 to W. M. McFall, Treasurer of Dickenson County, Clintwood, Virginia

February 18, 1943 to the same official

March 29, 1943 to Ralph L. Lincoln, Commonwealth's Attorney for Smyth County, Marion, Virginia.

These opinions are published in the Attorney General's Report for 1942-43, at pages 168 through 172.

The following quotation from the first opinion cited is pertinent to the question regarding the duties of the treasurer:

"It is further my opinion, therefore, that where a capitation tax is tendered under such circumstances that the treasurer does not feel that the person making the tender is the authorized agent of the taxpayer, and that the payment is not being made from the taxpayer's funds, the treasurer is required to omit the name of such taxpayer from the treasurer's list. In such a case it is obviously the duty of the treasurer to inform the person tendering the payment of the poll tax that he is not satisfied that the payment tendered is a 'personal payment' within the meaning of the law, and that, therefore, he will not place the name of the taxpayer on the treasurer's list of persons who have 'personally paid' their poll taxes. If, after being so advised, the person tendering payment nevertheless insists on the treasurer accepting same, the treasurer should do so, because the payment may be intended merely to discharge the tax. On the other hand, it may be that additional evidence produced at some future time will satisfy the treasurer that the payment is a 'personal' one, in which event the treasurer may still place the name on the list. Or it may be that the taxpayer may desire to apply to the court for the

entry of his name on the list as provided by section 110 of the Code of Virginia, presenting evidence to the court as to the personal character of the payment. However, the person tendering payment may not desire it accepted under the circumstances indicated and in such event he is entitled to withdraw his tender. He still would have the opportunity of renewing the tender accompanied by additional satisfactory evidence as to the 'personal' nature of the payment if he so desired. On the other hand, if the treasurer should accept the payment of the tendered tax under such circumstances as to lead the taxpayer or his alleged agent to believe that the name would be placed on the treasurer's said voting list, it would be an obvious injustice not to place it thereon. Not only would the taxpayer have been misled or deceived by such an act, but he would be lulled into a feeling of false security, and naturally fail to take the steps necessary to secure the placing of his name on said list."

Section 110 of the Code referred to is now Section 24-123.

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**ELECTIONS—Poll Taxes—Paid for Member of Household or Relative—§ 24-129 Discussed. (206)**

February 20, 1959.

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

This is in reply to your letter of February 17, 1959, which reads as follows:

"I would appreciate your opinion on the following questions pertaining to Section 24-129 of the Code of Virginia 1950.

"This section states, 'provided, however, that nothing in this section shall be construed as making it unlawful for any person to pay under such circumstances the poll tax of a *member of his or her household* or of any *person relating to him or her by consanguinity or affinity* as father or mother, son or daughter, brother or sister, grandfather or grandmother, or grandson or granddaughter, and no such payment shall be deemed a violation of this section.'

- "1. Does 'member of his or her household' include persons living within the family circle who are neither related to the person offering payment of the tax by blood or marriage?
- "2. Does consanguinity or affinity as used in the statute mean all persons relating by blood or marriage to the person offering payment of the tax or does the statute confine this payment to the relatives enumerated?
- "3. I would appreciate your enumerating the relatives by affinity whose poll tax could be legally paid under the statute.
- "4. May a father, who lives in Lee County, Virginia legally pay the poll tax of his son and daughter-in-law who live outside of his household?
- "5. May a person pay the poll taxes of his sister-in-law or brother-in-law?
- "6. May a wife pay the poll tax of her husband who is residing outside the household?

- "7. May an uncle pay the poll tax of his nephew or niece?
- "8. May a person pay his step-mother's poll taxes or a step-mother pay her step-son's poll tax?"

I am enclosing several opinions that have been issued by this office and which cover most of the questions presented by you.

Sections 20 and 21 of the Constitution require that poll taxes shall be personally paid. A strict construction would prohibit any person from paying the poll tax of another. By Section 24-129 of the Code, however, the General Assembly has interpreted the Constitution liberally to the extent set out therein. In so far as I am advised, the constitutionality of this statute has not been questioned. The presumption favors its validity.

All of the questions presented depend upon the factual circumstances as applied to the provisions of Section 24-129 and, at times, require the exercise of sound judgment.

As stated in the enclosed opinions, the Treasurer should receive and credit all poll taxes paid to him. Whenever the Treasurer feels that the tax has not been personally paid it is his duty to refrain from placing such person on the certified list. By this means, the right of the person involved will be protected, since he has the right to apply to the proper court to have the list corrected. Section 24-123.

I would be reluctant to pass upon the specific questions relating to degrees of consanguinity or affinity, except to state that I am in general agreement with the principles contained in the opinions which I am enclosing.

ENCLOSURES:

Report of Attorney General, 1952-53, p. 84.

Report of Attorney General, 1942-43, pp. 168, 171, 172.

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**ELECTIONS—Primaries—Declarations of Candidacy—§ 24-374 Complied with.**  
(281)

April 24, 1959.

HONORABLE LYMAN C. HARRELL, JR.  
Member of the House of Delegates

This is in reply to your letter of April 23, 1959, in which you state that certain candidates for nomination for public office subject to the primary to be held on July 14, 1959, filed their declarations of candidacy with your secretary at your office. The declarations were delivered to your secretary on April 15, 1959, at which time you were in Richmond attending the special session of the General Assembly. You have requested my opinion as to whether or not these declarations of candidacy were filed in compliance with Section 24-374 of the Code.

The question presented is similar to the question considered in an opinion issued by this office on April 16, 1958, and published in the Report of the Attorney General, 1957-58, at page 106, a copy of which I am enclosing.

In light of the authorities cited in the enclosed opinion, I am of the opinion that the declarations of candidacy under consideration here, were filed in compliance with Section 24-374 of the Code.

**ELECTIONS—Primaries—Must Be in Conformance with Chapter 14, Title 24—  
May Not Be Held in Conformance with Chapter 8, Title 24. (325)**

May 28, 1959.

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

This is in reply to your letter of May 28, 1959, in which you enclosed certain papers received from the Chairman of the Republican Committee of Carroll County, Virginia. These papers reveal that under rules and regulations adopted by the Republican County Committee a primary was held in Carroll County on the 4th day of October, 1958 for the purpose of nominating Republican candidates for the general election to be held on November 3, 1959.

You also enclosed copy of your letter of May 19, 1959 to the Chairman of the Republican County Committee of Carroll County, in which you stated that the primary held in October of 1958, pursuant to the rules and regulations of the Republican County Committee was not in accordance with the provisions of Chapter 14 of Title 24 of the Code of 1950, and that, therefore, you could not certify the names of the persons submitted as sufficient nominees for the offices in question and that, therefore, their names could not be placed upon the official ballot to be used in the general election on November 3, 1959.

You have requested my opinion with respect to this matter.

I find that in 1950 a similar question was presented to the Honorable J. Lindsay Almond, Jr., Attorney General at that time, and he rendered an opinion dated June 8, 1950, a copy of which I enclose herewith. This opinion is published in the Report of Attorney General for 1949-50, at page 107.

It appears from the papers submitted as a basis for the opinion by Attorney General Almond on June 8, 1950, and the papers submitted by the Chairman of the Republican County Committee of Carroll County, that the so-called primaries have been conducted in a similar manner. In other words, the procedure followed by the Carroll County Republican Committee is, from a practical standpoint, in all respects the same as the procedure that was followed in 1950.

In my judgment, the opinion handed down by Attorney General Almond is a correct interpretation of the Virginia election laws applicable to the situation. Therefore, I suggest that you notify the Chairman of the Republican County Committee of Carroll County and any other officers of that Committee who have consulted with you in connection with the matter, that in the opinion of this office there have been no nominations made for the offices in question and suggest to them that they may wish to correct the matter by making nominations in some other manner within ample time for filing, which I understand, is not later than July 14, 1959.

It is noted in the letter to you from Mr. W. A. Howlett that he states that the primary held in October, 1958, was held under Chapter 8 of Title 24 of the Code and, specifically Section 24-134. Chapter 8 applies to general elections and not to primaries.

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**ELECTIONS—Primary Fees—Candidates for Board of Supervisors—Determination  
of Amount—2% of Greater of Actual Annual Salary or Minimum Annual Salary.  
(251)**

March 27, 1959.

HONORABLE R. H. ADAMS  
Treasurer of Charlotte County

This is in reply to your letter of March 26, 1959, which reads as follows:

"We would like to have your opinion as to the proper salary to apply the 2% primary fee in case of supervisors.

"The supervisors of this county are now paid an annual salary of \$180.00 each, with the exception of the Chairman who receives \$250.00 annually.

"The Acts of Assembly for 1958, Page 404 sets minimum salary for Supervisors in county of this size (P.14,057) at \$300.00 and in all probability will be the salary paid in 1959; the first year of the new term of office.

"Section 24-398 sets primary fee at 2% of one year's salary attached to the office.

"The Question—Which salary, 1958 or 1959, should be basis of the primary fee to be charged this year?

"I would like to have your opinion before I receive any primary fee from the candidates."

The compensation for a member of a board of supervisors for a county having a population of more than fourteen thousand fifty but less than fourteen thousand one hundred shall be not less than three hundred dollars and not more than six hundred per annum. Section 14-57 of the Code, paragraph (34).

Section 24-398 of the Code provides that—

"Every candidate for any office at any primary shall, before he files his declaration of candidacy pay a fee equal to two percentum of one year's salary attached to the office for which he is a candidate."

Section 24-401 (b) provides that unless a receipt issued by the Treasurer of the county showing the payment of the filing fee is attached to the declaration of candidacy, such declaration shall not be received or filed.

The annual salary for the office in question will actually be fixed by the Board of Supervisors after they have assumed office. The Board may fix such compensation as low as three hundred dollars or as high as six hundred dollars. Since the annual salary attached to this office is flexible depending upon the action of the members to be elected, I feel that the intent of Section 24-398 will be carried out if the filing fee is fixed at two percentum of the actual annual salary or the minimum annual salary allowable under the law, whichever is the greater. On that basis the filing fee would be six dollars for each candidate.

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#### **ELECTIONS—Primaries—Dates—Candidate's Requirements—Party Oath—Petitions. (173)**

January 21, 1959.

HONORABLE ROBERT C. GOAD  
Commonwealth's Attorney for  
Nelson County

This is in reply to your letter of January 19, 1959, which reads as follows:

"I have received from the State Board of Elections a copy of the chart entitled 'Schedule of Elections for 1959', prepared by your office, and I am sure we will find this chart very helpful.

"As a supplement to the above chart I will appreciate your advising me in detail all of the necessary steps, including a list of all papers required to be filed, which a candidate has to take in order to qualify to run in the July Democratic Primary for any County office or for the State Legislature.

"Some confusion has arisen in the past over whether or not the party oath has to be filed by a candidate for a local office.

"Further confusion has arisen over the applicability of the War Voters Act, requiring candidates to file with the State Board of Elections.

"I shall appreciate an early reply, which I am sure will be helpful to us in Nelson County, as well as in other localities."

The provisions with respect to the primary elections are contained in Chapter 14, Title 24 of the Code—Sections 24-346 through 24-408. Supplementing these provisions is Section 24-345.3, which is applicable to a primary where the nominee will be a candidate in the general election subject to a state-wide vote or of any Congressional District, House of Delegates District, or State Senatorial District. This particular section does not apply to candidates for county office due to an amendment made to this section by Chapter 309 of the Acts of 1958.

The last day for filing in a primary for candidates for the General Assembly is April 15, 1959. The last day for filing in a primary for county officers is May 15, 1959. The provisions with respect to the qualification of candidates and the steps necessary in order to have their names placed on the ballot are found in Section 24-369 through 24-375 of the Code. Supplementing these provisions is the regulation adopted by the Democratic Party at the State Convention at Richmond on June 9, 1932 and which was subsequently amended at the Convention in Norfolk on June 16, 1936 and at the Conventions in Roanoke on June 14, 1940 and July 1, 1944. This regulation is entitled "Democratic Party Plans" and on page 12 the following regulation with respect to declaration of candidacy is found:

"1. 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 to 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.....'"

I wish to call attention to Section 24-373 which provides that any candidates for the General Assembly or for city or county office must file along with his declaration of candidacy a petition therefor signed by at least fifty (50) qualified voters of his district, city or county. Each signature to the petition shall have been witnessed by a person whose affidavit to that effect shall be attached to the petition.

The Party Plan provisions with respect to declaration of candidacy applies to candidates for city office as well as to candidates for the General Assembly.

Honorable Levin Nock Davis, Secretary of the State Board of Elections, Richmond, Virginia, can furnish you with any detailed information and forms generally used in connection with primaries.

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#### **ELECTIONS—Registration—Blind Persons—May Be Registered. (256)**

April 7, 1959.

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

This is in reply to your letter of April 6, 1959, in which you enclose a letter addressed to you from the general registrar of Russell County, Virginia, which reads as follows:

"A question has arisen, and the controversy is right heated between the two political parties here, as to my duty as Registrar in permitting a person to register who has been blind since soon after birth.

"This man is mentally alert, capable, and seems to meet all requirements with the exception of education, and this he has not been able to acquire due to his affliction. However, he signs his name nicely. Kindly advise me whether or not I should register a person of this description.

"I believe that, due to physical disability, some other person can fill out a registrant's application. Would the person above described come under this regulation, or does his lack of education hinder his qualifying?

"I would appreciate it very much if you would give me specific advice on these particular matters as soon as possible, as I am on the spot."

You request my opinion with respect to the question presented by the registrar. Section 20 of the Constitution provides in part as follows:

"Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:

\* \* \* \* \*

"Second. That, unless physically unable, he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officer, stating therein his name, age, date and place of birth, residence and occupation at the time and for the one year next preceding, and whether he has previously voted, and, if so, the State, county, and precinct in which he voted last; \* \* \*."

Under this constitutional provision any person who is in all other respects qualified to register but due to his physical condition is unable to make application in his own handwriting, may be registered without complying with this specific requirement. In such case the registrar should examine the applicant so as to determine whether or not he meets all the other requirements of this section.

No person may be denied the right to register solely because of the fact that he is blind or otherwise physically unable to prepare his application in his own handwriting.

While the question was not presented, I call attention to Section 21 of the Constitution which exempts a person from the necessity of preparing and depositing his ballot without aid if such person is physically unable to do so.

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#### ELECTIONS—Residence—One Year Requirement to Register. (145)

December 5, 1958.

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

This is in reply to your letter of December 2, 1958, in which you request my opinion as to whether or not a person who moved to Fairfax County, Virginia, from the State of Missouri on November 4, 1958 is eligible to register to vote at the present time.

Section 18 of the Constitution of Virginia provides 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 20 of the Constitution of Virginia provides in part as follows:

"Every citizen of the United States having the qualifications of age and residence required in § 18 shall be entitled to register, \* \* \*."

Section 26 of the Constitution of Virginia provides as follows:

"Any person who, in respect to age or residence, would be qualified to vote at the next election, shall be admitted to registration, notwithstanding that the time thereof he is not so qualified, and shall be entitled to vote at said election if then qualified under the provisions of this Constitution."

The next election in Fairfax County will be held on November 3, 1959. Under the provisions of the Constitution of Virginia, quoted above, a person must have resided in the State of Virginia for at least one year next preceding the election to be held on November 3, 1959 in order to be eligible from a residence standpoint to register to vote. In order for a person to meet this qualification, he must have established his residence in Virginia on or before November 3, 1958. A person moving to Virginia on November 4, 1958 will not have resided in Virginia for one year next preceding November 3, 1959; therefore, he will not be eligible to register or vote until after November 3, 1959.

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**ELECTIONS—Residence—Qualified Voter—Intention Governs—Eligibility to Hold Office Depends on Meeting Tests Established by Highest Court. (177)**

January 22, 1959.

HONORABLE A. L. PHILPOTT, *Member*  
House of Delegates

This is in reply to your letter of January 19, 1959, which reads as follows:

"I wish to inquire as to the residence status of an employee of a State Agency, who in the performance of his duties has been assigned to several different Counties in the State during the course of his employment. This man is employed by the State A.B.C. Board as an investigator and for the past eight (8) years he has been assigned to various posts of duty within different Counties in the State. He has moved his family from one post of duty to the other, however he has at all times continued to pay his poll tax and vote in the County in which he resided at the time of his employment, which is the County in which he was born and reared.

"Has this employee maintained his place of residence in the County in which he resided prior to his employment by the State; is he a qualified voter of such County in the sense that he would be eligible to seek election to public office in such County."

With respect to this person's qualification to vote in his native county, this office has held a number of times that the answer depends on the intention of the voter. If this person intends to return to his native county at any time, then I am of the opinion that he may continue to vote in that county. The nature of his employment which requires him to move from place to place would indicate that he desires to retain his voting residence where it was first established. It is not unusual for citizens to have an actual place of abode in one place while maintaining their domicile for voting purposes at the precinct where they originally established their voting place.

With respect to this person's eligibility to seek election to a public office of the county, I am of the opinion that the Electoral Board may not refuse to place his name on the official ballot if he is qualified to vote in the county in which he complies with the filing requirements. I enclose a copy of an opinion relating to this question which was issued by this office on May 11, 1950, and is published in the Reports of the Attorney General for 1949-50, page 100.

It would be difficult, if not impossible, under the facts presented, to express an opinion with respect to this person's eligibility to hold the office. Section 15-487 of the Code would apply and a proper conclusion would depend upon whether or not he meets the tests laid down in the Virginia cases. The leading cases on this point are *Williams v. Commonwealth*, 116 Va. 272 and *Dotson v. Commonwealth*, 192 Va. 565.

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**ELECTIONS—School Bond Referendum—Qualification of Voters Same as for General Election—Voting List for General Election Correct for Referendum Held at Same Time. (37)**

August 7, 1958.

HONORABLE A. A. RUCKER  
Attorney for the Commonwealth

This is in reply to your letter of August 6, 1958, relating to a proposed bond issue election to be held at the general election in November of this year.

You have presented the following questions:

- "(1) Is the qualification of voters on the school bond matter governed by Section 24-17 of the Code and particularly, is the ownership of land a requirement in order for a person to be qualified so to vote?"
- "(2) Will the voting list which will be used in the general election in November, 1958, also be the correct voting list for use at the school bond election held at the same time?"

With respect to question (1), the qualifications of voters will be as prescribed in Section 24-17 of the Code. Section 24-22 of the Code provides that "the qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at general elections \* \* \*." Since this will be a special election held on a general election day the exceptions set out in this section will not apply.

The ownership of land may not be considered in determining the qualifications of voters for this election. This question was before our Supreme Court in the recent case of *Carlisle v. Hassen*, 199 Va. 771. In that case the Court held that a freeholder qualification was in violation of Section 115-a of the State Constitution.

The answer to your second question is yes.

**ELECTIONS—Voting Places—Must Be Located Within Election District or Precinct. (182)**

January 27, 1959.

HONORABLE JULIUS GOODMAN  
Attorney for the Commonwealth for  
Montgomery County

This is in reply to your letter of January 21, 1959, in which you state that the Town of Christiansburg is divided into two election districts, or precincts, and that the voting places for each of the two precincts are located in the County Court House which is right on the line dividing the east precinct from the west precinct. In addition, you point out that it is desired to remove the voting places for the two precincts from the Court House to another place within the Town.

You pose the question:

“Could the new quarters for the changed voting places covering the East and West Christiansburg Precincts in the Town of Christiansburg be housed under one roof, still retaining one voting place designated as East Christiansburg Precinct and another voting place designated as West Christiansburg Precinct, if said quarters were within a reasonable distance of the line that divides the East Christiansburg Precinct and the West Christiansburg Precinct, or would there have to be two separate voting places within the Town of Christiansburg in County elections, one in the East Christiansburg Precinct for the East Christiansburg Precinct voters, and a separate voting place in the West Christiansburg Precinct for the West Christiansburg voters?”

It is my opinion that § 24-180 of the Election Laws contemplates that the voting places for each election shall be located within the election district, or precinct, where the voters reside. On February 28, 1956, this office rendered an opinion to that effect to Honorable Levin Nock Davis, Secretary, State Board of Elections, citing, with approval, a previous opinion of Attorney General Staples, dated March 29, 1945. I enclose copies of each of these two opinions.

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**ELIZABETH RIVER TUNNEL AUTHORITY—Abandoned Property—Retention for Ninety Days Before Disposition Reasonable—Permanent Records. (103)**

October 23, 1958.

MR. ROBERT R. MACMILLAN  
Norfolk, Virginia

This is in response to your letter written as counsel to the Elizabeth River Tunnel District and relative to the disposition (by destruction, sale, etc.) of certain unclaimed dangerous weapons, alcoholic beverages and other similar items coming into the possession of the Tunnel Commission police in connection with their duties on the bridge-tunnel and which are not subsequently claimed by the owners. It is further stated that such items do not specifically come within the forfeiture sections of the Code of Virginia. Inquiry is also made as to the length of time such items should be held and what records, if any, are required to be kept by the tunnel police in regard thereto.

After the passage of time without any claim from the owner for such weapons or other property, it appears that they would acquire the status of abandoned property for which no specific statutes appear to have been enacted to cover situations such as those presented. (Perhaps due to the nature of the acquisition, the property should be retained for a longer period than in the typical situation

where abandoned property is acquired). As no actual time limit can be stated for the retention of such property, a reasonable limit such as ninety days would appear a sufficient period for the retention of such property. In this connection, inquiry should be made to see if either of the cities embracing the tunnel district have ordinances dealing with the subject of disposition of abandoned property. As the Authority obviously cannot retain such property forever, the primary question is that of disposition.

Regarding disposition, I am of the view that, especially due to the danger of crimes occurring where dangerous weapons fall into the wrong hands, procedures should be followed which would lead to the destruction of such weapons. Reference is made to Section 18-147.1, prohibiting the possession of weapons such as those mentioned as evidencing the Commonwealth's recognition of the danger involved in the circulation of such weapons. The thought occurs that you might discuss the matter with the appropriate police court judges and/or circuit judges with regard to setting up a procedure for the destruction of such property.

While there appears to be no specific statute covering the type of records to be kept, I am of the view that permanent records denoting all pertinent facts should be kept on such items acquired.

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**EMBALMERS AND FUNERAL DIRECTORS—State Regulations—Inapplicable at Veteran's Administration Hospital. (15)**

July 16, 1958.

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

This is in reply to your letter of July 14, 1958, in which you request my opinion as to whether or not Chapter 10 of Title 54 of the Code of Virginia, and specifically § 54-260.37 of that chapter, which chapter relates to embalmers and funeral directors, is applicable to the embalming of bodies at the Veterans Administration Hospital, Kecoughtan, Virginia.

The answer to this question, in my opinion, would be primarily determined by whether or not the Commonwealth of Virginia has ceded jurisdiction over this federal property to the United States of America. Under the provisions of Chapter 39 of the Acts of Assembly of 1922 jurisdiction over this property has been ceded to the United States of America and, therefore, the embalming of bodies at this hospital would not come within the jurisdiction of the Commonwealth of Virginia or within the provisions of Chapter 10 of Title 54 of the Code of Virginia.

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**ESTATES—Appraisers—Appointment Mandatory Unless Will Directs Otherwise or Estate Less than \$500. (109)**

October 28, 1958.

HONORABLE T. F. TUCKER, *Clerk*  
Corporation Court of the City of Danville

This is in reply to your letter of October 27, 1958, which reads as follows:

"I have been requested by several Attorneys to secure from you an interpretation of whether or not Section 64-126 of the Code of Virginia makes it mandatory in every case that the Court or Clerk appoint appraisers for estates. In at least eighty per cent of all qualifications authorized in this Court appraisal of the estate is not necessary, such as in the cases where only stocks, bonds, or moneys are the corpus of the estate. Their

argument is that it is a needless expense upon the estate for these appraisers to be appointed. Does the phrase 'If the Court or Clerk deem it proper' apply to the whole sentence or just to the adverbial phrase, 'except when a testator directs his estate not to be appraised or though he so directs'?"

This section of the Code was formerly Section 5376 of the Code of 1919 and was discussed by the Supreme Court of Appeals in the case of *Commonwealth v. Carter*, 126 Va. 469, at page 486. The case involved the validity of the State inheritance tax and the Court in discussing the possibility of an injustice being done to a beneficiary stated:

"The danger of any injustice to a beneficiary is exceedingly remote also because of the statutes (Code \* \* \* 1919, ch. 219), requiring appraisers to be appointed by the court in which the personal representative qualifies, \* \* \*."

It would seem, therefore, the Court was of the opinion that an appraisement in connection with the administration of an estate of a deceased person is required. The statute under consideration is in part:

"Every court or clerk by whose order any person is authorized to act as a personal representative shall, except where a testator directs his estate not to be appraised or though he so directs, if the court or clerk deem it proper, appoint three or more appraisers \* \* \*."

Under this language, I am of the opinion that, in each case, unless the testator directs otherwise, and unless the value of the estate is less than \$500.00, it is mandatory that an appraisement shall be made. In a case where the testator has directed that no appraisement be made, the court or clerk, if he deems proper, may appoint appraisers despite the wishes of the testator.

The discretion placed in a court or a clerk may not, in my opinion, be exercised when the decedent has not made a will or, in the case of a will, it fails to direct that no appointment be made.

Judge Lamb, in his recent book entitled "Virginia Probate Practice", Section 16, pp. 31-36, states that:

"Appraisement by persons appointed for the purpose by the court or Clerk at the time of the qualification is required of estates of decedents only; Code § 64-126. Of other fiduciaries an inventory is required, but no appraisement. In the case of estates of intestate decedents both inventory and appraisement are required. In the case of estates of testate decedents appraisement of the estate may be, and frequently is, waived by the will; but even then the court or Clerk may, at discretion, require appraisement."

"So, in a proper case, and frequently, for instance, where the value of the estate is less than \$500.00, and the fiduciary may be permitted, in the discretion of the Clerk or court under Code § 26-4, to qualify without giving security on his bond, the court may further provide that the fiduciary is relieved by the court of duty to file inventory, appraisement and to settle accounts. It is recognized that the power to do this is discretionary in the court and should be exercised only in plain cases. It is thought best to limit the exercise of this discretion to the court. The court's connection with accounting is supervisory whereas the Clerk's is merely clerical."

"A typical case in which the court may properly, in the exercise of its discretion, waive the filing of inventory and appraisement and the settle-

ment of accounts is where the qualification is had for the sole purpose of instituting an action to recover damages under Code § 8-633 for the decedent's death by wrongful act, neglect or default; there being in almost all cases no 'estate' to be administered. It is the practice to grant administration in this situation upon a bond in the penalty of \$100.00 without surety."

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**EXPENSES—Travel—Judges in Annexation Cases—Paid by Governmental Unit Instituting. (213)**

February 25, 1959.

HONORABLE JOEL W. FLOOD, *Judge*  
Fifth Judicial Circuit of Virginia

This is in response to your letter of February 17, inquiring if, pursuant to Section 15-152.15, Code of Virginia, as amended, travel expenses of judges in annexation cases are paid by the city, town or county instituting such proceedings, as was formerly the law. Section 15-152.15 provides as follows:

"The costs in annexation proceedings shall be paid by the city, town or county instituting the proceedings and shall be the same as in other civil cases; provided that the costs shall include the per diem and expenses of the court reporter, if any, and, in the discretion of the court, a reasonable allowance to the court for secretarial services in connection with the preparation of the written opinion. If the proceeds be instituted otherwise than by a city, town or county, such costs shall be paid as the court directs.

"On appeal, the appellate court shall determine by whom the appellate costs shall be paid."

It is noted that the statute specifically provides for payment of costs by the instigator of the proceedings. The travel expenses of the judges would appear to come within the provision for the payment of costs under Section 15-152.15.

Accordingly, this office is of the opinion that the judges' travel expenses would be paid by such governmental unit instituting the proceedings under Section 15-152.15.

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**EXPENSES—Travel—Sheriffs—Extradition Under §§ 19-60 to 19-63—Orders Issued by Governor—Entire Amount Paid by State. (238)**

March 17, 1959.

HONORABLE ROBERT C. GOAD  
Commonwealth's Attorney for  
Nelson County

Reference is made to your letter of February 25, 1959 and to our reply under date of February 27th and to your letter of March 11th relating to the payment of travel expenses of a county officer who has traveled outside the State of Virginia for the purpose of returning to this State prisoners under extradition proceedings:

In this connection I enclose a copy of an opinion issued by this office on January 3, 1949, and published in the Attorney General Reports of 1948-49, at page 98. If the extradition to which you refer was made in accordance with the enclosed opinion, I am of the opinion that all of the expenses incident thereto should be

paid by the State pursuant to Section 19-64 of the Code. I understand from your letter of February 25th that it is a fact that the deputy sheriff of your county traveled under orders issued by the Governor.

We have discussed this matter with Mrs. Towill of the Governor's office and Honorable C. H. Morrissett, State Tax Commissioner, and we find that generally where the officer making the travel pursuant to an extradition order is a sheriff, such sheriff submits his expense account along with his other expenses allowed under Article 9, Chapter 1 of Title 14. In such cases the county would bear one-third of the expense incident to the extradition.

Section 19-64 of the Code, however, clearly provides that the expenses incident to an extradition under Sections 19-60 to 19-63, inclusive, of the Code shall be paid out of the State treasury, on warrants of the Comptroller issued upon vouchers signed by the Governor.

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**FISHERIES—Crab Size Limits—Unlawful to Possess Crabs Smaller Than Minimum Size. (82)**

October 1, 1958.

MR. B. T. GUNTER  
Attorney for the Commission of Fisheries

This is in reply to your letter of September 24, 1958, in which you request my opinion concerning the proper interpretation to be given to § 28-172 of the Code of Virginia concerning the limitation on sizes of crabs which may be caught, taken or kept in possession.

Section 28-172 of the Code reads as follows:

"It shall be unlawful for any person to catch, take or have in possession at any time a hard crab which crab measures less than five inches across the shell from tip to tip of spike, except the crab commonly known as the peeler crab, nor any buckram (a paper shell crab) or any soft crab measuring less than three and one-half inches from tip to tip of spike, nor any peeler measuring less than three inches from tip to tip of spike; or to destroy them in any manner, but shall immediately return the same to the water alive when taken out of the net or scrape."

You specifically ask if a person who has not caught or taken crabs from the waters of the State but who has purchased or otherwise obtained crabs from someone who has caught or taken crabs from the waters of the State violates the provisions of § 28-172 of the Code if he has in his possession crabs smaller than the minimum size provided for in this section.

I am of the opinion that § 28-172 of the Code not only prohibits the person catching or taking crabs from the waters of the State to have in possession crabs smaller than the minimum size permitted in § 28-172 of the Code, but it also makes it a violation for a person who has purchased or otherwise obtained crabs from the person originally catching or taking the crabs to have crabs under the minimum size in his possession. The statute expressly provides that it shall be unlawful for any person to have in possession at any time a hard crab which measures less than five inches across the shell from tip to tip or spike, or any buckram or soft crab measuring less than three and one-half inches from tip to tip or spike, or any peeler crab measuring less than three inches from tip to tip or spike.

**FISHERIES—Dredging of James River—Commission Recommendation Is Prerequisite to Gubernatorial Approval of Application. (162)**

December 29, 1958.

HONORABLE J. LINDSAY ALMOND, JR.  
Governor of Virginia

This is in reply to your letter of December 19, 1958, in which you request my opinion concerning the proper interpretation to be given to Chapter 302 of the Acts of Assembly of 1958, which chapter relates to the dredging of the James River between Hampton Roads and the ports of Hopewell and Richmond. Section 1 of that chapter provides as follows:

1. "§ 1. Insofar as the State has the power to prohibit the same, it shall be unlawful for any person, firm, corporation, association, or government or agency of any or all of any of the foregoing to dredge a ship channel in the James River between the James River Bridge and Jamestown Island and to employ or make use of disposal areas to place material so dredged, except for the ordinary maintenance of the existing ship channel at its established depth, unless application to accomplish such dredging, which application shall show specifically the areas to be dredged and the disposal areas proposed to be used, has been made to and approved by the Governor upon the recommendation of the Commission of Fisheries."

You request my opinion as to whether or not the Governor must await the recommendation of the Commission of Fisheries and be governed by that recommendation before approving an application for dredging of the James River. The statute provides that the application to accomplish such dredging must show specifically that it has been made to and approved by the Governor upon the recommendation of the Commission of Fisheries. I am of the opinion that the Governor cannot act upon the application until there has been a recommendation by the Commission of Fisheries. The statute does not in express terms require that the Governor must follow the recommendation of the Commission of Fisheries. Ordinarily the phrase "upon recommendation" involves the idea that another has the final decision. It has been held, in some instances, that a recommendation is not an act of final decisive power, but merely suggests the course of action to be followed by another. I am constrained to believe it is contemplated in this act that the Governor will not give his approval unless the recommendation of the Commission of Fisheries is favorable. You could, of course, withhold your approval, even if the Commission of Fisheries favors the project.

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**FISHERIES—Dredging of James River—Favorable Action by Commission Prerequisite. (164)**

January 8, 1959.

HONORABLE J. LINDSAY ALMOND, JR.  
Governor of Virginia

This supplements my letter to you of December 29, 1958, concerning the proper interpretation to be given to Section 1, of Chapter 302 of the Acts of Assembly of 1958, relating to the dredging of the James River between Hampton Roads and the ports of Hopewell and Richmond.

While the construction of this Section gave the office some concern, we concluded that it was the intention of the General Assembly of Virginia that an application to dredge in certain areas of the James River, contemplated by said Section, should be granted only with the approval of both the Governor and the Commission of Fisheries.

In reaching this conclusion, we accorded the word "recommendation" the meaning given it in the Second Edition, Unabridged, of Webster's New International Dictionary, to-wit:

"Act of recommending. State of being recommended; esteem; favor. Something which recommends or commends; as, 'His only recommendation is his personality'; specif., a statement, letter, or the like, declaring what one recommends, or expressing commendation . . . ; as, 'The Mayor would make no recommendations.'"

The commonly accepted meaning accorded the word "recommend" is "to commend."

We conclude that had the General Assembly not intended such applications to dredge to be granted only with the approval of both the Governor and the Commission of Fisheries, they would not have used the expression, "upon recommendation of the Commission," but would have authorized such applications *upon the approval of the Governor*, following investigation and report from the Commission of Fisheries on the effect of the granting of such applications, or the desirability thereof.

It would have been a very simple feat of draftsmanship to have made the granting of the application subject to the approval of either the Governor or the Commission. It appears, however, that the General Assembly contemplated that such applications should be granted following favorable action thereon by the Commission, and with the approval of the Governor.

**FISHERIES—Licenses—Fish to Be Manufactured Into Oil, Etc.—Clerk's Fee for Filing Application—Proceedings in Nature of Action at Law. (335)**

June 4, 1959.

HONORABLE O. B. CHILTON

Clerk of Lancaster County Circuit Court

I acknowledge your letter of June 3, 1959, which referred to my opinion of May 27, 1959, to Mrs. Emaline A. Hall, Clerk of Court for Northumberland County, with respect to the Clerk's fee in connection with proceedings had under Sections 28-63 and 28-64 of the Code of Virginia.

I am enclosing herewith copy of this opinion.

The opinion to Mrs. Hall was based upon the obvious fact that the proceedings had under these Code sections are actions at law. The application may be contested under Section 28-64 and in such case the Court is required to hear evidence for and against the granting of the license. Section 14-123(7) relates to the issuing of licenses by the Clerk. Licenses issued under Sections 28-63 and 28-64 are issued by the Oyster Inspector for the district.

Section 14-123(59) establishes a minimum fee in connection with all law actions.

Since I am of the opinion that the proceedings had under Section 28-63, etc., are in the nature of a law action, I feel that the Clerk is entitled to the fee provided in such cases.

**FISHERIES—License to Catch Fish to Be Manufactured Into Oil—Certificate of Circuit Court Required—Clerk's Fee for Filing Application \$5.00. (320)**

May 27, 1959.

HONORABLE EMALINE A. HALL

Clerk of Circuit Court of  
Northumberland County

This is in reply to your letter of May 23, 1959, in which you request my advice

with respect to the amount of the Clerk's fee in connection with proceedings had in your Court under Sections 28-63 and 28-64 of the Code of Virginia.

It appears that such proceedings are commenced by the filing of an application which is a law action, subject to being contested.

I am of the opinion, therefore, that the Clerk's fee shall be charged in accordance with the provisions of Section 14-123(59) of the Code. Since, as you state, the amount involved in any such case will not be in excess of \$500.00, the proper Clerk's fee in such actions is \$5.00, which shall be in lieu of any other fee.

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**FLAG OF VIRGINIA—Official Flag Must Comply with § 7-32—Silk and Printed or Stamped Flags May Be Flown. (185)**

January 30, 1959.

HONORABLE MARTHA BELL CONWAY  
Secretary of the Commonwealth

This is in reply to your letter of January 26, 1959, in which you ask certain questions involving § 7-32 of the Code of Virginia relating to the flag of the Commonwealth. Your letter states in part:

"The question is: Can the white silk fringe be omitted from the flag, whether for indoor or outdoor use, and still be the 'flag of Virginia?'"

"In this regard, I may point out two other troublesome points in this section. (1) It is specified that the flag shall be of bunting or merino. Most of the finer flags are made of silk. (2) It is specified that upon the white circle shall be 'painted or embroidered' the coat-of-arms of the State. Today many of our flags are made by use of the silk screen process or the colors are printed on or stamped.

"I am wondering if the above specifications must be adhered to strictly in order for a flag to be the 'official' flag of Virginia."

Section 7-32 of the Code is specific in the requirements established for the flag of Virginia. The full text of the section is as follows:

"The flag of the Commonwealth shall hereafter be made of bunting or merino. It shall be a deep blue field, with a circular white centre of the same material. Upon this circle shall be painted or embroidered, to show on both sides alike, the coat-of-arms of the State, as described in § 7-26 for the obverse of the great seal of the Commonwealth; and there shall be a white silk fringe on the outer edge, furthest from the flag-staff. This shall be known and respected as the flag of Virginia."

This section was adopted as § 6, Chapter 247, Acts of Assembly, 1872-3, approved March 27, 1873. Since that date no change has been made in the specifications as to materials, colors, or a fringe. The language of the statute is mandatory; repeated use of the word "shall" leaves no room for exceptions.

Of course, at the time the statute was adopted, it was impossible to foresee the present technological changes, such as the use of silk, screening processes and the printing or stamping of colors. However, until the General Assembly sees fit to amend this section and provide that the flag may be of silk or other materials; that the coat-of-arms of the Commonwealth may be printed, and that it will not be necessary to have a white silk fringe on a flag which is to be flown out-of-doors, "The flag of Virginia" remains as described in 1873.

I know of no prohibition against flying or displaying flags manufactured, under present-day processes, out of silk or other fine materials. It has been customary to fly flags without the silk fringe out-of-doors, and most flags now owned and displayed by the Commonwealth are made of silk, rather than bunting or merino. Rather than dispose of these valuable items, I would suggest that the doctrine of *de minimis* be applied, and that no objection be raised to the continued use of silk flags or of flags on which the colors are printed or stamped.

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**GAME AND INLAND FISHERIES—Bear and Deer Licenses—Expenditure of Proceeds—May Not Be Used to Indemnify for Damage to Fruit Trees by Deer—Fruit Trees Not “Crops” Under § 29-145.1. (254)**

April 2, 1959.

HONORABLE WILLIAM J. PHILLIPS  
Commonwealth's Attorney for  
Warren County

This is in reply to your letter of March 31, 1959, which reads as follows:

“The County Board of Supervisors of Warren County and the Game Warden of Warren County have asked me to obtain your opinion as to whether or not the fees for these special licenses to hunt bear and deer in the County of Warren, may be used to indemnify the owner or lessee for damage done by deer to young apple trees, as damages to crops.

“In view of Section 29-145.1 it does appear that fruit trees are distinguished from ‘crops’. I have, therefore, informed the Board of Supervisors that I did not consider that fruit trees, not in bearing, would come within the purview of the term ‘crops’ and the owner or lessee could not therefore be compensated for damages done by deer to apple trees under Chapter 311 Supra.”

Chapter 311, Acts of Assembly 1958, provides that the net amount of money realized from the sale of the special stamps, or so much as is necessary, shall be used for the payment of “damages to crops or livestock by deer, etc.”

As pointed out by you, Section 29-145.1 seems to make a distinction between fruit trees and crops. This would indicate that the General Assembly recognized the general rule that “crops” does not include trees, as distinguished from the fruit of a tree. In Section 43-27 relating to crop liens, the phrase “fruit or other crops” is used, which establishes that such a lien would not be on the tree but only on the crop of the tree—its fruit.

In C. J. S., Vol. 25, page 1, we find this statement:

“The word ‘crops,’ in its more general signification, means all products of the soil that are *grown and raised annually* and *gathered* during a single season.” (Emphasis supplied.)

The definition cited from Corpus Juris is supported by the authorities appearing in Words and Phrases.

I agree with your conclusion that the Act under consideration does not authorize the payment of damages out of the fund in question for injury done to trees.

**GAME AND INLAND FISHERIES—Elk Hunting Licenses—May Be Issued Only in Counties Having Open Season—Holder May Hunt in Any County Having Open Season. (53)**

August 29, 1958.

MR. H. P. SCOTT, *Clerk*  
Circuit Court of Bedford County

This is in response to your letter inquiring "If a person buys from the Clerk of the Circuit Court of Bedford County a license for \$5.00, a state resident, can he hunt on this license in any County in the State that has an open season on elk or only in Bedford County?" You make the same inquiry with regard to a non-resident.

Section 29-121, Code of Virginia, as amended, provides in part as follows:

"There shall be a license for hunting elk in this State, which shall be required of all persons hunting such animals. The fees for such licenses shall be as follows: For a State resident elk license, five dollars; and for a nonresident elk license, thirty-five dollars. The clerk's fee for issuance of each such license shall be twenty cents. Such licenses shall be issued only in counties which have an open season on elk."

Pursuant to the above statute, I am of the opinion that elk hunting licenses may be issued by clerks only in those counties which have an open season on elk. I am also of the opinion that a resident or non-resident who buys the appropriate State license for the hunting of elk may hunt on such license on any county of the State which has an open season on elk.

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**GAME AND INLAND FISHERIES—Fishing Licenses—Members and Guests of Private Club Must Have to Fish in Club Owned Pond. (333)**

June 2, 1959.

HONORABLE JOHN H. COLE  
Judge, Sussex County Court

This is in response to your letter of May 20, 1959, in which you make reference to §§ 29-51, 29-52 and 29-78 of the Code of Virginia and inquire:

"We have in our county a fishing club composed of many members from nearby cities and they term themselves a 'private club'. They own the fish pond which they term a 'privately owned pond'.

"I would appreciate it if you would let me have your opinion as to the following question as to license to fish requirements:

"May a member of the club and his invited guests fish in this pond without first procuring a license?"

Section 29-78 of the Code reads:

"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."

I understand from your letter that the "members" to whom you refer have associated themselves as a "private club" and collectively own the pond in question. In the circumstances, whether each member holds title to an undivided

fractional share of the pond, or whether the title to the pond stands in the name of the club, is immaterial. In view of the admitted association of the members as a "private club", I am constrained to believe that § 29-78 controls and each "member" and guest must obtain a fishing license.

My predecessor in office had occasion to consider a similar question where ownership of the particular pond was in a corporation. I enclose a copy of his opinion rendered on September 19, 1957, to the Commonwealth's Attorney for Frederick County.

Although it may be argued that where each member owns a fractional share of title to the pond as a joint tenant he is a "landowner" within the purview of § 29-52 (1) which exempts landowners and their families from the license requirement when fishing in their own inland waters, our Supreme Court of Appeals held in *Commonwealth v. Bailey*, 124 Va. 400, 97 S. E. 774, that such exemptions must be strictly construed. The Court stated that those claiming to come within an exemption to statutes making it unlawful to hunt without a license [§ 29-51], must make it clearly appear that they are so exempt. I feel that the principles expressed in that case are applicable here and that any such argument is without merit.

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**GAME AND INLAND FISHERIES—Revocation of License on Second Conviction—Provisions of § 29-77 Not Applicable to Persons Excepted Under § 29-52. (283)**

April 24, 1959.

HONORABLE CHESTER F. PHELPS  
Executive Director  
Commission of Game and Inland Fisheries

This is in reply to your inquiry of April 16, 1959, in which you make reference to §§ 29-52 and 29-77 of the Code of Virginia and state:

"In connection with a convicted violator for the second time with hunting and fishing privileges revoked for one year:

- "1. Is it permissible for him to hunt and fish on his own land?
- "2. Is it permissible for him to hunt and fish on leased and rented land?
- "3. Is it permissible for him to hunt deer on his own, rented or leased land during the deer hunting season?
- "4. Is it permissible for him to fish on leased, rented, and his own land, bearing in mind that South Fork of the Holston River at Sugar Grove is a closed stream?
- "5. If the answer to Question No. 2 is yes, does he have to purchase a special trout fishing stamp?"

As you know, § 29-51 prohibits any person from hunting, trapping or fishing in or on the lands or inland waters of the Commonwealth without a license, but specifically excepts from this prohibition the classes of individuals named in § 29-52. Among these excepted persons are landowners hunting, trapping or fishing within the boundaries of their own lands and inland waters; bona fide tenants, renters and lessees hunting, trapping or fishing within the boundaries of the lands or waters of which they are tenant, renter or lessee and on which they reside, provided they have the written consent of the landlord; and guests of the owner of a private fish pond.

Section 29-77 provides for revocation of the license of any person convicted a second time of violating the hunting, trapping or inland fish laws, prohibits application for a new license before twelve months have elapsed from the date of such second conviction, and adds:

"If found hunting, trapping or fishing during such prohibited period, such person shall pay a fine of not less than fifty dollars nor more than one hundred dollars."

This section, being of a penal nature, must be construed strictly against the Commonwealth.

I am of the opinion that the provisions of § 29-77 which provide a penalty for hunting, trapping or fishing during the twelve-month period within which a person whose license has been revoked may not apply for a new license are not applicable to those persons excepted by § 29-52 from the general license requirement set out in § 29-51. It follows that the answer to your first question is in the affirmative.

If the individual in question resides on the land of which he is a bona fide "tenant, renter or lessee" and has on his person written consent of the landlord thereof, the answer to your second question is also in the affirmative.

If the individual hunter who is the subject of your third question is exempt from the prerequisite of procurement of a special "Big Game" stamp or license by reason of qualification for such exemption in accordance with the provision of § 29-52, then I am of the opinion that he may hunt deer in season on his own land and, with permission, on rented or leased land on which he resides.

As for your fourth question, I take it that the words "to fish on leased, rented and his own land" refer to private inland waters to which the individual may have title or of which he is lessee or tenant. Regulation 74 of the Commission of Game and Inland Fisheries has closed to all fishing certain portions of the South Fork of the Holston River from January 1 through April 12 of each year. I find no exception which would allow anyone to fish therein during the closed season. Further, unless the individual in question has access by reason of ownership, lease, etc., to privately-owned portions of the South Fork of the Holston River, the no-license-required exceptions of § 29-52 would not be applicable and the convicted violator could not lawfully fish therein. In other words, the twice convicted violator could fish in privately owned inland waters, provided the statutory and regulatory requirements are fulfilled, but not in public inland waters.

Your last question involves consideration of the provisions of § 29-55 of the Code. This section was amended to provide for a separate trout license, with an additional license fee therefor. However, the twice convicted violator to whom you refer is not required to obtain a license of any kind to fish in the private inland waters discussed above. It follows that he may fish for trout without a license in such waters only.

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**GAME AND INLAND FISHERIES—Trout Fishing License—May Only Be Purchased if Person Has Regular License, May Not Be Purchased with Trip License.**  
(20)

July 21, 1958.

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

This is in reply to your letter of July 18, 1958, which reads as follows:

"Wherein the last few days several fisherman both resident and non-resident have applied for the RESIDENT & NON-RESIDENT 3 DAY TRIP LICENSE TO FISH, FORM No. 310, and have also ask for the Trout License, Form 308 & 309, to be used along with the 3 day trip, and when refused the trout license (as I am unable to find anything in the 1958 Acts under which the trout license is issued providing for this combination) they say that other Clerk's Offices or Agents are selling the 3 day license along with the trout license as valid for the taking of trout.

"Will you please clear up this matter for me, as to whether I am correct or in error in my assumption."

Section 29-55.1 of the Code, as amended by Chapter 443 of the Acts of 1958 is as follows:

"There is hereby provided a trip fishing license for residents and non-residents of the State to fish in the fresh water creeks, bays, inlets and streams of the State, or in any of the impounded waters of this State during the open season for game fish, which shall be in lieu of the regular season State or county fishing license. Provided, however, such license shall not entitle the owner thereof to fish for trout in any of the trout streams nor in any public waters in which trout have been planted. The fee for such license shall be one dollar and fifty cents, and said license shall be effective for three successive days, which days shall be set forth on the face of the license."

The holder of any fishing license issued under this section would not, in my opinion, be entitled to fish for trout in any of the streams of the Commonwealth.

A fishing license issued under Section 29-55.1 is *in lieu of* the regular licenses issued under Section 29-55. In order for a person to obtain a license to fish for trout in waters *stocked with trout by the Commonwealth*, he must apply for his regular license and his trout license under Section 29-55 and pay the license fees provided for therein. Of course, a person who has acquired a license under Section 29-55 would not need a license under Section 29-55.1.

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**GENERAL ASSEMBLY—Rules of House and Senate—Parliamentary Procedure—  
Reconsideration of Matters Decided at Regular Session—May Be Considered at  
Special Session if Proposed Legislation Presents Fundamentally Different Question. (262)**

April 9, 1959.

HONORABLE E. BLACKBURN MOORE  
Member, House of Delegates

I am writing with reference to your recent inquiry concerning the propriety of the General Assembly's considering, at its Special Session which was reconvened March 31, 1959, a bill recommended by the Commission on Education which provides for the compulsory school attendance of children between the ages of seven and sixteen under certain conditions. See, Report of the Commission on Education, p. 56.

In connection with this inquiry, you point out that the General Assembly, prior to the recess of the current Special Session, repealed the compulsory school attendance laws embodied in §§ 22-251 through 22-275 of the Virginia Code, which repeal became effective January 31, 1959. Chapter 2, Acts of Assembly, Extra Session (1959).

I have been unable to discover any provisions of Virginia law which would prohibit consideration of the bill in question by the General Assembly during the recently reconvened Special Session. Moreover, I am of the opinion that such action by the General Assembly would not be precluded by the provisions of Rule 70 of the Rules of the House, or Rule 62 of the Rules of the Senate. These Rules impose limitations upon the reconsideration of questions which have been decided during a session and establish procedures circumscribing reconsideration of questions which have been once determined. In my opinion, neither Rule purports to govern or limit consideration of questions which are essentially different in character, even though such questions may involve the same general subject matter.

§§ 22-251 through 22-275 of the Virginia Code formerly enunciated school attendance requirements imposed by the General Assembly upon all citizens of the Commonwealth within the purview of these provisions of law. The question determined by the General Assembly in repealing these statutes was that legislation of this scope and applicability should no longer be operative. The bill recommended by the Commission on Education proposes certain school attendance requirements, none of which shall be applicable until formally adopted by the various counties, cities and towns of the Commonwealth, in the manner prescribed by Sections 24 and 25 of the bill. The question which the proposed legislation presents to the General Assembly is, therefore, fundamentally different from that posed by the repeal of the previously existing law. I am, therefore, of the opinion that the General Assembly may properly consider the legislation under discussion during the reconvened Special Session.

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**GENERAL ASSEMBLY—Rules of Procedure—Settled by Each House—Committee of Whole Satisfies Requirement of Section 50 of Constitution. (278)**

April 22, 1959.

HONORABLE WILLIAM F. STONE  
Member of the Senate

I am in receipt of your letter of April 21, 1959, in which you call my attention to that provision of Section 50 of the Constitution of Virginia (1902), as amended, which prescribes:

“No bill shall become a law unless, prior to its passage, it has been:

(a) Referred to a committee of each house, considered by such committee in session and reported; \* \* \*.”

You request to be advised whether or not the above-quoted provision constitutes

“\* \* \* a mandate on the Senate of Virginia when a bill has been passed by the House of Delegates and communicated to the Senate to refer this to a committee of the Senate rather than to the committee of the whole as has been done in recent days.”

Initially, it will be noted that the constitutional provision in question does not undertake to specify the type of committee to which a bill must be referred, and by which it must be considered and reported, prior to its passage. Moreover, Section 47 of the Virginia Constitution of 1902, enacted simultaneously with the provision of Section 50 here under discussion, declares:

“The House of Delegates shall choose its own Speaker; and, in the absence of the Lieutenant Governor, or when he shall exercise the office of Governor, the Senate shall choose from its own body a president pro tempore. *Each house shall select its officers, settle its rules of procedure, and direct writs of election for supplying vacancies which may occur during the session of the General Assembly; \* \* \*.*” (Italics supplied.)

Manifestly, the italicized language of Section 47 vests in each house of the General Assembly the exclusive authority to establish its rules of procedure, and I have been unable to discover any provision of Virginia law which would

prohibit the Senate of Virginia from referring to a committee of the whole a bill which has been passed by the House of Delegates and communicated to the Senate. The determination, by appropriate action of the Senate, to adopt this procedure (resolve itself into a Committee of the Whole), in my opinion, constitutes no more than the exercise by that body of the authority vested in it by Section 47 to "settle its rules of procedure." In view of the fact that Section 50 of the Virginia Constitution does not specify that a bill must be referred to a standing committee or any other committee in existence when a Bill is received, and, in light of the power reposed in each house to govern its proceedings, I am constrained to believe that the language of Section 50 set out in your communication does not require the Senate to refer a bill passed by the House of Delegates to a standing committee of the Senate rather than to a committee of the whole, if the Senate be so advised and properly resolves itself into such a committee for the purpose of considering and reporting the bill.

While not directly related to your inquiry, and for your information and consideration only, I invite your attention to the case of *Albemarle Oil Company v. Morris*, 138 Va. 1, 11, 121 S.E. 60, in which the Supreme Court of Appeals of Virginia declared that courts "cannot overthrow legislative determination of the existence of conditions with respect to its own procedure, or the existence of conditions satisfying it of the propriety of its action." In support of this proposition, the Supreme Court of Appeals of Virginia reviewed a number of decisions of this and other jurisdictions, and observed (138 Va. at 11, 12):

"In *Roanoke v. Elliott*, 123 Va. 393, 400, 96 S. E. 819, 822, it was contended that an emergency enactment must set out the facts constituting the emergency. But the court held that the finding of an emergency was conclusive, saying: '\* \* \* It is necessary to state in the body of the bill that an emergency exists, in order that it may be put into immediate effect, for so the Constitution declares, but counsel very properly admit that 'the legislature is the sole judge of what shall constitute an emergency which will justify putting an act into immediate effect,' and the authorities so hold. See cases cited in 36 Cyc. 1193, 1194. It is for the legislature to 'ascertain and declare the fact of the existence of the emergency, and their determination is not reviewable elsewhere. The Constitution has vested the law making department of the government with power to determine that question \* \* \* and such determination is not made reviewable by the courts.'

"In *Speer v. Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402, the question was the validity of a private act because notice required by the Constitution had not been given. The court said: 'It is proposed in this case to show by extrinsic evidence that the proper notice had not been given for a sufficient length of time before the bill was introduced into the legislature. We do not think the courts are authorized to receive such evidence and upon it to decide whether or not the legislature, a co-ordinate branch of government, has made an erroneous decision and allowed a bill to be introduced without the notice required by the Constitution and the law'

"In *Cox v. Pitt County*, 146 N. C. 584, 60 S. E. 516, 16 L. R. A. (N.S.) 253, 254, the court held: 'It is insisted, first, that the bond act is unconstitutional and void for the reason that said act is a private act and that thirty days' notice was not given as required in section 12, article 2 of the Constitution. It is immaterial whether the act be a public local law as defined in *State v. Chambers*, 93 N. C. 601, and similar cases, or purely a private act, as contended by plaintiffs. The courts will not go behind the ratification of the act to ascertain whether notice has been given in accordance with section 12, of article 2, of the Constitution of the State. While that section is binding upon the conscience of the General Assembly, and doubtless is intended to be observed by that body, the courts will not undertake to review the action in that respect of a co-ordinate department

of the State government, and will conclusively presume from ratification that the notice has been given.'

