OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1960 to June 30, 1961

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1961
Letter of Transmittal

July 5, 1961

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

My dear Governor Almond:

In accordance with Section 2-93 of the Code of Virginia, I herewith transmit to you the Annual Report of the Attorney General. This report covers the period beginning July 1, 1960 through June 30, 1961, and includes opinions rendered by the Honorable A. S. Harrison, Jr., Attorney General from July 1, 1960 through April 30, 1961.

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 statement of cases now pending or disposed of since the last report issued by this office. Due to the increasing volume of tax collection cases on behalf of the Virginia Employment Commission and habeas corpus proceedings, such cases have not been stated individually. A complete record of these cases is available in this office.

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

Respectfully submitted,

FREDERICK T. GRAY
Attorney General
## PERSONNEL OF THE OFFICE
(Post Office Address, Richmond)

<table>
<thead>
<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
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<tbody>
<tr>
<td>A. S. Harrison, Jr.</td>
<td>Brunswick County</td>
<td>Attorney General</td>
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<tr>
<td>*Frederick T. Gray</td>
<td>Chesterfield County</td>
<td>Attorney General</td>
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<tr>
<td>Kenneth C. Patty</td>
<td>Tazewell County</td>
<td>First Assistant</td>
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<tr>
<td>D. Gardiner Tyler</td>
<td>Charles City County</td>
<td>Assistant</td>
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<tr>
<td>Francis C. Lee</td>
<td>Chesterfield County</td>
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<td>Robert D. McIlwaine, III</td>
<td>Petersburg City</td>
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<td>Reno S. Harp, III</td>
<td>Richmond City</td>
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<td>M. Ray Johnston</td>
<td>Fauquier County</td>
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<td>M. Harris Parker</td>
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<td>Frank V. Emmerson</td>
<td>Surry County</td>
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<td>William P. Bagwell</td>
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<td>A. R. Woodroof</td>
<td>Amherst County</td>
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<tr>
<td>Marie L. Waddill</td>
<td>Richmond City</td>
<td>Secretary</td>
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<td>Eleanor W. Tilley</td>
<td>Smyth County</td>
<td>Secretary</td>
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<tr>
<td>Mabel G. Hurt</td>
<td>Tazewell County</td>
<td>Secretary</td>
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<td>Madge V. Howell</td>
<td>Richmond City</td>
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<td>Agnes Reid Pickral</td>
<td>Pittsylvania County</td>
<td>Secretary</td>
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<td>Mary Kathryn Church</td>
<td>Richmond City</td>
<td>Secretary</td>
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<tr>
<td>Margaret E. Bennett</td>
<td>Colonial Heights</td>
<td>File Clerk</td>
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<tr>
<td>Helen B. Bowles</td>
<td>Goochland County</td>
<td>Receptionist</td>
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</tbody>
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*Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of A. S. Harrison, Jr., who resigned April 30, 1961.
ATTORNEYS GENERAL OF VIRGINIA
From 1776 to 1961

Edmund Randolph .................................................. 1776-1786
James Innes ................................................................ 1786-1796
Robert Brooke .......................................................... 1796-1799
Philip Norborne Nicholas ............................................. 1799-1819
James Robertson ......................................................... 1819-1834
Sidney S. Baxter ........................................................ 1834-1852
Willis P. Bocock ...................................................... 1852-1857
John Randolph Tucker ............................................... 1857-1865
Thomas Russell Bowden ............................................. 1865-1869
Charles Whittlesey (military appointee) ......................... 1869-1870
James C. Taylor ........................................................ 1870-1874
Raleigh T. Daniel ..................................................... 1874-1877
James G. Field .......................................................... 1877-1882
Frank S. Blair ............................................................. 1882-1886
Rufus A. Ayers ........................................................... 1886-1890
R. Taylor Scott .......................................................... 1890-1897
R. Carter Scott .......................................................... 1897-1898
A. J. Montague ........................................................... 1898-1902
William A. Anderson ................................................ 1902-1910
Samuel W. Williams ................................................... 1910-1914
John Garland Pollard ................................................... 1914-1918
*J. D. 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 ...................................................... 1958-1961
Frederick T. Gray ...................................................... 1961-

*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.

Hon. Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of Hon. A. S. Harrison, Jr., who resigned April 30, 1961.
CASES DECIDED IN THE SUPREME COURT OF APPEALS


McLane, Edward B. v. Commonwealth of Virginia. From the Corporation Court of the City of Lynchburg. Murder. Reversed.


Morris, John Linwood v. W. Frank Smyth, Jr., Supt., Virginia State Penitentiary. From Hustings Court, City of Richmond, Part II. Remanded with directions that a hearing be held as to the truth of the allegations in the petition.


Randolph, Raymond B., Jr., v. Commonwealth of Virginia. From Hustings Court, City of Richmond. Violation of Virginia anti-trespass statute. Affirmed.


CASES PENDING IN SUPREME COURT OF APPEALS


Correll, Leona v. Commonwealth of Virginia. Writ of error from Circuit Court of the City of Radford upon a conviction of the so-called “anti-picketing statute.” Pending.

Crowther, J. T. and Mary E. v. Commonwealth of Virginia, Department of Welfare and Institutions. From Circuit Court of Botetourt County. Suit for specific performance of contract.

Dearhart, Hayward Tempy v. Commonwealth of Virginia. From Hustings Court of the City of Richmond, Part II. Armed robbery. Pending.

Giordano, Angelo v. Commonwealth of Virginia. Writ of error from Circuit Court of the City of Radford upon a conviction of the so-called “anti-picketing statute” Pending.
REPORT OF THE ATTORNEY GENERAL

Hanbury, Joseph V. v. Commonwealth of Virginia. From the Corporation Court of the City of Lynchburg. Forgery and uttering (21 cases). Pending.

Snyder, John F., Jr. v. Commonwealth of Virginia. From Hustings Court of the City of Roanoke. Larceny. Pending.

Spence, Josephine v. Commonwealth of Virginia. Writ of error from Circuit Court of the City of Radford upon a conviction of the so-called "anti-picketing statute." Pending.

Tasker, Ewell Grant v. Commonwealth of Virginia. From Hustings Court of City of Roanoke. Larceny. Pending.


Waxman, Martin L., v. Commonwealth of Virginia. Writ of error from Circuit Court of the City of Radford upon a conviction of the so-called "anti-picketing statute." Pending.

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

Boynton, Bruce v. Commonwealth of Virginia. From the Supreme Court of Appeals of Virginia. Violation of Virginia anti-trespass statute. Reversed.


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


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


Yaeger, Charles F. v. The Director of Department of Welfare and Institutions, et al. Pending.

CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


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


Commonwealth of Virginia, ex rel. State Board of Medical Examiners, v. C. E. Wright, Jr. Court of Law and Chancery, City of Norfolk. Bill for injunction to restrain defendant from practicing chiropody. Pending.


Grove, Willis Lee v. State Department of Taxation, Commonwealth of Virginia. Circuit Court, City of Richmond. Suit involving tobacco tax. Case decided in favor of Tax Department.


New Mexico Seed Farms, Inc. v. Commissioner of Agriculture and Immigration. Circuit Court, City of Richmond. Appealed from decision of Commissioner refusing to amend or repeal rules and regulations establishing sorghum albinum as a noxious weed seed. Pending.


Richmond Stationery Company, Inc. v. Virginia Board of Purchases and Supply. Circuit Court, City of Richmond, Appeal from decision of contract award by Boards. Pending.


Sands, Marks & Sands v. E. B. Pendleton, Treasurer of Virginia, and Mid-Union Indemnity Company. Circuit Court, City of Richmond. Suit to subject statutory deposit to claims of Virginia creditors. Pending.


Times Film Corporation v. Division of Motion Picture Censorship. Circuit Court, City of Richmond. Suit attacking the constitutionality of the Motion Picture Censorship Law.

Tucker, Grafton, Committee, v. Mary Ola Bateman, et al.—Commonwealth of Virginia (Department of Mental Hygiene and Hospitals). Circuit Court, City of Lynchburg. Claim for maintenance of incompetent, etc. Pending.

Walton v. Virginia Real Estate Commission. Law and Equity Court, City of Richmond. Revocation of license. License revoked.
REPORT OF THE ATTORNEY GENERAL


HABEAS CORPUS CASES

A total of 225 habeas corpus proceedings were handled during the past fiscal year. Records are on file in the office of the Attorney General.

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

Bernhardt, Bryce William v. Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal from an action of the Commissioner suspending operator's license and registration privileges under Section 46.1-167.4. Petition dismissed.

Blackburn, Amos v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Gloucester County. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Pending.

Brewster, Princess Lee v. Commissioner of Motor Vehicles, Circuit Court of Henry County. Appeal from an action of the Commissioner revoking operator's license and registration privileges under Section 46.1-430. Action of the Commissioner affirmed.

Burrows, Beverly Joleson v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Hanover County. Appeal from an action of the Commissioner suspending operator's license and registration privileges under Section 46.1-449. Pending.


Commonwealth of Virginia, ex rel C. H. Lamb, Commissioner, Division of Motor Vehicles v. Teagle Transportation Corporation, Circuit Court of the City of Richmond. Civil action brought by Commissioner for collection of taxes in amount of $4,249.35 imposed by Sections 46.1-41 and 46.1-154. Judgment obtained.


Crumpacker, Sam Allen v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Botetourt County. Appeal from an action of the Commissioner revoking operator's license under Section 46.1-420. Action of the Commissioner sustained.

Dietrich, Thomas Edward v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Hanover County. Appeal from an action of the Commissioner suspending operator's license under Section 46.1-430. Action of the Commissioner affirmed.

Farmer, Richard Harrington v. Chester H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Princess Anne County. Appeal from an action of the Commissioner revoking operator's license and suspending registration under Section 46.1-167.2. Action of the Commissioner sustained.

Gills, George William and Clara Stone v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal from an action of the Commissioner revoking operator's licenses and suspending registration privileges under Section 46.1-167.2. Pending.

Hale, Grover Lee v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Pittsylvania County. Appeal from an action of the Commissioner revoking
REPORT OF THE ATTORNEY GENERAL

operator's license under Section 46.1-417 and suspending registration under Section 46.1-418. Pending.

Hester, Clarence Albert v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Mecklenburg County. Appeal from an action of the Commissioner suspending operator's license under Section 46.1-449. Pending.

Ingle, John West v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Corporation Court of the City of Bristol. Appeal from an action of the Commissioner suspending operator's license and registration under Section 46.1-449. Suspension withdrawn and case dismissed.

Ingle, John West v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Corporation Court of the City of Bristol. Appeal from an action of the Commissioner suspending operator's license and registration under Section 46.1-449. Pending.

Leech, Howard Gilmore v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Rockbridge County. Appeal from an action of the Commissioner revoking operator's license under Section 46.1-430. Revocation period expired. Operator required to furnish the Commissioner medical statements in future.


Meadows, Aubrey Jefferson v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal from an action of the Commissioner suspending operator's license and registration under Section 46.1-449. Pending.

Morris, Malcolm Ray, Peggy B. Johnson, Elwood Herring v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Augusta County. Appeal from an action of the Commissioner revoking operator's licenses and suspending registration privileges under Section 46.1-437. Pending.

Morris, Marvin McMillian v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Lunenburg County. Appeal from an action of the Commissioner revoking operator's license for a period of three years under Section 46.1-421. Pending.

Mosley, Daniel v. C. H. Lamb, Commissioner, Division of Motor Vehicles, and G. T. Riggin, Director, Bureau of Safety Responsibility, Corporation Court of the City of Lynchburg. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Dismissed.

Nunnally, Robert E. v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Chesterfield County. Appeal from an action of the Commissioner revoking operator's license under Section 46.1-419. Pending.

Peatre, William V., Jr., v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Hustings Court of the City of Portsmouth. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Action of the Commissioner affirmed.

Roy, Levi v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Henry County. Appeal from an action of the Commissioner suspending operator's license and registration privileges under Section 46.1-167.4. Pending.

Scioscia, Michael James v. Chester H. Lamb, Commissioner of the Division of Motor Vehicles, Hustings Court, Part II, City of Richmond. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Action of the Commissioner affirmed.

Sheets, Hugh Samuel v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Tazewell County. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Pending.

Sherwood, Frank M. and Helen Langan v. Commissioner of Motor Vehicles, Circuit Court of Fairfax County. Appeal from an action of the Commissioner suspending operating and registration privileges under Sections 46.1-442 and 46.1-446. Pending.

Tucker, Charles Knighton v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Alleghany County. Appeal from an action of the Commissioner
suspending operator's license under Section 46.1-430. Pending.

Tunstall, William Elden v. Chester H. Lamb, Commissioner, Division of Motor Vehicles, Hustings Court, Part II, City of Richmond. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Action of the Commissioner affirmed.

Wallingsford, Emery David v. Commissioner of the Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal from an action of the Commissioner suspending operator's license and registration under Section 46.1-449. 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


Lecomple, Cynthia E. v. Unemployment Compensation Commission of Virginia and Tidewater Automobile Association of Virginia, Inc. Hustings Court of the City of Portsmouth. Pending.


Virginia Employment Commission v. G. W. Adkins, and 265 other similar suits for collection of unemployment compensation taxes. Circuit Court, City of Richmond. Some contested, some were not.


Virginia Employment Commission v. L. Fornash, Jr. Circuit Court, City of Richmond. Injunction issued.


REPORT OF THE ATTORNEY GENERAL

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

July 6, 1960
July 20, 1960
July 21, 1960
August 12, 1960
September 15, 1960
October 7, 1960
October 18, 1960
January 4, 1961
January 20, 1961
January 30, 1961
February 3, 1961
February 24, 1961
February 24, 1961
April 10, 1961
April 27, 1961
May 26, 1961
June 12, 1961

Wayne Hiatt
Charles Lawrence Nassau
Robert Lee Fulton
Irene Maggard Harris
Freddie George Jackson
Harry A. Cawley, Sr.
Calvin Crisco
William Edward Warren
Lonnie Edwards
William Sexton
Dewey D. Anderson
Phil Jamison
J. E. Fagetti
Jack Lee Lawson
Michael Daughn
Jack Richard Boles
James A. Parks
OPINIONS

ACCOUNTANTS—ADVERTISING—No violation for Uncertified Accountant to List Name in Telephone Directory as Being Member of National Society. (367)

June 6, 1961

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

This will acknowledge receipt of your letter of June 2, in which you state that under the heading "Bookkeeping Service" in the classified section of a telephone directory in one of the cities in this State there are listings as follows:

"A"
"Member National Society—Public Accountants"

"B"
"Member—National Society of Public Accountants—The National Association of Tax Accountants"

"C"
"Member—National Society Public Accountants"

The requirements necessary to become a member of this Society are not stated, but apparently it is not necessary for a member to be either a certified public accountant or a registered public accountant.

Section 54-100 of the Code contains this language:

"* * * Any person not registered as a public accountant by the Board, who shall assume to practice as a public accountant either by the use of the words 'public accountant' on his door or stationery, or by signing in the capacity of a public accountant a certificate in writing in reference to any financial statement, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both, in the discretion of the court or jury; provided, however, that nothing contained in this chapter shall prohibit any person from engaging in any accountancy work for one or more persons so long as such person does not hold himself out to the public as a certified public accountant, public accountant, or accountant or auditor, offering his or her services to all those who may choose to apply; * * *."

The portion of the quoted language down to the first "provided," it will be noted, provides that any person who is not a registered public accountant who shall assume to practice as a public accountant either by the use of the words "public accountant" on his door or stationery, shall be guilty of a misdemeanor. In the cases presented neither of these violations has occurred.

The language of the quotation contained in the proviso does not, in my opinion, apply since the phrase "hold himself out to the public" must be read and considered in light of the two methods by which he is prohibited from assuming to practice as a public accountant, namely, "by the use of the words 'public accountant' " on his door or stationery.

Inasmuch as the statute under consideration is penal in nature, its terms must be construed strictly. I am of the opinion, therefore, that under a strict interpretation of the statute there is no violation on account of the listing in the telephone directory.
ACCOUNTANTS—Regulation—Extent to Which Legislature May Limit Practice or Require Licensure. (150)

HONORABLE EDWARD E. LANE
Member House of Delegates

This is to acknowledge receipt of your letter of September 30, 1960, in which you state that the Virginia Advisory Legislative Council is making a study as to the advisability of adopting additional regulatory legislation concerning the profession of accountancy. You ask my opinion as to the following questions, which will be answered seriatim.

"a. Whether or not the practice of accounting and bookkeeping can be regulated at all in the State of Virginia."

There is no question that the practice of accountancy can be regulated. Legislation providing for the certification of accountants exists in most jurisdictions, and whenever challenged upon the basis of constitutionality, such attack has been ejected by the courts. (70 ALR 2d, page 436). For many years the State has regulated certified public accountants. Sections 54-84 through 54-102, Code of Virginia.

"b. The bounds or limits within which regulation might be enacted."

While there appears to be no constitutional objection to a statute which (1) permits only persons meeting certain specifications to be classified as "certified public accountants" or "public accountants" and (2) prohibits those not so qualified from holding themselves out as certified public accountants or public accountants, there is substantial decisional authority to the effect that statutes which purport to prohibit non-certified persons from practicing accountancy are invalid.

Legislation prohibiting the practice by non-certified accountants has been disapproved in many jurisdictions. In 70 A.L.R. (2d), on page 447, the following cases are listed where the courts have disapproved such legislation: Heller v. Abess (1938), 134 Fla. 610, 184 So. 122; Florida Accountants Asso. v. Dandelake (1957, Fla.), 98 So. 2d 323, 70 A.L.R. 2d 425; Frasier v. Shelton (1926), 320 Ill., 253, 150 N. E. 696, 43 A.L.R. 1086; State v. De Verges (1923), 153 La. 349, 95 So. 805, 27 A.L.R. 1526; Davis v. Sexton (1925); 211 App. Div. 233, 207 NYS 377; State ex rel. Short v. Riedell (1924), 109 Okla. 35, 233 P. 864, 42 A.L.R. 765; Campbell v. McIntyre (1932), 165 Tenn. 47, 52 SW 2d 102, and Henry v. State (1924), 97 Tex. Crim. 67, 260 S.W. 190.

In the recent case of Florida Accountants Asso. v. Dandelake (1957), 98 So. 2d 323, the Court stated:

"We agree with the Oklahoma court that to prohibit non-certified accountants in this state from doing routine accounting work in their own offices, rather than in that of an 'employer' and to require them to designate themselves as 'bookkeepers' rather than as accountants 'is in conflict with the spirit and express provision of the Constitution and void, in this, that it abridges the right of private property and infringes upon the right of contract in matters purely of private concern bearing no perceptible relation to the general or public welfare, and thereby tends to create a monopoly in the profession of accountancy for the benefit of certified accountants, and denies to uncertified accountants the equal protection of the laws and the enjoyment of the gains of their own industry.' State ex rel. Short v. Riedell, supra 233 P. 864, 42 A.L.R. 765.

"So long as the defendants do not use the statutory title of 'certified public accountant' or 'public accountant' or any other designation that might mislead the public into believing that they hold a certificate from the State Board—for example, 'licensed accountant,' 'registered accountant',
'certified accountant,' 'enrolled accountant' might create such a false impression—we think they have a right to work at their chosen profession and to call themselves 'accountants' rather than 'bookkeepers.'"

I am inclined to think that the Virginia Court of Appeals would strike down any statute which would prohibit the practice of accountancy and bookkeeping in view of the position that Court has taken in the following cases: Moore v. Sutton; 185 Va. 481 (declaring the Photographic Examiners Act unconstitutional); Joyner v. Central Motor Company, 192 Va. 927 (in which a section of the Motor Vehicle Dealers Act was declared unconstitutional), and Chappell v. Commonwealth, 197 Va. 406, (in which the Dry Cleaners Act was declared unconstitutional).

"c. Your opinion with regard to a bill which was introduced in the General Assembly at the last session but not enacted into law. A copy is enclosed. (House Bill 25)."

The bill in question purports to amend the Code of Virginia by adding, in Title 54 thereof, a new Chapter numbered 5.1 (consisting of Sections 54-102.1 through 54-102.13) relating to the registration and licensing of public accountants by the State Board of Accountancy. In furtherance of this objective, the bill undertakes to repeal Section 54-90 of the Virginia Code which currently provides for the registration of public accountants. Since various other provisions of Chapter 5 of Title 54 also refer to public accountants (see, Sections 54-91 et seq.), it would appear advisable to amend these additional provisions to eliminate possible conflicts between existing and proposed legislation.

In addition, I would call your attention to the language of Section 54-102.11(a) of the bill under discussion, in which the public practice of accountancy is defined. I do not believe it is entirely clear from the existing language whether the various provisions of this statute are to be read separately or cumulatively in determining the scope of the phrase "public practice of accountancy." Since it is apparently the purpose of the legislation in question to prohibit the public practice of accountancy by anyone who is not registered as a public accountant by the State Board of Accountancy, that provision of the bill defining the conduct sought to be prescribed should be clarified.

ACKNOWLEDGMENTS—Validity—Armed forces. (71)

August 22, 1960

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

This is in reply to your letter of August 19, in which you request my opinion as to the validity of an acknowledgment taken under the provisions of Section 55-115 of the Code of Virginia. The acknowledgment is as follows:

"First Quartermaster Company
APO 1, N. Y. C., N. Y. to -wit:

"I, Orris C. Whitford, a Commissioned Officer in U. S. Army, do hereby certify that James Holdren, a Corporal in U. S. Army whose name is signed to the foregoing deed dated October 15, 1946, has personally appeared before me at Regensburg Germany aforesaid and acknowledged the same.

"Given under my hand this 9th day of Nov. 1946.

Orris C. Whitford
Capt. Inf. 01290860."

This code section provides that acknowledgments of persons who are in active service of the armed forces of the United States shall be sufficient for purposes of recordation if substantially in the form prescribed by this section. The acknowledgment appears to meet this requirement and, in my judgment, is valid for the purpose of recordation.
HONORABLE E. G. SHAFFER
Commonwealth's Attorney for Wythe County

This will acknowledge receipt of your letter of March 7, relating to the Smyth-Wythe Joint Airport Commission which was established by the political subdivisions of Smyth and Wythe counties and the towns of Rural Retreat, Marion and Wytheville. The Commission was established pursuant to the authority of § 5-24.1 of the Code under an agreement dated June 27, 1958. You enclosed with your letter a copy of the agreement and also a copy of a Project Application (For Federal Aid for Development of Public Airports). This application is on a form prepared by the Federal Aviation Agency of the United States and has been executed by the Commission. The application is a request to the Federal Aviation Agency for a grant of federal funds pursuant to the Federal Airport Act and the regulations issued thereunder.

You have directed attention to paragraph 7 of the Joint Agreement where provision is made for the withdrawal of any political subdivision after giving one year's notice to the other contracting units, but this provision is not, in my judgment, of particular importance in answering the questions that you have presented.

With respect to the Project Application, you state:

"You will notice on page 2 there is a provision with reference to the sponsor having legal power and authority to carry out the project. On page 4, paragraph 1, the sponsor is to make an assurance that the same will remain in force and effect throughout the useful life of the facilities but in no event to exceed twenty years, which in effect means that funds will be provided for the operation of the airport in the future.

"In addition to the Project Application continuing with page 8 thereof, the Federal Aviation Agency requests that the Project Application be co-sponsored and signed as co-sponsor by the various counties and towns, and in addition thereto that the attorneys for the various governmental agencies sign under the opinion of sponsor's attorney as set forth on page 8.

"I have advised the Board of Supervisors for Wythe County that in my opinion they do not have the legal authority to co-sponsor the Project Application.

"The grounds of my opinion are as follows:

"(1) That Section 5-24.1 of the Code of Virginia being one of the sections under which this commission was created provides that Where such a Board or Body is created, . . . "all proceedings . . . shall be in its name."

"(2) For the reasons set forth in an opinion of the Attorney General dated March 7, 1957, to the Honorable Felix E. Edmunds and contained on page 9 of the opinions of the Attorney General from July 1, 1956, to June 30, 1957, wherein Section 5-35 of the Code of Virginia and Section 115e of the Constitution is discussed.

"(3) In addition to the foregoing, I do not consider it proper for a person in the capacity of Commonwealth's Attorney to be called upon to execute such a certificate of opinion as contained on Page 8 of the Project Application.

"It would be appreciated if you would advise me if I am in error."

With respect to the first paragraph of the portion of your letter which I have quoted, I do not construe paragraph 1 on page 4 of the Application as creating an obligation upon any of the political subdivisions, in the event they sign the Application as co-sponsors, to appropriate funds out of current or future general revenues for
the purpose of maintaining and operating the airport facility. I am unable to find that such an obligation is incurred under any of the provisions of the Application. The assurances contained in Part III of the Application relate generally to the method and duration of operation. These assurances, as I construe them, pertain to certain standards required to be enforced by airport facilities obtaining grants from the Federal Aviation Agency.

I assume that the Federal Aviation Agency requires the several political subdivisions to join in the application because the Commission is a creature of these political units. In my opinion such action by the counties and towns would not obligate any of them to any greater extent than the obligations assumed by such participating governmental units in the contract executed on June 27, 1958.

The financial commitments of the several counties and towns are set forth in paragraph 9 of the contract, which reads as follows:

"The Commission shall prepare annually and submit to the parties hereto by March 1st a proposed budget showing the estimated revenues it may reasonably expect to receive for such year, and its estimated expenses for all purposes for such period. After approval of such budget by the parties hereto, the Commission shall be limited in its expenditures for such year to the estimated expenses shown therein; and shall not commit the parties hereto beyond appropriations actually made. All disbursements by the Commission shall be made by checks drawn by the Treasurer and approved by the Chairman, both of whom shall be bonded. The Commission shall keep proper records of its operations, transactions and meetings, which records shall be open to inspection at all times by the parties hereto. It shall make a financial and factual progress report on March 1st of each year to each of the parties hereto, and at such other times as the parties hereto may require."

These commitments limit the obligation of each participating unit to the appropriations actually made during any year, and do not contemplate that there is any obligation upon the counties that would violate the provisions of Section 115a of the Constitution or any statute with respect to the authority of counties to create debts.

In my opinion the counties by executing the Project Application would not be assuming any greater obligation than they have assumed under the contract by which the Commission was established.

For the reasons stated, I am of the opinion that the counties of Smyth and Wythe, acting through their respective governing bodies, may execute the Project Application without violating any legal restraints.

The opinion of this office to Honorable Felix E. Edmunds, to which you refer, is in no way inconsistent with the views expressed herein. We held there, and reaffirm that opinion now, that to the extent that Section 5-35 of the Code purported to create a charge upon the participating political units on account of the Airport Commission involved, which would be a liability not created in anticipation of the collection of county revenues for the current year, would be void.

With respect to paragraph (3) of the grounds of your opinion, I know of no reason why you should decline to sign the "Opinion of Sponsor's Attorney," unless you feel that it is not correct. One of the responsibilities of a Commonwealth's Attorney is to give opinions upon legal questions pending before the board of supervisors. If you and the Attorney for the Commonwealth for Smyth County wish to do so, you have my permission to add to your certificate the following:

"This opinion is based upon an opinion involving this matter furnished to the Commonwealth's Attorney of Wythe County by the Attorney General of Virginia, which opinion is dated March 9, 1961."

Mr. John M. Goldsmith and Mr. Robert I. Asbury have contacted this office in regard to this matter and, for that reason, a copy of this opinion is being mailed to them.
HONORABLE SIDNEY C. DAY, JR.
State Comptroller

You have requested an opinion concerning the amount to be distributed to the localities from the net profits derived under the provisions of the Alcoholic Beverage Control Act, (hereinafter referred to simply as "net profits.") Your letter reads as follows:

"Chapter 393, Acts 1960, added Section 4-15.1 to the Code of Virginia, levying a tax on certain alcoholic beverages. Sub-section (h) of this section reads as follows:

"'(h) Provided, however, that the counties, cities and towns shall in no event receive from the profits from the sale of alcoholic beverages less cash revenue than was received by such counties, cities and towns for the year ending June thirtieth, nineteen hundred sixty.'"

"Item 77 of the Appropriation Act appropriates two-thirds of the net profits derived under the provisions of Section 4-22 of the Code of counties, cities and incorporated towns, apportioned on the basis of their respective populations, etc.

"While the new Code section states that the localities shall in no event receive less cash revenue from profits than was received by them for the year ended June 30, 1960, we take the position that no appropriation is carried in sub-section (h), and Code section 4-22 has not been amended, therefore we should be guided by Item 77 of the Appropriation Act above referred to.

"I will thank you to advise me whether or not in your opinion I am correct in my interpretation of these provisions."

It is provided in Section 4-22 of the Code that the net profits derived under Chapter 1, Title 4, of the Code, after deducting therefrom such sums as may be allowed the Virginia Alcoholic Beverage Control Board by the Governor for the creation of a reserve fund not exceeding the sum of $1,000,000.00, in connection with the administration of the Alcoholic Beverage Control Act, and other specific purposes therein set out, shall be transferred by the Comptroller to the General Fund of the State treasury. It is further provided in this section that when the money so transferred by the Comptroller to the General Fund shall, during any fiscal year, exceed the sum of $750,000.00, two-thirds of all money in excess of $750,000.00 so transferred and paid into the General Fund of the State treasury during such fiscal year shall be apportioned by the Comptroller and distributed by him to the several counties, cities and towns of the Commonwealth on the basis of their population according to the last preceding United States census.

For the purpose of brevity of expression, I shall hereinafter refer to the amount to be distributed to the localities under the provisions of Section 4-22 simply as "two-thirds."

Section 186 of the Constitution of Virginia provides that no "appropriation shall be made which is payable more than two years and six months after the end of the session of the General Assembly at which the law is enacted authorizing the same." For this reason, it is necessary in each subsequent biennial Appropriation act to provide specifically for the distribution to the localities referred to in Section 4-22. In the 1960 Appropriation Act this appears as Item 77.

Obviously, if the "net profits" for the current fiscal year equal or exceed those of the fiscal year ending June 30, 1960, the questions set forth in your letter become purely academic. I shall assume, therefore, for purpose of response, that the "net profits" for the current fiscal year will be less than those for the preceding year.
The specific question raised by your letter is whether the localities, as a group, will receive the same amount that they received for the fiscal year ending June 30, 1960 or whether they will receive "two-thirds," as provided in Item 77 of the Appropriation Act, which I shall hereinafter refer to as the "regular share."

Section 186 of the Constitution of Virginia provides, in part:

"... No money shall be paid out of the State treasury except in pursuance of appropriations made by law; ..."

The question is immediately raised as to whether paragraph (h) of Section 4-15.1 of the Code can be considered an appropriation without more. If it cannot, it seems clear that the localities cannot receive any part of the "net profits" in excess of the "regular share," for nowhere else, to my knowledge, is there such an appropriation to them. I believe there can be no serious question but that the language of paragraph (h) of Section 4-15.1 clearly expresses a legislative intent to appropriate to the localities a sum sufficient to equal the amount by which the "net profits" for the current fiscal year are less than the "net profits" for the preceding fiscal year. This sum I shall hereafter refer to as the "guaranteed amount."

The Supreme Court of Appeals of Virginia has held in the case of Commonwealth v. Ferries Co., 120 Va. 827, 92 S. E. 804, that Section 186 of the Constitution of Virginia does not prescribe any particular form of appropriation.