"In *Agner's Case*, 103 Va. 811, 814, 48 S. E. 493, 494, it was contended that Buena Vista was not a city but a town because it had less than 5,000 inhabitants, but the court held otherwise, saying: 'Where the legislature of the State has granted a city charter to a community, it must be assumed that its discretion in that regard has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed, and if any special finding were required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding. Cooley's Const. Lim. (7th ed.), pp. 257, 258. The foregoing proposition is too generally recognized and established to render it necessary to multiply authorities in support of it.' "

While the above citations are not particularly pertinent to your inquiry, I thought that you as an attorney might be interested in them.

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**HIGHWAYS—Department of Highways May Require Recordation of Deeds of Right of Way as Prerequisite to Acceptance Into Secondary System. (155)**

December 18, 1958.

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

This is in reply to your letter of December 15, 1958, in which you asked to be advised as to whether the Virginia Department of Highways has the right to require the recordation of deeds conveying right of way for a public road as a condition precedent to processing the request that such road be added to the Secondary System of State Highways.

Section 33-141 of the Code of Virginia places the authority for the establishment of new roads to be added to the secondary system in the county boards of supervisors. After the establishment of such roads, the jurisdiction thereover rests with the State Highway Commission, except for the abandonment of such roads.

It is my understanding that the requirement that deeds for the proposed right of way be recorded stems from the desire on the part of the State Highway Commission to have some evidence on record to protect the Commission against purchasers for value between the time of the conveyance and the time the right of way is actually laid out and constructed.

Inasmuch as Section 33-141 of the Code leaves to the discretion of the State Highway Commissioner the determination as to whether any expenditure will be made by the State upon such new roads, I am of the opinion that any reasonable requirement that the right of way be secured by the board of supervisors as a condition precedent to the acceptance of the new road into the Secondary System of State Highways would be within the power of the State Highway Commission.

I can fully appreciate the reluctance of property owners to place a deed on record without having some assurance that the right of way will be accepted and the highway constructed. I will be happy to consult with the officials of the Department of Highways in order to determine if some assurance can be given the board prior to the recordation of the deeds for the right of way.

**HIGHWAYS—Interstate System—Federal-Aid Act Approval May Be Modified by Consent—Construction of Bridge with Federal-Aid Funds Does Not Necessarily Fix Route of Interstate Highway. (230)**

March 10, 1959.

HONORABLE H. RAY WEBBER  
Member, House of Delegates

This is in reply to your letter of March 4, 1959 in which you asked to be advised as to whether the construction of Island Ford Bridge between Clifton Forge and Covington with Interstate funds thereby made permanent the location of Interstate Route 64 at that point.

Without discussing the various statutory provisions germane to the establishment of this location as a portion of the Interstate System of State highways, for the purposes of your inquiry I feel it sufficient to state that approval of the project by the Secretary of Interior thereby committed the Federal Government to a contractual obligation for the payment of its proportional contribution for the cost of such project. It should be noted however, there is nothing in the Federal-Aid Act nor the Virginia statutes which leads me to believe that such a contractual obligation cannot be modified, altered or rescinded by mutual consent of the two governmental agencies. It would therefore appear to be possible to alter or relocate a particular Federal-Aid highway project or to refinance that project under a different program even though the Federal Government is already contractually obligated to pay a proportionate share of the cost of that project.

It should also be noted that § 33-36.7 of the Code of Virginia expressly authorizes the State Highway Commission to transfer roads, bridges and streets from the Interstate System of State highways to the primary or secondary system of State highways.

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**HIGHWAYS—State & Federal Secondary Project—Funds Allocated Prior to Annexation Will Be Expended Regardless of Change of Status of Area. (87)**

October 8, 1958.

HONORABLE EDWARD H. RICHARDSON  
Attorney for the Commonwealth  
Roanoke County

I wish to apologize for this belated reply to your letter of September 13, 1958. Other pressing duties have prevented an earlier exploration of the inquiry presented in your letter.

Your letter related to a highway-railway crossing project which is being proposed as a secondary federal aid project in Roanoke County, and the possible effect of an annexation by the Town of Salem subsequent to the letting of the contract for the project.

You have inquired as to whether the entry of an annexation order on or after January 1, 1959, which order would not become effective until December 31, 1959, would cause the United States Bureau of Public Roads or the Virginia Department of Highways to withhold funds which may have been allocated to such secondary federal aid project.

Any funds allocated by the State Highway Commission for a construction project in the County of Roanoke prior to the effective date of the incorporation of the area in question by the Town of Salem would be expended as if that portion of the county had not been so incorporated.

Section 33-32 of the Code of Virginia provides in part as follows:

“The present division of the State into not less than eight construction districts shall continue in effect. Work shall be continued in each district, except as herein provided. The State Highway Commission shall annually

make, as nearly as possible, an equitable apportionment among the various construction districts, of the construction funds to become available during the succeeding fiscal year.

\* \* \* \* \*

"In any case where any allotment of funds is made under this section to any county all or a part of which subsequently is incorporated as or into a city or town such allocation shall not be impaired thereby and the funds so allocated shall be expended as if such county or any part thereof had never become an incorporated city, but such city shall not be eligible to receive funds as a city during the same year it receives the funds allocated as a county or as any part of a county."

After a highway construction project has been programmed with the Federal Bureau of Public Roads, federal funds are set aside to pay the proportionate share for which the Federal Government has obligated itself. The subsequent transfer of the highway being constructed from one highway system into a different system of highways would not cause the Bureau of Public Roads to withhold the funds allocated for the particular project.

I am therefore of the opinion that the mere entry of an annexation order, which is not to become effective until after all necessary funds have been allocated for a highway project, would not adversely affect the prosecution of the project by the Virginia Department of Highways and the United States Bureau of Public Roads.

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**INDUSTRIAL COMMISSION—Retirement of Members—Compensation to Be Paid Out of Industrial Commission Funds. (284)**

April 24, 1959.

HONORABLE SIDNEY C. DAY, JR.  
State Comptroller

This is in reply to your letter of April 21, 1959, in which you refer to Sections 51-19 and 51-25 of the Code of Virginia and present the following question:

"Since retirement contributions of the members of the Industrial Commission are paid into the Judges' and Commissioners' Retirement Fund, it would appear that retirement salaries of retired members should be paid from the fund as provided in Section 51-25 of the Code rather than funds referred to in Section 51-19 of the Code."

Sections 51-3, 51-4, 51-7, 51-15, 51-18, 51-19 and 51-20 of the Code relating to the retirement of judges, members of the State Corporation Commission and members of the Industrial Commission, were all amended and re-enacted by Chapter 635 of the Acts of the Assembly of 1954. Therefore, the present provisions of Section 51-19 constitute the last expression and action of the General Assembly with respect to the fund from which the retirement installments of members of the Industrial Commission shall be paid.

While apparently the Act of 1942 referred to in your letter had the effect of modifying and suspending the operation of Section 51-19 insofar as it referred to the specific fund from which these retirement allowances should be paid, I feel that due to the re-enactment of Section 51-19 by the 1954 Act, that section controls.

Apparently, since the Comptroller is required to make deductions from the

salaries of the Industrial Commissioners and deposit these deductions into the fund created by the 1942 Act and continued under Section 51-25, an anomalous situation exists with respect to the payment of Industrial Commission retirement allowances which you should probably keep in mind and consider proposing that it be corrected at the next session of the Virginia General Assembly.

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**INSANE AND MENTALLY ILL—Commitment Proceedings—Appointment of Counsel for Patient Mandatory Where Private Counsel Not Employed—Commonwealth's Attorney May Not Be Appointed Guardian ad Litem. (203)**

February 18, 1959.

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

This is in reply to your letter of February 17, 1959, which reads as follows:

"The following questions have arisen in my office, the answers to which I do not have. Therefore, I would appreciate it if you would advise me, for the benefit of myself and our County Court. The problem is as follows: (1) The 1950 Code of Virginia, as amended, Section 37-62.1 requires that an attorney be appointed guardian ad litem to represent a person on whom a commission is being held. Our County Judge and I would like to know whether or not the Commonwealth's Attorney of a County is eligible to be appointed to serve as guardian ad litem for the person alleged to be incompetent. If the Commonwealth's Attorney is eligible to be appointed, can the \$10.00 fee provided by the statute be taxed and paid to the Commonwealth's Attorney (a) if the county has to pay the cost, or (b) if the alleged incompetent is financially able to pay it, can the said \$10.00 be taxed against the alleged incompetent? (2) If no attorney is available and you rule that the Commonwealth's Attorney is not eligible to be appointed, is the proceeding void if conducted without the appointment of a guardian ad litem, as mentioned in the said section?"

Section 37-62.1 provides that in any proceeding for commitment under Article 1, Chapter 3, Title 37 of the Code, 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 the judge is required to appoint an attorney at law to represent him in the proceeding. This section further provides that the attorney shall receive a fee of ten dollars to be paid as part of the fees and expenses of commitment as provided in Section 37-75 of the Code.

Section 37-75 provides that the fee shall be recoverable by the county, city or State from the person so examined, or from his estate, or from the person at whose request the proceedings were instituted, by appropriate action or proceeding for such purpose. The attorney who is appointed to represent the person who is sought to be committed is paid by the county, city or State, as the case may be, and such attorney cannot look to the person involved in the proceeding for his ten dollar statutory fee.

If the person whose commitment is sought is found to be sane or not subject to commitment, then the county, city or State has no right of recovery against such person, his estate or the person at whose request the commitment proceedings were instituted.

With respect to the question concerning the appointment of the Commonwealth's Attorney as counsel for the person whose commitment is sought, I am of the opinion that the Commonwealth's Attorney should not represent such person under any

circumstances. The Commonwealth's Attorney is an enforcement officer of his jurisdiction charged with the duty of looking after the interest of the State and the locality in which he serves. The obvious purpose of the statute under consideration is to assure competent legal counsel for the persons whose rights are involved. The Commonwealth's Attorney's duties as a public officer could conceivably be incompatible with the duties of counsel for the person whose commitment is being considered by the Court. The Commonwealth's Attorney cannot, in my opinion, represent such a person with any greater propriety than he could represent any other person who has been brought before a court in a proceeding where there is a duty upon the Commonwealth's Attorney to protect the interest of the State.

I believe the preceding comments constitute an answer to all the questions presented with the exception of your question (2).

It is stated in 28 American Jurisprudence, Vol. 28, Art. 12, at page 663, that—

“The procedure incidental to the determination of the sanity of a person is largely prescribed by local statute, and *must be conducted in the mode prescribed.*”

I can see no escape from the requirement that counsel be provided in such cases. The statute is mandatory. It may be reasonably assumed that if a person is denied counsel despite this mandatory provision, in habeas corpus proceedings, on that ground the person would be sent back for hearing in compliance with the statute.

The Court may delay the hearing until counsel can be obtained. It is well settled that in order to meet sudden emergencies and prevent either self-destruction or injury to other persons, an insane person may be restrained temporarily without any adjudication of his insanity, 28 A. M. J., Art 31, page 675. This is held as not a denial of due process of law—39 L. R. A., p. 353.

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**INSANE AND MENTALLY ILL—Commitment Proceedings—Counsel Mandatory for Commitment on Physicians' Certificate—Requirements of Article I, Chapter 3, Title 37 Incorporated in Article III. (128)**

February 5, 1959.

DR. HIRAM W. DAVIS, *Commissioner*  
Department of Mental Hygiene and Hospitals

This is in response to an inquiry from your office if persons admitted under Sections 37-103 to 37-106 for observation and subsequently committed under Section 37-109 as amended, require the representation by counsel in such commitment proceedings.

Section 37-109 as amended provides for commitment “as provided in Article 1 (Section 37-61 et seq.) of the chapter”. Section 37-61.1 as amended and Section 37-62.1, enacted in 1958, requires representation or appointment of an attorney to represent such person in such proceedings.

Accordingly, I am of the opinion that proceedings under Section 37-109 incorporate the requirements of Section 37-61 et seq., including Section 37-62.1 as amended, require representation by counsel of such person in such proceedings.

**INSANE AND MENTALLY ILL—Counsel Mandatory in Commitment Proceedings Regardless of Age of Person Proceeded Against. (44)**

August 18, 1958.

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

This is in reply to your letter of August 15, 1958, which reads as follows:

"I have been requested by Judge Ralph H. Ricardo, the Juvenile and Domestic Relations Court of Norfolk County to obtain your opinion in regards the following matter. The 1958 Legislature provided for the appointment of counsel for persons who are proceeded against for allegedly being mentally ill, epileptic, mentally deficient or inebriate pursuant to Section 37-62.1 of the 1950 Code of Virginia as amended. Judge Ricardo desires your opinion as to whether or not attorneys have to be appointed for children who are proceeded against as aforesaid."

In this connection we addressed a letter on August 15, 1958, to Dr. Hiram W. Davis, Commissioner, Department of Mental Hygiene and Hospitals, relating to this particular question. This letter reads as follows:

"I am in receipt of your letter of August 13, 1958, in which you request consideration of certain questions relating to commitment procedures posed in a letter addressed to you by Dr. Benedict Nagler, Superintendent of the Lynchburg Training School and Hospital, and a letter to Dr. Nagler from the Honorable Hugh Reid, Judge of the Juvenile and Domestic Relations Court of Arlington County. Principally, the questions presented involve the construction and application of Section 37-62.1 of the Virginia Code, which prescribes:

" '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.'

"I fully concur in Judge Reid's view that strict compliance with the provisions of the above quoted statute is required. With respect to Judge Reid's further observation that commitment forms currently in use do not contain an appropriate space to indicate compliance with the provisions of Section 37-62.1, I understand that necessary changes to rectify this deficiency in the forms has been made and that amended forms, soon to be issued by your department, contain appropriate language and spaces to be filled in by the judge or justice indicating compliance with the requirements of the statute in question.

"It appears that the terms of Section 37-62.1 of the Virginia Code require the appointment of counsel in appropriate instances without regard to the age or residence of the person whose commitment is sought. While I do not think that counsel so appointed need be actually present during every phase of the proceedings (for instance, when the physicians are conducting their professional medical examination of the individual in question), I believe that the statute contemplates effective representa-

tion by counsel, which would require counsel's presence during the hearing conducted by the commission."

You will observe that I expressed the opinion to Dr. Davis that Section 37-62.1 of the Code makes it mandatory that counsel be appointed in appropriate instances without regard to the age or residency of the person whose commitment is sought.

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**JAILS AND PRISONERS—Good Time for Jail Prisoner Controlled by § 53-151. (210)**

February 24, 1959.

HONORABLE R. BAIRD CABELL, *Judge*  
Civil and Police Court,  
Town of Franklin

This is in response to your letter of February 19, inquiring if Section 53-213, pertaining to persons sentenced to the State Prison System has any applicability to jail sentences of less than twenty days. As Section 53-213 pertains to persons convicted of a felony or ordered confined to the State Prison System, it would not apply to sentences to be served in local jails. Section 53-151, Code of Virginia, as amended, is the applicable section in the situation where the person is committed to jail. It also follows that by said Section 53-151, the person would have to complete the service of twenty days before it could be determined whether he had faithfully observed the rules and requirements which would qualify him for the ten day deduction. Reference is made to an opinion of this office dated November 24, 1950, to Trial Justice Shrader, contained in the 1950-51 Report of the Attorney General, page 170.

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**JAILS AND PRISONERS—Limitation of Confinement Where Fine and Costs Not Paid—Town Charter Provisions and Ordinances May Be Applicable. (215)**

February 27, 1959.

HONORABLE R. BAIRD CABELL, *Judge*  
Municipal Courts, Town of Franklin

This is in response to your letter of February 25, relative to the interpretation of Sections 19-309 and 15-77.66, Code of Virginia, as applicable to the two following situations:

"For example, let us assume that John Doe is convicted in the Civil and Police Court of the Town of Franklin for being drunk in public and is sentenced to pay a fine of \$5.00 plus court costs of \$5.75, a total of \$10.75. He is unable to pay his fine and costs. How much time must he serve for non-payment of fine and costs?

"Also, where one is convicted of violation of a town ordinance and is sentenced to serve 30 days in jail and pay court costs of \$5.75, and is unable to pay costs of court upon completion of service of his jail sentence, how much additional time must he serve for non-payment of costs of court?"

It is assumed that the offense in question No. 1 is a violation of State law, as no mention is made of an ordinance. Accordingly, Section 19-309 is applicable in the regular manner where such person has been sentenced to jail for non-payment of fine and until the cost is paid.

Likewise, Section 15-77.66 would not apply to the second situation for reason that no fine is imposed.

Moreover, Section 15-77.66 is not operative unless required charter provisions have been adopted. In addition, Section 19-309 does not apply to violations of municipal charters. The charter provisions of the town and the ordinances adopted under authority of the charter would be applicable.

In connection with the foregoing, you might desire to further discuss the matters, as they involve charter provisions, with your Town Attorney.

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**JAILS AND PRISONERS—Prison Labor—Reforestation—May Be Provided for Political Subdivisions or Agencies of State—May Not Be Furnished to Private Groups. (152)**

December 18, 1958.

HONORABLE R. M. YUELL, *Director*  
Division of Corrections  
Department of Welfare and Institutions

This is in reply to your letter of December 17, 1958, in which you request my opinion with respect to the authority of State Board of Welfare and Institutions to permit the use of prison labor in connection with the planting of trees on a watershed. You enclosed a copy of a letter from Mr. George W. Dean, State Forester, to Colonel Richard W. Copeland, Director of your Department, which reads as follows:

"One of our men who is project forester on the Back Creek Watershed project in Pulaski County advises me that he has had some conversation with the Superintendent of the Prison Farm at Mechanicsburg in Bland County concerning the possibility of some arrangement whereby landowners on the Back Creek Watershed could utilize crews of prisoners for tree planting. This watershed lies mostly west of Rt. 100 and immediately south of Little Walker Mountain. The situation is, briefly, that there are a number of landowners who are willing to participate in the plan which calls for the planting of 705 acres within the next three years on certain parts of the watershed provided they can secure the necessary labor to plant the trees. I am told that labor of this type is difficult to find in that vicinity, and our man tells us that he has understood that prisoners are sometimes used at a stated rate per hour or per day in gathering crops and perhaps other farm work in the Mechanicsburg vicinity.

"The labor involved in planting 235 acres per year for the next three years would amount to approximately 250 man days per year.

"The Virginia Division of Forestry has no part in this undertaking financially, but we are naturally anxious to see the planned improvements on this watershed project authorized under Public Law 566 carried out. Any arrangements or agreements concerning the prisoners themselves and the rate charged would be entirely between the individual landowners and your department. I am mentioning this to you on the possibility that some arrangements mutually satisfactory to you and to the landowners might be found. It would, of course, undoubtedly be more satisfactory to use free labor, but I understand that this has not worked out in that particular area."

I direct your attention to Sections 53-19.1 through 53-19.4 of the Code (Chapter 641, Acts of 1954), which authorize the furnishing of prison labor to any *political subdivision or agency of the State* for the purpose of reforestation, soil erosion control, water conservation, and the construction of public recreational areas.

If the watershed is a Watershed Improvement District established pursuant to Sections 21-112.1 through 21-112.21 of the Code of Virginia, such a District would be a political subdivision of the State as contemplated by Section 53-19.2 of the Code, and your Department would have authority to furnish such prison labor. The provisions of Code Sections 53-19.2, 53-19.3 and 53-19.4 would, of course, have to be followed strictly in this matter.

I am unable to find any statute which authorizes your Department to furnish prison labor to a group of farmers or other individuals. The arrangements would have to be made with the governing body of the Watershed Improvement District appointed pursuant to Section 21-112.9 of the Code.

#### JAMESTOWN FOUNDATION—Construction of Items in Appropriation Act. (144)

December 5, 1958.

HONORABLE L. M. KUHN, *Director*  
Division of the Budget

This is in reply to your letter of December 2, 1958, in which you request my opinion for the proper interpretation to be given to the language which is used in Items 718 and 719 of the Appropriation Act for 1958 in view of the provisions of § 3, Chapter 498 of the Acts of Assembly of 1958. Section 3 of Chapter 498 of the Acts of Assembly 1958 provides as follows:

"The revenues derived by the Foundation [Jamestown Foundation], from any source, including the sale, lease or right of use of property, but excluding any funds derived from gifts or donations shall be paid into the general fund of the State treasurer; and there is hereby appropriated out of these special revenues the sum of three hundred thousand dollars for each year of the biennium beginning July 1, 1958, for the expenses and operations of the Foundation. Any unexpended balance from the first year of the biennium shall be available to the Foundation for expenditure in the second year of the biennium."

Items 718 and 719 of the Appropriation Act of 1958 provide as follows:

"The appropriations herein made by Items 718 and 719 shall be paid only out of special revenues collected by the Jamestown Festival Park and paid into the State treasury, and not out of the general fund of the State treasury.

"Item 718	
"For land.....	\$18,700
"Item 719	
"For structures.....	16,300
<hr/>	
"Total for Jamestown Festival Park (special funds).....	\$35,000"

I am of the opinion that the language used in Items 718 and 719, quoted above, means that these appropriations may be paid out of special revenues collected by Jamestown Festival Park and paid into the general fund of the State treasury under the provisions of Chapter 498 of the Acts of Assembly of 1958; however,

that the appropriations made by Items 718 and 719 may not be paid out of the general fund of the State treasury derived from the collection of revenues and taxes by the State. In order for the appropriations made by Items 718 and 719 to become effective there must first have been paid into the general fund of the State treasury special revenues collected by the Jamestown Festival Park in an amount equal to or greater than any expenditures made under the authority of Items 718 and 719 of the Appropriation Act of 1958.

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**JUDGMENT—Foreign—Clerk May Not Docket Where Obtained Outside Territorial Limits of State. (295)**

May 5, 1959.

HONORABLE J. S. HOWARD  
Clerk, Circuit Court of  
Russell County

This is in reply to your letter of May 2, 1959, which reads as follows:

“I would like to have your opinion from your office on the question as to whether the Clerk of the Circuit Court in Virginia can docket a judgment rendered in the State of Tennessee.

“The defendant formerly lived in the State of Tennessee and the judgment was taken against him in that state while he was living in Tennessee. The judgment has been properly authenticated by the Clerk of the Court and the Judge of the Court in Tennessee.

“The question in my mind is whether the judgment of this kind should be docketed in this office under the full faith and credit clause of the Constitution.”

In my opinion the judgment in question may not be docketed in a Clerk's office in this State. Only those judgments which are obtained in federal courts and the courts of this State may be docketed in the Clerks' offices in Virginia. The judgment creditor named in a foreign judgment may sue upon that judgment. In this connection I refer you to Section 8-22 of the Code of Virginia.

In connection with the recordation of foreign judgments, I quote the following from Burk's Pleading and Practice, Fourth Edition, Section 351:

“Judgments of sister states and foreign countries have no force and effect *as judgments* outside of the territorial limits of the states or countries in which they are rendered, and, consequently, cannot be docketed and do not constitute liens in another jurisdiction where the land is situated. They may be the foundation of actions upon which judgments may be rendered, and full faith and credit will be given to the records of sister states of the Union, as provided by the Constitution, but that does not mean that they constitute liens outside of the State in which they are rendered, or can be enforced by execution or other process until a domestic judgment has been obtained on the foreign judgments. The manner of challenging foreign judgments is more appropriate to a treatise on conflict of laws or constitutional law.”

**JUSTICES OF PEACE—Compatibility of Office—Deputy Sheriff May Not Serve as.**  
(197)

February 13, 1959.

HONORABLE CARTER R. ALLEN  
Commonwealth's Attorney for the  
City of Waynesboro

This is in response to your letter of February 9, 1959, in which you ask whether a deputy sheriff who acts solely as a jailer may also be a justice of the peace. You direct my attention to the fact that this office has heretofore expressed the opinion that a deputy sheriff cannot also hold the office of justice of the peace (Opinions of the Attorney General, 1948-49, page 174), but that this opinion was based on § 16-1 of the Code of Virginia which has been repealed. (Acts of Assembly, 1956, Chapter 555.)

Section 15-486 of the Code is controlling herein. In the first instance, it specifically provides that a sheriff shall not hold any other public office, elective or appointive. The Supreme Court of Appeals of Virginia said in the case of *Board of Supervisors v. Lucas*, 142 Va. 84, 91, "In contemplation of law both organic and statutory, a sheriff and a deputy sheriff are one. A deputy can only come into being by virtue of the appointment of a sheriff."

Since a sheriff may not also hold the office of justice of the peace, it is manifest that his deputy cannot hold such office. You will note that paragraph 5 of § 15-486 expressly provides that a deputy sheriff may hold the office of town sergeant. This office has heretofore expressed the view that this section clearly implies that a deputy sheriff may not hold any office other than that of town sergeant. (Opinions of the Attorney General, 1955-56, page 156) Moreover, a deputy sheriff is charged with the duties and responsibilities of a sheriff, which duties are in some instances incompatible with the duties of a justice of the peace.

For the foregoing reasons, I am of the opinion that a deputy sheriff may not also hold the office of justice of the peace.

**JUSTICES OF PEACE—Compatibility of Office—Incompatible with Office of Local Registrar of Vital Statistics.** (195)

February 11, 1959.

HONORABLE ANNIE B. PAYNE  
Justice of the Peace for Rapidan District,  
Madison County

This is in reply to your letter of recent date in which you state that you have been requested by the Bureau of Vital Statistics to accept an appointment as local registrar of vital statistics in your magisterial district and you wish to know whether or not a justice of the peace may accept such an appointment.

While I am unable to locate any statute expressly forbidding a justice of the peace from acting as a registrar of vital statistics while retaining his office, I feel that the duties of the two offices are incompatible. A justice of the peace is a law enforcement officer, charged with various duties where complaints are made regarding the violation of any law. The registrar of vital statistics is a public officer, subject to the penalties prescribed in Article 1, Chapter 18 of Title 32 of the Code, such as removal from office for failure to discharge efficiently the duties of his office, and the penal provisions of Section 32-240 of the Code.

Under Section 32-339 of the Code the local registrar is charged with the strict and thorough enforcement of the vital statistics statutes. Under these statutes he is required to see that all physicians, midwives and undertakers perform the duties imposed upon them and to report violations. As justice of the peace he would be required, in case of violations, or alleged violations, upon proper com.

plaint, made by himself as registrar, to issue warrants for the apprehension of the person who has committed the violation. In such a case he would be disqualified from issuing the warrant. The justice of the peace could in the performance of his official duties be required to fix bail for an alleged violator of the statute. It is conceivable and not improbable, that occasion would arise when he would be required to act both in his capacity of registrar as an enforcement officer and in his capacity as a judicial officer. Even though it may be true that in such a case, the alleged violator could be brought before another justice of the peace or other judicial officer, yet such a procedure would only be necessary due to the conflict of duties attendant upon the two offices. Under Section 14-136 of the Code, a justice of the peace is entitled to a fee for issuing a warrant of arrest and an additional fee for admitting a person to bail and taking the necessary bond. The duty to act in such a capacity could arise in a case where the justice of the peace acting in his official capacity of local registrar, has discovered the alleged violation and has furnished the evidence upon which the complaint was based.

As stated in the case of *Perkins v. Manning* (Arizona), 122 Pac. (2) 857:

"The doctrine of incompatibility of public offices is a part of the common law and of great antiquity. Its correctness and propriety are so well established as to be assumed without discussion in practically every case which has arisen upon the subject. The question, however, is what constitutes incompatibility. Without citing and discussing the many cases upon the subject, we think they are practically unanimous in basing the doctrine on public policy. But the full scope of what public policy requires and the content of a general rule which will in all cases determine whether any two particular offices are compatible, has rarely, if ever, been determined by any court. The great majority of the reported cases take a somewhat narrow view of the question and determine the incompatibility by the duties of the respective offices rather than by the power of the incumbent to perform such duties. Following this principle, it is very frequently held that the only test is whether one office is subordinate to the other or has the power or duty of reviewing or regulating the conduct of the other. For example, it is held that the offices of mayor and alderman are incompatible when the mayor has a veto over the action of the alderman, and that the office of an auditor is incompatible with that of an office whose accounts he must audit. \* \* \*

As stated in the case of *Bryan v. Cattell*, Iowa Reports Vol. XV:

"Looking to the common law, we are of the opinion that the incompatibility must be such as arises from the nature of the offices, or their relation to each other." \* \* \* "The two offices are incompatible, where the holder cannot, in every instance, discharge the duties of each," citing *Rez v. Tizard*, 17 Eng. C. L. 193.

As recently as 1943, the Supreme Court of West Virginia declared that the weight of authority supports the conclusion reached in *Bryan v. Cattell*. See 24 S. E. (2d) 463.

It would seem clear that the justice of the peace and the local registrar could, at times, be required, in the exercise of the duties of their respective offices, to officially act in connection with the same case. This, of course, would create a situation that is not sanctioned by public policy.

I am of the opinion, therefore, that on account of the nature of the duties of the respective offices, and the jurisdictional power of a justice of the peace in case of a complaint against the registrar, the two offices are incompatible.

I regret that there has been a delay in answering your inquiry, but the resolution of the question required considerable research.

**JUSTICES OF PEACE—Fees—Civil Warrants—Flat \$1.25 Fee Total Compensation—Includes Where More than One Defendant Named in Warrant. (348)**

June 17, 1959.

HONORABLE RICHARD MARSHALL  
Justice of the Peace for the  
City of Newport News

This is in reply to your letter of June 15, 1959, which reads as follows:

"Title 14 Section 133 as rewritten by the 1958 Amendment allows a Justice of the Peace to deduct from the charge of \$3.00 a fee of \$1.25 for his services in the case.

"Question: Does this amount cover the total compensation allowed a Justice of the Peace for more than one defendant named in a warrant?

"Question: Does the fee of \$1.25 cover the amount allowed a Justice of the Peace for the issuing of a warrant where joint defendants live in separate jurisdictions?

"Note: The section before it was amended allowed a Justice of the Peace an additional fee for each defendant named in the warrant.

"Question: Can under Title 14 Section 133 as rewritten by the 1958 amendment allow more than one defendant in a warrant? (There is nothing said in Title 14 Section 133 as amended in reference to the number of defendants.)

"These questions have arisen and were referred to me by other Justices of the Peace for an answer. Your help in this matter will be greatly appreciated."

The terminal paragraph of Section 14-133, as amended, is as follows:

"The fees prescribed in this section shall be the only fees charged in civil cases for services performed by such judges and clerks, and when the services referred to herein are performed by justices of the peace such fees shall be the only fees charged by such justices for the prescribed services."

This provision, in my opinion, limits the fee to which a justice of the peace is entitled to \$1.25 in all civil cases. All of the provisions contained in this section prior to the amendment by Chapter 555, Acts of 1958, which were not included in the section as amended were repealed. Therefore, your first two questions are answered in the affirmative.

With respect to your third question, the answer is also in the affirmative. The statutory provisions with respect to the issuance and service of warrants contained in Title 39 of the Code are not affected by the amendment of Section 14-133.

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**JUSTICES OF PEACE—Jurisdiction to Issue Warrant—Appointed for City May Not Issue Warrants, Processes, Etc., for Adjoining Counties. (125)**

November 7, 1958.

HONORABLE W. FRANCIS BINFORD  
County Judge, Prince George County

This is in response to your letter of November 3, 1958, which reads in part as follows:

"Will you please advise me if a Justice of the Peace is appointed for a city which lies within the boundaries of two counties, can issue warrants, processes, etc., in the city for which he is appointed as well as the two counties adjoining."

This language from § 39-4 of the Code of Virginia is controlling herein:

"\* \* \* 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, \* \* \*."

I am, therefore, of the opinion that a justice of the peace for a city is not vested with the authority to exercise his power to issue warrants and processes in adjoining counties. This view is similar to that expressed in an opinion to Honorable J. T. Rogers, Justice of the Peace, on August 21, 1952 (Opinions of the Attorney General, 1952-53, page 133).

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**JUSTICES OF PEACE—Residence—Residents of City Not Qualified to Act as Justice for Adjoining County. (276)**

April 21, 1959.

HONORABLE WILSON SULLIVAN  
Justice of the Peace for the  
City of Fredericksburg

This is in response to your letter of April 18, 1959, inquiring if a justice of the peace for the city of Fredericksburg (presumably a resident thereof) could qualify to act as a justice of the peace for areas of Spotsylvania County more than one mile from the city limits.

I enclose a copy of an opinion to the Commonwealth's Attorney of Wise County dated August 4, 1955, contained in the 1955-1956 Report of the Attorney General at page 66, to the effect that a justice of the peace who is a city resident would not be eligible to be a justice of the peace for the county pursuant to the residence requirements contained in Section 15-487, Code of Virginia. Accordingly, it does not appear that a justice of the peace residing within a city could qualify to become a justice of the peace in the county's magisterial districts.

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**LAND SUBDIVISION ACT—Title to Dedicated Streets—Where Governing Body of County or Municipality Adopts Statutory Regulations Title Vests in Political Subdivision—Where Governing Body Fails to Act Title Vests in Commonwealth. (341)**

June 10, 1959.

HONORABLE G. GARLAND WILSON  
Attorney for the Commonwealth for the  
City of Radford

This is in reply to your letter of June 4, 1959, which I quote in full as follows:

"I am unable to reconcile Sections 15-792 and 15-798 of the Code of Virginia. The former vests title to streets, etc. in cities or counties, while the latter vests the same in the Commonwealth.

"May a city (less than 100,000 population) hold title to streets, etc. in accordance with the procedure set forth in Sec. 15-798 instead of the Commonwealth, as set forth in said statute? If not, how may such a city hold title to such streets?"

Article 2 of Chapter 23, Title 15 of the Code of Virginia of 1950, as amended, referred to as "Virginia Land Subdivision Act" codified the general provisions for the subdivision of land in the counties and municipalities of the State. For the powers conferred therein to become effective, the governing body of the counties or municipalities must adopt the regulations contemplated therein. Section 15-792, a portion of Article 2, provides, in part, as follows:

"The recordation of such plat shall operate to transfer, in fee simple, to the respective counties and cities in which the land lies such portion of the premises platted as is on such plat set apart for streets, alleys, public easements or other public use and to create a public right of passage over the same; \* \* \*."

Article 4 of Chapter 23, Title 15 of the Code, applies to the subdivision of lands in or near cities of less than one hundred thousand population when the provisions of Article 2 have not become operative due to the failure of the governing body to adopt the necessary regulation. Section 15-798, a portion of Article 4, provides, in part, as follows:

"The recordation of such plat shall operate to transfer, in fee simple, to the Commonwealth of Virginia such portion of the premises platted as is on such plat set apart for streets or other public use and to create a public right of passage over the same; \* \* \*."

I am, therefore, of the opinion that a city having a population of less than one hundred thousand may hold title to the streets, etc., provided on a subdivision plat only when such plat is recorded in accordance with the provisions of Article 2 of Chapter 23, Title 15 of the Code. Otherwise, title to such streets, etc., is transferred to the Commonwealth of Virginia by virtue of the provisions of Section 15-798 of the Code of Virginia.

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**LIBRARIES—County Library System—Endowment Income—Trustees May Use to Purchase Books—Must Be Deposited in County Treasury. (255)**

MR. JUNIUS W. PULLEY, *Chairman*  
Walter Cecil Rawls Library and Museum

April 2, 1959.

This is in response to your letter of March 26, 1959, relative to an endowment fund which is being established by Walter Cecil Rawls for the Walter Cecil Rawls Library and Museum. You ask the following question:

"The question is whether the income from the endowment money may be used by the Library Board of Trustees for library purposes, such as the purchasing of books, or does this income go into the county treasury to be used for operating expenses?"

This Library was established pursuant to the provisions of Chapter 2 of Title 42 of the Code of Virginia. The Board of Supervisors is required to establish such

a library if the majority of the electors vote in favor of the same in the election provided for by § 42-4 of the Code. The Board of Supervisors is required by § 42-10 to appropriate annually a sum sufficient to meet the minimum public library standards of the State Library Board. The State Library Board is required by § 42-28 to establish standards which must be met by local library systems in order to be eligible for State aid. Moreover, the Board of Supervisors is not required to appropriate any additional funds for the operation of the Library after the Board has appropriated a sum sufficient to meet the minimum standards of the State Library Board, and the Trustees of the Library cannot require the County to do so.

The expenditure of the money (interest) which the Trustees receive from the endowment is under the exclusive control of the Trustees (§ 42-9) and may be spent for "library purposes" (§ 42-10). These expenditures would be in addition to the money appropriated by the County for the purpose of qualifying for State aid.

I am of the opinion, therefore, that the income from the endowment fund may be used by the Trustees of the Library for library purposes *in addition* to the operating expenses necessary to meet the minimum standard fixed by the State Board. Of course, the term "library purposes," as used in the statute, includes the purchasing of additional books for the library to such extent as may be necessary in order to comply with the standards fixed by the State Library Board and would be included in the *operating expenses* required to be met out of the appropriation made by the governing body of the County. This, however, would not prevent the Trustees from spending the income from the endowment, or from any other donation, for additional books or equipment over and above that which is required by State Library Board standards. In other words, the income from the endowment may be spent for extra library purposes which would not be available under minimum standards.

The endowment income, however, must be deposited in the county treasury and paid out on the vouchers or orders of the Trustees of the local Board.

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#### LOTTERIES—Punch Board Constitutes. (70)

September 15, 1958.

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

This will reply to your letter of September 10, 1958, in which you inquire whether or not a certain sales promotional program constitutes a lottery in violation of Virginia law. As described in your communication, the promotion in question is of the following character:

"A small card blocked off into denominations of \$1.00, \$1.50, \$2.00 and \$2.50, totaling \$50.00 is presented by an automobile service station to each of its customers. The card contains a seal under which there is printed an amount from \$.50 to \$5.00. Each time the customer makes a purchase, the attendant punches appropriate blocks on the card to equal the amount of the purchase. When the customer has purchased \$50.00 worth of products from the service station and all of the blocks totaling this amount have been punched on the card, the seal is removed by the service station attendant in the presence of the customer, and the amount showing under the seal is given to the customer in cash."

As you are aware, the Supreme Court of Appeals of Virginia has held that an activity constitutes a law when the elements of prize, chance and consideration

combine, and as you already point out in your letter, the elements of prize and consideration are clearly present in the scheme concerning which you inquire. I am constrained to believe that the element of chance is also sufficiently present to bring the venture under consideration within the condemnation of the Virginia anti-lottery laws. Although it is true that a customer knows in advance that he will receive a cash payment of at least fifty cents, the question of whether or not he will receive a greater amount is determined entirely by chance. I am, therefore, of the opinion that the promotional plan in question would constitute a lottery under Virginia law.

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**LOTTERIES—Radio Station Bumper Stickers—Registered Owners of Cars Eligible to Write Slogan if License Number Announced and Car Bears Sticker—Lottery if License Numbers Announced Are Selected by Chance. (244)**

March 24, 1959.

HONORABLE EARL A. FITZPATRICK  
Member of the Senate

This will reply to your letter of March 23, 1959, in which you inquire whether or not a certain program proposed to be used by a local radio station would constitute a lottery under Virginia law. Section 18-301, Code of Virginia (1950) as amended. From your communication it appears that the venture in question would be conducted in the following manner:

“Announce several license numbers each day stating that the registered owners of these cars have been selected to play the Bumper Game for the current week. Give a deadline later the same week for all players to write a safety slogan to the station. Judges will be appointed to judge the best slogans and select several winners based on originality, sincerity and aptness of thought. There could be a first, second, third and possibly a fourth prize each week for the best four slogans each week in the opinion of the judges. License numbers would be selected from cars displaying the radio station's Bumper Stickers and observing rules of safe driving. The Bumper Sticker would be used only as an indication of the driver's willingness to play the game.”

As you are aware, a lottery exists whenever the elements of prize, chance and consideration combine. This office has consistently ruled that *bona fide* slogan contests, in which entries are considered upon the basis of objective criteria such as originality, aptness and utility do not constitute lotteries within the prohibition of Section 18-301 of the Virginia Code. See, Report of the Attorney General (1954-1955) p. 115; (1955-1956) p. 124. The entry receiving an award or prize in such contests is not determined by chance, thus one of the constituent elements of a lottery is lacking. In light of these rulings, I am of the opinion that the program concerning which you inquire would not constitute a lottery under Virginia law if the license numbers which are selected to determine the identity of those individuals eligible to participate in the contest are not selected by chance. However, if such license numbers are determined by chance, I am constrained to believe that the enterprise in question would fall within the scope of the Virginia anti-lottery laws. In this connection, I am forwarding to you an opinion of this office, dated December 20, 1948, to the Honorable Archer L. Jones, Commonwealth's Attorney for the City of Hopewell, in which a situation of this latter character was considered. See, Report of the Attorney General (1948-1949) p. 140.

If such an element of chance does exist in the management of the program under discussion, it might possibly be eliminated by permitting all persons having the radio station's Bumper Stickers to submit slogans to be judged upon the basis mentioned above.

**MEDICINE—Board of Medical Examiners—Prescribing and Casting Molded Shoes Is Practice of Chiropody. (Podiatry). (74)**

September 17, 1958.

HONORABLE ALBERT PINCUS  
Member Board of Medical Examiners

This is in response to your recent letter which reads, in part, as follows:

“As a member of the Board of Medical Examiners of Virginia representing the Podiatrists, I am writing to ask your opinion as to whether the casting and prescribing of molded shoes is within the practice of chiropody (podiatry) as defined in Section 54-273 of the Code of Virginia.”

You enclosed certain literature containing information relative to the casting and prescribing of molded shoes and the unfortunate results of the same when attempted by untrained persons. It would appear that the use of molded shoes is an expensive method of treating certain ailments of the foot. This type of shoe is “made to order,” and fits the individual’s foot in a manner entirely different from the fitting of an ordinary shoe. In order to secure the full benefits of this type of shoe, it is necessary that a plaster cast be made of the foot. This operation entails certain dangers when such cast is made on a patient who is a diabetic or is suffering from circulatory disorders of the lower extremities.

Section 54-273 (8) of the Code of Virginia, as amended, reads as follows:

“When used in this chapter unless expressly stated otherwise:

“(8) ‘*Practice of chiropody (podiatry)*’ means the medical, mechanical and surgical treatment of the ailments of the human foot, but does not include amputation of the foot or toes, nor the use of other than local anesthetics.”

I am constrained to believe that the fitting of such a shoe, as heretofore described, comes within the definition set forth above, in that such fitting involves the mechanical treatment of the human foot. I am, therefore, of the opinion that the casting and prescribing of molded shoes comes within the definition of the practice of chiropody (podiatry), as set forth in § 54-273(8) of the Code.

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**MEDICINE—Board of Medical Examiners—Unlicensed Physician—May Be Employed by Hospital as Technician. (2)**

July 7, 1958.

HONORABLE EDWARD L. BREEDEN, JR.  
National Bank of Commerce Building

This is in reply to your letter of July 3, 1958, relating to my opinion dated June 30, 1958 to Mr. W. L. Beale of Norfolk General Hospital concerning the employment of Dr. Carroll at said hospital.

You state that “Mr. Beale has advanced the thought that Dr. Edward D. Levy, who is the clinical pathologist for the Hospital, could employ Dr. Carroll as a technician and, assuming that this would not offend Dr. Carroll’s sensibilities, we could get along with such method of handling the surgical pathology based upon Dr. Levy’s having full responsibility and signing all reports.”

I am constrained to agree with the suggestion that Dr. Carroll may be employed as a technician provided that the Board of Medical Examiners grants this per-

mission in the manner allowed under Section 54-276.7 of the Code, and subject to the restrictions and conditions which the Board may prescribe. In this situation Dr. Carroll may discharge such duties and render such services as the Board may specify.

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**MEDICINE—Nurses—Board of Nurse Examiners May Treat Names of Unsuccessful Candidates as Confidential Information. (129)**

November 7, 1958.

MISS MABEL E. MONTGOMERY  
Secretary-Treasurer  
State Board of Nurse Examiners

This is in reply to your letter of November 7, 1958, in which you request my opinion with respect to the policy of your Board of considering the results of candidates on the licensing examination as a confidential matter between the Board, the candidates and the School of Nursing from which she graduated. You state that you have refused to furnish the press with the names of those applicants who failed to pass the examination, but that you do release the names of the successful candidates for publication.

The statutes relating to these examinations are silent with respect to this question. However, Section 54-340 of the Code provides that "a record of all proceedings of the Board, *including a register of the names of all nurses duly registered under this article*, which shall be open at all reasonable times to public inspection."

I am of the opinion that the Board is only required to permit public inspection of the record prepared by the secretary under the above numbered section of the Code.

While there is no statute expressly forbidding the Board from releasing the names of unsuccessful applicants, I am of the opinion that the Board, in its discretion, may treat such information as confidential. I understand that this is the procedure followed by the State Board of Bar Examiners.

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**MEDICINE—Suspension of License of Chiropractor—Conviction of Procuring Abortion Automatic Suspension—Crime Involving Moral Turpitude. (135)**

November 19, 1958.

HONORABLE K. D. GRAVES  
Secretary-Treasurer  
Board of Medical Examiners

This is in response to your letter of November 14, 1958, in which you enclose a judgment order of conviction of the Corporation Court of the City of Norfolk, Virginia, wherein Chiropractor Harry S. Bybee, Jr., was convicted of "unlawfully encourage (sic) and the prompt procuring of an abortion and miscarriage in violation of § 18-68 of the Code of Virginia of 1950, as amended."

You ask the following question:

"Will you please inform us whether this offense comes under Section 54-320(1) whereby his license would be automatically suspended after compliance with the procedure specified in Section 54-321.2."

In order to come within the provisions of § 54-317.1(1) of the Code of Virginia the party in question must be convicted of a felony or of a crime involving moral

turpitude. Dr. Bybee was convicted of a misdemeanor, and the problem presented is whether or not such crime is one involving moral turpitude. This matter has not yet been before the highest court of this Commonwealth, but, while the question is not entirely free from doubt, I am of the opinion that it is a crime involving moral turpitude. (See *Kemp v. Board of Medical Supervisors*, 46 App. D. C. 173, 181.) I am of the further opinion that you should proceed in accordance with the provisions of § 54-321.2 of the Code of Virginia.

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**MENTAL HYGIENE AND HOSPITALS—Capital Outlay Contract—Architectural Services—Reference to “Other Buildings at Present Site” Includes All Other Such Buildings. (288)**

April 29, 1959.

DR. HIRAM W. DAVIS, *Commissioner*  
Department of Mental Hygiene and Hospitals

This is in response to your letter of April 27, 1959, inquiring if the contract for architectural services dated April 18, 1946, obligates the State Hospital Board to employ such architectural firm for all remodelling work at the “present site”, or only requires the board to employ the architects for remodelling the buildings mentioned.

The pertinent provisions of the April 18, 1946, contract are as follows:

“WHEREAS, the Owner, in the execution of a single project at the Western State Hospital, Staunton, Virginia, and at New Site, near Staunton, Virginia, contemplates the construction of the following project units, to-wit:

“Remodeling of the Wheary Building and Alterations and Additions to other buildings at present site, as directed.”

The contract provided for the “remodelling of the Wheary Building and alterations and additions to other buildings at present site, as directed.” Accordingly, the contract covers alterations and additions to all other buildings at the present site. The “as directed” pertains to the alterations and additions to the buildings and would in no way appear to pertain to the selection of the architects to perform such services.

In accordance with the foregoing, it is the opinion of this office, as set forth in a former opinion, dated March 16, 1953, to Dr. Barrett, that the said contract of April 18, 1946, is still in effect and cannot be terminated without a mutual consent or for some breach thereof. Moreover, all remodelling work at the present site is covered by such contract in accordance with the foregoing.

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**MENTAL HYGIENE AND HOSPITALS—Charitable Adoption Agency Responsible for Expenses of Child Admitted to State Colony from Agency. (55)**

September 2, 1958.

HONORABLE HIRAM W. DAVIS, *Commissioner*  
Department of Mental Hygiene and Hospitals

This is in reply to your letter of August 26, 1958, in which you enclosed a communication from Dr. Ennion J. Williams, President of the Children's Home Society of Virginia. Dr. Williams states that it is the function of that Society to receive young children for the purpose of placing them for legal adoption. He states

further that the Society could operate with more flexibility if it could turn over to the Department of Mental Hygiene and Hospitals such children as are mentally retarded. A portion of his letter reads as follows:

"Each child is received for a brief period of observation and then legal steps are taken to transfer full custody from the natural parents to the Society if it appears that the child is within the normal range and presumably adoptable. The transfer of custody may be a Juvenile Court proceeding but in most cases is a direct release and commitment from the parent to the Society. It is believed that this is irrevocable."

The question which you ask is whether the Society would have to reimburse the Commonwealth for the care of any such child admitted to a State Colony operated by the Department of Mental Hygiene and Hospitals.

The answer to your question as to the liability of the Children's Home Society of Virginia for the support of such children as are admitted to a Colony lies in the interpretation of § 37-125.1 of the Code of Virginia, which reads as follows:

"Any person who has been or who may be committed or admitted to any hospital for the mentally-ill or colony for the epileptic of the mentally-deficient and any person admitted or committed for drug addiction or the intemperate use of alcohol, or the estate of any such person or *the person legally liable* for the support of any such person, shall be liable for the expenses of his care, treatment and maintenance in such institution. Such expenses shall not exceed the actual per capita cost of maintenance, or the sum of sixty-five dollars per month, whichever amount is the lesser, and shall be fixed by the Department of Mental Hygiene and Hospitals, but in no event shall recovery be permitted for amounts more than five years past due." (Italics supplied.)

The term "persons" as defined in § 1-13(19) includes corporations for civil purposes (*Sun Life Assurance Company v. Bailey*, 101 Va. 443, 44 S. E. 692). The intent of the Legislature is clearly expressed by the italicized language in the above-quoted section, 37-125.1, that the "person legally liable" for the support of a child being cared for in a State Colony shall pay the expense of the maintenance of such child. This broad language includes the Children's Home Society inasmuch as they have full custody of the child. I am, therefore, of the opinion that the aforementioned Society would be liable for the cost of the maintenance of any children who are in their custody and who are admitted to a State Colony.

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**MENTAL HYGIENE AND HOSPITALS—Commitment—Fees and Expenses—  
§ 37-75 Does Not Authorize Fees to Salaried Officers—Mileage is Payable to  
Salaried Officers. (268)**

April 16, 1959.

HONORABLE J. FORESTER TAYLOR  
Judge, Juvenile and Domestic Relations Court of  
City of Staunton

This is in reply to your letter of April 11, 1959, which reads as follows:

"Section 37-75 of the 1950 Code provides for the fees and expenses of commitment to mental hospitals. This section provides that the justice shall receive a fee of \$5.00 for his services, and shall receive mileage also.

I should like to know whether you consider the collection of the fee and mileage to be mandatory, and if collected by a justice who receives an annual salary, should the fee and mileage be retained by the justice or paid into the treasury of the city?"

Under Section 37-75 of the Code, the justice of the peace is entitled to a fee of five dollars plus mileage. This provision, except in cities where a justice of the peace may be compensated on a salary basis, is, in my opinion, a mandatory requirement. This section also provides for the payment of a fee of ten dollars to a special justice appointed under Section 37-61.2 of the Code. The maximum compensation which may be retained by a justice of the peace is subject to the provisions of Section 14-156 of the Code, and any excess shall be paid in accordance with the provisions of Section 14-150 of the Code.

Section 37-75 of the Code does not, in my opinion, authorize the payment of a fee to salaried officers. However, I feel that a salaried officer would be entitled to mileage.

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**MENTAL HYGIENE AND HOSPITALS—Donations for Comfort of Patients at Eastern State—Installation and Fencing of Playground Area Not Proper Expenditure of Such Funds. (260)**

April 8, 1959.

DR. HIRAM W. DAVIS, *Commissioner*  
Department of Mental Hygiene and Hospitals

I am in receipt of your letter of April 6, 1959, in which you state that, in 1951, Mr. John D. Rockefeller, Jr., donated \$2,500.00 to Eastern State Hospital to provide "comforts for patients not provided in the budget," and that, in 1954, Mr. Winthrop Rockefeller made a gift of one hundred shares of stock of the Standard Oil Company of California to Eastern State Hospital, to be used "for little extra things outside of the Hospital budget which would add to the comfort and happiness of the patients." You advise that the present value of both gifts exceeds \$8,000.00, and you inquire whether or not these funds may properly be used for the purchase of equipment or the installation of a fenced-in playground area for patients in Eastern State Hospital.

I am of the opinion that your inquiry must be answered in the negative. I am constrained to believe that the installation and equipping of a fenced-in playground area would not constitute "comforts for patients" or "little extra things \* \* \* which would add to the comfort" of patients, within the ordinarily accepted meaning of the quoted phrases.

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**MENTAL HYGIENE AND HOSPITALS—"Legal Resident"—Includes Alien Who Has Lived in Virginia for One Year, Etc. (246)**

March 26, 1959.

DR. HIRAM W. DAVIS, *Commissioner*  
Department of Mental Hygiene and Hospitals

This is in reply to your letter of March 25, 1959, in which you request my opinion as to whether or not an alien who has not become a citizen by naturalization may be termed a resident of this State.

Section 37-1.1 (6) of the Code defines "Legal resident" as that term is used in Title 37 pertaining to the Department of Mental Hygiene and Hospitals as "any person who *has lived* in this State for a period of one year without public support for himself or his spouse or minor child."

A person may be a resident of this State without being a citizen of the United States.

The definition which I have quoted controls. One is not required to be a citizen within the scope of Section I of the Fourteenth Amendment to the Federal Constitution in order to establish entitlement under the provisions of Title 37 of the Virginia Code.

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**MENTAL HYGIENE AND HOSPITALS—Patients Boarding with Private Families—Person Legally Liable Must Pay Charges into General Fund—May Not Make Direct Payments to Persons Boarding Patients. (239)**

March 19, 1959.

HONORABLE A. E. H. RUTH  
Director  
Department of Mental Hygiene and Hospitals

This is in reply to your letter of March 18, 1959, which reads as follows:

“Section 37-128 of the Code of Virginia permits the Superintendent of a State hospital or colony to place, under specified circumstances, patients to board in private families at the expense of the Commonwealth.

“In many such instances, the patient or the patient's estate or legally liable relative is financially able and willing to pay for the board of such patients in private families.

“The State Hospital Board has instructed me to request an opinion of your office as to whether or not it would be legally proper to permit direct payment for the board of such patients by the patient or the patient's estate or the legally liable relative.”

Under Section 37-125.1 your Department is entitled to charge the estate of a patient or the person legally liable for his support for his care, treatment and expense, subject to the limitations provided therein. Such charges when collected must be paid into the general fund of the State treasury, pursuant to Section 37-125.2. Under Section 37-128 it is specifically provided that the expenses incident to the board and lodging of a patient shall be “at the expense of the Commonwealth,” not to exceed the amount per week fixed by this section.

Any arrangement made with a person willing to board the patient must, of course, be a contract between such person and your Department. The statute, in my opinion, does not contemplate that such an arrangement as you suggest may be made. This would lessen the control your Department should have over the collection of the funds payable under Section 37-125.1 and would make it more difficult to determine the accountability of your Department for such funds. The procedure established by these statutes, in my judgment, requires that all funds collected under Section 37-125.1 shall be paid into the general fund and all expenses for board and lodging shall be paid on vouchers issued by your Department.

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**MENTAL HYGIENE AND HOSPITALS—Personal Property of Former Patients—May Not Be Sold at Auction. (102-A)**

October 23, 1958.

MR. ALFRED E. H. RUTH, *Director*  
Department of Mental Hygiene and Hospitals

This is in reply to your letter of October 22, 1958, which reads as follows:

"Section 37-50 of the Code of Virginia provides for the disposition of unclaimed funds of former patients of the several institutions of the Department of Mental Hygiene and Hospitals. I find no statutory provision for the disposition of personal property of former patients left at the hospital under similar circumstances.

"Would it be proper to sell such personal property at public auction after reasonable efforts to find the person or persons entitled to such property and to use the proceeds of such sale for the benefit of the patients of the hospital or colony? Would it be proper to likewise dispose of unclaimed personal property found within the hospital grounds in cases where the lawful owner cannot be found?"

I am of the opinion that the questions raised by you must be answered in the negative.

Section 53-312.1 authorizes such a disposition of personal property unclaimed by inmates of a penal institution as defined in Section 53-9 of the Code. This provision, however, does not appear to be broad enough to include patients who have been confined in a State institution under the provisions of Title 37 of the Code.

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**MENTAL HYGIENE AND HOSPITALS—Property of Eastern State Hospital in Williamsburg May Be Disposed of by Board and Proceeds Utilized. (49)**

August 22, 1958.

HONORABLE ALFRED E. H. RUTH  
Director of Mental Hospitals  
Department of Mental Hygiene and Hospitals

This is in reply to your letter of August 18, 1958 in which you request my opinion as to whether or not Chapter 208 of the Acts of Assembly of 1938 is still in full force and effect. This Act authorizes the State Hospital Board and the Governor of Virginia to sell and convey from time to time all or any part of the property of the Eastern State Hospital in the City of Williamsburg, and to use the money received therefrom for the purchase of certain lands in James City County and for the construction of necessary buildings on the land in James City County.

I can find no record of action by the General Assembly since Chapter 208 of the Acts of Assembly of 1938 was approved which amends or repeals Chapter 208. The only Act of the General Assembly which in any manner refers to Chapter 208 of the Acts of 1938 is Chapter 248 of the Acts of Assembly of 1944, which authorizes the Governor and the State Hospital Board to convey to the College of William and Mary as a gift certain property of Eastern State Hospital in the City of Williamsburg and the County of James City. This Chapter 248 contains the following provision:

"Section 3. This act shall not be construed to limit or otherwise affect the power and authority conferred upon the Governor and the State Hospital Board by chapter two hundred eight of the Acts of Assembly of nineteen hundred thirty-eight, approved March nineteenth, nineteen hundred thirty-eight, it being intended that the power and authority herein conferred shall be an additional grant of power applicable only to the property described in this act."

I am of the opinion that Chapter 208 of the Acts of Assembly of 1938 remains in full force and effect and, therefore, the State Hospital Board and the Governor of Virginia may dispose of property of the Eastern State Hospital described in that Act in the manner prescribed by the Act.

**MENTAL HYGIENE AND HOSPITALS—State Hospital Board—Members Immune from Civil Liability for Negligence of Physicians Employed by Department. (118)**

November 6, 1958.

HONORABLE HIRAM W. DAVIS, *Commissioner*  
Department of Mental Hygiene and Hospitals

This is in reply to your letter of October 31, 1958, in which you request my opinion as to whether or not the members of the State Hospital Board could be held liable civilly for damages resulting from negligent acts of physicians employed by the Department of Mental Hygiene and Hospitals, and also whether members of the State Hospital Board who serve on the sterilization committees may be held liable for civil damages in suits arising over the sterilization of patients of State hospitals and colonies.

I am of the opinion that the members of the State Hospital Board cannot be held liable, individually, for civil damages resulting from the negligent acts of a physician employed by the Department of Mental Hygiene and Hospitals.

With regard to your second question, § 37-245 of the Code of Virginia provides that neither the superintendents nor any other person legally participating in the execution of the provisions of the chapter of the Code relating to sterilization of inmates shall be liable either civilly or criminally on account of such participation.

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**MENTAL HYGIENE AND HOSPITALS—Surplus Property—Board May Declare Standing Timber Surplus and Sell Separately. (291)**

May 1, 1959.

HONORABLE THOMAS N. PARKER, JR.  
Member, House of Delegates

This is in reply to your letter of April 29, 1959, relating to Sections 37-34.2:1 through 37-34.2:7 of the Code as enacted by Chapter 556 of the Acts of Assembly of 1958. You state that the State Hospital Board owns certain real estate upon which there is standing timber, and you request my opinion as to the authority of the Board to sell surplus timber separate and apart from the sale of any of the land on which the timber is located. You further state that it is proposed in the sale of the Elko tract that bids be received for the purchase of the timber as well as for the purchase of the land without the timber. It is further stated that at the Petersburg Training School and Hospital it is contemplated that the standing timber alone be declared surplus and sold.

With respect to the Elko property, I can see no reason why the Board may not offer the timber for sale separate from the land on which the timber stands. This could be offered separately with the understanding that it will also be offered as a whole, the confirmation depending on which method produces the best results. The question is one of policy, depending upon the most advantageous method of sale. The Act under which authority to make the sale is granted does not, in my opinion, require that the offers of sale may not be made in such manner that the sale of the timber may be separate from the sale of the land exclusive of the timber. Of course, it will be necessary that the advertisements be carefully worded so as to meet the conditions attached to the cutting and removal of the timber so that, in the event there should be separate purchasers, each would be completely aware of the rights of each other with respect to the matter.

With respect to the Petersburg property, the question is more difficult. I am constrained, however, to the opinion that if the Board feels that the timber located on the property has reached the state of static or diminishing value, it may, upon the theory that the land exclusive of the timber may be useful for hospital purposes, but that the timber will not be needed, declare the timber surplus and sell it separately. The Act, I think, contemplates that the Board may for any of the reasons set forth therein declare any property it owns as surplus, and sell the same.

**MENTALLY ILL—Duty of Justice When Committed—Should State Whether Patient Under Criminal Charge—Charge No Bar to Commitment. (225)**

March 4, 1959.

HONORABLE WILLARD J. MOODY  
Member, House of Delegates

This is in reply to your letter of March 3rd in which you state that a person is confined in the Portsmouth city jail and serving a sentence for writing bad checks and that there are warrants outstanding against this person in other areas of the State for a similar offense.

You state that the question has been raised as to the sanity of this person and that the local justice is of the opinion that since there are charges pending against him in other communities, he does not have authority to have the person committed as an insane person under the provisions of Chapter 3 of Title 37 of the Code. It appears that a form which is used by the local court when committing persons to mental institutions contains a statement to the effect that said person "is not under criminal charge."

You present two questions as follows:

- (1) Is the judge required to use a form containing the above language, and
- (2) If such language is required in the commitment papers you would like to have an interpretation of the same.

In my opinion, the fact that there may be other criminal warrants outstanding against the person suspected of being insane would not in any way preclude the justice from holding a hearing and making a determination with respect to such person's mental condition under the procedure established in the above chapter. I can find nothing in the statutes which would justify the failure to commit an insane person to a mental institution on such grounds. Obviously, if the committing justice is in position to state that such person is not under a criminal charge, he should do so. Likewise, if the committing justice has knowledge of other criminal warrants outstanding against this person he should include that information in the committal papers and strike out the phrase to which you referred. I think that the purpose of the phrase referred to is revealed by Sections 37-93 and 37-94 of the Code. Section 37-93 provides in part as follows:

"When any person, confined in the department for the criminal mentally-ill at the proper hospital and charged with crime subject to be tried therefor, or convicted of crime, shall be restored to sanity, the superintendent shall give notice thereof to the judge by whose order he was confined, and delivered him in obedience to the proper precept; \* \* \*"

In Section 37-94 of the Code, it is provided that—

"When any person *not* charged with or convicted of crime, confined in a hospital or a jail under the provisions of this title shall be restored to sanity, the superintendent or the court shall discharge him and give him a certificate thereof. \* \* \*"

It would seem clear from these two sections of the Code that the committing officer should fill out the form of commitment so as to reveal the actual facts with respect to whether or not there are any warrants outstanding against this person.

**MILK COMMISSION—Assessments for Expenses of Local Boards—Paid on All Milk Handled and Sold—Milk Sold on Federal Reservations. (345)**

June 12, 1959.

MR. A. GORDON WILLIS, *Chairman*  
State Milk Commission

This is in reply to your request for an official opinion by your letter of June 9, 1959, stating that:

"A question has been raised by the Tidewater Local Milk Board as to whether or not the assessments provided for in Section 3-377 of the Code of Virginia of 1950 must be paid on milk handled by distributors and sold by producers where such milk is sold to Federal reservations physically located in Virginia.

"The Commission has construed this Section as requiring that the assessment on milk so utilized be paid.

"It is respectfully requested that you render an official opinion as to whether or not an assessment must be paid by distributors who handle milk and producers who sell it for use on Federal reservations physically located in Virginia."

With regard to the question which you have raised, I refer you to two former opinions of this office on the interpretation of Section 3-377 of the Code of Virginia of 1950—dated June 8, 1949, unreported, the other dated July 29, 1953, reported on Page 126 of the "Report of the Attorney General" from July 1, 1953, to June 30, 1954. (Copies Attached.)

Subsequent to the rendering of these opinions Section 3-377 of the Code of Virginia of 1950 was before the 1958 General Assembly of Virginia and during that session was amended by that body. Insofar as here germane that section reads as follows:

"Section 3-377. Assessments for expenses of local boards; bonds of employees.—The expenses of the milk board, including salaries and the per diem of such personnel as the board finds it necessary to employ properly to carry out its functions under this article, and including the assessments levied by the Commission, shall be met by an assessment of not over three cents per hundred pounds of milk, or cream (converted to terms of milk) handled by distributors and not over three cents per hundred pounds of milk, or cream (converted to terms of milk) sold by producers \* \* \*"

Inasmuch as the above quoted portion of Section 3-377 of the Code of Virginia of 1950, as amended, does not provide for any exception or differentiation as to the utilization of milk or cream handled by distributors and sold by producers, I am of the opinion that the assessment must be paid on all milk handled by distributors and sold by producers, including that utilized on Federal reservations physically located in Virginia.

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**MILK COMMISSION—Local Milk Boards—Expenses, Personnel, Budget of Controlled by Commission. (3)**

July 8, 1958.

HONORABLE SIDNEY C. DAY, JR.  
Comptroller

This is in reply to your letter of July 3rd, which is in part as follows:

"Section 3-377 of the Code of Virginia states in part as follows:

"The expenses of the milk board, including salaries and the per diem of such personnel as the board finds it necessary to employ properly to carry out its functions under this article, and including the assessments levied by the Commission, shall be met by an assessment of not over two cents per hundred pounds of milk or cream \* \* \*."

"You will note that the above section designates the source from which funds to pay the expenses of the local boards are obtained and apparently gives the local boards authority to employ such personnel as may be necessary to carry out the duties and responsibilities placed on the boards.

"There is a question in our minds as to the authority for establishing salary scales and per diem applicable to local board personnel. In order to clarify questions that have been raised, we seek your opinion on the following questions:

"1. Do the local boards have the authority to set salary scales and per diem? If not, who does?

"2. If the local boards do have the authority to set salaries and per diem, what are the limitations?"

The local milk boards are authorized and established pursuant to Sections 3-375 and 3-376 of the Code, which read as follows:

"3-375: For the purpose of securing the benefits of this article, in any market area, the producers and distributors and producer-distributors in that market area shall establish a milk board of five members to carry out the provisions of this article in conjunction with the Commission."

"3-376: On each local milk board there shall be two representatives of the producers supplying milk to the market, one of whom shall be named by the producers' co-operative marketing association operating in the market, except that in markets where the producers' co-operative marketing association handles the selling of fifty per centum or more of the milk, the association shall have the right to name both representatives of the producers on the milk board. There shall be two representatives of the distributors operating in the market. In markets where producer-distributors handle fifty per cent or more of the milk used in the market the Commission shall determine the representation of the producers, the producer-distributors and distributors on the milk board on a basis fair to all parties.

"The Commission shall appoint the fifth member of the milk board to represent the consumers and the public interest, who shall serve as chairman of the board. The representative of the consumers and the public interest shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom."

Item 286 of the Appropriation Act for 1958-60 appropriates to the Milk Commission a sum of money to be used by the Commission for expenses of the local milk boards.

The local milk boards, established pursuant to the provisions of the Code cited above, are within the framework of the Milk Commission, and, as provided by Section 3-378 of the Code, may perform such functions as are delegated to them by the Commission. Since under the Appropriation Act the funds available for the expenses of the local milk boards have been appropriated to the Milk Commission, it follows that the Commission has authority, subject to the control vested in the Divisions of the Budget and Personnel, to determine the manner in which

the appropriation may be expended. It is the duty of the Commission to prepare the annual budget for the payment of salaries and other expenses. The funds for this budget are raised by the assessments made by the Commission and the local boards pursuant to Sections 3-373 and 3-377 of the Code.

Upon consideration of the provisions of the statutes cited and of the Appropriation Act, I am of the opinion that the Milk Commission has superior authority as to the administration of the duties of the local boards, especially with respect to the control of the compensation and classification of the employees and personnel appointed by the local board. The Milk Commission may, under Section 3-378 of the Code, delegate such authority to the local board as it may consider in the best interests of the overall operation of the State Milk Control Act.

The Milk Commission, of course, is subject to the control exercised by the Division of the Budget and to the provisions of the State Personnel Act with respect to the classification of positions and the salary scale.

It is my opinion, therefore, that the authority to set the salary scales and per diem of the local boards is vested in the Milk Commission.

In view of my answer to your question 1, it is not necessary to discuss question 2.

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**MOTOR VEHICLES—Abandoned Vehicles—Method of Disposition Explained—Commonwealth's Attorney Has no Duty to Dispose of but May Be Engaged by Commissioner of Motor Vehicles. (136)**

November 20, 1958.

HONORABLE VIRGIL H. GOODE  
Commonwealth's Attorney of Franklin County

This is to acknowledge receipt of your letter of November 13, 1958, in which you request my opinion on the following question:

"If a vehicle is abandoned as prescribed under Section 46.1-2, and at the request of the officer in charge, the vehicle is moved and stored at a garage, should the officer in charge of the investigation report this matter to the Commonwealth's Attorney as provided under Section 19-131 of the Code of Virginia to determine what disposition should be made, if any, of said abandoned vehicle.

"If the Commonwealth's Attorney is not the legal adviser, who is?"

I agree with you that the Commonwealth's Attorney should be notified when any vehicle is found abandoned on the highways by the peace officer discovering it or having a report of the same. Often time the abandonment of a vehicle is the source or a lead to a violation of a penal law, and under the provisions of Section 19-131, the Commonwealth's Attorney should be apprised of it, so he could take the necessary action in the premises. However, there is no duty on the Commonwealth's Attorney to dispose of such vehicles.

Under the provisions of Section 46.1-2 of the Code, it is the duty of the Commissioner of the Division of Motor Vehicles to sell the abandoned vehicle by following the procedure outlined in that section. In performing this duty the Commissioner may employ the services of any one he elects. Inasmuch as the statute must be closely followed, and litigation may result, the Commonwealth's Attorney would be the logical person for the Commissioner to designate to act for him. I would recommend to the Commissioner to engage the services of the Commonwealth's Attorney in such matters where it is practical. The cost of having these vehicles disposed of is charged to the proceeds of the sale.

Briefly, the procedure of disposing of an abandoned vehicle is as follows:

(1) The police officer or other peace officer discovering the vehicle, or being informed of it, should have it removed to the nearest storage garage.

(2) This information should be reported immediately to the Division of Motor Vehicles and to the owner.

(3) Such officer forthwith should notify the Commonwealth's Attorney the circumstances under which the vehicle was found, etc. (Section 19-131 of the Code.) Although there is no express duty on the part of the officer to notify the Commonwealth's Attorney except in those instances in which there is a probability that a penal law has been violated, the better practice would be to notify the Commonwealth's Attorney in *all* such cases.

(4) The Commissioner should give notice of the same to the owner at his address indicated by the records of the Division of Motor Vehicles and to the holder of any lien of record.

(5) If the owner fails or refuses to pay the cost of the removal and storage, or should the identity of the owner be unknown, the said Commissioner, after thirty days and after having the vehicle appraised by three disinterested dealers or garagemen, may proceed to have the vehicle sold at either private or public sale. The Commissioner may designate the Commonwealth's Attorney or some other person to act for him.

(6) All papers relative to the transaction should be filed with the Division of Motor Vehicles, Richmond, Virginia.

(7) The proceeds of the sale less expenses thereof, should be transmitted to the Division and deposited by the Commissioner with the State Treasurer in a special fund to meet the expenses incurred in administering this statute.

(8) Should the owner thereafter make and establish his claim for such vehicle, the Commissioner of the Division of Motor Vehicles should cause the net proceeds of the sale to be paid such owner.

It should be borne in mind that Section 46.1-2 only applies to such vehicles found on the improved portion of the highway or adjacent thereto. The procedure thereunder cannot be invoked in all cases where the identity of the owner is unknown or where the owner refuses to pay storage charges, or other charges.

I can find no basis for invoking the procedure in Chapter 4, Title 43, (Sections 43-32 and 43-34) in such cases, where the value of the abandoned vehicle is less than the storage charges. In order to divest the owner of his property (sell the vehicle), the procedure under Section 46.1-2 must be followed exactly. I see no reason why the guidance of the court of competent jurisdiction could not be invoked in complicated cases.

My reply has been rather lengthy as there is apparently some misunderstanding of the duties of the respective public officers involved in such cases.

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**MOTOR VEHICLES—Blood Test for Alcohol—Fact That Suspect Without Funds to Pay Cost of Test When Arrested Does Not Relieve Arresting Officer of Duty to Escort to Laboratory, Etc. (25)**

July 22, 1958.

HONORABLE E. R. HUBBARD  
Justice of the Peace  
Wise, Virginia

I am in receipt of your letter of July 21, 1958, in which you inquire whether or not arresting authorities may refuse to escort an individual charged with the offense of driving a motor vehicle while under the influence of alcoholic intoxicants to a physician's office, hospital or laboratory, for the purpose of having a sample of the accused's blood withdrawn for alcoholic analysis, if such refusal is predicated solely upon the circumstance that at the time of his arrest the accused lacks sufficient funds to defray the cost of having a sample of his blood withdrawn.

I am constrained to believe that your question should be answered in the negative. As you are aware, Section 18-75.1 of the Virginia Code prescribes that if an

accused requests a blood alcohol determination, the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness. In this connection, I am forwarding to you an opinion of this office, dated August 31, 1956, to the Honorable Carter R. Allen, Commonwealth's Attorney for the City of Waynesboro, in which the view was expressed that the duty of the arresting authorities to render "full assistance" to an accused in obtaining a blood alcohol determination comprehended a serious attempt on the part of such authorities to make necessary arrangements for the withdrawal of a blood sample of the accused. True it is that the Commonwealth incurs no liability for the cost of obtaining an accused's blood sample and that the arresting authorities are under no obligation to defray such cost individually; however, Section 18-75.1 of the Virginia Code does prescribe that an amount, not to exceed \$5.00, to cover the cost of withdrawing a blood sample shall be taxed as a part of the costs of the case. With respect to this provision of the statute under consideration, this office has ruled that such taxed cost should be disbursed entirely to the physician, nurse or laboratory technician taking the blood sample of the accused. This office has also ruled that the court in which the accused is subsequently tried may allow a reasonable amount, out of the appropriation for criminal charges, to a physician, nurse or laboratory technician rendering services under Section 18-75.1. A copy of an opinion, dated August 6, 1956, to the Honorable A. A. Rucker, Commonwealth's Attorney for Bedford County, relating to both of these latter considerations is enclosed.

In those situations in which an accused lacks sufficient funds to defray the cost of having a sample of his blood withdrawn, I believe that the arresting authorities should point out to the physician, nurse or laboratory technician in question the above mentioned sources of subsequent remuneration in an effort to assist the accused in securing a blood sample for alcoholic analysis.

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**MOTOR VEHICLES—Exemption from Compliance with Traffic Control Signals—Operator of Private Ambulance May Not Be Exempt. (301-A)**

May 13, 1959.

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

This is to acknowledge receipt of your letter of May 4, 1959, in which you request my opinion as to the construction of Section 46.1-226 of the Code. I quote from your letter, in part:

"Information is requested as to whether or not an ambulance, or any other vehicle, owned and operated by a privately owned funeral home, and operated for a fee to be paid by the person or persons served by the ambulance, is included in the exemption set up in said Section.

"If no fee is charged by such vehicle, and all other facts are the same, would such vehicle be included in the exemption?"

Section 46.1-226 exempts the operator of a motor vehicle from the regulations requiring vehicles to be stopped at red signal lights, stop signs, etc., without subjecting the driver to criminal prosecution. Particular attention is invited to that portion of Section 46.1-226 which reads as follows:

"\* \* \* and the operator of any ambulance or rescue or life saving vehicle, whether such vehicle is publicly owned or operated by a non-profit corporation or association when such vehicle is being used in the performance of public services, when such vehicle is operated under emergency conditions \* \* \*."

The burden is upon an ambulance driver to show that he comes within the exemption, and, therefore, the statute must be construed strictly against one who has driven through a red light. A strict interpretation would, it would seem, prevent an ambulance owned and operated by a profit making organization from enjoying the benefit of the exemption.

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**MOTOR VEHICLES—Fire Department Vehicles Shall Be Equipped with Siren, Private Vehicles Owned by Members of Fire Department Shall Not Have Sirens. (18)**

July 17, 1958.

HONORABLE ROBERT C. GOAD  
Commonwealth's Attorney of  
Nelson County

This is to acknowledge receipt of your letter of July 11 in which you state:

"I will appreciate your opinion on the following question.

"Section 46.1-285 (1958) of the Code requires fire department vehicles to be equipped with sirens. In the case of a volunteer fire department, can the private vehicles of the fire chief, fire marshal, or other official be equipped with sirens under this Section of the Code, and are they required to be so equipped?"

Section 46.1-285 provides as follows:

"Every police vehicle and fire department vehicle and every ambulance or rescue vehicle used for emergency calls shall be equipped with a siren or exhaust whistle of a type not prohibited by the Superintendent."

I believe that the term "fire department vehicle" in this section applies to those vehicles that are publicly owned or owned by volunteer fire departments or associations and not the vehicles that are privately owned by the individuals that are members of such departments. There is no authority vested in the Superintendent of State Police to issue permits for the installation of sirens in these vehicles inasmuch as the General Assembly has specified what vehicles shall be equipped with sirens and has made it unlawful for any other vehicle to be so equipped (see Section 46.1-284).

I am, therefore, of the opinion that only such vehicles that are actually owned by the volunteer fire department as such can be equipped with sirens, and that the privately owned vehicles of the fire chief, fire marshal or other official of the volunteer fire department are not required to be equipped with sirens nor can they legally be so equipped.

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**MOTOR VEHICLES—Hit and Run—"Driver" Must Be in Physical Control at Time of Collision. (27)**

July 24, 1958.

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

This is in reply to your letter of July 23, 1958, which reads as follows:

"I have been unable to determine whether or not the following question has ever been ruled on by your office. Therefore, I would appreciate it if you would give me the opinion of your office on this question, which is as follows:

"Is the driver of a vehicle guilty of violating Code Section 46-1.176 (the hit and run section) under the following facts: If the driver parks his car on a hill, leaves the car, and while he is gone, the car suddenly without any other interference rolls down the hill into another parked automobile causing damages; the driver returns, gets in his car, backs it away from the car that was struck and makes no effort to identify himself or locate the owner of the struck car? Is the driver of the vehicle that rolled unattended into an unattended vehicle guilty of the violation of Section 46-1.176?

"I will appreciate it if you will write me the opinion of your office on these facts."

I think that the word "driver" as used in Section 46.1-176 must be considered as synonymous with the word "operator" which is defined in Section 46.1-1 (17), as follows:

"Every person who drives or is in actual physical control of a motor vehicle upon a highway or who is exercising control over or steering a vehicle being towed by a motor vehicle."

Under this definition I am of the opinion that in order for a person to be guilty of a violation of Section 46.1-176 he must be in physical control of the automobile in motion or connected therewith.

Under the well established rule with respect to the construction of punitive statutes, I am constrained to express the opinion that under the circumstances presented by you, there would not be a violation of the statute in question. Certainly the well established principle of strict construction of a punitive statute would apply in such a case.

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**MOTOR VEHICLES—Insurance—Uninsured Motorist Endorsement—Lack of Provision for Defense by Carrier of "Known" Uninsured Motorist Not Denial of Due Process. (245)**

March 25, 1959.

HONORABLE EDWARD E. LANE  
Member House of Delegates

I am in receipt of your letter of recent date in which you call my attention to the provisions of Chapter 282 of the Acts of Assembly (1958) codified as Section 38.1-381 of the Virginia Code and known as the Uninsured Motorist Endorsement. You state that you have been advised that certain insurance carriers "are taking the position that they are not bound" by the statute in question because:

"\* \* \* there is no provision in such legislation whereby the insurance carrier has any right to defend the uninsured motorists or to otherwise participate in such suit where it is brought by an attorney selected by the insured against the uninsured motorists whose identity is known. The only provision in such legislation for the insurance carrier to defend the interests of the uninsured motorists lies in those cases where 'hit and run' is involved and the identity of the uninsured motorists against whom the claim is being made is unknown."

You request my views concerning the validity of the defense suggested in the above quoted language.

Apparently, as you point out in your communication, the rationale of the suggested defense is that the failure of the statute to accord an insurance carrier the opportunity to appear and defend an action brought against an uninsured motorist whose identity is known deprives insurance carriers of due process of law. I have been unable to discover any decisional authority supportive of this proposition and am constrained to believe that the position under consideration is not well taken. So long as the premium rate established for policies containing the uninsured motorist endorsement is not confiscatory but is commensurate with the risk assumed by insurance carriers in the absence of an opportunity to appear and defend actions of the type indicated above, the challenged feature of the statute in question does not, in my opinion, entail a denial of due process with respect to such carriers.

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**MOTOR VEHICLES—Interstate Reciprocal Agreement—Owners of Passenger Cars Registered in Signatory States Not Required to Procure Virginia Plates (Registration)—Certain Exceptions. (344)**

June 10, 1959.

HONORABLE SAM T. BOWMAN  
Commissioner of the Revenue of the  
City of Bristol

This is to acknowledge receipt of your letter of June 4, 1959 in which you refer to Information Bulletin—1959—#20 issued by the State Police on April 20, 1959 dealing with the Reciprocal Agreement now existing between Virginia and thirteen states. This is commonly known as the "Fourteen State Reciprocal Agreement Governing the Operation of Interstate Motor Vehicles." You have construed this agreement to mean that the owners of all passenger cars remaining in the state for a period of thirty days except Indiana and Florida, must secure Virginia tags. I do not agree with your interpretation.

Enclosed herewith is a copy of the said Reciprocal Agreement together with copy of my letter to the Honorable Edward E. Willey dated December 11, 1958. I have examined this agreement and find that the portion pertaining to the registration of privately owned passenger cars (Section II) does not differ from the corresponding portion of the agreement of December 17, 1949 to which reference is made on the third page of my said letter. In addition to the states, parties to the 1949 agreement, the new agreement applies to vehicles registered in Indiana, Maryland, Michigan and West Virginia. Owners that have their cars registered in these states which are parties to this agreement may operate the same in Virginia without obtaining Virginia plates, except when the owner becomes gainfully employed for a continuous period of more than thirty days, in Indiana sixty days, then he is required to register his vehicle in Virginia.

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**MOTOR VEHICLES—Proof of Financial Responsibility—Certificate of Registration, License Plates and Operator's Permit May Be Taken up More than One Year After Accident Where Note Given to Pay Damages. (29)**

July 30, 1958.

HONORABLE R. TURNER JONES  
Commonwealth's Attorney  
Highland County

This is in reply to your letter of July 24, 1958, in which you request my opinion concerning the suspension by the Division of Motor Vehicles of the operator's

license and registration certificates of a person involved in automobile accidents who has unsatisfied claims or judgments outstanding against him as a result of the action pursuant to the provisions of Article 4 of Chapter 6 of Title 46 of the Code of Virginia before it was repealed by the General Assembly at its 1958 Session. Your letter reads, in part, as follows:

"On September 1, 1956, the person I have reference to was involved in an accident causing property damage to the extent of more than \$400.00. This defendant pleaded guilty to a charge of driving under the influence and causing the accident and was given the usual punishment. Before the year was up on the revocation of his permit, he came to the person to whom the damage was inflicted and asked permission to give a note covering the amount of the damage and providing for monthly payments thereof. The note was accepted and it was specifically stated on the note that the amount of the note represented damages inflicted by the maker of the note in the accident of September 1, 1956, for which the maker was solely responsible. The maker paid one monthly installment of \$25.00 and then absconded himself for more than a year. The holder of the note finally located the maker and obtained judgment on the note for the damages.

"My question is whether or not the operator's license, registration certificates and plates, can be taken from the judgment debtor at this time and withheld until the judgment is paid in full."

You have subsequently notified us that no release was executed to the person who gave the note.

Old § 46-447 of the Code provides in part as follows:

"The suspension required by the provisions of this article and the prohibition against registration in the name of the person whose license is suspended or in any other name when the Commissioner has reasonable grounds to believe that the registration of the vehicle involved or of any other vehicle in his name will have the effect of defeating the purpose of this chapter shall continue, and no other motor vehicle shall be registered or shall remain in effect in his name and no new license is to be issued to him, unless and until he complies with the requirements with respect to furnishing security or unless and until he has obtained a release, or a judgment in his favor in an action to recover damages resulting from the accident, or unless and until he has satisfied in the manner provided any judgment rendered against him in the action, and at all events gives and thereafter maintains proof of his financial responsibility. But any person whose license or registration became subject to suspension or has been suspended pursuant to § 46-436, whether or not he has furnished security and proof of financial responsibility, shall be relieved from furnishing or maintaining proof of financial responsibility if one year has elapsed since the date of the accident and he has neither paid nor agreed to pay anything for damages resulting from the accident and no action for damages because thereof has been brought against him, and he is not required to furnish or maintain proof of financial responsibility for some reason other than for having been involved in the accident."

Since this accident occurred prior to the time that new title 46.1 came into effect, the old provisions of law would govern this situation. I am of the opinion that the relief from furnishing proof of financial responsibility provided for by § 46-447 of the Code of Virginia in those cases where one year has elapsed since the accident and no action for damages because thereof has been brought against the

motorist involved in the accident is not applicable in this instance because the person had agreed to pay for damages resulting from the accident by giving a note covering the amount of the damages.

This section provides that "any person whose license or registration became *subject to suspension* \* \* \* shall be relieved from furnishing or maintaining proof of financial responsibility if one year has elapsed \* \* \* and he has *neither paid nor agreed* to pay anything for damages resulting from the accident \* \* \*."

The person involved *did agree* to pay the damages, and, hence, he is not entitled to the relief afforded by the statute.

I am of the opinion, therefore, that the operator's license and registration certificates and license plates can be taken from the judgment debtor at the present time and withheld until the judgment on the note is paid in full, since the note was given to cover the amount of damages resulting from the automobile accident.

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**MOTOR VEHICLES—Licenses—Interstate Reciprocal Agreement Does Not Exempt Vehicle Owned by Virginia Corporation. (31)**

August 1, 1958.

HONORABLE HAROLD L. TOWNSEND  
Attorney for the Commonwealth,  
Greensville County

This is in reply to your letter of July 28, 1958, which reads as follows:

"A Corporation duly organized and existing in Virginia with registered office in Richmond, Virginia, has secured authority to transact business in Florida. The corporation maintains an office in Virginia and Florida and hauls intra state in Virginia and Florida.

"The corporation has Virginia contract carrier permit and certificate of necessity and convenience for transportation of petroleum products by tank car in Virginia as issued by State Corporation Commission. I understand the petroleum certificate is only issued to residents of Virginia.

"The corporation has ICC permit and also hauls exempt agricultural products.

"A truck with Florida license, *which the defendant claims is based in Florida*, owned by the corporation with above certificates from Virginia and ICC was hauling from Maine to Raleigh, N. C., was stopped in Virginia for failure to have Virginia license tag. Title to this truck is registered in Va. and was delivered to lien holder. A supplemental title was issued by Florida showing title to vehicle to be in Virginia and prohibiting sale on Florida title.

"Please advise whether in your opinion a Virginia license tag is required for this vehicle or similar vehicles to operate in Virginia under these circumstances and whether the reciprocal license agreement entered into pursuant to 46.1-20 would have any effect on this matter."

The Division of Motor Vehicles has always considered that reciprocal privileges, where applicable, are extended to nonresidents of Virginia who are in fact residents of a state with which Virginia has a reciprocal agreement. Such operational privileges are limited to movements which are inter-state in character, and no intrastate movement of the equipment within Virginia is subject to such privileges.

Section 46.1-41 of the Code is the general licensing statute applicable to all cases and subject to the exemptions and exceptions permitted by statute.

In the instant case we have a Virginia resident operating a motor vehicle into and through Virginia while displaying license plates of a foreign state. Further, such vehicle is titled in Virginia.

It is our view that such an operation would require the proper Virginia license plates on the equipment inasmuch as the owner is a Virginia resident operating his equipment in Virginia and falls within the section referred to above.

The reciprocal privileges in effect pursuant to Section 46.1-20 of the Code, in my opinion, are not intended to be available to a person in the State of his residence. It is designed to grant such privileges in proper cases to residents of another state that is party to the reciprocal arrangement.

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**MOTOR VEHICLES—Licenses—Truck Operated for Compensation—License as “For Hire Carrier” Required. (122)**

November 6, 1958.

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

This is to acknowledge receipt of your letter of October 30, 1958 in which you ask my opinion whether a truck which is operated under the circumstances herein-after narrated is considered operated for compensation and whether or not it should be licensed as a truck for hire.

Property owner B was desirous in having a lot leveled which necessitated the moving of quantities of dirt from an embankment. B made an arrangement with M to remove the embankment. M then agreed with G to place the dirt on a lot situated about a half mile from the location of the embankment on B's property and would receive \$1.25 per truck load for so doing. B received no cash compensation for the dirt, but he was benefited by having the embankment removed.

For his services of moving the embankment, M became the owner of the dirt or obtained the right to dispose of it in any manner he desired, and thereafter sold the dirt to G, hauling it from one point to another and in the sale price there was reflected a charge for transportation.

The pertinent portion of Section 56-275.1 is as follows:

“Any person who purchases article, merchandise, commodities or *things at one point* or points and *transports* them in a motor vehicle, trailer or semitrailer 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 vehicles for compensation; \* \* \*” (Italics supplied.)

It seems to me that this truck is operated for compensation within the meaning of this section.

Your attention is invited to Section 46.1-1 (35) which reads as follows:

“ ‘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 semitrailer operating over the highways of this State who *accepts or receives compensation for the service*, directly or indirectly; but such terms shall not be construed to mean a ‘truck lessor’ as defined herein.” (Italics supplied.)

In hauling this dirt M receives compensation for this service, to-wit: \$1.25 per truck load, and it is, therefore, my opinion that M must license his truck as a "for hire carrier" under the provisions of Section 46.1-154 of the Code of Virginia, as amended.

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**MOTOR VEHICLES—Licenses—Truck Used Only to Haul Peanuts from Owner's Farm to Factory Not Exempt from License Tax. (123)**

November 6, 1958.

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

This is to acknowledge receipt of your letter of October 30, 1958 in which you make this inquiry:

"Is a farmer who owns a truck and uses it only for the purpose of hauling peanuts from his farm to a peanut factory exempt from vehicle license tax under Section 46.1-45 of the Code?"

Section 46.1-45 provides that motor vehicles under certain circumstances are exempt from the licensing statutes. Paragraph (a) of that section is as follows:

"(a) No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor, pursuant to the provisions of this chapter, for *any truck* upon which is securely attached a machine for spraying fruit trees and plants of the owner or lessee of the truck or for *any motor vehicle, trailer or semi-trailer, which is used exclusively for agricultural or horticultural purposes* on lands owned or leased by the owner thereof and *which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway or along a highway from one point of the owner's land to another part thereof*, irrespective of whether or not the tracts adjoin, provided that the distance between the points shall not exceed ten miles, or *for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs*. The foregoing exemption from registration and license requirements shall also apply to *any vehicle hereinbefore described* or to any farm trailer owned by the owner or lessee of the farm on which such trailer is used, *when such trailer is used by the owner thereof for the purpose 'of moving farm produce and livestock from such farm along a public highway for a distance not to exceed ten miles to a storage house or packing plant, when such use is a seasonal operation.'*" (Italics supplied.)

It must be shown that the use of the vehicle comes within the four corners of the exception before it can be exempted from the operation of the statute. In the case of *Adley Express Company v. Commonwealth*, 196 Va. 1007, the Court stated (Page 1013):

"(2) As we have several times said, since taxation is the rule and exemption therefrom the exception, provisions exempting property from taxation should be strictly construed against the party asserting such exemption."

It does not appear that the truck used in the manner which you describe is included in the exemption set forth in this statute. Such an exemption extends to

farm trailers used for the purpose of moving farm produce for a distance not exceeding ten miles, but not to trucks hauling farm produce.

I am, therefore, of the opinion that a farmer who owns a truck and uses it only for the purpose of hauling peanuts from his farm to the peanut factory is not exempt from the license tax under the foregoing section and his truck must be licensed properly before it can be lawfully driven upon the highways of Virginia.

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**MOTOR VEHICLES—Licenses—Vehicles Owned by College Students—Registrants of States Party to Reciprocal Agreements—Registrations of Other States.**  
(149)

December 11, 1958.

HONORABLE EDWARD E. WILLEY  
Member of the Senate

This is to acknowledge receipt of your recent letter in which you inquire as to whether persons who are domiciled in other states and attend college in Virginia are required to license their private automobiles in Virginia.

It should be borne in mind that the law requires all vehicles operated on the highways of Virginia to be licensed in this State. Foreign licensed vehicles are permitted to be operated on the highways of Virginia as a matter of grace or comity. Reciprocity is extended by statute and through reciprocal agreements or understandings with other states. Therefore, in determining whether or not a vehicle should be licensed in this State consideration must be given to the statutes that extend reciprocity and to such reciprocal agreements. I call your attention to Section 46.1-132 of the Code which reads as follows:

"A nonresident owner, except as otherwise provided in this article, owning any passenger car which has been duly registered for the current calendar year in the state or country of which the owner is a resident and which at all times when operated in this State has displayed upon it the license plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such passenger car within or partly within this State for a period of six months without registering such passenger car or paying any fees to this State. But if at the expiration of such six months such passenger car is still in this State, such owner shall procure registration and license and shall pay for such license from the time operation of such vehicle in this State commenced."

It will be noted that reciprocity here is extended to passenger vehicles for a period of six months, but after that time the owner must procure registration paying the fees from the time the operation of the vehicle commenced within this State. For instance, if a person came into Virginia September 15th and stayed in Virginia as a sojourner until after the 15th of March, he would be required to license his vehicle for the preceding year (i.e., as of September 15). If a person becomes gainfully employed within this State for a period of sixty days or becomes engaged in business within the State, he must license his vehicle. The privilege extended by the above section of the Code is conditioned upon the extension of like privileges by the State in which the nonresident's vehicle is registered to citizens of Virginia.

In Section 46.1-1 (16) we find the term "nonresident" defined as follows:

"Every person who is not domiciled in this State, except:

"(a) Any foreign corporation which is authorized to do business in this State by the State Corporation Commission shall

be deemed a resident of this State for the purpose of this title; provided, however, that in the case of corporations incorporated in this State but doing business without the State, only such principal place of business or branches located within this State shall be dealt with as residents of this State.

"(b) A person who becomes engaged in a gainful occupation in this State for a period exceeding sixty days, shall be deemed a resident for the purposes of this title.

"(c) 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 purposes of this title."

There is nothing in the statutory law specifically concerning the registration of vehicles by nonresident students. Hence, they must be treated in the same manner as any other nonresident who operates vehicles within the State.

Under the provisions of Section 46.1-137 of the Code the Commissioner of the Division of Motor Vehicles with the consent of the Governor may extend reciprocal privileges to residents of other states. That section (46.1-137) is as follows:

"Notwithstanding the other provisions of this article, the Commissioner, with the consent of the Governor, may extend to the owners of foreign vehicles operated in this State the same privileges which are granted by the state of the United States or foreign country wherein the owners of such foreign vehicles are residents to residents of this State operating vehicles in such state of the United States or foreign country."

Furthermore, under the provisions of Section 46.1-20, the Governor with the advice of the Reciprocity Board may enter into reciprocal agreements on behalf of the Commonwealth with the appropriate authorities of other states with respect to taxes imposed by this State on motor vehicles. Acting under the provisions of the last mentioned section in December 1949, the Governor entered into a reciprocal agreement with the authorities of the following states:

Alabama	Louisiana
Florida	Mississippi
Georgia	North Carolina
Kentucky	South Carolina
Tennessee	

I understand that Virginia is now negotiating with the states of Maryland, Michigan, West Virginia and Indiana and has indicated to the authorities of those states that this State desires to enter into a like agreement with them. The aforementioned agreement is commonly known as the "Reciprocal Agreement of the 10 Southern States." Although the instrument does not indicate that the Governor was acting under the advice of the Reciprocity Board, we must assume that he was, or at any rate he consented to the action of the Commissioner of the Division of Motor Vehicles extending the reciprocal privileges narrated therein (Section 46.1-137). In that agreement, we find the following pertaining to passenger cars:

#### "I APPLICABILITY

"This agreement shall apply only to the following persons, firms and corporations:

"(1) To privately owned and operated passenger cars duly licensed in the State of the owner's bona fide residence.

\* \* \* \* \*

## "II PASSENGER CARS

"Privately owned and operated passenger cars licensed by any one of the reciprocating States shall be permitted to operate freely between the several States, provided, however, that continuous residence for a period of thirty days or more during gainful employment shall constitute the establishment of a legal residence for the purpose of motor vehicle registration; except that members of the Armed Forces temporarily assigned in any one of the reciprocating States shall be extended full reciprocal privileges for the period of such registration, and further except:

"(a) Traveling salesmen, solicitors, or peddlers carrying merchandise in such passenger car and using same for transporting such merchandise for the purchase (purpose) of selling or otherwise similarly disposing of same.

"(b) Under Florida law persons when gainfully employed, or when placing minor children in the public schools of the State shall be required to register their passenger car."

It will be noted that unlimited reciprocity is granted the owners of passenger cars as long as they do not come within the exceptions mentioned in the above quoted paragraph, as the time limitation (six months) expressed in Section 46.1-132, *supra*, is waived. It would follow, therefore, that the residents of the above mentioned states having their passenger vehicles registered in the state of their domicile have the privilege of operating their vehicles in Virginia for the full period of registration and this would apply to all sojourners including nonresident students, as long as the state of their domicile extends like privileges to residents of Virginia.

In addition to the reciprocal agreement of the ten Southern States, such agreements have been consummated with the authorities of other states. Many of these agreements date back to 1942, but they are still in effect as they have not been cancelled. No mention of the nonresident students is made in these agreements, but the privilege to operate passenger cars is limited to a period of six months.

Your statement, "that the Division of Motor Vehicles' interpretation of the law passed at the last session of the General Assembly is that if the student goes home for Christmas or leaves the State any time prior to six months' residence, he is not subject to the law" is not entirely correct. I have inquired and find that Commissioner Lamb interprets the statute to mean that if the student leaves the state any time prior to the completion of the six months period, he is not required to purchase license tags for his car; but he is required to purchase tags if he remains in this State for a period exceeding six months regardless of whether or not he returns to his home during the Christmas holidays.

My conclusion is that those nonresident students who have their cars registered in a state other than the states that are a party to the Reciprocal Agreement of the 10 Southern States, *supra*, must be treated as any other nonresidents and must register their motor vehicles in Virginia if they stay in this State for a greater period than six months.

Of course, the situation could be clarified by statute or by the action of the Governor and the Commissioner of the Division of Motor Vehicles extending reciprocal privileges under Section 46.1-137; or under Section 46.1-20.

**MOTOR VEHICLES—License Tax—Tractor or Trailer Used for Agricultural Purposes—Not Owned by Owner or Lessee of Farm Lands—Not Exempt. (161)**

January 5, 1959.

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

This is to acknowledge receipt of your letter of December 29, 1958 in which you state in part:

"In this particular case the tractor or trailer is owned by the son of the owner of the land and the land to which the vehicle was traveling was leased by the father, the two tracts of land not adjoining. My question then is whether the owner of the tractor or trailer can operate the vehicle without registration or license plates where he does not own or lease the land? In other words, does the exemptions provided for in this section apply only to the owner of the land or lease or to members of his immediate family as well, the son and owner of the vehicle living in the same house with his parents."

The pertinent provisions of Section 46.1-45 are:

"No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor, pursuant to the provisions of this chapter, for any truck upon which is securely attached a machine for spraying fruit trees and plants of the owner or lessee of the truck or for any motor vehicle, trailer or semi-trailer, which is used exclusively for agricultural or horticultural purposes *on lands owned or leased by the owner* thereof and which is not operated on or over any public highway of this state for any other purpose other than for the purpose of operating it across a highway or along a highway from one point of the owner's land to another part thereof, irrespective of whether or not the tracts adjoin, provided that the distance between the points shall not exceed ten miles. \* \* \*" (Italics supplied.)

In order to be exempted from the payment of registration fees (taxes), a person must come within the four corners of the exception set forth in the statute. We find this rule stated in MJ Volume 18, Page 169, which reads as follows:

"Taxation being the rule and exemption therefrom the exception, constitutional and statutory provisions exempting property from taxation should be strictly construed against the exemption and any doubt should be resolved in favor of the state. Though tax statutes are construed in favor of the taxpayer, exemptions from their provisions are strictly construed against him."

Obviously the son, the owner of this motor vehicle or trailer, does not come within the exception of the statute.

I am, therefore, of the opinion that inasmuch as the tractor or trailer is owned by the son and he does not lease or own the farm lands, he is liable for registration fee if these vehicles are so used on the highways.

**MOTOR VEHICLES—Local Licenses—Vehicles Operated by Common Carrier Between City or Town in Virginia and Points Outside of State Are Subject to License Tax. (28)**

July 30, 1958.

HONORABLE S. PAGE HIGGINBOTHAM  
Commonwealth's Attorney  
Orange County

This is in reply to your letter of July 23, 1958, in which you refer to § 46.1-66(a) (6), which reads as follows:

“(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

“(6) The motor vehicle, trailer or semitrailer is operated by a common carrier 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;”

You ask the following question:

“Does the above described exemption cover common carriers who operate from a town in this State to points outside of the State? In other words, does a common carrier with an interstate permit operating from a town within a county to points beyond the border of the State of Virginia fall within the above exemption?”

I am of the opinion that a common carrier that operates between a city or town in Virginia and a city or town in another state does not fall within the exemption set forth above. Statutes providing exemptions from the imposition of a license tax under the well established rules of construction must be strictly construed against the taxpayer. He has the burden of proving that he comes within the exemption. The fact that the vehicles in question are engaged in interstate commerce raises the question as to whether or not an instrumentality of a state may impose a tax on such commerce. The Supreme Court of the United States in the case of *Independent Warehouses, Incorporated, v. Scheele*, 331 U.S. 70, upheld the validity of a warehouse license tax imposed by a political subdivision of the State of New Jersey. This tax was levied by a township on commercial warehouses located in the township. There was, however, only one such warehouse, and it was engaged in interstate commerce. The Court held the license tax valid and not repugnant to the commerce clause.

The matter of the licensing of motor vehicles engaged in interstate commerce was discussed in the recent case of *Chicago v. Atchison, Topeka and Santa Fe Railway Company*, 3 L. ed. 2d. ————. In this case the Supreme Court of the United States held invalid an ordinance of the City of Chicago, Illinois which required that persons operating vehicles between two railroad stations located in Chicago secure a certificate of public convenience and necessity from the City. These vehicles were engaged wholly in interstate commerce. The Court stated, however:

“We are fully aware that use of local streets is involved, but no one suggests that Congress cannot require the city to permit interstate commerce to pass over those streets. Of course the city retains considerable authority to regulate how transfer vehicles shall be operated. It could hardly be denied, for example, that such vehicles must obey traffic signals,

speed limits and other general safety regulations. Similarly the city may require registration of these vehicles and *exact reasonable fees for their use of the local streets*. Cf. *Fry Roofing Co. v. Wood*, 344 U. S. 157; *Capitol Greyhound Lines v. Brice*, 339 U. S. 542." (Italics supplied.)

In the light of the authorities cited, I am constrained to believe that the county may impose a motor vehicle license tax on motor vehicles, trailers and semitrailers which operate between cities and towns in Virginia and cities and towns located beyond the boundaries of the Commonwealth.

The example set forth in § 46.1-66(a) (6) is applicable also to motor vehicles, trailers and semitrailers which operate between cities and towns on the one hand and points and places outside cities and towns on the other hand, either of which is located without the confines of the Commonwealth of Virginia.

This opinion, I find is contrary to the view expressed by this office on April 27, 1956 (Reports of the Attorney General, 1955-56, page 137).

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**MOTOR VEHICLES—Local Licenses—Vehicles Operated by Common Carrier Between Points in State But Not Intracity Exempt from County License Tag Requirements. (321)**

May 27, 1959.

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

This is in response to your letter of May 13, 1959, in which you ask whether a county can require a common carrier to purchase a county motor vehicle license tag which carrier does not engage in intracity operations but operates between points and places within the boundaries of this State.

Section 46.1-66(a) (6) of the Code reads as follows:

"(a) No county, city or town, shall impose any license tax or license fee upon any motor vehicle, trailer or semitrailer when:

"(6) The motor vehicle, trailer or semitrailer is operated by a common carrier of persons or property operating between cities and towns on the one hand and points and places without cities and towns on the other and not in intracity transportation;"

I am of the opinion that the common carrier in question comes within the above-quoted exemption for the reason that it transports property: (1) between cities and towns in this State, and (2) between cities and towns on the one hand and points and places without cities and towns on the other, and (3) it does not engage in intracity transportation. I am, therefore, of the opinion that the county cannot require the common carrier in question to purchase a county motor vehicle license tax.

I am enclosing for your information a copy of a related opinion rendered to Honorable S. Page Higginbotham, Commonwealth's Attorney for Orange County, dated July 30, 1958.

I am also returning your copy of the opinion in the case of *Atwood v. City of Richmond*.

**MOTOR VEHICLES—Local License Tax—Armed Forces Personnel—Residing in County Solely as Result of Military Orders—No County License Tax Assessable Where Similar Tax, if Any, of Permanent Home State Paid—Civilian Employees of U. S. Residing in County Are Subject to Tax. (242)**

March 20, 1959.

HONORABLE BERNARD MAHON  
Commonwealth's Attorney for Caroline County

I am in receipt of your letter of March 13, in which you advise that the Commonwealth of Virginia exercises concurrent jurisdiction with the United States over Camp A. P. Hill, which is located in Caroline County, Virginia, and that Caroline County has enacted a motor vehicle license tax ordinance imposing a license fee upon automobiles owned by residents of the county. Pointing out that no effort has been made to require "military personnel living in the camp" to pay the license tax in question, you present the following inquiries:

"1. Please advise whether military personnel stationed at Camp A. P. Hill and residing in Caroline County should be required to pay this local license.

"2. I would also like to know whether civilians from other states employed at Camp A. P. Hill and residing in Caroline County should be required to pay this local license

"3. Please advise how long military personnel who reside off of the military post can operate their automobile in the State of Virginia without obtaining Virginia state license."

Pertinent to the resolution of your first and third inquiries are those provisions of the Soldiers and Sailors Civil Relief Act, 50 USCA App. 574, which prescribe:

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: *Provided*, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

*"(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or exercises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid." (Italics supplied.)*

In light of the above quoted language, I am of the opinion that military personnel residing in Caroline County solely as a result of compliance with military orders stationing them at Camp A. P. Hill would be able to claim the exemption conferred by this statute, if all license fees imposed in the States of their permanent homes have been paid. This view is consistent with that heretofore taken by this office and that enunciated by the Federal courts. See, Report of the Attorney General (1954-1955), page 155; *Woodroffe v. Village of Park Forest*, (D. C. Ill.), 107 F. Supp. 906. Thus, an individual having the status under consideration would not be required to pay the motor vehicle license tax imposed by Caroline County (1) if a similar tax is imposed by the political subdivision of his permanent home State and that tax has been paid or (2) if no local tax is imposed by the political subdivision of his permanent home State. However, if a local motor vehicle license tax is imposed by the political subdivision of the permanent home State of such an individual, and that local tax has *not* been paid, he would, in my opinion, be subject to the motor vehicle license tax ordinance of Caroline County. Moreover, military personnel in Virginia, who do not reside on a military post, may operate their motor vehicles in Virginia indefinitely, without paying the license tax imposed by the Commonwealth, if such personnel have paid the license fees imposed by their permanent home States.

With respect to the second question, I am of the opinion that civilians from other States employed at Camp A. P. Hill, who are residents of Caroline County, would be subject to the local motor vehicle license tax to the same extent as other residents of the county.

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**MOTOR VEHICLES—Local License Taxes—County May Impose Under §§ 46.1-65 and 46.1-66. (165)**

January 7, 1959.

HONORABLE OTIS B. CROWDER, *Treasurer*  
Mecklenburg County

I acknowledge receipt of your letter of January 5, 1959, which reads as follows:

"I would like your opinion as to whether or not Mecklenburg County may for the year 1960 levy a motor vehicle county license tax under the emergency 1958 General Assembly Act regulating motor vehicle licensing.

"We will soon be working on our 1959-60 Budget, and would like to have your opinion before this is started."

I presume that you have reference to Chapter 482 of the Acts of 1958. We have heretofore issued an opinion in which we took the position that the provisions of this Act were repealed by the provisions of Chapter 541 of the Acts of 1958.

Of course, under Sections 46.1-65 and 46.1-66, the county has the right to impose a license tax upon motor vehicles subject to paragraph (b) of Section 46.1-66, which reads as follows:

"No county shall impose any license fee or tax upon a motor vehicle, trailer or semitrailer of an owner resident in an incorporated city or town within the county when such city or town imposes a license fee or tax upon motor vehicles, trailers or semitrailers."

I am enclosing for your information the opinion referred to and which was furnished to Honorable Robert R. Gwathmey, III, under date of August 29, 1958.

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**MOTOR VEHICLES—National Guard License Plates—Issued by D. M. V. Without Statutory Obligation—Guard May Adopt Regulation Requiring Proof of Financial Responsibility as Prerequisite to Issue. (183)**

January 27, 1959.

MAJOR GENERAL SHEPPARD CRUMP  
The Adjutant General

This is to acknowledge receipt of your letter of January 22 in which you state that for a number of years special license plates for officers of the Virginia National Guard have been issued by the Division of Motor Vehicles. These plates are used on the privately owned vehicles of the officers and are issued upon your authorization as The Adjutant General. You propose to forbid the use of such plates by officers who do not file proof of financial responsibility (insurance as required by Article 10, Title 46.1 of the Code, commonly known as the "Uninsured Motorist Law.") You ask whether or not the forbidding the use of these tags to the said officers in any way interferes with any intention, expressed or otherwise of the legislature in connection with the use of license plates.

This practice of issuing special plates to National Guard officers to be used on their privately owned vehicles is not covered by statute. There is no legal obligation on the Division of Motor Vehicles to issue such plates. As Commander in Chief of the Virginia National Guard, the Governor has plenary authority to prescribe regulations relating to the organization thereof (Title 44 of the Code of Virginia). Obviously, this arrangement was adopted to enhance the *esprit de corps* of the Guard and it is certainly a privilege that may be extended and forbidden by the Military authorities.

I think that the adoption of such a regulation as you propose is entirely proper and would not be in violation of the law.

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**MOTOR VEHICLES—Operator's License—Person Released from Commitment as Inebriate or Addict—Statement Prerequisite to Restoration of Driving Privileges May Be Executed by Special Justice Appointed Under § 37-61.2. (257)**

April 9, 1959.

HONORABLE T. DIX SUTTON  
Special Justice of Henrico County

This is to acknowledge receipt of your letter of April 3, 1959 in which you ask whether or not a Special Justice, who is appointed under Section 37-61.2, has the authority to issue a statement under Section 46.1-428 of the Code which would be the basis on which the Commissioner of the Division of Motor Vehicles could restore the driving privileges, the same having been suspended for the reason that the person had been committed to an institution as an inebriate or an habitual user of drugs.

As a Special Justice, you are vested with the authority of County Courts in

performing their duties under Title 37 of the Code. The Special Justice together with two physicians summonsed by him, constitutes the commission vested with the authority to determine whether a person is mentally ill, epileptic, mentally deficient or an inebriate, and such commission commits persons to hospitals or colonies for the care and treatment of the mentally ill, etc.

Section 46.1-428 provides in part:

"(a) The Commissioner, upon receipt of notice that any person has been committed to, or has been admitted to an institution as an inebriate, or an habitual user of drugs, shall forthwith suspend his license. *Such suspension shall be terminated by the Commissioner after the release of the person from the institution, in the event the Commissioner is furnished a statement executed by two members of the Commission committing such person, or by the judge of the county or municipal court of the jurisdiction in which such person resides, that the person is sufficiently recovered to operate a motor vehicle safely. If the two members of the Commission, or the judge of the county or municipal court fail or refuse to execute said statement, the person affected may appeal to the circuit court having jurisdiction.* \* \* \*" (Italics supplied.)