In view of this holding, and the manifest intent of the General Assembly, I am of the opinion that paragraph (h) of Section 4-15.1 constitutes an appropriation of the "guaranteed amount," and being payable within the time specified by Section 186 of the Constitution, the appropriation is valid.

In reaching this conclusion I have relied to some extent upon an opinion rendered by the late Attorney General Abram P. Staples on June 26, 1941. In considering language in a 1940 Act, identical to the language of paragraph (h) of Section 4-15.1, Attorney General Staples said:

"'It was evidently thought possible that the imposition of this state tax might reduce the profits from the sale of alcoholic beverages, of which the counties, cities and towns received a designated share. It was evidently the purpose of paragraph (ff) to insure that the receiving of revenue by the State in the form of taxes should not result in reducing the amount to be received by the localities if the imposition of the State tax resulted in decreasing the amount received by the Alcoholic Beverage Control Board in the form of profits. ** *

"It is my opinion, therefore, that the localities should now receive, as their proportionate share of the profits of the Alcoholic Beverage Control Board, two-thirds of the profits derived from the sale of alcoholic beverages in excess of $1,675,000.00, or, if this sum be less than was distributed to the localities in 1939, they should, as a group, receive the same amount distributed to them in that year. **"

While it is true that Attorney General Staples was not responding to the specific question presented by your inquiry, I am inclined to the view that the language quoted was more than an "off-hand" statement and is entitled to serious consideration, in view of the preeminence of its author.

Having thus determined that the "guaranteed amount" was appropriated by Section 4-15.1, the question arises as to whether that appropriation may have been repealed by Item 77, which only appropriates to the localities the "regular share."

One of the rules of statutory construction is that if two Acts are in irreconcilable conflict, that which was first adopted must yield to the latest legislative expression. Other such rules are that every effort should be made to carry out the legislature intent, that repeal by implication is not favored, and that statutes will be construed to avoid conflict, if such construction is possible.

I do not find Item 77 of the Appropriation Act and paragraph (h) of Section 4-15.1 in irreconcilable conflict. In my opinion, Item 77 appropriates the "regular share"
and paragraph (h) makes an additional appropriation of the "guaranteed amount."

It might be argued that certain of the language in Item 77 appears in conflict with paragraph (h). I believe it sufficient to point out that the identical language has appeared in the corresponding items in Appropriation Acts for several years, and it was, therefore, obviously not drafted or intended to repeal paragraph (h) of Section 4-15.1; indeed, Item 77 was adopted in the identical form in which it was introduced into the Legislature in 1960, and having been introduced as House Bill 20 four days prior to the introduction of the bill which finally was enacted into law as Section 4-15.1 of the Code, it can hardly be contended seriously that the Legislature intended its language to operate as an implied repealer of the positive provision of paragraph (h) of Section 4-15.1.

It is my opinion that the amount to be distributed to the localities, as a group, must be ascertained under the provisions of Item 77 and paragraph (h) of Section 4-15.1 of the Code, and that the localities should receive both the "regular share" and the "guaranteed amount."

ALCOHOLIC BEVERAGE CONTROL LAWS—Distribution of Wine Tax to Towns Operating Special School Districts—Effects of Dissolution of District and of Annexation. (163)

HONORABLE PHILIP P. BURKS
Treasurer of Bedford County

November 9, 1960

This is in reply to your letter of October 11, 1960 in which you presented the following question:

"By resolution adopted at its regular meeting held on the 23 day of September, 1960 the State Board of Education approved the dissolution of the Special School District of the Town of Bedford, Virginia for operational purposes. In said resolution it is stipulated that the Town Council of the Town of Bedford dissolved and abolished the Special School District for said Town of Bedford for operational purposes by ordinance which became effective on August 9, 1960. The School Board of Bedford County, by resolution adopted on August 10, 1960 approved the dissolution and abolition of the said Special School District for operational purposes only.

"Section 4-24 of the Code of Virginia provides for the distribution of the tax on wine 'in those counties wherein is situated any incorporated town constituting a special school district and operated as a separate school district under a town school board of three members appointed by the town council.'

"I am charged with the duty of distributing the wine tax between the County of Bedford and the Town of Bedford. The said Special School District had not been abolished as of June 30, 1960. When the wine tax for the fiscal year ending on June 30, 1960 is received by me should the amount of said check be distributed between the County of Bedford and the Town of Bedford or should the entire amount be retained by the County of Bedford?"

Section 4-24 of the Alcoholic Beverage Control Act reads in pertinent part as follows:

"... All amounts collected by the Board pursuant to the provisions of this section shall be promptly paid into the State treasury and credited to the general fund in the treasury. Two-thirds of the amount so credited shall be paid to the several counties and cities of the Commonwealth in proportion to their respective population, and in those counties wherein is situated any incorporated town constituting a special school district and
operated as a separate school district under a town school board of three members appointed by the town council, the county treasurer shall pay into the town treasury the proper proportionate amount received hereunder by him in the proportion that the population of such town bears to the population of the entire county. Two-thirds of the tax hereby levied is appropriated for the purpose of distribution among the several counties and cities as is herein provided.

"The term 'population' as used herein shall mean the population according to the last preceding United States census. If the population of any city or town shall have been increased through the annexation of any territory since the last preceding United States census, such increase shall, for the purpose of this chapter, be added to the population of such city or town as shown by the last preceding United States census and a proper reduction made in the population of the county or counties from which the annexed territory was acquired."

Section 4-22 of the Alcoholic Beverage Control Act, providing for the disposition of the net profits accruing from the operation of the Alcoholic Beverage Control Board, is also of significance in this inquiry. That statute preceded and apparently served as a model for Section 4-24. Certain provisions similar to those of Section 4-24 are amplified in Section 4-22, which reads, in part, as follows:

"... When such moneys so transferred by the Comptroller to the general fund of the State treasury shall during any fiscal year exceed the sum of seven hundred and fifty thousand dollars, two thirds of all moneys in excess of seven hundred and fifty thousand dollars so transferred and so paid into the general fund of the State treasury during such fiscal year shall be apportioned by the Comptroller and distributed by warrants of the Comptroller drawn on the Treasurer of Virginia to the several counties, cities and towns of the Commonwealth, on the basis of the population of the respective counties, cities and towns, according to the last preceding United States census, for which purpose such portion of the moneys is hereby appropriated. If the population of any city or town shall have been increased through the annexation of any territory since the last preceding United States census, such increase shall, for the purpose of this chapter, be added to the population of such city or town as shown by the last preceding United States census and a proper reduction made in the population of the county or counties from which the annexed territory was acquired. The judge of the circuit court of the county in which the town or greater part thereof seeking an increase under the provisions of this chapter is located is hereby authorized and empowered to appoint two disinterested persons as commissioners, who shall proceed to determine the population of the territory annexed to the town as of the date of the last preceding United States census, and report their findings to the court, and future distributions of the moneys allocated under the provisions of this chapter shall be made in accordance therewith..."

In a subsequent discussion in regard to your inquiry, you indicated that the dissolution of the special school district for operational purposes was the subject of a contract entered into by the Town of Bedford, the School Board of the Town of Bedford, the County of Bedford, and the School Board of the County of Bedford. You further indicated that the parties to this contract did not consider the matter of the wine tax distribution. It is my understanding that, while the contract provides for the transfer of a specified amount of residual school funds, it contains no reference to the wine tax.

The language of Section 4-24 provides no clear answer to your inquiry. In practice, the basic distribution under that statute has been determined by the State Comptroller who also distributes the net profits under Section 4-22. It is my understanding that the administrative practice of that office has been to make both distributions, on a fiscal year basis, sometime after the close of the fiscal year and that eligibility
to share in the distributions, as well as the proportionate share, has been determined as of the last day of the fiscal year, June 30th. This practice is supported by the obvious necessity for establishing a fixed cut-off date without which it would be impossible to compute proportionate shares as required by the statutes. It is also pertinent that the General Assembly implements the disposition provided for by these statutes by means of items in the biennial Appropriation Act which provides for disbursement on a fiscal year basis. See Acts of Assembly 1960, Chapter 610, pp. 944, 959, Items 76 and 77.

The foregoing practice appears to be equally applicable in the instant case. Since the basic distribution to the county will be based on its status as of June 30, 1960, consistency requires that the same rule be followed in determining the right of the town to a share.

It is also significant that the Town of Bedford did operate its schools during the fiscal year in which the wine taxes to be distributed were collected and that it has been held that the wine tax funds are not designated for school use. See Covington v. Driscoll, 185 Va. 425, 39 S. E. (2d) 249.

As suggested, it is my opinion that the Town of Bedford is entitled to its proportionate share of the wine tax distribution for the fiscal year 1959-1960. To hold otherwise would be to adopt the unlikely theory that the legislature intended to make the determination of interests in the wine tax funds dependent upon the dispatch with which the Comptroller could make the basic distribution under Section 4-24.

You have also advised me that, effective as of midnight, December 31, 1959, the Town of Bedford has annexed a portion of Bedford County. You request my comments as to the effect of this situation.

Both Sections 4-24 and 4-22 include provisions as to the effect of the annexation of territory upon population computations. They are essentially the same, but Section 4-22 includes procedural instructions. The distribution of the wine tax to the town, for which you are responsible, should be made in accordance with the population figures determined by the commissioners as provided for in the latter statute. At the risk of repeating the obvious, your attention is invited to the fact that these population computations are based on the population of the annexed territory as of the date of the last preceding United States census, not upon the population as of the date of annexation.

ALCOHOLIC BEVERAGE CONTROL LAWS—Forfeiture of Automobile Under Section 4-56—Not Allowed in Case of Previous, Undetected Violation. (285)

HONORABLE FERDINAND F. CHANDLER
Attorney for the Commonwealth of Westmoreland County

March 15, 1961

This is in reply to your letter of March 4, 1961 which was addressed to me. In this letter you requested my opinion upon the following question:

"Do forfeiture proceedings, under the provisions of Section 4-56 of the Code of Virginia, lie against an automobile in which the owner admits he has transported illegally acquired alcoholic beverages at some time in the past, but upon search no alcoholic beverages were found at the present time?"

Section 4-56, Code of Virginia of 1950, as amended, provides for an in rem civil proceeding by means of which conveyances or vehicles may, under certain conditions, be seized by an officer charged with the enforcement of the alcoholic beverage laws of this State when found to be transporting alcoholic beverages illegally or to contain illegally acquired alcoholic beverages. The statute then proceeds to set forth
in considerable detail the manner in which conveyances or vehicles thus seized may be forfeited to the Commonwealth.

An examination of the various provisions of this statute discloses an apparent legislative intention that forfeitures under Section 4-56 only be accomplished where the necessary seizure has been made at a time when a specifically proscribed condition existed. There is no indication that a conveyance or vehicle continues to be subject to seizure and forfeiture after the condition has ceased to exist. Thus, it is my opinion that, while criminal liability under other statutes may survive the commission of the acts prohibited under Section 4-56, an in rem forfeiture proceeding under the statute cannot be initiated subsequently when it is learned that one of the specified illegal conditions existed undetected on some prior occasion.

ALCOHOLIC BEVERAGE CONTROL LAWS—May Not be Allowed in Store Where Food or Refreshments are Served for “on Premise” Consumption. (127)

October 10, 1960

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

This is in response to your inquiry of October 6, 1960 which reads as follows:

“The following problem recently arose in my office. The Judge and I were not certain or satisfied as to the exact interpretation to be placed upon Code Section 4-61 (as last amended).

“Therefore, I will appreciate it if you will give me the opinion of your office as to whether or not a violation was committed under this section under the following set of facts: a person operated a small country store in which store only groceries and soft drinks were sold. If whiskey acquired from an A.B.C. Store is found in this grocery store, is it a violation of Section 4-61 under the language of the section which says; ‘where food or refreshments of any kind are furnished for compensation.’

“I will appreciate it if you will let me have the benefit of your opinion as to whether or not a violation would have been committed.”

The statute in question, Section 4-61 of the Code of Virginia of 1950, as amended, reads in pertinent part as follows:

“No alcoholic beverages shall be kept or allowed to be kept upon any premises or upon the person of any proprietor or person employed upon the premises of a restaurant, soda fountain or other place where food or refreshments of any kind are furnished for compensation, except such alcoholic beverages as such person owning or operating such place of business is authorized by license under this chapter to purchase and to sell at such place of business . . . .”

It is my opinion that, in an otherwise appropriate case, the language of this statute covers keeping or allowing the keeping of alcoholic beverages in a place where food or refreshments of any kind are furnished for consumption on the premises. The underlined words constitute a qualification of the broad general provisions of the statute. This distinction appears to be in order in view of the fact that the statute specifically refers to restaurants and soda fountains, thus indicating an intention to restrict the statutory coverage to those “other places” having a similar type of food business.

From the foregoing, it follows that a country grocery store selling groceries and soft drinks for off-premises consumption only would not fall within the ambit of
Section 4-61. On the other hand, a country grocery store in which the patrons customarily were permitted to exercise the privilege of consuming their purchases upon the premises would appear to be such a place as is subject to the provisions of the statute.

Two opinions similar to this have been rendered in the recent past. The first was to Honorable Kenneth P. Asbury, Commonwealth's Attorney for the County of Wise and the City of Norton, on August 26, 1959, and the second was to Honorable Mark D. Woodward, Judge of the County Court of Page County, on May 20, 1960. A copy of each of these opinions is enclosed for your information.

ALCOHOLIC BEVERAGE CONTROL LAWS—Public Places. (54)

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

August 4, 1960

This is in reference to your inquiry of June 16, 1960 and the response of this office dated July 6, 1960. The question presented was as follows:

"A Virginia corporation is the lessee and the operator of a motel in Princess Anne County, Virginia. The corporation operates a modern motel, catering largely to a commercial trade. In order to provide a meeting room for sales groups, the motel constructed a relatively large room suitable for that purpose which is attached to and an integral part of the motel. It is completely separate from the lobby and the halls of the motel.

"The above-mentioned meeting room, hereinafter referred to as the 'conference room,' is used by three categories of persons, as follows:

"(a) Sales managers and the like who are guests of the motel and have arranged the use of the conference room for sales or similar meetings.

"(b) Local business, fraternal and social organizations who have arranged the rental of the room for specific affairs limited in attendance to the members and guests of such group.

"(c) Registered guests of the motel who frequent the conference room for use as a television lounge or card room on occasions when the same is not in use as set forth in (a) and (b) above.

"Said corporation is engaged in no other business than the motel business and does not hold a restaurant license or any license granted by the Virginia ABC Board.

"Adjoining the motel is a restaurant leased and operated by a completely separately owned corporation, with its own managers and employees, having no entrance into the motel. The restaurant corporation holds a restaurant license and a wine and beer on and off premises retail license granted by the Virginia ABC Board.

"In broad general terms, the question presented is whether the conference room above described is a 'public place' as defined in the Code of Virginia, to-wit: 'Any place, building or conveyance, including restaurants, soda fountains, hotel dining rooms, lobbies, corridors of hotels, and any highway, street, lane, park or place of public resort or amusement: but shall not include hotel dining rooms or hotel ball rooms while in use for private meetings or private parties limited in attendance to members and guests of a particular group, association or organization . . .'

"The general public is not at any time admitted to the conference room and attendance in such room is limited to the three classifications above-mentioned.

"Your opinion is respectfully requested as to whether or not there would be a violation of any provision of the Virginia law, if persons in any three classifications above-mentioned should:
“1. Carry to this room and consume in this conference room legally acquired distilled spirits.

“2. Carry to this room and consume in this conference room legally acquired malt beverages.

“3. Arrange with the restaurant corporation holding an off premises license, to deliver to this conference room, upon order, wine or beer for consumption in such room.

“4. Arrange with the restaurant corporation to deliver to such conference room, upon order, food, non-alcoholic beverages, ice, etc., for consumption in such conference room.”

As you have indicated, a basic element of your inquiry lies in the question of whether or not the conference room is a public place as that term is used in Section 4-78 of the Alcoholic Beverage Control Act (subsequent section references are to the provisions of this act). Section 4-78 reads in full as follows:

“(a) If any person shall take a drink of alcoholic beverages or shall tender a drink thereof to another, whether accepted or not, at or in any public place, he shall be guilty of a misdemeanor, and fined not less than one nor more than ten dollars.

“(b) This section shall not prevent any person from drinking alcoholic beverages or offering a drink thereof to another in the dining room or other designated room, as defined in § 4-25, of a hotel, restaurant, club or boat or in a dining car, club car or buffet car of any train, or in any other establishment, provided such hotel, restaurant, club, boat, dining car, club car, buffet car, or establishment, or the person who operates the same, is licensed to sell at retail for consumption in such dining room, room, car or establishment, such alcoholic beverages, and the alcoholic beverages drunk or offered were purchased therein.”

If the conference room is a public place, this statute will preclude the consumption of alcoholic beverages therein by any of the groups to which you have referred. The exceptions within Section 4-78 are inapplicable since the motel is not licensed.

A public place is defined in Section 4-2 (20) as follows:

“‘Public place’ shall mean any place, building or conveyance to which the public has, or is permitted to have, access, including restaurants, soda fountains, hotel dining rooms, lobbies and corridors of hotels, and any highway, street, lane, park or place of public resort or amusement; but shall not include hotel dining rooms or hotel ball rooms while in use for private meetings or private parties limited in attendance to members and guests of a particular group, association or organization and shall not include private dining rooms approved by the Board while such rooms are in use for private meetings or private parties limited in attendance to members and guests of a particular group, association or organization.”

This definition controls the term as it is used in Section 4-78. In providing examples of the application of the definition, the Legislature has listed, among other places, restaurants, soda fountains, and hotel dining rooms. Then, it has provided that hotel dining rooms or hotel ball rooms shall not constitute public places while “in use for private meetings or private parties limited in attendance to members and guests of a particular group, association or organization.” Approved private dining rooms in restaurants licensed by the ABC Board are similarly treated. Thus, it is clear that the Legislature contemplated that places such as restaurants, hotel dining rooms or hotel ball rooms would be public places when occupied by the regular guests or patrons thereof as distinguished from an occupancy by a bona fide private group. In other words, the guests of a hotel, or motel as in the instant case, do not constitute a private group whose exclusive occupancy of a given room renders it non-public. Actually, they are members of the public and may gain access to the room, regardless of other interests in common, by the payment of the required charges. In fact, it would appear that the common law as to innkeepers requires that they be admitted. See Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. (2d) 906.
While it appears that the conference room is a public place when accessible to the guests of the motel, this is not so if a bona fide business, fraternal or social organization exclusively occupies the premises. Members of such a group may possess and consume their own lawfully acquired alcoholic beverages. This situation was covered in my opinion addressed to your office on June 26, 1959 in regard to a proposed use of the Virginia Beach Convention Hall by such a group. The foregoing exceptions to Section 4-2 (20) are indicative of the legislative intent in this regard.

When the conference room is a public place, no alcoholic beverages may be consumed therein. When it is not a public place and such beverages may be consumed therein insofar as Section 4-78 is concerned, there are a number of statutes which might affect the operation which you have outlined. For instance, if any food or refreshment of any kind is furnished for compensation, keeping or allowing the keeping of alcoholic beverages upon the premises is prohibited by Section 4-61. Assuming that no food or refreshments are thus dispensed, no sale of alcoholic beverages may be made by the operators or employees of the motel by virtue of Section 4-58. On the other hand, the adjoining restaurant, licensed by the Alcoholic Beverage Control Board, may, by the terms of its license, sell wine and beer in open containers only for on-premises consumption or in closed containers for off-premises consumption. While it may deliver wine and beer in closed containers, it must not actually sell the beverages thus delivered at any point other than upon its licensed premises. See Section 4-25 (m) and 4-60 (e). Any attempt by the restaurant to exercise the on-premises privileges of its ABC license in an area outside of the licensed premises would appear to be in violation of these statutes. Incidentally, the furnishing of these alcoholic beverages in the conference room for compensation might well be sufficient of itself to invoke the provisions of Section 4-61.

It is also possible that the various statutory limitations upon the transportation of alcoholic beverages would be of significance in the arrangement here considered.

The provisions of Sections 4-61 and 4-89 (c) creating certain exceptions to the provisions of Section 4-61 and of the ABC Act in the case of possession of alcoholic beverages in a residence do not apply in the present situation. Section 4-2 (21) defines a residence as follows:

" 'Residence' shall mean any building or part of a building or tent where a person resides, but does not include any part of a building which part is not actually and exclusively used as a private residence, nor any part of a hotel or club other than a private guest room thereof."

This clearly denies the conference room the status of a residence.

ALCOHOLIC BEVERAGE CONTROL LAWS—Second Conviction of Violation of § 84-58—Jail Sentence May Not Be Suspended. (153)

October 28, 1960

HONORABLE G. GARLAND WILSON
Commonwealth's Attorney
for the City of Radford

This is in reply to your letter of October 6, 1960, in which you made the following request:

"Would you please advise me whether or not the Municipal Court can suspend a jail sentence for a second conviction for the illegal sale of alcoholic beverages?"

You have since advised me that you are specifically interested in the question of whether or not the provision of Section 4-58 of the Alcoholic Beverage Control Act, which provides that in no case shall such a sentence be suspended, is void by reason of an apparent conflict with the general grant of authority to suspend sentences embodied in Section 53-272, Code of Virginia of 1950, as amended.
Section 53-272 reads in pertinent part as follows:

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

This statutory provision has been in existence in substantially identical form since 1918 (Acts of Assembly 1918, p. 520).

The pertinent provision of Section 4-58, which deals with the illegal sale of alcoholic beverages in general, reads as follows:

* * * *

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

The last sentence in the quoted language was added in 1952 (Acts of Assembly 1952, p. 787). As of that point, there is no doubt that this provision of Section 4-58 stood as an exception to the general provisions of Section 53-272.

Since 1952, Section 53-272 has been amended and reenacted on three occasions (Acts of Assembly 1954, p. 141; Acts of Assembly 1956, p. 397; Acts of Assembly 1958, p. 600). None of these amendments materially altered the basic grant of authority to suspend sentences.

Statutory repeal by implication is not favored. It is also a general principle of statutory construction that a later enacted statute dealing with a general subject does not necessarily have the effect of repealing a prior, inconsistent statute dealing with a special subject lying within the broad general classification. Before such a repeal is recognized, it is held that there must be express statutory language to that effect or that the provisions of the two statutes must be so mutually contradictory that recognition of the special provision would render a part of the general provision meaningless. In addition, the legislative history and the circumstances under which the respective statutes were enacted constitute pertinent fields of inquiry. See 17 M. J., Statutes, Section 100 and cases cited therein.

In the instant case, there appears to be no statutory provision expressly repealing the pertinent provision of Section 4-58, either specifically or as a part of a class. The language of Section 53-272 is not so directly contradictory of the pertinent provision of Section 4-58 as to render it a nullity. See Petersburg v. General Baking Company, 170 Virginia 303, 196 S. E. 597. I am aware of no aspect of the circumstances under which Section 53-272 has been amended since 1952 which would indicate a legislative intent to nullify the exception found in Section 4-58.

In the light of the foregoing, it is my opinion that the previously quoted paragraph of Section 4-58 continues in force and effect as an exception to the provisions of Section 53-272.
HONORABLE VIRGIL H. GOODE  
Commonwealth's Attorney for Franklin County

This is in reply to your letter in which you request my opinion based upon the following facts:

"Assuming that the Board of Supervisors of Franklin County amended an ordinance now in force under Section 4-97 of the Code, allowing fraternal clubs to sell beer between certain hours on Sunday, and prohibited all other licensees in the County from selling beer in public places on Sunday, I would like to know if this action by the Board would not be discriminatory, and unconstitutional."

As you are aware, Section 4-96 of the Alcoholic Beverage Control Act denies the localities almost all power in regard to the regulation of alcoholic beverages. That statute does, however, make express reference to two statutory exceptions to this general withdrawal of power. These exceptions are found in Sections 4-38 and 4-97 of the Alcoholic Beverage Control Act.

Section 4-97 has the effect of returning to the localities the power to prohibit "the sale of beer and wine, or either beer or wine, between the hours of twelve o'clock post meridian of each Saturday and six o'clock ante meridian of each Monday, or fixing hours within said period during which wine and beer, or either, may be sold . . ."

In the past, the opinion of the Attorney General has been sought in regard to the question of whether or not this statutory grant of power is such as to permit the localities to exercise it selectively. The specific question was whether or not a locality, acting under authority of this statute, could prohibit the on-premises sale of beer or wine while permitting the off-premises sale thereof during the same period. In an opinion dated June 20, 1950 and addressed to Honorable W. O. Fife, Commonwealth's Attorney for Albemarle County, the then Attorney General, J. Lindsay Almond, Jr., concluded that such an ordinance would be valid. The essence of that opinion is found in the following excerpt:

"In so doing the governing body will be exercising a portion of the power which has been granted it, and I do not believe it is objectionable that they will have declined to exercise that portion of the power which relates to off-premises sales of beer. It is a generally accepted principle that a greater power includes a lesser power, and I believe that principle is applicable to this situation."

This reasoning appears to be equally valid today.

The nature of the selective application of the power to regulate Sunday sales which you have described presents a somewhat similar situation. The ordinance would probably be nondiscriminatory and constitutional so long as there is a reasonable basis for the distinction between those activities which are prohibited and those which are permitted.

As you are aware, the Alcoholic Beverage Control Act provides for the issuance of licenses authorizing the sale of certain alcoholic beverages by the licensee. Various types of licenses are authorized for issuance to specified commercial activities. In addition, the Act provides for the issuance of licenses to "clubs." See Section 4-25 of the Alcoholic Beverage Control Act. The controlling definition of a "club" is found in Section 4-2 (6) of the Act and is as follows:
“‘Club’ shall mean any non-profit corporation or association which is the owner, lessee or occupant of an establishment operated solely for objects of a national, social, patriotic, political or athletic nature, or the like, but not for pecuniary gain, the advantages of which belong to all the members. It also shall mean the establishment so operated.”

Obviously, there is a clear distinction between a club licensee and the usual commercial licensee. From this, it would follow that an ordinance banning Sunday sales in general while permitting such sales in these noncommercial establishments could be said to be founded upon recognizable distinguishing characteristics.

In your letter, you suggest that the only exception to the Sunday ban will be the sale of beer by fraternal clubs. Granting the word fraternal its customary meaning, there appears to be no reasonable basis for distinguishing between fraternal clubs holding A.B.C. licenses and other similarly qualified clubs holding A.B.C. licenses. To this extent, it does appear that the proposed ordinance which you have described would be discriminatory and unconstitutional.

**APPROPRIATIONS—State Institutions—V. P. I. has Authority to Specify Manner of Expenditure. (7)**

**Dr. Walter S. Newman**  
President  
Virginia Polytechnic Institute

July 7, 1960

This will acknowledge your letter of July 4, relating to Item 443 of the Appropriation Act of 1960, and my letter of June 30 to Senator Blake Newton.

A paragraph in your letter is as follows:

“I judge from the copy of your letter to Senator Newton that V. P. I. has the authority to determine the amount of grants made to any qualifying student and, therefore, I also believe that since the sponsors of this legislation are in agreement with us as to the use of these funds, V. P. I. has the authority to determine the specialties that are to be pursued by these students in out-of-State institutions and likewise the administration has the right to select these institutions.”

You have interpreted my letter to Senator Newton correctly. The appropriation is made to V. P. I. and that Institution has authority to determine how it will be administered. I think it would be well for you to consider the VALC Report in exercising this authority.

**ARCHITECTS, ENGINEERS, SURVEYORS—Board May Not Charge Separate Fee for Each Part of Two-Section Examination. (92)**

**Honorable Turner N. Burton**  
Director  
Department of Professional and Occupational Registration

September 8, 1960

This is in reply to your letter of September 2nd, in which you state that the Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors, gives these examinations in sections. You further state that under the rules and regulations adopted by the Board persons who make a passing grade upon some sections have the privilege of returning and taking examinations upon the other sections at the regular time fixed for examinations on that subject.
You have presented the following question:

"Will you please advise if Section 54-30 makes it mandatory for each applicant for certification to submit a fee of $25.00 for each examination he sits for; whether it be an original sitting, or whether it be for the purpose of retaking that portion of the examination that he failed at the original sitting?"

Section 54-30 of the Code provides as follows:

"In order to defray the compensations and expenses above provided, and any other expenses incident to the proper discharge of the duties of the Board, each applicant for a certificate to practice as a professional engineer, architect or land surveyor, as the case may be, in this State, shall pay the secretary of the Board a fee of twenty-five dollars for each examination in any branch as defined in this chapter. Five dollars of this fee shall be returned if the certificate be not granted."

In my opinion the Board does not have authority to charge a sum in excess of $25.00 to each applicant, even though such applicant may complete only a part of the examination at the first sitting. The statute, in my opinion, contemplates a fee of $25.00 for a complete examination whether or not the examination is completed at one sitting or at two or more sittings.

Section 54-25 of the Code authorizes the Board to promulgate rules and regulations which may contain "the requirements necessary for passing examination, in whole or in part.* * *" If the Board authorizes an examination to be taken in such manner it does not, in my opinion, necessarily follow that more than one examination has been given.

In considering this matter, I find that the provisions dealing with examination fees vary. The provisions relating to medical examinations expressly provide for examinations in two parts and fix a fee for $25.00 for each part. Prior to the amendment of 1960 this fee was $12.50 for each part. See Section 54-307. Section 54-393 relating to optometry provides for a fee of $25.00, and if an applicant fails in only one subject, he may have one more examination at the next meeting without any additional fee. Section 54-349 relating to nurses provides for an extra fee of $5.00 for each re-examination. The provisions relating to contractors provide for a second examination without any extra fee. See Section 54-130.

Section 54-30, unlike the sections to which I have referred, makes no provision for any charge except the fee of $25.00 for each examination. Since the Board has the power to promulgate regulations permitting applicants to take examinations by sections or steps, I feel that the term "each examination" relates to the examination as a whole. The examination is complete when the applicant is eliminated by failure to pass the required number of parts or sections, or, within the scope of the applicable regulation, attains a passing grade. Of course, where an applicant fails in the initial step and hence is not entitled to pursue the matter further, a subsequent application would be subject to the fee of $25.00 as in the first instance.

ARLINGTON COUNTY—May Acquire Improved Property by Purchase. (77)

August 23, 1960

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

This is to acknowledge receipt of your letter of August 18, 1960, in which you state in part:
"I have been reviewing, at the request of my governing body, Chapter 210 of the Acts of Assembly of 1960, which provides that Arlington County, on a population basis 'may acquire by lease with or without an option or options, to purchase any land...'

"It is my problem to ascertain whether or not the phrase 'any land' means land together with any improvements thereon, or merely unimproved land."

Your attention is called to the following, to-wit:

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

(Italics supplied).

And:

"§ 1-13.12.—Land, real estate. The word 'land' or 'lands' and the words 'real estate' shall be construed to include lands, tenements and hereditaments, and all rights and appurtenances thereto and interest therein, other than a chattel interest."

It is my opinion that the County of Arlington may acquire land with improvements thereon as well as unimproved property pursuant to the provisions of the aforesaid chapter.