Section 37-61.2 reads in part as follows:

"The authority having the power to appoint the justice or trial justice defined in § 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 and another member of the Commission could execute the statement which would be honored by the Commissioner of the Division of Motor Vehicles under that statute. Inasmuch as the Special Justice is a member of the Commission, and is vested with only such powers as conferred on trial justices (County Courts) under Title 37, I do not believe that such justices have the authority to act for the judge of the county court or municipal court under the provisions of Section 46.1-428.

The authority in Section 46.1-428 in making such a statement is limited to the judge of the county court or the substitute judge thereof. The judge of the Circuit Court of Henrico County would have no authority to execute such a statement. However, the Circuit Judge does have the authority under that section to hear an appeal from the failure or refusal of the members of the Commission of the County Court to execute said statement. In other words, the powers of the Circuit Judge are limited to appellate review.

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**MOTOR VEHICLES—Operator's License—Suspension for Reckless Driving (Over 65 or 75)—"License" Defined—Non-Resident or Non-Licensed Operators—Licensed Operator Suspension Mandatory. (221)**

March 3, 1959.

HONORABLE C. E. REAMS, JR.  
Judge of the Culpeper County Court

This is to acknowledge receipt of your letter of February 25, 1959 in which you ask my opinion on several questions pertaining to the interpretation of Section 46.1-423 of the Code. That section reads as follows:

"When any person shall be convicted of reckless driving for exceeding a speed of 65 or 75 miles per hour as the case may be upon the highways of this State under § 46.1-190 (i) or § 46.1-190 (l), then in addition to any other penalties provided by law, except in those cases for which revocation of licenses is provided in § 46.1-417, the operator's or chauffeur's license of such person shall be suspended by the court or judge for a period of not less than 60 days nor more than 6 months. In case of conviction the court or judge shall order the surrender of the license to the court where it shall be disposed of in accordance with the provisions of § 46.1-425. Where the conviction is a second conviction which would require revocation under the provisions of § 46.1-417, the court shall suspend the operator's or chauffeur's license of such person and thereupon transmit the same to the Division of Motor Vehicles as provided by law. *If such person so convicted has not obtained a license required by chapter 5 (§ 46.1-348 et seq.) of this title or is a nonresident, such court may direct in the judgment of conviction that for such period of not less than ten days nor more than six months, as may be prescribed in the judgment, such person shall not drive or operate any motor vehicle in this State.*" (Italics supplied.)

I shall answer your questions seriatim:

Question 1. Does the word *license*, as used in the above referred to Section, mean the right to operate or is the meaning restricted to the commonly accepted idea of a card issued by Division of Motor Vehicles authorizing a person to operate?

Answer: The term "license" referred to in this section means the operator's or chauffeur's license issued by the Division of Motor Vehicles under the provisions of Chapter 5, Title 46.1 of the Code which is evidence of the privilege to operate a motor vehicle upon the highways of Virginia.

Question 2. The latter part of this Section starting with the words "Where the conviction is a second conviction which would require & etc'". this section goes ahead and states that if the party convicted has not acquired a license as required by Chapter 5 or is a non-resident, such Court may in its judgment of conviction direct the person convicted not to drive for a period of not less than ten (10) days or more than six months. The question here is, would this section apply so that a non-resident or a non-licensed operator would not be subject to the penalty provided earlier in this Section for suspension of license for from 60 days to 6 months, but would only be subject to be forbidden to operate for from 10 days to 6 months?

Answer: Under this section the nonresident or non-licensed operator would *only* be subject to the latter part of the section which authorizes the court to prohibit in its discretion the convicted nonresident or the convicted non-licensed person to drive on the highways for a period of not less than ten days nor more than sixty days.

Question 3. Does this section in effect create two classes of drivers, one subject to one penalty and one subject to another?

Answer: The two portions of this section are not consistent, but the language is clear that the nonresident and non-licensed operator are placed in a different class than the licensed operator. You will note that in the event of the conviction of the latter the suspension is *mandatory* and must be for a period not less than

sixty days nor greater than a period of six months whereas in the former, it is discretionary upon the court whether the person should be prohibited from operating a motor vehicle in this State, the minimum period for such prohibition being ten days. Whether this classification would render this section of the statute invalid from a constitutional standpoint, I express no opinion.

Question 4. In the absence of an answer being contained in the above question, what is the purpose of the last part of this Section and does it apply only to second convictions under the provisions of 46.1-417?

Answer: The obvious purpose of the last portion of this section (that which is in italics) is to deny the use of the highways to nonresidents and to unlicensed operators and assure that this denial would be immediate, beginning at the time of the conviction. I do not think that this portion of the statute (that which is in italics) applies only where there is a second conviction which can be acted upon by the Division of Motor Vehicles under Section 46.1-417.

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**MOTOR VEHICLES—Radar Evidence of Speed—Accuracy of Speedometer of Test Car Presumed—Defendant May Rebut—Burden of Proof of Test of Radar for Accuracy Still on Commonwealth. (134)**

November 18, 1958.

HONORABLE DALE W. LARUE, *Judge*  
Carroll County Court

This is to acknowledge receipt of your letter of November 10th in which you request my opinion on certain questions arising in speeding cases in which radar is used to establish the rate of speed. I shall answer your questions seriatim:

Question 1. Is the accuracy of the speedometer of the car used in testing the radar machine a proper subject for inquiry by the defendant.

Answer: As you point out the Supreme Court of Appeals of Virginia, in the case of *Royals vs. Commonwealth*, 198 Va. 876, 883, held it is necessary that the Commonwealth produce evidence that the radar machine was tested for accuracy before and after detection in order to sustain a conviction. As this test presupposes that the speedometer of the car used in testing the radar machine is accurate, I am of the opinion that the defendant should be given the opportunity to show the inaccuracy of the said speedometer. The answer is, therefore, in the affirmative.

Question 2. If so, may its accuracy be presumed by the Court without proof thereof by competent evidence.

Answer: Unless the question is raised by the defendant, in my opinion the accuracy of such a speedometer can be presumed. As stated above, the burden is on the Commonwealth to prove that the radar machine used has been properly set up and tested for its accuracy.

**MOTOR VEHICLES—Reckless Driving—Passing Halted School Bus—Applicable to Dual Highways. (64)**

September 11, 1958.

HONORABLE J. B. COWLES, JR.  
Commonwealth's Attorney of  
James City County

This is to acknowledge receipt of your letter of September 5 in which you state in part:

"Section 46.1-190 of the Code of Virginia, as amended, provides, 'A person shall be guilty of reckless driving who shall \* \* \* (f) fail to stop at a school bus stopped on the highway for the purpose of taking on or discharging school children, when approaching the same from any direction and to remain stopped until all school children are clear of the highway and the bus is put in motion, provided, however, that this shall apply only to school buses marked or identified as provided in the regulations of the State Board of Education.'

"The question arises as to whether the above quoted provision requires a west bound motorist on a dual highway to stop when a school bus has stopped in the east bound highway. The question arises further as to whether or not the distance between the east bound highway and the west bound highway, as well as the location of embankments, trees, etc., between the highways which obstruct the vision of the motorist, affect the application of the above quoted statute."

When the legislature considered the adoption of the revised Motor Vehicle Code (Title 46.1) it was first sought to amend this subsection (paragraph (f)) by inserting after the word "motion" the following "except that the driver of a vehicle upon a highway with roadways separated by a traffic island or other barrier to the movement of a vehicle need not stop upon meeting or overtaking a school bus which is in a different roadway." Instead of so amending this section, the General Assembly saw fit to strengthen the same by inserting the language: "when approaching the same from any direction."

I am, therefore, of the opinion that a west bound motorist on a dual highway is required to stop when a school bus has stopped in the east bound highway for the purpose of taking on or discharging school children.

I would hardly think that a motorist could be found guilty of violating this statute when the vision of the school bus is entirely obscured. However, there can be no categorical answer to such questions as contained in the last sentence of the second paragraph, above quoted. The guilt of the accused must be determined by the local court considering the circumstances surrounding each individual case.

**MOTOR VEHICLES—Reckless Driving—Proof of Prior Conviction—D. M. V. Certificate Should Contain Only Convictions Had Within Statutory Period. (24)**

July 22, 1958.

HONORABLE B. M. MILLER  
County Judge  
Rappahannock County

This is in response to your letter of July 15, 1958, which I quote below:

"A question arises as to the admissibility in evidence of the certification of a prior conviction of reckless driving under Title 8, Section 266 of the

Code of Virginia. An abstract of judgment of conviction together with a certification by an officer of the Division of Motor Vehicles is submitted, however, the certification by the officer of the Division of Motor Vehicles certifies not only as to the conviction of reckless driving within the preceding 12 months, but also lists other and separate offenses committed prior to the 12 month period.

"It is contended that the admission of such a certificate in evidence and the presentation to the County Court would introduce unrelated matters and tend to be prejudicial.

"I shall appreciate your reply as to whether in your opinion when an accused is charged with a second offense of reckless driving, within a 12 month period, such a certificate containing other offenses should be admitted as evidence or whether the certificate should be admitted only in those cases where it is limited to a record of the prior conviction of reckless driving within the 12 month period."

Reckless driving is defined in §§ 46.1-189, 46.1-190 and 46.1-191 of the Code of Virginia (1950), as amended. Section 46.1-192 provides for the penalties for reckless driving, and reads as follows:

"Every person convicted of reckless driving under §§ 46.1-189, 46.1-190 or 46.1-191 shall for the first violation be punished as provided by § 19-265. For each second or subsequent conviction for the offense of reckless driving under §§ 46.1-189, 46.1-190 or 46.1-191 committed within twelve months before or after the date of another act of reckless driving for which he has been convicted, such person shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in jail for not less than ten days nor more than twelve months, or by both such fine and imprisonment."

As pointed out by you in your letter, the certificate from the records in the office of the Division of Motor Vehicles is admitted into evidence pursuant to the provisions of § 8-266 of the Code of Virginia. It would appear that the sole reason that such certificate is introduced is to show other convictions of reckless driving within the time specified in § 46.1-192, which provides for an increased punishment in such cases. Any convictions listed on such certificate other than the convictions for reckless driving within the time specified in § 46.1-192 would be beyond the scope of this section. I am, therefore, constrained to believe that the better practice would be to limit the contents of any such certificate which is admitted in evidence to the convictions of reckless driving which occurred during the period of time specified in § 46.1-192 of the Code.

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**MOTOR VEHICLES—Registration—Dolly Used with Wrecker for Towing Disabled Vehicles—Need Not Be Registered—No Brakes Required—Must Be Substantially Attached to Towed Vehicle. (277)**

April 22, 1959.

COLONEL C. W. WOODSON, *Superintendent*  
Department of State Police

This is to acknowledge receipt of your letter of April 17, 1959 addressed to the Honorable Francis C. Lee in which you request an opinion as to the questions arising from the use of a Holmes Speed King Dolly when used in conjunction with a wrecker to remove vehicles from the highways.

I shall answer your questions seriatim:

1. When used in the manner as shown in the photographs, would this dolly be considered a separate vehicle and require registration and license?

Answer: This dolly is a vehicle, but the question arises whether it is such a vehicle as would be regulated by the provisions of the Motor Vehicle Laws. The term "vehicle" is defined in Section 46.1-1 (34) as follows:

"Every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks."

The vehicles required to be licensed under the motor vehicle laws are (1) motor vehicles (2) trailers and (3) semitrailers. Obviously such a dolly is not a motor vehicle. Now the terms "semitrailer and trailer" are defined in Section 46.1-1, paragraphs 27 and 33 as follows:

"(27) '*Semitrailer*.'—Every vehicle of the trailer type so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another vehicle."

"(33) '*Trailer*.'—Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle."

The dolly is certainly not a trailer because it is not designed to carry property or passengers *wholly* on its *own structure*. To be a semitrailer some part of the vehicle *and* that of its own load *rests upon* or is *carried* by another vehicle. No part of the dolly's own weight is rested or carried by another vehicle although a part of its load rests upon the wrecker. Under these circumstances, I do not think that such a dolly is a semitrailer or trailer within the meaning of the Motor Vehicle Code.

I am therefore, of the opinion that such a dolly or device would not be considered a separate vehicle and would not be required to be registered and licensed.

2. If the actual gross weight exceeded three thousand pounds when loaded, would brakes be required?

Answer: Section 46.1-280 of the Code is as follows:

"(a) Every semitrailer or trailer or separate vehicle attached by a drawbar, chain or coupling to a towing vehicle and having an actual gross weight of three thousand pounds or more, shall be equipped with brakes controlled or operated by the driver of the towing vehicle which shall conform to the specifications set forth in § 46.1-279 and shall be of a type approved by the Superintendent.

"(b) '*Gross weight*' for the purpose of this section includes the load upon such semitrailer, trailer or separate vehicle."

As a dolly is not a trailer or semitrailer or is not a separate vehicle attached by a drawbar, chain or coupling to a towing vehicle, it would not be required to be equipped with brakes although the actual gross weight when loaded may exceed three thousand pounds.

3. Would a connection between the dolly and the wrecker, other than the vehicle being towed, be required?

Answer: So long as a dolly is substantially attached to the vehicle being towed, there would be no necessity for a connection between the dolly and the wrecker, other than the vehicle being towed.

**MOTOR VEHICLES—Registration—Evidence of Financial Responsibility—Commissioner May Issue Registration Without \$15 Fee to Fleet Owner if Fleet Lessee Holds Certificate of Insurance or Self-Insurance—Lessee Cannot Cover Owner-Lessor with Self-Insurer Privileges by Assignment. (231)**

March 10, 1959.

HONORABLE C. H. LAMB, *Commissioner*  
Division of Motor Vehicles

This is to acknowledge receipt of your letter of February 25, 1959, in which you state in part:

"In the field of commercial vehicle operation there are a number of cases where the registered owner is the lessor of certain motor vehicle equipment, and the lessee is the truck line operator of such equipment. These leases may vary widely both as to length of lease and provisions relating to the payment of license fees for the motor vehicles involved.

"In cases where the lessee operator is a self-insurer properly qualified with this Division and such leased vehicles make up a part or all of his motor vehicle fleet do the privileges extended to the self-insurer hereinbefore referred to and which have been obtained by the lessee extend to the licensing of the motor vehicles subject to the lease agreement although the lessor owner of record is not qualified with this Division as a self-insurer?"

You refer me to Section 46.1-167.1, which reads in part as follows:

"\* \* \* or the Commissioner or his duly authorized agent may, in his discretion, require that such person produce as evidence of financial responsibility a certificate, in form prescribed by the Commissioner, of insurance or self-insurance complying with the requirements of 46.1-395 \* \* \*."

As I understand the matter, you wish to know whether or not—in a case where the owner of the vehicles, who is not insured and who is not the holder of a self-insurance certificate in compliance with Section 46.1-395, makes application for registration of his vehicles—you may issue the registration to such owner without the payment of the \$15.00 fee required by Section 46.1-167.1, if the vehicles have been leased and the lessee-operator holds such a certificate.

Under Section 46.1-395, the Commissioner may issue a self-insurance certificate to "any person operating more than twenty vehicles \* \* \* as lessee." This section is a part of the "Virginia Motor Vehicle Safety Responsibility Act" and under its provisions the issuance of a financial responsibility certificate of self-insurance to a lessee-operator may be treated as having the same efficacy as such a certificate issued to the lessor-owner of the leased vehicle. The concluding sentence of Section 46.1-167.1 does not specifically state that the insurance policy or the self-insurance certificate must be in the name of the owner. There is no specific language in Section 46.1-167.1 which would indicate that such a certificate issued to a lessee under Section 46.1-395 would not also satisfy the requirements of Section 46.1-167.1.

You also present the following question:

"Further, is it possible for the lessee to cover by assignment or otherwise the lessor owner of the motor vehicles to be licensed with the self-insurer privileges of the lessee?"

In my opinion the statutes under consideration do not authorize you to follow the procedure suggested by your question. A certificate of financial responsibility under Section 46.1-395, it would seem, contemplates that it be issued upon a basis of the financial worth of the person to whom it is issued.

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**MOTOR VEHICLES—Reports to D. M. V.—Clerk not Required to Report Conviction of Perjury Arising Out of Speeding Trial. (141)**

December 2, 1958.

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

This is to acknowledge receipt of your letter of November 25 in which you ask my opinion on the question presented which is found in the following quotation from your letter:

"A man was given a ticket for speeding on the Highways of this County and at the trial of the case the defendant and two persons who were riding with him in his automobile at the time of the offense testified in the County Court. The defendant was convicted of speeding and paid his fine and costs. \* \* \*

"Then as a result of the testimony given by the defendant and the two passengers all three of the men were indicted for perjury. All of the men were later tried by a jury and convicted for perjury.

"Now my question is, are these cases which a report to the Division of Motor Vehicles is required to be made by the Clerk of the Court in which the men were convicted for perjury?"

Section 46.1-417 provides that the Commissioner of the Division of Motor Vehicles shall revoke a person's driving license upon the receiving of record that he has been convicted of certain offenses. One of the said convictions is described as follows:

"(d) Any crime punishable as a *felony* under the motor vehicle laws of this State or any other felony in the commission of which a motor vehicle is used;" (Italics supplied.)

In the case of *Lamb v. Driver*, 196 Va. 393, the Court of Appeals held, that the term "used" in this section meant to operate or drive a vehicle and, therefore, in order to revoke the driving license there must be a showing that the person drove or operated the vehicle in committing the felony.

In my opinion, the conviction of the driver of the automobile and his guests, under the above circumstances, would not be a ground for revocation of a driver's license as a motor vehicle was not actually used in committing the crime of perjury, although the statements concerning the operation thereof were the basis of the perjury convictions. Therefore, the clerk is not required under Section 46.1-413 to report the convictions of these men for perjury to the Division of Motor Vehicles.

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**MOTOR VEHICLES—Revocation of Driver's License—Operating Motor Vehicle After When Permit Has Not Been Surrendered—Violation of Statute. (9)**

July 14, 1958.

HONORABLE C. H. LAMB, *Commissioner*  
Division of Motor Vehicles

This is to acknowledge receipt of your letter of June 26, 1958, in which you

request my opinion concerning the applicability of Section 46.1-350 of the revised Motor Vehicle Code in light of the opinion of this office issued June 19, 1958, in a letter to the Honorable D. R. Taylor, Judge of the James City County Court.

I quote from your letter:

"Will you kindly advise me if the language of this section, effective June 27, 1958, particularly the phrase '\* \* \* who has been forbidden as prescribed by law by the Commissioner \* \* \* to operate a motor vehicle in this State \* \* \*' is broad enough, in relation to Section 46.1-441, to deprive a resident or non-resident of the privilege to operate a motor vehicle upon the issuance of an order of revocation or suspension even though the person revoked or suspended has not surrendered the license items. That is, is the order of the Commissioner entered as prescribed by law an act by the Commissioner, which, upon its performance, forbids the affected person thereafter to drive a vehicle until the period of revocation or suspension set forth in the order and prescribed by statute shall have terminated, and having been so forbidden, can he be prosecuted if he drives prior to the surrender of license, or prior to the running of 180 days, whichever is earlier?"

The pertinent portion of the revised statute (Section 46.1-350) is as follows:

"(a) No person resident or non-resident whose operator's or chauffeur's license or instruction permit has been suspended or revoked by any court or by the Commissioner or by operation of law pursuant to the provisions of this title or of § 18-77 or who has been *forbidden as prescribed by law by the Commissioner*, the State Corporation Commission, the State Highway Commissioner, or the Superintendent of State Police, to operate a motor vehicle in this State, shall thereafter drive any motor vehicle in this State unless and until the period of such suspension or revocation shall have terminated." (Italics supplied.)

In my opinion of June 19, 1958, I took the position that a prosecution and conviction could not be had under Section 46-347.1 of the Code with respect to a person whose driving permit had been revoked by the Commissioner of Motor Vehicles but *who had failed to surrender his driving permit* and was apprehended driving a motor vehicle after receiving notice of the order of revocation, such apprehension being before the lapse of 180 days after the date his conviction became final. I held in that opinion that the applicable provision for prosecution where a person has failed to comply with the directive to surrender his driving license was Section 46-395 (Now 46.1-397).

You have now raised the question as to whether or not a person whose driver's permit has been revoked under Section 46.1-420 may be prosecuted and convicted under Section 46.1-350 of the Code despite the fact that the period of 180 days has not elapsed since the date his conviction became final. Your question is prompted by the language of Section 46.1-350, which is an amendment and re-draft of former Section 46-347.1, and which new Section is quoted above. You refer specifically to that portion of Section 46.1-350 which is underscored. The underscored language was not contained in former Section 46-347.1. Of course, whenever the Commissioner of Motor Vehicles revokes the driver's permit of any person, such revocation is tantamount to and is in fact an order forbidding such person from operating a motor vehicle on the highways of this State. The amendment to which you refer and which is the italicized language contained in Section 46.1-350, in my opinion, now permits the prosecution and conviction under this Section of a person who is apprehended driving a motor vehicle after his permit has been revoked but who has failed to surrender such permit, even though the period of 180 days provided for in Section 46.1-441 of the Code has not elapsed.

The opinion of June 19, 1958 was with respect to a revocation for a period of 60

days under Section 46-416.2 of the Code. This Section is now 46.1-420 and the period of revocation is still 60 days. This period of 60 days commences to run under Section 46.1-441 (formerly Section 46-427.1) from the date on which the license is surrendered or from 180 days after the conviction becomes final, whichever period shall first commence. Prior to the insertion of the new language which is underscored in Section 46.1-350 if the person whose permit had been revoked under Section 46-416.2 (now Section 46.1-420) refused to surrender his license he could not be convicted *under that section* for driving a motor vehicle upon the highways, until the period of revocation or suspension commences 180 days after the conviction becomes final. The effect of the amendment is that he may now be prosecuted and convicted under Section 46.1-350 despite his failure to surrender his driver's permit even though the period of revocation has not commenced to run under Section 46.1-441.

I suggest that you revise your form of revocation so as to include therein a clause to the effect that the person to whom the form is directed is forbidden to drive a motor vehicle from the date of receipt thereof until such time as the period of revocation or suspension has expired.

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**MOTOR VEHICLES—Revocation or Suspension of Operator's License—Driving Without License—Driving After License Suspended. (133)**

November 17, 1958.

HONORABLE JOSHUA PRETLOW  
Commonwealth's Attorney  
Nansemond County

This is to acknowledge receipt of your letter of November 10th in which you request my opinion on two questions involving the suspension and revocation of driving licenses, and the applicable statutes under which to prosecute. I shall answer your questions seriatim:

Question 1. The first situation, which involves a driver whose license has expired, say January 1, 1958, and his license was revoked for four months on February 1, 1958, for three convictions of speeding under Section 46.1-419, and after this revocation has expired this person was directed to appear for examination and failed to do so, then under Section 46.1-383, the order of suspension for his license (which license he does not have), is entered. If he drives after this last order, is he guilty of driving without a driver's license or while license is suspended?

Answer: From what you say, this man's driving license expired before the termination of the period of revocation resulting from his convictions. Due to his failure to pass or refusal to submit to the examination required to be taken under Section 46.1-383 of the Code of Virginia, the Commissioner of the Division of Motor Vehicles issues an order suspending his license to operate any motor vehicle in this State until such time as he passes the required examination.

Section 46.1-383 is as follows: "The Division shall, upon receipt of a record that a *licensed operator* or chauffeur has, (1) been convicted of two traffic violations occurring during a period of one year in which the vehicle operated by him was in motion or (2) during a period of one year been involved as driver of a vehicle in two accidents involving personal injury or property damage in excess of fifty dollars, or having any other good cause to believe that a *licensed operator* or chauffeur is incompetent or otherwise not qualified under this chapter to be licensed, may, upon written notice of at least five days to the licensee, require him to submit to an examination to determine his fitness to operate a motor vehicle

upon the highways of this State. Upon the conclusion of such examination, the Division shall take such action as may be appropriate and may suspend or revoke the *license* of such person or permit him to retain such *license*, or may issue a *license* subject to such restrictions as are authorized to be imposed by § 46.1-378. Refusal or neglect of the *licensee* to submit to such examination or comply with such restrictions shall be grounds for suspension or revocation of his *license*." (Italics supplied.)

It will be noted that this Section applies only to a licensed operator or a licensed chauffeur. It does not apply to a person who does not have a valid driving license. If a person not having a license desires to secure one he must pass the examination. The purpose of this Section is to require certain persons who are lawfully licensed to undergo the examination to determine their fitness to drive. If they fail or refuse to submit to the examination, the Commissioner may suspend their driving license. This takes such persons off the highways until their qualifications are determined and established.

In the case you cite, the person's operator's license has already expired so in order to drive he must obtain another driving license by passing the required examination. The action of the Commissioner in such a case is meaningless as there is nothing to suspend.

It is, therefore, my opinion that this person should be prosecuted for driving without an operator's license in violation of Section 46.1-349 of the Code of Virginia, 1950, as amended.

Question 2. The second situation is where a suspension is ordered by the Commissioner under Section 46.1-419 for two convictions of speeding for a period of 60 days and his license expired in 30 days. After the 30 days, but before expiration of the 60 days, he is caught driving, will he be guilty of driving after his license is suspended or driving without a license?

Answer: Under the provisions of Section 46.1-350, a person may be prosecuted for driving at any time before the period of suspension or revocation has terminated. The fact that the license expires during the period of revocation does not alter this situation. The driving license is merely the physical evidence of the privilege to drive extended the person by the State. When there is no operator's or chauffeur's license issued to the person, his driving privileges can be revoked or suspended, that is, he is prohibited from driving by the Commissioner of the Division of Motor Vehicles. You will note that Section 46.1-350 makes it a misdemeanor to drive where the person has been prohibited to drive by the Commissioner. This extends not only to nonresidents who have no Virginia operator's license but to residents of Virginia who have no driving license issued to them by this State. Section 46.1-452 provides that the provisions of the Safety Responsibility Act, (which includes Section 46.1-419), are applicable to persons who have no license to drive issued by the Division of Motor Vehicles.

I am, therefore, of the opinion that this person should be prosecuted for driving after his license is suspended in violation of Section 46.1-350 of the Code of Virginia, 1950, as amended.

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**MOTOR VEHICLES—Small Trailers—Licensing—May Be Attached to Pick-Up Truck as Well as Passenger Automobile. (10)**

July 14, 1958.

HONORABLE JOHN HENRY POWELL, *Clerk*  
Circuit Court of Nansemond County

This is to acknowledge receipt of your letter of July 3, 1958 in which you request my opinion on this question which I quote from your letter:

“ ‘may the owner of a pick-up truck who owns a trailer lawfully licensed, pursuant to Section 46.1-155, 1950 Code of Virginia, as amended, lawfully attach this trailer to the pick-up truck?’ ”

Section 46.1-155 reads as follows:

“The fee for the certificate of registration and license plates to be paid to the Commissioner by the owner of a one or two wheel trailer with a body length of not more than nine feet and a width not greater than the width of the motor vehicle to which it is attached at any time of operation, to be attached to the owner's own motor vehicle and used only for carrying property belonging to the owner of such trailer, not to exceed one thousand pounds at any one time, shall be three dollars and fifty cents.”

The term “motor vehicle” is defined in Section 46.1-1 (15) as “Every vehicle as herein defined which is self-propelled or designed for self-propulsion \* \* \* .”

Section 46.1-154 prescribes that the fee for licensing trucks and trailers not designed to transport passengers shall be determined by the gross weight of the vehicle or combination of vehicles of which it is a part when loaded to the maximum capacity. The pick-up truck must be licensed under that section (46.1-154).

The question presented is whether a trailer of a size described in Section 46.1-155 must be licensed under Section 46.1-154 when it is towed by a pick-up truck, or stated in another way, are the provisions of Section 46.1-155 only applicable when such a trailer is towed by a *passenger car*.

Section 46.1-154 commences with this language: “Except as hereinafter otherwise provided, the fee for certificates of registration and license plates to be paid by owners of all motor vehicles, trailers and semitrailers not designed and used for the transportation of passengers shall be \* \* \* .” It would seem that the trailers licensed in Section 46.1-155 are exceptions to the provisions of Section 46.1-154, just as are the trailers to which well drilling machinery is attached (Section 46.1-156) and semitrailers in combination with tractor-trucks licensed under Section 46.1-157. These sections were enacted in 1942 as parts of Chapter 377. The pick-up truck is certainly a motor vehicle by the definition in Section 46.1-1 (15). Your question, therefore, must be answered in the affirmative.

I am not unmindful of the fact that the Division of Motor Vehicles has for many years so construed Section 46-163 (now Section 46.1-155) to apply only to the situation where such a trailer as described therein, is moved by a passenger-type automobile. To read into Section 46.1-155 the word “passenger” immediately preceding the term “motor vehicle,” would do violence thereto and place a different meaning than that clearly indicated in the statute.

I am, therefore, of the opinion that if the pick-up truck is licensed under the provisions of Section 46.1-154 and the fee paid is based on a maximum gross weight including the weight of the trailer (1000 pounds), the owner thereof may lawfully attach to this pick-up truck such a trailer (as described in Section 46.1-155) used only carrying property belonging to himself.

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**MOTOR VEHICLES—Small Trailers—Licensing—Requirements to Be Met to Come Within Definition—Chassis Trailer With No Body. (16)**

July 17, 1958.

HONORABLE C. H. LAMB, *Commissioner*  
Division of Motor Vehicles

This is in reply to your letter of July 15, 1958, which reads as follows:

“A situation has arisen in the Norfolk area regarding the proper application of Title 46.1-155 in the issuance of proper license plates to certain

trailers. In order that you may have the background and to make clear the issue presented, I am enclosing copies (enclosed designated) of letters which I trust will be helpful to you.

"We have always considered that old Title 46-163, which is now 46.1-155, is an exemption from the provisions of old Title 46-162, and that if the trailer did not meet the requirements imposed by 46-163 the Division had no alternative but to assess and collect the fee provided in 46-162. Since the inception of this enactment it has been this Division's policy, in determining the proper license fee to assess and collect, and the proper type of license plate to be issued, to consider in the case of boat, lumber or pole trailers which do not have conventional bodies the distance from the front to the rear rest, cradle or bolster as the body length. To express this more simply—the distance from the front to the rear of that part of the trailer which supports the object carried is considered the body length of the trailer.

"Inasmuch as the Statute 46.1-155 in setting forth the license fees for trailers which meet the requirements expressed therein makes specific reference to '\* \* \* one or two wheel trailers with a body length of not more than 9 feet \* \* \*', can this Division properly abandon reference to this body length in determining the proper license plates and fees to be collected? If the answer to this question is in the negative, is it proper for the Division to set up an administrative yardstick to determine the body length as explained above, and if so is the method of determination referred to above reasonable and proper for an administrative agency to lay down and enforce?

"Your opinion as to the questions posed herein will be greatly appreciated."

I concur in your conclusion that Section 46.1-155 of the Code is an exception to Section 46.1-154 so as to exempt a trailer meeting the requirements of Section 46.1-155 from the fees provided for in Section 46.1-154.

In order for a trailer to come within this exemption and thus be subject to the \$3.50 fee, rather than a greater amount under Section 46.1-154, such trailer must meet the dimensional and other conditions. Section 46.1-154 is a general statute imposing certain fees upon trailers, the minimum being \$12.00, and any statute which takes a trailer out of the scope of the general statute must, under the well established rule of law governing exemptions from a taxable provision, be construed strictly. Unless a trailer meets all of the dimensional and other conditions and specifications contained in Section 46.1-155, the owner thereof is not entitled to the benefit of the exemption. The purpose for which the trailer is used is not an element to be considered. Therefore, your first question is answered in the negative.

With respect to your second question, I feel that what constitutes a body length is a factual matter. It does not seem to present a legal question. In a case where no body is attached to a trailer, it being what is ordinarily known as a chassis, I am of the opinion that the Commissioner of Motor Vehicles may determine by a reasonable rule or regulation how the body length in such cases shall be measured. By such procedure the Commission would permit certain trailers to qualify for the \$3.50 fee, because otherwise such trailers, for lack of being equipped with a measurable body would, it would seem, fail to qualify.

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**MOTOR VEHICLES—Statute Requiring Rear Fenders, Flaps or Guards for Certain Vehicles Not Discriminatory. (97)**

October 17, 1958.

HONORABLE J. EDGAR POINTER, JR.  
Commonwealth's Attorney of  
Gloucester County

This is to acknowledge receipt of your letter of October 14, 1958 in which you ask me whether or not Section 46.1-290 of the Code, as amended, is constitutional.

You feel that there is discrimination concerning the classes to which this legislation applies. That section reads as follows:

*“Rear fenders, flaps or guards required for certain motor vehicles.—(a) No person shall operate upon a highway any motor vehicle or combination of vehicles having an actual gross weight in excess of twenty-two thousand five hundred pounds which motor vehicle or combination of vehicles is not equipped with rear fenders, flaps or guards which shall be of such size as will substantially prevent the projection of rocks, dirt, water or other substances to the rear. Such fenders, flaps or guards shall be of a type approved by the Superintendent of State Police. Vehicles used exclusively for hauling logs shall be exempt from the provisions of this section. (b) ‘Gross weight’ for the purpose of this section includes the load upon such motor vehicle or combination of vehicles.”* (Italics supplied.)

This statute is designed for the protection of the traveling public and, therefore, clearly within the police power. Your attention is invited to Michie’s Jurisprudence, Volume 4, Page 164, which reads as follows:

*“It can readily be seen that a large discretion is vested in the legislature to determine what the interests of the public require and also as to what is necessary for the protection of such interests, and every possible presumption is to be indulged in favor of the validity of a statute. It is for the legislature to determine to what classes a police statute shall apply, and unless there is a clear case of discrimination the courts will not interfere.”*

I agree with you that the question you present is not free from doubt. Many factors are considered in the enactment of legislation; the legislature is much better qualified to determine the necessity for the statute than the courts and it is not for the courts to say whether the legislation is unwise or injudicious. The legislature has set forth the classes to which this statute applies and I cannot state that there is a clear case of discrimination here.

My conclusion is that the section is not unconstitutional.

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**MOTOR VEHICLES—Traffic Control—School Zone Signs on Highway—Appropriate Time for Placing on—Responsibility for Maintenance. (163)**

January 7, 1959.

HONORABLE R. H. PETTUS  
Commonwealth’s Attorney for  
Charlotte County

This is in reply to your letter of December 18, 1958, in which you request my opinion as to the appropriate time for the placing of portable school signs in the highway as provided in Section 46.1-193(f) (1) of the Code of Virginia of 1950, as amended.

The portions of the statute in question, insofar as here germane, are as follows:

*“No person shall drive any vehicle upon the highways of this State at a speed in excess of:*

\* \* \* \* \*

*“(f) And irrespective of the type or use of the vehicle driven;*

"(1) Twenty-five miles per hour between portable signs or fixed blinking signs placed in the highway bearing the word "school" which word shall indicate that school children are presently in the immediate vicinity. If the portion of the highway to be posted is within the limits of a city or town, such portable signs shall be furnished and delivered by such city or town. If the portion of the highway to be posted is outside the limits of a city or town such portable signs shall be furnished and delivered by the State Highway Department. It shall be the duty of the principal or chief administrative officer of each school or some responsible person designated by the school board to place such portable signs in the highway at the limits of the school property and remove such signs when their presence is no longer required by this subsection. Such portable or fixed blinking signs shall be placed in a position plainly visible to vehicular traffic approaching from either direction but shall not be placed so as to obstruct the roadway. *Such portable signs shall be in position for 30 minutes preceding regular school hours and for 30 minutes thereafter and during such other times as the presence of children on such school property reasonably requires a special warning to motorists.* \* \* \*" (Italics supplied.)

The italicized language is subject to at least three interpretations, any one of which can be supported with some degree of logic. I am inclined to construe the language so as to require the portable signs to be in place only during the times when the presence of school children in or near the highway can be reasonably expected. Had the legislature intended the signs to be in place throughout the school day, it would have been quite simple to so word the statute. It would appear that the danger periods for school children due to the presence of motor vehicles are those critical minutes before school convenes and a like period following the adjournment of school.

Secondarily, but nevertheless important, the posting of the signs in question has the effect of reducing the lawful speed limit for motorists, the violation of which is a criminal offense. Hence, the signs should be posted only when reasonably necessary. Inasmuch as the statute admits of more than one interpretation, I am constrained to the view that the most liberal construction should be adopted so as to promote the maximum protection for school children while at once providing minimum restriction upon the movement of traffic.

In view of the foregoing, I am of the opinion that Section 46.1-193(f) (1) of the Code should be interpreted so as to require the placing of "school" signs in the highway one-half hour preceding the commencement of school hours and removed therefrom after school convenes. The signs should again be placed in the highway when school adjourns and allowed to remain for one-half hour.

It should be noted that such signs may be posted at any other times as the presence of children on the school property reasonably requires a special warning to motorists. This places wide discretion in the principal, or other responsible person which may be designated by the school board, in determining when the portable signs may be placed in the highway. There may be instances in which staggered school hours, recess and lunch hours, or other circumstances which cause the presence of school children near the highway to such an extent as to make reasonable the placing of such signs in the highway throughout the school day.

You also inquire as to the responsibility of the school board to maintain or replace the portable signs.

The statute here in question places the burden of furnishing such signs upon the city or town, or the State Highway Department, dependent upon whether the school is situated inside or outside the municipal corporate limits. I am of the opinion that the maintenance or replacement of such signs, like all other speed or traffic control signs, is the responsibility of the governmental agency obligated to furnish the signs in the first instance. Therefore, the maintenance or replacement of signs is the responsibility of the city or town in which the school is situated, or the State Highway Department when the schools are located outside the municipal corporate limits.

**MOTOR VEHICLES—Uninsured Motorists Law—"Motor Vehicles" Defined as Self-Propelled or Designed for Self-Propulsion. (47)**

August 21, 1958.

HONORABLE C. H. LAMB, *Commissioner*  
Division of Motor Vehicles

This is in response to your letter of August 12, 1958, which reads as follows:

"This is with further reference to recently enacted legislation which deals with registration of uninsured motor vehicles, more particularly described as Article 10, Chapter 3 of Title 46.1.

"(Since the requirements relating to registration refer to the term 'motor vehicle' will you advise me if such term relates to the definition of motor vehicles as defined in 46.1-1 (15). If your answer is in the affirmative, is our interpretation correct that vehicles incapable of self-propulsion, i.e., semitrailers, trailers, etc., are excluded from the provisions of Article 10, Chapter 3, referred to above?"

This article, consisting of §§ 46.1-161.1 to 46.1-167.6, inclusive, was enacted by Chapter 407, Acts of 1958, the title to which clearly sets forth that the purpose of the Act is to require an additional fee for registration of motor vehicles coming within the scope of the Act. Since the Act itself did not add any particular section to the Code, the Virginia Commission assigned to the several paragraphs of the Act article number and section numbers so as to codify the Act in that part of the Motor Vehicle Code relating to registration, although the purposes are to some extent analogous to the provisions of Chapter 6 relating to safety responsibility.

Article 10, Chapter 3 fails to define the term "motor vehicle." It does, however, define "insured motor vehicle" and "uninsured motor vehicle." The words "motor vehicle" in both instances must, it would seem, include such motor vehicles as are defined in § 46.1 (15) without regard to the definition of "motor vehicle" as contained in Chapter 6 of Title 46.1. That definition is as follows:

"(15) '*Motor vehicle*'.—Every vehicle as herein defined which is self-propelled or designed for self-propulsion except that the definition contained in § 46.1-389(d) shall apply for the purposes of chapter 6 (§ 46.1-388 et seq.) of this title."

Upon examination of the report filed by the Virginia Code Commission relating to its revision of the Motor Vehicle Code, there is appended the following note to their definition found in § 46.1-1 (15):

"The words 'except that the definition contained in 46.1-389 shall apply for the purposes of Chapter 6 of this Title' are added to make certain the application of a special definition of motor vehicle used in Chapter 6."

It would seem clear from the recitals set forth above that the Act in question, codified as set forth herein, is applicable to "motor vehicles" as defined in § 46.1-1 (15) which are vehicles that are self-propelled or are designed for self-propulsion. It is my opinion, therefore, that trailers, semitrailers and similar type vehicles that are not self-propelled or designed for self-propulsion are not subject to the \$15.00 additional fee prescribed by Article 10, Chapter 3 of Title 46.1 of the Code.

**MOTOR VEHICLES—Weight Laws—Assessment of Damages—Judgment—Forfeiture—§ 46.1-342 Is Constitutional—Release of Vehicle Upon Acceptance of Bond. (318)**

May 26, 1959.

HONORABLE KOSSEN GREGORY  
Member of the House of Delegates

This is to acknowledge receipt of your letter of May 13, 1959, in which you state in part:

"I would appreciate an opinion as to the constitutionality of this section (46.1-342) as it relates to a judgment with no personal notice to the owner and no opportunity available to him to assert his defense, and also, if the basis of the proceedings in an in rem action, whether or not the releasing of the vehicle constitutes a complete release of the rights of the Commonwealth given under Section 46.1-342."

This section was enacted twice during 1958, Chapters 541 and 612. The section as compiled by the Code Commission includes the provisions of both of these chapters.

The Code section under consideration reads as follows:

"(a) Upon conviction of any person for violation of any weight limit as provided in this chapter the court shall assess the owner, operator or other person causing the operation of such overweight vehicle liquidated damages in the amount of two cents per pound for each pound of excess weight over the prescribed limit when the excess is five thousand pounds or less, and five cents per pound for each pound of excess weight over the prescribed limit when such excess is more than five thousand pounds. Such assessment shall be entered by the court as a judgment for the Commonwealth, the entry of which shall constitute a lien upon the overweight vehicle. Such sums shall be paid into court or collected by the attorney for the Commonwealth and forwarded to the State Treasurer and allocated to the fund appropriated for the construction and maintenance of State highways.

"(b) Any officer authorized to make arrests and weigh vehicles under the provisions of this chapter may for a period of twenty-four hours without a court order and thereafter upon a written order of the court either before or after conviction hold the vehicle involved in the overweight violation, provided the same is not registered with the Division of Motor Vehicles, until the amount assessed, if after conviction, or subject to be assessed, if before conviction, together with the cost of holding or storing of the vehicle, be paid, or until a bond by or on behalf of the offending person is given for payment as the court may direct of the amount assessed or to be assessed with surety approved by the court or its clerk.

"(c) In the event the amount so assessed be not paid or no bond be given as provided hereinabove, the vehicle involved in the overweight violation shall be stored in a place of security, as may be designated by the owner or operator of the vehicle. If no place be designated, the officer making the arrest shall designate the place of storage. The owner or operator shall be afforded the right of unloading and removing the cargo from such vehicle. The risk and cost of such storage shall be borne by the owner or operator of such vehicle.

"(d) If within sixty days from the time of the conviction for the overweight violation, the offending party does not pay the assessment

imposed by this section, together with the cost of storing such vehicle and cargo, if the cargo is not removed as herein provided, the vehicle and cargo shall be forfeited to the Commonwealth and sold to satisfy the assessment and cost of storage.

"(e) Upon notification of the failure of such person to pay the amount assessed, together with the payment of cost of holding such vehicle under this section, the Division or the Department of State Police may thereafter deny the offending person the right to operate a motor vehicle or vehicles upon the highways of this State until such assessment has been paid.

"(f) The Department of State Police is vested with the same powers with respect to the enforcement of this section as it has with respect to the enforcement of the criminal laws of the Commonwealth.

"(g) The charge hereinabove specified shall be in addition to any other liability which may be legally fixed against such owner or operator for damage to a highway or bridge attributable to such weight violation."

The statute in question, particularly paragraph (a), authorizing a judgment to be entered for damages against the owner, operator or other person causing the operation of an overweight vehicle is, in effect, similar to Section 46-338.1 of the Code which was tested as to constitutionality in the case of *Joyner v. Matthews*, 193 Va. 10, 68 S. E. (2) 127. Under the holding in that case, I feel that our court would take the position that no constitutional rights of the owner have been violated. The reasoning in that case seems to be applicable to the case presented by you.

Under paragraphs (b) and (c), if no bond is given by or on behalf of the offending person, the vehicle shall be impounded and held in a place of storage as security for the payment of the judgment, and after a period of sixty days it shall be forfeited and sold to satisfy the judgment and the cost of storage. This procedure, in my judgment, is also valid under the *Joyner* case. The operator of the vehicle, although it was being driven by his agent, is a violator of the statute regulating the weight of his vehicle. Under such circumstances the vehicle involved in the matter becomes liable for the satisfaction of the judgment which, by its nature is a judgment *in rem*.

The vehicle may be released upon the execution of a satisfactory bond. Whenever a proper state officer accepts such a bond, the vehicle is thereupon released and may not be proceeded against further for the satisfaction of the judgment. The Commonwealth's remedy thereafter for satisfaction of the judgment is limited to collection upon the bond by proceeding against the parties thereto.

The statute is silent as to the service of process upon the owner of the vehicle in an action to have the vehicle forfeited and sold for satisfaction of the judgment. In this connection, I call attention to Section 29-229 of the Code of Virginia, which is as follows:

"Except in cases where the forfeiture incurred is enforceable according to the preceding sections of this chapter, and except also in other cases where it is otherwise specially provided, whenever any property is forfeited to the Commonwealth by reason of the violation of any law, the court before which the offender is convicted shall order the sheriff of the county, or sergeant of the city, to sell the same. The sale shall be at such time and place, and after such notice at the courthouse door, as in the case of property levied on, and the clerk shall make return to the Comptroller and the officer account for and pay the proceeds of sale as in the case of a pecuniary forfeiture."

It would seem that forfeiture could be enforced under this section.

**MOTOR VEHICLES—Weight Laws—Liquidated Damages—May Be Assessed on Bases of Both Gross Overload and Axle Overload. (50)**

September 5, 1958.

HONORABLE C. J. ROWELL, *Judge*  
Surry County Court

This is to acknowledge receipt of your letter of September 3, 1958 in which you state:

"The road had a posted load limit of 35,000 gross and 16,000 axle limit. The warrant charged 'over gross weight 2200 pounds; over axle weight 1700 pounds.'

"The gross weight of the tractor-trailer, upon being weighed, was 37,200. The axle load was 17,700.

"Upon conviction would the defendant be charged two cents per pound for the gross overload of 2200 and also for the axle overload of 1700, for liquidated damages."

I assume that this road was posted by the Highway Commissioner under the authority of Section 46.1-345 which section makes it a misdemeanor to operate a vehicle in excess of the maximum posted by the State Highway Commissioner. Section 46.1-342 prescribes upon conviction of any person for a violation of any weight limit as provided in *this Chapter* that such a person be assessed the liquidated damages. Both of these sections are found in Chapter 4, Title 46.1. Section 46-338.1, now repealed, provided for the imposition of a fine calculated on the weight in excess of the weight permitted by statute. Section 46.1-342 is the successor to and similar to the aforesaid statute (Section 46-338.1). This office has heretofore held (Annual Report of the Attorney General, 1950-1951, Page 156) that the provisions of Section 46-338.1 applied to violations of *axle weight limits* as well as *gross weight limits*. The same reasoning is applicable here.

I am, therefore, of the opinion that the defendant upon conviction can be assessed for liquidated damages based on the gross overload of 2200 and also on the axle overload of 1700 pounds.

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**MOTOR VEHICLES—Weight Laws—Liquidated Damages Unpaid—Neither Owner Nor Driver May Be Jailed—Manner of Enforcement of Lien. (116)**

November 3, 1958.

HONORABLE D. W. MURPHEY  
Substitute Judge of the  
Chesterfield County Court

This is to acknowledge receipt of your letter of October 23, 1958 in which you ask my interpretation of certain provisions of Code Section 46-338.2 as amended by Chapter 612, Acts of Assembly of 1958. This section was also amended by Chapter 541 of the Acts of 1958 which chapter as you know re-codified the Motor Vehicle Laws.

I notice that the Code Commission included the provisions of the above chapters as Section 46.1-342. As both of these statutes (Chapters 541 and 612) were approved by the Governor on the same date and both became effective on the same date, to-wit: June 27, 1958; therefore, effect must be given to all portions of the statutes that are not in conflict. Examination of the two statutes indicate that there is some difference in paragraph (a), but these differences are not appreciable. Furthermore, paragraphs (c) and (d) of Chapter 612 are not found at all in Chapter

541. Although the foregoing has no particular bearing on the inquiry you make, that fact that there are two statutes on the same subject enacted at the same time, some confusion may arise as to their validity, therefore, I have made the above comments.

In answering your questions I shall refer to and consider only the provisions of Chapter 612. Your questions will be answered seriatim:

Question 1: If liquidated damages are assessed should they be included as "costs" and should the defendant be committed to jail for default in payment of fine and costs may he be held the additional time which would include the amount of liquidated damages?

Answer: Paragraph (a), Section 46.1-342 reads in part as follows:

"Upon conviction of any person for violation of any weight limit as provided in this chapter the courts shall assess the owner, operator or other person causing the operation of such overweight vehicle liquidated damages \* \* \* such assessment shall be entered by the court as a judgment for the Commonwealth and the entry of which shall constitute a lien upon the overweight vehicle. Such sums shall be \* \* \* allocated to the fund appropriated for the construction and maintenance of State highways."

These liquidated damages are not fines or penal forfeitures. The assessment of them is civil and not criminal. If they were criminal forfeitures or fines they would be allocated to the literary fund.

Therefore, my opinion is that neither the driver nor the owner who has been convicted, can be committed to jail for default in the payment of the liquidated damages so assessed.

Question 2: Should the accused not be present in Court, or should he decline to pay the liquidated damages (and to pay only the fine and other costs), in what manner should the owner of the vehicle be proceeded against to collect the liquidated damages prior to the institution by the Attorney for the Commonwealth of civil proceedings to obtain a judgment against the owner?

Answer: If after conviction, the operator or owner refuses to pay the liquidated damages so assessed and if the person (owner or operator) is not present, it becomes the duty of the court to proceed under subsection (b) by issuing a written order directing that the vehicle involved be held until the amount of the assessment is paid or bond given for the same. This procedure can only be invoked in the case where the vehicle is registered in a foreign jurisdiction (other than Virginia). Where the vehicle is registered in Virginia, the same should be released, but it is the duty of the court to call the Commonwealth's Attorney's attention to the case so that he may take the necessary steps to have the vehicle sold to satisfy the assessment. It is incumbent upon the court in all cases to see that the vehicle is properly described in the papers of the criminal proceeding and that the assessment (judgment) is entered on the records of the court. There is no mode of enforcing the forfeiture set out in this section (46.1-342). There are no references in this section (46.1-342) to Chapter 10, Title 29 or to any other statutes which prescribe forfeiture proceedings. In these forfeiture statutes I do not find the terms "lien" or "judgment" mentioned as they are set out in this section (46.1-342). As the entry of the judgment by the criminal court constitutes a lien upon the overweight vehicle, apparently the Legislature intended that the lien be enforced by an equity proceeding. (See Section 8-391 of the Code.) If this statute (Section

46.1-342) cannot be tied in with the other statutes setting forth procedures in forfeiture cases or *with Section 8-391 of the Code* which gives equity jurisdiction to enforce judgment liens, then the statute is fatally defective for want of notice or hearing to interested parties. (See case of *Boggs v. Commonwealth*, 76 Va. 989.)

Therefore, it is my opinion that if the offending party does not pay the assessment imposed within sixty days from the time of conviction, a bill in equity must be filed to enforce the lien of the judgment on the overweight vehicle.

Question 3: Our information is that the owner of a vehicle involved in overweight charge is now bankrupt. I have fined the operator but suspended his fine and costs because of certain extenuating circumstances, but I feel that the owner of the vehicle should be required to pay the amount of liquidated damages. As stated above, the only information we have as to the name of the owner is the statement of the State Police Officer making the arrest, and we have no charge of record against said owner. How should I proceed to collect the liquidated damages from such owner?

Answer: Neither does the suspension of the fine and cost nor the bankruptcy of the owner effect the validity of the assessment. The lien should be enforced in the method described above and the claim of the Commonwealth filed in the bankruptcy court.

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**NATIONAL GUARD—Call by Civil Authorities in Emergencies—Sheriffs and Mayors Not Authorized to Order Out Local Unit to Search for Missing Person—Local Unit Commander Should Not Question Legality of Summons Except Where Obviously for Unauthorized Purpose. (316)**

May 26, 1959.

MAJOR GENERAL SHEPPARD CRUMP  
The Adjutant General

This is in reply to your letter of 19 May 1959 in which you stated the following:

“Enclosed is correspondence with the Commanding Officer of Company ‘K’, 176th Infantry, Virginia Army National Guard, West Point, Virginia, and a copy of the call of Sheriff C. T. Dunn of King William County, dated 2 May 1959, directing that this officer assemble his company to aid in the search of a woman (Annie Elizabeth Taliaferro) who had been lost.

“Section 44-75 and 44-78, Military Laws of Virginia, provide that the Governor may call forth the militia, or any part thereof, in the event of flood, hurricane, fire or other forms of disaster wherein the lives or property of citizens of this Commonwealth are imperiled. While it does not appear that the law referred to specifically covers the case in point, it would seem that by a broad interpretation and taking a humane viewpoint it might be applicable. On several occasions this Department, by authority of the Governor, has authorized the transportation of an iron lung by a National Guard airplane when it appeared that the life of a polio victim was in danger.

“While neither the Governor nor the Adjutant General were contacted before troops left their home station for the duty performed, due to their absence from the State at that time, and both offices should have been notified, the Company Commander did contact the Commanding Officer, 176th Infantry, at 7:30 PM on Saturday, May 2nd, who assumed the

responsibility of approving the call to assemble the company for this duty.

"It would be appreciated if you will advise whether you consider the members of Company K, 176th Infantry, who answered this call are entitled to pay and allowances as provided by law."

Section 44-78, as amended, of the Code of Virginia, reads, in pertinent part, as follows:

"In case of any breach of the peace, tumult, riot, or resistance of law, or imminent danger thereof, or in case of any disaster wherein the lives or property of citizens are imperiled, it shall be lawful for the sheriff of any county or the mayor of any city, to call upon the Governor for aid, and, in cases where the emergency is such as not to admit of delay, upon the commanding officer of any unit, and it shall be the duty of the commanding officer, upon whom such call is made, to order out, in aid of the civil authorities, the military force or any part thereof under his command.  
\* \* \*

"This summons shall be signed and properly attested as the act of such sheriff or mayor, and may be varied to suit the circumstances of the case; and a copy of the same shall be immediately forwarded to the commander in chief. The officer to whom the order of the commander in chief or such summons is directed shall forthwith order the troops therein called for, to assemble at the time and place appointed; and shall immediately by telegraph or other most expeditious means, notify the commander in chief of the receipt of such summons and also by letter through the usual military channels. Such troops shall appear at the time and place appointed, armed and equipped with ammunition, and shall obey and execute such orders as they may then and there receive according to law."

In addition, § 44-82, as amended, of the Code, reads in part:

"All officers and enlisted men of the national guard or naval militia, whenever called out in aid of the civil authorities, shall receive the compensation herein provided; \* \* \*."

I am of the opinion that the General Assembly did not intend that National Guard Troops, as such, should be used to assist local authorities in a situation such as in that recited. The general tenor of § 44-78 would indicate that where local law enforcement authorities could not muster sufficient strength to prevent or contain a breach of the peace, tumult, riot or resistance of law, a sheriff is authorized to call upon the commander of a local unit in such emergency.

Likewise, by its use of the words "in case of any disaster wherein the lives or property of citizens are imperiled," the Legislature doubtless had in mind one of the more serious calamities, such as fire, flood or explosion. In the event of the occurrence of any such calamity, the militia troops would then be used primarily to maintain law and order and to protect the lives and property of citizens of the Commonwealth.

In a case involving the disappearance of a local citizen, I do not feel that the question of protection of "the lives or property of citizens" is so involved as to authorize the employment of a unit of the Virginia National Guard to assist the local constabulary. This is more a matter which can and should be handled by volunteers from the area.

However, in the instant case, the Commanding Officer of Company K, 176th Infantry, Virginia Army National Guard was served with a summons issued by the Sheriff of King William County to aid in the search for a lost person, said summons being substantially in the form required by law. To permit local unit commanders

to question the legality of such summonses in an emergency might defeat the very purpose for which the legislation was enacted. Therefore, in this particular case, I am of the opinion that the officers and enlisted men of the National Guard who reported for duty as ordered should receive the compensation to which they are entitled under the provisions of § 44-82, as amended. In addition, whoever paid out the sum of \$31.50 for forty-five lunches should be reimbursed, and the owners of the automobiles used in lieu of military transportation should be paid at the regular rate per mile for the travel involved.

I would suggest that the sheriff of each county and the mayor of each city be advised that the powers granted them under § 44-78, as amended, of the Code of Virginia to issue summonses for Virginia Army National Guard troops in an emergency do not include the power to summon such troops to aid the local law enforcement authorities in the search for missing persons.

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**NOTARIES PUBLIC—Committed to Hospital as Mentally Ill—Does Not Automatically Revoke Commission. (13)**

July 15, 1958.

MISS MARTHA BELL CONWAY  
Secretary of the Commonwealth

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

"I have recently had an inquiry from Mr. H. F. Phillips, 602 Yorkshire Street, Salem, Virginia, concerning the validity of his notary public commission.

"Mr. H. F. Phillips was commissioned as a notary public by this office on February 7, 1958. He tells me that several months ago he was committed to the Western State Hospital at Staunton as 'mentally ill'. Two months later he was discharged as 'not mentally ill.' (This information has been verified.) He wants to know whether this commitment invalidated his commission as a notary public, or whether he may continue to take acknowledgments.

"I would appreciate your opinion in this matter."

Section 47-1 of the Code provides that the Governor may remove a notary public from office on the ground of incapacity. Since this authority was not exercised, I am of the opinion that the notary commission remains in effect. I do not feel that the commission issued to Mr. Phillips was automatically invalidated by his commitment to a mental institution.

While under Section 32 of the State Constitution an insane person may not be appointed a notary public, due to the provisions of Section 23 of the Constitution relating to disqualifications from voting, it appears from Section 37-1.1 of the Code that a "mentally ill" person is not "insane" as that term is used in the same Code section.

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**NOTARIES PUBLIC—No Criminal Sanction for Ante- or Post-Dating Certificate of Acknowledgment—Commission May Be Revoked by Governor. (72)**

September 17, 1958.

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

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

"Will you please advise me if there is any provision in the statute law or otherwise to hold a Notary Public criminally liable for post dating or anti-dating a certificate of acknowledgment whereby the instrument would create liability on a third person or corporation."

I am unable to find any criminal statute covering the situation presented.

I call attention to Section 47-1(l) of the Code which authorizes the Governor to remove a Notary for misconduct.

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**NOTARIES PUBLIC—Public Officers—Must Be Resident of State for at Least One Year Before Appointment. (113)**

October 31, 1958.

HONORABLE EUGENE A. LINK  
Commonwealth's Attorney for the City of Danville

This is in reply to your letter of October 30, 1958, which reads in part as follows:

"Will you kindly furnish me with your opinion as to whether or not the facts stated below qualify the applicant to receive a commission as a Notary Public. I am aware of the fact that a previous opinion has been rendered by a former Attorney General. However, I feel that the former opinion was predicated entirely on the qualification of the applicant's ability to vote and which I consider an erroneous construction of Section 32 of the Constitution.

"The applicant, who is now twenty-six years old, was born and reared in Danville, Virginia. On January 13, 1951, she married a resident of Danville, who was a soldier, and after travelling with him to various camps, finally resided in San Antonio, Texas. The applicant secured a divorce from her first husband and subsequently remarried in January, 1954 to another resident of Texas. Both of her marriages took place in Danville, Virginia. The applicant returned to Danville twice a year during her stay in Texas and has always considered Danville, Virginia her home. In 1955 the applicant returned to Danville and resided here for a period of five months. On June 12, 1958, the applicant returned to Danville for the purpose of residing here permanently and is now employed as a secretary with a local attorney.

\* \* \* \* \*

"I would appreciate it very much if you would give me your opinion as to whether or not the applicant is qualified to become a Notary Public under the aforesaid facts."

Section 32 of the State Constitution is 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."

This office has previously held (Opinion, Attorney General 1947-48, page 125) that a Notary holds a public office. Moreover, Section 47-1 of the Code pertaining to the appointment of notaries by the Governor is as follows:

"The Governor shall appoint in and for the several counties and cities of the State as many notaries as to him may seem proper, who shall *hold office* for the term of four years, and who *shall exercise the powers and functions of conservators of the peace*, and who shall be removable by the Governor at will for misconduct, incapacity or neglect of *official duty*; but in every case where the Governor shall remove a notary public from office, he shall report such action with his reasons therefor to the next session of the General Assembly." (Italics supplied.)

The above statutory provision establishes beyond question that the General Assembly considers a notary to be a public officer.

Under Section 18 of the Constitution every person in order to be eligible to vote must have been a resident of this State for a period of at least one year. Whether or not the person mentioned in your letter has been a resident of Virginia for at least one year is, of course, a question of fact. This I am not able to pass upon. That would depend upon (1) whether she was a resident of Virginia when she married and (2) whether she abandoned her residence when she left the State.

The exception in Section 32 of the Constitution with respect to a person eighteen years of age being eligible to the office of Notary Public would not be applicable to a person who is twenty-one years of age.

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**NURSES—Advisory Council on Nursing Training—Appropriation for Construction of Facilities—Limited to Dormitories for Housing. (83)**

October 1, 1958.

HONORABLE C. FRANCIS COCKE, *Chairman*  
Advisory Council on Nursing Training

This is in reply to your letter of September 29, 1958, relating to Chapter 636, Acts of Assembly, 1958, known as the "State Nursing Training Facilities Construction Act."

Your letter is in part as follows:

"Chapter 636 appears to contemplate that the funds will be available for aiding in the construction of nurse training facilities, which is defined to mean a dormitory used by a nursing school exclusively for housing student nurses, etc. Item 459a places a limit on the assistance which may be given any one project, but does not otherwise restrict the purpose for which the appropriation may be used. Some have expressed the view that the funds might be used for aiding in the construction of facilities other than dormitories, but others appear to be of the opinion that the assistance is limited to the dormitory construction. It is understood that the patrons of the measure intended to limit the assistance to the dormitory type of project.

"For example: one applicant for assistance is building a new student nurses' dormitory which, in addition to providing living quarters for

student nurses, will contain a small auditorium and one or two small laboratories. The auditorium and laboratories will be used exclusively in connection with the teaching or training program of the nurses. The main purpose of the building is to provide dormitory space for 100 student nurses, but will the fact that the building contains quarters for nurse training prohibit this hospital from receiving a grant, all other conditions having been fulfilled?

"You have heretofore ruled that the appropriation would be available to a limited degree for the expenses of the Council, and for making certain surveys. I will appreciate your furnishing your opinion as to whether or not the remainder of the appropriation can be used for assisting in the construction of dormitories used by a nursing school exclusively for housing student nurses, or whether assistance can be given for constructing facilities other than dormitories."

Under the Act, as set out in Section 7, "The construction program shall provide, in accordance with regulations which the Council is hereby authorized to adopt under this Act, for *adequate nurse training facilities* for the people residing in this State \* \* \*."

Under Section 2(d), "Nurse training facility" is defined as "a dormitory used by a nursing school *exclusively* for housing student nurses in training to become nurses \* \* \*."

It would seem, and I am of the opinion, that the funds appropriated in Item 495(a) of the Appropriation Act of 1958 may be used only for the purpose of aiding in the construction of a dormitory to be used exclusively by a nursing school for housing student nurses while in training to become nurses, and that the Act does not contemplate the use of any amount of such funds for constructing facilities other than dormitories. I have heretofore advised in an opinion dated July 15, 1958, furnished to Mr. John B. Boatwright, Jr., that certain over-head expenses may be paid out of this appropriation.

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**NURSES—Advisory Council on Nursing Training—Appropriation for Training Facilities—May Be Used for Expenses of Council—May Not Be Used for State-owned Hospitals. (11)**

July 15, 1958.

HONORABLE JOHN B. BOATWRIGHT, JR.  
Director  
Division of Statutory Research and Drafting

I acknowledge receipt of your letter of July 9, 1958, which reads as follows:

"Chapter 636 of the Acts of Assembly of 1958 created an Advisory Council on Nursing Training and set forth its powers and duties. Item 495-A of the Appropriation Act appropriates \$1,000,000.00 for aid in constructing new training facilities. In order to expend this money the council will require funds for administration expenses. It was the intention of the patrons of the legislation that the expenses of the Commission be paid from this appropriation.

"In order to settle any questions which may arise, I will appreciate your opinion upon whether or not the Commission may use a reasonable part of the appropriation for administrative expenses."

By reference to Section 3 of Chapter 636 of the Acts of 1958, you will note that the Advisory Council on Nursing Training is established within the office of the

Governor and that under subsection (b) of this Section, the Governor may assign to any agency within his office all or any part of the duties imposed upon the Council by the Act.

Also in paragraph 5 of Chapter 636, it is provided as follows:

“Council members, while serving on business of the Council, shall be entitled to receive actual and necessary travel and subsistence expenses while so serving away from their places of residence to be paid from funds appropriated to carry out the provisions of this act.”

Item 495-A of the Appropriation Act appropriates to the Governor's office the sum of \$1 million “for aid in constructing nurse training facilities.”

The language in the Appropriation Act, coupled with the language quoted from Section 5 of Chapter 636, makes it clear that the travel and subsistence expenses of the members of the Council may be paid out of the \$1 million appropriation. In the administration of the Act it will be necessary for the Council to incur expenses in addition to the necessary travel and subsistence expenses of the members.

The Governor may find that he can utilize the services of an agency within the Executive Department to assist the Council in this matter. This, however, may not be practical.

While the language of the Appropriation Act does not specifically authorize the use of any part of the fund for clerical and other necessary expenses incident to the proper functioning of the Council, I think it may be construed so as to permit expenditures from the fund in order to carry out the manifest purpose of Chapter 636, which is to render aid to qualifying hospitals in providing the facilities contemplated by the Act. The expense of administration is a necessary and unavoidable incident to furnishing this aid.

I am of the opinion, therefore, that such necessary expense may be paid out of the appropriation made in Item 495-A.

In view of subsection (b) of Section 3 of Chapter 636, I feel that the Council should ascertain from the Governor whether he wishes to assign any of these duties to an agency in his office, or prefers that the Council employ its own staff. Since the money is appropriated to the office of the Governor, I believe the Council should first obtain his permission to expend a part of the appropriation for the administrative needs.

Mr. Cocke, in a letter to me dated July 9, 1958, presents the following question:

“As Chairman of the Advisory Council on Nursing Training created by the above Act, I desire your opinion as to Paragraphs (b) and (c), Section 2, of the Act. Do these paragraphs include the nurses' training schools conducted at the Medical College of Virginia and the University of Virginia?”

I am of the opinion that the Act does not apply to hospitals owned by the State. Paragraph (a) of Section 2 of the Act is as follows:

“ ‘Hospital’ includes any general *nonprofit* hospital, but does not include any hospital furnishing primarily domiciliary care.”

Paragraph (b) is as follows:

“ ‘Nonprofit’ as applied to a hospital means any hospital owned and operated by a corporation, foundation, authority, municipal corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.”

Under these two definitions I feel that State-owned hospitals are excluded. Moreover, paragraph 15 of the Act, provides that the contribution by the State shall not exceed one-third of the cost of any one facility. Obviously, the Act contemplates that the other two-thirds of the cost shall be borne by a hospital that is not financing its part of the project out of State funds.

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**NURSES—Advisory Council on Nursing Training—Capital Projects—May Construct Facility with State Participation in Costs. (130)**

November 7, 1958.

HONORABLE C. FRANCIS COCKE, *Chairman*  
Advisory Council on Nursing Training

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

"I have written you before as to the powers of the Advisory Nursing Council created by Chapter 636 of the Acts of Assembly of 1958. You have heretofore advised us that the appropriation is limited to expenditures for dormitories which, as you know, ordinarily include the usual facilities for nurses in such dormitories, such as reception room, small kitchen, etc.

"We have now been confronted with the question as to whether or not the State could participate in financing a project which would combine, under one roof, a dormitory and facilities other than dormitory, such as classrooms, laboratories, etc. For illustration—a building might devote fifty per cent to dormitory space and fifty per cent to non-dormitory space. Could we participate in the construction of that part which constitutes the dormitory space, leaving the hospital to bear the entire cost of the non-dormitory space? We would assure ourselves that the hospital had the funds to defray this part of the building. The ratio of space use would vary from project to project, and of course it would be our view that we could not assist in financing any part of the structure other than the dormitory portion.

"I would greatly appreciate your opinion on whether or not we may assist in financing projects which are not limited to dormitory space exclusively, provided our participation would be limited to that portion of the structure devoted exclusively to dormitory space, with a reasonable allocation of cost between dormitory and non-dormitory space."

I do not construe Chapter 636, Acts of Assembly, 1958, as requiring that a dormitory constructed under the provisions of this Act and regulations promulgated by the Council must be a separate structure, detached from other buildings owned by a hospital. It is conceivable that such a facility could be built at less cost under the conditions suggested in your letter. I feel the Act contemplates that the dormitory facility shall be constructed so that privacy may be assured to the occupants and, therefore, where the dormitory is under the same roof as space used by the hospital for classrooms, laboratories, and other purposes, the building should be designed and constructed in such manner as will prevent the occupants and users of the connecting facilities from having access to the dormitory quarters by a means that would not be available where the dormitory is a separate building.

**NURSES—Advisory Council on Nursing Training—Definition of “Nurse Training Facility”—Dormitory. (146)**

December 8, 1958.

HONORABLE JAMES W. ROBERTS  
Member of the House of Delegates

I have received your letter of December 4, 1958, relating to Chapter 636 of the Acts of 1958 in which you state that you have seen the opinions issued by me to Honorable C. Francis Cocke, Chairman of the Advisory Council on Nursing Training, and to the Honorable John B. Boatwright, Jr.

You suggest that the purposes for which the appropriation was made in connection with this matter are wider in scope than construed by me. You state that “it is conceivable that certain class rooms and assembly rooms and laboratories are a part and parcel” of the program contemplated by Chapter 636.

In considering this matter we have had to rely upon the definition of “nurse training facility” contained in the Act, which definition is as follows:

“(d) ‘Nurse training facility’ means a dormitory used by a nursing school exclusively for housing student nurses in training to become nurses but shall not include a facility for training beyond such level.”

I do not believe that the phrase “dormitories used by a nursing school exclusively for housing student nurses” can be construed to include the facilities suggested by you.

Webster’s Dictionary defines the word “dormitory”, as

“A sleeping room, or a building containing a series of sleeping rooms; a sleeping apartment capable of containing many beds, especially, one connected with a college, boarding school, monastery, etc.”

We have made some examination of the definition of the word “dormitory” in Words and Phrases and we have been unable to find any definition that would extend its scope to include class rooms, assembly rooms and laboratories.

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**NURSES—Doctor’s Nurses—Questionable Whether Membership in National Organization and Wearing of Emblem Violates Chapter 13, Title 54. (313)**

May 22, 1959.

MISS MABEL E. MONTGOMERY  
Secretary-Treasurer  
State Board of Nurse Examiners

This is in reply to your letter of May 19, 1959, in which you state that the State Board of Nurse Examiners request my opinion on the following question:

“Is it unlawful for a person who is employed as a doctor’s nurse and who has not been licensed as a registered nurse in the State of Virginia, to use the title ‘Registered Doctor’s Nurse’ or the letters ‘R.D.N.’ after said person’s name, or to wear or display a pin with said letters embossed thereon?”

With your letter you enclosed a brochure issued by the American Registry of Doctor’s Nurses, National Press Building, Washington 4, D. C., in which the following statement is contained:

"The purpose of the American Registry of Doctors' Nurses is to bring to the woman who has made a Career of nursing for a doctor, an association of such Scope, Magnitude and Importance that it will bring her National Recognition.

"The official pin will readily eliminate your being mistaken for a beautician or waitress. Not only will your importance grow in the eyes of the patient but to the doctor as well.

"At last Recognition is available to a group long in need of it. Read thoroughly the front page of your application. It contains a great deal of additional information.

It is noted that the emblem issued by your organization is a pin on which the letters "D.N." are embossed. Any applicant who is accepted as a member of the organization will be forwarded a pin, a certificate, a membership card and a life insurance policy.

Section 54-359 of the Code provides as follows:

"It shall be unlawful for any person to:

\* \* \* \* \*

"(4) Use the abbreviation R.N., or any other designation to indicate that she is a trained or graduate or professional nurse unless licensed as a professional nurse under the provisions of this article;"

The question to be determined is whether or not the wearing of the emblem issued by this organization is "any other designation" to indicate that the wearer of the pin is a trained or graduate or professional nurse who has not been licensed as a professional nurse under the provisions of Chapter 13 of Title 54 of the Code.

While you make reference in your letter to "Registered Doctor's Nurse" and to the initials "R.D.N.", it does not appear from the brochure which you enclosed that a member of this organization will represent himself as being a "Registered Doctor's Nurse" or will wear a pin of the description given by you.

The brochure does not disclose the wording which will appear on the certificate or the membership card and, therefore, I am unable to determine whether or not either of these instruments would purport to indicate falsely that the holder, if unlicensed as a professional nurse, is a trained or graduate or professional nurse. On the basis of the information I have been furnished, I cannot state that membership in the organization under consideration and the wearing of the emblem issued by it would be in violation of the provisions of Chapter 13, Title 54 of the Code.

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**NURSES—Practice of Professional Nursing—Must Be Licensed—Student Nurses Should Wear Identification as Such. (312)**

May 22, 1959.

MISS MABEL E. MONTGOMERY  
Secretary-Treasurer  
State Board of Nurse Examiners

This is in reply to your letter of May 19, 1959, in which you enclosed a clipping from the *Richmond News Leader* of April 21, 1959, under the headline "Students to Work as Registered Nurses."

Of course, the newspaper article is of no value in determining whether or not in any instance there has been a violation of Chapter 13 of Title 54 of the Code of

Virginia and particularly Section 54-359. It will be noted that under Section 54-362 there are certain exemptions to the provisions of Section 54-359 and it is quite possible that the students mentioned in the newspaper article would come within one or more of these exemptions. Exemption 2, you will note, applied to "part time nursing for compensation under the supervision of a licensed physician" and Exemption 4 to "any person who does not in any way assume or hold herself out to be a registered professional or graduate nurse, etc."

It would seem that students employed by a hospital who have not been licensed under the provisions of the Code should wear some type of identification or emblem to indicate that they are not graduate and licensed nurses. Certainly no undergraduate should be permitted to wear the uniform and other emblems ordinarily worn by graduate nurses.

Your letter contains the following paragraph:

"If in your opinion, 'it is unlawful for any person to practice professional nursing without having obtained a certificate or license from the State Board of Nurse Examiners or to use the abbreviation of R.N. or any other designation to indicate that she is a trained or graduate or professional nurse unless licensed as a professional nurse' under the provisions of the Nurse Practice Act, I shall call this fact to the attention of the authorities of Medical College next year before the students are employed in 1960."

Of course, it is unlawful for any person to hold herself out as a professional nurse or as a graduate or trained nurse or to wear the emblem "R.N." unless such person is licensed under the provisions of Chapter 13 of Title 54. Whether or not a person is violating the Act would depend upon the facts in connection with any particular case.

The provisions of the "Nurses and Attendants" statute as set out in Chapter 13 of Title 54 do not appear to be ambiguous in any way and each section of this Act is, it would seem, free from doubt as to its meaning.

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**OPTOMETRY—Board of Examiners—Regulations—Grounds for Revocation of Certificate—Must Conform to § 54-388—May Issue Subpoenas. (296)**

May 6, 1959.

DR. HAROLD L. FRIEDENBERG, *President*  
State Board of Examiners in Optometry

This is in response to your letter of April 30, 1959, in which you present the following two inquiries:

"1. May the Virginia State Board of Examiners in Optometry make rules and regulations to govern the ethical practice of optometry as provided in Section 54-376 of the Code and provide that the violation of such rules and regulations may be grounds for the revocation or suspension of a certificate of registration? Such contemplative rules and regulations would be in addition to and more stringent than the grounds listed for revocation by Section 54-388 of the Code.

"2. Is the Board correct in assuming that it has the right to issue subpoenas under Section 9-6.10 of the Code even though Chapter 14 of Title 54 which deals specifically with the optometry does not so provide?"

With regard to the first question, Section 54-376 provides that "the Board may make such rules and regulations not inconsistent with the law as may be necessary \* \* \*". Moreover, Section 54-388 provides that "The Board shall revoke or

suspend a certificate of registration or exemption, or censure the holder of such certificate, for any of the following causes: \* \* \* ”

This office is of the opinion that the Board may make rules pursuant to said Section 54-376, but that in order for the prohibited acts to be grounds for the revocation or suspension of a certificate of registration, such acts must be embraced within the grounds enumerated in said Section 54-388. The two aforementioned sections should be reconciled under the applicable principles of statutory construction. Accordingly, the proposed new rules which would provide grounds for revocation should not be inconsistent with the provisions of said Section 54-388.

In response to your second question, this office is of the view that the Board may issue subpoenas pursuant to the provisions of the “General Administrative Agencies Act”, which includes Section 9-6.10, providing for the issuance of subpoenas in appropriate cases.

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**OPTOMETRY—Unprofessional Conduct—Letter Enclosing Card Entitling Recipient to “Reduced Fee” for Examination and “Reduced Cost” for Glasses Violates § 54-388. (340)**

June 8, 1959.

DR. HAROLD L. FRIEDENBERG  
State Board of Examiners in Optometry

I acknowledge your letter of June 6, 1959, to which you attached a photostatic copy of a letter which was written by an Optometrist to a member of a Union, which letter is as follows:

“The enclosed card entitles you and members of your family to the privilege of an eye care program which your Union has made available to you.

“As a member of your Union, you and members of your immediate family are entitled to have your eyes examined by me at a reduced fee, and glasses, if they are necessary, at reduced cost.

“To benefit from this plan you must be a member in good standing in your Union.

“My office hours are from 9 AM to 5 PM daily, and from 9 AM to 1 PM on Saturday.

“If you will call my office at MI 4-3394 I shall arrange a convenient time for you to come in, or if you prefer, come in any time during my office hours and I shall be glad to see you.”

You request my advice as to whether or not the second paragraph of the above letter is in violation of Section 54-388 of the Code of Virginia.

The pertinent provisions of this section are as follows:

“The Board shall revoke or suspend a certificate of registration or exemption, or censure the holder of such certificate, for any of the following causes:

\* \* \* \* \*

“2. *Unprofessional conduct.*—The following acts shall be deemed unprofessional conduct on the part of the holder of a certificate of registration to practice optometry;

\* \* \* \* \*

"(d) The advertising directly or indirectly the following: Statements as to skill or method of practice of any person or of any optometrist; in any manner that will tend to deceive, mislead or defraud the public; to claim professional superiority; to offer free optometrical services or examinations; to set forth any amount, price, premium, gift, *discount* or terms for professional services or for eyeglasses, spectacles, lenses, frame, mountings or any other prosthetic devices; \* \* \*

The letter appears to be a method adopted by the Optometrist to notify the members of the Union that, by reason of their membership, they are entitled to have their eyes examined at a "reduced fee" and to purchase glasses at "reduced cost." This manner of calling attention to a feature of one's business or profession for the purpose of attracting customers is one method of advertising.

The advertisement, in this instance, seeks to attract customers by announcing that the recipient of the letter, the bearer of a card issued by the Optometrist—which card is enclosed with the letter—may receive the services listed at a reduced fee or at reduced cost. The phrase "reduced fee" and "reduced cost" must, it would seem, constitute a proposal by the Optometrist to furnish the services listed at a price below the regular consideration charged to customers for such services. I am not aware of any rational definition of the word "discount" as used in the statute, unless it means a less fee or less price than the usual or standard fee or price. "Reduced fee" or "reduced cost", as used in the letter, are certainly synonymous with "discount." Each conveys the impression that the recipient of the letter will receive a discount from the usual price if he presents the card which has been furnished by the Optometrist.

The statute in question forbids an Optometrist to advertise for the purpose of attracting customers by notifying those who can qualify by reason of union membership that a price less than the customary price will be made to them.

The letter in question, in my opinion, is a violation of the statute.

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**PARDON, PROBATION AND PAROLE—Conditional Pardon and Removal of Political Disabilities—Subsequent Conviction—If of Felony or Certain Crimes Involving Moral Turpitude Civil Rights Forfeited Again. (218)**

February 27, 1959.

HONORABLE MARTHA BELL CONWAY  
Secretary of the Commonwealth

This is in response to your letter of February 20, 1959, in which you advise me that there is pending before the Governor a request for the removal of political disabilities from a man while serving a life sentence in the penitentiary who was granted a conditional pardon. This pardon provides that if he ever again violates any penal law of the Commonwealth of Virginia, he shall serve the remainder of his sentence in the penitentiary. Your letter reads in part as follows:

The question is: If the man's political disabilities are removed, and he is later returned to the penitentiary for violation of a penal law of the Commonwealth, how would this later conviction affect his civil rights? I assume if he were later convicted of any crime set out in Sec. 24-18 of the Code, this later conviction would exclude him from exercising his civil rights, and place him in the same political rights position as the original conviction. Would this also be true if he were convicted of any other misdemeanor, subsequent to the removal of his political disabilities?"

The Governor is empowered by Section 73 of the Constitution of Virginia to remove political disabilities. Section 23 of that Constitution and § 24-18 of the Code of Virginia contain an enumeration of persons excluded from registering and voting.

I am of the opinion that, should this man commit any of the crimes set forth in Section 23 of the Constitution after his political disabilities have been removed by the Governor, he would again forfeit his political rights. If, however, he should commit an offense other than those set forth in Section 23 of the Constitution, I am of the opinion that he would not forfeit the political rights that were restored by the Governor.

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**PENAL INSTITUTIONS—Convict Labor—Bricks Manufactured at Penitentiary or State Farms Available only for State Owned or Supported Institutions—Produce Market Erected Under §§ 3-79:1 et seq. Not Eligible to Receive. (100)**

October 21, 1958.

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

You inquire as to whether bricks made by convict or misdemeanor labor at any of the State farms are available for use in the erection of a produce market, as defined by Title 3, Chapter 7.1, Articles 1 and 2 of the Code of Virginia of 1950, as amended (Sections 3-79.1 to 3-79.27, inclusive).

I have examined Section 53-61 of the Code of Virginia of 1950, as amended, which reads as follows:

“Section 53-61. Goods to be made for State institutions and agencies.—Convicts or misdemeanants actually confined within the penitentiary at Richmond, or at the State farms shall be used, as far as possible, in the making of articles required by the departments, institutions and agencies of the State which are supported in whole or in part by the State.

“The production and manufacture of bricks, cinder blocks, light weight aggregate block and concrete block by convict or misdemeanor labor at the State penitentiary or at any of the State farms shall be limited to the needs of State-owned and State-supported institutions, and the same shall not be produced or manufactured for any other purpose; nor shall the present capacity for the manufacture and production of such products be increased.”

The second paragraph of the foregoing section was added by Chapter 390 of the Acts of Assembly of 1952 and limits the use of bricks, cinder blocks, light weight aggregate block and concrete block to the needs of State-owned and State-supported institutions.

Therefore, I am of the opinion that bricks, cinder blocks, light weight aggregate block and concrete block produced and manufactured by convict or misdemeanor labor at any of the State farms are not available for use in the erection of a produce market as defined by Sections 3-79.1 to 3-79.27 of the Code.

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**PUBLIC CONTRACTS—Construction, Improvement or Repair of Buildings—Must Be Advertised for Bids—Where All Bids in Excess of Appropriation and Substantial Change in Plans Necessary Must Be Readvertised for New Bids. (337)**

June 5, 1959.

DR. HIRAM W. DAVIS  
Commissioner  
Department of Mental Hygiene and Hospitals

This is in reply to your letter of June 2, 1959, which reads, in part, as follows:

"The General Assembly has appropriated the Department of Mental Hygiene and Hospitals a sum of \$318,000.00 for the reference project. [Remodeling Old C. I. Building, Southwestern State Hospital, Marion, Virginia.] During the time of preparation of working drawings and specifications, it was felt by all concerned that the funds available were sufficient to include an addition of approximately 9000 square feet to the existing structure.

"Bids were received for this project on May 5, 1959, and the low bid of \$369,000.00 submitted by Southside Plumbing Company of Farmville, Virginia, was obviously too high for the awarding of a contract for the project as planned. It has been determined by Mr. McIntosh, Architect for this department, through conferences with the low bidder and the architects for the project that the sum of \$97,121.00 can be cut from the base bid by deleting the proposed 9000 square feet of new construction. Further, alternates 2, 3 and 4 would be accepted as shown on the proposal form for an additional saving of \$23,409.00. The above items deducted from the base bid would bring the project within the funds available and thereby permit the award of a contract to Southside Plumbing Company.

"It is felt by many involved with this project, that a revision of the drawings and specifications and rebid of the project would generate so little interest that the construction would cost even more than the negotiated price, or that we would receive no bids at all. Remodeling work is not very inviting to contractors at its best. Remodeling at Southwestern is even less inviting.

"It is, therefore, the desire of the State Hospital Board to negotiate with the low bidder as outlined above and as shown on the enclosed contract forms if this procedure is within our jurisdiction. \* \* \*

The provisions of Chapter 4, Title 11 of the Code of Virginia pertain to the letting of public contracts. The pertinent provisions are the first paragraphs of Sections 11-17 and 11-20 and paragraph 11-21, which are as follows:

"§ 11-17: Every contract in excess of twenty-five hundred dollars, except in a case of emergency and except also contracts for the purchase of stone, soil, lumber, borrow pits, gravel, sand, hay, grain, repairs and supplies for standard equipment, and other materials bought locally from farmers and property holders, to which the State of Virginia, or any department, institution or agency thereof is a party, for the construction, improvement or repair of any building, highway, bridge, street, sidewalk, culvert, sewer, reservoir, dam, dock, wharf, draining, dredging, excavation, grading, or other such construction work, shall be let by the State, or such department, institution or agency thereof, only after advertising for bids for the work at least ten days prior to the letting of any contract therefor. The advertisement shall state the place where bidders may examine the plans and specifications for the work, and whether the contract will be let for a lump sum or on a cost plus per centum or fee basis, and the time and place where bids for the work will be opened."

"§ 11-20: The contract shall be let to the lowest responsible bidder for the particular work covered in the bid when the contract is to be let for a lump sum, or to the responsible bidder naming the lowest per centum or fee if the contract is to be let on a cost-plus basis; and the contractor who is the successful bidder shall thereupon enter into a bond with surety thereon payable to the Commonwealth of Virginia, in the sum of at least the estimated cost of the work, which bond shall be approved by the Attorney General, and conditioned upon the faithful performance of the work in strict conformity with the plans, specifications and conditions for the same, and the payment to all persons who have, and fulfill, contracts which are directly with the contractor for performing labor or

furnishing materials in the prosecution of the work provided for in said contract, a certified copy of which bond shall be delivered to and kept on file in the office of the Comptroller."

"§ 11-21: The State is authorized to reject any and all bids made under this chapter. In the event that all bids are rejected, advertisement for new bids shall be made as in the first instance."

It would be proper to let this contract to Southside Plumbing Company after deducting alternate bids 2, 3 and 4, because it is obvious from the tabulation of bids attached to your letter that by eliminating the alternates, this company would still be the lowest bidder. Each bidder submitted alternate bids with respect to similar subjects.

The suggestion that the sum of \$97,121.00 be deducted by deleting the proposed 9,000 square feet of new construction from the project raises a serious question. This deletion makes a substantial change in the plans and specifications, resulting in a project varying materially from the one that was advertised for the purpose of soliciting competitive bids. Once a contract has been let to the lowest competitive bidder, change orders may be made in accordance with the terms of the contract, but before a contract is let it is mandatory that opportunity be given to interested building contractors to examine the plans and specifications and submit bids.

The Virginia War Memorial project to which you refer, and concerning which the Attorney General gave an opinion, involved a low bid of \$744,767, and the adjustments amounted to \$17,000.00. Governor Almond (Attorney General at that time) was of the opinion that the minor adjustments would "not do violence to or impinge upon the rights of the other bidders." In the instant matter, the plans have been altered in a manner to justify a reduction by the low bidder by more than twenty-five percent of his original bid.

I am of the opinion that the proposed action by your Board would be in violation of the statutes relating to the letting of public contracts. The bids should be rejected under Section 11-21 and further bids should be requested in accordance with the revised plans and specifications.

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#### **PUBLIC HOUSING—Redevelopment and Housing Authority—Political Subdivision of State—Provisions of Code Explained. (107)**

October 24, 1958.

HONORABLE JAMES M. THOMSON  
Member of the House of Delegates

This is in response to your letter of October 16, 1958, in which you ask several questions relative to the "Housing Authorities Law" (Chapter 1, Title 36 of the Code of Virginia) which I shall answer seriatim.

"1. If a Housing and Redevelopment Authority is created, what is its legal life or duration under State law?"

Section 36-4 of the Code of Virginia creates in each city and county a political subdivision of the Commonwealth which is known as the Redevelopment and Housing Authority of that city or county. The Authority, however, may not exercise any of its powers until the qualified voters of the city or county have found a need for the Authority in an election held pursuant to § 36-4.1 of the Code. The housing project may be liquidated pursuant to the provisions of § 36-7.1; however, such Authority is a political subdivision of the State and is, therefore, perpetual until such time as the General Assembly should change the provisions

of law applicable thereto. The liquidation of the housing project does not abolish the political subdivision created by the General Assembly. (See Opinions of the Attorney General 1954-55, page 132.)

"A. Can the Authority be abolished if there is no bonded indebtedness? If bonded indebtedness exists?"

As pointed out above, the Authority cannot be abolished, but the housing project may be liquidated in conformity with § 36-7.1 of the Code, which provides in part as follows:

"\* \* \* Provided that no bid on such projects shall be accepted which would result in a sum insufficient to meet the outstanding obligations of the authority with respect to such project and provided further that if the authority finds that the highest offered price is not as much as what it considers a fair value for the property, the authority shall notify the governing body of this fact. \* \* \*

"2. With the establishment of such an authority, for redevelopment only, cannot under State law a future local governing body, 5, 10, 15 years from now use the Authority for Public Housing as well as Redevelopment?"

The "Housing Authorities Law" apparently contemplates that the "Authority" shall be a Redevelopment and Housing Authority. It was held in *Hunter v. Norfolk Redeveloping Authority*, 195 Va. 326, 78 S. E. 2d 983 that the Authority could take property and use it both for redevelopment and housing projects. I am, therefore, of the opinion that, under present law, an Authority may exercise its powers in both fields. The powers of the Authority are exercised not by the local governing body but by the Commissioners of the Authority.

"3. How are members of a Housing and Redevelopment Authority chosen? What are their powers? Can they be recalled? If so, how?"

Section 36-11 of the Code of Virginia provides for the appointment and tenure of the commissioners of the redevelopment and housing authority, and reads as follows:

"When the need for an authority to be activated in a city or county has been determined in the manner prescribed by law, the governing body of the city or county shall appoint five persons as commissioners of the authority created for such city or county. The commissioners who are first appointed shall be designated to serve for terms of one, two, three, four and five years, respectively, from the date of their appointment, but thereafter commissioners shall be appointed as aforesaid for a term of office of four years except that all vacancies shall be filled for the unexpired term. Except as may be otherwise expressly provided in the charter of a city or town specifically pertaining to such authority, no commissioner of any authority may be an officer or employee of the city or county for which the authority is created. A commissioner shall hold office until his successor has been appointed and has qualified. A certificate of the appointment or reappointment of any commissioner shall be filed with the clerk and such certificate shall be conclusive evidence of the due and proper appointment of such commissioner. A commissioner shall receive no compensation for his services, but he shall be entitled to the necessary expenses, including traveling expenses, incurred in the discharge of his duties."

Section 36-17 contains the provisions for the removal of such commissioners:

"For inefficiency or neglect of duty or misconduct in office, a commissioner of an authority of any city or county may be removed by the governing body of such city or county; but a commissioner may be removed only after he shall have been given a copy of the charges at least ten days prior to the hearing thereon and had an opportunity to be heard in person or by counsel. In the event of the removal of any commissioner, a record of the proceedings, together with the charges and findings thereon, shall be filed in the office of the clerk."

"4. If the vote on the ballot is 'yes,' there is need for a Housing and Redevelopment Authority, is it mandatory on the local governing body submitting such a need for a referendum to establish the Authority?"

"A. Legally?"

"B. Morally?"

Section 36.11, which is quoted above, provides that after the election has been held pursuant to § 36-4.1 of the Code, and if the need for the Authority has been thus determined, the governing body of the city or county *shall* appoint the commissioners of the Authority. I am of the opinion that it is mandatory for the governing body of such city or county to appoint the commissioners of the Authority and that thereby the Authority is created and may thereafter exercise its powers.

"5. Assuming the General Assembly of Virginia were to enact a law creating separate authorities for Redevelopment and Housing, what would be the chances that such a law would be made retroactive?"

I am unable to speculate as to the will of the General Assembly of Virginia at some future date relative to this matter. This is purely a question for the Legislature. Whether or not a retrospective act would be valid would, of course, depend upon the contents of the act as a whole. It would be difficult to establish definite criteria upon which the attitude of the courts can be foretold.

"6. If the Authority is established and uses Federal funds, is it legally bound to practice nondiscrimination among the races in any housing plans necessary either to Redevelopment or to Housing."

I am unable to find any provision contained in the Code of Virginia which requires an Authority to practice nondiscrimination among the races in any of its operations. I have also made a careful search of the United States Code, and I am unable to find a similar provision contained therein. As you are no doubt aware, Federal agencies frequently promulgate regulations requiring as a condition precedent to receiving federal grants, that the facilities shall not be denied to any person on account of race and other reasons. I would suggest that this question be explored by inquiry to the Federal Agency involved if you wish to confine the facility to a specific class of citizens. You will, I believe, be confronted with the possibility that the courts would prohibit the operation of such facilities on a discriminatory basis. We have not made an examination of the authorities on this point.

**PUBLIC OFFICES—Board of Supervisors—Eligibility of Federal Employee to Serve—§ 2-29 (9) Applied. (186)**

February 2, 1959.

HONORABLE FERDINAND F. CHANDLER  
Attorney for the Commonwealth for  
Westmoreland County

This is in reply to your letter of January 27, 1959, in which you ask the following question:

“Will you please render to me your opinion as to whether an employee of the United States Government under the Civil Service at Dahlgren, Virginia, but who was born and lived in Westmoreland County all of his life, is eligible for election to the Board of Supervisors of Westmoreland County?”

Section 2-27 of the Code of Virginia forbids any employee of the government of the United States from holding office as a member of a county board of supervisors. As you know, § 2-29 of the Code sets out certain exceptions to the general rule. It would appear from your letter that the exception embodied in subparagraph (9) of § 2-29 would be the only exception which might be applicable in this case.

Section 2-29(9) states that § 2-27 shall not be construed

“To prevent foremen, quartermen, leading men, artisans, clerks or laborers, employed in any navy yard or naval reservation in Virginia, from holding any office under the government of any city, town or county in this Commonwealth;”

It may be that the gentleman to whom you refer occupies one of the enumerated positions and would thus be eligible to serve as a member of the Board of Supervisors of Westmoreland County. In the event he does not occupy any of these positions, this employee of the United States Government is not eligible for election to the Board of Supervisors of Westmoreland County.

I enclose a copy of an opinion dated January 30, 1958, rendered to Honorable Blake T. Newton, in which this question is discussed at some length.

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**PUBLIC OFFICES—Compatibility—Mayor of Town May Serve on County School Board—County Director of Civil Defense May Serve on School Board. (279)**

April 22, 1959.

HONORABLE J. T. ROBERTSON  
Mayor of Montross

I acknowledge your letter of April 17, 1959, relating to my letter of April 9, 1959, in which I stated that you were not ineligible to serve on the County School Trustee Electoral Board by reason of the fact that you are mayor of a town. You now advise me that your inquiry related to your eligibility to serve on the County School Board.

You are advised that in my opinion the fact that you are mayor of the town does not disqualify you from serving as a member of the school board. Section 22-69 of the Code provides that no State or county officer may serve upon the County School Board subject to certain exceptions. A mayor, of course, is not a county officer.

You have asked me whether or not the fact that you are county director of the Civil Defense Organization would disqualify you from holding the office of county School Board member. Section 44-145 of the Code provides for the establishment of a local council of defense in each county, city and town and that in each county the governing body of the county shall elect a director subject to the exceptions set forth in subsection (4) of that section.

The term "county officer" as used in Section 22-69 may reasonably be interpreted to mean those officers who hold office by virtue of the State Constitution and provisions of Title 15 of the Code relating to county governments. Chapter 3 of Title 44 relating to civil defense is a part of the military laws of the State. The functions of the personnel engaged in this type of work are military as distinguished from governmental. Section (d) of Section 44-145 of the Code prescribes that the duties of a director shall be "to engage in such activities and perform such functions and duties as will further the defense of the locality and the State."

It does not appear that the Director of Civil Defense is charged with any governmental duties which would in any way be incompatible with the duties of a member of a school board.

I am of the opinion, therefore, that the statutes do not prohibit a member of a school board from serving as a director of local civil defense.

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**PUBLIC OFFICES—Compatibility—Member of Board of Supervisors May Be an Employee of State Forestry Service—May Not Hold an Office in Forestry Service. (315)**

May 25, 1959.

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

This is in reply to your letter of May 23, 1959, which reads as follows:

"I have been requested to obtain an opinion from your office as to whether or not a member of the Board of Supervisors may be an employee of the State Forestry Service when the county in question is appropriating funds to the Forestry Service."

Unless the member of the Board of Supervisors holds an office within the State Forestry Service, I am of the opinion that there is no statutory reason why he cannot continue to serve as a member of the Board. Under Section 15-486 a member of a board of supervisors may not hold any other office, subject to the exceptions contained therein.

The prohibitions contained in Section 15-504 are not applicable to this specific case.

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**PUBLIC OFFICE—Compatibility—Member of Electoral Board May Also Serve as Substitute County Judge. (191)**

February 4, 1959.

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

This is in reply to your letter of January 30, 1959, which reads as follows:

"This is a request for an opinion in the following matter:

"Mr. P. B. White has served for several years as Chairman of the Electoral Board of Princess Anne County. In December of 1958, Mr. White was appointed Substitute Trial Judge of the County (Trial Justice) Court. At the present time he holds both of the positions mentioned above.

"I have examined Section 24-29 of the Code, and it appears to me that Mr. White could hold both positions. However, we would like an opinion from your office."

I do not know of any statute prohibiting a substitute county judge from being a member of an electoral board. The prohibitions contained in Section 16.1-18 and 24-31 of the Code do not apply to the situation presented by you.

In my opinion the two offices in question may be held by the same individual.

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**PUBLIC OFFICES—Compatibility of Offices—U. S. Rural Mail Carrier May Be Member of County Board of Supervisors. (241)**

March 17, 1959.

MR. J. S. HARDAWAY, *Member*  
Board of Supervisors of  
Nottoway County

This is in reply to your letter of March 16, 1959, which reads as follows:

"Will you please advise me whether or not a rural mail carrier can serve legally on a county Board of Supervisors."

Section 2-27 of the Code prohibits persons from holding any office under the Constitution of Virginia while at the same time holding any office or post of profit under the government of the United States. However, under Section 2-29 there are certain exceptions to the prohibitions contained in Section 2-27, one of which is to the effect that Section 2-27 shall not be construed "to prevent any United States rural mail carrier, or star route mail carrier from being appointed and acting as notary public or hold any county or district office." A member of the Board of Supervisors is a district office of the county and also a constitutional officer under Section 111 of the State Constitution.

I am of the opinion, therefore, that there is no statutory prohibition against a rural mail carrier holding the office of a member of the Board of Supervisors.

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**PUBLIC OFFICES—Eligibility—Federal Employee May Not Serve as Justice of Peace Unless County Within Provisions of § 2-29(11). (280)**

April 22, 1959.

HONORABLE W. FRANCIS BINFORD  
County Judge of Prince George County

This is in reply to your letter of April 20, 1959, which reads as follows:

"Will you please advise me if a Federal Civil Service Employee can also hold the position of Justice of the Peace."

In my opinion a justice of the peace would not be entitled to continue to hold his office while employed by the federal government in the capacity of Federal Civil Service Employee unless the county in which the justice of the peace is an officer comes within the exception of Section 2-29 (11) of the Code. In this connection, you are referred to Sections 2-26 and 2-27 of the Code, which are as follows:

§ 2-26: "No person, unless his disabilities shall have been removed by the General Assembly, shall be allowed to hold any office of honor, profit, or trust, under the Constitution of Virginia, who, while a citizen of this State, has, since the adoption of the present Constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, either within or beyond the boundaries of this State, or knowingly conveyed such challenge, or aided or assisted in any manner in fighting such duel; or who shall hereafter fight a duel with a deadly weapon, or send or accept a challenge to fight a duel with a deadly weapon, either within or beyond the boundaries of this State, or knowingly convey such challenge, or aid or assist in any manner in fighting such duel."

§ 2-27: "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."

Subsection (11) of Section 2-29 reads as follows:

"Section 2-27 shall not be construed:

"(11) To prevent any United States government employee, otherwise eligible from holding any office under the government of any county in this State having a population in excess of three hundred inhabitants per square mile, or of any city or county adjoining any county having a population in excess of two thousand inhabitants per square mile;"

A justice of the peace is an office established under Section 108 of the State Constitution and, therefore, comes within the scope of these sections relating to disabilities to hold office.

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**PUBLIC OFFICES—Eligibility for—Clerical Employee at Dahlgren Proving Grounds Eligible for County Board of Supervisors. (264)**

April 14, 1959.

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

This is in reply to your letter of April 10, 1959, which reads, in part, as follows:

"A citizen of King George County is employed at the United States

Naval Proving Grounds, Dahlgren, Virginia, with a rating of Supervisory Fiscal Accounting Assistant. He advises that this means clerical work.

\* \* \* \* \*

"I would appreciate an official opinion from you as to whether an employee with the classification given above would be eligible to seek the Office of Board of Supervisors?"

Since this individual states that the nature of his employment is clerical, I am of the opinion that he comes within the exceptions contained in paragraph (9) of Section 2-29 of the Code.

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**PUBLIC OFFICES—Eligibility—Member of School Board May Not Serve as Assessor. (343)**

June 10, 1959.

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

I am enclosing two opinions issued by this office pertaining to the question presented by you, viz., opinion dated May 27, 1940, published in the Attorney General Reports of 1938-40, at page 168, and opinion dated October 18, 1954, published in the Attorney General Reports of 1954-55, at page 178.

The first opinion involved the appointment of a member of the Board of Supervisors and is enclosed since it is referred to in the later opinion because of the statement made by Attorney General Staples that "I am inclined to the view that he (an assessor) would be considered an officer of the county." The later opinion cites the case of *Whitlock v. Hawkins*, 105 Va. 242, in which the Supreme Court of Appeals adhered to the view that an assessor was an officer. At the time this case was decided the statute—Code 1919, Section 2233—required an assessor "to take the oath prescribed by the Constitution and execute the bond prescribed by Section 2241." Upon the theory that an assessor is an officer, the opinion of 1954 was issued holding that a member of a school board could not continue to hold that office if he accepted an appointment as assessor.

The statutes contained in the 1919 Code relating to this matter were repealed by Chapter 45, Acts of 1928, establishing the Tax Code of Virginia, and under this Act the re-assessments were delegated to the Commissioners of the Revenue. By Chapter 411, Acts of 1930, these provisions were amended, resulting in enactment of Section 242 of the Tax Code, etc., which now appear, with certain amendments, as Article 3, Chapter 15 of Title 58 of the Code, and under which the re-assessment duties were taken away from the Commissioners of the Revenue.

As a result of these amendments of 1928, et seq., the requirement that an assessor take the oath prescribed by the Constitution and execute a bond was repealed and no such statutory requirements are now in the statutes. However, Section 44 of the Constitution, relating to the qualifications and eligibility of persons to be members of the General Assembly seems to classify an assessor as an officer. The pertinent part of this section is as follows:

"But no person holding a salaried office under the State government, and no judge of any court, attorney for the Commonwealth, sheriff, sergeant, treasurer, *assessor of taxes*, commissioner of the revenue, collector of taxes, or clerk of any court, shall be a member of either house

of the General Assembly during his continuance in office, and the election of any such person to either house of the General Assembly, and his qualification as a member thereof, shall vacate *any such office* held by him; \* \* \*." (Italics supplied.)

The phrase "any such office" refers to "assessor of taxes" and the other offices mentioned in the preceding portion of the sentence.

Furthermore, I feel that the duties of office of a member of a school board are incompatible with the duties of an assessor of property for the purpose of taxation. The valuations of taxable real estate may determine the amount of revenue available to the school board. It would seem that the persons responsible for the valuation of property for the purpose of taxation should be as far removed as possible from the responsibility of spending the revenues realized therefrom.

For the reasons stated herein, I am of the opinion that a member of the school board is not eligible to serve as an assessor.

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**PUBLIC OFFICES—Fire Warden May Be Candidate for Board of Supervisors—  
If Elected and Qualifies May Not Serve as Fire Warden. (331)**

June 2, 1959.

HONORABLE E. L. BILLUPS  
Secretary  
Electoral Board of Mathews County

This is in reply to your letter of June 1, 1959, which read as follows:

"Kindly give us the following information. Is it lawful for a man who is the fire warden to be a candidate for the office of supervisor?"

You added a postscript to your letter as follows:

"If he were elected, is it lawful for him to hold both offices?"

There is no statutory prohibition against a fire warden being a candidate for the office of supervisor of the county.

However, if the fire warden should be elected and should qualify for office, he would be prohibited from acting as fire warden under the provisions of Section 15-504 of the Code.

This opinion, of course, is based upon the assumption that the fire warden is compensated out of county funds.

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**PUBLIC OFFICES—Member County Electoral Board Paid Officer—May Not  
Contract with County to Supply Fuel Oil. (88)**

October 9, 1958.

HONORABLE O. B. CHILTON, *Clerk*  
Circuit Court of Lancaster County

This is in reply to your letter of October 6, 1958 in which you request my opinion as to whether or not a member of the County Electoral Board of Lancaster County may enter into a contract with the county to supply fuel oil to the county.

Section 15-504 of the Code of Virginia provides that no paid officer of the county shall be interested directly or indirectly in any contract, or in the profits of any

contract made by or with any officer, agent, commissioner or person acting on behalf of the supervisors or the school board of the county. Section 31 of the Constitution of Virginia, and § 24-29 of the Code of Virginia provide for the appointment and qualification of members of the county electoral board. I am of the opinion that members of the county electoral board are officers of the county. Section 24-37 of the Code of Virginia provides the amount and manner of payment for members of the county electoral board.

In view of these provisions relating to members of a county electoral board, I am of the opinion that a member of the electoral board is a paid officer of the county and, therefore, is prohibited under the provisions of § 15-504 of the Code from entering into a contract with the county or any of its agencies.

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**PUBLIC OFFICES—Residence—Board of Supervisors—Permanent Residence and Registration to Vote in Magisterial District—Eligible to Hold Office Where Resides from Time to Time in City. (352)**

June 22, 1959.

HONORABLE KENNETH M. COVINGTON  
Commonwealth's Attorney for  
Henry County

This is in reply to your letter of June 18, 1959, which reads as follows:

"I am writing on behalf of a citizen of this area who proposes to become a candidate for the Board of Supervisors of Henry County, Virginia, in the Ridgeway Magisterial District thereof. There seems to be some question of his qualification for this office from the standpoint of the residence requirement. Mr. Fuller, the prospective candidate, owns real estate and is a qualified voter in the Ridgeway Magisterial District. Mr. Fuller has for several years paid real estate taxes in the Ridgeway Magisterial District, but for several years has paid his personal property tax in the City of Martinsville. Mr. Fuller actually lives in both the City of Martinsville and the Ridgeway Magisterial District of Henry County, staying in each jurisdiction certain intervals throughout the year. He receives mail at the Post Office located in the Ridgeway Magisterial District and he states that he considers and intends that the residence located in the Ridgeway Magisterial District to be his permanent home.

"He has requested that I write you and request your opinion as to his qualification to become a candidate for Supervisor in the Ridgeway Magisterial District of Henry County from the above stated facts."

Under the state of facts set forth by you, I am of the opinion that this person is eligible from the standpoint of residence requirements, to hold the office of a member of the board of supervisors from the Ridgeway Magisterial District.

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**PUBLIC OFFICES—State Highway Commission—Member of Commission Is Public Officer. (78)**

September 22, 1958.

HONORABLE FRANCIS B. GOULDMAN  
Member House of Delegates

This is in reply to your letter of September 16, 1958, in which you request my opinion as to whether membership on the Highway Commission of Virginia constitutes holding public office.

On May 16, 1951, this office rendered an opinion to Honorable George S. Aldhizer, II, then a member of the House of Delegates, copy of which I am enclosing, in which this office ruled as follows:

"A member of the State Highway Commission is appointed by the Governor for a term of four years, subject to the confirmation of the General Assembly. He is required to give bond and the General Powers of the Commission are prescribed by statute. It is my opinion that a member of the Commission is clearly a State officer \* \* \*."

I concur in this opinion and, therefore, am of the opinion that membership on the Highway Commission of Virginia constitutes holding public office.

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**PUBLIC OFFICES—Towns—Mayor Ineligible to Be Elected Treasurer Where Town Charter Provides for Election of Treasurer by Town Council. (23)**

July 22, 1958.

HONORABLE HARRY B. ROWLETT  
Commonwealth's Attorney  
Lee County

This is in reply to your letter of July 14, 1958, in which you request my opinion as to whether or not the Mayor of the town of Pennington Gap may also be appointed to serve as Treasurer of the town.

The charter for the town of Pennington Gap is found in Chapter 327 of the Acts of Assembly of 1902. Section 8 of that charter provides, in part, as follows:

"The mayor and councilmen shall constitute the council of said town, a majority of whom shall constitute a quorum to transact business and all the corporate powers of said town shall be exercised by said council under its authority, except when otherwise provided by law \* \* \*."

Section 10 of this charter provides, in part, as follows:

"The council shall have the power to elect a treasurer, sergeant, and any other officers they deem necessary for said town; to regulate their duties, prescribe their compensation, remove them from office, and require bonds, with approved security, for the faithful performance of their respective duties \* \* \*."

As you can see from the above two quoted provisions of the charter of the town of Pennington Gap, the Mayor is considered a member of the council of the town, and the Treasurer is elected by the council. Section 15-393 of the Code of Virginia reads as follows:

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

I am of the opinion that § 15-393 of the Code of Virginia expressly prohibits the Mayor of the town of Pennington Gap from also being elected or appointed as Treasurer of the town.

**PUBLIC WELFARE—County Adopting County Manager Form May Abolish Welfare Board—Manager or Other Officer May Perform Functions. (106)**

October 23, 1958.

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

This is in reply to your letter of October 17, 1958, in which you enclosed a letter from the Clerk of the Arlington County Board of Supervisors stating that it is proposed in Arlington County that the Welfare Board be abolished and that the operation of the Welfare Board be placed under the direction and control of the County Manager. You have requested my opinion as to whether or not such action by the Board of Supervisors of Arlington County is permissible.

I understand that the County of Arlington has adopted the County Manager form of government provided for in Article 3, Chapter 12, Title 15 of the Code. Based upon this assumption the Welfare Board of the County was selected under Section 63-60 of the Code which provides that in such instances the Welfare Board shall be selected by the governing body of the County. Section 15-354 of the Code is as follows:

"The board, by a majority vote of all the members elected, may abolish any board, commission, or officer of such county except the school board, school superintendent and trial justice, and the officers elected by popular vote provided for in section one hundred and ten of the Constitution, and may delegate and distribute the duties, authority and powers of the boards, commissions, or officers abolished to the county manager or to any other officer of the county it may think proper. In the event of the abolition of any such board, commission, or office, those to whom the duties thereof may be delegated or distributed shall discharge all of the duties and exercise all of the powers and authorities of, and both they and the county for which they were appointed, or by whom they were employed, shall enjoy the immunities and exemptions from liability or otherwise that were enjoyed by the abolished boards, commissions, or offices, prior to the adoption of the county manager plan of government, except in so far as such duties, powers, authority, immunities and exemptions have been or hereafter may be changed according to law."