AUTOMOBILE GRAVEYARDS—Section 33-279.3 of Code Not Criminal Statute. County Zoning Ordinance Not Repealed. (118)

Counties—May Regulate Automobile Graveyards Pursuant to Sections 15-18 and 33-279.3 of Code. (118)

September 30, 1960

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

This is in reply to your letter of September 26, 1960, in which you request my opinion on the effect of § 33-279.3 of the Code upon automobile graveyards established in Fairfax County in conformity with the zoning ordinance of Fairfax County and within five hundred feet of a State highway.

Prior to the enactment of § 33-279.3 of the Code in 1958, the localities were authorized by § 15-18 of the Code to license and regulate automobile graveyards, including the power to require fences or hedges around such establishments within one thousand feet of a highway in the State Highway System. The enforcement of such requirements was the responsibility of the State Highway Commissioner, and violation of the section constituted a misdemeanor. The power to regulate was separate and distinct from the zoning authority in the localities.

Section 33-279.3 of the Code constituted only a portion of the Act of Assembly enacting this new section. The title to Chapter 552, Acts of Assembly of 1958, reads as follows:

"AN ACT to amend and reenact § 15-18, as amended, of the Code of Virginia, relating to local regulation of automobile graveyards; and to amend the Code of Virginia by adding a section numbered 33-279.3, prohibiting establishment of automobile graveyards except under certain conditions; requiring the erection of fences or hedges around certain automobile graveyards; providing for enforcement, and prescribing penalties."

Section 15-18 of the Code was thus amended to repeal the former portions thereof relating to the fencing requirements at the instance of the localities, and § 33-279.3
was enacted to impose more stringent limitations on the establishment and maintenance of automobile graveyards. Thus, it appears fairly obvious that the General Assembly intended to preempt the field on behalf of the State as to the fencing and location of automobile graveyards, leaving in the localities the power of taxation and the regulation as to the maintenance and operation of such establishments. Unfortunately, however, §33-279.3 of the Code, as finally enacted into law, did not contain provisions for enforcement, nor did it prescribe penalties for violations, as was indicated by the title to the Act. I, therefore entertain grave doubts as to whether this section can be construed as a criminal statute, the violation of which constitutes a punishable offense; rather, I am constrained to interpret this statute as being directive only, constituting an expression of public policy or intent of the General Assembly.

While I feel that the zoning powers heretofore granted the several localities are unimpaired by the provisions of Chapter 552 of the Acts of Assembly of 1958, I am, nevertheless, inclined toward the view that the exercise of those powers with respect to automobile graveyards should be in accord with the directive of the General Assembly, as evidenced by § 33-279.3 of the Code, even though this would entail a voluntary amendment to the zoning ordinance rather than a mandatory requirement.

Any city, town or county may by appropriate ordinance give effect to § 33-279.3 of the Code by prohibiting future establishment of automobile graveyards within one thousand feet of a highway in the primary system of State highways, and within five hundred feet of any other State highway. Those automobile graveyards heretofore established which are within five hundred feet of any other State highway would be required to erect and maintain a fence or hedge as specified in § 33-279.3 of the Code.

BOARDS OF SUPERVISORS—Cannot Regulate Personnel Employed by State Agencies. (132a)

Counties—Employees—Only County Employees Are Subject to Personnel Regulations of Board of Supervisors. (132a)

October 12, 1960

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney for
Augusta County

This is to acknowledge receipt of your letter of October 5, 1960, in which you state that the Board of Supervisors of Augusta County is contemplating the establishment of a uniform personnel policy which would cover the following: Classification of employees; salaries; hours of work; vacation and sick leave; work requirements and qualification of employees, etc. You further state that some of these employees who would be covered under such a policy are employed by constitutional officers, one-half of whose salaries are paid by the Commonwealth. You ask my opinion as to the authority of the county to do this.

The Board of Supervisors may adopt regulations and standards relating only to employees of the county and fix the wage scale in those positions where there is no conflict with State law and the prerogatives of constitutional officers. With respect to those departments of the county financed solely out of appropriations made by the Board of Supervisors, in my opinion the plan contemplated by your board would be valid.

Inasmuch as many public employees perform their duties at the county seat and appear to be county employees, I make the following comments:

Certain constitutional officers (Attorneys for the Commonwealth, Treasurers, Commissioners of the Revenue, Clerks of Circuit Courts and Sheriffs) are subject to the State Compensation Board's power with respect to determining the expenses of their offices, which would include salary payments for clerical help. The Board of
Supervisors has no responsibility in connection with the operation of such constitutional offices, and, in my opinion, these officers may select their employees without regard to any regulations or standards established by the local governing body.

The salaries of Judges of County Courts, their clerks and assistants, are determined by a committee pursuant to Section 14-50 of the Code. In my opinion, the Board of Supervisors of a county such as Augusta could exercise no control with respect to such employees.

Sections 63-75 and 63-76 relate to the employment of personnel by the local board of welfare, and under these sections these employees are employed under regulations established by the State Board of Welfare.

Those employees of the county who are performing services which are subject to the regulations of the State Board of Health would be in a category similar to those employed in welfare work.

While the local governing body may control the amount of local funds available to a local school board, the authority of the school board with respect to the qualifications, standards and compensation of all employees of such board, within the limits of the appropriation to the school board, may not be impaired by personnel regulations established by the Board of Supervisors.

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BOARDS OF SUPERVISORS—May Appropriate Funds for Publishing Annual Report of Soil Conservation District. (240)

HONORABLE R. D. COLEMAN
Commonwealth's Attorney for Scott County

February 15, 1961

This is to acknowledge receipt of your letter of February 13, 1961, in which you state in part:

"In the year 1954 the Natural Tunnel Soil Conservation District was organized in Scott County, under the provisions of Title 21, Chapter 1, Sections 21-1 through 21-112.21. Since that time the district has been carrying out certain conservation practices to improve and protect the soil, water, and woodland resources.

"Can the Board of Supervisors of Scott County, under the provisions of Section 15-11 of the Code of Virginia, legally make an appropriation of $350.00 to the Natural Tunnel Soil Conservation District for the purpose of printing and mailing its Annual Report to the farmers of Scott County?"

Section 15-11 of the Code of Virginia (1950) as amended, reads as follows:

"The board of supervisors of any county in this State may, out of the general county levy of the county, apply and expend annually a sum not exceeding two thousand five hundred dollars for the purpose of promoting agriculture in the county. The term 'promoting agriculture' shall include, without limiting the generality thereof, watershed projects and expenditures in connection therewith for which purposes a county governing body may make expenditures without regard to the limit of two thousand five hundred dollars hereinabove provided for."

You do not state whether there has been established a watershed improvement district by the said Soil Conservation District under the provisions of Article 9, Title 21, of the Code. Of course, if this has been done, then there is no question about the
authority of the Board of Supervisors to appropriate money for the watershed project, and this office has so held. See a copy of the opinion expressed in a letter to the Honorable John H. Daniel, dated November 27, 1959, a copy of which is enclosed. (Report of the Attorney General, 1959-1960, p. 108.)

The last sentence of Section 15-11, supra, was added in 1960. Even before this addition to the statute, the Board of Supervisors had the authority to expend money for the purpose of promoting agriculture in the county. Hence, if the activities of this Soil Conservation District are such that the same promotes agriculture in the county, the Board of Supervisors could authorize this expense of disseminating information relating thereto. Likewise, if the Conservation District is engaged in a watershed project, although a watershed district had not been formed, the Board of Supervisors would have the authority to make this expenditure, publishing information concerning the watershed project.

The above section (15-11) has been liberally interpreted in authorizing the Board of Supervisors to expend money for agricultural purposes. See opinions of this office (Report of the Attorney General, 1936-1937, p. 22, and Report of the Attorney General, 1945-1946, p. 10) which are enclosed.

It is, therefore, my opinion that if the Board of Supervisors determines the annual report of said Soil Conservation District it would be valuable to the farmers in the operation of their farms, then the dissemination thereof would be for the purpose of promoting agriculture within the meaning of the statute (Section 15-11), and the Board of Supervisors would have the authority to make an appropriation of $350.00 to cover the cost of printing and mailing said annual report.


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Honorable W. D. Reams, Jr.
Commonwealth’s Attorney of Culpeper County

This will acknowledge receipt of your letter of December 28, in which you request my opinion as follows:

“"The Board of Directors of the Town and County Library Association has made application to the Board of Supervisors of this County for a donation of a portion of the Court House square for the erection of a library building. Erection of the building is to be paid for by private funds. The directors state that they will re-convey the land and building to the county; but, however, the building will naturally continue to be used as a library. The Court House square, including the area occupied by buildings is less than two acres in area.

"Under the provisions of Chapter 21 of Title 15 (§ 15-686, et seq.) of the Code of Virginia of 1950, as amended, may (1) the land be conveyed to the Library, and (2) the Court House square be used for library purposes after the reconveyance to the County?"

The statutory provision with respect to the use of a portion of the courthouse square for library purposes is found in Section 15-693 of the Code. Under this section the board of supervisors may permit a county free library system to be erected on the courthouse property. Such a system is managed by a board of trustees appointed pursuant to Section 42-9 of the Code.

In my opinion a board of supervisors would not have authority to permit the use of a portion of the courthouse square for the purpose of operating a library owned by an
association of a different character than is contemplated in Chapter 2 of Title 42 of the Code.

A county library system is established for the use and benefit of the county as a whole which includes the incorporated towns. The association to which you refer may donate its property and other assets to the county library system and, with the consent of the board of supervisors, the library building of such system may be erected on the courthouse square.

I do not feel that the board of supervisors would have authority to convey the lot to the association, conditioned upon it being reconveyed to the county.

BOARDS OF SUPERVISORS—No Authority to Reduce Assessments or Rates of Public Service Corporations. (79)

Honorable Thomas E. Warriner, Jr.
Commonwealth's Attorney for Brunswick County

This is in reply to your letter August 23, which reads as follows:

"The Atlantic and Danville Railway Company has been in bankruptcy some time. They have reported to me that the date of their bankruptcy was 19 January 1960.

"The Trustee in Bankruptcy reports that with the help of a loan they will be able to pay their current taxes but that there is a certainty that they will not be able to pay the taxes next year unless the assessments are substantially reduced.

"He reports that receivers of other bankrupt railroads state that local governments throughout the country have cooperated in the endeavor of the Trustee to keep the railroads operating by reducing taxes 'anywhere from fifty to eighty percent.'

"The Board of Supervisors has asked me to determine whether or not there is any action the Board can take to the end that such assessment or taxes on the railroad company might be reduced. I think the sentiment of the Board is that they would like to do anything that is reasonable and within the law in order to cooperate with the Trustee to keep the railroad operating; however, they do not want to take any action which would be contrary to law or which would be regarded as an unreasonable act on their part.

"It would be appreciated if you would give us an opinion on what action if any the Board can take to the end that such assessment or taxes on the railroad might be reduced and on the propriety of such action."

The assessments of the railroad property were made by the State Corporation Commission pursuant to Section 176 of the Constitution and Article 2 of Chapter 12 of Title 58 of the Code. I know of no statute under which the board of supervisors would have the power to reduce these assessments. Furthermore, the board of supervisors does not have authority to levy a tax upon the property owned by the railroad company at a less rate than that imposed upon the real estate and personal property of natural persons.

You will note that Section 176 of the Constitution requires the board of supervisors of a county to impose the same rates of tax against railroads as against property owned by natural persons.
BOARDS OF SUPERVISORS—Procedure to Reconsider or Rescind Prior Action Taken on Motion. (59)

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney
Augusta County

This is in reply to your letter of July 29, 1960, in which you request my opinion as to the proper procedure for the Board of Supervisors to follow in the event a motion is made to reconsider a vote or rescind action taken at a former meeting.

Section 15-245 of the Code provides the method for determining questions submitted to the board. A motion to rescind prior action is to be governed by the same procedure as any other question presented for determination; hence, the former action may be rescinded by majority vote of those members voting. In the event of a tie vote when all members are present, the Commissioner in Chancery must cast the deciding vote.

In the event of a motion to reconsider, I concur in your view that the motion must be made by a member of the Board who voted with the majority when the question was first determined. 62 C.J.S. 773, Munc. Corp., § 407.

BOARDS OF SUPERVISORS—Secretary For Each Member—Not Authorized. (336)

HONORABLE JOHN C. WEBB
Member, House of Delegates

In order to avoid delay, I am replying to your letter of April 20 to Mr. Gray, who will assume office on May 1. You request my advice as follows:

"The purpose of this letter is to ask for an official ruling from you as to whether or not.

"(1) The Fairfax County Board of Supervisors can assign a County employee as secretary to each member of the County Board for the purpose of aiding the County Board member in the execution of his official duties as a Board member; and

"(2) Could such assigned secretarial employee perform her services at a place or places suitable to the convenience of the Board member to which she was assigned?"

Section 14-57(10) of the Code of Virginia is applicable to Fairfax county and reads as follows:

"The annual compensation to be allowed each member of the board of supervisors of any county shall be determined by dividing the total amounts allowed the entire board in accordance with the provisions of § 14-56 by the number of supervisors in the county, subject to the following exceptions:

"(10) In any county having a population in excess of ninety thousand, adjoining a county having a density of population in excess of one thousand per square mile, the annual salary of each member of the board of supervisors shall be not less than six hundred nor more than three thousand dollars, together with an allowance for the actual expense of secretarial services not to exceed fifty dollars per month;"

This section is the only authority under which the board of supervisors of your county may compensate each member and provide for secretarial help for each member. The limitations are clearly set forth in this section and, therefore, in my opinion, the answer to your question numbered (1) is in the negative.

In view of the nature of the answer to your first question, no answer to question numbered (2) is required.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Zoning Permits—Members May Vote on Issuance of Permits for Business in which they are Interested. (256)

February 27, 1961

Mr. N. C. Sharp
Executive Secretary
Board of Supervisors
Prince William County

This is in reply to your letter of February 22, in which you present the following question:

"Is it in order for a member of the Board of Supervisors to take action on a matter in which he has a direct interest? Specifically, if a Board member owns or holds an interest in a business, should he participate in legal action concerning the operation and/or control of that type of activity?"

As I understand from my conversation with you this morning, the specific point involved is whether or not a member of the board of supervisors who is interested in obtaining a permit under the zoning regulations adopted by the board is disqualified from voting as a member of the board when the permit comes up for consideration. As I understand it, in your county the board of supervisors has retained unto itself the power to issue permits rather than delegate this power to the zoning administration.

There is no statute which would disqualify a member of the board of supervisors from voting on the question involving a permit to be issued to him or to a company in which he is interested. The prohibitions set forth in Section 15-504 of the Code relate to contracts entered into by county agencies with county officials and contain no prohibitions with respect to actions of the nature suggested in your question.

It might be that in such cases a member of the board of supervisors who is interested in obtaining a permit would feel inclined to refrain from taking any part in consideration of the question involving his application.

CITIES AND TOWNS—Charter Provision Prescribing that a Newly Incorporated City Shall Succeed to Functions of Former County Not Violative of Virginia Constitution. (335)

April 27, 1961

Mrs. Dorothy S. McDiarmid
Member, House of Delegates

I am in receipt of your letter of March 29, 1961, in which you call my attention to House Bill 292 which was introduced during the 1960 regular session of the General Assembly. You inquire whether or not Section 8.02 of Article Eight of this bill is constitutional.

The bill to which you refer purports to provide for the creation and incorporation of the city of Fairfax and to prescribe a charter and form of government for such city. Article Eight of the proposed legislation is entitled "Provisions for Transition" and Section 8.02 thereof prescribes:

"§ 8.02. Assumption of County Functions. On and after the date the city of Fairfax is incorporated and becomes effective as a city, it shall take over, assume and exercise all functions and responsibilities of the county of Fairfax with respect to the towns formerly within the county, and the functions formerly performed jointly with the city of Falls Church."

This office has previously ruled that 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 Virginia Constitution. See Report of the Attorney
REPORT OF THE ATTORNEY GENERAL

General, 1958-1959, pp. 16, 17. As I construe its terms, the above quoted provision does no more than prescribe that the city of Fairfax—when incorporated and effective as such—shall succeed to all functions and responsibilities formerly discharged by the county of Fairfax in connection with those towns formerly within the county and the city of Falls Church. As thus interpreted, I am constrained to believe that the provision in question is not antagonistic to the Virginia Constitution.

I regret that the pressure of business on this office and the illness of certain of my assistants have prevented an earlier response to your communication. Trusting that the delay has not inconvenienced you, I am

CITIES AND TOWNS—Fire Departments—Authority Beyond Corporate Limits. No Authority to Contract with Private Citizens in Adjoining County to Perform Governmental Function. (18)

HONORABLE JAMES A. H. FERGUSON
City Attorney
City of Danville

This is in reply to your letter of July 7, 1960, in which you asked to be advised as to whether the City of Danville may enter into contracts with individual citizens residing in Pittsylvania County for the purpose of rendering aid and fire protection in said county pursuant to § 27-2 of the Code of Virginia of 1950.

Section 27-2, Code of 1950, provides as follows:

"The governing body of any city or town may, in its discretion, authorize or require the fire department thereof to render aid in cases of fire occurring beyond their limits, and may prescribe the conditions on which such aid may be rendered, and may enter into a contract, or contracts, with adjacent or adjoining counties for rendering aid in fire protection in such counties, or any district, or sanitary district thereof, on such terms as may be agreed upon by such governing body and the governing body of such counties and/or district, including sanitary districts, and when the fire department of any city or town is operating under such permission or contract, or contracts, on any call beyond the corporate limits of the city or town, it shall be deemed to be operating in a governmental capacity, and subject only to such liability for injuries as it would be if it were operating within the corporate limits of such city or town."

The function of the city's fire department in providing fire protection is undertaken in its governmental capacity as a political subdivision of the State. The legislative authority extended by virtue of § 27-2 of the Code for cities and towns to render aid in cases of fire occurring beyond their municipal corporate limits, and to enter into contracts with adjoining counties for such purpose is a delegation of authority which cannot be redelegated by such cities and towns nor performed by private citizens. I am of the opinion that the authority to enter into such contracts cannot be extended by the City to contracting with private individuals within adjoining counties to perform this governmental function.

CITIES—Abatement of Public Nuisance—Not Considered as "Citizen" to Bring Suit under Section 48-1 of Code. (225)

HONORABLE ARMISTEAD L. BOOTHE
State Senator

This is in reply to your letter of January 14, 1961, which I quote in part as follows:

"Does Section 48-1 of the Virginia Code of 1930 permit the City Council..."
of Alexandria, as a Council, to complain to the local Circuit or Corporation Court setting forth the existence of a public or common nuisance?

"Several citizens have sought to have the City Council make such a complaint. The City Attorney and I both feel that Section 48-1 authorizes five or more citizens to act but confers no authority upon the City Council as such. Of course five or more members of the City Council could act individually under this section.

"No other section is involved in the question of the Council's authority."

Section 48-1 of the Code of Virginia reads as follows:

"When complaint is made to the circuit court of any county, or the corporation court of any city of this State, by five or more citizens of any county, city of town, setting forth the existence of a public or common nuisance, the court, or the judge thereof in vacation, shall summon a special grand jury, in the mode provided by law, to the next term of such court, to specially investigate such complaint."

The purpose of the foregoing statute is to afford private citizens a legal process by which to abate a public nuisance. I am of the opinion that the word "citizens" was used advisedly by the General Assembly and it was not intended that public authorities resort to this statutory remedy.

I presume that there is no question but that the City Council may undertake the abatement of public nuisances by means other than the procedure provided in Chapter 1 of Title 48 of the Code of Virginia.
instance, it must be the clerk of the circuit court. The next general election for a clerk of court of record in cities of this nature is November, 1961, and whoever is elected at that time shall take office on the first day of February of the second year after his election, which would be February 1, 1963.

Therefore, in my opinion, the appointment made by the circuit court of Chesterfield county for a term expiring January 31, 1963 with respect to the clerk of the court of record of Colonial Heights, is correct.

CIVIL PROCEDURE—Removal of Cases from Courts Not of Record—Unlawful Entry and Detainer. (109)
Courts—Not of Record—Jurisdiction—Removal of Civil Cases—Unlawful Entry and Detainer. (109)

HONORABLE ROBERT L. QUARLES
Judge, Municipal Court
Roanoke, Virginia

September 23, 1960

This is in reply to your letter of September 20th, which reads as follows:

"The above section [§ 16.1-92, Code of Virginia] was amended by the 1960 Legislature by adding to the first sentence thereof, the words 'except cases of unlawful entry and detainer,' with the result that we in this office are completely confused as to the present meaning of the section.

"It has always been our position that cases of unlawful entry and detainer could not be removed unless there was an amount in controversy in excess of three hundred dollars. This was our construction of Sec. 16.1-92 prior to the 1960 amendment. Under old sections 16-14 and 16-81 it was clearly the intention of the Legislature that such cases were not removable.

"Now the question arises whether the section as amended means that cases of unlawful entry and detainer can be removed even though the amount in controversy does not exceed three hundred dollars, or whether it means that such cases are not removable under any circumstances.

"We have received an application to remove a pending unlawful detainer case in which no money is sought to be recovered, and we would therefore appreciate the benefit of your interpretation of Sec. 16.1-92."

Prior to the amendment to Section 16.1-92, which added the phrase "except in cases of unlawful entry and detainer" (Chapter 284, Acts of 1960), cases of unlawful entry and detainer were removable under this section if the amount involved was in excess of the amount stated in said section.

The amendment, in my opinion, has the effect of taking cases of unlawful entry and detainer out of the category of law actions that may be removed to a court of record under the provisions of Section 16.1-92 of the Code.

The procedure in these cases is prescribed in Sections 8-791, et seq., of the Code. Whenever a suit is brought under Section 8-791, in my opinion, the defendant may only take the case to a court of record by complying with the provisions of Section 8-794 of the Code. Jurisdiction of a court not of record is set forth in Section 16.1-77 (3) of the Code.

The purpose of the amendment contained in Chapter 284, Acts of 1960, it would seem, was to revive the exception that was formerly contained in Section 16-14 of the Code which had been repealed by Chapter 555, Acts of 1956.
CLERKS—Circuit Court—May Serve as Member of Democratic Executive Committee. (248)
Elections—Primary—Clerk of Circuit Court May Run for Democratic Executive Committee. (248)

February 20, 1961

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

Reference is made to your letter of February 8, in which you enclosed a letter from the clerk of the circuit court of Portsmouth, which reads as follows:

"As memberships on the City Democratic Executive Committee are to be voted upon at the primary this summer, July 11th, I am writing to inquire whether in your opinion I am barred from offering for the committee since I am the Clerk of the Circuit Court. Also, would it not be necessary for the candidates for election to the committee to file their declarations for candidacy with me as the chairman prior to April 12, 1961."

In my opinion there is no reason why a clerk of the circuit court may not be a candidate and, if elected, serve as a member of the City Democratic Executive Committee.

In the event the Committee is elected at the July primary, it will be necessary for the declarations of candidacy to be filed in accordance with State primary law.

CLERKS—Compensation—County May Not Pay Salary in Excess of Limit in Statute —County May Pay Fee for Collecting Recordation Tax. (245)

February 17, 1961

HONORABLE J. T. MARTZ, Clerk
Circuit Court of Loudoun County

This is in reply to your letter of February 9, 1961, in which you advise that the Board of Supervisors of Loudoun County has proposed a recordation tax ordinance which will provide a 5% payment to your office for all collections. A question has been raised as to whether it would be preferable to increase your salary by the sum of $330.00, the amount necessary to reach your maximum allowance for the year 1960.

You have requested my opinion on the following questions:

"Does the Board have the right to pay this $330.00 direct to me and if so, to what could it be charged? Is the Board restricted by Section 15-238 as to the amount it can pay me?"

I am aware of no authority for a county board of supervisors to increase the annual allowance of the clerk beyond the maximum fixed by statute. Section 14-163.1 of the Code of Virginia (1950) as amended limits the Clerk of Loudoun County to the sum of $1,600.00 annually, to be paid from the county treasury. Section 15-238 of the Code limits the salary of the county clerk to $150.00 annually, except in those counties specified in Section 15-239 of the Code. Loudoun County is not specified in the last mentioned section of the Code.

Apparently, the Board of Supervisors is agreeable to paying you a sum sufficient to meet your annual maximum allowance fixed under § 14-155 of the Code, although reluctant to enact an ordinance containing a percentage fee which could result in
a greater amount being paid from county funds. While the board is limited in the amounts it may pay the clerk, under the statutes mentioned above, there would be no objection to specifying a particular sum to be paid the clerk for collecting the recordation tax now being contemplated, so long as the sum did not result in the clerk's office receiving an annual amount in excess of the maximum allowance provided by § 14-155 of the Code of Virginia. Section 58-65.1 of the Code reads in part as follows:

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

By virtue of the foregoing quoted provision, the Board of Supervisors would be authorized to compensate you by a fixed amount, or by a percentage on collections. As another alternative, the compensation could be fixed by a percentage, not to exceed a fixed maximum.

CLERKS—Courts of Record—Compensation from County for Services as County Clerk to be Disregarded to Extent Provided by Statute. (25)

July 18, 1960

HONORABLE N. G. HUTCHESON
Clerk of Mecklenburg County

This is in reply to your letter of July 9, 1960, which I quote as follows:

"The Acts of 1960, page 348, Section 14-162.3; 'The governing body of every County is empowered to determine what annual salary shall be paid to the County Clerk—Mecklenburg County—$1200.00—$1800.00. In lieu of this statute, is the Board of Supervisors of Mecklenburg County authorized under the Acts of 1960, page 93, Section 14-155, to pay the Clerk $2500.00?"

I believe your reference to § 14-162.3 was an inadvertent oversight, inasmuch as the 1960 Act of the Assembly, referred to in your letter, was confined to amending and reenacting § 14-163.1 of the Code.

I am of the opinion that your inquiry must be answered in the negative.

Section 14-163.1 of the Code of Virginia provides the minimum-maximum amount which may be paid out of the county treasury for annual allowance to the county clerks of the several counties. For the County of Mecklenburg that minimum-maximum range has been fixed at not less than $1200.00 nor more than $1800.00. The 1960 amendment to this section of the Code did not alter the maximum amount allowed the County Clerk of the County of Mecklenburg.

Section 14-155 of the Code of Virginia provides the maximum annual compensation which may be paid the clerks of the courts of record, whose compensation and expenses of office are fixed by the State Compensation Board. Any sums of money paid into the clerk's office in excess of the maximum compensation fixed by statute, and the expenses actually incurred and allowed by the State Compensation Board, must be paid into the treasury, pursuant to § 14-150 of the Code. In determining this maximum amount, the Compensation Board must disregard certain specific amounts paid the clerks by cities and counties, exclusive of commissions. The amount received pursuant to § 14-163.1 of the Code would be excluded, provided it does not exceed the maximum sum to be so disregarded.

The effect of the 1960 amendment to § 14-155 of the Code, in so far as here germane, is to require the Compensation Board to disregard a sum not to exceed $2500.00
which may be received by the clerks from cities and counties having a population of less than two hundred thousand when determining the maximum compensation and expenses to be allowed such clerks. Prior to this amendment, the amount was $1500.00 for counties having a population between twenty-five thousand and fifty thousand. While the State Compensation Board must now disregard the sum of $2500.00 which may be paid by the County to the Clerk of the court of record for Mecklenburg County when determining his maximum compensation pursuant to § 14-155 of the Code, the maximum allowance which may be paid said Clerk for his services as County Clerk remain fixed at $1800.00.

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**CLERKS—COURTS OF RECORD—Fees Allowed for Filing Warrants Received from County Courts. (48)**

August 1, 1960

**Honorable J. Gordon Bennett**

Auditor of Public Accounts

This is in reply to your letter of June 30, to which you attached a copy of a letter to you from Honorable John Henry Powell, Clerk of Nansemond County, in which the following questions are presented:

"In reading the advanced sheets of the new Acts of Assembly, I find so many discrepancies that many of them will have to be interpreted."

"First: When Titles 18 and 19 were re-written, Section 19-312 relating to certificates of fines was deleted, but I assume the Clerk can still bill the State Treasury under that Section for all fines and costs from County Courts through June 27 or 30, whichever date the new sections became effective. Am I right in that conclusion?"

"Second and most important: New Section 19.1-337 apparently entitles the Clerk to $1.25 either in the case where a fine and costs are imposed or where only costs are imposed and the same are paid by the defendant, and $.25 from the State Treasury where the fine and costs or costs are not paid or where the defendant is acquitted."

"I note that Section 14-132(6) as amended in 1960, provides for a fee of $.25 which when collected by the County Court is to be remitted to the Clerk."

"Therefore, I assume that there should be charged against the defendant for Clerk's costs $1.25 under Section 19.1-337 and $.25 for filing, under Section 14-132 (6), making a total Clerk's costs to be assessed of $1.50. Am I correct in this assumption?"

You have requested my opinion with respect to the questions raised by Mr. Powell.

With respect to the first question, old Section 19-312 of the Code remained in effect and was applicable through June 30, 1960.

With respect to the second question, Section 19.1-337 allows the clerk of a circuit court or corporation court, as the case may be, a fee of $1.25 for his services performed under Sections 19.1-335 and 19.1-336 in cases involving a violation of a State statute where there is a judgment for a fine and costs, or costs only. This fee is not payable out of the State treasury, but is taxed and collected as a part of the costs in each case.

In cases where the accused is acquitted, or wherein the costs are not collected from the accused in Commonwealth cases, the clerk's fee shall be twenty-five cents only, to be paid out of the State treasury.

The first sentence of Section 19.1-337 is applicable only in cases where the warrant charges a violation of a State statute.
With respect to the last two paragraphs of Mr. Powell's letter, it is necessary to read paragraph (6) of Section 14-132 of the Code and the terminal sentence of Section 19.1-337 together in order to determine the correct intent of paragraph (6) of Section 14-132. You will note that the last sentence of Section 19.1-337 reads as follows:

"The clerk's fee for filing warrants and summonses for violations of local ordinances shall be taxed as a part of the costs and paid in conformity with §14-132 of this Code."

This language, in my opinion, allows a clerk of a court of record the twenty-five-cent fee under paragraph (6) of Section 14-132 only in those cases where the papers received by him relate to violations of local ordinances. In such cases the clerk of a court of record is not entitled to the fee of $1.25 (or 25 cents) provided for in the first sentence of Section 19.1-337.

In light of this interpretation, the clerk's fee for performing the services under Sections 19.1-335 and 19.1-336, in my opinion, may not exceed $1.25 in any case.

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CLERKS—FEES—Filing Petition and Recording Orders in Connection with Certificates of Deposit By State Highway Commissioner. (356)

Highways—Certificates of Deposit By Commissioner—What Fees to be Charged by Clerk. (356)

May 16, 1961

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

This is in reply to your letter of May 11, 1961, which reads as follows:

"I am in receipt at the present time of many certificates and plates filed in this office for recordation by the State Highway Commissioner covering estimates to be the fair value of land taken in conjunction with the construction, etc. of highways. I am paid the proper fee for recording these certificates and plates.

"Later, through an attorney the person whose land is taken, comes in by petition and order, request the court to enter the order confirming absolute and indefeasible title to the land described in the certificate in the Commonwealth of Virginia.

"The Court enters the order which is recorded in the Chancery Order book and in the order there is this: 'and doth direct this order to be spread on the current deed book in the Clerk's Office of this Court, and reference to be made showing the book and page number recordation on the margin of the page where the aforesaid certificate is spread.'

"What is my charge for filing the petition, recording the order in the Chancery Order book, the Deed Book and indexing and making the proper notations?"

Section 33-70.8 provides:

"Notwithstanding any other law to the contrary, the clerk of the court wherein any such certificate is filed shall receive the following fees, and no other:

"(1) For the filing of any petition as provided in §§ 33-70.6, 33-70.7 and 33-70.11, the clerk shall be entitled to a fee of fifty cents to be paid by the petitioner."
"(2) For the recordation of such certificate or copy thereof, as well as for any order of the court as herein provided, the clerk shall be entitled to a fee of two dollars and fifty cents, to be paid by the party upon whose request such certificate is recorded or order is entered."

The language of the statute is all inclusive and by its provisions sets forth the fees which may be charged in the various matters enumerated therein, including settlement pursuant to the provisions of Section 33-70.11.

I am of the opinion that the proper fees to be charged under the facts set forth in your letter are as follows:

For filing a petition for the approval of agreement subsequent to the recordation of such certificate contemplated in section 33-70.11 ................................................... $0.50

For recordation of the order of the court confirming title in the Commonwealth ............................................ $2.50

Total .................................................. $3.00

CLERKS—Garnishments—No Duty to Furnish Forms to Creditors. (69)

August 11, 1960

HONORABLE SAMUEL W. SWANSON
Clerk of Court
Pittsylvania County

This is in reply to your letter of August 10, which reads as follows:

"I am writing to you to determine the obligations of a Clerk pertaining to the affidavit required by Section 8-441 of the Code of Virginia pertaining to the issuance of a summons in garnishment.

"The question has arisen locally as to whether a Clerk has either the right or the duty to furnish to judgment creditors an affidavit form and/or to assist a judgment creditor in completing the affidavit. The specific questions which I would like to have answered are:

"1. Is there any obligation upon a Clerk to furnish an affidavit form to a judgment creditor?

"2. If a Clerk does furnish an affidavit form to a judgment creditor, can he make a charge for the same?

"3. Can a Clerk or any of his deputies assist a judgment creditor in completing the affidavit form whether or not a charge is made, or would this be practicing law?"

In my opinion the answer to questions 1 and 2 must be in the negative. The statute does not require the clerk to furnish a form to a judgment creditor for his use in complying with the procedure required before a clerk may issue a summons in garnishment. I understand that the clerks generally throughout the State have kept on hand a supply of suitable forms for this purpose and have made them available to judgment creditors and their counsel without charge. I am not aware of any statute which authorizes a clerk to charge a fee for these forms. Paragraph (39) of Section 14-123 would not apply, since this paper does not go out of the clerk's office.

With respect to question 3, the affidavit is an essential part of the suggestion. The amendment to Section 8-441 has the effect of requiring that the suggestion shall contain information that was not required prior to the amendment. I think it has
been the practice of clerks to aid judgment creditors and their counsel, if requested so to do, in the preparations of this official paper. I think that this service is one that may be tendered by a clerk as an incident to his public service, although it may not be a mandatory public duty. I do not feel that such service would come within the prohibitions with respect to the practice of law.

CLERKS—Office Hours—County Office May Not be Closed on Saturday—Section 17-41(9) of Code Erroneously Codified in 1960. (204)

December 19, 1960

HONORABLE HARRY W. BALDWIN
Clerk of Circuit Court
Goochland County

This is in reply to your letter of December 15, in which you request my advice as to whether or not the Clerk's Office of the county of Goochland may be closed on Saturdays.

I have looked into the question as to Code section 17-41(9), and I find that when House Bill No. 283 was introduced, (9) was as follows:

"The clerk's office of any court of record in any city or county may be closed on Saturday if so authorized by the judge of such court and the governing body of such county or city."

Upon examining the "Errata" set out by the Clerk of the House of Delegates on page 1131 of the Acts of 1960, I find that he has this note with respect to Chapter 482 of the Acts of 1960, which amended paragraph (9) of Section 17-41:

"Ch. 482, p. 733, subsection (9), second line after the word 'city', strike out 'or county'."

I conferred with Honorable E. Griffith Dodson, Clerk of the House of Delegates, and he advises me that House Bill No. 283 was amended before its passage to strike out the words "or county" at both places in paragraph (9) of the bill. Colonel Dodson advises me that the bill as passed and as signed by the Governor applies to cities only.

In view of this I do not believe that the Code Commission had authority to add to paragraph (9) the words "or county."

The provisions of Chapter 482 as published in the Acts of 1960 must be read together with the Errata memorandum made by the Clerk of the House of Delegates on page 1131 of these Acts.

CLERKS—Recordation—Chattel Mortgage—Not Affected by Section 55-58.1 of Code. (40)

July 27, 1960

HONORABLE LEDA S. THOMAS, Clerk
Circuit Court of Prince William County

This is in reply to your letter of July 25, 1960, which reads as follows:

"On July 7, 1960, I returned a Chattel Deed of Trust to the Commercial Credit Plan, Incorporated, Silver Spring, Maryland with a letter saying that, under a new law that had gone into effect I could not record the Trust. I also sent a photostat copy of the new law governing this. It did not list a Trustee but just 'Commercial Credit Plan, Incorporated.'"
"I then received a letter from them, a copy of which is enclosed. "Please let me have your opinion as to whether I was right or wrong in refusing to record their Chattel Trust."

It will be observed that Chapter 565 of the Acts of Assembly, 1960, amended the Code by adding § 55-58.1. It is further noted that § 55-58 is a part of Article II, Chapter 4, which article deals with "Form and effect of deeds of trust; sales thereunder; assignments; releases." While this new section of the Code provides that the term, "security trust" shall include a deed of trust, mortgage, bond, or other instrument, it is obvious from a careful reading of the section that it refers principally to deeds of trust and that its primary object is to provide that only residents of Virginia and corporations chartered under the laws of Virginia or the United States of America, whose principal office is within this State, be designated as the trustee of a security trust.

Paragraph 3 of § 55-58.1 provides that clerks shall not admit any security trust (which I construe as meaning a deed of trust) for recordation or filing which does not state the residence address of the trustee or trustees named therein. This obviously refers to instruments in which there is a trustee designated and not to other types of security.

While you referred to the instrument returned to the Commercial Credit Plan, Incorporated as a "chattel deed of trust," I presume the instrument was actually a "chattel mortgage," to which a trustee is not a party.

It is my considered opinion that § 55-58 of the Code of 1950, as amended, does not affect the legality of chattel mortgages, and the clerk may record such instruments without reference to this section of the Code.

CLERKS—Recordation—Security Trusts—When Resident Trustee Required. (41)

July 27, 1960

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

This will acknowledge receipt of your letter of July 25, 1960, which reads as follows:

"I am enclosing herewith a copy of a letter dated July 15 from the firm of Muecke, Mules and Ireton which is in response to my letter to them dated July 7, a copy of which I am enclosing herewith.

"For your convenience I am also enclosing herewith a copy of the mortgage that is used by the Commercial Credit Plan which I thought might be of assistance to you in making your determination of this matter.

"I believe under the new Section of the Code, namely: 55-58.1 the Clerk has no alternative but to refuse instruments that do not have a resident trustee or mortgagee."

It will be observed that Chapter 565 of the Acts of Assembly, 1960, amended the Code by adding § 55-58.1. It is further noted that § 55-58 is a part of Article II, Chapter 4, which article deals with "Form and effect of deeds of trust; sales thereunder; assignments; releases." While this new section of the Code provides that the term, "security trust" shall include a deed of trust, mortgage, bond, or other instrument, it is obvious from a careful reading of the section that it refers principally to deeds of trust and that its primary object is to provide that only residents of Virginia and corporations chartered under the laws of Virginia or the United States of America, whose principal office is within this State, be designated as the trustee of a security trust.
Paragraph 3 of § 55-58.1 provides that clerks shall not admit any security trust (which I construe as meaning a deed of trust) for recordation or filing which does not state the residence address of the trustee or trustees named therein. This obviously refers to instruments in which there is a trustee designated and not to other types of security.

The instrument enclosed with your letter is a typical chattel mortgage in which personal property is transferred to the mortgagee, no trustee being a party to the transaction.

It is my considered opinion that § 55-58 of the Code of 1950, as amended, does not affect the legality of chattel mortgages, and the clerk may record such instruments without reference to this section of the Code.

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CLERKS—Recordation—Tax—Local—Compensation by Locality for Collecting Included when Determining Maximum Compensation. (208)

Public Officers—Deputy Clerk—Must be Resident of Political Subdivision Where Appointed. (208)

December 21, 1960

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

This is in reply to your letter of December 17, 1960, in which you pose two questions relating to the conduct of your office. Your letter reads in part as follows:

"The Board of Supervisors pays me a salary of $1750.00 and in addition to that they pay me 5% commissions on county taxes on deeds admitted to record, pursuant to an ordinance passed by the Board of Supervisors. These fees as you see do not come under State law and therefore I am wondering if I can disregard $1750.00 plus the commissions paid to me by the Board of Supervisors under that ordinance."

Section 14-155 of the Code provides the maximum annual compensation which may be paid the clerks of courts of record, whose compensation and expenses of office are fixed by the State Compensation Board. Any sums of money paid into the clerk’s office in excess of the maximum compensation fixed by statute, and the expenses actually incurred and allowed by the State Compensation Board, must be paid into the Treasury, pursuant to § 14-150 of the Code. The effect of the 1960 amendment to § 14-155 of the Code, in so far as here germane, is to require the Compensation Board to disregard a sum not to exceed $2500.00 which may be received by the clerks from cities and counties having a population of less than two hundred thousand when determining the maximum compensation and expenses to be allowed such clerks. Prior to this amendment, the amount was $1500.00 for localities having a population between twenty-five thousand and fifty thousand. The section now reads, in part, as follows:

"The total annual compensation, exclusive of expenses authorized by the State Compensation Board, of any officer mentioned in § 14-145 shall not exceed the sums hereinafter named, to-wit:

"In cities or counties having a population of one hundred thousand or more, such compensation shall not exceed the sum of seventy-five hundred dollars per annum; * * * with a population between twenty-five thousand and fifty thousand, such compensation shall not exceed six thousand seven hundred fifty dollars per annum; * * * and provided, however, that in determining the compensation allowed to any such officer hereunder any
compensation allowed to such officer by his city council or county board of supervisors, other than commissions allowed by State law, for the discharge of any duties imposed upon such officer by the council of the city, board of supervisors of the county, or laws of this State shall be disregarded to the extent of: (a) not more than five thousand dollars in cities having a population of two hundred thousand or more and in counties adjoining cities having a population of two hundred thousand or more, (b) not more than twenty-five hundred dollars in cities or counties having a population of less than two hundred thousand and not included in subsection (a) above. ***

In fixing your annual compensation and expenses, the State Compensation Board must now disregard any compensation received from the County up to $2,500.00, except the commissions received from the County which are allowed by State law. The probing question, therefore, is whether or not the 5% commission being paid by the County is a "commission allowed by State law" within the meaning of § 14-155 of the Code.

I presume that the ordinance adopted by the Board of Supervisors by which you are allowed a 5% commission on county taxes on deeds admitted to record was adopted pursuant to § 58-65.1 of the Code, which reads in part as follows:

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

In the absence of such a statutory provision, the Board of Supervisors would be without authority to allow the 5% commission on the taxes collected by the clerk. The initial authorization for such commissions thus stems from State law, rather than the ordinance adopted by the Board of Supervisors of Nansemond County.

I am, therefore, of the opinion that the compensation thus allowed by the Board of Supervisors falls within the purview of § 14-155 of the Code, as being "commissions allowed by State law." Such commissions are to be considered in determining the maximum compensation allowed by § 14-155 of the Code, and the State Compensation Board should disregard only the $1,750.00 compensation paid by the Board of Supervisors for services performed on behalf of the county.

You also asked to be advised as to whether there is any law prohibiting the employment of a deputy clerk who resides outside of the county in which the clerk's office is located.

Section 32 of the Constitution reads in part: "Every person qualified to vote shall be eligible to any office of the State, or in any county, city, town or other subdivision of the State, wherein he resides, ***." This office has on prior occasion expressed the view that the foregoing provision of the Constitution requires every officer of the State, and of every county or city, to be a qualified voter and a resident thereof. See Report of the Attorney General, 1943-44, pages 76-83.

Section 15-487 of the Code of Virginia of 1950, as amended, relating to residence requirements of officers, provides in part: "Every county officer, except deputy clerks of courts of record, shall, at the time of his election or appointment, have resided six months next preceding his election or appointment, either in the county for which he is elected, or appointed, or in the city wherein the courthouse is, ***."

While the General Assembly has thus provided an exception to the six months' residence requirement for deputy clerks, no such exception is authorized in the Constitution. If § 15-487 of the Code is to be construed as removing the office of deputy clerk from the constitutional requirement that every county officer must be a qualified voter and resident of the county in which he acts, I have grave doubts as to the constitutionality thereof.
June 6, 1961

HONORABLE E. RALPH JAMES
Member, House of Delegates

This is in reply to your letter of May 26, 1961, in which you request my opinion concerning the construction of Section 23-49.1 of the Code of Virginia, as it was amended at the 1960 session of the General Assembly. I quote from your letter as follows:

"The amendment provides for the establishment of Divisions of the College of William and Mary at Newport News and Petersburg, respectively. Question has arisen as to whether the word at means that the Divisions must be within the corporate limits of the cities of Newport News and Petersburg or whether the word at simply designates the general locality in which it should be located.

"I understand that the Petersburg Division is being established outside of the corporate limits of the city although possibly on land already owned by the city of Petersburg. However, I am not interested in that situation but I am interested in whether or not under the Act in question, the college may be established outside the city limits of Newport News. It would seem to me that it was intended to establish the general locality of the area."

Webster's Dictionary defines the word "at" as follows:

"Primarily, at expresses the relation of presence or contact in space or time, or of direction toward. Hence, it implies; 1. Simple presence in, on, or by, or near to; . . . ."

I am advised that the General Assembly in acting upon the establishment of the Newport News and Petersburg Divisions of the College of William and Mary had before it specific proposals revealing that the Petersburg Division would be outside of the corporate limits of the city, whereas the Newport News Division would be located within the corporate limits of that locality. It seems clear to me, therefore, that the General Assembly in using the word "at" in the legislation referred to was seeking to establish the general location of the institution involved, and that under that terminology the facility could be located in or near to the named locality.

In that connection, it is interesting to note that the Appropriation Act passed in 1960 refers to the College of William and Mary in Virginia at Williamsburg; to the Medical College of Virginia, at Richmond; to the University of Virginia, at Charlottesville; to the Virginia Polytechnic Institute, at Blacksburg; to the Virginia Military Institute, at Lexington, etc.

While I am convinced that the language of the Act is sufficiently broad to permit the location of the facility either in the named locality or near the named locality, it would seem to me that, in view of the fact that the Legislature had certain specific proposals before it at the time this legislation was under consideration, those responsible for acting under the legislation should give very serious consideration to any deviation from the proposals which were the basis for the legislative action.
COLLEGES AND UNIVERSITIES—Real Property—Colleges of William and Mary—May Convey Land Under Prior Authority of College of William and Mary.

(2)

July 1, 1960

DR. A. D. CHANDLER
President
College of William and Mary

This is in reply to your letter of June 30, 1960, which reads as follows:

"Chapter 258 of the Acts of the General Assembly of Virginia, 1960, House Bill No. 581, authorizes the Board of Visitors of the College of William and Mary in Virginia to sell and convey certain property, described therein, in the City of Williamsburg, to Colonial Williamsburg, Incorporated.

"Chapter 180 of the Acts of the General Assembly of Virginia, 1960, House Bill No. 466, approved by the Governor on March 3, 1960, established a corporate body known as The Colleges of William and Mary. This act also transferred all real estate and personal property standing in the name of the corporate body designated as the College of William and Mary in Virginia to 'The Colleges of William and Mary.' Also included in this act was a provision which made the College of William and Mary in Virginia an integral part of The Colleges of William and Mary.

"In light of the above, I am requesting an opinion from your office as to whether The Colleges of William and Mary has authority to make conveyance of that property described in Chapter 258 of the Acts of the Assembly, 1960, to Colonial Williamsburg, Incorporated."

Chapter 258, Acts of General Assembly of Virginia, approved March 11, 1960, authorizes the Board of Visitors of The College of William and Mary in Virginia to convey to Colonial Williamsburg, Incorporated, for a consideration of $116,400, the real estate therein described containing 1.96 acres of land, being the real estate known as 'Travis House' and which was conveyed to the College of William and Mary in Virginia by deed from Colgate W. Darden, Jr., Governor of Virginia, et al., dated September 5, 1945, and recorded on September 11, 1945 in the Clerk's Office of the Circuit Court, of the City of Williamsburg and James City County in Deed Book No. 20, page 298.

Chapter 258 contains an emergency clause and, therefore, it became effective on March 11, 1960.

On March 3, 1960, Chapter 180, Acts of Assembly, 1960, was approved. This Act also contains an emergency clause and became effective immediately upon its approval. This Act contains this language:

"§ 23-39. The board of visitors of The Colleges of William and Mary shall be a corporation under the style of 'The Colleges of William and Mary.'

"§ 23-40. All the real estate and personal property now existing and standing in the name of the corporate body designated 'The College of William and Mary in Virginia' shall be transferred to and be known and taken as standing in the name, and to be under the control of the corporate body designated 'The Colleges of William and Mary.' Such real estate and personal property shall be the property of the Commonwealth.

"§ 23-41. (a) The board of visitors is to consist of fourteen members to be appointed by the Governor from the State at large, and the Superintendent of Public Instruction ex-officio. The visitors of the College of William and Mary in Virginia in office on March seventh, nineteen hundred sixty, are hereby declared to be visitors of The Colleges of William and Mary, and are continued in office until their respective terms would have otherwise expired."
"§ 23-44. The board of visitors shall be vested with all the rights and powers conferred by the provisions of this chapter and by the ancient royal charter of the College of William and Mary in Virginia, in so far as the same are not inconsistent with the provisions of this chapter and the general laws of the State.

"The board shall control and expend the funds of the Colleges and any appropriation hereafter provided, and shall make all needful rules and regulations concerning the Colleges, and generally direct the affairs of the Colleges."

Under this Act the Board of Visitors of The College of William and Mary in Virginia is continued in office as the Board of Visitors of The Colleges of William and Mary. All the real estate standing in the name of The College of William and Mary in Virginia is, by this Act, vested in The Colleges of William and Mary.

Chapter 258, which authorizes the Board of Visitors of The College of William and Mary in Virginia to sell the real estate involved must be considered in light of the provisions of Chapter 180 which had previously changed the name to The Colleges of William and Mary, vested the title in the new name and continued the Board of Visitors in office with authority to exercise all the powers that had previously been delegated to the Board of Visitors. Thus by whatever name the college may be known the Board of Visitors may exercise all powers delegated to them by any legislative act.

The question involved was considered by this office at the time the deed was prepared and approved. Reference to the change of name, with a recital to Chapter 180, is contained in the deed. We were of the opinion then, and are of the same opinion now, that the Board of Visitors of the Colleges of William and Mary has authority under Chapter 258 of the Acts of the General Assembly of Virginia to sell and convey to Colonial Williamsburg, Incorporated, the property described in said Act.

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COLLEGES AND UNIVERSITIES—Va. Education Assistance Authority may Extend Gifts to Acquire Notes of Students in Private Colleges. (160)

November 7, 1960

Honorable C. Harrison Mann, Jr.
Member, House of Delegates

I am in receipt of your letter of November 3, in which you call my attention to Sections 2, 4, 6 and 9 of Chapter 494 of the Acts of Assembly of 1960 and inquire whether or not the State Education Assistance Authority may use gifts to it "for buying or selling or acquiring a contingent interest in obligations of residents of this state representing obligations of students for the purpose of obtaining an education at private institutions of higher education."

Particularly pertinent to the resolution of the question you present in Section 4(f) of the above mentioned enactment, which provides:

"§ 4. The Authority is hereby authorized and empowered:

* * * *

"(f) To receive and accept from any federal or private agency, corporation, association or person grants to be expended in accomplishing the objectives of the Authority, and to receive and accept from the Commonwealth, from any municipality, county or other political subdivision thereof and from any other source aid or contributions of either money, property, or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made;"
In light of the language italicized above, I am of opinion that a grant or contribution which has been made to the State Education Assistance Authority for the purpose of buying, selling or acquiring a contingent interest in the obligations of students at private institutions of higher education may be used or applied by the Authority to effectuate the stated purposes for which such grant or contribution was made. In this connection I am constrained to believe that the power conferred upon the Authority by Section 4(f) of the statute in question is not subject to the apparent restriction embraced in Sections 2, 6 and 9 of the enactment limiting the power of acquisition to obligations of students at State-supported institutions of higher education.

COMMISSIONERS OF THE REVENUE—Erroneous Assessments of Real Property—Power to Correct. (1)

HONORABLE E. GLENN JORDAN
Commissioner of Revenue
Richmond, Virginia

This will reply to your letter of June 20, in which you inquire whether or not the opinion rendered to you by this office on March 2, 1960, would be applicable to erroneous assessments of real estate. In the opinion to which you refer, it was ruled that Section 58-1142 of the Virginia Code—which relates to the correction of local levies by commissioners of the revenue or other officials performing the duties imposed on commissioners of the revenue—supersedes provisions of the Charter of the City of Richmond inconsistent therewith.

In this connection, the initial sentence of Section 58-1142 of the Virginia Code provides:

"If such commissioner of the revenue, or other official performing the duties imposed on commissioners of the revenue under this title, be satisfied that he has erroneously assessed such applicant with any such levy, as aforesaid, the commissioner or such other official shall correct such assessment."

(Italics supplied)

It is manifest from the language italicized above that the initial sentence of Section 58-1142 must be read in conjunction with the immediately preceding provisions of Section 58-1141 of the Virginia Code, which prescribe:

"Any person, firm or corporation assessed by a commissioner of the revenue or other official performing the duties imposed on commissioners of the revenue under this title with local levies on tangible personal property, machinery and tools, or merchants' capital, or a local license tax, or local or State capitation tax, aggrieved by any such assessment, may, within five years from the thirty-first day of December of the year in which such assessment is made, apply to the commissioner of the revenue or such other official who made the assessment for a correction thereof.

"Sections 58-1141 to 58-1144 shall also apply to erroneous assessments of real estate if the error sought to be corrected in any case was made by the commissioner of the revenue or such other official to whom the application is made."

(Italics supplied)

In light of the language italicized above, I am of the opinion that the provisions of Section 58-1142 of the Virginia Code—which, as pointed out in the opinion of March 2, 1960, supersedes provisions of the Charter of the City of Richmond inconsistent therewith—would be applicable to erroneous assessments of real estate, if the error sought to be corrected in any case was made by the commissioner of the revenue or other appropriate official to whom the application is made.
In conclusion, I call your attention to Chapter 547 of the Acts of Assembly (1960) which amended Section 58-1142 of the Virginia Code, effective June 27, 1960. The enactment in question enlarges the time during which refunds may be made under Section 58-1142 to a period of three years from the thirty-first day of December of the year in which an erroneous assessment was made, and further provides that any assessment which is erroneous because of a mere clerical error or calculation may be corrected with or without any petition from the taxpayer involved, and without any limitation as to time.

COMMISSIONERS OF WRECKS—Has no Authority to Regulate, Supervise or Permit Salvage Operations in Atlantic Ocean. (39)

July 26, 1960

HONORABLE F. MASON GAMAGE
Commissioner of Wrecks
Princess Anne, Virginia

This is in reply to your letter of July 22, 1960, in which you state that you are Commissioner of Wrecks for Princess Anne County, Virginia, and that approximately sixty-five years ago the sailing vessel "Clytheia", laden with a valuable cargo of Italian marble, was wrecked and sunk in the Atlantic Ocean near False Cape off Princess Anne County, Virginia. The wreckage is presently located approximately one hundred yards from shore. You further state that salvage operations are presently being conducted to remove this marble cargo and that some of the cargo has already been removed to the docks in Little Creek, Virginia, within the boundaries of Princess Anne County. You have inquired as to whether or not you have jurisdiction over this salvage operation and, therefore, can obtain from the salvors five per cent of the value of the salvage cargo up to $10,000.00 in value and two per cent thereafter as provided in Section 62-165 of the Code of Virginia.

Section 62-158, et seq., of the Code of Virginia set forth the duties and authority of a Commissioner of Wrecks, and I can find no provision in these Code sections granting a Commissioner of Wrecks the power or authority to supervise, permit or regulate salvage operations in the Atlantic Ocean as described above. Therefore, it is my opinion that a Commissioner of Wrecks has no authority in this case to assert a claim against the salvors under the provisions of Section 62-165.

In view of this conclusion, I am not rendering an opinion at this time concerning your authority to secure legal counsel in this matter.

COMMONWEALTH ATTORNEYS—Duty to Institute Proceedings to Collect Claims Against Patients of Mental Institutions. (379)

Mental Hygiene and Hospitals—Collection of Claims—Field Representatives May Not Institute Proceedings to Collect. (379)

June 13, 1961

HONORABLE ALFRED E. H. RUTH
Director of Mental Hospitals

This is to acknowledge receipt of your letter of June 9, 1961, in which you state that for the past several years representatives of the Department of Mental Hygiene and Hospitals have proceeded under the provisions of Section 37-125.7 of the Code of Virginia to collect claims for expenses and care of patients, in lieu of action by local Commonwealth's Attorneys. In your letter you state in part:
"The question has now come up as to whether or not this procedure is legal and proper. The Municipal Court of the City of Danville has requested that we obtain an opinion from you as to whether or not the Commonwealth's Attorney must institute such proceedings in person or whether this action may be delegated to a Field Representative of this Department as his agent."

Said Section 37-125.7 of the Code is as follows:

"The Department shall proceed by notifying the attorney for the Commonwealth of the county or city in which such application is to be filed, of the facts incident to the expenses of caring for any such patient or inmate, and shall include in such notification a statement of the amount due for his care, treatment and maintenance in the institution in which he is a patient. Upon receipt thereof the attorney for the Commonwealth shall institute proceedings on behalf of the Department for the collection of the claim. Such proceedings shall conform to the procedure for collection of debts due the Commonwealth in so far as they are modified by law governing proceedings for the collection of claims against persons under disability."

This section of the Code places upon the Attorneys for the Commonwealth a specific duty which they alone must perform. I see no reason why your department cannot aid and assist Attorneys for the Commonwealth by proffering to them for their consideration sketches of pleadings, orders and decrees suitable for such cases, but before the proceedings are actually filed, the general form of which has been approved by this office, the Attorney for the Commonwealth should sign the pleadings and endorse the orders or decrees on behalf of the Commonwealth. Where it is obvious that the case will not be contested, there would be no prohibition which would prevent the lay representative of the department appearing in court and presenting facts as distinguished from legal conclusions and does not participate in the examination of witnesses, so long as his actions do not amount to the practice of law. Even in such a case where the Attorney for the Commonwealth is not present, that officer would have to endorse any order or decree proffered to the court for entrance. The practice of law has been defined by the Supreme Court of Appeals of Virginia in Section 1 of the Rules promulgated for the integration of the Virginia State Bar. In this connection, see Volume 201 Virginia Reports, p. Lxxxv-i, the pertinent portion of which is as follows:

"Specifically, the relation of attorney and client exists, and one is deemed to be practicing law, whenever—

* * *

"(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal,—judicial, administrative, or executive,—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such presentation by such employee or expert does not involve the examination of witnesses or preparation of pleadings."

Also in this connection, see Opinion No. 28 Virginia State Bar dated May 9, 1957. It is, therefore, my opinion that the Attorney for the Commonwealth must institute such proceedings and this action may not be delegated to a field representative of the Department of Mental Hygiene and Hospitals, although such representative may aid and assist the Attorneys for the Commonwealth in such cases. As indicated above, all pleadings and sketches of orders must be signed or endorsed by the Attorney for the Commonwealth.
COMMONWEALTH ATTORNEYS—Duty to Prepare Necessary Proceedings for County Bond Issue. (139)

Counties—School Bond Issue—Duty of Commonwealth Attorney to Prepare Proceedings. (139)

October 18, 1960

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

This is in reply to your letter of October 17, in which you present the following question:

"I have recently been requested by the Board of Supervisors of Pittsylvania County to prepare all necessary documents and conduct the necessary proceedings with reference to a proposed bond issue to be voted upon by the voters of Pittsylvania County for the construction of new schools, etc. I have always been of the opinion there is a duty of a Commonwealth's Attorney to give legal advice and opinions to the Board of Supervisors. However, I am of the opinion there is no duty on the Commonwealth's Attorney to undertake the responsibility of preparing all the necessary documents and conducting the proceedings with reference to a proposed bond issue without being paid a reasonable compensation for his services to be rendered.

"Is there a duty on the Commonwealth's Attorney to prepare all necessary documents and conduct the necessary proceedings with reference to a proposed bond issue without receiving a reasonable compensation for services rendered in connection therewith or is the Commonwealth's Attorney entitled to be paid a reasonable fee for services rendered in connection with a proposed bond issue such as is contemplated under the Public Finance Act of 1958?"

This question was previously considered by Honorable Abram P. Staples in an opinion dated November 13, 1940, and published in the Report of this office for 1940-'41, at page 39. I am enclosing herewith copy of said opinion.

While the opinion rendered by Mr. Staples related to services rendered for a county school board in connection with a bond issue in a magisterial district, it would, however, be applicable to bond issues for the county as a whole.

I am in accord with the opinion expressed by Mr. Staples.

COMMONWEALTH ATTORNEYS—No Duty to Prosecute Violations of Town Ordinances May be Retained by Town to Prosecute. (272)

March 7, 1961

HONORABLE CURTIS A. SUMPTER
Attorney for the Commonwealth
Floyd County

This is in reply to your letter of March 3, 1961, which reads as follows:

"Will you kindly furnish information on the following questions? Where an incorporated town in a county has elected to try violations of its town ordinances in the County Court of the county, may the Commonwealth’s Attorney for the county appear in behalf of the town and prosecute such violations? If so, may such Commonwealth's Attorney receive from the town compensation for such services?

"Will you kindly answer both questions with respect to appearance in the Circuit Court of the county on appeals of convictions under the town ordinances?"
REPORT OF THE ATTORNEY GENERAL

This office has previously expressed the view that there is no duty encumbent upon the Attorney for the Commonwealth to prosecute violations of town ordinances in any court. (See Reports of Attorney General, 1939-40, at page 49; 1953-1954, at page 36). I concur in that view.

I am aware of no objection to the employment of the Attorney for the Commonwealth by a town to prosecute violations of town ordinances, or to the payment of such compensation as may be agreed upon between the town and the attorney.

CONSERVATORS OF PEACE—Notary Public No Longer Included—May Not Carry Concealed Weapon Without Permit. (238)

Notaries Public—May Not Carry Concealed Weapon Without Permit. (238)

February 14, 1961

Mr. Wolford M. Hall, Jr.
Justice of the Peace
Norfolk 17, Virginia

This is to acknowledge receipt of your letter of February 11, 1961, in which you state:

"I would like to ask you a question pertaining to my rights under the law in reference to my recent appointment to Notary Public for the City of Norfolk.