Under this section the Board of Supervisors has authority by a majority vote of all the members elected thereto to abolish the Welfare Board and delegate the duties thereof to the county manager or to any other officer of the county it may think proper.

The question has been raised in the letter from the Clerk of the Board of Supervisors as to whether or not the proposed reorganization would adversely affect the receipt of the funds for welfare purposes under the statute. I know of no reason why such a reorganization should have any effect upon the right of the locality to receive its allocation of funds under the welfare statutes. I do not think that the receipt of these funds is dependent upon the type or structure of the local welfare organization. The eligibility of a locality to share in the distribution of such funds depends upon various factors, one of which, of course, is that the agency administering the local fund shall be established in accordance with the statutory provisions, which condition, in my opinion, would be complied with by the county.

**PUBLIC WELFARE—Disclosure of Information—Cooperation with Law Enforcement Officers—May Give Addresses, Etc., to Assist in Service of Process or Apprehension of Criminals. (302)**

May 13, 1959.

HONORABLE ROBERT C. FITZGERALD  
Commonwealth's Attorney for  
Fairfax County

This will reply to your letter of May 7, in which you state that the Department of Public Welfare of Fairfax County is occasionally requested by the local police department and sheriff's office to furnish "the address or other information which might enable a summons to be served on a person apprehended for whom a warrant has been secured". You inquire whether or not the provisions of Sections 63-140, 63-161, 63-204, 63-220 and 63-246 of the Virginia Code would prohibit the furnishing of such information unless the service of process or apprehension is related to the administration of the public welfare laws.

The statutes specified above prohibit the disclosure of information concerning applicants for and recipients of public assistance, or persons received or placed by a child placing agency and the parents or relatives of persons so received or placed. While I am of the opinion that these statutes clearly forbid the disclosure of information concerning such persons which is pertinent to their status as applicants for or recipients of public assistance, or their status as a person involved in an investigation by a child placing agency, I do not believe that the provisions of law in question should be construed to prohibit local welfare or child placing agency officials from furnishing law enforcement officers with addresses or other routine information concerning the whereabouts of an individual which would facilitate the service of judicial process or the apprehension of persons for whom criminal warrants have been issued. Subject to the exceptions specified in Section 63-246 of the Virginia Code, the propriety of furnishing such information in a particular case would rest within the discretion of the local public welfare or child placing agency officials.

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**PUBLIC WELFARE—Lien of Judgment Against Recipient of Aid for the Blind—Local Board May Join in Deeds of Partition Where Recipient Holds Undivided Fractional Share Interest in Real Estate. (357)**

June 26, 1959.

MR. J. CLIFFORD HUTT, *Chairman*  
Department of Public Welfare  
Westmoreland County

This is in reply to your letter of June 23, 1959, in which you state that the Board of Welfare of your county has a judgment dated September 22, 1958, against a blind person who has been the recipient of aid for the blind since December 1, 1953, and that the judgment is in the amount of \$31.00 per month. I assume that you have reference to a lien perfected under the provisions of Section 63-191 of the Code. It appears that the recipient in this case owns a one-seventh undivided interest in certain real estate inherited from her parents, and that the heirs have agreed to divide the land into seven parts and that the recipient will become the sole owner of a small cottage and each of the other children will be conveyed a separate part.

You wish to know whether or not the Board may release from this lien the six shares acquired by the other children in the division of the estate. Your letter contains the following paragraphs:

"My specific problem is this—can the Westmoreland County Board of Public Welfare by a partition deed release its lien of the aforesaid judg-

ment set out in this letter against the remainder of the land to be conveyed to the heirs at law of Harvey and Minnie Ambrose and by so doing acquire a lien against the property which would be conveyed to Dorothy Kohr by the brothers and sisters, the heirs at law of Harvey and Minnie Ambrose.

"There would be no actual money transfer but the Board of Public Welfare would be securing a lien on a piece of land, which in value would exceed the value of her interest in the land in which she is releasing her interest."

It appears from your statement that the proposed method of voluntary partition among the heirs is, in the judgment of the Board, a fair division and that the recipient will be the sole owner of a share that is more valuable than her undivided interest in the estate. Under these circumstances, it is doubtful whether the lien in favor of the Board would attach to the shares of the other six heirs. The existence of liens on undivided shares, *per se*, does not, it seems, prevent co-tenants of real estate from voluntarily dividing the property so as to vest in each co-tenant an equal or fair share of the property, leaving the existing lien against the lien debtor's share only. *Wright v. Strother*, 76 Va. 857.

However, in order to assure that the lien will upon partition of the property attach only to the share of the lien debtor, I know of no reason why your Board may not join in the deeds of partition for the purpose of releasing the other six shares from the encumbrance.

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**PUBLIC WELFARE—Payments to Dependents of Prisoner Sentenced to State Convict Road Force—Paid Weekly Beginning When Prisoner Is Admitted. (34)**

August 5, 1958.

MR. FRANCIS C. JONES  
Fiscal Director  
Department of Welfare and Institutions

This is in reply to your letter of July 31, 1958, in which you make inquiries as to the interpretation of Section 20-63 of the Code of Virginia as amended by the 1958 session of the General Assembly.

Section 20-63, insofar as here material, provides as follows:

"(a) It shall be the duty of the governing body of the county or city within the boundaries of which any work is performed under the provisions of this chapter to allow and order payment at the end of each calendar month out of the current funds of the county or city, to the court which originally sentenced the prisoner for the support of his wife or child or children, a sum not less than five nor more than fifteen dollars for each week in the discretion of the court during any part of which any work is so performed by such prisoner.

"(b) If the prisoner be sentenced to the State convict road force the sum or sums provided for in paragraph (a) shall be paid by the State treasury out of the funds appropriated for the payment of criminal costs, and such payments shall begin when such prisoner is admitted to the State convict road force; \* \* \*."

You first inquire as to the appropriate administrative office to approve payments pursuant to the section of the Code above mentioned.

Inasmuch as the records of the prisoners sentenced to the State convict road force are maintained in the administrative office of the Road Force, I am of the

opinion that the requisitions for the payments made pursuant to the order of the court sentencing such prisoners should be prepared by that office.

Your second inquiry relates to the interpretation to be placed upon the language which provides for a weekly amount to be paid into court for the benefit of the prisoner's dependents.

Prior to 1954, the State, counties or cities were required to pay into court a sum for the support of the dependents of prisoners sentenced to work farms, work houses, work squads or the convict road force, calculated on a per diem basis for each day any work was performed by such prisoner.

In 1954, Section 20-63 of the Code was amended so as to change the rate of payment from a per diem basis to a weekly sum, to be paid for each week during any part of which any work was performed by the prisoner. In addition to this change in the basis for payment, sub-paragraph (b) of Section 20-63 was amended to read as follows:

"If the prisoner be sentenced to the State convict road force, the sum or sums provided for in paragraph (a) shall be paid by the State Highway Commissioner out of the funds provided for the construction and maintenance of public roads and *such payments shall begin when such prisoner is admitted to the State convict road force.*" (New language in italics.)

The only change in Section 20-63 of the Code by the 1958 amendment, insofar as here germane, was to provide for the weekly payments to be made from funds appropriated for payment of criminal costs, rather than from highway construction and maintenance funds, if the prisoner is sentenced to the State convict road force.

By the 1954 amendment to Section 20-63 of the Code, it appears fairly obvious that the General Assembly intended to provide the dependents of desertion or nonsupport prisoners with a weekly sum to be determined by the court sentencing such prisoner, rather than with a per diem amount as previously determined by the number of days the prisoner worked on the farms, work houses, work squads or convict road force. The only limitation placed on the payment of the weekly sum specified by the court was that some work must have been performed during the week for which the payment was made when payment is made by cities or counties. It is to be noted, however, that such a limitation was not placed on the payments to be made when the prisoner was sentenced to the State convict road force, for the 1954 amendment provided that the "payments shall begin when such prisoner is admitted to the State convict road force."

Generally speaking, a "week" is defined as a seven-day period commencing at 12:01 o'clock a.m. Sunday and continuing through 12:00 o'clock p.m. the following Saturday. Therefore, when prisoners are sentenced to the State convict road force, and the court sentencing such a prisoner provides that a weekly sum is to be paid for the support of the prisoner's dependents, that sum specified must be paid for each week, or any portion thereof, the prisoner is held in the convict force. The first weekly payment begins when the prisoner is admitted and continues for each additional week he is so held. No computation on the part of the State convict road force is necessary other than to determine the number of weeks or any portion thereof the prisoner is held in the convict force.

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**PUBLIC WELFARE—Suit to Enforce Lien Brought in Name of Members of Local Board of Public Welfare—Commonwealth's Attorney May Represent Board. (274)**

April 17, 1959.

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

This will reply to your letter of April 15, 1959, in which you inquire whether or

not a suit to enforce a lien, established in favor of a local board of public welfare by Section 63-127 of the Virginia Code, should be brought in the name of the local board and whether or not such suit should be brought by the local Attorney for the Commonwealth.

With respect to your first inquiry, I am forwarding to you a copy of an opinion of this office, dated November 17, 1949, to the Honorable Byrum P. Goad, Commonwealth's Attorney for Carroll County, in which it was ruled that suits of the type under consideration "should be brought in the name of the individual members of the Local Board of Public Welfare as such Board". See, Report of the Attorney General (1949-50) p. 183.

In connection with your second question, Section 15-504 of the Virginia Code in part provides:

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

In light of the language italicized above, I am of the opinion that a suit to enforce a lien established by Section 63-127 may be brought on behalf of the local board of public welfare by the local Attorney for the Commonwealth.

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**SANITARY DISTRICTS—Taxation—Sanitary District Improvement Tax Must Be Imposed on All Property Subject to Local Taxation. (45)**

August 18, 1958.

HONORABLE ERNEST P. GATES  
Commonwealth's Attorney  
Chesterfield County

This is in reply to your letter of August 14, 1958, in which you request my opinion as to whether or not the board of supervisors may impose a sanitary district improvement tax on the real estate located within the sanitary district without imposing an equal tax on other taxable property located within the sanitary district.

Section 21-118 of the Code of Virginia provides that the board of supervisors has the following powers and duties:

"(6) To levy and collect an annual tax upon all the property in such sanitary district subject to local taxation to pay, either in whole or in part, the expenses and charges incident to constructing, maintaining and operating water supply, sewerage, garbage removal and disposal, heat, light, fire fighting equipment and power and gas systems and sidewalks for the use and benefit of the public in such sanitary district."

I am of the opinion that under the above-quoted provisions of the Code, and also in order to comply with the provisions of Section 168 of the Constitution of Virginia, the board of supervisors, if they impose a tax on property, must impose such tax on all property subject to local taxation and not on real estate alone. I should like to call your attention to §§ 58-829.1 and 58-851. Under § 58-829.1 the board of supervisors may exempt household goods and personal effects from

property taxes, including a sanitary district tax. Under the provisions of § 58-851 the board of supervisors may fix a different rate of levy on the real estate from that imposed on tangible personal property.

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**SCHOOLS—Admission of Child Under Minimum Age—School Board May Admit and Collect Actual Cost Per Month of Education. (305)**

May 18, 1959.

HONORABLE M. H. BELL, *Superintendent*  
Harrisonburg Public Schools

This is in reply to your letter of May 14, 1959, in which you state as follows:

"We have had a situation to arise concerning tuition payments to the Harrisonburg School Board on which we would like to have your opinion. The Harrisonburg School Division has been following the State policy of not permitting children to enter the first grade until they are six years of age on or before October 1.

"We have had a case of a family moving to Harrisonburg from Hagerstown, Maryland, where the children are permitted to enter at an earlier age than in Virginia. The child had started to school in Hagerstown in the kindergarten prior to the parents moving to Harrisonburg. Since the child's enrollment was in the latter part of the school session, she was permitted to continue in the kindergarten. The following session the parents were eager for the child to enroll in the first grade, in spite of the fact that the child was not six years old by October 1. The School Board considered the matter and decided to let the child enter the first grade, with the understanding that the parents would pay tuition of \$12 per month, since the Division would not receive state money toward her education.

"Is the School Board within its legal rights in this case to press collection of the tuition fee of \$12 per month?"

It is my opinion that the Harrisonburg School Board is within its legal rights in collecting the tuition fee of \$12.00 per month. I find no prohibition in the statutes which would forbid the School Board from allowing a child under the age of six years, who is otherwise qualified, to attend the kindergarten or the first grade of an elementary school operated by the School Board. At the same time, since the School Board was not required by law to educate this child, but did so in its sound discretion, I see no impediment to its collecting from the parents what the Board determines to be the actual cost per month of such education.

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**SCHOOLS—Board—Immune from Tort Liability. (110)**

October 29, 1958.

HONORABLE ALONZO BEAUCHAMP  
Commonwealth's Attorney for  
Russell County

This is in reply to your letter of October 23, 1958, in which you request my opinion as to whether the State Highway Department may sue the County School Board of Russell County for damages allegedly being caused to a public highway due to the ponding of water adjacent to such highway during heavy rains which fill the

excavation which was made during school construction. You also inquire if the School Board would be liable for any damages that may be caused by an act of God.

It is well settled that the State is immune from tort liability and may not be sued for damages sounding in tort. *Eriksen v. Anderson*, 195 Va. 655. Generally speaking, in the absence of a statute to the contrary, this immunity is extended to the counties and to the political subdivisions carrying out a governmental function. *Mann v. County of Arlington*, 199 Va. 169.

The County School Board of Russell County was established pursuant to Article IX of the Virginia Constitution and is engaged in performing a governmental function. There is no statute which authorizes the school boards to be sued in tort actions. I am, therefore, of the opinion that the County School Board of Russell County would not be liable for damages allegedly being caused by the impounding of water adjacent to the public highway.

In view of the foregoing, an answer to your second inquiry is rendered unnecessary.

I express no opinion as to the possible liability of the contractor for the School Board, nor as to the right of the State Highway Commission to enjoin the continuation of impounding of the water in question.

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**SCHOOLS—Board—May Deduct Premiums from Teachers' Salaries on Request of Teacher—May Remit in Lump Sum Monthly to Insurance Companies, Etc. (143)**

December 3, 1958.

HONORABLE CHARLES E. EARMAN, JR.  
Commonwealth's Attorney  
Rockingham County

This is in reply to your letter of November 26, 1958, in which you request my opinion as to whether or not the County School Board may make monthly payroll deductions from a teacher's salary at the teacher's request for group plan life insurance, hospitalization insurance, government savings bonds, etc., and if such payroll deductions are made, should the money be held in the reserve fund and paid as a gross amount, or should the deducted amount be paid to the designated payee immediately by separate and distinct payments for each teacher?

I am of the opinion that the School Board of Rockingham County may make monthly payroll deductions from a teacher's salary at the teacher's request for the purposes enumerated above. I am of the further opinion that the money should be paid to the designated payee as soon as practicable. I do not feel that the School Board is required to make a separate and distinct payment each month for each teacher, but that the Board may deduct the amount for group life insurance from each teacher's salary each month and draw one check or warrant payable to the life insurance company for the monthly premiums deducted from the salaries of all the teachers participating in the group insurance plan.

I am enclosing a copy of a letter which was written to Mr. J. R. Bennington, Clerk of the School Board of Rockingham County by Honorable J. Gordon Bennett, Auditor of Public Accounts, on November 24, 1958, relative to the monthly deductions from a teacher's salary.

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**SCHOOLS—Board—May Sponsor and Contribute to Summer Workshop for Teachers. (114)**

October 31, 1958.

HONORABLE RAY E. REID  
Division Superintendent  
Arlington County Public Schools

This is in reply to your letter of October 24, 1958, in which you request my

opinion as to whether or not the School Board of Arlington County may co-sponsor a summer workshop for Arlington teachers with the University of Virginia and George Washington University. You state that the tuition cost per teacher participating in the proposed workshop would be \$20.00, and that the Arlington School Board would pay one-half of the tuition costs for the teachers who are presently employed and who agree to teach in the Arlington County public schools in the next school year.

While I can find no provision relating to the subject in the Code of Virginia or in the Rules and Regulations of the State Board of Education, I am of the opinion that the School Board of Arlington County may participate in such an in-service training program as outlined in your letter if the Board finds that this additional training would enable the teachers to conduct a better educational program in the public schools of Arlington County.

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**SCHOOLS—Board Member—Contracts with Board—When May Enter Into with Permission of State Board of Education. (6)**

July 11, 1958.

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

This will reply to your letter of June 30, 1958, in which you state that the School Trustee Electoral Board of Stafford County has recently appointed to the County School Board of Stafford County an individual who is an electrical contractor and who, in years past, has had contracts with the County School Board involving the furnishing of electrical equipment and work. You inquire whether or not—in light of Section 15-504 of the Virginia Code—the individual in question may qualify as a member of the County School Board and, if so, whether or not he may thereafter enter into contracts with the County School Board, with the permission of the State Board of Education, pursuant to the provisions of Section 22-213 of the Virginia Code.

In pertinent part, Sections 15-504 and 22-213 of the Code of Virginia (1904) as amended, respectively provide:

"Sec. 15-504. 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. \* \* \*" (Italics supplied.)

"Sec. 22-213. It shall be unlawful for any member of the State Board, division superintendent of schools, *member of the school board* or any other school officer, principal or teacher in a public school, *except by permission of the State Board evidenced by resolution spread on the minutes of such Board*, to have any pecuniary interest, directly or indirectly, in any contract for building a public schoolhouse, or in furnishing material to a contractor for building such schoolhouse, or in supplying books, maps, school furniture or apparatus to the public schools of this State, or to

sell or write or solicit insurance on any school building; or act as agent for any other publisher, book seller, or dealer in any such school furniture or apparatus, or directly or indirectly to receive any gift, emolument, reward or promise of reward, for his influence in recommending, or procuring, the use of any book, map, school furniture, or apparatus of any kind in any public school of this State, nor shall the board or the division superintendent employ any of its members in any capacity. Any such officer, principal or teacher who shall violate this provision, besides being removed from his office or post, shall be deemed guilty of a misdemeanor. \* \* \* (Italics supplied.)

With respect to the first question presented in your communication, I am of the opinion that the individual under consideration would not be prohibited, by any provision of Section 15-504 of the Virginia Code, from qualifying as a member of the County School Board because of past contracts between such individual and the County School Board.

In connection with your second question, this office has previously had occasion to consider the interrelationship of Sections 15-504 and 22-213 of the Virginia Code. In an opinion to the Honorable J. Gordon Bennett, Auditor of Public Accounts, rendered September 20, 1950, Judge Almond, then Attorney General, pointed out that members of the various local school boards could be included within the prohibitions of Section 15-504 only as "paid officers of the county" and, if so included, the provisions of Section 22-213 must be deemed to constitute an exception to the provisions of Section 15-504. See, Report of the Attorney General (1950-1951) p. 246.

I fully concur with the views expressed by Judge Almond in the above mentioned opinion, a copy of which is enclosed. In light of the conclusion stated therein, I am of the opinion that a member of a local school board may—with the permission of the State Board of Education—enter into contracts, *of the types specified in Section 22-213*, with the local school board of which he is a member, without violating the provisions of Section 15-504. However, a member of a local school board, as a paid officer of the county, would be prohibited by the provisions of Section 15-504 from entering into any contract of a type not specifically permitted by Section 22-213 of the Virginia Code.

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**SCHOOLS—Bonds—Employment of Fiscal Experts—School Board May Not Employ But Board of Supervisors Has Power—Public Finance Act of 1958. (172)**

January 20, 1959.

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

This is in reply to your letter of January 15, 1959, which reads as follows:

"By a written letter of contract dated July 9, 1958, The County School Board of Bedford County undertook to enter into a contract with the Francis I. duPont Company under the terms of which contract the duPont Company was engaged as financial consultants and advisors to Bedford County, including, among other things, the printing and advertising and selling of some contemplated bonds for school construction purposes (said bonds yet to have been authorized and issued) and under the terms of which contract the duPont Company would be Bedford County's exclusive fiscal agent. This contract purports to be 'Accepted for Bedford County, Virginia,' by John R. Hyatt, Chairman of the County School Board and by Yhome W. Montaines, Clerk of the County School Board.

"A typed copy of this letter of contract is enclosed herewith.

"It now appears that the law of the Commonwealth of Virginia, and particularly Section 15-666.31 and Section 15-666.32 of the Code provide, among other things, that the governing body of the county and not the county school board, shall have the powers for selling authorized bonds, and presumably for doing all matters necessary in connection therewith. I understand that prior to 1958 the school boards may have had this power.

"The School Board has requested me to request your opinion concerning the following matters:

"(1) Did the County School Board of Bedford County have power legally to enter into this contract?

"(2) Is this contract binding upon the County School Board of Bedford County?

"(3) Is this contract binding upon the County of Bedford?

"(4) Does the County School Board of Bedford County have the power to make a contract such as this for and on behalf of itself with the duPont Company or with any other company?

"(5) Does the County of Bedford have the power to make a contract such as this for and on behalf of itself with the duPont Company or with any other company?

"Your opinion on these matters will be appreciated."

By Chapter 640 of the Acts of 1958, the Public Finance Act of 1958 was enacted and this statute became effective on June 27, 1958. This Act expressly repealed Article 2, Chapter 9, Title 22 of the Code of Virginia of 1950, as amended, relating to the issuance of school bonds. The agreement between Francis I. duPont Company and the School Board of Bedford County is dated July 9, 1958. Under the former provisions of Title 22 which were repealed, school boards did have the power subject to the approval of the county governing body to negotiate and arrange for the issuance of school bonds. It appears that effective June 27, 1958, the county school boards no longer have this power.

Section 15-666.28 provides that any county shall have all the power granted by Section 15-666.18 to municipalities subject to the exception that no bonded debt shall be made unless the same has been approved by the qualified voters. Section 15-666.18(f) authorizes municipalities to employ financial experts in connection with the proposed issue of bonds. Therefore, the county may exercise this power.

Section 15-666.29 of the Code provides as follows:

"Whenever the governing body of any county shall determine that it is advisable to contract a debt and issue general obligations bonds of the county to finance any project, it shall adopt a resolution (herein sometimes called the 'initial resolution') setting forth

"(a) In brief and general terms the purpose or purposes for which the bonds are to be issued, and

"(b) The maximum amount of such bonds and, if bonds are to be issued for more than one purpose, the maximum amount for each purpose; provided, however, that with respect to bonds for school purposes a statement of the maximum amount of each separate purpose is not required. Such resolution shall request

the circuit court, or any judge thereof, to order an election upon the question of contracting the debt and issuing the proposed bonds.

"Prior to the adoption under the provisions of this section of a resolution by the governing body of any county requesting the ordering of an election upon the question of contracting a debt and issuing bonds for school purposes, the county board of education or school board of such county shall first request, by resolution, such governing body to take such action."

It will be noted that under the last paragraph of this section it is provided that the governing body of the county may not proceed until it has first been requested so to do by the county school board. In all other respects it seems clear from the provisions of the Public Finance Act of 1958 that the contracting power is placed in the governing body of the county alone, subject, of course, to the provisions with respect to the approval of the project by majority vote of the qualified voters voting in the election and subject to the initial request by the school board for such action. I am of the opinion, therefore, that the school board of Bedford County did not have authority to obligate the county in the manner contemplated by the agreement made with Francis I. duPont Company. Therefore, the answers to the first four questions presented in your letter are in the negative.

With respect to question number five, I am of the opinion that the governing body of the county does have the power to make such a contract for the services of financial advice.

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**SCHOOLS—Conveyance of Real Estate Owned by School Board—Highway Widening and Sidewalk Construction—School Board May Donate Land for Purpose—May Contribute Share of Sidewalk Construction Cost. (275)**

April 20, 1959.

HONORABLE EMORY L. CARLTON  
Commonwealth's Attorney for Essex County

This is in reply to your letter of April 15, 1959, which reads as follows:

"The Virginia State Highway Department plans to widen U. S. Route 17, a highway in the Primary System in the Town of Tappahannock, and proposes to construct a sidewalk along a portion of the highway adjoining the public school tract. The Essex County School Board proposes to donate to the Commonwealth a strip of land so that the State Highway may be widened and improved. The sidewalk will be constructed over the strip of land proposed to be donated by the School Board. The Highway Department requires that the Town of Tappahannock bear one-half of the cost of constructing the sidewalk. The town proposes that the Essex County School Board pay one-half of the town's share of this construction. The School Board is agreeable to paying one-fourth of the construction cost of the sidewalk if it may legally do so. The School Board is anxious that the sidewalk be built because it will be beneficial to the children going to and coming from the school.

"Please write me, first, may the School Board donate land to the Commonwealth for the purpose of widening U. S. Route 17; second, whether the School Board may legally contribute to the expense of constructing such a sidewalk from funds made available by the Board of Supervisors for that purpose. There is no school levy in Essex County, but funds are appropriated for school purposes from the general county levy."

I am of the opinion that the School Board may convey the strip of land in question by following procedure set forth in Sections 22-161 and 15-692 of the Code. I do not know of any statutory provision under which the School Board could convey this tract of land without following the procedure set forth above.

I am of the opinion that the School Board may contribute toward the expense of constructing the sidewalk. However, if this item was not included in the school budget heretofore approved by the Board of Supervisors of the county, it will be necessary for the School Board to obtain the consent of the Board of Supervisors before this expenditure can be made.

In this connection I call attention to Section 22-72 of the Code and to the case of *Board of Supervisors v. County School Board*, 182 Va. 266.

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**SCHOOLS—County District System—Capital Outlays—Funds May Be Expended to Construct Consolidated School Serving Two Districts—Funds May Be Drawn From Accounts of Both Districts Through Joint School Located in One. (265)**

April 13, 1959.

HONORABLE JAMES O. MOREHEAD  
Division Superintendent  
Bland County School Board

This will acknowledge receipt of your letter of April 8, 1959, which reads as follows:

"In a County School Division, such as Bland, where we adhere to the County district system and where each of the four magisterial districts has a separate district levy for capital outlay purposes within its own and respective district, may the County School Board with the approval of the County Board of Supervisors, expend district funds for the construction of a consolidated high school serving the two districts?"

"Seddon and Mechanicsburg Districts, Bland County, propose to construct a joint high school and located, perhaps, in Seddon District. Although the School Board keeps separate accounts of receipts in each district, may the School Board expend funds from the Mechanicsburg District Account when such expenditure will be used for capital outlay purposes in Seddon District?"

Section 22-128 of the Code provides as follows:

"For capital expenditures and for the payment of indebtedness or rent, the governing body of any county or city may levy a special county tax, a special district tax, or a special city tax, as the case may be, on all property subject to local taxation, such levy or levies to be at such rate or rates as the governing body levying the tax may deem necessary for the purpose or purposes for which levied, except that where the tax is for raising funds for capital expenditures the rate shall not be more than two dollars and fifty cents on the one hundred dollars of the assessed value of the property in any one year."

This section, in my opinion, authorizes the governing body of the county to levy a uniform special district tax in those magisterial districts for which a school is constructed for the use and benefit of such districts jointly. The tax collected under such levy may be spent only for the purposes set forth in Section 22-128.

Therefore, each of your questions is answered in the affirmative.

**SCHOOLS—Federal Aid—State Board of Education Authorized to Submit and Administer Plans Under National Defense Education Act of 1958. (273)**

April 17, 1959.

DR. DAVIS Y. PASCHALL  
Superintendent of Public Instruction  
State Board of Education

I am in receipt of your letter of April 6, 1959, in further connection with my letter to you of March 27, 1959, in which I stated that Section 14 of the Appropriation Act of 1958—Acts of Assembly (1958) p. 1075—empowered the Governor of Virginia to authorize the State Board of Education “to accept the Federal grants made to the Commonwealth under the provisions of Public Law 85-864, Titles III, V and VIII of the National Defense Education Act of 1958 for the fiscal year ending June 30, 1959”. Noting that the funds in question are available upon the submission of State plans to the Office of Education for approval by that agency, you forwarded to me with your communication copies of State plans approved by the State Board of Education for Titles III and V of Public Law 85-864. You inquire whether or not the State Board of Education is authorized to submit and administer such plans and whether or not these plans are inconsistent with the laws of Virginia.

The general supervision of the public school system of the State of Virginia is vested in the State Board of Education by virtue of the provisions of Section 130, Constitution of Virginia (1902) as amended. In addition to certain powers and duties conferred and enjoined upon it by Section 132 of the Virginia Constitution, the State Board of Education is directed by statute to perform such duties as may be prescribed by law. Section 22-16, Code of Virginia (1950). In this latter connection, Item 161 of the Appropriation Act of 1958—Acts of Assembly (1958) p. 998—provides:

“The State Board of Education shall make rules and regulations governing the distribution and expenditure of such additional Federal, private and other funds as may be made available to aid in the establishment and maintenance of the public schools.”

In light of the provisions indicated above, I am of the opinion that the State Board of Education is authorized to submit and administer the State plans concerning which you inquire. I have reviewed these plans and am also of the opinion that their provisions are not inconsistent with the laws of the Commonwealth.

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**SCHOOLS—Joint Schools Operated for Towns and Magisterial Districts—School Boards “Acting Jointly”—Each Board to Vote Separately. (261)**

April 8, 1959.

HONORABLE E. B. STANLEY  
Division Superintendent  
Washington County Schools

This is in response to your letter of April 6, 1959, in which you make reference to Chapter 28 of the Acts of Assembly, Extra Session, 1956. Chapter 28 authorizes the Central School Board of the Town of Abingdon and the County School Board of Washington County, with the consent of the State Board of Education, to establish joint schools for the use of the Town of Abingdon and the Abingdon Magisterial District. You ask the following question:

"Please advise if decisions relating to such schools would have to be made at a joint meeting of both school boards or if these decisions could be made at separate meetings of the two boards, so long as there is agreement by both boards."

Chapter 28 provides that the two school boards "acting jointly" may condemn land for such schools. The title to such land is vested jointly in both school boards. The joint schools are to be "constructed, maintained, managed and controlled equally by" the two school boards.

The answer to the question presented lies in the interpretation of the phrase "acting jointly". Although the Supreme Court of Appeals of Virginia has apparently not had occasion to construe this phrase, I am constrained to believe that it was not the intention of the Legislature that the two boards meet jointly in a conglomerate mass to vote on matters affecting the joint schools. The Supreme Court of Alabama in the case of *White v. Powell*, 20 So. 2d 467, had occasion to construe and interpret the phrase "acting jointly". That Court held that the several boards must each act separately before any specific action could be taken.

Both school boards must agree before any action may be taken relative to the construction, maintenance or operation of any joint school. It may be that both boards will desire to meet together to discuss the various problems attendant to such joint schools, but each board must vote separately on any question presented. I am, therefore, of the opinion that the school boards must vote separately on any matter affecting such joint schools before any specific action can be taken.

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#### SCHOOLS—Legislation Enacted at 1959 Special Session—General Discussion. (314)

May 22, 1959.

HONORABLE GARLAND GRAY  
Member of the Senate

This is in reply to your letter of May 7, 1959, in which you enclosed a series of questions relating to the educational statutes enacted at the recent special session of the General Assembly. The questions will be stated, and answered in the order presented by you.

1. Is there anything in the State Constitution to require a locality to operate public schools?

*Ans.:* There is no such requirement in the Constitution.

2. If a locality decides to go out of the public school business, what happens to the requirement that the General Assembly must operate a state-wide system of public schools? Will the State have to operate a token public school in that locality? Will the locality have to help in anyway? Can the State operate in a locally owned school building.

*Ans.:* While the Constitution of Virginia contemplates that the operation of the public school system in this State be a joint state and local effort, there is no mandatory provision in the Constitution that any locality operate public schools. Counties and cities, and those towns that constitute separate school districts, are authorized to raise sums and levy taxes for the purpose of establishing and maintaining schools. This is not a mandatory provision and each locality has a right to use its own discretion in this respect.

The mandate for the operation of public free schools throughout the State is imposed by the Constitution on the General Assembly. This mandate would not be changed by the decision of any locality "to go out of the public school business." However, the question of whether or not the State should operate a "token" public school in such a locality will depend upon many things. The Constitution

refers to an "efficient" system of schools. Without local effort it would be impossible in many localities to operate "efficient" schools, or anything other than a makeshift, or what you refer to as "token," schools. The amount which § 135 of the Constitution requires the General Assembly to apply to public schools is for schools of the primary and grammar grades only, and at the present time is approximately \$10.00 per pupil. Manifestly, this sum would not be sufficient to operate many schools for very long in any locality, and those in a very inadequate manner. All other State funds appropriated for school purposes are on a matching or reimbursement basis, and depend upon certain local effort.

While compliance with the mandate of the Constitution would probably demand that the State make a *bona fide* effort to operate public schools in a locality that refused to contribute to such operation, nevertheless it is not believed that the Constitution envisions, or the law contemplates, that the State do a vain thing, or attempt the operation and maintenance of schools which would not be "efficient" or schools which would not provide any effective education for the children of such locality.

For reasons that are obvious, this question cannot be answered categorically at this time, and its ultimate answer will necessarily depend upon circumstances and conditions existing in each particular instance. For this reason, we reserve opinion for the present as to the duty of the State with reference to the operation of public schools in a locality which no longer exerts any local effort to maintain such schools.

Under the present Constitution and laws of Virginia, a locality would not be required to assist the State in the operation of "token public schools." Again, the decision to appropriate money for the operation of public schools is one to be made by the governing body of the locality, and I know of no way in which a locality could be forced to levy taxes, appropriate money or maintain public schools contrary to the wishes of the people of such locality and its governing body.

Title to the public schools of a locality is vested in the local county School Board. The decision as to the use of such schools is one to be made by the Board. I am presently of opinion that the State could not operate schools in such buildings without the consent and acquiescence of the School Board of the locality in which they are located.

3. Under the tuition grant program, as passed, the State will only put up as much as it is now spending in any locality on a per pupil basis, up to a maximum of \$250.00 a year. Just how is the State share determined when State money is based on average-pupil attendance, and a locality that closed its public school would have no attendance? Is there any provision that the locality MUST put up the difference to give each pupil \$250.00 a year? Is \$250 the limit that the State and the locality can grant to pupils?

Ans.: Under Section 5 of Chapter 53 of the Acts of the Special Session, any person who qualifies may receive a scholarship to be provided out of joint State and local funds up to (1) a maximum of \$250.00 for the school year, or (2) an amount equal to the actual cost of tuition or (3) the total cost of operation, excluding debt service and capital outlay, per pupil in average daily attendance in the public schools of the locality providing such scholarship, whichever of the three sums is the lowest. The share of the locality for each scholarship is the amount obtained by multiplying the amount of the scholarship by the percentage which the expenditure out of local funds is to the total such cost per pupil in average daily attendance in such locality for the school year 1958-59 or 1957-58 as the case may be. Thus, if the schools operated in your county during 1958-59 and the percentage of cost borne by the county was 40%, and the total cost per pupil was \$200.00, then the county's share will be \$80.00, and the State is obligated to pay the balance, or \$120.00.

The county may, if it desires to do so, increase the scholarship amount, but none of the increase will be borne by the State. The State's contribution will not be affected if the majority or all of the pupils cease attending the public schools.

4. Is it true that a public school teacher can teach in a private school and still

retain full State retirement rights? What other rights that a public school teacher now has could also be retained if they went to teaching in a private school?

*Ans.:* Teachers may be protected in their retirement rights under the provisions of Section 51-111.38:1 through 51-111.38:3 of the Code which are as follows:

§ 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 Supplemental 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."

§ 51-111.38:2:—"The chief fiscal officer of the employer shall submit to the Board such information and shall cause to be performed in respect to the employees of the employer such duties as shall be prescribed by the Board in order to carry out the provisions of this chapter."

§ 51-111.38:3:—"The employer contribution rate shall, unless otherwise fixed by the Board, be the normal and accrued contribution rate determined as provided in § 51-111.47 for members of the retirement system qualifying under § 51-111.10 (4). The contributions so computed shall be certified by the Board to the chief fiscal officer of the employer. The amounts so certified shall be a charge against the employer. The chief fiscal officer of each such employer shall pay to the State Treasurer the amount certified by the Board as payable under this article, including such charges as the Board may deem necessary to cover costs of administration, and the State Treasurer shall credit such amounts to the appropriate accounts of the retirement system."

I am of the opinion that if the provisions cited are complied with, all the retirement rights the teachers now enjoy will be preserved. I do not know what other specific rights you have in mind, but I am unaware of any statute which would deprive the teachers of any of the usual rights enjoyed under the usual contracts of employment.

Chapter 50 of the recent session enables a teacher to discharge a scholarship obligation by teaching one year in a private nonsectarian school.

5. How does the transportation bill work? Can a locality that has closed its public schools maintain its present transportation system, or part of it, to carry pupils to the private schools? Will it receive the same State aid that it now receives, or in proportion to the buses it operates?

*Ans.:* Chapter 49 relates to transportation for children attending private nonsectarian schools. The text of this Chapter is as follows:

"§ 1. The school board of every county, city or town, if the same be a separate school district, may provide transportation for any child enrolled in and attending nonsectarian private schools and, in such event, shall be entitled to reimbursement out of State funds to the same extent as counties, cities and towns are reimbursed for costs expended for transportation of pupils to and from public schools. Chapter 13 of Title 22 shall be applicable to such transportation together with the rules and regulations of the State Board of Education adopted pursuant thereto.

"§ 2. The school board may, in lieu of furnishing transportation authorized by the preceding section, allot funds to assist parents of children attending nonsectarian private schools in paying the cost of other means of transportation. Such assistance shall not exceed an amount

approved by the State Board of Education with due regard to the cost of transporting pupils generally in the public schools throughout this State. Fifty per centum of such cost shall be paid by the school division in which the child resides and fifty per centum by the State.

"§ 3. The governing bodies of the several counties and the councils of the several cities and towns are hereby authorized to appropriate such funds as in their judgment may be necessary to carry out the provisions of sections 1 and 2 of the Act."

6. Under the law just passed if a locality decides to go out of the public school business entirely, how long must it wait to declare its or part of its, school buildings surplus, before it could sell that or some of them to a private school corporation?

*Ans.:* Section 22-161 provides the method to be followed in the sale of school buildings. Neither this section nor Section 15-692 provides for a waiting period before proceeding to sell the property. These sections are as follows:

§ 22-161:—"The school board shall have the same power to sell or exchange and convey the real and personal school property of the county as the governing body of the county has with reference to the power of sale, exchange and conveyance of other county property under § 15-692; provided that property not exceeding five hundred dollars in value may be sold by the school board after advertising for not less than ten days or by appropriate hand bills posted at ten or more public places in the county at least three of which shall be posted in the neighborhood of the school."

§ 15-692:—"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."

Under Chapter 68 of the recent Extra Session, which statute will become effective on July 24, 1959, it is provided that whenever not less than 10% of the number of voters voting in the last preceding presidential election petition the court having jurisdiction to do so, it shall call a referendum to be held not less than twenty nor more than thirty days after entry of the order to determine the will of the people with respect to whether or not the school property is no longer needed for public school purposes. If a majority of the qualified voters voting in the referendum shall vote that any specific property is no longer needed the school board is then required to initiate proceedings to sell the property pursuant to the Code sections cited above.

7. As I understand it the new law permits a locality to operate without a budget, so that school funds can be cut off in 30 days—does this apply only to counties?

*Ans.:* The statutes do not authorize the local governing bodies to "cut off" funds as that term is generally used. The statutes authorize the governing bodies of all counties, cities and towns, constituting separate school districts, to refrain from appropriating funds for public school or educational purposes except periodically, such as monthly, quarterly, semi-annually or annually. Thus, the locality, if it appropriates funds for the first month only, may refuse to appropriate funds

thereafter. Cities and towns may elect to comply with the procedure set out in Chapter 69, Extra Session, rather than with conflicting charter provisions. This is provided in Section 15-585 of the Code, as amended, which is as follows:

"The Council of any city or town whose charter contains provisions for a budget may elect to comply with the provisions of this chapter rather than those contained in the charter."

8. If it does not apply to cities which have a provision in their charter for a yearly budget, is there any way a city council might get out of appropriating school funds for a full year? If not, month by month for six months?

*Ans.:* Since the above mentioned statutes regarding budgets do apply to cities, the answer to this question is found in the answer to 7 *supra*.

9. Under the present laws can a locality close down its secondary schools and continue to operate its grade schools, or *vice versa*?

*Ans.:* We have heretofore pointed out in this memorandum that there is no mandate in the Constitution of Virginia which requires the General Assembly to establish and maintain *high* schools, and no mandate which requires localities to establish and maintain *any* public schools. The Constitution does provide for the establishment of an efficient system of public free schools throughout Virginia, and does direct that the revenue derived from certain sources be applied by the General Assembly to schools of the *primary* and *grammar* grades for the equal benefit of all the people of the State, to be apportioned on the basis of the school population, such basis being the number of children between the ages of 7 and 20 years in each school district. The General Assembly is likewise *authorized*, but not directed, to make such appropriations for school purposes as it may deem best, and to apportion the appropriations on a basis to be provided by law. Localities are authorized, but not directed, to raise sums for establishing and maintaining such schools as, in their judgment, public welfare may require, provided that such primary schools as may be established shall be maintained at least four months of a school year before any part of the moneys assessed and collected may be devoted to the establishment of schools of higher grade.

While the mandate of the Constitution could be satisfied by the minimum appropriation from the General Assembly for the operation of primary and grammar grades only, it is a matter of common knowledge that the public school system which has been established throughout the State is a system which consists of both elementary and secondary schools.

Your question as to whether, under present law, a locality may close down its secondary schools and continue to operate its grade school, or *vice versa*, must necessarily depend upon a great number of factors, particularly the manner in which taxes are levied, appropriations made, and the time of the decision to discontinue operation of all schools, or schools of a certain category. Our answer to this question, therefore, will have to await developments and depend upon facts and circumstances then existing in the particular locality which desires to discontinue its schools, or a part of its school system.

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**SCHOOLS—Levies for—Submission of Estimated Budgets—Town Special School District—Board of Supervisors Cannot Except Town Property from County School Levy—Provisions of Town Charter on Budget May Be Followed. (334)**

June 4, 1959.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of June 2, 1959, which reads as follows:

"I have received a letter dated May 29 from Mr. J. Leonard Mauck,

Division Superintendent of Schools of Smyth County, in which he raises certain questions involving interpretation of the new school laws. In the light of this fact, I should appreciate it if you would review the following questions propounded by Mr. Mauck and give me your opinion with respect to each:

"1. What responsibility does the Smyth County Board of Supervisors have in setting the school levy within this Special District.

"2. If the Smyth County Board of Supervisors decides to have a school levy for the county, will the law permit them to set a different school levy in the Town of Saltville from the other districts of the county?

"3. Is it possible for the Board of Supervisors to set a school levy in other districts of Smyth County and set no school levy within the Town of Saltville? Of course, this assumes that the town council will set a town levy and collect its own school taxes.

"4. The fiscal year for the Town of Saltville begins September 1. When does the school budget for the town have to be published? When does action have to be taken by the town council regarding appropriation of funds?"

By telephone you have stated that the questions raised by the Superintendent of Schools of Smyth County are in connection with the town of Saltville, located in said county and which constitutes a separate school district.

I shall attempt to answer these questions in the order stated:

1. Any levy made by the Board of Supervisors for the purpose of raising money for public schools or educational purposes must be uniform upon the same class of subjects located within the county, which, of course, would include that property located in the town of Saltville.

The question of county-wide application of levies laid by Board of Supervisors either for school purposes or for general purposes is discussed in our letter of May 19, 1959, to Honorable J. P. Beale, Commissioner of the Revenue for Westmoreland County, and I suggest that you mail Mr. Mauck a copy of that opinion.

2. For the reasons set forth in the letter to Mr. Beale it is clear that any levy for taxes in the county must be at a uniform rate. The rate on property located within the town must be the same as on property located in the rural area of the county.

3. For the same reason the answer to question 3 is in the negative.

4. I suggest that you furnish Mr. Mauck with a copy of the two opinions furnished by this office to Mrs. Annie H. Miller, Treasurer of Washington County, dated May 19th and May 25th respectively. In accordance with these opinions, of course the town of Saltville would be entitled to its pro rata share of the revenues collected from a special levy or its pro rata share of any appropriation made for public school or educational purposes out of the general school levy. The two opinions to Mrs. Miller develop the point with respect to the town's right to share in the county school funds.

In the event that the pro rata share the town of Saltville will receive from the county should not be sufficient to meet the school budget of the town, a separate levy may be made by the town council for the purpose of raising funds to supplement the amount that will be received from the county. In lieu of laying a separate levy for school purposes, the town council may make an appropriation out of its general fund for these purposes.

Under Section 15-575, as amended at the recent extra session of the General Assembly, it is provided that in any locality where the fiscal year begins other than on the first day of July, the estimate required by that section shall be submitted at least three months prior to the beginning of the fiscal year. This section and Section 15-576 provide for the preparation of the budget and what information shall be included in the budget. Section 15-577 provides that a brief synopsis of the budget shall be published at least seven (7) days prior to the date set for the hearing on the budget. The section further provides that the hearing shall be held at least seven (7) days prior to the beginning of the fiscal year, with the proviso that the governing body may recess or adjourn from day to day or from time to time during such hearing. These statutory provisions do not necessarily apply to a town where the charter contains special provision with respect to the preparation of a budget and the publication thereof, but under Section 15-585, it is provided as follows:

"The Council of any city or town whose charter contains provisions for a budget may elect to comply with the provisions of this chapter rather than those contained in the charter."

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**SCHOOLS—Loans—One Year Limitation—Board Cannot Pay Curtailment and Give New Note for Balance—Must Pay Total Due. (169)**

January 14, 1959.

HONORABLE BALDWIN G. LOCHER  
Member, House of Delegates

This is in reply to your letter of January 13, 1959, requesting my opinion with respect to the following question presented by the Honorable Henry Breckinridge Vance, City Attorney for Buena Vista:

"The School Board of the City of Buena Vista wishes to build a lighted football and baseball field at an approximate cost of \$30,000. Under Title 22-120, Code of Virginia, 1950 edition, as amended, School Boards are authorized to make temporary loans for a period of one year. These loans must be repaid in a one-year period. The School Board wants to know whether or not they could make a \$30,000 loan this year; repay the \$30,000 at the end of the year and then make a new loan for \$25,000, and so on until the \$30,000 is repaid within a five or six year period."

I am enclosing copy of an opinion relating to a similar situation issued by the Honorable A. P. Staples, under date of January 8, 1940, to the Commonwealth's Attorney for Patrick County, which opinion is published in Attorney General Reports for 1939-40, at page 202. Section 675 of the Code of Virginia referred to in the enclosed opinion is now section 22-120 of the Code.

You will note under this opinion Mr. Staples stated that this Code section does not impose a limit upon the number of times a loan may be negotiated by a School Board provided the other requirements of the section are met.

The School Board, in my opinion, would not have authority to renew the existing loan. It would first have to pay off the existing loan and subsequently, subject to the approval of the Board of Supervisors, adopt a resolution authorizing the borrowing of a sum of money not to exceed the amount permitted under Section 22-120. In other words, the existing loan could not be paid off by the payment of a curtailment and giving of a new note for the balance, but the total amount of the loan would have to be paid after which a new loan could be negotiated under this section in such amount as the Board might require and within the limitations of the amount it is authorized to borrow for one year under this section.

**SCHOOLS—Member of Board—May Act as Agent of Surety Company Writing Contractor's Performance Bond. (108)**

October 24, 1958.

HONORABLE W. W. ROBINSON  
Division Superintendent  
Shenandoah County Public Schools

This is in reply to your letter of October 23, 1958, which reads as follows:

"We will appreciate it very much if you will render an opinion on the following situation which has arisen here:

"The Shenandoah County School Board has awarded contracts to the Thorington Construction Company of Richmond for the construction of three new high schools in this county. This firm has, in turn, awarded sub-contracts for plumbing and heating to a local plumbing firm. This local firm desires to secure bond and has requested a local insurance agent to handle this bond insurance. The owner of this local insurance company is a member of the Shenandoah County School Trustee Electoral Board. Therefore, the question arises as to whether or not this insurance agency would be permitted to handle this business under existing State law."

Section 22-213 of the Code prohibits a member of the School Trustee Electoral Board from furnishing materials to a contractor for building a school building, but it does not appear that this section is sufficiently broad to prohibit a member of such Board from acting as an agent of a surety company writing a performance bond covering the contractor. Section 15-504 applies to contracts between an officer of the county and the county, and, therefore, would not be applicable to the case presented by you.

I am of the opinion, therefore, that there is no statutory prohibition against the member of the Board in question acting as agent for the surety company and receiving his commission therefor.

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**SCHOOLS—Private Schools Not State or Local Government Agencies—Not Entitled to Purchase Products of Penitentiary Industrial Department. (282)**

April 24, 1959.

HONORABLE RICE M. YOELL  
Director  
Division of Corrections

This is in reply to your letter of April 23, 1959, which reads as follows:

"We have received an inquiry as to whether or not it is legal for private schools who receive tuition grants from the State to be eligible to purchase school furniture from the Penitentiary Industrial Department.

"The sale of products from the Penitentiary Industrial Department is covered, I believe, in Section 53-61, 62, 63, 64, 67, 68, 69, 70, 71 and 72.

"It will be appreciated if you would advise whether or not you think it would be legal for the Industrial Department of the State Penitentiary to sell goods to such institutions as mentioned above."

The legislation pertaining to tuition grants does not authorize such grants to be made to private schools, but the grants are payable to the parents or other persons in *loco parentis* to certain pupils who may attend such schools. Such schools do not become State or local public agencies by reason of the attendance of pupils who receive such grants. Therefore, I am of the opinion that such schools are not entitled to purchase goods made under the provisions of Article 3, Chapter 2, Title 53 of the Code of Virginia.

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**SCHOOLS—Public School System May Be Operated Only as Authorized by General Assembly. (84)**

October 7, 1958.

HONORABLE JOHN C. WEBB  
Member of the House of Delegates

This is in reply to your letter of October 2, 1958, which reads as follows:

"In light of the plainly apparent inability of 'Massive Resistance' to keep public schools 'open and segregated', and considering the die-hard nature of the extreme segregationist of Virginia, I anticipate that a strenuous effort will be made to amend the Constitution of Virginia so as to delete Section 129 in its entirety, or emasculate its mandatory provisions.

"Assuming that such is done, the question I would like to have your opinion on, as Attorney General of this Commonwealth, is this:

"Would the General Assembly of Virginia have the constitutional right to bar the local governments from operation of their respective free public school systems?"

Section 65 of the Constitution of Virginia is as follows:

"The General Assembly may, by general laws, confer upon the boards of supervisors of counties, and the councils of cities and towns, such powers of local and special legislation as it may, from time to time, deem expedient, not inconsistent with the limitations contained in this Constitution."

Under this constitutional provision, the localities may exercise only those powers that are authorized by the General Assembly. Counties, cities and towns of the Commonwealth are creatures of the State and subject to the supreme power of the State acting through its legislative body, which, in Virginia, is the General Assembly.

Under Section 136 of the State Constitution the localities may be limited to a rate of levy for taxes for school purposes in such amount as the General Assembly may determine.

Any public school system that may operate in this State can be only such a system as is authorized by the General Assembly.

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**SCHOOLS—Pupils—Admission to System Operated on Annual Promotion Basis—Must Reach Sixth Birthday on or Before September 30th of School Year. (43)**

August 18, 1958.

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

This is in reply to your letter of August 14, 1958, in which you request my opinion

as to when a child under the laws of the Commonwealth of Virginia may first be admitted to a public school in the City of Covington. You state that a parent, whose child will be six years of age in January, 1959, contends that as soon as the child becomes six years of age the child will be eligible for admission to a public school in the City of Covington.

The answer to this question is governed by § 22-218.1 of the Code of Virginia. That section provides as follows:

"The school board of a county, city, or town operating as a separate school district in which the school system is operated on an annual promotion basis may, in its discretion, admit persons defined in §§ 22-218, 22-219 and 22-220 who have reached their sixth birthday on or before September thirtieth of any year to the primary grades for the school year. The school board of a county, city or town operating as a separate school district in which the school system is operated on a semiannual promotion basis may, in its discretion, admit persons defined in §§ 22-218, 22-219 and 22-220 who have reached their sixth birthday on or before September thirtieth of any year to the primary grades for the first semester or who have reached their sixth birthday on or before March first of any year to the primary grades for the second semester."

You state that the City of Covington operates its school system on an annual promotion basis. Section 22-218.1 of the Code provides that, if the school system is operated on an annual promotion basis, the school board may admit persons who have reached their sixth birthday on or before September thirtieth of any year to the primary grades for that school year. If a person does not reach their sixth birthday on or before September thirtieth, then they may not be admitted by the school board of the city until September of the following school year.

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**SCHOOLS—Real Property—Board Acquiring Property from Town May Enter into Agreement and Deliver Deed of Reconveyance to Be Held in Escrow. (159)**

December 29, 1958.

HONORABLE BALDWIN LOCHER  
Member of the House of Delegates

This is in reply to your letter of December 9, 1958, in which you request my opinion as to whether or not the School Board of Rockbridge County may deliver a deed in escrow to an escrow agent wherein the Board conveys a parcel of property, which it has obtained from the Town of Glasgow back to the Town, and the escrow agreement is to provide that such deed shall be delivered to the Town of Glasgow in the event the School Board of Rockbridge County should cease to use the property for public school purposes.

I am of the opinion that the School Board could deliver a deed in escrow under those conditions, provided it was a part of the consideration to the Town of Glasgow for property at the time the property was acquired from the Town. I am of the opinion that such deed in escrow would constitute an encumbrance upon the property in question. The School Board would not have a fee simple, unencumbered title to the property and, therefore, they could not obtain a loan from the Literary Fund for the erection of a school building upon the property in question.

**SCHOOLS—School Board May Pay Bills Incurred in Purchasing School Supplies and Equipment Where School Activity Funds no Longer Available. (50)**

August 25, 1958.

HONORABLE EMORY L. CARLTON  
Commonwealth's Attorney  
Essex County

This is in reply to your letter of August 20, 1958, in which you state that the former principal of a high school in Essex County has incurred several bills in purchasing such supplies and equipment as milk for the cafeteria of the school, athletic equipment for the school, stationery, furniture, duplicating machine, films, medical supplies, printing of school programs and books for the school library, all of these items purchased were to be paid for from school activity funds. You state that no audit was made of the school activity funds from 1952 to 1958.

I am enclosing a copy of an opinion rendered on October 14, 1949 to Mr. W. A. Early, Division Superintendent of Arlington County Public Schools, with regard to a similar matter. As you can see from that opinion, while it is questionable as to whether the School Board is legally liable for these bills, this office is of the opinion that the School Board has the authority to pay such bills. I should like to call your attention to a regulation adopted by the State Board of Education on June 16, 1954 governing the handling of school activity funds. This Regulation provides as follows:

"All funds derived from extra-curricular school activities, such as entertainments, athletic contests, cafeterias, club dues, etc., and from any and all activities of the school, involving school personnel, students, or property, are hereby classified as school activity funds (internal accounts). The local school boards shall be responsible for the administration of these regulations in the schools under their control, and may determine which specific funds in any school may be excluded from those subject to these regulations. (Funds defined by law as public funds are not subject to these regulations and are to be handled as provided by law.)

"Each school shall keep an accurate record of all receipts and disbursements so that a clear and concise statement of the condition of each fund may be determined at all times. It shall be the duty of each principal to see that such records are maintained in accordance with these regulations, and rules promulgated by the local school board. The principal or person designated by him shall perform the duties of school finance officer or central treasurer. The school finance officer shall be bonded, and the local school board shall prescribe rules governing such bonds for employees who are responsible for these funds.

"The use of specific forms prescribed by the State Board of Education is not mandatory, but the basic information required by the uniform system must be incorporated in such a system as may be substituted for the system designed by the State Board of Education.

"School activity funds (internal accounts) must be audited at least once a year by a person or persons approved by the local school board and a copy of the audit report filed in the office of the division superintendent; monthly reports of such funds shall be prepared and filed in the principal's office; and annual reports shall be filed in the office of the principal and division superintendent.

"Nothing in these regulations or suggested forms shall be construed as superseding or modifying the Federal-State plan for operation of cafeterias under the National School Lunch Act.

"These regulations shall become effective September 1, 1954, and supersede regulations governing this subject heretofore included in Bulletin, Volume XXXIII. Standards for the Accrediting of Secondary Schools. (Minutes, Vol. 25, p. 48, June 16, 1954.)"