"What I would like to know is: Am I eligible under the laws of the State to carry a pistol being thus commissioned by the Governor of the State and exercising the duties of Conservator of the Peace?

"If you would advise me of that right I would appreciate it very much. I would like to add that one is really necessary in that capacity and carrying out the duties mentioned above are very hazardous and dangerous . . . ."

For many years there was considerable doubt as to whether a Notary Public could lawfully carry a concealed weapon as he was a conservator of the peace according to Section 18-9 of the Code of 1950, formerly Section 4789 of the Code of 1919, and the Supreme Court of Appeals held that a conservator of the peace may carry a concealed weapon.

I am enclosing herewith a copy of an opinion of this office, dated November 2, 1949, addressed to Mrs. Thelma Y. Gordon, Secretary of the Commonwealth, (Annual Report of the Attorney General, 1949-1950, p. 171), in which my predecessor held that a Notary Public did not have authority to carry a concealed weapon.

However, Section 18-9, supra, which listed a Notary Public as a conservator of the peace, was amended in 1960 in the following language, to-wit:

"Every judge throughout the State and every justice of the peace, commissioner in chancery, and county surveyor while in the performance of the duties of his office within his county or corporation shall be a conservator of the peace, and may require from persons not of good fame security for their good behavior for a term not exceeding one year. Every conservator of the peace shall arrest without a warrant for felonies committed in his presence, or upon reasonable suspicion of felony, and for breaches of the peace and all misdemeanors of whatever character committed in his presence."

You will note that a Notary Public is no longer a conservator of the peace. Hence, the doubt has been definitely resolved: a Notary Public has no authority to carry a concealed weapon.

If you desire to carry a concealed weapon, you should apply to the proper court for such authority.
CONTRACTS—Providing for Finance Charges Not Usurious. (70)
Interest—Finance Charges Not Considered. (70)

HONORABLE FITZGERALD BEMISS
Member of Senate

This is to acknowledge receipt of your letter of August 8, 1960, in which you request my comments on the following situation relating to financial charges resulting from the purchase of an automobile.

The total price of the 1953 Ford was $500.00; $100.00 was paid in cash, leaving a net automobile cost to be financed of $400.00. To this had to be added $81.15 of casualty insurance, increasing the total to be financed to $481.15. The eighteen months finance charge indicated is $124.68, or approximately 26% of the principal. The automobile company (dealer) which sold the car had the balance of the purchase price financed through General Motors Acceptance Corporation. This means that the purchaser executed a chattel mortgage or a conditional sales contract secured by a lien on the automobile. The contract was sold by the automobile dealer to General Motors Acceptance Corporation. Your attention is invited to Sections 6-346 and 6-347 of the Virginia Code, which read as follows:

"Sec. 6-346—Legal interest shall continue to be at the rate of six dollars upon one hundred dollars for a year, and proportionately for a greater or less sum, or for a longer or shorter time; and no person upon any contract shall take for the loan or forbearance of money or other thing above the value of such rate."

"Sec. 6-347—All contracts and assurances made, directly or indirectly, for the loan or forbearance of money or other thing, at a greater rate of interest than is allowed by the preceding section, shall be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned or forborne."

It has been held, however, that a note given for deferred payments of purchase money in a bona fide sale may bear interest at a rate far in excess of the legal rate. The so-called interest is here really a part of the purchase price as originally agreed. Graeme v. Adams, 23 Gratt. (64 Va.) 225; Kraker v. Shields, 20 Gratt. (61 Va.) 377. Hence, the finance charge made under the circumstances as narrated in your letter is part of the cost price of the article and not considered interest. It would follow therefore, that the finance charge of $133.00 is not usurious.

I also call your attention to Section 6-301 of the Code, which provides that the State Corporation Commission can set a maximum rate of charge for small loan companies not to exceed 2½% a month. The maximum of such loan is $600.00. From what the enclosed correspondence indicates, the transaction was not a loan from a small loan company, but was the imposition of a finance charge which is considered part of the purchase price, supra.

COSTS—Commonwealth Not Taxable Except asExpressly Provided by Statute. (199)

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

This is in reply to your letter of December 9, 1960, in which you request my opinion as to whether the clerk of the circuit court can bill the State in the sum of $5.00 for misdemeanor cases and $10.00 for felony cases when the defendant is either acquitted or convicted and unable to pay the costs. You refer to § 14-96 of the Code of Virginia.
Your inquiry was the subject of a thoroughly considered opinion addressed to Honorable Thomas R. Miller, Clerk of the Hustings Court of the City of Richmond, by Attorney General Abram P. Staples, under date of March 22, 1946. This opinion, copy of which is attached hereto, is reported in the Report of the Attorney General, 1945-'46, pages 24-26.

While the statutes referred to in Judge Staples' opinion have been recodified in the Code of Virginia of 1950, there has been no material change in the context.

I concur in the conclusion reached by Attorney General Staples and share his opinion that the long accepted interpretation of these statutes should be changed only by amendatory legislation in which the General Assembly's intention was manifested.

COSTS—Criminal Cases—Fees to be Taxed for Service of Commonwealth Attorney. (322)
Commonwealth Attorneys—Costs in Criminal Prosecution—What Amount to be Taxed. (322)

April 12, 1961

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

Reference is made to the opinion issued by this office on March 22, in response to an inquiry from Honorable Rhea F. Moore, Jr., Clerk of the Circuit Court of Tazewell, regarding Section 14-130 of the Code.

Mr. Moore called attention to the last paragraph of our letter and I find that this paragraph is misleading. The last paragraph of our opinion of March 22, 1961 should read as follows:

"In all cases where there has been a preliminary hearing in the county court on a charge of felony and the defendant is held and tried and convicted in the circuit court and the conviction is not set aside, the fee for the Commonwealth's Attorney for his services at the preliminary hearing is $5.00; the fee in the circuit court will be either $20.00 or $10.00, depending upon the degree of the felony."

COSTS—Criminal Cases—Fees To Be Taxed for Service of Commonwealth Attorney. (291)
Commonwealth Attorneys—Costs in Criminal Prosecution—What Amount to be Taxed. (291)

March 22, 1961

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of March 20, requesting my opinion with respect to a question presented to you by the Clerk of the Circuit Court of Tazewell County by letter dated March 16, and which reads as follows:

"Thank you for your letter of March 15th relative to my inquiry as to taxing costs in criminal cases.

"I am sorry that I did not make myself clear in my first letter, but the point I was raising, and on which Judge Sexton and I had had our discussion was the proper amount to be charged in County Court by its Clerk for the Commonwealth's Attorney. I fully understand that in
Circuit Court that the Commonwealth’s Attorney fee for misdemeanors would be $5.00, for felonies would be $10.00, except in cases when the penalty can be death that it would be $20.00. We would like to know if the fee charged by County Court is $2.50 for both misdemeanors and felonies or if it is $2.50 for misdemeanors and $5.00 for felonies; we would be directly interested in this on misdemeanor appeals and on felonies sent on to Circuit Court.

“We shall appreciate your advising us on this matter, since we are interested in taxing these costs correctly, as was pointed out in our original letter.”

The provisions of Section 14-130 of the Code prescribed the fees to be paid to a Commonwealth’s Attorney for services where there is a conviction and sentence. I shall not discuss the first sentence of the second paragraph of this section because the clerk has interpreted this sentence correctly. The terminal sentence of this paragraph provides a fee of five dollars for each person prosecuted by the Commonwealth’s Attorney at a preliminary hearing upon a charge of felony.

The third paragraph of this section of the Code allows a payment of $5.00 to the Commonwealth’s Attorney for the services therein mentioned subject to the exception that when the prosecution is before a trial justice (now a county court) the fee is limited to $2.50.

If a defendant has been convicted in the county court upon a misdemeanor charge and appeals to the circuit court and is convicted and sentenced in that court, and the conviction is not set aside, in my opinion the proper fee to be taxed as costs by the clerk for the services of the Commonwealth’s Attorney is $7.50—$2.50 for his services in the county court and $5.00 for his services in the circuit court.

In all cases where there has been a preliminary hearing in the county court on a charge of felony and the defendant is held and tried and convicted in the circuit court and the conviction is not set aside, the fee for the Commonwealth’s Attorney is $10.00, or $5.00 in each court.

COSTS—Fee for Service of Process—Taxable as Cost. (68)
Civil Procedure—Cost—Fee for Service of Process. (68)

August 11, 1960

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of August 10, in which you request my advice as to whether the fee for service of process should be taxed as a part of the costs when judgment is rendered in a civil action brought in a county court.

Section 14-175 of the Code is applicable. Under this section, except when it is otherwise provided, the prevailing party is entitled to recover his costs against the opposite party. The plaintiff in any civil action brought in a county court is required to pay the service of process fee. This is a part of the plaintiff’s costs and, in my opinion, when the plaintiff prevails should be taxed as a part of the costs recoverable by the plaintiff. There is no statute providing otherwise in connection with civil actions in county courts and, therefore, Section 14-175 applies.

I am enclosing a copy of an opinion dated June 1, 1943, and published in the reports of this office for 1942-43, at page 87, which relates to this matter.
COSTS—Sheriff’s Mileage—Amount to be Taxed Against Accused. (332)

Criminal Procedure—Costs Against Accused—Mileage of Sheriff—Amount to be Taxed. (332)

April 21, 1961

MISS VIRGINIA WOODROOF, Clerk
Brunswick County Court

This is in reply to your letter of April 7, 1961 in which you asked to be advised as to the amount to be taxed as costs against the defendant in criminal cases for mileage traveled by the sheriff in connection with such cases.

When the fee system for sheriffs was abolished by Chapter 386 of the Acts of the Assembly of 1942, the General Assembly directed the clerks to continue the collection of such fees and mileage allowances provided for services in connection with the prosecution of any criminal matter.

Section 14-82 of the Code reads in part as follows:

"Every sheriff and sergeant, and every deputy of either, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter. Such fees and mileage allowances accruing in connection with any criminal matter shall be collected by the clerk of the court in which the prosecution is had. Such fees as are collected by the clerk of the court shall be paid by him into the treasury of the county or city for which the sheriff or sergeant, on account of whose services such fees are collected, is elected or appointed." ** *(Emphasis supplied)*

It is to be noted that the fees and allowances of sheriffs which are set forth in Section 14-122 of the Code for services in criminal matters were not changed or affected by the 1942 legislation; therefore, the clerks are to continue collecting the fees prescribed therein for criminal matters.

While there are statutory provisions for taxing of all expenses incident to a criminal prosecution against the accused, I do not believe that such provisions would extend to traveling expenses incurred by the sheriff in the apprehension of the accused. I am of the opinion that the clerk of the county court should collect for sheriff’s mileage allowance only the fees prescribed in Section 14-122 of the Code.

COSTS—Writ Tax—Assessed on Petition For Rehearing. (292)

Civil Procedure—Petition For Rehearing—Writ Tax Assessed. (292)

March 21, 1961

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

This is in reply to your letter of March 17, which reads as follows:

"On February 6, 1959, a certain chancery cause was adjudicated in the Circuit Court of Page County, Virginia, and retired from the Court docket as an ended matter. The Supreme Court of Appeals of Virginia, subsequently upon appeal, affirmed the judgment entered therein by our said Court, and later the Supreme Court of the United States denied a petition filed therein for a writ of certiorari.
"On February 4, 1961, a 'Petition for Rehearing' was filed in our office in the aforesaid cause, and we are of the opinion that in view of all the facts, the writ tax and statutory Clerk's fee should apply to the petition. Are we correct?"

I am unable to find any statute specifically relating to a situation such as this, but it would seem that the proceedings instituted on February 4, 1961, are in the nature of a new suit and that the writ tax and clerk's fee would be applicable.

COUNTIES—Appropriations—May be Made by Lump Sum Amount. (143)
Appropriations—County Funds—May be Made in Lump Sum Amounts. (143)

October 21, 1960

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

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

"On June 3, 1960, in a letter to Honorable C. Harrison Mann, Jr., of Arlington, you indicated that lump sum appropriations for educational purposes were permissible. It would appear to me that the reasoning in your letter applied to appropriations for general County purposes. I discussed this matter with some member of your staff by telephone and was under the impression that my interpretation was correct.

"Harry N. James & Company, Certified Public Accountants, who audits our County records, has just written to our Treasurer that Mr. Joseph S. James, Assistant Auditor of Public Accounts, takes a different view.

"Will you please advise me whether or not, under the present law, the Board of Supervisors of this County can appropriate from the General Fund of the County a lump sum amount each month for the operation of public schools and a lump sum amount for general County purposes? It makes the work much easier, and there would appear to me to be no objection to this. In view of the Assistant Auditor's position, however, the Treasurer has asked me to write this letter."

In my opinion to Mr. Mann, I stated that the board of supervisors could make a lump sum appropriation for public school purposes which could be on an annual, semiannual, quarterly or monthly basis. Under such circumstances, the school board would be obligated on account of the provisions of Section 22-72(9) to adhere to the estimates submitted by the school board to the board of supervisors. I further stated that the board of supervisors in making its appropriation of a lump sum could add appropriate language so as to give its prior consent to the school board to disregard the breakdown of the proposed expenditures as shown in the estimate and to expend the total appropriation, within the limits thereof, for school purposes, shifting and transferring moneys from one item or purpose to another without the further consent of the board of supervisors. As I understand your letter, you now request my advice as to whether or not the board of supervisors can make a lump sum appropriation for general county purposes.

Under Section 15-575 of the Code, "all officers and heads of departments, officers, divisions, boards, commissions, and agencies of every county, city, and town shall, on or before the first day of May, 1959, and on or before the first day of April of each year thereafter, prepare and submit to the board of supervisors or council an estimate of the amount of money deemed to be needed during the ensuing fiscal year for his department, office, division, board, commission, or agency;"
The board of supervisors may make a lump sum appropriation out of the general fund for each of the above mentioned categories on an annual, semiannual, quarterly or monthly basis and the departments or offices affected would be limited to such lump sum appropriations in their expenditures. The appropriations made by the board of supervisors should be made to each department or agency of the county for specific purposes. These purposes may be determined by express language in the appropriation resolution or by reference to the estimates that have been filed pursuant to Section 15-573, approved by the governing body.

Section 58-921 of the Code provides that "copies of all appropriations, and ordinances, and resolutions appropriating funds by the governing body, shall be delivered to the treasurer by the clerk of the governing body." The treasurer is entitled to have a breakdown of appropriations according to departments, agencies, etc., of the county, so that he will be in position to determine whether or not the expenditures are within the limits of the funds available to each such department or agency.

COUNTIES—Appropriations—May Contribute Funds to Civil War Commission. (242)

Civil War Commission—Counties May Contribute Funds to Celebration. (242)

February 16, 1961

HONORABLE RHEA F. MOORE, JR., Clerk
Tazewell County Board of Supervisors

This is to acknowledge receipt of your letter of February 8, 1961, in which you state in part:

"This governing body, along with many others throughout the Commonwealth, is cooperating with the Virginia Civil War Commission, through the appointment of a local coordinating committee for this celebration. This committee in our county is in need of a small amount of funds to start their work off, namely, funds to purchase a supply of centennial license plates. From the sale of these plates, the committee anticipates making sufficient profit to be able to repay the county general fund, if a loan can be made to the committee, and to further have sufficient funds to sustain and maintain its operation in the future. This governing body would like to know if it would be within its rights to make a loan from general county funds for such a purpose, with the express understanding that said loan would be repaid within a given time, say ninety days.

* * *

"The committee has also asked me to raise one further question to you—later in this year, from the profits it may make from these license plates, it anticipates awarding cash prizes of $10.00 to winners in the four county high schools for essays on Civil War history in this area—they would like to know if they are within their rights in making such awards."

Both of these inquiries raise the question as to whether the Board of Supervisors has authority to appropriate funds in furtherance of the mission of the Virginia Civil War Commission. If the board has authority to appropriate money for this purpose, it would necessarily follow that it could enter into such arrangements with the local committee, as described by you.

Chapter 335 of the Acts of 1958, creating the Virginia Civil War commission, provides, among other things, this:
"It shall be the duty of the Commission to develop and coordinate the plans of the public and private agencies for commemorating the one hundredth anniversary of the Civil War. All agencies of the State and all political subdivisions are authorized to cooperate with the Commission and to grant funds, property and services to it for the furtherance of the commemoration." (Italics supplied).

Section 15-16.1 of the Code was amended by Chapter 453, Acts of the General Assembly of 1960, so as to permit the governing bodies of the counties, cities and towns to make gifts and donations from their treasuries "to any and all public and private non-profit organizations and agencies engaging in commemorating historical events."

I am of the opinion that the boards of supervisors may make appropriations to further the activities of the Civil War Commission. The amount of the appropriation and the extent to which the counties will cooperate is left to the discretion of the boards of supervisors. So long as the appropriations are reasonable and the arrangements with the local committee of the Commission are feasible, I see no legal objection.

Enclosed herewith is a copy of a letter, dated October 11, 1960, to the Honorable Charles H. Wilson, Commonwealth's Attorney for Nottoway County, in which I expressed the opinion that a board of supervisors had the authority to make an appropriation to the Civil War Centennial Celebration.

The answers, therefore, to the questions you propound are in the affirmative.

COUNTIES—Appropriations—Welfare Department—Control of Governing Body. (299)
Appropriations—Counties—Extent of Control of Governing Body. (299)

HONORABLE A. A. RUCKER
Commonwealth's Attorney for
Bedford County

March 31, 1961

This is in reply to your letter of March 28, 1961, in which you request my opinion on several inquiries relating to the preparation of the budget by the Bedford County Board of Supervisors. You are particularly interested in determining whether the views expressed in my letter of June 3, 1960, to Honorable C. Harrison Mann, Jr., regarding appropriations for school purposes, are applicable to the Department of Welfare.

As pointed out in my letter to Mr. Mann, the basic purpose of the amendments to §§ 15-575, 15-576 and 15-577 of the Code of Virginia was to strengthen the control and supervision of the boards of supervisors over expenditures of revenues subject to local appropriation.

While the specific questions presented by Mr. Mann were directed to appropriations for school purposes, my replies my be appiled with equal cogency to contemplated expenditures by any department or officer of the county. Thus, your questions, which are identical to questions (2), (3), (5) and (6) in Mr. Mann's letter (except that the "County Department of Public Welfare" has been substituted for "School Board") are to be answered in the affirmative.

You have also asked to be advised as to the authority of the County Department of Public Welfare to deviate from the appropriation ordinance by transferring funds allotted to that department from one category to another without first obtaining the consent of the Board of Supervisors. While the Board of Supervisors may disregard the itemization submitted by each department pursuant to §15-575 of the
Code, or appropriate to each department by lump sum, a department is not relieved of the obligation to adhere to the terms of the ordinance if the purpose for such appropriation is specified.

I have heretofore considered the manner in which lump sum appropriations may be made by the boards of supervisors. I am enclosing a copy of my letter of October 21, 1960, to Honorable Ernest W. Goodrich, Commonwealth's Attorney for Surry County, wherein I made the following statement:

"Under Section 15-575 of the Code, 'all officers and heads of departments, officers, divisions, boards, commissions, and agencies of every county, city, and town shall, on or before the first day of May, 1959, and on or before the first day of April of each year thereafter, prepare and submit to the board of supervisors or council an estimate of the amount of money deemed to be needed during the ensuing fiscal year for his department, office, division, board, commission, or agency;'

"The board of supervisors may make a lump sum appropriation out of the general fund for each of the above-mentioned categories on an annual, semi-annual, quarterly or monthly basis and the departments or offices affected would be limited to such lump sum appropriations in their expenditures. The appropriations made by the board of supervisors should be made to each department or agency of the county for specific purposes. These purposes may be determined by express language in the appropriation resolution or by reference to the estimates that have been filed pursuant to Section 15-575, approved by the governing body."

In absence of language in the ordinance granting prior consent for a deviation, I am of the opinion that the Department of Public Welfare may not transfer funds from one category to another in the appropriation ordinance without the consent of the Board of Supervisors.

COUNTIES—Authority to Appropriate Funds for Life Saving and Rescue Squad.

This is in reply to your letter of May 23, 1961, in which you ask if there exists any statutory prohibition against the County of Giles participating in the operations of the Giles County Lifesaving and Rescue Squad. You state that the group of volunteer workers comprising the Squad are organized as an association. No appropriation is made to the association by the County; instead, all the equipment and housing facilities are owned by Giles County, and all expenses are paid directly by the Treasurer of Giles County, after approval by the Board of Supervisors.

Section 15-16.2 of the Code of Virginia authorizes the counties to provide payment to volunteer rescue squads, not to exceed ten dollars, for each call made for an automobile accident in which a person is injured on the highways.

Section 15-16 of the Code authorizes counties to make contributions of funds, or real and personal property, to charitable institutions or associations.

From the explanation contained in your letter, I presume that the Lifesaving Rescue Squad qualifies as a charitable association within the meaning of the last mentioned section of the Code. Thus, the County would be authorized to make contributions to this organization. Rather than making outright contributions to the association, the Board of Supervisors of Giles County has apparently thought it the better course of action to contribute property for the use of the association, and to provide an appropriation over which it maintains continuing control, from which to pay the operating expenses of the Squad. I am aware of no legal prohibition against such a mode of contribution.
COUNTIES—Authority to Contribute to Civil War Centennial Celebration. (129)

Civil War Centennial Celebration—Authority of Localities to Contribute Funds. (129)

October 11, 1960

HONORABLE CHARLES H. WILSON
Attorney for the Commonwealth
Nottoway County

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

"At the request of the Board of Supervisors of Nottoway County, Virginia I am writing you with reference to the Civil War Centennial Celebration.

"Nottoway County is planning a rather elaborate program and I have been requested to ascertain if any state funds are available to assist in the financing of such program and, if not, whether the Board of Supervisors of Nottoway County may make an appropriation and, if so, the extent thereof."

Section 15-16.1 of the Code was amended by Chapter 453, Acts of the General Assembly of 1960, so as to permit the governing bodies of the counties, cities and towns to make gifts and donations from their treasuries "to any and all public and private non-profit organizations and agencies engaging in commemorating historical events." Under this section the board of supervisors of your county is authorized in my opinion, to make an appropriation for the purpose of contributing to the Civil War Centennial Celebration.

This amendment, you will note, places no restriction upon the amount of the appropriation which the governing body may make.

The General Assembly made certain appropriations to the Civil War Centennial Commission which money is expended in the discretion of the Commission. No doubt the Commission could be of some assistance to your county, even though it might not make a cash contribution, and I suggest that you contact Mr. James J. Geary, Executive Director, Civil War Commission, 914 Capitol Street, Richmond, Virginia. No State money is directly appropriated to the localities for this Celebration.

COUNTIES—Authority to Contribute to Organization Commemorating Historic Event When Event Outside County. (370)

June 8, 1961

HONORABLE W. D. REAMS, JR.
Commonwealth's Attorney for the County of Culpeper

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

"Recently at a meeting of the Board of Supervisors a non-profit historical corporation petitioned the Board of Supervisors of this county for a donation. The corporation controls a forest area which is run as a private park open to the general public, and is just across the river from Culpeper County in Orange County. Culpeper was formed from Orange County in 1749. This park commemorates the first white settlers in Orange County, and a good number of the citizens of Culpeper County are descendants of those first settlers.

"I respectfully request your opinion as to whether it is lawful for the Board of Supervisors of Culpeper County to donate money to this corporation to be spent outside of Culpeper County."
The third paragraph of Section 15-16.1 of the Code of Virginia provides that the governing body of a county may make donations to any and all public and private non-profit organizations and agencies commemorating historical events. This paragraph does not contain a limitation to the effect that such donations may be made only to organizations operating within the boundaries of the county making the grant.

In my opinion, the Board of Supervisors of your county may make donations of this nature despite the fact that the organization commemorating the historical event is located outside the county.

COUNTIES—Authority to Name Streets—No Referendum Necessary—Limitation on Roads in Primary System of Highways. (184)

Highways—Names—Extent of Authority in Boards of Supervisors. (184)

December 6, 1960

HONORABLE HORACE T. MORRISON
Attorney for the Commonwealth
King George County

This is in reply to your letter of December 3, 1960, which I quote:

"Our Board of Supervisors has been asked by a group of citizens of Dahlgren (outside of U. S. Naval Reservation and in Potomac Magisterial District, King George County, Virginia), to approve their action in designating street names for said unincorporated area. The citizens group has no legal entity and the said area is only a small part of said Potomac Magisterial District. The Board will seriously consider this request, but they feel that unless there is a legal referendum (wherein all of the citizens in said area eligible to vote pass upon the question) which will truly express the wishes of a majority of the legal voters thereof, they would not be carrying on their democratic processes.

"I am of the opinion that the proposed referendum cannot be legally held, for the reason that the group in the Dahlgren area are only a small part of the said Magisterial District; and has no legal status. The Board, therefore, requested me to obtain an official opinion from you upon this question."

I am of the opinion that the holding of a referendum for a magisterial district for the purpose of determining the names to assign streets in a section thereof is unnecessary in order that the Board of Supervisors comply with the statutory provisions granting the Board this power.

Section 15-77.1 of the Code of Virginia of 1950 authorizes the governing body of any county to give names to streets, roads and alleys outside the corporate limits of towns, except those in the primary system of State highways. This action is undertaken by resolution of the governing body.

COUNTIES—Authority to Supplement Salary of Judges Not Applicable to All Counties. (185)

Courts—Judge's Salary—When Counties May Supplement. (185)

December 7, 1960

HONORABLE EDW. H. RICHARDSON
Commonwealth's Attorney
Roanoke County

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

"I understand that you have issued a ruling lately regarding the right of Counties to supplement the salaries of Judges of Courts of Record, and also possibly those of County Judges."
"If you have issued such a ruling, I would appreciate it very much if you would send me a copy of same."

I enclose herewith copy of an opinion furnished the Commonwealth’s Attorney of Henrico County on November 7, 1947. This opinion is published in Report of Attorney General for 1947-'48, at page 7. I also enclose copy of a letter written by this office to the Honorable John W. Eggleston, Chief Justice of the Supreme Court of Appeals, on June 22, 1960, which relates to this matter.

You will note from these opinions that those counties which come within the scope of Section 15-10 of the Code may supplement the salaries of the judges. This does not apply, however, to a county operating under the provisions of Section 15-8 of the Code. I do not believe that Roanoke county comes within the scope of Section 15-10. However, that would depend upon the population of the city of Roanoke as shown by the United States Census which has been just released.

I know of no statute which would authorize the counties generally to supplement the salaries of county judges.


You will note that these two Code sections authorize certain counties to supplement salaries of judges of certain counties but there is no general provision in so far as I am able to determine.

COUNTIES—Authority to Tax and Regulate Garbage Disposal Business. (96)
Taxation—License for Garbage Disposal Business. (96)

HONORABLE KENNETH M. COVINGTON
Commonwealth's Attorney for Henry County

September 14, 1960

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

"The Board of Supervisors of Henry County is considering the acquisition of properties in the magisterial districts of this County on which to establish public dumps for waste material pursuant to the authority of Title 15-707 of the Code.

"There are several persons in this County who are engaged in the business of operating garbage services for a fee collected from householders and businesses. It is anticipated that these persons will use the dumps created by the County for disposal of waste material.

"In order to defray the cost to the County for labor and machinery necessary to maintain these dumps in accordance with regulations of the Health Department, it has been proposed that the County enact an ordinance requiring all persons engaged in the business of providing garbage collection services to obtain a license from the County before they engage in such business and that such ordinance require the payment of a fee to the County.

"It is further proposed that such ordinance provide for the frequency of collection of waste material, viz., once weekly throughout the year. It is further proposed that such ordinance regulate the type vehicle used in transporting garbage and waste material along the highway to assure that such material are not strewn on the highway or on private property. It is further proposed that such ordinance regulate the type containers used by the householders and businesses for the storage of garbage and waste material."
"I find no specific authority for an ordinance requiring collectors of waste material to be licensed by the County and a fee charged by the County for such license. I can find no specific authority for the further regulation of the proposed ordinance set forth above other than the general powers of the Board of Supervisors contained in Title 15-8 of the Code.

"I would appreciate an expression of your opinion as to whether the general powers of the Board of Supervisors set forth in Title 15-8 of the Code are broad enough to permit the Board of Supervisors of Henry County to enact an ordinance containing the above stated regulations."

With respect to the imposition of a license tax, I call attention to Section 58-266.2, which authorizes counties of the classification therein set forth to impose a license tax on any type of business. However, I do not believe Henry county comes within the classification. I am enclosing copies of three opinions relating to the power of counties to impose a license tax, in which it was held that a county may not impose such a tax in the absence of statutory authority. These opinions are published in the Reports of Attorney General for 1949-50, at pages 33 and 73, and for 1950-51, at page 280.

With respect to the authority of the board of supervisors to enact an ordinance to provide for the frequency of collection of garbage and other refuse matter in rural areas, in my opinion this should be handled by the State Board of Health. This board has authority under Section 32-9 of the Code to promulgate regulations concerning such matters. The local Board of Health established under Chapter 3, Title 32 of the Code, would have certain powers with respect to sanitary affairs. See Section 32-35 of the Code.

There is statutory authority under which certain counties may require property owners to remove garbage, trash, refuse, etc., but I do not believe that Henry county comes within the classification established by the statute. See Section 15-15.2 of the Code.

Section 46.1-303 of the Code is the statute regulating the operation of a vehicle so as to prevent the contents of the vehicle from falling on a highway. The penalty for violating this provision is set forth in Section 46.1-16 of the Code.

It appears that the provisions of Article 2, Chapter 4 of Title 46.1 of the Code—Sections 46.1-180, et seq., confer upon counties authority to enact and enforce ordinances similar to Section 46.1-303. Such ordinances must comply with the provisions of Section 46.1-188.

In my opinion, Section 15-8 of the Code does not confer upon the local governing body the power to enact and enforce ordinances of the nature suggested in your inquiry.

The county may, if it is deemed advisable, with the approval of the circuit court, establish sanitary districts under the provisions of Chapter 2, Title 21 of the Code. Upon the establishment of such districts the broad powers contained in Section 21-118 of the Code would be available, including the power to charge fees for the services rendered and to levy and collect a tax upon the property located in such sanitary district.

COUNTIES—Board of Supervisors of Prince William County may Adopt Ordinances Pursuant to Sections 15-8 and 15-10 of the Code. (108)

September 23, 1960

HONORABLE H. SELWYN SMITH
Commonwealth's Attorney for Prince William County

This is to acknowledge receipt of your letter of September 14, 1960, in which you request my opinion as to whether the Board of Supervisors of Prince William County should act under Section 15-8 or Section 15-10 of the Code of Virginia, as amended, in enacting legislation.
Section 15-10, which was formerly Section 27-43b of Michie's Code of 1942 was amended by Chapter 47 of the Acts of 1946, by including counties having within their boundaries any United States Marine Corps Base. As a major portion of the Quantico Marine Base is within the geographical boundaries of Prince William County, unquestionably the provisions of that section are applicable to said county. To construe the section otherwise would render the said amendment (1946) useless.