I am of the opinion that the School Board of Essex County may legally pay all the bills listed in your letter since such bills were incurred in the purchasing of school supplies and equipment.

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**SCHOOLS—School Boards—Immunity from Liability for Tort—Renting Auditorium May Be Non-Governmental—Boards Authorized to Carry Liability Insurance. (222)**

March 3, 1959.

HONORABLE E. W. CHITTUM  
Superintendent, Norfolk County Public Schools

This is in response to your letter of February 23, 1959, which reads as follows:

“Our School Board would like to have an opinion from your office concerning liability to the School Board under the following conditions:

“1. Liabilities from any injuries to spectators from the collapse of bleachers such as happened recently at the Woodrow Wilson High School in Portsmouth.

“2. Liability when the school is used by outside groups. These groups would normally be paying rental sufficient to take care of actual costs of opening the building. Our Board does not carry accident insurance. Do you advise that insurance be carried when the building is rented for non-school use?

“3. The Band Parents Association in some of our schools run a concession stand during football season. Is there any liability to the School Board in the event of any unusual accident as a result of this operation? For example: Food poisoning.”

I shall answer your questions seriatim.

It is a well established principle that the State is immune from liability for the tortious acts of its agents and employees, and that this immunity extends to the County School Board when it is acting in its governmental capacity. *Fry v. County of Albemarle*, 86 Va. 195. This immunity does not necessarily shield the members of the school board or its employees from individual liability when they cause an injury by reason of their negligent conduct. My predecessor in office expressed the opinion that local school boards are authorized to expend funds for liability insurance on the theory that such insurance is in the public interest. (Opinions of Attorney General, 1952-53, page 203.) I concur in that opinion.

It would seem that the renting of the school auditorium to outside groups might be construed to be a nongovernmental function and, consequently, the immunity of the State might not protect the School Board should an accident or injury occur. If the School Board does not carry accident insurance which would protect it under such circumstances, it would appear that the better practice would be to require the group renting the auditorium to carry such insurance.

The question as to the liability of the School Board as set forth in the third paragraph of your letter would be determined by the contractual relationship between the Board and the Band Parents Association. I suggest that the Board require as a condition precedent to granting a concession to any person or group of persons that adequate insurance be obtained for the protection of the concessionaire as well as the School Board and its individual members.

**SCHOOLS—School Buses—Insurance Mandatory—Policies Must Cover Risks Specified in § 22-288. (338)**

June 5, 1959.

MR. DON P. BAGWELL

Attorney for Halifax County School Board

This is in response to your letter of April 30, 1959, in which you enclose a copy of fleet insurance policy for the school buses owned and operated by the Halifax County School Board. You state that the enclosed policy is similar to those used by the several insurance companies which write this type of insurance for other school boards.

You ask the following questions:

"1. Does an insurance policy in the form of the one enclosed herewith furnish all of the insurance coverage required by the laws of this state?

"2. If the question is answered in the negative, what endorsement do you recommend to correct the deficiency."

Localities, as a prerequisite to receiving State funds for schools, are required by § 22-284 of the Code to purchase school bus insurance, which insurance must comply with the provisions of Article 2 of Chapter 13, Title 22 of the Code. The specimen policy which you enclosed does not state the monetary limits covered, but I assume that they are in conformity with the provisions of §§ 22-285 and 22-286 of the Code, as amended.

The question then arises as to whether or not the "school bus endorsement" provides the coverage required by § 22-288 of the Code which reads as follows:

Every policy of insurance issued in pursuance of the provisions of this article, in addition to compliance with other requirements of this article and with the requirements of other applicable laws, shall cover:

"(1) Injury, including death, to school pupils and personnel, except the driver when not a pupil, riding as passengers on any of the vehicles so insured when used to transport such persons to or from any school at which they are required to be by State law or school regulations;

"(2) Injury, including death, to any persons not passengers on any such vehicle;

"(3) Damage, including destruction, to property of any person, other than the insured."

An examination of the specimen policy and the endorsement attached thereto reveals that the policy does not insure against injury, including death to school personnel while riding on the bus, or to school personnel who are not passengers on the bus. This risk is not covered for the reason that Exclusion (d) of the policy is, by the terms of the policy, made applicable to school personnel whether they are passengers on the bus or not. This Exclusion reads as follows:

"(d) under coverage A, to bodily injury to or sickness, disease or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured;"

In addition, Exclusion 3(d) of the automobile medical payments endorsement, contains a similar limitation. The presence of these two exclusions prevent the

policy from complying with the requirements contained in § 22-288 of the Code. Your attention is directed to the fact that the above-quoted § 22-288 requires certain coverage in addition to that required by "other applicable laws." I construe this to mean that the risk specified therein must be covered, even though they may be covered by workmen's compensation policies. I am, therefore, of the opinion that the enclosed specimen policy does not cover the risks required to be covered by § 22-288 of the Code.

I find this opinion to be in conflict with that expressed in an opinion to Honorable Davis Y. Paschall, Superintendent of Public Instruction, of June 27, 1958 (Opinions of the Attorney General, 1957-58, page 233), and that opinion is hereby overruled.

In answer to your second question, I would suggest that you advise the insurance company that an endorsement should be attached to the policy which would provide that the aforementioned Exclusions would apply only to the driver of the school bus when he or she is not a pupil.

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**SCHOOLS—State Board of Education—Federal Grants Under P. L. 85-864—Governor May Authorize Board to Accept. (250)**

March 27, 1959.

DR. DAVIS Y. PASCHALL  
Superintendent of Public Instruction  
State Board of Education

This is in reply to your letter of March 26, 1959, which reads, in part, as follows:

"Under date of March 20, 1959, Governor Almond authorized the State Board of Education to accept Federal funds under the provisions of Public Law 85-864, Titles III, V and VIII of the National Defense Education Act of 1958 for the fiscal year ending June 30, 1959. I am enclosing a photostatic copy of the Governor's authorization.

"Federal regulations require a statement from the Attorney General certifying that the Governor has the authority to permit the State Board of Education to accept such Federal funds. I will appreciate very much if you will let me have such a letter in order that we may then present the approved State plans to Federal authorities."

Section 14 of the Appropriation Act of 1958 (page 1075, Acts of 1958) provides as follows:

"No donations, gifts or Federal grants whether or not entailing commitments as to the expenditure, or subsequent request for appropriation or expenditure, from the general fund of the State treasury shall be solicited or accepted by or on behalf of any department, institution or other agency of the State government without the prior written consent and approval of the Governor."

In my opinion this provision of the Appropriation Act delegates to the Governor power to authorize the State Board of Education to accept the Federal grants made to the Commonwealth under the provisions of Public Law 85-864, Titles III, V and VIII of the National Defense Education Act of 1958 for the fiscal year ending June 30, 1959.

**SCHOOLS—Teachers—Continued Employment of Teacher Who Marries Brother of Board Member, not Prohibited. (1)**

July 3, 1958.

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

I am in receipt of your letter of July 2, 1958, in which you forwarded to this office for consideration a letter addressed to you by Mr. Harold W. Ramsey, Superintendent of Schools for Franklin County, concerning the application of Section 22-206 of the Code of Virginia (1950) as amended, to the following situation outlined by Mr. Ramsey:

"The County School Board of Franklin County, at its meeting June 16th, employed Miss Joyce Blessing as a teacher in this county for the session 1958-59. Miss Blessing has been employed for the past six years as a teacher in the Public Schools of Bland County. She will be married, within a short while, to Mr. Willard Finney whose brother, Mr. S. W. Finney, is a member of the County School Board of Franklin County."

In response to your inquiry, I am forwarding to you an opinion of this office, dated May 22, 1958, to the Honorable Baxley T. Tankard, Commonwealth's Attorney for Northampton County, in which a situation substantially identical to that presented in your communication was discussed. In light of the recent amendment to Section 22-206 of the Virginia Code and the interpretation placed upon the amended statute in the enclosed opinion, it is manifest that employment of Miss Blessing by the County School Board of Franklin County, as a teacher for the session 1958-1959, would not violate the provisions of the statute in question.

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**SCHOOLS—Tuition Charges for Non-Residents of City Comprising Separate School District—§ 22-219, as Amended, Controls. (200)**

February 17, 1959.

HONORABLE H. RAY WEBBER  
Member of the House of Delegates

This is in reply to your letter of February 16th in which you state that the city of Covington, which is a separate school district, has promulgated regulations under authority of Section 22-219 of the Code, as amended, imposing a tuition charge upon students of Alleghany County who attend the schools being operated by the City.

You inquire whether or not Sections 22-193 and 22-194 of the Code may be construed so as to afford any relief to the students from the county at the high school level.

Section 22-219 was amended at the 1958 session of the General Assembly so as to divest the State Board of Education of the power formerly conferred upon it by this section. This amendment is apparently in conflict with Sections 22-193 and 22-194.

The conflict, it would seem, is irreconcilable and where this situation exists, the most recent act will control since it is the last expression of the legislature.

I am of the opinion, therefore, that Section 22-219 of the Code, as amended by Chapter 628, Acts of 1958, controls.

**SCHOOLS—Virginia Supplemental Retirement System—Teachers in Private Schools Organized After December 29, 1956—May Become Members of System. (188)**

February 3, 1959.

HONORABLE HARRY F. BYRD, JR.  
Member of the State Senate

This is in reply to your letter of February 2, 1959, in which you request my opinion as to whether or not public school teachers who resign, or take a leave of absence, so as to teach in private schools, will be adequately and properly protected as to their retirement rights and salaries under the existing laws of this State.

The Virginia Supplemental Retirement Act was amended by the special session of the General Assembly of 1956 so as to protect the retirement benefits of these teachers. These amendments are found in §§ 51-111.10 and 51-111.38:1 through 51-111.38:3 of the Code of Virginia. The pertinent parts of these sections read as follows:

*"§ 51-111.10:*

*"(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 Supplemental 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."*

Under these provisions of the Virginia Code, 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.

It therefore appears that these teacher retirement benefits and privileges are adequately protected by the existing laws of this State. However, the laws should be re-examined by the Governor's Study Commission in the light of developments since they were enacted.

As to salaries, of course, they could not be paid by the State, or any political subdivision, but would be paid by the private school wherein they are teaching. With the enactment of the amended Appropriation Act, assuring tuition grants up to \$250.00 from the State, and with the accompanying legislation providing that the localities may supplement these tuition grants from local funds, the private schools should have a source of revenue adequate to pay the salaries of teachers employed by such schools.

**SEAL OF VIRGINIA—Use in Mastheads of Newspapers—Not Prohibited—Nor Is Use on Stock Certificates. (328)**

May 29, 1959.

HONORABLE MARTHA BELL CONWAY  
Secretary of the Commonwealth

This will acknowledge receipt of your letter of May 20, 1959, which reads as follows:

"Please refer to the Attorney General's opinion of November 2, 1953, concerning the use of the seal of Virginia on the masthead of The Alexandria Gazette, and citing Section 18-355 of the Code of Virginia.

"This morning I received a clipping from 'The (Danville) Bee' on which was printed an old copy of the seal of Virginia, together with a letter from a Richmond attorney inquiring whether this was a proper use of the seal. Our office clipping service revealed other prints of the seal on the 'Covington Virginian', 'The (Lynchburg) News', and the 'Daily Press' (Newport News-Hampton). Copies of these are enclosed.

"I am advised that a few years ago your office sanctioned, officially or unofficially, the use of the seal of Virginia on stock certificates issued by a private corporation.

"I would appreciate your answering the following questions:

"1. May the seal of Virginia be properly used on the mastheads of Virginia newspapers and on the face of stock certificates?

"2. If not, would your ruling apply only to the present seal of Virginia, and to old copies of the seal?

"3. Do newspapers and stock certificates fall within the exceptions listed by Section 18-357 of the Code?

"4. Generally speaking, should the use of the state Seal be confined to papers, personnel, departments, agencies and institutions of the State government?"

Subsequent to the opinion of November 2, 1953, (Attorney General Reports 1953-54, p. 199), this office in an opinion to you under date of May 31, 1955, expressed the view that the use of a facsimile of the State seal on certificates of stock would not be in violation of Section 18-355(3) of the Virginia Code, if printed on the certificate "with no design or words placed thereon," and the stock certificate was in the usual form. This opinion was based upon our interpretation of Section 18-357 of the Code, which section was not considered in the opinion of November 2, 1953, relating to the use of a facsimile of the State seal on mastheads of newspapers.

We have reviewed the opinion of November 2, 1953, and it appears that under the facts stated therein, the provisions of Section 18-357 are applicable. In our opinion the use of such facsimile on the masthead of a newspaper in the manner shown on the clippings submitted by you is not prohibited by the statute, but such use comes squarely within the exceptions of Section 18-357.

It would seem that the purpose of the Uniform Flag Act (Article 2, Chapter 10, Title 18 of the Virginia Code) is to uphold the dignity of the flags of the United States and the State. Hence, the use of the flags must be in a manner that will not result in the flags' defilement. If the State flag, or the State Seal, which is an integral part of the flag, or any facsimile thereof, is used by a person or business establishment to promote the sale of a product, such use is in violation of the statute. The use of a picture of the State flag, or of the State Seal, so as to detract from its splendor by commercializing it to attract public attention for advertising purposes is, of course, clearly forbidden by the statute.

Generally, I think, the term "advertise" means to give public notice by empha-

sizing desirable qualities of a product in order to arouse a desire to purchase. Every newspaper has a name for the purpose of identification, but the name alone cannot reasonably be considered a commercial advertisement of the publication. The use of the facsimile of the State Seal on the masthead of a newspaper suggests that the publisher is happy to be a citizen of this State.

The rule of law is well settled that a penal statute, such as this, must be construed strictly. An offense of the statute cannot be created by inference or implication.

The Uniform Flag Act is not intended to prohibit a person from using the flag in a patriotic or unselfish manner.

In view of the foregoing, it would appear that more specific answers to your questions are not necessary. However, it would appear that, assuming the facsimile of the Seal would not be used contrary to the views expressed herein, questions 1 and 2 are answered in the affirmative, question 4 in the negative, and question 3 does not require an answer.

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**SHERIFFS—Delivery to State Hospital of Person Committed Under Chapter 3, Title 37, Relieves Officer of Responsibility for Safekeeping. (73)**

September 17, 1958.

HONORABLE A. A. RUCKER  
Attorney for the Commonwealth  
Bedford County

This is in reply to your letter of September 16, 1958, in which you call attention to the provisions of Section 37-72 of the Code and present the following question:

“Where an individual duly and properly has been committed to a State Hospital, with papers in order, can the sheriff absolve himself of further responsibility for the safekeeping and proper care of such individual by delivering said individual to such institution or its authorized agent, regardless of whether or not such institution is able to receive and admit such individual when presented by the sheriff?”

I believe that the answer to your question is found in Section 37-71 of the Code in which the duties of the sheriff in connection with persons committed to him under Chapter 3 of Title 37 are set out. You will note that under this section the sheriff may place the person who has been committed to his care in any of the hospitals mentioned therein. The cost in connection therewith, you will note, will be taken care of by the State.

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**SHERIFFS—Power to Appoint Deputies and Personnel of Office—Exclusive with Sheriff—County Manager or Board of Supervisors Have no Control Over Appointments. (171)**

January 16, 1959.

HONORABLE W. J. EACHO  
Sheriff, Henrico County

This is in reply to your letter of January 14, 1959, which reads as follows:

“From time to time, in the past, several instances have arose which questions the authority of the Henrico County Sheriff, inasmuch as the personnel of his Department are concerned.

"As you know the Sheriff is elected by the people, placed in his position to discharge the duties of his office.

"Under the County Manager Form of Government and the personnel organization of this type of Government, a controversy arises as to who has jurisdiction over the actual hiring of the personnel required to maintain the Henrico Sheriff's Department.

"I respectfully request a ruling from your Office as to who has the actual jurisdiction of employing and discharging personnel of the Henrico Sheriff's Department under this Form of Government."

It is my understanding that the county of Henrico has adopted the County Manager form of government under the provisions of Article 3, Chapter 11, Title 15 of the Virginia Code. Under Section 15-329 of this Article, it is provided that "the sheriff shall be selected in the manner and for the terms, and vacancies in such office shall be filled, as provided in general law."

Under Section 110 of the Virginia Constitution the sheriff is elected by the people and his term is fixed by Section 112 at four years.

Section 15-323 of the Code provides that the sheriff's office is within the Department of Law Enforcement, along with the Commonwealth's Attorney. Except with respect to members of the police force appointed by the manager, all other persons in this Department are appointed by either the sheriff or the Commonwealth's Attorney, subject to Section 15-9.1 relating to assistants to the Commonwealth's Attorney. This section further provides that "The sheriff shall exercise all the powers conferred and perform all the duties imposed upon sheriffs by general law."

Section 15-485 is the general statute which authorizes a sheriff to appoint his deputies. Section 15-318 sets forth the activities for which the county management is responsible. The office of sheriff is not included within the scope of the county manager's duties and responsibilities by this section.

Section 15-314 provides that the county manager shall be responsible to the Board of Supervisors for the proper administration of all the affairs of the county which the Board has authority to control. This section further provides that the county manager shall appoint all officers and employees in the administrative service of the county except as otherwise provided under the county management form of government. Since the Board of Supervisors has no authority or control over the sheriff's office (except with respect to certain control in connection with compensation), it is obvious that the county manager has no appointing power with respect to this office.

For the reasons set forth herein, it is my opinion that the sheriff has the sole and exclusive appointing power with respect to deputies and personnel within his office and under his supervision.

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**SHERIFFS—Town Sergeant—Transportation of Prisoners—Mileage—§ 14-122**  
**Applicable only to City Sergeant and Violations of State Law. (131)**

November 12, 1958.

HONORABLE J. GORDON BENNETT  
Auditor of Public Accounts

This is in reply to your letter of November 12th requesting my opinion with respect to the questions presented in the following inquiry addressed to you by the Mayor of the Town of Boones Mill, Virginia:

"I have questioned the charge against a defendant being transported from our Town to the County jail, a distance of twelve (12) miles.

"The prisoner is transported by our Town Sergeant after a warrant has been issued for his arrest to the County jail. When it involves one prisoner, the charge is based on twenty-four (24) miles travelled by the Sergeant and twelve (12) miles travelled by the prisoner. The final cost chargeable to the prisoner is obtained by the following calculations:

"Miles travelled by Sergeant (round trip)	24 x \$0.08/mi. = \$1.92
"Miles prisoner transported from Town to County Jail in private car by Sergeant	12 x \$0.08/mi. = \$0.96
Total transportation charged to prisoner	\$2.88

"Also, if the Town Sergeant transports more than one prisoner, all being arrested on separate warrants, would the same cost apply to each as in the case of one prisoner being transported?"

"I have read Section 14-122 of the Code of Virginia and would like some clarification. Would you please express your opinion regarding these charges. Are they in accordance with other Towns?"

Section 14-122 of the Virginia Code dealing with fees and allowances provides that the allowance for carrying a prisoner to jail under an order of a justice shall be eight (8¢) cents for each mile travelled in going and returning. This section further provides that an allowance of eight (8¢) cents per mile shall be for carrying a prisoner to jail when the distance is over ten miles.

I am of the opinion that the mileage allowance to which the officer is entitled includes the mileage of the officer and the prisoner. Thus, if the distance is twelve miles, the officer is entitled to be paid on a basis of thirty-six times eight cents. If the mileage is only ten miles or less, no allowance would be payable for the prisoner.

With respect to a situation where more than one prisoner is transported on the same trip, I am of the opinion the officer is entitled to be paid eight cents per mile for each prisoner.

A similar question was presented in an opinion issued by Honorable Abram P. Staples on July 7, 1936, and published in the Reports of this Office for 1936-37, page 89, and he arrived at a similar conclusion.

The word sergeant as used in Section 14-122 has reference to sergeants of cities and it would seem that it is not intended to apply to sergeants of towns, whose authority would be limited to enforcement of town ordinances. Furthermore, the fees provided for in this section are applicable only where a prisoner is charged with the violation of a State law.

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**SHERIFFS—Travel Expenses—Extraditions—Two-Thirds Paid by Commonwealth Under § 14-91. (214)**

February 27, 1959.

HONORABLE ROBERT C. GOAD  
Commonwealth's Attorney for Nelson County

This is in response to your letter of February 25, inquiring if Section 19-64, Code of Virginia, requires the Commonwealth to pay the full traveling expenses of a deputy sheriff going out of the State in connection with an extradition matter.

Kindly be advised that Section 14-91, specifically stating that the Commonwealth shall pay two-thirds of the expense allowances of sheriffs and their deputies, has been deemed to be the applicable statute in such matters. This office has been advised by the Governor's office that such expenses have always been paid in this manner.

**SOCIAL SECURITY—State Employees—Officers Performing Policy Making or Advisory Functions Are Not—Definitions. (292)**

May 4, 1959.

HONORABLE CHARLES H. SMITH, *Director*  
Virginia Supplemental Retirement System

Reference is made to your letter of March 11, 1959, requesting this office to review the opinion rendered by former Attorney General Almond, dated November 16, 1953. This opinion is as follows:

"This is in reference to the coverage provided by the Federal Insurance Contributions Act as to certain positions. After studying the statutes and various cases as to the definitions of an employee, or State employee, the conclusions of this office are as follows:

"Members, local board of public welfare; members of electoral boards; members, local boards of health; members, local advisory boards and committees; members, local school trustee electoral boards; and, members, State boards and commissions which are policy or advisory and not administering bodies, are not included within the Act as they do not meet any of the definitions of employee as set out in Title 42, Section 410 (k) of the United States Code Annotated. The status of the above listed persons is not such that an employer-employee relationship exists between them and the State under common law rules. They are members of policy making groups and receive only nominal remuneration on a per diem basis for their services. They average only one day a month service on these various boards. Certain material common law incidents of the employer-employee relationship, such as powers of supervision and control, regular terms and conditions of employment, a definite overall compensation are not present in any of the above cases. Historically, the Legislature has never included or considered the above groups as employees of the State.

"Most of the same reasons would apply to local medical examiners and members of commissions to inquire into commitment of insane, epileptic, feeble-minded and inebriate persons. These persons render occasional service, professional or otherwise, to the State upon request. They receive nominal remuneration for this on a basis of service performed. The State has no actual control or supervision over them as is generally found in employer-employee relationship. Under the present relationship between these two classes of persons and the State, they are not employees of the State for social security purposes.

"Judges of elections are not employees of the State. They serve two or three days a year receiving remuneration, or on a per diem basis. Here again, none of the conditions which are characteristic of an employer-employee relationship exist. See, *Finert v. Bryan*, 214 N. J. 570, 16 N. E. 2d 882.

"In checking the charters of the following cities, it was found that there are provisions providing for the election of the Justices of the Peace, and, therefore, they are excluded from social security coverage: Bristol, Clifton Forge, Portsmouth and Waynesboro.

"The charter of Fredericksburg contains no provisions relating to Justices of the Peace, therefore, they come under Section 39-1 which provides for their election.

"Buena Vista, Hampton and Warwick charters provide for the appointment of Justices of the Peace either by the council or circuit judge. Therefore, they would be included within the social security coverage."

You state that the Department of Health, Education and Welfare insists that persons composing the groups mentioned in the foregoing opinion are officers

and hence come under the social security coverage. I assume that this is based upon the provisions of paragraph (c) of Section 51-111.2 of the Code of Virginia. This paragraph is as follows:

"The term 'employee' includes an officer of the State, or of one of its political subdivisions."

As I recall, it is the contention of the Department of Health, Education and Welfare that under the language of the above section, any person who holds any of the positions in the categories considered in the opinion in question is automatically covered under the Social Security Act. This paragraph (c) should be considered along with the definition of the term "employment" as contained in paragraph (b) of this Code section. The pertinent part of paragraph (b) is "The term 'employment' means any service performed by an *employee* of the State, or any political subdivision thereof, for such employer \* \* \*." Under this language, in order to determine whether or not a person is an "employee" it is obviously necessary to look to the common law definition. If the relationship is such that under the common law rules the person is an "employee" then the service performed is employment. It may be accepted as a fact that the elements of power or power of control necessary under common law to constitute the employer-employee relation is lacking. The persons performing service in the classifications set out in the opinion under review perform policy making and advisory functions free from control by the State or the locality. Therefore, I feel compelled to conclude that these persons are not "employees" as that term is used in paragraph (b) of the Code section under consideration.

The language contained in paragraph (c) is not, in my opinion, intended to include in the category of an employee a person who happens to hold a position which might be considered an office for that reason alone. The fact that a person may hold a position of official nature does not necessarily make him an officer in the sense that he exercises the administrative powers generally incident to the rank of officer. Under paragraphs (e) and (f) of this Code section, certain State and local officers are specifically brought under the coverage of the statute, which indicates that these were the only officers intended to be covered unless the employer-employee relation actually exists.

Under the definition of the term "employee" contained in the definitions relating to employment for the purpose of coverage under the Social Security Act, the persons occupying the positions considered in the opinion of November 16, 1953, are not in employment. See USCA, Title 42, Section 410 (k).

Considering Chapter 3.1 of Title 51 of the Code of Virginia from an historical standpoint, it is, I feel sure, a reasonable conclusion that persons rendering the type of services in the different categories mentioned in the opinion of November 16, 1953, were never intended to be brought under the Social Security System.

The earnings of the persons in these categories are insignificant. *De minimi: non curat lex.*

We do not feel that the opinion rendered by Attorney General Almond should be disturbed.

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**STATE PRISON FARMS—Commitment—Board of Welfare and Institutions Generally Commits—Courts May Commit Only Defectives Directly—State Convict Road Force—Courts May Commit Only for Non-Support or Alimony Contempt. (300)**

May 12, 1959.

MAJOR RICE M. YOEEL, *Director*  
Division of Corrections

This is in response to your letter of April 21, 1959, requesting an opinion on the subjects contained in a letter from Judge Hamilton Haas to you, a copy of which was enclosed.

Inquiry is made as to the existing provisions of law, if any, providing a trial court's direct commitment to a State farm, except in the case of defectives.

Also, inquiry is made as to the authority of a trial court to make a direct commitment to the State Convict Road Force except in cases of non-support or alimony contempt.

After noting the repeal of Section 53-105, Judge Haas concludes as follows:

"A casual examination of the existing statute law on the subject would indicate that, as a general thing, such commitments can now be made only by transfer directed by the Board of Welfare and Institutions. If I have overlooked any other permissive authority for such direct commitment, please give me light."

This office is of the same general conclusion as that expressed by Judge Haas. Regarding State farms generally, reference is made to Section 53-83, providing that the Board of Welfare and Institutions shall decide when it is feasible and expedient to transfer prisoners to such farm or farms, and shall decide what types of defective misdemeanants or other misdemeanants or felons and what number shall be transferred to such farm or farms. This office is not advised of any additional authority other than that mentioned in Judge Haas' letter for direct commitments to the State Farm by trial courts for violation of State laws.

With regard to the State Convict Road Force, as previously noted herein, Section 53-105, permitting direct commitment by judges to the road force in certain cases, has been repealed.

However, reference is made to Section 53-103, which contains authority for the sentencing of certain misdemeanants to work on the public roads through delivery into the custody of the Director to be kept by him as a member of the State Road Force in accordance with law and subject to work on the public roads. Again, this statute permits detention in accordance with law and renders the convicted misdemeanant subject to work on the public roads, but does not specifically authorize the court to direct that he be worked on the public roads.

In view of the present statute law pertaining to the subject, there does not appear to be any other permissive authority other than as mentioned by Judge Haas for direct commitment to the State Convict Road Force.

By way of background revealing the administrative difficulties entailed and the reasons for the limited provisions for direct commitment to the road force, hereinafter set forth is an excerpt from a letter from the Director of the Division of Corrections to the Town Attorney of Lawrenceville dated September 29, 1958:

"At the time of the passing of the statute referred to in your letter, there were some 3,000 inmates occupied in road work. Since that time, a statute was passed which limited the number of inmates the Highway Department could work on the road to 1,600. At the present time, they are working 1,800 and no prisoners with jail sentences are being received in the road camps, except those convicted of nonsupport."

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**STATUTES—Construction of Time Limitation for Public Hearing by State Hospital Board. (26)**

July 24, 1958.

HONORABLE ALFRED E. H. RUTH  
Director  
Department of Mental Hygiene and Hospitals

This is in reply to your letter of July 22, 1958, which reads as follows:

"Pursuant to Section 37-34.2:2 of the Code of Virginia, the State Hospital Board met on July 22, 1958 to examine the condition of a certain property known generally as the Elko Tract in the light of the practices and methods employed by the Board in the care and treatment of persons committed to it in accordance with law.

"The Board found that the said Elko Tract is not being used for the care and treatment of patients, is not required for such purpose, and is not reasonably related to the present or reasonable future needs of the Board for the care and treatment of patients.

"The Board, by its Director of Mental Hospitals, notified the Governor of the foregoing findings in accordance with Section 37-34.2:3 of the Code on July 22, 1958. The Board proposes to hold the public hearing required by Section 37-34.2:4 of the Code on September 5, 1958.

"The Board has instructed me to inquire of the Attorney General as to whether or not the proposed hearing date meets the requirement of 'not less than forty-five . . . days after such notification to the Governor' as specified by Section 37-34.2:4."

Section 37-34.2:4 to which you refer, reads as follows:

*"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."*

Section 1-13.3 of the Code prescribes the method by which the forty-five day period shall be determined. Under this section in counting the days, July 23rd will be considered the first day and September 5th will be the forty-fifth day. In my opinion, the public hearing may not be held before the full forty-five day period has elapsed. The forty-five day period will not have elapsed until the last moment of September 5th. It is my opinion, therefore, that the first day that the public hearing may be held under this statute is September 6, 1958.

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**SURPLUS PROPERTY—Sale—Disposition of Proceeds—Paid Into General Fund to Credit of Agency—Appropriation Acts and § 2-265 Reconciled. (137)**

November 24, 1958.

HONORABLE L. M. KUHN  
Director of the Budget

This is in reply to your letter of November 19, 1958, which reads as follows:

"Section 2-265 of the Code of Virginia provides that the proceeds of sales of surplus property by the Director of the Department of Purchases and Supply are to be paid into the State treasury to the credit of the department, institution or agency owning the property. However, Section 20 of the 1958 Appropriation Act provides for the payment into the general fund of the State treasury of all monies and revenues collected by or on behalf of certain boards, institutions and agencies.

"We would appreciate it very much if you would advise us as to the proper interpretation of the law concerning the disposition and use of proceeds from sales of surplus property belonging to any department, division, institution or agency.

"If such funds are not to be paid into the general fund of the State treasury, but are to be credited to such departments, institutions or agencies, may these funds be used without an allotment authorized by the Director of the Budget?"

The phrase "to the credit of the department, division, institution, or agency owning the surplus supplies, or equipment" contained in Section 2-265 of the Code was added at the 1958 Session of the General Assembly by Chapter 124 of the Acts of Assembly. It applies to all State Departments.

Section 20 of the Appropriation Act provides that (a) "all monies, fees, charges, and revenues, excluding Federal grants, heretofore accumulated or hereafter collected by or on behalf of the agencies listed below" shall be paid into the general fund of the State treasury.

I am of the opinion that it was the intention of the General Assembly that the proceeds resulting from the sale of surplus products should be paid into the general fund of the State treasury to the credit of the State agency for which the products were sold. The provisions of Section 2-265 and Section 20 of the Appropriation Act may, in my opinion, be reconciled. Actually the proceeds of such sales go into the general fund ear-marked for the credit of the agency involved.

Section 20 of the Appropriation Act is a standard provision carried from one biennium to another biennium and is not to be construed as repealing acts, such as Section 2-265, specifically relating to the disposition of funds of the nature involved, unless such intention is clearly evident.

The question presented is quite similar to the question considered in the opinion of former Attorney General Staples, dated July 12, 1938, and reported in the Reports of Attorney General, 1938-39 at page 16. Also, see opinion by Attorney General Staples, 1940-41, at page 8.

With respect to the question presented in the last paragraph of your letter, it would seem that the amounts deposited in the general fund would be considered in making the quarterly allotments upon request of the agency affected.

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**SURVEYORS—Subdivisions—No Examination Fee Required Where Proof of Qualification Submitted Under "Grandfather" Clause of § 54-17. (80)**

September 30, 1958.

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

This is in reply to your letter of September 23, 1958, in which you request my opinion concerning the provisions of § 54-17 (3) (a) and (3) (b) of the Code of Virginia, which provisions were enacted by the General Assembly at its 1958 Session. Section 54-17 (3) (b) reads as follows:

"(b) In addition to the work described above, a land surveyor may, for subdivisions only, prepare plats, plans and profiles for roads, storm drainage and sanitary sewer extensions where such work involves the use and application of standards prescribed by local or State authorities, provided the land surveyor passes an examination given by the board in addition to that provided for the certification of land surveyor under paragraph (a) above; provided, however, that any land surveyor

who shall, within one year from the effective date of this Act, submit satisfactory proof to the Board that he has satisfactorily engaged in such work in the past may continue to do such work without further examination."

You ask if the exemption provided in the above-quoted provision of the Code provides that a present holder of a land surveyor's certificate, who submits satisfactory proof to the Board that he has in the past rendered the professional services outlined in subsection (3) (b), may continue to render such services without being issued an additional certificate by the Board, or should the Board consider this submission of satisfactory proof of having performed these services in the past, and the consideration of such proof by the Board, as an examination under the provisions of § 54-30 of the Code, and require the land surveyor to pay the examination fee prescribed in § 54-30 of the Code.

I am of the opinion that the exemption provided for in §54-17 (a) (b) of the Code does not require additional certification to be given to a land surveyor. I am of the further opinion that the submission of satisfactory proof by the land surveyor that he has satisfactorily engaged in such work in the past approved by the Board, does not constitute an examination within the provisions of § 54-30 of the Code, and, therefore, the Board may not require the land surveyor to pay the examination fee prescribed in § 54-30 of the Code.

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**TAXATION—Assessment of Two or More Parcels of Real Estate as One Where Same Owner. (22)**

July 22, 1958.

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

This is in reply to your letter of July 15, 1958; in which you request my opinion as to whether or not the Commissioner of Revenue of Isle of Wight County may combine, enter and assess on the land book for taxes several tracts of land as one tract owned by the same corporation or person if (1) the tracts are contiguous and located in the same magisterial district; (2) if the tracts are not contiguous but are located in the same magisterial district or (3) if the tracts are not contiguous and are located in two or more magisterial districts.

I am of the opinion that if tracts are owned by the same person or corporation and are contiguous and are located in the same magisterial district, then, with the permission of the owner, the Commissioner of the Revenue may combine the tracts and enter them on the land book as one tract of land, provided that by combining the several tracts into one parcel no change in valuation of the property concerned will result. I am of the opinion that, under the provisions of § 58-804 of the Code, if the tracts of land are not contiguous or are located in different magisterial districts, they must be listed and assessed as separate tracts and may not be combined as one tract on the land book for taxes.

I am enclosing copy of an opinion rendered by this office on August 18, 1955 to Honorable Samuel W. Swanson, Commissioner of the Revenue, Pittsylvania County, in which it was held that the Commissioner of the Revenue may not increase the assessed value of property if there are no improvements made upon the property.

**TAXATION—Church Parsonage Exempt from Real Estate Tax. (67)**

September 12, 1958.

HONORABLE E. GLENN JORDAN  
Commissioner of Revenue

This is in reply to your letter of September 11, 1958, which reads, in part, as follows:

"I would appreciate it if you could furnish me with an opinion on the following question.

"When a church acquired title to a residence on December 19, 1957 to be used exclusively as a parsonage for the minister, is the property subject to an assessment by the locality for real estate taxes on January 1, 1958?

"The property in question was not vacated until January 7, 1958 due to the fact that the occupants could not vacate at any earlier date; however, no compensation was received by the church for these seven days. The church's minister did not occupy the parsonage until January 30, 1958 as certain improvements and remodeling was done, and he desired to move in after this work was completed."

Section 183 of the Constitution of Virginia is, in part, as follows:

"Unless otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

"(b) Buildings with land they actually occupy, and the furniture and furnishings therein and endowment funds lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building."

This section of the Constitution is implemented by Section 58-12 of the Code which is, in part, as follows:

"The following property shall be exempt from taxation, State and local, including inheritance taxes:

"(2) Buildings with land they actually occupy, and the furniture and furnishings therein, and endowment funds lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building."

Under these provisions I am of the opinion that the parsonage, together with the lot on which the parsonage is located, is exempt from real estate taxes imposed by the locality in which the parsonage is located. The church acquired the property prior to January 1, 1958 for the residence of the minister serving the congregation of that church. The fact that the parsonage was temporarily, for a

period from January 1 until January 7, not actually available for the occupancy thereof by the pastor of the church, does not cause the property to be subject to real estate taxes for the year 1958. Under the state of facts, it is clear that the church owned the property on January 1 for the exclusive purpose of using it as a residence for the pastor of the church.

Under Section 58-796 of the Code, assessments are made against the owner of the real estate as of the first day of January of each year. The church in this instance was the owner of the property on January 1 and, therefore, the property was not subject to assessment for taxable purposes for the year 1958.

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**TAXATION—Correction of Erroneous Assessment—Real Estate—Costs of Court—Clerk Not Compensated Where Petition for Correction Granted. (181)**

January 23, 1959.

MISS VIRGINIA E. SAVEDGE  
Clerk of Circuit Court of Surry County

I have considered your letter of January 10, 1959, in which you request my opinion as to what costs, if any, may be taxed in connection with a petition for erroneous assessment of real estate. You also refer to Section 58-1139 of the Code relating to the taxation of costs in connection with applications for relief from erroneous assessments for State taxes.

Under Section 58-1139 if the petitioner for correction of State taxes has proceeded under any of the provisions of Sections 58-1130 through 58-1138 and the court grants to the petitioner the relief prayed for, the Clerk is prohibited from taxing any costs against the petitioner. Under such a situation the Clerk would receive no fees or other compensation for his services.

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**TAXATION—Counties—Amelia May Not Levy License Tax on Dry Cleaning Establishments. (58)**

September 3, 1958.

HONORABLE J. B. MASON  
Commonwealth's Attorney  
Amelia County

This is in response to your letter of September 1, 1958, in which you ask my opinion relative to the following question:

Is Amelia County vested with the authority to impose a license tax on dry cleaning establishments?

Amelia County is apparently not such a county as described in §§ 58-266.2, 58-266.3 and 58-375.1 of the Code of Virginia. The aforementioned provisions of law authorize such counties to levy a license tax on dry cleaning establishments. In view of the fact that Amelia County does not come within the provisions of the aforementioned sections, I am of the opinion that it may not impose a license tax on dry cleaning establishments.

**TAXATION—County Treasurer May Deduct Amount of Taxes Due by Party From Warrant Payable Out of County Funds. (42)**

August 14, 1958.

Miss ELSA B. ROWE, *Treasurer*  
Northumberland County

This is in reply to your letter of August 13, 1958, which reads as follows:

“Section 58-922 of the Code of Virginia authorizes the treasurer to deduct from warrants lawfully drawn on account of allowances made against the Commonwealth all taxes due by the party in whose favor the warrant is drawn. Please define ‘allowances made against the Commonwealth’. Would General Fund warrant checks and School Fund warrant checks be ‘allowances made against the Commonwealth?’”

I believe that Section 58-921 is the section of the Code which would be applicable in case a person who is indebted to the county for taxes should present a warrant to be paid out of the General Fund of the County or out of the School Fund. Under this section whenever a taxpayer presents a warrant to the treasurer for payment from county funds the treasurer may deduct from the amount due the payee of the warrant whatever county taxes he may owe at that time, or, if the taxes exceed the amount of the warrant the treasurer may credit the tax ticket with the amount of the warrant.

For your information I am enclosing copies of two opinions issued by this office construing Section 356 of the Tax Code of Virginia, which section is now 58-921 of the Code of 1950.

These opinions are reported in Attorney General Reports for 1942-43 at page 295 and Attorney General Reports for 1940-41 at page 185.

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**TAXATION—Delinquent Real Estate—Sold to Commonwealth—Redemption—Owner or Agent Entitled to Redeem—Must Pay Applicant for Tax Title Expenses and Deposit. (217)**

February 27, 1959.

HONORABLE S. L. FARRAR, JR.  
Clerk of Circuit Court of  
Amelia County

This is in reply to your letter of February 24, 1959, which reads as follows:

“There is a tract of land in this County, (and for briefness will use the letters A B and C to identify the persons involved) standing in the name of A. There are delinquent taxes on this land for the years 1948, 1949, 1950, 1951, 1954 and 1955 in my office. This land has been purchased in the usual manner by the Treasurer for the Commonwealth because of said delinquent taxes.

“On Feb. 16, 1959 B filed an application to purchase this land under the provisions of Section 58-1083 and following sections of the 1950 Code of Virginia.

“A, I am informed is a married man and I am further informed that his whereabouts are unknown, and it is also unknown whether he is living or

dead. However, C appeared in the office on Feb. 21 in regard to paying the taxes on behalf of the wife of A. C advises that he is in contact with the wife of A, and that A and his wife have been separated but not legally divorced for a number of years and that the wife of A does not know his whereabouts or whether he is living or dead. C advises there were no children of this union. He did not know of any children of A by any former marriage.

"It appears from the Code that after an application is filed that only a party in interest or a person who has the right to charge the land with a debt can redeem said land.

"I wish to be advised on the following questions:

" 'Has a person, not a party in interest, without authorization, acting as an individual, the right to redeem the land by payment of taxes, doing so on behalf of a party in interest?

" 'Has the same person who states he has been orally authorized to redeem the land on behalf of a party in interest, the right so to do?

" 'Has the same person, exhibiting a letter or written statement, the right to redeem the land on behalf of a party of interest, said letter of written statement being executed by the party in interest?'

"It appears, of course, that if said person has such right under any of the above three circumstances that the Clerk should accept payment for the taxes.

"I presume the wife of A would be considered a party in interest, but I would like to have your opinion on this also, taking into consideration the circumstances as hereinbefore mentioned as to his marital life.

"If the land can be redeemed under circumstances mentioned, it appears in addition to paying the taxes, the applicant for a tax title will also have to be reimbursed for all costs, fees etc., he has expended, and for the ten percentum of the purchase price he is required to deposit with his application. I would also like your opinion on this question."

I shall answer your questions in the order presented above:

Section 58-1083 provides how and by whom real estate purchased by the Commonwealth for delinquent taxes may be redeemed. Under this section the previous owner of such real estate, his heirs or assigns or any person having the right to charge such real estate with a debt may redeem the same. Therefore, under this statute I am of the opinion that the answer to your first question is in the negative.

The provisions of the statute with respect to the sale of land for delinquent taxes must be strictly construed in favor of the owner of the property. Therefore, any bona fide agent of the owner of the property or any person who has a redeemable interest therein may pay the tax on behalf of such person. Therefore, if any person offers to pay the tax on behalf of the owner and represents to the official entitled to receive payment of the tax that he is the agent of the owner, I think that the tax should be received and credited to the owner.

There can be no question about the right of the wife to redeem the property. She is unquestionably an interested party.

With respect to the last question concerning the amount necessary to be paid by the person redeeming the property you are referred to Section 58-1090 which would be applicable to this case. It appears that you have correctly interpreted this provisions.

**TAXATION—Erroneous Assessment—Refund—Limitation on Application—  
§ 58-1142, as Amended, Supersedes Inconsistent Charter Provision. (220)**

March 2, 1959.

HONORABLE E. GLENN JORDAN  
Commissioner of the Revenue of the  
City of Richmond

This is in reply to your letter of February 25, 1959, which reads as follows:

"I would appreciate it if you would furnish me with a written opinion as to whether Section 58-1142 of the Code, which I quote in part below, applies to localities where their Charter specifies that if the tax is paid a refund can only be granted if the request is made within one year from the thirty-first day of December of the year in which the assessment is made.

"If the assessment exceeds the proper amount, the commissioner or such other official shall exonerate the applicant from the payment of so much as is erroneously charged if not paid into the treasury of the county or city; and if paid, the governing body of the county or city shall, upon the certificate of the commissioner or such other official with consent of the town, city or Commonwealth's attorney that such assessment was erroneous, direct the treasurer of the county or city to refund the excess to the taxpayer, provided such time be within two years from the thirty-first day of December of the year in which such assessment was made.'"

By reference to the Charter of the City of Richmond (Acts of 1948—Chapter 116, Section 8.07(d)), I find that application for refund must be filed within one year from the 31st of December of the year in which the assessment was made. The provision of the Charter with respect to refund where the tax has been paid apparently comes within the same limitation.

Section 58-1142 of the Code was amended by Chapter 598, Acts of 1956, so as to authorize the governing body of a city, upon the certificate of the Commissioner of the Revenue, with the consent of the City Attorney, to direct the treasurer of the city to make a refund of the erroneous tax. This Act contained the following provision:

*"The provisions of this section relating to the exoneration or refund of taxes or levies shall not apply in cities whose charters make other provision for the exoneration or refund of erroneous assessments of taxes or levies."*

Section 58-1142 was again amended in Chapter 585, Acts of 1958, so as to provide that such refund may be made within two years from the 21st day of December of the year in which such assessment was made. Furthermore, in this last Act the language found in the 1955 Act and quoted herein to the effect that the provisions of this Section shall not apply where there are Charter provisions, was repealed.

I am of the opinion, therefore, that the provisions of Section 58-1142 of the Code, as amended by the 1958 Session of the General Assembly, supersedes the inconsistent Charter provision of the city.

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**TAXATION—Exemptions—Volunteer Fire Departments and Volunteer Rescue Squads—Statutory Provision Purporting to Exempt Property Invalid—Conflicts with Constitution, Section 183. (235)**

March 17, 1959.

HONORABLE C. H. MORRISSETT  
State Tax Commissioner

This will reply to your letter of March 10, 1959, in which you call my attention

to the provisions of Section 58-12(9) of the Code of Virginia (1950) as amended, and request to be advised whether or not this statute is repugnant to Section 183 of the Constitution of Virginia (1902).

Section 58-12 of the Virginia Code is the statutory provision which generally parallels Section 183 of the Virginia Constitution and catalogues property which is exempt from State and local taxation. As amended by Chapter 478 of the Acts of Assembly (1956), which amendment added subparagraph (9) to which your inquiry relates, this provision in part declares:

"The following property shall be exempt from taxation, State and local, including inheritance taxes:

\* \* \* \* \*

"(9) Property owned by volunteer fire departments or volunteer rescue squads and used by them exclusively for the benefit of the general public without charge."

Section 183 of the Virginia Constitution provides that certain property therein specified, *and no other*, shall be exempt from taxation, State and local, including inheritance taxes. It further prescribes that, except as to property owned directly or indirectly by the Commonwealth or its political subdivisions which is rendered exempt from taxation by the provisions of subparagraph (a) thereof, general laws may be enacted "restricting but not extending" the enumerated exemptions.

I am constrained to believe that none of the classes of property declared by Section 183 of the Virginia Constitution to be exempt from taxation can reasonably be construed to embrace property owned by volunteer fire departments or volunteer rescue squads and used by them exclusively for the benefit of the general public without charge. As the General Assembly is precluded by the express language of Section 183 of the Virginia Constitution from extending the exemptions therein specified, I am impelled to the conclusion that Section 58-12(9) of the Virginia Code is invalid to the extent that it purports to exempt from taxation property not within the aegis of Section 183 of the Virginia Constitution. I, therefore, concur in your view that exemptions claimed under the statutory provision in question should be disallowed.

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**TAXATION—Garages—Operator of U-Drive-It or Rent-a-Car System Liable to Tax Imposed Under § 58-378. (322)**

May 27, 1959.

HONORABLE KOSSEN GREGORY  
Member of the House of Delegates

This is in reply to your letter of May 15, 1959, in which you state that a licensee of Avis Rent-A-Car Service in Roanoke is aggrieved on account of the assessment of a license tax imposed under Section 58-378 of the Code. This Code section reads as follows:

"Every person who shall keep a garage for the storage or hire of motor vehicles in counties and in towns of less than two thousand inhabitants shall pay the sum of fifteen dollars and an additional sum of fifty cents for each vehicle for the storage capacity of each vehicle over five; in towns of two thousand inhabitants and over, he shall pay twenty-five dollars and an additional tax of fifty cents for each vehicle for the storage capacity of each vehicle over five; and in cities of the second class, he shall pay a

tax of thirty-five dollars and fifty cents additional for each vehicle for the storage capacity of each vehicle over five; and in cities of the first class he shall pay a tax of fifty dollars and one dollar additional for each vehicle for the storage capacity of each vehicle over five. The license to keep a garage by the proprietor of public watering places and other places of summer resort, or any person at such places, for six months or less, shall be one-half of the sums hereinbefore specified. A garage, as used in this section, means very place where five or more motor vehicles are stored or housed at any one time for compensation."

You have presented the facts in the following manner:

"K., a resident of the City of Roanoke, is the local licensee of a nationwide chain of auto rental establishments. He is a sole proprietor and owns all of the automobiles himself. Under his licensing arrangement with the national organization, his local business uses the national name and on each car is painted that name.

"K. rents these cars to members of the public on a per diem basis, plus so many cents per mile. K. furnishes all gas and oil, repairs, insurance and the like. Most of the cars are rented for short trips, primarily to persons arriving in town by air.

"K. leases, by the month, a building in which he has his office and in which he also keeps these automobiles when not rented. No automobiles are ever kept there except these cars owned by K. and rented by him to the public as aforesaid.

"The Attorney General is respectfully requested to express his opinion as to whether or not K. is subject to the license tax imposed upon garages by Section 58-378 of the Code of Virginia."

You have requested my opinion with respect to this matter.

Upon inquiry at the Office of the Honorable C. H. Morrisett, State Tax Commissioner, I find that his office has interpreted the section of the Code under consideration as being applicable to the U-Drive-It plan or Rent-A-Car system. Mr. Morrisett's statement is contained in a letter dated May 26, 1959, a copy of which I enclose herewith. The statute under consideration has been in its present form since 1928 and it has been construed and enforced by the Department of Taxation as being applicable to the instant situation. Since this interpretation has continued without objection for so many years, we feel that we should not express a contrary view, even though the meaning of the statute with respect to a case like this may be to some extent doubtful.

It is an elementary rule of statutory interpretation that the practical construction accorded a statute by public officials charged with its administration and enforcement is entitled to great weight by the courts and, in doubtful cases, will be regarded as decisive. The Legislature is presumed to be cognizant of such construction, and when it is long continued without change, the Legislature will be presumed to have acquiesced therein and courts will adopt that construction. See, 82 C. J. S. 761, 781, Statutes: Section 359(a) and (c); 50 Am. Jur. 309-311, Statutes: Section 319; 2 Sutherland on Statutory Construction (3rd Ed.) 512-517, Sections 5103-5105.

The general rule is well stated by our Court in *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652, in the following language:

"It is a rule of construction that, if a statute is of doubtful import, a court will consider the construction put upon the act when it first came into operation, and that construction, after lapse of time, without change either by the Legislature or judicial decision, will be regarded as the correct construction. Sutherland on Stat. Con., sec. 307; *Anable v. Com.*, 24 Gratt. 563, 566; *Lewis v. Whittle*, 77 Va. 415, 422; *Mangus v. McClennand*, 93 Va. 786, 789.

"So, also, the practical construction given to a statute by public officials and acted upon by the people, is not only to be considered, but in cases of doubt, will be regarded as decisive. It is allowed the same effect as a course of judicial decision. The Legislature is presumed to be cognizant of such construction, and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction."

This principle has been reaffirmed and applied by our Court in numerous cases involving a variety of statutes. *Virginia Coal and Iron Co. v. Keystone, etc. Co.*, 101 Va. 723, 45 S. E. 291 (land patent recording statute); *Smith v. Kelley*, 162 Va. 645, 174 S. E. 842 (statute relating to the filling of vacancies upon county board of supervisors); *Miller v. Commonwealth*, 180 Va. 36, 21 S. E. (2d) 721 (statute regulating practice of medicine), *Anglin v. Joyner*, 181 Va. 660, 26 S. E. (2d) 58 (motor vehicle license statute); *Nuttall v. Lankford*, 186 Va. 532, 43 S. E. (2d) 37 (statute relating to leasing of oyster planting grounds); *Rountree Corporation v. City of Richmond*, 188 Va. 701, 51 S. E. (2d) 256 (ordinance regulating plumbing contractors); *Dan River Mills v. Unemployment Compensation Commission*, 195 Va. 997, 81 S. E. (2d) 620 (unemployment compensation benefit eligibility statute). See, also, *Almond v. Gilmer*, 188 Va. 822, 51 S. E. (2d) 272; *Commonwealth v. Dodson*, 176 Va. 281, 11 S. E. (2d) 120; *Batcheller v. Commonwealth*, 176 Va. 109, 10 S. E. (2d) 521.

For the reasons set forth herein, I am of the opinion that a business operating in the manner stated in your letter is subject to the license tax imposed by Section 58-378 of the Code of Virginia.

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**TAXATION—Licenses—Agents of Foreign Corporation Not Having Regular Place of Business in Virginia Must Obtain Peddler's License. (56)**

September 2, 1958.

HONORABLE REGINALD H. PETTUS  
Commonwealth's Attorney  
Charlotte County

This is in reply to your letter of August 27, 1958, in which you state that a representative of a Lightning Rod Company of Raleigh, North Carolina took an order for lightning rods in Charlotte County on August 15, 1958, which lightning rods were to be delivered at a later date. The lightning rods were delivered and installed on August 18, 1958. This lightning rod company has no place of business of any description in the State of Virginia and does not have a license or permit to do business in the State of Virginia, nor have they qualified under the laws of Virginia as a foreign corporation authorized to do business in this State. You request my opinion as to whether or not the agents of this company come within the provisions of §§ 58-340 and 58-341(4) of the Code of Virginia as peddlers of lightning rods.

These two sections of the Code read as follows:

"§ 58-340. Any person who shall carry from place to place any goods, wares or merchandise and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler.

"All persons who do not keep a regular place of business, whether it be a house or a vacant lot or elsewhere, open at all times in regular business hours and at the same place, who shall offer for sale goods, wares and merchandise, shall be deemed peddlers under this article. All persons who keep a regular place of business, open at all times in regular business hours and at the same place, who shall, elsewhere than at such regular place of business, personally or through their agents, offer for sale or sell and, at the time of such offering for sale, deliver goods, wares and mer-

chandise shall also be deemed peddlers as above, but this article shall not apply to those who sell or offer for sale in person or by their employees ice, wood, charcoal, meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits or other family supplies of a perishable nature or farm products grown or produced by them and not purchased by them for sale. But a dairyman who uses upon the streets of any city one or more wagons may sell and deliver from his wagons milk, butter, cream and eggs in such city without procuring a peddler's license.

"The license taxes imposed by this article shall not apply to any peddler who is covered by article 10 of this chapter, and who sells to licensed dealers or retailers only."

"§ 58-341 (4). The tax on peddlers of lightning rods shall be two hundred dollars in each county and city."

Since the agents and representatives of the concern selling and installing lightning rods in your county do not carry the lightning rods with them or deliver them at the time of sale, the only provision of § 58-340 which could possibly be applicable is the first sentence of the second paragraph. If this lightning rod concern has a regular place of business open at all times in regular business hours at the same place either within or without this State, I am of the opinion that its agents and representatives would not be considered peddlers under the provisions of this section. However, if the lightning rod concern does not have a regular place of business open at all times in regular business hours within or without this State, its agents and representatives would be required to obtain a peddler's license under the provisions of §§ 58-340 and 58-341(4) of the Code.

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**TAXATION—Licenses—No License Tax Required on Vending Machines When Located on Premises of Payor of Retail Merchant's License Tax. (30)**

August 1, 1958.

HONORABLE C. H. MORRISSETT  
State Tax Commissioner

This is in reply to your letter of July 24, 1958, relating to the following amendment to Section 58-362 of the Code:

"Regularly licensed retail merchants paying retail merchants license tax on their sales at retail shall not be required to have any separate vending machine license on such coin-operated machines which are located on the premises of their place of business."

This amendment is contained in Chapter 415, Acts of 1958, the title of which is as follows:

"An Act to amend and reenact §§ 58-362, as amended, and 58-367.2 of the Code of Virginia, *relating to merchants placing vending machines.*"

The sections amended by this Act appear in Article 12, Chapter 7, of Title 58 of the Code. Section 58-366 of Article 12 provides as follows:

"The taxes imposed by this article shall be in lieu of any license tax on the individual vending machines."