I am, therefore, of the opinion that the provisions of Section 15-10 of the Code of Virginia, as amended, are applicable to Prince William County.

You also raise the question as to whether said county could act under the provisions of Section 15-8 of the Code, as amended. That section confers general powers upon the boards of supervisors of every county. These are general powers. The section also prescribes a procedure to be followed by the board in adopting ordinances pursuant thereto. However, the last sentence of Section 15-8, reads as follows:

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

The powers granted under Section 15-10 to the boards of supervisors of certain counties are in addition to the powers granted under Section 15-8. However, in adopting ordinances, whether pursuant to the powers authorized under Section 15-8 or Section 15-10, the boards of supervisors of the counties included in Section 15-10 must follow the procedure under that section (15-10) and not under 15-8.

I am, therefore, of the opinion that the Board of Supervisors of Prince William County may adopt ordinances pursuant to the powers prescribed in both Sections 15-8 and 15-10, as amended.

COUNTIES—General Levy—Towns No Longer Obligated to Appropriate Entire Pro Rata Share to Schools. (155)

Schools—Appropriations—General County Levy—.§ 22-141.1 Construed. (155)

November 1, 1960

MR. J. CLIFFORD HUTT
Member, Board of Supervisors
Westmoreland County

This will acknowledge your letter of October 28, to which you have attached a statement of facts and a series of questions relating to the application of Section 22-141.1 of the Code. This section was enacted at the 1960 session of the General Assembly for the purpose of relieving the governing body of a qualifying town from allocating to the town's school all of its pro rata share of school funds derived from the county general fund levy.

The formula for distributing to the town its pro rata share of general county funds appropriated for school purposes is the same under Section 22-141.1 as it was under Section 22-141 prior to its amendment by Chapter 531, Acts of Assembly of 1960.

I am enclosing copies of four opinions relating to this matter which are published in the Annual Report of the Attorney General for 1958-'59, at pages 55, 59, 61 and 71. The opinion to Honorable J. P. Beale, one of the enclosed copies, contains this paragraph:

"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."

You will note that Section 22-141.1 contains language similar to the above citation from my opinion to Mr. Beale.

The 1960 amendment changed the law so as to allow a town council to use its pro rata share for any purpose, making the underscored part of the above citation obsolete.

In addition to the opinions published in the 1958-'59 report of this office, I enclose a copy of an opinion dated August 9, 1960, which relates to the provisions of Section 22-141.1. This opinion was furnished to E. B. Stanley, Superintendent of the Washington County schools.

With the exception of those questions which relate to accounting procedure, I believe that the answers to the questions presented by you are contained in the opinions which I am enclosing. I shall, however, attempt to give more specific answers to questions (1) through (4).

"(1) Assuming that by the time of the December Board Meeting the Treasurer has collected $400,000.00 of the overall assessment, that $100,000.00 was collected from assessments in the Town of Colonial Beach, and that the Board of Supervisors wished to appropriate to the School Board of the county the sum of $120,000.00 and, in addition thereto, pay to Colonial Beach its pro-rata portion, what is the formula to determine the amount to be paid to the Town of Colonial Beach? And what is the amount?"

As I understand this question you assume that at the December meeting $300,000.00 has been collected from the sources mentioned in Section 22-141.1 on assessments of property located outside the town, and that from the same sources $100,000.00 has been collected from property located within the town. $120,000 is appropriated to the county school board, or 40% of the amount collected from sources outside the town. Under the formula, since $100,000 has been collected from town sources, it is entitled to a like percentage of 40% of $40,000.

"(2) Thereafter, does the percentage of Unit levy receipts allocated to the Town of Colonial Beach change as the percentage of collections from the Town of Colonial Beach changes?"

The answer to this question is in the negative. Under the formula, the same percentage of receipts from the taxable resources always applies. Thus, if the appropriation to the county school board is 30% of the revenue collected from county sources (outside the town) the town will be entitled to an appropriation of 30% of the revenue collected from the same taxable sources within the corporate limits of the town.

"(3) Can payments be made to the Town of Colonial Beach as taxes are collected from the Town of Colonial Beach, or must they be made in conjunction with appropriations by the county to the county School Board?"

The statute contemplates that the appropriations to the town will be made in conjunction with appropriations made to the county school board.

"(4) Does the application of Section 22-141.1 confine itself only to appropriations made by the Board of Supervisors from revenues derived by the county as a result of a Unit or General Levy? e.g., Can the county appro-
priate to the School Board monies received by the county as a result of
reversion of last year's dog tax fund, monies received by the county as a
result of the wine tax, or other sources of revenue which enure to the benefit
of the county for reasons other than levy, without making prorata matching
appropriations to the town of Colonial Beach?"

Section 22-141.1 applies only to general or unit levy receipts from the sources
mentioned therein. In my opinion, the governing body of the county is not required
to pro rate appropriations to the town except from revenues derived from the sources
mentioned in Section 22-141.1.

"(5) Does the enactment of 22-141.1 require the county to establish
separate funded balances segregating county receipts, so as to clearly
identify levy receipts from other classes of receipts, and further require
appropriations made by the county to designate which of said funded
balance accounts are to be charged with the appropriation? e.g., in the
event the county should make an appropriation of $120,000.00 to the School
Board of Westmoreland County, and an appropriation of 'x' number of
dollars to the Town of Colonial Beach, in accordance with the require-
ment of Section 22-141.1, must this appropriation charge said amounts to a
separate receipt account of the county which has accrued its balance by
reason of levy collections? And in the event the county should see fit to
appropriate to the county School Board the sum of $25,000.00, that being
the amount the county received as its portion of ABC funds, should the
appropriation of the said $25,000.00 to the School Board of the county be
charged to a separate revenue account which has accrued its balance by
reason of receipts of ABC funds?"

"(6) In the event your answer to the preceding questions would indicate
that there need be no separation of county receipts, how is the county to be
appraised of the fact in making appropriations to the Westmoreland County
School Board that such appropriations are from levy receipts as are speci-
fied in Section 22-141.1, or from non-levy receipts?"

This is an accounting matter which, I believe, should be referred to the Auditor of
Public Accounts. I am furnishing Mr. Bennett with a copy of this letter, and I assume
he will advise you with respect to these questions.

It would seem that the county treasurer would have to maintain his records in such
manner that he will at all times be able to determine separately the amount of revenue
collected from the sources outside the town and inside the town.

COUNTIES—Investments—Bond Funds—How Funds May Be Deposited or In-
vested. (347)

Treasurers—County Bond Funds—How to be Deposited or Invested. (347)

May 3, 1961

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of April 28, to which you attached a copy of a letter
received from the treasurer of Pittsylvania county under date of April 18, which reads
as follows:

"It would be appreciated if you would get a ruling from the Attorney
General on the following as to application of funds from sale of school bonds
under Section 15-666.52:
"Who has the authority to select depository bank or banks for Time Open Accounts, the Board of Supervisors or the Treasurer with approval of Finance Board?"

"Is a county with Finance Board government in the same category as a county without Finance Board government as far as above named section stipulates; namely, 'deposited in banks in conformity with general law in case of counties'?"

"Does general law for counties with Finance Board hold true regarding 'depository selected by County Treasurer and approved by Finance Board'—Section 58-943—with respect to funds derived from sale of school bonds?"

"Is Time Deposit Open Account of regular revenue, other than proceeds from sale of bonds, also considered an investment?"

As you state in your letter, undoubtedly the questions presented by Mrs. Tredway have arisen as a consequence of a desire of the Board of Supervisors for Pittsylvania County to invest a part of the proceeds of a $2 million bond issue. This matter was recently the subject of a discussion between this office and the Commonwealth's attorney of Pittsylvania county and in that discussion we expressed the opinion that Section 15-666.48 is the applicable statute in cases where bonds have been issued under the provisions of Chapter 19.1 of Title 15 of the Code.

Under this section, upon resolution of the governing body of the county, the proceeds of the bond issue, pending the application thereof, may be invested in accordance with Section 2-297 of the Code. Subsection (5) of this section permits the investment of such funds in savings accounts or time deposits.

Section 15-666.52, to which Mrs. Tredway made reference, relates to the deposit of such funds and the security that may be required of the depository. The terminal sentence of this section states that in lieu of retaining such moneys on deposit the governing body may invest all or any part of the moneys in securities that are legal investments under Section 2-297 of the Code.

With particular attention to the first question presented by Mrs. Tredway, it is my understanding that Pittsylvania county has a Finance Board pursuant to the provisions of Section 58-940 of the Code and that the Finance Board has never been abolished under the authority set out in the terminal paragraph of that section. If this is true, then the bank or banks in which the county treasurer deposits the funds of the county must be approved by the county Finance Board.

With respect to the second and third questions presented by Mrs. Tredway, the answer is in the affirmative.

The fourth question presented by Mrs. Tredway has been answered by pointing out that under subsection (5) of Section 2-297 time deposits are legal investments.

COUNTIES—Loans—Methods Which May be Utilized to Borrow for Construction of Jail. (51)

August 3, 1960

HONORABLE OTIS B. CROWDER
Treasurer, Mecklenburg County

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

"Mecklenburg County is in the position of being compelled to build a jail. In anticipation of this situation, some five years ago the levy was increased to provide about $20,000.00 per year and some $100,000.00 has accumulated from this source. An additional $100,000.00 will be required."
"The County is required to act immediately; otherwise the present jail will be condemned. There is grave doubt that an election will be successful, and the Board has asked that I submit the following questions to you.

"(1) Is there any legal authority for the borrowing of funds in a situation of this kind without an election?

"(2) Could these funds be provided under Sec. 15-250 as amended by the 1960 General Assembly?"

The power of a county to create a debt is restricted by the provisions of Section 115-a of the State Constitution. The county may contract a debt under this provision of the Constitution in anticipation of the collection of the revenue for the current year pursuant to the provisions of Sections 15-250 and 15-251 of the Code. Under these sections the governing body of the county may contract for a loan in an amount not in excess of one-fourth the amount that will be produced by the county levy for the current year. The due date of the obligation may not be later than December 15, 1960, at which time the note must, under the statute, be paid in full. On or after February 1, 1961, the board of supervisors would have authority to contract for a loan in the restricted amount of one-fourth of the revenue for 1961, which would necessarily fall due not later than December 15, 1961, at which time the note would have to be paid in full.

The only effect of the 1960 amendment to Section 15-250 of the Code was to permit such loans to be made as early as February first of each year instead of June first.

COUNTIES—Loans—No Authority to Encumber Sewerage Plant to Secure Loan. (76)

HONORABLE S. L. ALEXANDER
Clerk of the Board of Supervisors
Stafford County

August 24, 1960

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

"The Board of Supervisors of Stafford County has requested that I write you in regard to the following matter:

"The County has built, at the insistence of the State Water Control Board, a Sewage Disposal Plant at Falmouth, to treat the sewage from an existing sewer system, which was started by the W. P. A. many years ago.

"There is now a balance of approximately $15,000.00 to be paid for the plant, which is at present borrowed from the General Fund of the County.

"The question is, is there any way this amount can be borrowed from an outside lender, such as a bank by deed of trust on the Plant, or some other method other than a temporary loan which has to be repaid within the calendar year or a bond issue?"

In my opinion your question must be answered in the negative. The provisions with respect to debts that may be created by a board of supervisors are contained in Sections 15-250 and 15-251 of the Code. Any moneys borrowed by the board of supervisors contrary to the provisions of these sections would be in violation of the provisions of Section 115a of the Constitution unless the question was presented to the qualified voters of the county and approved by a majority of the voters participating in the election.

There is no provision under which a board of supervisors would have authority in any case to execute a deed of trust or other lien upon the sewerage disposal plant for the purpose of securing a loan.
COUNTIES—May Appropriate Funds to Volunteer Rescue Squad. (283)

March 15, 1961

HONORABLE H. SUMMERS SHEFFEY
Commonwealth's Attorney for Washington County

This will acknowledge receipt of your letter of March 13 relating to the power of the board of supervisors to appropriate public funds to cover the operating expenses of Washington County Lifesaving Crew.

Your letter reads as follows:

"I note that the Virginia Code, Section 15-16, provides for donations to charitable institutions or associations by counties, cities, and towns of this Commonwealth. Section 15-16.1 provides for appropriations for voluntary fire-fighting organizations, non-profit recreational and historic organizations, and chambers of commerce.

"The Board of Supervisors of Washington County have been requested to appropriate money for the operating expenses of the Washington County Lifesaving Crew. My question is this:

"Would such an appropriation be legal under any of the above quoted code sections or any applicable Virginia law?"

You did not furnish any details as to the nature of the services rendered by this organization, but from its name it would seem that the organization may come within the provisions of Section 15-16.2 relating to volunteer rescue squads. If this organization is a volunteer rescue squad, and is not a profit-making organization, it would seem that an appropriation could be made by the board of supervisors within the limits prescribed by Section 15-16.2.

The information available from your letter does not justify a conclusion that the provisions of Sections 15-16 and 15-16.1 are sufficient to authorize an appropriation of public funds to cover the operating expenses of the organization.

COUNTIES—May Expend Funds to Establish Sewerage System for Limited Area—Code Section 15-720 (209)

December 22, 1960

HONORABLE J. B. COWLES, JR.
Commonwealth's Attorney
County of James City

This is in reply to your letter of December 16 in which you state that the governing body of your County plans to install a sewage system for the benefit of the residents of the village of Toano, consisting of approximately thirty houses, as well as service stations and other business establishments located in that community. You state that the project will involve the expenditure of approximately $10,000. You request my advice as to whether or not it is legal for the County to expend this sum for a purpose which is essentially for the benefit of a limited number of citizens similar to that under § 15-720 of the Code of Virginia.

In my opinion such an expenditure is authorized by § 15-720 of the Code. This conclusion is supported by the case of Dominion Land Company v. Warwick County, 172 Va. 160, at pages 167 and 168. This statute, it will be observed, provides as follows:

"The owners of adjacent lands shall have the right to connect their premises with such sewers and water mains on such terms as the board of supervisors shall prescribe."
This provision, when considered alone, does not specifically empower the governing body to force the residents to use such sewer facilities and assess a charge against the users and beneficiaries, although it authorized the board to fix the terms upon which an adjacent property owner may use such facility. I am of the opinion, however, in answer to your second question relating to the power of the County to make a charge for such service, that the Board of Supervisors may enact a valid ordinance under the provisions of Article 3.1 of Chapter 22 of Title 15—the chapter in which § 15-720 is found—requiring the property owners in the area designated by the ordinance to connect with the sewage system and establishing a fee to be paid for such service. Section 15-739.1, found in Article 3.1, provides, in part, as follows:

"For the purpose of providing relief from pollution, and for the improvement of conditions affecting the public health and in addition to other powers conferred by law, the governing body of any county, city, or town, hereinafter referred to as governing body, shall have power and authority:

"(1) To establish, construct, improve, enlarge, operate and maintain a sewage disposal system with all the necessary sewers, conduits, pipe lines, pumping and ventilating stations, treatment plants and works, and other plants, structures, boats, conveyances and other real and personal property necessary for the operation of such system, subject to the approval of the State Water Control Board.

* * * *

"(7) To fix, charge and collect fees, rents or other charges for the use and services of the sewage disposal system."

Paragraph (1) of § 15-739.1, as you will note, requires the approval of the State Water Control Board when establishing a sewage system under Article 3.1. In my opinion, the Water Control Board, under its general powers contained in Chapter 2, Title 62 of the Code, may exercise such authority with respect to any system established under § 15-720.

COUNTIES—No Authority to Contract for Purchase of Land Over Period of Years Without Vote of People. (207)

HONORABLE LEON OWENS
Commonwealth's Attorney for Russell County

December 20, 1960

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

"Russell County is contemplating the purchase of a lot in Lebanon, Virginia. The owner is willing to sell the lot to the County for $11,500.00, if paid at the time of sale, or for $10,000.00 if paid in four (4) annual installments of $2,500.00 each.

"Can Russell County enter into a contract with the owner of the land, agreeing to pay $2,500.00 at the time of the purchase and three (3) additional annual payments of $2,500.00 each? If so, can the money for each payment be appropriated by the County the year it becomes due, or should the full purchase price be in one appropriation?

"If the full purchase price should be in one appropriation, would legal investment of the amount not paid, until due under the contract, be permissible?"

Section 115a of the Constitution prohibits a county "to contract any debt except to meet casual deficits in the revenue, a debt created in anticipation of the collection of the revenue of the said county, board or district for the then current year, or to
reed a previous liability, unless in the general law authorizing the same provision be made for the submission to the qualified voters of the proper county or district, for approval or rejection, by a majority vote of the qualified voters voting in an election, on the question of contracting such debt; and such approval shall be a prerequisite to contracting such debt. No scrip, certificate or other evidence of county or district indebtedness shall be issued except for such debts as are expressly authorized in this Constitution or by the laws made in pursuance thereof."

It is clear from this constitutional provision that the county is prohibited from entering into a contract of the nature suggested by you unless the question is submitted to and approved by a majority of the qualified voters of the county voting in an election upon the question. The opinion herein expressed makes it unnecessary to answer the last paragraph of your letter.
It is the policy of the State to allow reimbursements for necessary gratuities. See Section 30, Appropriation Act, Chapter 610, Acts of 1960. Therefore, I am of opinion that the board of supervisors of your county has the power to make reimbursements which include tips where an individual has performed necessary travel on official business for the county.

**COUNTIES—Ordinances—Amending Procedure Same as when Adopting.** (263)

**Alcoholic Beverage Control Laws—County Ordinance Prohibiting Selling Beer on Sunday. Procedure to Amend.** (263)

March 2, 1961

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

This is in reply to your letter of March 1, in which you request my opinion with respect to the following question:

"The Board of Supervisors of Franklin County passed an ordinance good many years ago prohibiting the sale of beer on Sundays as provided for under Section 4-97 of the Code.

"At our regular February meeting, a fraternal club, who had recently been granted a license to sell beer on club premises, to its members, in accordance with the County ordinance, requested the Board to pass a resolution allowing the club to sell beer between 2:00 o'clock and 6:00 o'clock p. m. on Sundays.

"I informed the Board of Supervisors that a resolution allowing the club to sell beer between 2:00 o'clock and 6:00 o'clock, p. m. on Sundays was an amendment to the present ordinance and would be void unless Section 15-8 of the Code of Virginia had been complied with. It was brought to the Board's attention that Section 4-97 of the Code does not mention the publication of the ordinance, but it is my contention that an ordinance, or amendment thereto, could not become effective until it has been published as provided for in Section 15-8."

Section 4-97 of the Code authorizes a county board of supervisors to adopt ordinances regulating the time of sale of wine and beer. This section does not prescribe the procedure to be followed in adopting such an ordinance.

Therefore, any ordinance adopted under authority of Section 4-97 of the Code, in order to be valid, must be enacted in accordance with the procedure set forth in Section 15-8 of the Code. The procedure in this instance will be the adoption of an ordinance amending the previous ordinance to which you referred in your first paragraph of your letter.

**COUNTIES—Ordinances—Procedure for Adopting Zoning Ordinance. May Follow Section 15.10 of Code.** (261)

March 2, 1961

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

This is in reply to your letter of March 1, in which you request my advice as to whether or not the Master Zoning Plan of Princess Anne County, adopted pursuant to Section 15-859 of the Code of Virginia, may be amended in accordance with the procedure prescribed in Section 15-10 of the Code.
In my opinion, under the terminal paragraph of Section 15-10, as amended by Chapter 190 of the Acts of 1958, the procedure set forth in this section may be followed in amending a zoning ordinance.

The terminal paragraph to which I have referred reads as follows:

"Notwithstanding any other provision of law, any board of supervisors authorized to act under this section may follow the procedure prescribed herein in adopting any ordinance which such board of supervisors has the power to adopt under any other law."

COUNTIES—Ordinances—Publication Necessary When Adopted Under Section 15-8 of Code. (135)

Ordinances—County Must Follow Provisions of Statute on Publication When Acting Pursuant to Section 15-8 of Code. (135)

October 17, 1960

HONORABLE LEE STANLEY
Deputy Clerk, Circuit Court of Wise County

This is in reply to your letter of October 15, in which you enclose copy of an ordinance adopted by the board of supervisors on the 13th of October, 1960, and you present the following questions:

"1. Does the Board of Supervisors have the authority to pass the enclosed ordinance without publishing notice of the ordinance as required by statute?

"2. Is this ordinance valid by being passed on only one reading?

"3. Does the Board of Supervisors have the authority to pass an ordinance restricting political signs in the individual office of the Commonwealth's Attorney, Treasurer, etc. after the said officeholders have been assigned individual office space?"

Section 15-8(9) of the Code of Virginia sets forth the methods by which ordinances of this nature may be enacted by the board. Such an ordinance comes within the following provisions of this Code section:

"The object of each such ordinance shall be expressed in its title.

"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, or by its title and an informative summary of such ordinance, once a week for two successive weeks in a like newspaper. If such publication is by title and informative summary the publication shall include a statement that a copy of the full text of the ordinance is on file in the clerk's office of the circuit court of the county.

"The above provisions of this section shall apply to ordinances other than those hereinafter set forth. */ * */"

It appears from your letter that no notice of an intention to propose this ordinance for passage was advertised in accordance with the above statutory provision. If
my information is correct, it follows that the ordinance is of no effect. Furthermore, it does not comply with that portion of the statute relating to the title to an ordinance.

In view of the fact that the ordinance was not properly enacted, I do not deem it necessary at this time to comment upon the other questions presented.

COUNTIES—Ordinances—Trailer Camps—Applies Throughout the County, Including Towns. (161)

Trailer Camps—Ordinance Applies Throughout County, Including Towns. (161)

November 10, 1960

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

This is to acknowledge receipt of your letter of November 3, 1960, in which you state, in part:

“...I would like your opinion concerning the following matter:

"Northampton County is giving consideration to adopting an Ordinance concerning the regulation of trailer camps, pursuant to the provisions of Title 35, Chapter 6, Article I, of the 1950 Code of Virginia, as amended. Will such an Ordinance, when properly adopted, apply uniformly throughout the County, including the areas of the County within the incorporated towns of Exmore, Nassawadox, Eastville, Cheriton, and Cape Charles? None of these towns has an Ordinance on the subject."

The authority granted the counties under the provision of Article I, Chapter 6, Title 35, of the Code of Virginia, 1950, to license and regulate trailer camps is of general application throughout the subject county, including the incorporated towns therein. It should be noted, however, that the licenses imposed thereunder must bear a definite relation to the cost of regulation before the same is valid. County Board of Supervisors v. American Trailer Company, 193 Va. 72. In that case it was held that § 35-62 is not a revenue measure, but a regulatory one. Article 1.1 of the same chapter, enacted in 1952, is primarily a revenue measure. This office has held that both a town and the county in which the town is located have the authority to impose a license tax on the operator of the same trailer camp. (Copies of letters to the Honorable Stirling M. Harrison, Commonwealth’s Attorney of Loudoun County, and W. Hill Brown, Jr., Town Attorney for Manassas, dated January 15, 1960, and September 7, 1960, respectively, are enclosed herewith).

I am, therefore, of the opinion that such an ordinance as described in the second paragraph of your letter supra would apply uniformly throughout the county, including the areas within the limits of incorporated towns.

COUNTIES—Subdivision—Dedication of Sites for Schools, Parks and Playgrounds Cannot be Required. (289)

Subdivision of Land—County Ordinance on Recordation of Plats—Cannot Require Subdivider to Dedicate Sites for Schools, Parks and Playgrounds. (289)

March 20, 1961

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

This is in reply to your letter of March 13, 1961, which I quote:

“...The Board of Supervisors of this county has requested me to obtain your opinion on the authority and power of the county to require subdi-
providers of land to dedicate land on subdivision plats submitted to the county for approval for sites for schools, parks and playgrounds.

"In 1950 the Legislature (Chapter 379 of the Acts of Assembly, 1950) amended Chapter 379 of the Acts of Assembly of 1946 by adding to Section 2 thereof, '... and may also provide for the reservation of suitable and adequate sites for schools, parks and playgrounds.' The question is, can the county require a subdivision to dedicate such sites without compensation as a condition to the approval and recordation of the subdivision plat?"

In addition to other power and authority conferred upon it by general law, the governing body of Fairfax County possesses the powers with respect to subdivision of land as are provided in Chapter 379, Acts of Assembly of 1946, as amended by Chapter 542, Acts of Assembly of 1950.

While Section 2 of Chapter 379 of the Acts of 1946, as amended, now authorizes the governing body to require a subdivider to reserve suitable and adequate sites for schools, parks and playgrounds on plats to be recorded, there is no statutory provision which requires that such sites be dedicated to the public by the subdivider. Section 2(d) of the Acts of 1946 provides that the recordation of plats shall operate to transfer in fee simple to the Commonwealth of Virginia such portion of the premises platted as is set apart for streets. This section has not been amended to bring within its purview those sites reserved for schools, parks and playgrounds. Hence, if the County is authorized to require dedication of such sites, that authority must, of necessity, be implied by Section 2 of Chapter 379 of the Acts of 1946, as amended. I entertain grave doubts that such an implication can be justified.

Assuming, for the sake of further discussion, that the County has been authorized to require a dedication of sites reserved for schools, parks and playgrounds, a very serious question is raised as to the constitutionality of such a requirement. That question is whether the Legislature itself, or by authority delegated by it to a political subdivision, can require an owner of land to dedicate land to be used by the public, without doing violence to Section 58 of the Constitution of Virginia and the Fourteenth Amendment to the Constitution of the United States.

There has been no pronouncement by the Virginia Supreme Court of Appeals on this question, in so far as I have been able to ascertain, although this form of statutory dedication has long been recognized. Sipe v. Alley, 117 Va. 819. The most complete compilation of cases on the subject from other jurisdictions is found in 11 A. L. R. (2d), 524-607.

The law appears to be well settled that an owner may be required to dedicate a reasonable quantity of land for public use within a subdivision as a condition of subdividing such land and placing that plat to record. Equally established, however, is the rule that the validity of a law is to be determined by its purpose, and its reasonable and practical effect and operation.

In the situation here presented there is a broad statutory power for the governing body of the County to adopt regulations which provide for reservation of sites for specific purposes. There is no limitation on the quantity of land to be so reserved; neither are there standards by which an owner could determine the quantity or the location of such sites to be reserved. There is no requirement that the sites be used by the County for the purpose intended when the plat is placed to record. Furthermore, there is no language in the Acts of Assembly to evince any intention on the part of the General Assembly that title to such sites is to be dedicated to the public without compensation to the owner.

In view of the foregoing, I entertain grave doubt as to the validity of a condition the County may impose upon a subdivider which would require sites for schools, parks and playgrounds to be dedicated to the public without compensation.
COUNTIES—Subdivision Ordinance—Publication of Notice—Not Necessary to Notify Public of Amendments Suggested at Public Hearing Before Enactment of Ordinance. (316)

April 11, 1961

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This is in reply to your letter of April 6, 1961 which reads in part as follows:

"Under 'The Virginia Land Sub-Division Act' Section 15-792 and etc., the Board of Supervisors have under consideration the adoption of a sub-division control ordinance for Montgomery County. The proposed sub-division control ordinance was advertised in full in the newspaper as provided under Section 15-782 and a public hearing was held.

"After said hearing and suggested changes arrived at because of said hearing, the Board of Supervisors have made several changes in the proposed sub-division control ordinance. Up to this time, the said ordinance has not been adopted. My question is: at the next hearing of the Board of Supervisors or any future hearing with reference to this proposed sub-division control ordinance, is it necessary for the Board of Supervisors to advertise in the newspaper the changes made from the original proposed ordinance as advertised, or can they proceed to go ahead and adopt a sub-division control ordinance with the changes made by them, without any further advertising?"

Section 15-782 of the Code of Virginia, reads as follows:

"The governing body shall not adopt or amend any regulation under the provisions of this article unless and until notice of intention so to do has been published once a week for two successive weeks in some newspaper published, or having general circulation, in such county or municipality. Such notice shall specify the time, not less than ten days after final publication as aforesaid, and place at which persons affected may appear before the governing body and present their views."

The obvious purpose of the foregoing statute is to afford interested persons an opportunity to present their views on the proposed adoption or amendment of a sub-division ordinance. Once that opportunity has been given, the governing body of the county may proceed with the adoption or amendment. I am of the opinion that it is unnecessary to again publish a notice of intention to adopt the regulations which may have been amended or modified due to suggestions made by affected persons at the public hearing.

COUNTIES—Supervisor at Large—Not Permissible Without Change in Form of Government and Vote of People. (301)

April 4, 1961

HONORABLE EDWARD M. HUDGINS
Member, House of Delegates

This is in reply to your letter of March 28, in which you request my advice as to whether or not Chesterfield county, which now has an executive secretary form of government, "could, by amending some code section and without seeking a change in its form of government so as to require a referendum of the people, provide for the election of one member of its board of supervisors from each district and a floater member to be elected from the county at large to represent all of the districts."
County executive secretaries are appointed under the provisions of Article 8 of Chapter 16 of Title 15 of the Code. This is not a form of government contemplated in the terminal paragraph of Section 110 of the Constitution. Chapter 16 of Title 15 relates to county, city and town officers generally under the form of government established under Article VII of the Constitution.

The amendment which is contemplated in your question would, in my opinion, have the effect of establishing a form of government different from that provided for in Article VII and, therefore, a vote of the people would be required.

Under Section III of the Constitution it is required that the board of supervisors of every county shall consist of one supervisor from each district unless a different form of government is established pursuant to the provisions of Section 110.

In my opinion an amendment to the Code providing for a supervisor from each district and one supervisor for the county at large would not be valid unless the question of providing for that type of representation would be contained in a complete form of county organization and government different from that provided for in Article VII of the Constitution and submitted to the people for their approval.

COUNTIES—Trailer Camps—Regulation of—Meaning of Term “Public Place.”

January 12, 1961

HONORABLE JAMES CLOPTON KNIBB
Commonwealth’s Attorney of
Goochland County

This is to acknowledge receipt of your letter of December 28, 1960 which reads as follows:

"Goochland County has recently adopted a Trailer Court ordinance requiring among other things the licensing of Trailer Camps in Goochland County. Since this has been done a question has arisen as to the meaning of the words ‘public place’ as used in Section 35-64.4 of the 1950 Code of Virginia. It is, of course, clear that trailers can no longer lawfully be parked on the streets, alleys or highways but I have a doubt as to the legal meaning of a ‘public place’; therefore I shall appreciate it if you will give me your opinion as to the meaning of these words in this Section.”

Section 35-64.4 of the Code of Virginia, to which you refer, is as follows:

"Whenever a license is required by ordinance it shall be unlawful within the limits of any such political subdivision for any person to park any trailer on any street, alley, highway or other public place in said political subdivision, except in a trailer park for which the operator thereof has obtained a license in accordance with the provisions of this article, except, however, that one trailer may be parked or stored in an improved enclosed garage or accessory building, or on any lot or plot of land, provided, however, that no living quarters shall be maintained or any business practiced while such trailer is so parked or stored. Nothing in this section shall be construed so as to prevent or prohibit a trailer being temporarily parked on a city street if permitted by the other ordinances of said city.”

A search of this and related sections of the Code reveals no special definition of the term “public place.” Hence, it appears logical that the intent of the framers of the statute was to give the term its usual meaning.