You have requested my opinion with respect to the effect of the quoted amendment to Section 58-362.

As you point out in your letter, the amendment contained in Chapter 415 of the Acts of 1958 is mere surplusage and meaningless because Section 58-366 already accomplishes the same purpose and, because of this section, there never has been imposed any State license tax on the individual vending machines on either the merchant placing vending machines or on the "regularly licensed" retail merchant on whose premises the machine may be located. In other words, the amendment contained in Chapter 415, Acts of 1958, is, in effect, a repetition of Section 58-366 and, hence, actually accomplishes nothing with respect to Section 58-362.

You call attention to Chapter 511, Acts of 1958, which is entitled:

"An Act to amend and reenact § 58-355, as amended, of the Code of Virginia, relating to taxes on machines operated on the coin-in-the-slot principle."

It is possible, as you suggest, that the amendment to Section 58-362 under consideration here was tacked on to the bill (H. B. No. 438) in error in the course of its passage. The language was not contained in the bill when it was introduced. This error could have occurred by reason of the fact that H. B. No. 655—Chapter 511—was also in the course of passage and the patron of the amendment may have intended it for H. B. No. 655 where it would have apparently accomplished its obvious purpose.

I am unaware, however, of any legal manner whereby the provision in question may be considered as a valid legislative amendment to House Bill No. 655.

I am of the opinion, therefore, that the amendment under consideration should be treated as though it had never been offered and passed, because it makes no change in the preexisting law.

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**TAXATION—Licenses—Pin Ball Machines—Not Transferable from Person to Person—Machine May Be Moved from Place to Place. (347)**

June 15, 1959.

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

This is in reply to your letter of June 11, 1959, which reads as follows:

"I would appreciate your advising me on the following:

"The owner of a pin ball machine installs said machine in 'A' restaurant under an arrangement whereby the license fees as imposed by Section 58-355, Code of Virginia, are paid for out of proceeds from the machine, that is to say that the license is paid for one-half by the owner and one-half by the operator of 'A' restaurant. The license is issued in the name of the owner and on his application a particular pin ball machine is indicated at a particular location, in this case 'A' restaurant. The owner, at a later date during the year for which he has been licensed, decides to move this particular machine to 'B' restaurant.

"*Question:* Is the owner liable for an additional license fee under the provisions of Section 58-355, Code of Virginia."

At the 1958 Session of the General Assembly, Section 58-355 of the Code was amended so as to insert therein the words "which license shall not be pro rated or transferable."

I am of the opinion that the word "transferable," as used in this section, prohibits a licensee from transferring his license to another person. I do not feel that this section prohibits the use of the machine by the licensee in premises different from the premises in which the machine was located at the time the license was issued.

I understand that a bulletin has been issued by Honorable C. H. Morrissett, State Tax Commissioner, to the commissioners of the revenue in which he construes the amendment in this manner.

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**TAXATION—Licenses—Seller of Coal to County and to School Board Is Subject to Wholesale Merchant's License Tax. (140)**

November 26, 1958.

JOSEPH A. MASSIE, JR., *Esquire*  
Attorney for the Commonwealth for  
Frederick County

This is in response to your letter of November 21, 1958, which reads as follows:

"I would like a ruling in regard to what license tax, if any, should be charged under the following facts and circumstances:

" 'A resident of Frederick County is low bidder on a contract to furnish coal to the schools of Frederick County and to the Board of Supervisors for the Court House. He has no place of business other than his residence, and when coal is required for the school buildings and Court House, he drives his truck to the West Virginia, Maryland or Pennsylvania coal fields, buys the coal himself, hauls it back to the particular school building or to the Court House needing it in Frederick County, and later submits a bill to the School Board or the Board of Supervisors, as the case may be.' "

The following definition of a "wholesale merchant" is found in a portion of Section 58-304 of the Code of Virginia and is controlling in this matter:

"The term 'wholesale merchant', as used in this article, means every merchant who sells to other persons for resale only or who sells to institutional, commercial or industrial users."

I am constrained to believe that the person described in your letter is selling coal to an "institutional" user and, therefore, comes within the definition of a "wholesale merchant." I am, therefore, of the opinion that he is subject to the wholesale merchant's license tax as imposed by Article 6, Chapter 7 of Title 58 of the Code of Virginia.

**TAXATION—Licenses—Veterinary Surgeon—Issued by Commissioner of Revenue Under § 58-404—Revenue License Only and Not License to Practice—Commissioner Not Required to Check Qualifications of Applicant. (310)**

May 20, 1959.

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

This is in reply to your letter of May 15, 1959, which reads as follows:

"The question has arisen in Appomattox County as to whether or not any person whomsoever that applies to the Commissioner of Revenue for a license to practice veterinary medicine should be issued such license by the Commissioner of Revenue provided such person pays the license fee provided (I think the Code section involved is Section 58-404 of the 1950 Code; however, I do not mean to limit you to this section. I want your opinion based on all of the law applicable).

"I would appreciate it if you would give me the benefit of your office as to whether or not the Commissioner of Revenue should issue such license to anyone who applies for it or whether or not he should require some proof of the fact that such person is a duly qualified veterinarian or veterinary surgeon."

Section 58-404 of the Code is as follows:

"Every veterinary surgeon shall pay a license tax of ten dollars and no further revenue license shall be required of a veterinary surgeon by the State for practicing his profession in any part thereof; providing, that nothing in this section shall be construed as requiring a license tax of persons who confine their practice to castration, spaying or dehorning livestock."

The license tax paid under this section is a revenue license only and is not technically a license to practice the profession of a veterinarian. A license to practice veterinary surgery may only be issued in accordance with the provisions of Chapter 19 of Title 54 of the Code. Any person who has been issued a license under this Chapter is required to pay the revenue license provided for in Section 58-404.

The functions of the Commissioner of the Revenue in connection with the issuance of all revenue licenses are ministerial and a Commissioner of the Revenue is not expected to pass upon the qualifications of any person who makes application for such a revenue license under Chapter 7 of Title 58 of the Code.

The applications for licenses shall be upon a form prescribed by the Department of Taxation and in the manner set forth in Section 58-241 of the Code. Section 58-243 provides, in part, as follows:

"No license issued by a commissioner of the revenue shall be valid or have any legal effect unless and until the tax prescribed by law be paid to the treasurer of the county or city in which the commissioner of the revenue issued the license, and the facts of such payment shall appear on the face of the license."

In the case of *Warren vs. The Commonwealth*, 136 Va. 573, the Supreme Court of Virginia, in discussing the question of the duties of the Commissioner of the Revenue and the Treasurer in connection with the issuance of licenses, made this statement:

"But with respect to the first and second charges contained in the rule, the situation is materially different. The official duty of the accused with respect to the matters embraced in those charges was purely ministerial; and, under the express and imperative provisions of the statute law on the subject, the accused, as to such matters, was intrusted with no discretion whatever. Under the plain mandate of the statute (2360 of the Code) commissioners of the revenue have no authority to issue licenses except upon the application 'accompanied with the certificate of the treasurer \* \* \* that the amount of the tax \* \* \* has been deposited with him by the applicant; and they have no authority, under any circumstances, to act for the treasurer in receiving such taxes. They are given by the statute no discretion in this particular. For them to act for the treasurer in receiving such taxes, from any motive whatsoever, is in direct violation of the statute on the subject and if allowed would annul and suspend the operation of the statute."

Further in connection with this matter, the Court in the above case also stated:

"\* \* \* 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. \* \* \*"

Section 2360 of the Code of 1919 mentioned in the above case, in so far as it is material to this opinion, is now Section 58-243 of the Code of 1950. In view of the statutory provisions cited herein, I am of the opinion that it is the duty of the Commissioner of the Revenue, if a proper application is presented to him by an applicant for the license in question, together with the certificate showing that the license tax has been paid to the Treasurer, to issue the revenue license provided for in Section 58-404 of the Code.

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**TAXATION—Local—Correction of Erroneous Assessments—§§ 58-1142 and 58-1152.1 Compared—Limitation on Time Within Which Refunds May Be Made. (303)**

May 15, 1959.

HONORABLE LIGON L. JONES  
Commonwealth's Attorney for the  
City of Hopewell

This is in reply to your letter of May 12, 1959.

Section 58-1142 of the Code, as amended by Chapter 585 of the Acts of 1958, seems to relate to the correction of erroneous assessments made by the Commissioner of the Revenue upon his own initiative or upon the application of the person who has been assessed. Under this section if the tax has been paid the governing body of the county or city is required upon the certificate of the Commissioner of the Revenue and with the consent of the Commonwealth's Attorney of the city or county, to direct the Treasurer to refund the excess to the taxpayer, provided such time be within two years from the 31st day of December in which such assessment was made.

Section 58-1152.1 does not seem to be applicable unless the governing body of the city or county has provided by ordinance for the refund of any local levies erroneously paid. If the taxes under this section have not been paid, then the applicant may be exonerated from the payment thereof. If the taxes have been paid, then no refund shall be made in any case where more than three years has elapsed since assessment.

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**TAXATION—Local License Tax—Motor Boats—No Statutory Authority for Counties to Levy. (311)**

May 21, 1959.

HONORABLE E. C. WESTERMAN, JR.  
Commonwealth's Attorney for  
Botetourt County

This is in response to your letter of May 18, 1959, inquiring as to the existence of authority for a county to levy a license tax on motor boats located within the county and also upon those temporarily brought within the county and operated therein.

Kindly be advised that this office is not informed as to the existence of any authority which would permit counties to levy such proposed license taxes upon motor boats. It is further noted that there was no authority for counties to impose license taxes upon automobiles until appropriate legislation was enacted.

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**TAXATION—Motor Vehicles—Local License Tax—Ordinance Provides for Payment to Treasurer—Official Receipt Should Be Issued—Treasurer May Mark "Paid Under Protest." (354)**

June 23, 1959.

HONORABLE BOB NEWBERRY  
Treasurer of  
Dickenson County

This is in reply to your letter of June 19, 1959, which reads as follows:

"The Board of Supervisors of Dickenson County recently enacted a County Strip Tag Ordinance, effective July 1, 1959, a copy of which is enclosed herewith. As Treasurer of Dickenson County, it is my duty under the ordinance to collect the \$10.00 license fee for these tags. Since the enactment of the ordinance, a resident of Dickenson County had printed in our county paper a notice to the citizens of Dickenson County, which states among other things that: 'When and if you should buy your County tag ask the treasurer for a PROTEST receipt. (Buying the tag against your will.) Have the receipt signed and keep it. If they won't give you a receipt you don't have to buy a tag.' A copy of this notice is also enclosed herewith.

"With reference to the above ordinance and notice, I would greatly appreciate your advice on the following questions:

"1. Am I required to give any receipt other than the official receipt showing payment of the license fee?

"2. Has the writer of the enclosed notice violated any criminal laws of the Commonwealth?"

The ordinance which you enclosed was adopted by your Board of Supervisors pursuant to the provisions of Sections 46.1-65 and 46.1-66 of the Code, as amended by Chapter 541, Acts of 1958, and Chapter 22, Acts of Extra Session of the General Assembly, 1959. The sections of the Code authorize the governing body of a county to impose a license tax upon motor vehicles within the limitations and subject to the conditions prescribed therein.

The ordinance provides that the fee or tax for the license purchased thereunder shall be paid to the Treasurer of the county but it is silent as to the form of receipt to which the licensee is entitled. Of course the purchaser is entitled to an official receipt for the license fee paid by him, but I am not aware of any statute which would require the treasurer to issue any other form of receipt.

With respect to the notice published in the local paper, copy of which you enclosed with your letter, I am not familiar with any criminal statute that is violated by the publication of such notice.

P.S. Of course, if a taxpayer wishes the record to show that he has paid a license tax under protest, there would be no objection to your writing across the face of his official receipt a statement such as "Paid under protest."

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**TAXATION—Local License Taxes—Carnivals, Circuses or Speedways—Statute Does Not Define "Speedway"—Ordinance May Define if Reasonable—Motorcycle Event—Compensation in Form of Donations Does Not Relieve from Liability for Tax. (353)**

June 23, 1959.

HONORABLE D. CARLTON MAYES  
Commonwealth's Attorney for  
Dinwiddie County

This is in response to your letter of June 17, 1959, in which you ask whether the County may impose a license tax on each performance of an event known as "Scrambles" pursuant to an ordinance authorized by § 58-284.1 of the Code. You advise me that Scrambles is sponsored by the Petersburg Motorcycle Club, which organization is a member of the American Motorcycle Association. You did not state whether Scrambles is a race on a circular race track or whether it is some other type of contest. Trophies are awarded to the winners of Scrambles, the cost of the same being borne by the Club. Club funds consist of money donated by the riders taking part in Scrambles and of money donated by persons attending these events.

Section 58-284.1 of the Code reads as follows:

"The governing bodies of the several counties and cities are hereby authorized to levy and collect a license tax, the amount to be fixed by the governing body of such county or city, for each performance held in such county, or city, upon carnivals, circuses or speedways which are operating within the limits of such county or city, whether such carnivals, circuses or speedways are permanently established in such county or city or are traveling shows, and, until such tax has been paid, the county or city shall have a lien upon the property of such carnival, circus or speedway to the extent of the unpaid tax."

The above-quoted section authorizes counties and cities to pass an ordinance levying a license tax on each performance of a carnival, circus or speedway. From the facts presented in your letter, I do not believe that Scrambles is a carnival or circus. Speedway is not defined by Article 2, Chapter 7 of Title 58, nor has it apparently been defined by the Supreme Court of Appeals by Virginia. I am of the opinion that if the ordinance authorized by § 58-284.1 defines the term "speed-

way" in a reasonable manner and that if this definition includes Scrambles, then the County is authorized to collect the license tax in question.

With respect to your second question, you will note that § 58-280 of the Code provides that it is "the intent and meaning of *this article* that every company, association or person, or corporation, which makes its business that of giving exhibitions for compensation, whether a part of the proceeds are for charitable or benevolent purposes or not, shall pay the license tax prescribed by law." This provision, I feel sure, would be applicable to the local licenses imposed under § 58-284.1 as well as the State licenses. This section and § 58-280 are both contained in Article 2 of Chapter 7, Title 58. In my opinion, free will offerings or donations would be methods of collecting compensation for giving the exhibition and that if the operation otherwise comes within the scope of the ordinance, such method of collecting compensation would not be grounds for relief from the license tax.

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**TAXATION—Motor Vehicles—Levy by Town Exempts Residents from County Tax  
—§ 46.1-66 Not Applicable to Property Tax. (154)**

December 9, 1958.

HONORABLE G. M. WEEMS  
Treasurer of  
Hanover County

This is in reply to your letter of December 8, 1958, which reads as follows:

"I would appreciate your advising whether or not Section 46.1-66 permits the Town of Ashland, which abolished its motor vehicle license tax several years ago, to now impose such motor vehicle license fee when the County of Hanover has an ordinance imposing a county license fee on all motor vehicles, but not on trailers in the county. The Town of Ashland, of course, is part of the county.

"The County of Hanover has set up the motor vehicle license tax in its current budget for the year ending June 30, 1959, and I have ordered receipt forms and license plates to be sold for the license year beginning April 1, 1959. The Town of Ashland now wants to impose a license fee on motor vehicles within its limits for the year beginning April 1, 1959.

"Also, the Hanover County Board of Supervisors will have to consider its budget in January of 1959. At that time the question will arise as to whether or not under 46.1-66 subsection (a) (1), the present county ordinance prevents the Town from imposing any license fee on motor vehicles in the Town of Ashland so long as the county license fee is not repealed.

"As the county does not impose any license tax on trailers or semi-trailers, it would appear that the Town of Ashland could impose a license tax on trailers and semi-trailers. The county imposes a property tax on automobiles and the town also imposes a property tax. I would appreciate your advising whether or not Section 46.1-66 applies to property taxes."

I am enclosing copy of an opinion relating generally to this subject. This opinion is dated August 29, 1958, and was furnished to Honorable Robert R. Gwathmey, III, member of the House of Delegates from Hanover County. As stated in this opinion, it is my view that the Town of Ashland may impose a license tax on motor vehicles owned by the residents of the Town, and, pursuant to the provisions of paragraph (b) of Section 46.1-66 the county would be prohibited from imposing a license tax on the same motor vehicles.

With respect to your question relating to property tax, I am of the opinion that Section 46.1-66 does not apply to such a tax. The section relates only to a motor vehicle license tax.

**TAXATION—Motor Vehicles—Levy of Motor Vehicle Tax by Town on Residents Exempts Them from County Motor Vehicle Tax. (54)**

August 29, 1958.

HONORABLE ROBERT R. GWATHMEY, III  
Member of the House of Delegates

This is in reply to your letter of August 27, 1958, which reads as follows:

"I am writing to request that you furnish me a legal opinion as to whether the Town of Ashland, Virginia, can levy a motor vehicle tax on the residents of Ashland under Section 46.1-65 and 46.1-66 of the Code of Virginia, as amended by the Acts of 1958, in view of the fact that the County of Hanover already imposes a license tax at the present time on all of the residents of the County, including the Town of Ashland.

"If the Town of Ashland can impose such a license tax on its residents, I would also like to know whether or not under paragraph (b) of Section 46.1-66 the County can impose its license tax on the residents of the Town of Ashland. This information is requested in an effort to solve the seeming conflict between the provisions of the law as embodied in House Bill No. 598 and Senate Bill No. 10, both of which were passed at the 1958 Session of the General Assembly."

House Bill No. 598 is Chapter 482 of the Acts of Assembly of 1958, and Senate Bill No. 10 is Chapter 541 of the Acts of Assembly of 1958, and they will be referred to in this manner in this opinion.

Both of these Chapters were approved by the Governor on March 29, 1958. Under Section 76 of the Constitution both Chapters became a law on March 29, 1958. See *Mahoney vs. Commonwealth of Virginia*, 162 Va. 846, where the Supreme Court of Virginia stated as follows:

"A bill becomes an act when it is approved by the Governor, or becomes a law without his signature. (See section 76, Constitution of Virginia.) When two bills are signed by the Governor on the same day (as was the case with these two acts), they are to be regarded as having become 'acts' simultaneously, neither one before the other. Under these circumstances a provision in the emergency act (which becomes effective instantly), providing that 'all acts or parts of acts in conflict herewith are hereby repealed,' is not to be construed as speaking of an act which comes into being simultaneously with it, but of acts which were acts when it became an act. The intention of the legislative branch of the government is to be interpreted as intending that the emergency act shall remain in force until the other act becomes effective, and then be displaced by it to the extent that the two are in conflict."

In light of the Constitution provision and the above statement made by the Supreme Court of Virginia, I see no escape from the fact that both of these Chapters became "acts" of the General Assembly simultaneously.

Chapter 482, which amended Section 46-64 of the Code, contains an emergency clause, and, therefore, it became effective and operative on March 29, 1958.

Chapter 541, which is the omnibus bill amending and recodifying the Code provisions with respect to motor vehicles, does not contain an emergency clause and, therefore, it became effective and operative at the first moment of June 27, 1958.

The facts here are different from those stated in *Mahoney v. Commonwealth*, *supra*, in that the repealing clause is not found in the emergency act but in the other act which became effective for operational purposes ninety days after the adjournment of the General Assembly. Therefore, the repealing clause speaks of acts which were operative laws prior to the time the repeal became effective.

The title to Chapter 541 contains the following language:

"An Act to revise, rearrange, amend and recodify the motor vehicle laws of Virginia; to that end to repeal Title 46 of the Code of Virginia, which title includes Chapters 1 to 10 and §§ 46-1 to 46-553, inclusive, of the Code of Virginia, as severally amended, which title relates to motor vehicles generally; \* \* \*."

Section 1 of Chapter 541 is as follows:

"Be it enacted by the General Assembly of Virginia:

"1. That Title 46 of the Code of Virginia, which title includes Chapters 1 to 10 and §§ 46-1 to 46-553, inclusive, of the Code of Virginia, as severally amended, is repealed."

Title 46 of the Code and especially Section 46-64 was capable of being amended by the General Assembly during the 1958 session because this title and all sections thereof, as amended by emergency act, remained in effect until the last moment of June 26, 1958, when Title 46 and all sections thereof and amendments thereto were superseded by Chapter 541.

As of the first moment of June 27, 1958, Title 46 and all sections thereof, as amended, ceased to be a part of the Code of Virginia.

Section 46-64 of the Code which was amended by Chapter 482, contained a provision 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 and 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."

The amendment contained in Chapter 482 had the effect of repealing the language quoted immediately above and inserted in lieu thereof a provision which would allow counties to impose a license tax upon automobiles owned by residents living in a town located in the county, even though the town required such person to purchase a town automobile tag. Under this amendment the county could charge for the issuance of the county tag under such circumstances the difference between the amount charged by the town and \$10.00.

This amendment contained in Chapter 482 was a valid and enforceable act having life so long as Section 46-64 remained in effect.

When Chapter 541 became effective on June 27, 1958, it expressly, and not by implication, repealed Title 46 of the Code and all sections thereof, including Section 46-64 as amended at the same session of the General Assembly by Chapter 482.

Chapter 541 contains Section 46.1-65 and 46.1-66, which are revisions of Sections 46-64 and 46-65 as suggested by the Virginia Code Commission in its report (Senate Document No. 7), filed during the last session of the General Assembly. The revisors attached to their report the following notes with respect to these sections:

[46-64]

"Note: The section has been rewritten for brevity and clarity. The section is now limited to an enabling act and the limitations formerly contained in the section have been transferred to § 46.1-66 (old 46-65) and are combined with the limitations presently appearing in that section. The words 'according to the last preceding United States Census' have been deleted with the intention of applying the definition of population contained in § 1-13.22."

[46-65]

"Note: the section has been rewritten for clarity and brevity. The limitations formerly appearing in old 46-64 now appear in this section. The language in line 13 beginning with the words 'Counties, cities and towns may impose' and ending 'at or in any such terminal or lot' has been deleted since it already appears in § 56-337.1."

Paragraph (6) (b) of Section 46.1-66 of the Code is as follows:

"No county shall impose any license fee or tax upon a motor vehicle, trailer or semitrailer of an owner resident in an incorporated city or town within the county when such city or town imposes a license fee or tax upon motor vehicles, trailers or semitrailers."

Under this provision the law with respect to the power of the counties to impose automobile license tax upon the residents of towns is similar to the provision contained in Section 46-64 prior to the emergency amendment contained in Chapter 482.

In my opinion, based upon the legislative history of the Code sections involved, there is no escape from the conclusion that the amendment to Section 46-64 of the Code authorizing counties to impose a license tax upon automobiles already taxed by a town located within the county was an effective and enforceable statute from March 29, 1958, until the first moment of June 27, 1958, and that upon the latter date it ceased to be a valid and existing statute.

I have made a reference to the case of *Mahoney vs. Commonwealth of Virginia*, *supra*. This case is cited with approval and quoted from in the case of *Commonwealth vs. Sanderson*, 170 Va. 33. A discussion of these principles of law sustaining our position here may be found in *Sutherland Statutory Construction*, 3rd Ed., Volume 1, Sections 2013 to 2021. We have been unable to find any decisions of the Supreme Court of Virginia which would support a conclusion to the effect that Chapter 482 of the Acts of 1958 was not repealed by Chapter 541 of the Acts of 1958 effective at the first moment of June 27, 1958.

Since the effective date of Chapter 541 the provisions of Section 46.1-66 have been the law and the provisions of Section 46-64 as amended at the 1958 session by Chapter 482 ceased to be the law at that time.

Specifically answering your questions I conclude—(1) the Town of Ashland under Section 46.1-65 may levy a motor vehicle tax on its residents and (2) if this levy is made the county is prohibited under Section 46.1-66 from imposing a license fee or tax upon the residents of the Town.

There may have been some county ordinances adopted under Section 46-64 as amended during the life of the amendment. I am not expressing an opinion with respect to the duration of any such ordinances.

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**TAXATION—Real Estate Conveyed to Exempt Organization After Tax Day—Grantor Liable for Entire Tax—Unpaid Portion Is Lien Against Parcel Conveyed. (102)**

October 23, 1958.

MISS MARGARET COWAN, *Treasurer*  
County of Montgomery

This is in reply to your letter of October 22, 1958, in which you state that a deed was recorded on March 31, 1958, conveying to a church organization a tract of real estate to be used for conference purposes, which is deemed to be exempt from taxation under the provisions of Section 58-12 (2) of the Code and Section

183 of the Constitution of Virginia. You wish to know whether or not the former owner of the property shall be relieved from the payment of taxes on said property for that portion of the year 1958 subsequent to the time title thereto became vested in the church.

I am unaware of any statute which would grant such relief. In my opinion the tax assessable against the property as of January 1, 1958 must be paid for the entire year. The unpaid portion of the tax for the year 1958 is a lien against the property in question.

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**TAXATION—Real Estate Not Previously Taxed—Tax May Be Assessed for Current Tax Year and the Three Tax Years Immediately Preceding. (38)**

August 8, 1958.

HONORABLE JAMES M. THOMAS  
Member of House of Delegates

This is in reply to your letter of August 7, 1958, which reads as follows:

"I would like to request a ruling by the Office of the Attorney General in regard to Section 58-1165 of the Code of Virginia of 1950, as amended.

"Section 58-1165 of the Code of Virginia, 1950, as amended, reads in part as follows. ' . . . provided, however, that no assessment shall be made hereunder for any year except the then current year or any tax year of the three tax years last passed.' Pursuant to this section, for how many years may a tax be imposed upon omitted land which previously had not been taxed? Is it permissible under the Code to tax omitted property for the then current year and the previous three years, or is the taxing authority restricted to a choice of only one of those four years? It was generally thought that a tax might be imposed by the City for all four years, but the correctness of this policy has recently been challenged, and it has been suggested that a tax may be collected for only one of these years.

"I would appreciate it if you could let us have this ruling within the next ten days. A local situation has arisen which would render this very desirable."

I am enclosing a copy of a letter written by the Honorable Abram P. Staples during his term as Attorney General. This letter is published in the Reports of Attorney General for 1941-42, at page 159.

This matter has been considered informally by this office several times in recent years and it is our opinion that the statute in question prohibits making such assessments except for the current year and the three tax years immediately preceding. 1958 is the current year and the three tax years immediately preceding would be 1957, 1956 and 1955.

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**TAXATION—Real Estate of Educational Institutions—No Longer Exempt When Cease to Use for Educational Purposes. (166)**

January 7, 1959.

HONORABLE E. RALPH JAMES  
Member of the House of Delegates

This is in reply to your letter of January 6, 1959, which reads as follows:

"I have a situation which I would like to present to you for ruling.

"Hampton Institute has a farm which was used for a number of years in connection with its agricultural school, it being used for herd from which milk supply was obtained; also raising crops, some of which were used as food stuffs for Hampton Institute and some of which were used for feed for the herd; and also being used as a training facility or for their agricultural students. Because of a number of considerations, Hampton Institute has found it necessary to get rid of its dairy herd and also to curtail its agricultural school so that it would appear that this farm will no longer be needed for this purpose. Hampton Institute desires to sell off this farm into lots to its faculty and staff for the building of homes. The property will not be offered for sale to the general public and it is not the intention of Hampton Institute to engage in the operation for a profit, but, of course, they expect to sell the lots to their own employees at a fair market value which would be considerably above cost in view of the fact that they have owned the farm for many years.

"Under ordinances of the City of Hampton, the property cannot be sold in lots unless it is subdivided under the terms of the ordinances. Ordinances provide that a plat must be made and recorded after its approval by the City authorities; streets meeting the standards of the State Highway Department have to be installed; and likewise sidewalks, curbs, gutters and sewers.

"Because of the fact that sales will be generally restricted to the faculty, staff and employees of Hampton Institute, it can be seen that all of the lots will not be readily sold, but some of them may possibly be held by Hampton Institute for several years.

"Having in mind the tax exemption on property owned by educational institutions and used for its purpose, I would like to know if the property is sub-divided and placed on sale to the specified parties as above set forth, will it be subject to local real estate tax or will each lot continue to have the tax exemption until sold. I would appreciate it very much if you would let me have your opinion on this as promptly as reasonably convenient."

In my opinion the real estate in question will not be exempt from taxation from the time it has been subdivided and placed for sale in the manner stated in your letter. Furthermore, it would seem that under the provisions of Section 183 (d) of the Constitution, the real estate in question is not exempt from taxation from the time that the Institute ceased to make use of the property for educational purposes even though it may not be at that time actually subdivided into lots.

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**TAXATION—Real Estate Tax—May Not Be Prepaid Before First Day of Tax Year.**  
(79)

September 24, 1958.

HONORABLE ROBERT C. FITZGERALD  
Attorney for the Commonwealth  
Fairfax County

I acknowledge receipt of your letter of September 22, 1958, in which you state in part as follows:

"Request has been made in this County for permission to pay the real estate tax on a piece of property for the year 1959 prior to the end of the 1958 calendar year. I believe the request arises from a citizen who wishes to get a Federal tax advantage therefrom."

You have enclosed a copy of a letter dated September 18th from Honorable C. H. Morrisett, State Tax Commissioner, to the Director of Finance of Fairfax County in which he expresses the opinion that there is no statute authorizing pre-payment of real estate taxes during a current year for the ensuing year. Mr. Morrisett refers to Code Section 58-966 and states that it has never been construed as authorizing such pre-payments.

You have requested my opinion with respect to this question.

I feel that I must agree with the conclusion reached by the State Tax Commissioner. Under the provisions of Section 58-806 of the Code, the Commissioner of the Revenue is not compelled to deliver a copy of the land book for any year prior to September 1. The rate of tax is not available to the Commissioner of the Revenue until the year for which it is fixed by the governing body of the county under the provisions of Section 58-839 of the Code.

In my opinion, Section 58-966 is designed to permit a taxpayer, after the rate has been fixed by the governing body and the Commissioner of the Revenue has sufficient information to determine correctly the true tax on the real estate, to pay the tax prior to the delivery of the land book to the Treasurer. This Code Section authorizes the payment of taxes that will be shown by the land book and does not, in my opinion, authorize the payment of an estimated tax. This is confirmed by the language of Section 58-966 immediately following the semi-colon, in which the payment of an estimated tax is forbidden, but the filing of a return from which the true tax may be determined is required as a condition precedent to the payment of the tax.

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**TAXATION—Reassessment of Real Estate—Counties Must Reassess Every Six Years—Cannot Extend Period Between General Reassessments to Seven Years. (201)**

February 17, 1959.

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

This is in reply to your letter of February 10, 1959, in which you state the following:

"The last general reassessment of real estate in Washington County took place in 1953. This reassessment was not done with the assistance of the Department of Taxation. Under the provisions of Section 58-780 of the Code of Virginia of 1950, as amended, another general reassessment should be held in this county during the year 1959.

"It seems to be the concensus of the Board of Supervisors that it would be preferable to have the assistance of the Department of Taxation in this reassessment. The Department, however, has advised that, due to their schedule and the lack of sufficient notice, they will be unable to assist during the year of 1959. The Department has advised the Board, however, that they would assist in the reassessment if it could be delayed until 1960.

"At the request of the Board, therefore, I am writing to request your opinion as to whether there is any way in which the general reassessment can be postponed until 1960 in order that the services of the Department of Taxation can be utilized. I have carefully read Section 58-784.2 of the Code and recent opinions of the Attorney General covering both of the Sections herein referred to. It is not clear in my mind under what circumstances the general reassessment can be postponed.

"I shall greatly appreciate your opinion as to whether there is any legal means by which we can postpone our general reassessment until 1960."

I agree that § 58-780 of the Code, when read with § 58-784.2, requires that a general reassessment of real estate should be held in Washington County during the year 1959. I am unable to discover any provision of law by means of which this general reassessment could be postponed until 1960. As you know, the general rule since 1950 is that, in counties containing 21,000 or more population according to the United States Census of 1940, the period between general reassessments cannot exceed six years. I am enclosing copies of opinions rendered by my predecessor in office, the first dated October 19, 1954, to the Commonwealth's Attorney of Lunenburg County, and the second, dated December 23, 1954, to the Commonwealth's Attorney for Russell County, in which this general rule is spelled out. These opinions appear in the Report of the Attorney General, 1954-55, on page 232.

I may say that I have conferred with Honorable C. H. Morrissett, State Tax Commissioner, in regard to your inquiry, and he concurs in this view.

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**TAXATION—Reassessment of Real Property—Values Determined by Board of Assessors. (158)**

December 23, 1958.

HONORABLE WILLIE H. ROUNTREE  
Commissioner of the Revenue

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

"In counties having a General Reassessment of land every six years, which counties avail themselves of appraisers furnished by the State Department of Taxation, but paid for by the counties—in the final analysis, does the Local Board of Assessors appointed by the Circuit Court have the final decision to make as to the appraised values, or do the Appraisers make the final decision?"

Section 58-794 of the Code provides that:

"The Department of Taxation, upon the request of the governing body of any county, or city, or town shall render *advisory* aid and assistance in making any general reassessment of the real estate in such county, or city, or town." (Italics supplied.)

Under the provisions of § 58-787 the general reassessments of real estate are made by assessors appointed by the circuit court of the county, or the judge thereof in vacation.

Since the services contemplated under § 58-794 are *advisory* only, I am of the opinion that the actual assessed values are those determined by the assessors appointed pursuant to § 58-787, subject, of course, to the power of the local board of equalization.

**TAXATION—Recordation—Contract for Sale and Deed Conveying Identical Real Estate Both Subject to Recordation Tax. (57)**

September 2, 1958.

HONORABLE RUDOLPH L. SHAVER  
Clerk of the Circuit Court of Augusta County

This is in reply to your letter of August 29, 1958, in which you state that on August 27, 1958 you recorded a contract for the sale of a tract of land in your county and charged the recordation fee required by Section 58-58 of the Code. You state that a deed will be presented to your office for recordation covering the same identical property that was involved in the contract recorded on August 27, 1958, and you wish to know whether or not this deed will be subject to the recordation charges under Section 58-58 of the Code.

You are advised that this office has previously held that the two transactions are separate and independent within the scope of Section 58-58 and that the recordation tax must be charged in each instance in accordance with the provisions of said section.

These transactions do not come within the scope of Section 58-60 of the Code.

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**TAXATION—Recordation—Deed from Tenants by Entirety to Husband Alone—Half Interest Passes—Tax Based on Half of Value of Real Estate. (178)**

January 23, 1959.

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

This is in reply to your letter of January 22, 1959, which reads as follows:

"I have presented to me for recordation a deed from a husband and wife who own land as tenants by entirety with the right of survivorship, to the husband and I would appreciate your opinion as to how I should arrive at a recordation tax on such a deed."

I am enclosing copies of opinions rendered by this office to the Clerks of the Corporation Court of Charlottesville and the City of Martinsville. These opinions are published in the Reports of the Attorney General for 1952-53, page 242, and 1956-57, page 261.

In light of these opinions, since a one-half interest in the property passes under the deed, the recordation tax under Section 58-54 of the Code should be based upon one-half the value of the property as a whole.

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**TAXATION—Recordation—Deed Vesting Title After Change of Name of Corporation—No Change in Stock Structure—Tax Is Fifty Cents. (153)**

December 18, 1958.

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

This is in reply to your letter of December 17, 1958, in which you state that a deed has been tendered for recordation from the Dick King Motor Company, Inc.

You state that the Dick King Buick Co., Inc., recently amended its charter so as to change the name of the corporation to Dick King Motor Co., Inc.

This deed, it would seem, is for the purpose of vesting in the corporation under its new name the title to the property it owns.

Since you state that there was no change in the stock structure of the corporation, you have requested my opinion as to the proper recordation tax in a situation such as this.

Your attention is directed to the third paragraph of Section 58-54 of the Code, in which it is provided that in such instances the recordation tax shall be 50 cents.

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**TAXATION—Recordation—Local—Clerks May Receive Compensation for Collection Where Authorized by Local Government. (285)**

April 28, 1959.

HONORABLE E. E. FRIEND  
Clerk of the Circuit Court of  
Pittsylvania County

This is in reply to your letter of April 24, 1959, which reads as follows:

"A question has arisen whether the clerks of this State are entitled to commission on County tax collected by the Clerk on deeds admitted to record in their respective offices.

"I understand all the Clerks of this State are collecting commissions on tax in the counties that have imposed a County tax. If possible, I will appreciate reply to this before the first of the month."

I am enclosing copy of an opinion issued by this office on April 29, 1958, and published in the Reports of Attorney General for 1957-58, at page 41. This opinion, I believe, answers the question presented by you. This opinion points out the fact that in order for a clerk to receive compensation for the collection of the local recordation tax, it is necessary that the governing body of the locality by resolution authorize such compensation.

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**TAXATION—Recordation—Wills Admitted to Probate—Counties Not Authorized by § 58-65.1 to Impose Local Tax. (208)**

February 24, 1959.

HONORABLE JAMES M. SETTLE, *Clerk*  
Circuit Court of Rappahannock County

This is in reply to your letter of February 20, 1959, which reads as follows:

"For your information, I enclose herewith a copy of an ordinance adopted by the Board of Supervisors of Rappahannock County which became effective July 2, 1958.

"A question has now arisen as to whether or not, under this ordinance, the Clerk can lawfully collect county tax for the county on Wills presented in his office for probate. I have been collecting such tax on both deeds and wills since July 2, 1958. I have taken the position that a will is a taxable instrument under Sec. 58-65.1 of the 1950 Code of Virginia as amended."

In my opinion Section 58-65.1 of the Code does not authorize a county or a city to impose a recordation tax upon wills. It will be noted by reference to this section that it states: "In addition to the State recordation tax imposed by this article 3 \* \* \*" the localities may impose a local recordation tax. Article 3 referred to relates to deeds, mortgages, deeds of trust and contracts generally but does not relate to Wills and Administrations. The provisions with respect to State tax on Wills and Administrations are found in Article 4, Chapter 3 of Title 58.

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**TAXATION—Shenandoah National Park—Property of Concessionaire May Be Assessed by County. (232)**

March 12, 1959.

HONORABLE J. T. CAMPBELL  
Commissioner of Revenue of  
Page County

This is in reply to your letter of March 10, 1959, which reads as follows:

"The Virginia Skyline Co., Inc., operates the concessions along the Skyline Drive, within the Shenandoah National Park. They erect their own buildings and own the equipment in the buildings. They pay State licenses on their retail sales, tobacco, slot machines and hotels at their various locations along the Skyline Drive and a Wholesale Distributors license on their rented warehouse here in Luray Corporation.

"Page County has never assessed the Virginia Skyline Co., Inc., for any of the buildings they have erected within the Shenandoah National Park, for any of the equipment they own in the buildings or any of the motor vehicles which they use in connection with their rented headquarters here in Luray Corporation and their places of business along Skyline Drive.

"Please advise this office if there is any reason why Page County should not assess the Virginia Skyline Co., Inc., for their buildings and/or equipment and motor vehicles located in Page County."

The jurisdiction of the Commonwealth of Virginia with respect to the area included in the Shenandoah National Park is set out in Section 7-22 of the Code. Subsection (f) of this section reads as follows:

"The Commonwealth shall have jurisdiction and power to levy non-discriminatory taxes on private individuals, associations and corporations, their franchise and *properties*, on such lands, and on their businesses conducted thereon." (*Italics supplied.*)

In my opinion the powers reserved to the Commonwealth in this code section extend to counties and, therefore, I am of the opinion that the county has the right to assess for taxation purposes the property of the corporation in question situated within the Shenandoah National Park area.

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**TREASURERS—Bonds of Treasurer and Deputies—Selection of Sureties—Treasurer Has Right to Select—May Agree to Be Covered Under Blanket Bond Plan Proposed by County Manager. (350)**

June 17, 1959.

HONORABLE COLIN C. MACPHERSON  
Treasurer of Arlington County

This is in reply to your letter of June 15, 1959, which reads, in part, as follows:

"It has been customary here in Arlington for the Treasurer to act in the placement of surety bonds on his employees, and in the placement of robbery and burglary insurance policies to protect him from loss of money and securities while in his possession. Following a study of bond and insurance needs and current insurance policies now written separately for various departments of the County Government and the Constitutional Officers, the County Manager has proposed a change in the manner of obtaining this protection in order to effect a saving in premiums.

"The proposal provides for the cancelling of all non-statutory surety bonds and all present burglary, robbery or money and securities policies throughout the County Government, including those mentioned above that were authorized to be written by the Treasurer. In their place, it is planned to have written, effective July 1, 1959, a blanket surety bond on all non-statutory employees of the County Board and of the Constitutional Officers, and one blanket Money and Securities Broad Form policy, covering all locations of exposure, regardless of whether the functions performed there are by Constitutional Officers or by other departments of the County Government. Under this arrangement (with the cooperation of the various departments), the amount and kind of insurance to be written, the selection of bidders and the award of bids would henceforth be handled by the County's Purchasing Division, under the jurisdiction of the County Manager. The name of the insured under the new coverage would be the County of Arlington, Virginia, with the Constitutional Officers being named individually as insured."

You request my opinion as to the legality of the proposed arrangement, and you further inquire as to your personal liability in the event of loss due to such arrangement. You refer to Section 58-918 of the Code and state that this section seems to indicate that the matter of surety bonds on your deputies is solely within the discretion of the treasurer.

In my opinion, the proposed arrangement does not violate any statutory provisions, provided the bond covering the treasurer is executed in compliance with Sections 15-478 and 15-480 of the Code. The Treasurer has the right to select his surety upon his official bonds subject, of course, to their being deemed sufficient by the court, judge, or clerk before whom he qualified. I enclose copies of two opinions on this question which are published in the Reports of the Attorney General for 1935-36, at pages 21 and 22, and 1955-56, at page 220. I am in accord with these opinions.

With respect to bonds under Section 58-918 of the Code upon the deputies of a treasurer, I am of the opinion that the treasurer would have the same right to select the surety upon these bonds as he has in connection with the bond upon himself executed under Section 15-480. This bond is given by a deputy for the benefit of the treasurer and the treasurer is the person who passes upon its sufficiency.

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**TREASURERS—Overage in Tax Accounts—Should Be Credited to Account as Safeguard for Future. (127)**

November 7, 1958.

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

This is in reply to your letter of November 5, 1958, in which you state that, upon an audit of the funds and accounts of your office, it was discovered that there is an overage in the tax accounts in the sum of \$98.76. You request my opinion as to whether or not the City of Buena Vista may legally pay you this overage.

While I can find no statute or prior opinion of this office on the subject, I am of the opinion that this overage should be credited to an overage or shortage account as a protection and safeguard for you and your office for any errors which might occur in the future.

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**VIRGINIA CIVIL WAR COMISSION—Contracts—May Contract with Members for Professional Services. (193)**

February 6, 1959.

HONORABLE JAMES J. GEARY, *Executive Director*  
Virginia Civil War Commission

This is in reply to your letter of February 3, 1959, which reads as follows:

"The Virginia Civil War Commission has decided to publish a one-volume commemorative selection of the wartime papers of General R. E. Lee as part of its Centennial program marking the 100th anniversary, 1961-1965, of the War Between the States. This will be a scholarly work, and it is hoped it may lay the foundation for a complete publication of General Lee's lifetime papers later on should public or private funds become available.

"As it has evolved, the project contemplates that a qualified historian would be retained to do the collecting, editing and selecting of Lee papers to be included in the volume. Then, to make for a readable book with a minimum of footnotes and aimed at a relative good sale, a professional writer would be employed to prepare a connective narrative and perhaps an introduction.

"From the beginning the Executive Committee has contemplated that Clifford Dowdey, a professional writer with a number of successful books on the Civil War period, would write the connective narrative. Because Mr. Dowdey is vice chairman of the Commission, and because he would be paid a fee for his professional contribution to the Lee papers volume, a question has arisen of the legality or propriety of his assuming this double role. I would appreciate your looking into this and advising me."

I have examined Chapter 335 of the Acts of 1958, and I do not find any provision therein which would prohibit the Commission from contracting for the services of one of its members for any phase of the project, even though such contract would involve the payment of a fee to such person.

The Act provides that the members shall serve without compensation and, for that reason, the provisions of Section 18-342 of the Code, if it could be considered applicable, would not prohibit such a contract.

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**VIRGINIA MUSEUM OF FINE ARTS—Expenditure of Bequest—Construction of Will of Donor—Balance of Funds May Be Transferred to Building Fund. (287)**

April 29, 1959.

MR. WILLIAM J. RHODES, JR.  
Business Manager and Assistant Secretary  
Virginia Museum of Fine Arts

This is in reply to your letter of April 28, 1959, which reads as follows:

"The Executive Committee of the Board of Trustees of the Virginia Museum of Fine Arts passed the following Motion on 22 April 1959:

"On motion duly made, seconded and passed, approval was given for the transfer of the balance of the Woodson P. Waddy Fund to the Building Fund if legally proper, and further that provided this transfer is accomplished, the Trustees agree to assume full responsibility to properly maintain or improve the Fountains; such expenses to be paid from the Building Fund or the Operating Funds of the Museum. The President requested that Mr. Rhodes report regarding this transfer at the next meeting".

"Also, I forward copies of letters relating to the Woodson P. Waddy Fund, and a copy of the excerpt from the will of Woodson P. Waddy.

"From the information submitted herewith, I request that your office determine if the motion passed by the Executive Committee is legally proper within the terms of the gift to the Museum."

Article Seven of the will of Woodson P. Waddy providing for a gift of \$50,000.00 to the Virginia Museum of Fine Arts is as follows:

"Article Seven. I give and bequeath to the Board of Trustees of the Virginia Museum of Fine Arts, Richmond, Virginia, the sum of \$50,000 in trust, nevertheless, for the express purpose of erecting two marble fountains on either side of the main entrance of the Virginia Museum of Fine Arts facing on the Boulevard. While I desire the material, design and size of these fountains to harmonize and be in keeping with the architectural style and facade of the Virginia Museum of Fine Arts, it is my desire that they be as similar as possible to the fountains now standing on the Mall front of the National Gallery of Art, Washington, D. C.

"I direct that in the execution of this trust that there be placed on each of said fountains either a bronze plaque or an engraved inscription moderately and suitably inscribed in memory of Woodson P. Waddy.

"In the event that this trust should fail or if for any reason the Virginia Museum of Fine Arts through its Board of Trustees should fail to notify the Executors of its acceptance of this trust within the period of one year from the date of probate of my will, then, in that event, I specifically direct that this legacy shall become a part of the residuum of my estate and be administered in accordance with Article Eight of this will."

Assuming that the marble fountains have been erected and compliance has been made of the provision relating to a plaque or suitable inscription, I am of the opinion any balance remaining in the fifty thousand dollar fund may properly be transferred to the Building Fund of the Museum. Article Seven of the will, in my judgment, does not require that the residue of the gift shall be preserved as a maintenance fund. Of course, there is an implied obligation that the fountains will be properly maintained, and the resolution adopted by the Executive Committee is a pledge to fulfill that obligation.

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**VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Compulsory Retirement Age—Not Applicable to Sheriffs and Deputy Treasurers. (176)**

January 22, 1959.

HONORABLE O. B. CHILTON  
Clerk of Circuit Court of  
Lancaster County

This is in reply to your letter of January 21, 1959, in which you ask whether or

not the compulsory provisions of Section 51-111.54 are applicable to the sheriff of your county who is 70 years of age and to a deputy treasurer who is 77 years of age.

Section 51-111.54 applies only to State employees and teachers.

Therefore, I am of the opinion that the officers mentioned in your letter are not affected by this section.

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**VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Counties—Constitutional Officers Cannot Be Required to Withdraw—Locality May Not Discontinue Participation. (209)**

February 24, 1959.

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

I am in receipt of your letter of February 23, 1959, which reads as follows:

"I thank you for your letter advising me concerning constitutional officers under the retirement system entered into by the county. I have a further question and that is, if constitutional officers are not bound to retire at the age of seventy-two can the county discontinue its retirement system as to the constitutional officers who have petitioned to come under it once the system has been adopted."

I am unaware of any statutory provision under which a locality may discontinue participation in the Virginia Supplement Retirement System after it has once become a member under Section 51-111.31 of the Code. Similarly, there is no provision which would authorize the county to require any group covered by such System to withdraw.

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**VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Employees and Constitutional Officers of Cities—Credit for "Prior Service" only for Service Performed Before City Became "Employer" Under Retirement System. (168)**

January 9, 1959.

HONORABLE M. A. FIREBAUGH  
City Treasurer, City of Harrisonburg

This is in reply to your letter of January 8, 1959, which reads as follows:

"It is our understanding that on or about January 1, 1948 the City of Harrisonburg entered into an agreement with the Virginia Retirement System whereby the employees of the above mentioned city, with the exception of the constitutional officers and their employees (who were not eligible by law at that time), would be subject to the provisions and benefits of the Virginia Retirement System. Prior service credit was provided by the City Council and the Virginia Retirement System for all employees who entered the Retirement System on January 1, 1948.

"Furthermore, it is our understanding that the constitutional officers and their employees of the City of Harrisonburg were not eligible to become members of the Virginia Supplement Retirement System until July 1, 1958, at which time they so indicated their desire to become

members. A resolution of the City Council passed at a regular meeting on November 13, 1958 provides that it is the intent and purpose of the City Council to provide prior service credit for the constitutional officers and their employees. A copy of this resolution is enclosed for your information.

"On the basis of the resolution passed by City Council, applications for prior service credit were made to the Virginia Retirement System (which applications were attached to copy of a letter dated November 14, 1958 from Mr. W. A. Woodward, City Manager). These applications for prior service credit were denied as stated in a letter of Mr. Charles Smith, Director of the Virginia Supplemental Retirement System to Mr. W. A. Woodward, City Manager of Harrisonburg, Virginia dated November 17, 1958.

"It is our understanding that constitutional officers and their employees of other counties and cities entering the system on July 1, 1958 were granted prior service credit if their local governing body so indicated by appropriate resolution, and we cannot understand why prior service credit cannot be granted to the Harrisonburg constitutional officers and their employees for their period of service prior to July 1, 1958.

"Please advise if it is the intent and purpose of Section 51-111.31 (b) of the 1950 Code of Virginia as amended to deprive these constitutional officers and their employees of prior service benefits afforded to other employees of the City of Harrisonburg and to other employees of the cities and counties in the State of Virginia.

"Your interpretation of the above mentioned section will be appreciated."

The question presented by you has been discussed with the Director of the Retirement System from time to time and we have felt that the interpretation made by the Board is correct. Subsection (b) of Section 51-111.31 of the Code provides as follows:

"Any person employed by a political subdivision which, on September 1, 1955, was participating in the Retirement System under § 51-111.31 and who was, or thereafter becomes, a member of the Retirement System prior to July one, nineteen hundred fifty-eight, may be credited with service approved by the governing body of his political subdivision *prior to the effective date of the coverage of employees of such political subdivision under § 51-111.31*; provided that this paragraph shall apply only to attorneys for the Commonwealth, treasurers, commissioners of the revenue, clerks of courts, sheriffs, sergeants, and a deputy or assistant, whether elected or appointed, or employee of any such officer."

The phrase "effective date of the coverage of employees" relates to the time when the political subdivision first perfected retirement coverage for its employees which you state was on or about January 1, 1948. The credit for prior service can be only for such service as the employee performed for the political subdivision prior to the date it became an employer under the retirement system. It does not appear that any of the individuals involved were in the service of the city prior to January 1, 1948. The statute does not contemplate that employees may be given credit for prior service performed during the time the locality has been a member of the system, except as provided in this section and Section 51-111.32.

**VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Mandatory Retirement  
—Employees of Corporation Commission—Standards Applicable to All State  
Employees—"Clerk D" Not Excepted. (194)**

February 6, 1959.

HONORABLE H. LESTER HOOKER, *Chairman*  
State Corporation Commission

This is in reply to your letter of January 30, 1959, in which you request my opinion upon the following questions:

"We have an employee in the Clerk's Office, not a Deputy Clerk, but classified as a Clerk D, who is 70. Will this employee have to retire? If this employee does not have to retire, would an employee in the Banking Department who is 70 have to retire?"

Chapter 356 of the Acts of 1958 to which you refer amended Section 51-111.54 of the Code so as to make it mandatory that State employees who are members of the Virginia Supplemental Retirement System and who reach the age of 70 prior to July 1, 1959, shall be retired on July 1, 1959, subject to certain exceptions. The positions to which you refer do not come within any of the exceptions.

With your letter you enclose copy of an opinion rendered by Governor Almond during his tenure of office as Attorney General, which opinion is dated October 22, 1948, and is published in the Reports of Attorney General for 1948-49, at page 221. The opinion to which you refer relates to the question of the validity of any legislation which would vest in the Executive Department of the State Government the power to control the schedule of salaries paid by the State Corporation Commission to its employees out of the funds appropriated by the General Assembly to the Commission for administrative purposes. It is stated in this opinion that the State Corporation Commission is a part of the Judicial Department of the State. This opinion of Attorney General Almond followed the principles laid down in the opinions of former Attorney General Abram P. Staples, which are published in Attorney General Reports of 1940-41, at pages 10 and 131. I am in accord with the views expressed by Attorney General Almond and Attorney General Staples, but I do not believe that these opinions, and the court decisions upon which they are based, are in any way determinative of the questions presented by you.

These opinions involve the separation of powers provided for in Section 39 of the Constitution of Virginia. There is no division of authority between the Executive and Judicial Departments involved in the questions presented by you. The statute under consideration does not grant to the Executive Department of the State government any authority whatsoever with respect to personnel employed by the State Corporation Commission. It is merely a general statute prescribing certain standards which are applicable to all State employees whether in the Judiciary, Executive, or Legislative branch of the State government. I think the General Assembly has the constitutional power to prescribe the standards with respect to the employment and retirement of State employees generally.

I am of the opinion, therefore, that the provisions of Section 51-111.54 of the Code are mandatory upon the State Corporation Commission.

**VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Mandatory Retirement Not Applicable to County Constitutional Officers. (202)**

February 18, 1959.

HONORABLE W. M. McCLENNY  
Commonwealth's Attorney for  
Amherst County

This is in reply to your letter of February 16, 1959, which reads as follows:

"Will you please advise me on the following question:

"If a county enters its employees and its constitutional officers under the Virginia Retirement System as a result of a Petition signed by the constitutional officers, can a constitutional officer, who has obtained the age of seventy-two continue in office for the rest of his unexpired term of four years or must he resign and receive retirement after obtaining seventy-two years of age.

"Also please advise whether such an officer after obtaining seventy-two years of age can be a candidate for the same office for an additional term."

Section 51-111.54 of the Code, which relates to retirement on obtaining seventy years of age, does not apply to employees of the various localities who have been brought into the retirement system. It applies only to State employees and teachers.

The eligibility of a person to be elected to or to hold a constitutional office in a county after reaching seventy years of age is in no way affected by the provisions of the Virginia Supplemental Retirement Act. Any person who has become twenty-one years of age and is eligible to hold or offer for an office in a county never loses his eligibility due to age.

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**VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—State Treasurer May Contract with Banks in Virginia for Storage and Service of Securities Owned by System. (33)**

August 4, 1958.

HONORABLE E. B. PENDLETON, JR.  
Treasurer of Virginia

This is in reply to your letter of August 1, 1958, in which you request my opinion as to whether or not you may contract with a bank or banks located in the City of Richmond to store and service securities owned by the Virginia Supplemental Retirement System. You state that, due to lack of vault space, it is impossible to provide proper protection for these securities at the office of the State Treasurer.

Section 51-111.51 of the Code of Virginia provides as follows:

"The State Treasurer shall be the custodian of the assets of the retirement system. All payments from the accounts thereof shall be made by him on warrants of the Comptroller issued upon vouchers signed by such persons as are designated by the Board. A duly attested copy of a resolution of the Board designating such persons and bearing on its face

the specimen signatures of such persons shall be filed with the Comptroller as his authority for issuing warrants upon such vouchers. No voucher shall be drawn unless it has previously been authorized by resolution of the Board."

Under the provisions of this section, you are the custodian of the assets of the Retirement System. You may take such steps as you deem necessary to protect the securities owned by the Retirement System and, if you do not have adequate vault space in your office, you may contract for such space with a bank or banks located in the Commonwealth of Virginia, and you may also arrange to have these securities serviced by the personnel of the bank. Even though the securities are located in a bank, you will still be the official custodian of them and will be legally responsible for them; therefore, you should take all steps that you deem necessary to safeguard these securities.



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