Black's Law Dictionary defines a “public place” as: “a place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited
by many persons and usually accessible to the neighboring public." The same source, citing Babb v. Elsinger (Sup.) 147 N.Y.S. 98, 100 includes: "also, a place in which the public has an interest as affecting the safety, health, morals and welfare of the community."

The Supreme Court of Appeals of Virginia, in Hackney v. Commonwealth, 186 Va. 888, a case dealing with disorderly conduct in public, quotes with approval a definition of "public place" found in Bouvier's Law Dictionary, as follows: "any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look."

Considering the foregoing and the narrowness of the exceptions found in Section 35-64.4 itself, it is my opinion that the statute contemplates any place which in point of fact is public rather than private and is not limited to lands owned or controlled by the government, state or any political subdivision.

COUNTIES—Zoning Ordinances—Appeal from Board of Zoning Appeals is to Circuit Court. Appeal to Board of Supervisors Provided in Certain Counties. (244)

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney for Augusta County

February 16, 1961

This is in reply to your letter of February 8, which I quote as follows:

"An Augusta County zoning ordinance provides for the appeal from the Board of Zoning Appeals, established by the ordinance, to the Board of Supervisors of Augusta County. This ordinance was adopted in 1947 and amended in 1949.

"I would like to have your opinion as to whether the provisions of Section 15-850, Code of Virginia have the effect of repealing the provisions of the County ordinance which provides for an appeal from the Board of Zoning Appeals to the Board of Supervisors, and requires that any appeal from the Board of Zoning Appeals must be taken direct to the Circuit Court.

"The provisions of Section 15-850.1 are not applicable since Augusta County does not qualify under that statute.

"I would also like to know whether there is any distinction to be made when the matter involves an appeal from the action of the Board of Zoning Appeals in rejecting application for the establishment of an 'automobile graveyard.' ""

Prior to the 1950 amendment, §15-850 of the Code read, in part, as follows:

" * * * Any person or persons, jointly or severally, aggrieved by any decision of the county board of zoning appeals or any taxpayer or county official may present to the next regular meeting of the board of supervisors held not earlier than ten days from the time that such decision is rendered a petition setting forth the grounds on which he is or they are aggrieved, at which meeting the board of supervisors of the county shall refer such petition and the minutes of the board of zoning appeals in regard to the decision appealed from, to the county planning commission for review and recommendation as to whether or not the board of zoning appeals has properly interpreted and applied the powers delegated to them by the board of supervisors, such recommendation to be presented at the next regular meeting thereafter. * * *."
The above quoted provision was removed from the statute in the 1950 Session of the General Assembly, and provision was made for appeal from the board of zoning appeals to the circuit court and the Supreme Court of Appeals of Virginia. At the same session, the General Assembly enacted § 15-850.1 of the Code, whereby a review by the county board of supervisors, such as was formerly proved in § 15-850 of the Code, was confined to certain counties.

I am of the opinion that the provision in the Zoning Ordinance of Augusta County relating to review by the county board of supervisors is no longer operative, the authority for such review having been repealed by the General Assembly.

I am further of the opinion that there is no valid reason for drawing a distinction in the manner of review when the appeal from the action of the board of zoning appeals concerns application for zoning an area for "automobile graveyards," as is contemplated by § 33-279.3 of the Code of Virginia.

COUNTIES—Zoning Ordinance May be Applicable to one Magisterial District Only. (24)

July 15, 1960

HONORABLE J. B. COWLES, JR.
Commonwealth's Attorney for the City of Williamsburg and County of James City

This is in reply to your letter of June 29, 1960, which reads as follows:

"A group of citizens in Jamestown Magisterial District of James City County has requested the Board of Supervisors of James City County to enact a zoning ordinance for their magisterial district. It has heretofore been considered that zoning would not be politically palatable to the other two districts of the County, but the residents of Jamestown Magisterial District, by and large, are desirous of having such an ordinance. I have expressed an informal opinion to various of the advocates of zoning that it would be legal for the Board of Supervisors to enact a zoning ordinance zoning only Jamestown Magisterial District and leaving the rest of the County unzoned.

"In order that the Board of Supervisors may be more expertly guided and in order to have a more authoritative and accurate opinion in this regard, I write to inquire whether or not it would be legal for the Board of Supervisors of James City County to enact a zoning ordinance for only Jamestown Magisterial District while the remaining magisterial districts of the County remain unzoned."

I am of the opinion that the Board of Supervisors of James City County can enact an ordinance zoning only one magisterial district in the county without zoning the remaining districts, provided, of course, that such zoning is not unreasonable, arbitrary or discriminatory. My reasons for this are set forth in the enclosed opinion by this office on June 30, 1955, to the Honorable Raymond V. Long, Director of the Department of Conservation and Development (Opinions of the Attorney General, 1954-1955, p. 64). I also call your attention to the recent case of Board of Supervisors of Fairfax County v. Carper, 200 Va. 653 (1959), in which a zoning ordinance was declared unconstitutional and invalid on the grounds that it was unreasonable and without substantial relationship to the public health, safety and welfare.
COUNTIES, CITIES AND TOWNS—Consolidation—Rate of Taxation—When Differential May Be Provided For Consolidating Areas. (224)

Taxation—Differential in Rates—How Permitted When Political Subdivisions Consolidate. (224)

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

January 18, 1961

I am writing in further reference to your letter of December 5, 1960, and our various discussions concerning the question posed in your communication in the following language:
"Can the General Assembly by special act (charter) grant to the consolidated municipality, Richmond-Henrico, the power to fix a lower rate of taxation to be imposed for a specified period of years upon land in Henrico County than is imposed on similar property within Richmond at the time of consolidation?"

"The suggested plan of consolidation among other things is to divide the geographical area of the consolidated municipality into three areas: (a) municipal, (b) urban, and (c) rural, for the purpose of making a differential in tax rates and for the purpose of the exercise of the police power.

"The municipal area is to consist of the boundaries of the present city. The present urbanized areas in the county that adjoin the city plus the area extending further into the county to which an adequate level of municipal services may be practically extended by the city within the 10 years following consolidation will constitute the urban area. It is proposed that these two areas will be defined by metes and bounds and shown on a map.

"The present tax differential between the municipal and the urban areas will remain the same for one year following consolidation and thereafter the differential will be reduced at the rate of 10% per annum until the tax rate is uniform throughout the entire urban and municipal area.

"The remainder of the county will be known as the rural area and the tax rate differential in the Henrico rural area will remain the same for 25 years, unless:

"(a) A part of the rural area becomes an urban or municipal area by the extension of the sewer and water service by the consolidated city for occupants of property in that part of the rural area, or

"(b) By appropriate order of a court of record upon a petition filed by the consolidated city and a showing that a part of the rural area has substantial urban or municipal services.

"Whereupon the municipal or urban tax rate, whichever is applicable, will apply to such part of the rural area beginning with the year following the completion of the extension of the sewer and water service or the entry of the court order.

"It is contemplated that after consolidation the rate of tax on all real estate in the consolidated city shall be set by the governing body but that the differential will be maintained as outlined above. It is further contemplated that assessments of all real estate in the consolidated city upon consolidation will be uniform throughout the consolidated city."

Pertinent to a consideration of this question are Sections 168 and 169 of the Virginia Constitution which, in part, provide:

"Sec. 168. All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. The General Assembly may define and classify taxable subjects, and except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes may be levied."
"Sec. 169. ** The General Assembly may allow a lower rate of taxation to be imposed for a period of years by a city or town upon land added to its corporate limits, than is imposed on similar property within its limits at the time such land is added. ** "

In light of the express language of Section 169 of the Virginia Constitution quoted above, it seems manifest that the General Assembly may, by general law, authorize the cities and towns of the Commonwealth to impose a lower rate of taxation for a period of years upon land added to the corporate limits of such municipalities than is imposed upon similar property within the corporate limits at the time such land is added. Thus, the critical inquiries presented in the situation you outline are (1) whether or not the General Assembly may authorize one lower tax rate to be imposed by a city for a period of years upon a certain portion of land added to a city and a different lower tax rate to be imposed by that city for a period of years upon another segment of land so added and (2) whether or not such authorization may be conferred by special enactment rather than general law.

Particularly pertinent with respect to the first of the above stated inquiries is the decision of the Supreme Court of Appeals of Virginia in Roanoke v. Hill, 193 Va. 643. In that case, portions of three separate magisterial districts and all of a sanitary district of Roanoke County were incorporated within the city of Roanoke effective January 1, 1949. Immediately prior to annexation, the real estate tax rates per $100.00 of assessed valuation in force in the four areas subsequently annexed were $1.50, $1.50, $1.55 and $1.65, respectively. For the year 1949 and the year 1950, the Council of the City of Roanoke, by ordinance, fixed the city's real estate tax rate at $2.50 per $100.00 of assessed valuation for lands situated within the corporate limits prior to the annexation in question and continued the individual real estate tax rates specified above in each of the areas which had been annexed.

Commenting upon the city's authority to fix a lower real estate tax rate in the annexed areas, the Supreme Court of Appeals of Virginia observed, 193 Va. at 647:

"The Constitution of Virginia, Art. XIII, § 169 provides that '* * * The General Assembly may allow a lower rate of taxation to be imposed for a period of years by a city or town upon land added to its corporate limits, than is imposed on similar property within its limits at the time such land is added.' Pursuant to this authority, the legislature has provided in what is now section 15-141 of the Code of 1950, that 'The tax rate upon the land annexed shall not be increased for a period of five years after such annexation, * * *.' It was in compliance with this mandate of the legislature that the council of the city of Roanoke fixed the tax rates for the years 1949 and 1950 on real estate in the areas annexed on January 1, 1949, at a lower rate than the $2.50 rate currently fixed for the area included within the corporate limits of the city of Roanoke prior to January 1, 1949." (Italics supplied).

Moreover, the court rejected the contention that the real estate tax rate ordinance there in question was antagonistic to Section 168 of the Virginia Constitution for want of uniformity and declared, 193 Va. at 648-650:

"The appellees further argue that the tax rate of $1.65 violates the provisions of the Constitution, Art. XIII, § 168, which provides that taxes shall be uniform as to class of subjects and levied and collected under general laws, and that the uniformity must be co-extensive with the territory to which it applies. If this section of the Constitution alone could be relied on, the city of Roanoke would have had to levy a tax rate of $2.50 on all the land in the annexed areas because that was the rate that was levied on all the real estate included in the corporate limits of the city of Roanoke prior to and after the annexation of the area herein concerned. But the Constitution, Art. VIII, § 126, provides for the extension of corporate limits,
and Art. XIII, § 169, specifically permits a reduced rate of taxation on the lands annexed for a period of time to be fixed by the legislature.

* * * * *

"Admittedly the tax rates in the city of Roanoke for the years 1949 and 1950 were not uniform. Art. XIII, § 169 of the Constitution and Code section 15-141 not only authorize an exception to the rule of uniformity and equality but they demand that the tax rates in the old and in the new portions of the city be unequal and different if such was the situation prior to the annexation.

"Even if Art. IV, § 63, of the Constitution were applicable, it and Art. XIII, § 168, must be read along with Art. XIII, § 169. The language of §§ 63 and 168 is general, while that of § 169 is specific and the general must give way to the specific. Fallon Florist v. Roanoke, 190 Va. 564, 58 S. E. (2d) 316; Portsmouth v. Weiss, 145 Va. 94, 133 S. E. 781.

"The appellees also complain that the tax rate of $1.65 levied by the city of Roanoke on the lands in the old sanitary district is discriminatory because the lands lying in the three other magisterial districts which were annexed at the same time were taxed at a lower rate than $1.65. This record shows, and it is common knowledge from the many decided cases, that since the enactment of the first annexation law in 1904 it has very often been the case that lands annexed at the same time are situated in two or more districts having different tax rates. An exhibit in this very case, for example, shows that the city of Richmond on January 1, 1942, acquired lands from seven districts in Henrico county and four districts in Chesterfield county and for a five-year period the city of Richmond fixed tax rates on the annexed lands at the same rate that had been levied thereon by the counties before the annexation, which except in two cases were different and varied from a low of $1.10 to a high of $1.93. The mere fact that other areas were annexed at the same time which had lower tax rates prior to the annexation does not make the continuation of the $1.65 rate for the appellees a violation of the provisions of the Constitution or the statute. Article XIII, § 169, of the Constitution provides for a permissible discrimination and permits lack of uniformity of taxation in those cases where lands are annexed to a new taxing jurisdiction. This provision was intended as a temporary measure to facilitate the transition of the annexation and is for the benefit of the annexed land. The Constitution and statute restrict or limit no further than prohibiting an increase in the tax rate on any given area of land." (Italics supplied).

On the basis of the result reached and the language utilized in Roanoke v. Hill, supra, it is clear that—under the circumstances—the above quoted provision of Section 169 of the Virginia Constitution authorizes the General Assembly to permit two or more different tax rates to be imposed by a city upon land added to its corporate limits, each of which rates may be different from that imposed upon property which was within the corporate limits at the time such land was added. In this connection, it should be noted that Section 169 merely declares that the General Assembly may allow a lower rate of taxation upon such land, thus authorizing "an exception to the rule of uniformity" prescribed by Section 168 of the Virginia Constitution. Id. at 649. It was pursuant to this authority that the General Assembly enacted former Section 15-141 of the Virginia Code, which provided that the tax rate upon land annexed to a city should not be increased for a period of five years after such annexation. Id. at 647. Although Section 15-141 of the Virginia Code did not expressly authorize cities to impose different tax rates upon different portions of land added to their corporate limits, it was "in compliance with this mandate of the legislature" that the city of Roanoke fixed three different tax rates upon land added to its corporate limits. Id. at 647.

This action of the Council of the City of Roanoke, i.e., fixing not one uniform lower rate to be imposed upon land added to its corporate limits, but three different lower rates upon such land, was held by the Supreme Court of Appeals of Virginia to
be authorized by Section 169 of the Virginia Constitution, not withstanding the requirement of uniformity enunciated in Section 168 of the Constitution. Indeed, the Court noted that if Section 168 "alone could be relied on," the City Council would have had to levy the same rate upon the annexed land as it levied upon property situated within the corporate limits of the city at the time of annexation. Roanoke v. Hill, supra at 648. However, the exception to the rule of uniformity contained in Section 169 was deemed to permit not only a difference between the rate of taxation imposed upon land situated within the city and that added to the city, but also a difference in the rate of taxation imposed upon separate portions of land added to the city.

Thus, in their operative effect, Section 169 of the Virginia Constitution, Section 15-141 of the Virginia Code, and the real estate tax rate ordinance of the city of Roanoke authorized a valid series of differing tax rates to be imposed upon land added to the city of Roanoke, the difference in such rates being predicated upon the difference in the individual rate of taxation in effect in a given area prior to its annexation to the city. Since Section 169 of the Virginia Constitution empowers the General Assembly—in those instances in which land is added to a city—to depart from the rule of uniformity upon any demonstrably rational and practical basis which is deemed by the legislature to support the variance. In this connection—assuming real estate to be a taxable subject properly susceptible to classification—I do not believe that the separation of real estate into municipal, urban and rural categories upon the basis of the various factors set out in your communication would constitute arbitrary classification having no reasonable relation to the legislation in question.

However, it should be noted that the tax rates approved in Roanoke v. Hill, supra, were the identical tax rates which were in force in the annexed areas at the time they were added to the city, and the Virginia Supreme Court initiated its discussion of the constitutional question with the presumption that such taxes were valid. Thus, the decision in that case may be viewed as approving no more than a continuation, after annexation, of taxes which were valid before annexation. Whether the Virginia Supreme Court would be disposed to validate additional departures from the rule of uniformity enunciated in Section 168 upon other grounds, or would be inclined to limit its decision in Roanoke v. Hill, supra, to the specific situation there presented, cannot be forecast with certainty on the basis of available decisional authority.

With respect to the second of the above stated inquiries, i.e., whether or not the General Assembly may confer authorization for the imposition of different tax rates by special enactment rather than general law, this office has previously ruled that the power to classify different types of real estate—if such power exists under that provision of Section 168 of the Virginia Constitution which authorizes the General Assembly to define and classify taxable subjects—may be exercised only by general law and not by special or local legislation. See Report of the Attorney General, 1949-1950, p. 220. In this connection, I am forwarding to you a copy of that opinion, dated March 1, 1950, to the Honorable Victor P. Wilson, Member of the House of Delegates, in which the constitutionality of a charter provision authorizing a city to classify real property was considered at length. While it may be argued on the basis of such decisions as Portsmouth v. Weiss, 145 Va. 94, and Fallon Florist v. Roanoke, 190 Va. 564, that the specific authority conferred by Section 169 of the Virginia Constitution supersedes the general constitutional prohibitions against enactment of special legislation, I am constrained to believe that a special enactment conferring such powers in the circumstances you present would be of questionable validity in light of the express admonition of Section 126 of the Virginia Constitution that no special act for the extension and contraction of the corporate limits of cities and towns shall be valid.

I regret that I have been unable to discover any decision of the Supreme Court of Appeals of Virginia in which a situation similar to that which you present has been considered. As I indicated during the last conference upon this subject, no dispositive answer to the question presented in your communication can be given in the absence of any closely related decisional authority, and it would appear that the matter can be ultimately resolved only by the decision of an appropriate court of jurisdiction in the Commonwealth.
REPORT OF THE ATTORNEY GENERAL

COUNTY COURTS—Compatibility of Office of Substitute Judge and Substitute Clerk. (4)

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

This will reply to your letter of recent date in which you call my attention to Section 16.1-18 of the Virginia Code and inquire whether or not a substitute judge of a county court who subsequently qualifies as a substitute clerk of such court would, by his acceptance of the latter office, vacate his office as substitute judge.

Section 16.1-18 of the Code of Virginia (1950) as amended, provides:

"Except as provided in § 16.1-22 no person shall at the same time hold the office of judge, associate judge or substitute judge of a court not of record and the office of justice of the peace, clerk of a court, sheriff, sergeant, treasurer, or commissioner of the revenue, or deputy of either of them. If any judge of a court not of record shall accept any office for which he is ineligible under this section, such acceptance shall vacate his office as judge of such court." (Italics supplied).

In light of the language italicized above, it is manifest that the ultimate resolution of your inquiry depends upon whether or not the term "court" in the phrase "clerk of a court" should be construed to embrace courts not of record, and whether or not the term "clerk" in the same phrase should be construed to embrace substitute clerk.

Considering these subordinate questions in the inverse order of their statement and assuming, arquendo, that courts not of record are included within the phrase under consideration, I am constrained to believe that the office of substitute clerk of a court not of record would also be included within that phrase. In this connection, provision for the appointment of substitute clerks of county courts in certain counties—to serve when the clerk of the county court is unable to perform the duties of his office by reason of sickness, absence, vacation or otherwise—is made by Section 16.1-46 of the Virginia Code. The terminal sentence of this provision prescribes:

"The substitute, after qualifying and giving bond as provided for clerks hereunder, may perform all the duties of the office during the absence or disability of the clerk, and may perform all acts with respect to the proceedings of the court in the same manner and with the same effect as if he were the duly appointed and acting clerk of the court." (Italics supplied).

It is manifest from the language quoted above that a substitute clerk of a county court—during his tenure of office—occupies the position of the clerk of such court and possesses all the powers and discharges all the duties of the office of clerk. It would, therefore, appear that the disabilities attendant upon acceptance of the office of clerk would apply with equal emphasis to the acceptance of the office of substitute clerk, and that the acceptance of the latter office by an individual who has previously accepted the office of substitute judge of a county court would have the effect of vacating such individual's office as substitute judge.

Whether or not courts not of record are embraced within the phrase "clerk of a court" is more difficult to resolve. In this connection, the office denominated by the phrase under consideration appears in conjunction with the offices of justice of the peace, sheriff, sergeant, treasurer and commissioner of the revenue. As the latter offices are all constitutional offices of the various political subdivisions of the Commonwealth, application of the rule of noscitur a sociis would lend support to the view that the phrase in question should be limited to include only the office of a clerk of a court of record—an office of the same class as the others with which the phrase is associated in the statute. Such a construction would also be consonant with the principle that statutes of the type under discussion are to be strictly construed to avoid rendering persons ineligible for office and to avoid vacating an office.
On the other hand, it appears that the General Assembly has employed the specific terms "court of record" and "court not of record" throughout Title 16.1 of the Virginia Code. In this particular instance, however, the Legislature has used the language "clerk of a court"—a general phrase which is susceptible of being construed to include both of the above mentioned types of courts. This particular phrase is couched in the identical language which appears in numerous predecessor statutes from which Section 16.1-18 is derived. See Section 16-1, Code of Virginia (1950); Section 3093, Code of Virginia (1942); Section 1020, Code of Virginia (1887); Section 5, Chapter 48, Code of Virginia (1849).

In light of the foregoing, I am unable to furnish a dispositive answer to the question presented in your communication. On the whole—although the question is by no means free from doubt—I am of the opinion that the phrase "clerk of a court" should be construed to mean the clerk of a court of record and should not be construed to embrace a substitute clerk of a court not of record. It would appear that your inquiry can ultimately be resolved only by a final decision of a court of competent jurisdiction in the Commonwealth.

COURTS—Clerks—Types of Paper Used in Books for Recordation. (191)
Records—Paper to be Used by Courts Must be of Best Quality. (191)

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

This will acknowledge your letter of December 7, relating to Section 17-70 of the Code of Virginia, and in which you present the following question:

"Should the paper used for permanent record electrostatic prints be extra one hundred percent rag, sub. No. 36, or extra one hundred percent rag, sub. No. 32?"

We consulted with Mr. Butler at the Department of Purchasing and Printing, who is in charge of the purchase of paper supplies for the State. In Mr. Butler's opinion either grade of paper mentioned in your question will be sufficient, as the difference in quality is very slight. The purpose of the statute is to require that deeds and other documents mentioned in Section 17-70 shall be recorded upon paper of the best quality available that is suitable for the type of equipment being used.

COURTS—Costs—Juvenile and Domestic Relations Criminal Cases. Amount Is Variable—Procedure in Making Return on Warrants Disposed of to Court of Record. (116)
Costs—Courts Not of Record to Return Warrants to Court of Record with Fines and Costs—Fee to be Paid Clerk. (116)

HONORABLE BENJAMIN L. CAMPBELL, Judge
Juvenile and Domestic Relations Court
Petersburg, Virginia

This is in reply to your letter of September 19, 1960, which I quote:

"There seems to be some doubt in this court as to the proper court costs to be collected on Commonwealth cases where a fine is imposed and
where there is no fine. We have been collecting $6.75 court costs when there is a fine and $5.75 when there is no fine. Is this correct?

"Also, we have been remitting to the clerk of the Hustings Court out of the court costs 25c when no fine is imposed and $1.25 when a fine is imposed. Inasmuch as this is not a court of record, should this be paid to them or should it be paid to the City?"

Unfortunately, there is no categorical reply to your first inquiry, since the costs in a criminal case vary with the peculiar circumstances. While certain fixed costs and fees, such as those for commitment and serving warrants, may remain constant in all cases, many fees, such as those prescribed by §§ 14-116, 14-122, 14-130 and 14-132 of the Code, will vary according to the circumstances of the case and the service rendered by the officer.

The present practice of reporting fines and costs to the clerk of the court of record should be altered to the extent necessary to comply with Article 3 of Chapter 14, Title 19.1 of the Code of Virginia of 1950, as amended. Section 19.1-335 of the Code provides the procedure for making the return of the warrants disposed of by your court to the Corporation (Hustings) Court of the City. Section 19.1-337 of the Code specifies the fee to be paid the Clerk of the Hustings Court for his services, both as to Commonwealth cases and for violations of municipal ordinances. The amount does not depend upon whether a fine is imposed. The fee in Commonwealth cases is $1.25, to be taxed and collected as a part of the costs, unless the accused is acquitted or the costs are not collected from the accused. In the latter instances, the fee is 25c only, to be paid out of the State Treasury. In municipal ordinance violation cases the clerk's fee is to be paid in accordance with § 14-132 of the Code.

COURTS—County Court Judge may Accept Employment as Town Attorney if Municipal Court Tries Violations of Town Ordinances. (372)

Towns—Attorney—When County Court Judge may Accept Office. (372)

June 8, 1961

HONORABLE WILLIAM P. HAY, JR.
Judge of County Court of Prince Edward

This will acknowledge receipt of your letter of June 5, which reads as follows:

"I have been approached by a Committee in the Town of Farmville, concerning employing me as Town Attorney for the Town of Farmville for a short period of time. I am not familiar with whether your office would feel that, as County Judge, I would be in a position to accept such employment."

I am enclosing copy of an opinion which was issued by this office on March 14, 1949 and published in the Report of the Attorney General for 1948-'49, at p. 272, which relates to this question. Under the facts set forth in this opinion, effective April 1, 1949, all cases involving violations of town ordinances would be heard by the trial justice of the county. That was the reason the offices of town attorney and trial justice were deemed to be incompatible.

I note under Section 32 of the charter of the town of Farmville that the mayor or a police justice, if one is appointed, tries all cases involving town ordinances or the collection of town taxes or assessments. This would indicate that the county judge does not hear any such cases. If this is true, I know of no reason why you would be prohibited from performing the duties of town attorney.
REPORT OF THE ATTORNEY GENERAL

COURTS—Municipal Police Court—No Jurisdiction to Try Juvenile for Violation of Town ordinance. (210)

HONORABLE E. SUMMERS SHEFFEY
Commonwealth’ s Attorney for Washington County

I am in receipt of your letter of December 15, 1960, in which you call my attention to the provisions of Section 6.13 of the Charter of the Town of Abingdon and Section 16.1-158(1)(i) of the Virginia Code and inquire "whether or not the police justice of the Town of Abingdon, Virginia, can try a person less than eighteen (18) years old for the violation of one of the Town’s ordinances, or whether such a person must be tried in the Juvenile and Domestic Relations Court of Washington County.”

Section 6.13 of the Charter of the Town of Abingdon and Section 16.1-158(1)(i) of the Code of Virginia (1950) as amended, in pertinent part, respectively prescribe:

"The police justice is hereby vested with original and exclusive jurisdiction in criminal matters involving a violation of any ordinance of the town of Abingdon, Virginia, which violation occurs within the corporate limits of said town, or within one mile thereof. Such police justice shall not exercise the jurisdiction conferred by §§ 63-259 to 63-266, inclusive, and 20-61 of the Code of 1950, and anything in this Charter shall not be construed as giving to such police justice the jurisdiction conferred by the above sections.” (Section 6.13).

"Except as hereinafter provided, each juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, and within one mile beyond the corporate limits of said city, concurrent jurisdiction with the juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving:

"(1) The custody, support, control or disposition of a child:

* * * * *

"(i) who violates any State or federal law, or any municipal or county ordinance; provided, however, that in violations of federal law jurisdiction in such cases shall be concurrent and shall be assumed only if waived by the federal court . . ." (Section 16.1-158(1)(i)).

As you indicated in your communication, Sections 63-259 to 63-266 of the Code of Virginia (1950) were expressly repealed by Chapter 383 of the Acts of Assembly of 1950, which enactment established a State-wide system of Juvenile and Domestic Relations Courts. Section 81 of Chapter 383 also provided that the provisions of Chapter 383 should supersede and repeal any provisions of any charter of any city, or any State law, to the contrary or in conflict therewith. Chapter 383 was subsequently codified as Section 16-172.1 et seq. of the Code of Virginia (1950) as amended; and these provisions were ultimately repealed by Chapter 555 of the Acts of Assembly of 1956, which enacted new Title 16.1 of the Virginia Code and undertook a fundamental reorganization of courts not of record, including the Juvenile and Domestic Relations Courts of the Commonwealth. Particularly pertinent to your inquiry is the language of Section 16.1-1 of the Virginia Code, which provides:

"All acts and parts of acts, all sections of this Code, and all provisions of municipal charters, inconsistent with the provisions of this title, are, except as herein otherwise provided, repealed to the extent of such inconsistency.” (Italics supplied).

In light of the foregoing, I am of the opinion that the police justice of the Town of Abingdon does not have jurisdiction to try persons under eighteen years of age for violations of town ordinances. In this connection, I am forwarding to you a copy of
an opinion of this office, dated February 16, 1954, to the Honorable C. S. Minter, Police Justice of the Town of Covington, in which a substantially similar question—arising before the enactment of new Title 16.1—was considered and discussed.

With respect to your second inquiry, I am of the opinion that fines imposed by the Juvenile and Domestic Relations Court of Washington County for violations of ordinances of the Town of Abingdon should be paid into the treasury of the Town of Abingdon.

COURTS—Not of Record—Costs—What Fees to be Collected and Taxed in Tax Cases by Localities and State. (99)
Fees—Courts Not of Record—When to be Collected and Taxed as Costs. (99)

September 16, 1960

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of September 9, 1960, in which you make several inquiries relating to the collection of, and taxing as costs, the fees for services in civil cases instituted in county courts by the State and localities for the collection of taxes. Your inquiries were prompted by my letter of July 11, 1960, addressed to Honorable J. H. Johnson, Treasurer of the City of Roanoke.

In my letter of July 11, 1960, I advised that the $3.00 fee prescribed by § 14-133 of the Code was not collectible in tax cases instituted by any county, city or town. Since no such fee is to be collected from the plaintiff, there is no authority for taxing the fee as a part of the costs to be paid by the defendant in the event of a judgment for the plaintiff. I also advised that the $3.00 fee should not be collected from the Treasurer when instituting a case to collect State income taxes.

You now ask to be advised if my opinion of July 11, 1960, is to be construed as precluding the taxing of the fee prescribed by § 14-133 of the Code as a part of the costs in a judgment rendered in tax cases instituted by the State for collection of taxes, as well as those cases instituted by the localities for collection of local taxes.

Section 14-175 of the Code provides for the recovery of costs by the party for whom final judgment is given, whether he be plaintiff or defendant. Section 14-195 of the Code, relating to the items to be taxed by the Clerk, provides, in part, as follows:

"The clerk shall tax in the costs all taxes on process, and all fees of officers which the party appears to be chargeable with in the case wherein the recovery is, except that when in any court, on the same side, more than one copy of anything is obtained or taken out, there shall be taxed only the fee for one copy of the same thing."

It is to be noted that the taxed costs are to include the fees of officers which the party appears to be chargeable with in the case. Therefore, in order to determine which fees are taxable, one must determine which fees are chargeable to the parties. The notable exception to this rule is in cases where judgment is for the Commonwealth. Section 14-196 of the Code reads as follows:

"In a case wherein there is judgment or decree on behalf of the Commonwealth for costs, there shall be taxed in the costs the charge actually incurred to give any notice, although it be more than fifty cents; and the fees of attorneys and other officers for services, and allowances for attendance, as if such fees and allowances were payable out of the State treasury. What is so taxed for fees of, or allowance to, any person, shall be paid by the sheriff or officer who may receive such costs into the State treasury."
As pointed out in my letter of July 11, 1960, the fee prescribed by § 14-133 of the Code should not be paid by the Commonwealth in tax cases. This conclusion was based upon the prohibition in § 14-98 of the Code, and the general theory that, inasmuch as fees collected by the clerks of county courts are paid into the State treasury by virtue of § 14-54 of the Code, it would be impracticable to require the Commonwealth to pay a fee which eventually finds its way back into the State treasury. That opinion, however, was limited to the collection of the fee prescribed by § 14-133 of the Code, no view being expressed as to the taxing of such fees as a part of the costs against the defendant.

In view of the express mandate of § 14-196 of the Code that all fees of officers for services are to be taxed as costs as if they were payable out of the State treasury, I am of the opinion that the clerks should continue taxing in the costs the fee prescribed in § 14-133 of the Code, as well as other applicable officers' fees, when the judgment in a tax case is in favor of the Commonwealth, even though they were not paid out of the State treasury.

You have also inquired as to whether my letter of July 11, 1960, precludes the payment of the $.25 fee provided in § 16.1-115(1) of the Code, or the taxing of this amount as costs, in cases instituted by the Commonwealth and localities for collection of taxes.

Section 16.1-115(1) of the Code prescribes a $.25 fee for the clerk of the circuit court for services in preserving the records transmitted from the county courts. That section provides, in part, as follows:

“All papers connected with any civil action or proceeding in a court not of record, except those in actions or proceedings (1) in which no service of process is had, (2) which are removed or appealed, and (3) in which the papers are required by law to be sooner returned to the clerk's office of a court of record, shall be disposed of as follows:

“(1) If in a county court, they shall be retained for six months after the action or proceeding is concluded, and at the end of such period they shall be delivered to the clerk of the circuit court where they shall be properly filed, indexed and preserved, for which filing and indexing such clerk shall receive a fee of twenty-five cents which shall be paid by the plaintiff as a part of the costs and transmitted to the clerk of the circuit court with the papers.”

In the letter to you under date of July 10, 1956 (Report of Attorney General, 1956-57, page 75), former Attorney General Almond expressed the views that the clerks of the county courts should collect the $.25 fee from the Commonwealth, and in turn transmit the same to the clerk of the circuit court. I concur in that view.

Section 14-133 of the Code provides, 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:

“(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. No such fee shall be collected in any tax case instituted by any county, city or town.”

While this section provides that the $3.00 fee of the county court includes the fee prescribed by § 16.1-115 of the Code, this does not mean that § 14-133 of the Code supersedes or conflicts with § 16.1-115 of the Code. The county court fee in the
amount of $2.75 and the circuit court clerk's fee of $.25 are entirely separate and
distinct. Section 14-133 of the Code simply combines the two fees which are to be paid
to the clerk of the county court. By relieving the localities of the obligation to pay the
county court fee prescribed in § 14-133 of the Code, there can be no reasonable pre-
sumption that they were also relieved of the obligation to pay the $.25 filing and in-
dexing fee prescribed by § 16.1-115(1) of the Code. I am of the opinion that the
localities, as well as the Commonwealth, must continue to pay this fee, and the clerk
should tax the same as a part of the costs when judgment is rendered for the plaintiff
in tax collection cases.

Your next inquiry relates to the applicability of my letter of July 11, 1960, to the
fees prescribed for sheriffs and sergeants in § 14-116 of the Code.

The Commonwealth does not pay the fees prescribed in § 14-116 of the Code, by
virtue of the prohibition in § 14-82 of the Code, providing, in part, as follows:

"Every sheriff and sergeant, and every deputy of either, shall, however,
continue to collect all fees and mileage allowances provided by law for the
services of such officer, other than such as he would have been entitled to
receive from the Commonwealth or from the county or city for which he is
elected or appointed and fees and mileage allowances provided for services
in connection with the prosecution of any criminal matter."

In view of my opinion relating to the taxing as costs the fee prescribed in § 14-133
of the Code, even though only $.25 be actually paid by the Commonwealth, it will
be unnecessary to elaborate further upon the taxing of the sheriff's fee prescribed by
§ 14-116 of the Code.

Your final inquiry is quoted from your letter:

"Will the court be required to collect and include in the judgment the
sheriff's or sergeant's service of process fee in suits instituted
by a political subdivision without the jurisdiction of the sheriff or sergeant when such
political subdivision brings a suit for taxes against a person living within
the area in which the sergeant or sheriff serving the civil process has juris-
diction?"

Section 14-133 of the Code expressly provides that the court fee prescribed therein
shall not include the service fee of any sheriff or other officer serving process. The
applicable portion of the section reads as follows:

"... The foregoing court fee shall not include the service fee of any
sheriff, city sergeant, or other officer serving process, but the person issuing
process shall accept and forward any such service fees when tendered at the
time of issuing process . . ."

It is, therefore, obvious that the exemption of counties, cities and towns from the
payment of the court fee prescribed by § 14-133 of the Code in tax cases has no effect
upon fees which may be imposed by virtue of other statutes. Since § 14-82 of the Code
precludes a sheriff or sergeant from collecting fees from the Commonwealth or from
the county or city for which he is elected or appointed, it necessarily follows that the
clerk is not to collect, nor tax as costs, any such fee when the service of such sheriff
or sergeant is performed for the locality in which he is elected or appointed. When,
however, the service is performed in civil cases instituted by some other political sub-
division, fees prescribed in § 14-116 of the Code should be collected and taxed as a
part of the costs.
COURTS—Not of Record—May not Adjudicate as to Competency of One Previously Committed as Inebriate. (133)

Motor Vehicles—Operators' License—Reinstatement After Commitment as Inebriate—County Court not Empowered to Adjudicate as to Present Competency. (133)

October 13, 1960

HONORABLE VOLNEY H. CAMPBELL, Judge
Washington County Court

This is to acknowledge receipt of your letter of October 4, 1960 in which you request an opinion on the question raised in the following quoted paragraph of your letter:

"I will greatly appreciate your advising me whether, in your opinion, the Judge of a County Court can, after hearing testimony of witnesses, and perhaps medical testimony, enter an order adjudging a person who has been formerly committed on more than one occasion as an inebriate, competent at the present time for the purpose of the termination of the suspension of his operator's license and privileges."

Paragraph (a) of Section 46.1-428 of the Code of Virginia is as follows:

"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 the person in charge of such institution, 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 person in charge of such institution, 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. Provided, if such person shall thereafter return to an institution for the care or treatment of inebriates or habitual users of drugs the license shall be forthwith suspended and not thereafter be reissued until such person is adjudged competent by judicial order or decree, or discharged as cured from an institution for the cure of inebriates or for the treatment of habitual users of drugs." (Italics Supplied)

The question here is relative to the underscored portion of Section 46.1-428 as set forth herein above which states in effect that where a person has been committed to, or has been admitted to an institution as an inebriate, or an habitual user of drugs, the license shall be suspended and not thereafter reissued until such person is: (1) adjudged competent by judicial order or decree, or (2) discharged as cured from the institution for the cure of inebriates or for the treatment of habitual users of drugs. It is obvious that the legislature intended a different procedure for those persons admitted or committed more than once. Otherwise this proviso in the statute would be superfluous. The person who has been in an institution for the second or additional time must furnish a statement that he is "cured" and not merely that he is "sufficiently recovered to operate a motor vehicle safely." It would seem most logical for the person to obtain such a statement from the institution in which he had been treated, if such institution would discharge him as cured. If he could not obtain such a statement, his only means of relief is that he be adjudged competent by a judicial order or decree. There is no authority granted the county or municipal court in this section to issue any statement of competency of the person to the Commissioner as is specifically granted in the case of the person who had been confined only once. This section alone would appear to require the same formality as required upon appeal from a decision of the institution or the county court not to issue the statement necessary for restoring a
license after one admission to an institution. This conclusion seems to follow by virtue of the fact that if the institution would not issue the statement showing the person "cured" after his second or additional confinement, he could only appeal to the circuit court for an adjudication as to his competency.

While the jurisdiction of the county court is extensively inclusive, it does have its basis entirely in the statutes, some of which give to the county courts the powers and duties formerly entrusted to justices of the peace and trial justices and many of which enlarge upon these by granting additional jurisdiction pertaining to numerous specific matters. Under Code Section 37-62 the county judge and two physicians constitute a commission to inquire whether a person be mentally-ill, epileptic, mentally-deficient or inebriate and a suitable subject for a hospital or colony for the care and treatment of such persons. However, nowhere in any of these statutes, general or specific, do I find the authority for a county court to adjudge a person who has been admitted or committed to an institution as an inebriate or habitual user of drugs competent by order or decree of the court. Code Section 17-123 grants original jurisdiction to the circuit courts in all civil cases except as specifically otherwise stated in the statutes. Code Section 37-123 grants to the circuit court or corporation court jurisdiction for determination of competency where a person claims illegal detention by an institution for the care of the mentally-ill, epileptic, mentally-deficient or inebriate. Code Section 37-124 grants the power to make such judicial determination in all other cases where the person has been adjudged mentally-ill, epileptic, mentally-deficient or inebriate to the circuit or corporation court in the county or city in which he resides.

In accordance with the foregoing, it is my opinion that your question must be answered in the negative.

CRIMES—County Ordinances—Act Must be Prohibited in Order to be Punishable.

(321)

April 12, 1961

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This is to acknowledge receipt of your letter of April 5, 1961, in which you state:

"I will appreciate very much an opinion as to the following:
"There is a town ordinance of Christiansburg, to be specific—Section 21-12, which reads as follows:
"Sec. 21-12. Loitering on sidewalks or in doorways.
"'No person or aggregation of persons shall be permitted to loiter on the sidewalks of the town in front of any business establishment or like place, or in the doorways of any such place.'
"Also, Section 21-14 Town ordinance reads as follows:
"Sec. 21-14. Persons assembling on streets and sidewalks.
"'The assembling and collecting of persons on the streets or sidewalks in such manner as to block up and obstruct free passage shall not be permitted and it shall be the duty of the police to disperse such assemblages.'
"There is a general penalty under the Town ordinance which reads as follows:
"' Sec. 1-6. General penalty; continuing violations.
"'Wherever in this Code or in any ordinance or resolution of the town or rule or regulation or order promulgated by any officer or agency of the town under authority duly vested in him or it, any act is prohibited or is declared to be unlawful or an offense or a misdemeanor, or the doing of any act is
required or the failure to do any act is declared to be unlawful or an offense or a misdemeanor, and no specific penalty is provided for the violation thereof, the violation of any such provision of this Code or of any such ordinance, resolution, rule, regulation or order shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding twelve months, or both. Except as otherwise provided, each day any violation of this Code or any such ordinance, resolution, rule, regulation or order shall continue shall constitute a separate offense.'

"I would like to have an opinion as follows:

"FIRST: Is Section 21-12 an ordinance that is designed to give an officer the right to disperse persons or is it an ordinance that can be classed as a violation of law for which a fine can be imposed as provided for in the general penalty provision hereinabove set forth?

"SECOND: Also, your opinion as to whether or not the word 'permitted' in the Section 21-12, which reads 'no person or aggregation of persons shall be permitted', covered under the general penalty statute can be construed to mean the same as 'prohibited'. In other words, Section 21-12 uses the word 'permitted' and the penalty statute uses the word 'prohibited' and other words therein set out."

The fundamental question involved here is whether the acts are prohibited. No act can be punished as a crime unless it is prohibited, and the courts cannot by construction make that a crime which is not so prohibited. 22 C.J.S., Criminal Law, page 66. The ordinance appears to be vague upon its face.

I have grave doubt as to the effect of section numbered 21-12 of the ordinance. This section fails to contain any language that would authorize an officer to disperse persons. It may be that if an officer should order persons to disperse and they should refuse, the disobedience of the order would constitute a misdemeanor, and upon a warrant charging such failure to obey the order of an officer, such person would be subject to the penalty prescribed in Section 1-6.

Section 21-14 would seem to authorize an officer to direct persons in violation thereof to disperse, and upon their failure to do so, they would, it would seem, be subject to trial upon a valid warrant for refusing to obey the officer's order if the evidence should in fact show that the persons had assembled on the street in such manner as to block up and obstruct the free passage of pedestrians.

I think it would be advisable to have the ordinances redrafted so as to specifically declare that it shall be unlawful for persons to do the things sought to be prohibited.

For your information I enclose copies of two ordinances of Richmond which may be of benefit in drafting new ordinances.

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CRIMES—Drunkenness in Public—Counties May Punish—Penalty May Exceed State Law. (300)

Ordinances—Drunkenness in Public—County Penalty May Be in Excess of State Penalty. (300)

HONORABLE LEON OWENS
Commonwealth’s Attorney for Russell County

March 31, 1961

This is to acknowledge receipt of your letter of March 22, 1961, in which you state:

"Section 18.1-237, of the Virginia Code, provides that Counties may adopt ordinances prohibiting and punishing profane cursing or drunkenness in public. Is there any reason why a County, by ordinance, cannot punish such conduct by a greater fine than the one imposed by the State?"
Section 18.1-237, *supra*, is 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."

(Underscoring supplied).

The counties are empowered to adopt certain types of ordinances pursuant to Section 13-8 of the Code, last amended in 1960. Your attention is invited to the following language in that section:

"For carrying into effect these and their other powers, the boards of supervisors may make ordinances and by-laws and prescribe fines and other punishment for violations thereof which shall be enforced by proceedings before a judge of the county court in like manner and with like right of appeal as if such violations were misdemeanors. *Such fines, however, shall in no case exceed three hundred dollars and if imprisonment in the county jail be prescribed in any case such imprisonment shall not exceed thirty days.*"

(Underscoring supplied).

It will be noted that Section 18.1-237 specifically empowers the counties, cities and towns to adopt ordinances similar to and covering the same subject as embraced in this section. However, there is no limitation concerning the extent of punishment as is found in Section 15-8, supra; therefore, the county could fix the fine greater than that provided for in section 18.1-237 so long as it does not exceed the maximum fine ($300.00) set forth in Section 15-8, and if a prison term in jail be prescribed, the same cannot exceed thirty days.

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February 24, 1961

HONORABLE C. E. REAMS, JR., Judge
Culpeper County Court

This is to acknowledge receipt of your letter of February 20, 1961, in reference to the interpretation of Sections 6-129 and 6-130 of the Code of Virginia, especially the last four lines of the latter section, beginning with the word "unless".

The pertinent portion of Section 6-129 is:

"Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for the payment of money, upon any bank, banking institution, trust company, or other depository, knowing at the
time of such making, drawing, uttering or delivering, that the maker or
drawer has not sufficient funds in, or credit with, such bank, banking in-
stitution, trust company, or other depository, for the payment of such check
draft or order, although no express representation is made in reference there-
to, shall be guilty of larceny."

Section 6-130 is as follows:

"In any prosecution under the preceding section, the making or drawing
or uttering or delivery of a check, draft, or order, payment of which is re-
 fused by the drawee because of lack of funds or credit, shall be prima facie
evidence of intent to defraud and of knowledge of insufficient funds in, or
credit with, such bank, banking institution, trust company or other de-
pository unless such maker or drawer, or some one for him, shall have paid
the holder thereof the amount due thereon, together with interest, and
protest fees (if any), within five days after receiving written notice that such
check, draft, or order has not been paid to the holder thereof."

I shall answer your questions seriatim.

"1. Is it necessary in case of returned check that the holder of the unpaid
check give the maker written notice of its dishonor, especially when the
check is returned for insufficient funds?"

The offense is in violation of Section 6-129, and is committed when the drawer
utters the check. Section 6-130, is merely procedural and its purpose is to facilitate
the prosecution under Section 6-129.

Cook v. Commonwealth, 178 Va. 251, 258:

"On the other hand, the Commonwealth may prosecute the drawer for
commission of this crime even though no notice of dishonor was ever given.
In such event the Commonwealth would be required to prove affirmatively
the existence of a fraudulent intent in the mind of the drawer."

It is not necessary that the written notice be given under Section 6-130 in order to
prosecute under Section 6-129.

"2. The same question as above when the check is returned marked
'No account' or 'Account closed'?"

The same answer is given as given to the preceding question.

"3. In the event that your opinion would be to the effect that written
notice is not necessary, what, in your opinion, would be the purpose of the
above referred to four lines in Section 6-130?"

The first portion of Section 6-130 provides for a prima facie presumption of the
intent to defraud upon the showing that the check has been dishonored. The failure
to pay the same within five days after notice strengthens this presumption, but the
same remains only prima facie. However, this prima facie presumption is dissipated
when the maker or drawer or someone for him pays the check within five days after
receiving written notice that the check has been dishonored.

"4. I am familiar with the case of Cook vs. Cook in 178 Virginia, page
251, and to me this case leaves the above question hanging, while deciding
it was not necessary to allege notice in an indictment and that a past pay-
ment would not bar prosecution."

This question has been answered in the answer given to the preceding questions.
There have been two somewhat recent cases dealing with prosecutions under Section
6-129 of the Code, to-wit, Rosser v. Commonwealth, 192 Va. 813, holding that the
intent to defraud is an indispensable element of the crime and the burden is on the Commonwealth to prove its existence at the time of drawing or uttering the check. The case of Hubbard v. Commonwealth, 201 Va. 61, held that a prosecution under this section failed where the check was given with the assurance that it would be paid within a short time, there being no false representation made at the time the check was uttered. The Court did, however, sustain a conviction for obtaining money under false pretenses in violation of Section 18-180.

CRIMINAL LAW—Drunk in Public—Being Drunk in Motor Vehicle on Public Highway Constitutes Offense. (22)

HONORABLE JOHN R. DUDLEY, Judge
Loudoun County Court

July 13, 1960

This is to acknowledge receipt of your letter of July 8, 1960 in which you ask my opinion as to whether or not the person under the circumstances set forth below could be found guilty of the offense of being drunk in public in violation of Section 18.1-237 of the Code.

You state that an officer upon arresting an operator of an automobile found the accused in a supine position on the rear seat of the automobile on a public highway so situated as to be concealed from common observation by others passing on the highway.

Section 18.1-237 of the Code reads in part:

“If any person arrived at the age of discretion profanely curse or swear or get or be drunk in public he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one nor more than ten dollars. * * * *” (Italics supplied)

In this particular case the accused was actually observed in close proximity to the driver of the vehicle, who, of course, observed him. Referring to the opinion of this office on February 21, 1957 to Mr. John E. Hopkins, Sheriff of Giles County, Annual Report of the Attorney General 1956-1957, Page 77, it was stated that what constitutes being in public depends on the facts in each case. The court or jury trying the case must determine this.

A public highway is certainly a public place. The fact that a person is not always seen by others passing on the highway does not in my opinion mean that he is not in a public place. Hence, if this individual were drunk on the rear seat of the automobile while it was being operated on the highways, he would be amenable to the said statute.

CRIMINAL LAW—False Report—Unlawful to Give False Information to Officer to Avoid Arrest. (149)

Motor Vehicles—Operator's License—Unlawful to Give False Information Regarding License In Order to Avoid Criminal Charge. (149)

HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney for Floyd County

October 25, 1960

This is to acknowledge receipt of your letter of October 17, 1960, in which you request my interpretation of Section 18.1-401 of the Virginia Code. You state in part as follows:

"Information is requested as to whether or not subject statute is construed to apply to a person being investigated for and subsequently charged
REPORT OF THE ATTORNEY GENERAL

with a crime. For example, if an officer questions the operator of a motor vehicle about his operator's permit, and the operator states that he does not have it with him but has one at home, when, in fact, his operator's permit has been revoked or he has never been issued one."

Under the provisions of Section 46.1-7 of the Virginia Code, the operator of a motor vehicle must have in his possession his operator's or chauffeur's license while driving the vehicle, and such a person must, upon request of a police officer, exhibit his driving license. Section 18.1-401 of the Code reads in part as follows:

"It shall be unlawful for any person knowingly to give a false report as to the commission of any crime to any sheriff, deputy, member of the State Police, police officer or any other law enforcement official with intent to mislead . . ."

When a person is requested by a police officer to exhibit his driving permit under Section 46.1-7, he is not obligated to make any statements whatsoever to the officer. However, should he make any statements about the commission of the offense (crime) which are false or misleading, the offense would certainly come within the purview of the statute. (Section 18.1-401). Obviously, in the hypothetical case, the individual is seeking to avoid the consequences of the statutes (Sections 46.1-7, 46.1-349 or 46-350), as the case may be, by stating a falsehood to the officer with intent to mislead the officer. For your information I am enclosing a copy of an opinion issued by this office on July 26, 1956 (Annual Report of the Attorney General, 1956-1957, page 78), holding that said statute covers a false report concerning the commission of a crime made by a participant therein.

It is my opinion that under such circumstances such a person would be subject to prosecution under Section 18.1-401 of the Virginia Code as amended.

CRIMINAL PROCEDURE—Admissibility of Certificate of Blood Analysis in Drunk Driving Case—Not Necessary that Sample be Examined by Chief Medical Examiner. (188)

Criminal Law—Blood Alcoholic Test—Who May Examine Sample. (188)

December 8, 1960

HONORABLE D. R. TAYLOR, Judge
County and Juvenile and Domestic Relations
Court of the County of James City

I am in receipt of your letter of November 30, 1960, in which you call my attention to certain provisions of Section 18.1-53 of the Virginia Code and inquire whether or not a blood alcohol certificate which indicates that a particular blood sample was examined by a toxicologist—rather than the Chief Medical Examiner or an Assistant Chief Medical Examiner—should be excluded from evidence on motion of an individual accused of driving a motor vehicle while under the influence of alcoholic intoxicants in violation of an ordinance of the City of Williamsburg.

In pertinent part, Section 18.1-55 of the Code of Virginia (1950) as amended, provides:

"Only a physician, registered professional nurse or laboratory technician, shall withdraw blood for the purpose of determining the alcoholic content therein. The blood sample shall be placed in a sealed container provided by the Chief Medical Examiner. Upon completion of taking of the sample, the container must be resealed in the presence of the accused after calling the fact to his attention. The container shall be especially equipped with a sealing device, sealed so as not to allow tampering, labelled and identified
showing the person making the test, the name of the accused, the date and time of taking. The sample shall be delivered to the police officer for transporting or mailing to the Chief Medical Examiner. Upon receipt of the blood sample, the Chief Medical Examiner or an Assistant Chief Medical Examiner shall examine it for alcoholic content and shall execute a certificate which certificate shall indicate the name of the accused, the date, time and by whom the same was received and examined, and a statement that the container seal had not been broken or otherwise tampered with and a statement of the alcoholic content of the same. The certificate, attached to the container shall be returned to either the police officer making the arrest, the department from which it came or to the clerk of the court in which the matter will be heard.” (Italics supplied).

I am constrained to believe that the statutory directive that the Chief Medical Examiner or an Assistant Chief Medical Examiner shall examine a blood sample for alcoholic content should not be viewed as requiring such officials to perform the actual chemical analysis involved in such an examination. On the contrary, I believe that the statutory language under consideration envisions only that such officials shall cause an examination of the blood sample to be made by qualified personnel under their supervision. It would appear that this construction is supported by the fact that the certificate to be executed by the Chief Medical Examiner or an Assistant Chief Medical Examiner must indicate the identity of the individual “by whom the (blood sample) was ... examined”—information which would clearly be superfluous if the official executing the certificate were required to make the actual examination himself. Moreover, it would appear that this construction is consistent with the administrative interpretation which has been placed upon the statute by the Chief Medical Examiner and with the uniform practice followed by his department in the discharge of the duties imposed upon it thereunder.

In light of the foregoing, I am of the opinion that the certificate concerning which you inquire may properly be admitted in evidence.

CRIMINAL PROCEDURE—Bail and Recognizance—What Constitutes Personal Recognizance—Cash Deposit Receipt Alone not Sufficient. (375)
Arrest—Bail and Recognizance—Cash Deposit—Receipt Only Does Not Constitute Personal Recognizance. (375)

June 8, 1961

HONORABLE C. VINCENT HARDWICK, Judge
Essex County Court

This is in reply to your letter of May 22, 1961, which I quote as follows:

"It is the habit of many of the Justices of the Peace of this area to give the receipt mentioned in section 19.1-131 to those who deposit cash in lieu of recognizance with surety as mentioned in section 19.1-130 of the Code, without executing any other instrument.

"1. Does this receipt alone comply with the statute requiring the accused to 'give his personal recognizance and deposit'?

"2. If the accused makes the deposit required or causes it to be deposited for him, and a receipt only is executed by the Justice of the Peace, may the deposit be forfeited for the non-appearance of the accused, and in addition a capias to answer summons also be issued against the accused.

"3. The receipt above referred to contains the words 'which includes fee for the Justice for taking this recognizance.' Does that alone make it a
recognizance even though it does not contain the waiver referred to in section 19.1-134, and is the Justice of the Peace entitled to his $2.00 fee when a receipt only is executed by him?"

Under the provisions of § 19.1-126 of the Code of Virginia any officer letting a person to bail is required to take a recognizance. The conditions of the recognizance are set forth in § 19.1-128 of the Code. A recognizance carries with it a penalty in the amount to be fixed by the officer. Section 19.1-127 of the Code provides the instances in which security is not mandatory.

When security is required, it may be in the form of surety or a cash deposit. If the cash deposit is given in lieu of the recognizance with surety, an official prenumbered receipt must be given by the officer accepting such deposit.

I have examined a copy of the form of receipt which was prepared pursuant to § 19.1-131 of the Code. The language is substantially as follows:

"Received of ____________________________ for the appearance of ____________________________ before the ____________________________ Court of ____________________________ County on ____________________________ day of ____________________________ 19________ at ____________________________ A.M./P.M., to answer charges made against him/her under oath by ____________________________ ____________________________ on the ____________________________ day of ____________________________ 19________ $__________________________ Dollars $__________________________, which includes the fee of the Justice for taking this recognizance."

Manifestly, the foregoing was intended to serve as a recognizance as well as a cash receipt. However, I entertain grave doubts as to whether this receipt alone constitutes a recognizance. The officer granting bail must substantially comply with the provisions of § 19.1-128 of the Code. The cash receipt is to show that the person who has been recognized to appear in court has put up a cash deposit in lieu of personal or corporate surety. Whenever an officer grants bail in this manner, it is his duty to make a notation or memorandum on the warrant to that effect. See Walker v. Commonwealth, 144 Va. 648, 131 S. E. 230. Whenever bail has been granted in this manner and the defendant fails to appear as required by the recognizance, it is necessary that forfeiture proceedings be followed before the cash deposit passes to the Commonwealth.

In the absence of some form of return evidencing the taking of the personal recognizance of the person let to bail, I am of the opinion that forfeiture proceedings may not be taken against the cash deposit.

Your first two inquiries are, therefore, answered in the negative.

In reply to your third inquiry, I see no objection to the Justice of the Peace requiring a cash deposit in a sufficient amount to pay his statutory fee. As to the waiver in the recognizance, it is unnecessary that it be expressly set forth. Section 19.1-133 of the Code provides that every recognizance shall include a waiver of certain exemptions provided by law, and even though such waiver be not expressed, it shall be deemed to be included. I believe it obvious that this section of the Code would apply only when some form of security, other than a cash deposit is given with the recognizance. There is no necessity for such a waiver when the cash deposit may be forfeited if the person from whom the recognizance is taken fails to appear.
"If a person is arrested for being drunk in public, and confined in a jail and requests a blood test, is it the duty of the sheriff or his deputies to see that a blood test is given?"

Under the provisions of Section 18.1-55 of the Code of Virginia (1950) as amended, it is the duty of the arresting authorities, if requested by a person charged with a violation of Section 18.1-54 (drunk driving), to render full assistance in obtaining a chemical analysis of such person's blood, provided the request is made within two hours of the time of the alleged offense (drunk driving). When a person is charged with a violation of Section 18.1-237 of the Code (drunk in public), there is no corresponding duty on the part of the arresting authorities, as that Section (18.1-237) is silent upon this point.

Therefore, it is my opinion that there is no duty upon the arresting officer to see that a blood test is given a person accused of the violation of Section 18.1-237.

CRIMINAL PROCEDURE—Conviction of Involuntary Manslaughter Bars Prosecution on Same Act for Reckless Driving. (229)

Motor Vehicles—Reckless Driving—Prosecution Barred if Accused Convicted of Involuntary Manslaughter on Same Act. (229)

February 1, 1961

HONORABLE G. GARLAND WILSON
Commonwealth's Attorney for the City of Radford

This is to acknowledge receipt of your letter of January 17, 1961 which reads as follows:

"I should like an opinion from your office on the question of whether or not a person who is convicted of involuntary manslaughter may be subsequently convicted of reckless driving, on the same set of facts, in which he was convicted of involuntary manslaughter in a non-collision motor vehicle accident."

Section 19.1-259 of the Code of Virginia of 1950, as amended, is as follows:

"If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the State statute."

You will observe that the requisites for consideration here are that the same act be a violation of two or more statutes and that there has been a conviction under one of these statutes. Reckless driving is described by Section 46.1-189 of the Code of Virginia of 1950, as amended, as driving "a vehicle upon a highway recklessly or at a speed or in a manner so as to endanger life, limb or property of any person." Involuntary manslaughter may be defined as the unintentional killing of a person by one engaged in an unlawful, but not felonious act; or in the improper performance of a lawful act. When the unlawful act of reckless driving results in death to another person, the one guilty of the unlawful act of reckless driving may be tried and convicted of involuntary manslaughter. This is the situation in the case which you have described.

In the case of Hundley v. Commonwealth, 193 Va. 449, our Supreme Court said, "a test of the identity of acts or offenses is whether the same evidence is required to
sustain them." Inasmuch as the same set of facts would be required to obtain a conviction for reckless driving or involuntary manslaughter in this case, the same act would constitute a violation of the two statutes, and the driver of the vehicle could be found guilty under either statute. This, in my opinion, comes within the purview of Section 19.1-259, previously quoted herein, and since there has been a conviction for involuntary manslaughter, such conviction is a bar to prosecution under the reckless driving statute.

CRIMINAL PROCEDURE—Costs—Defendant May Not Be Compelled to Pay When Charge Dismissed. (342)

Courts—Not of Record—No Authority to Require Payment of Costs By Accused When Dismissed. (342)

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This is to acknowledge receipt of your letter of May 5, 1961, in which you state in part:

"I would appreciate an opinion as to the following: does a Trial Justice have the legal right, upon a warrant charging a defendant with an infraction of the traffic law, upon hearing the case find such a verdict 'Dismissed on payment of costs'?

Inasmuch as this case involved a traffic law, it is well to consider whether or not the action of the court constituted a conviction within the meaning of the Motor Vehicle Safety Responsibility Act, Chapter 6, Title 46.1 of the Code. The term "conviction" is defined in paragraph (a), Section 46.1-389, as follows:

"'Conviction' means conviction upon a plea of guilty or the determination of guilt by a jury or by a court though no sentence has been imposed or, if imposed, has been suspended and includes a forfeiture of bail or collateral deposited to secure appearance in court of the defendant unless the forfeiture has been vacated, in any case of a charge conviction upon which requires or authorizes the Commissioner to suspend or revoke the license of the defendant ..."

In the case of Lamb v. Butler, 198 Va. 508; the court held that this definition applied to the revocation statute, to-wit, Section 46.1-419 of the Code.

I do not see how the action of the court in dismissing this case upon payment of costs constitutes a conviction within the meaning of the above statutes, as obviously there was no determination of guilt by the court. If this language is construed to mean an acquittal, the court is without authority to tax the costs on the defendant. The term "dismissed" would indicate that the prosecution was not terminated and no adjudication was determined. Of course, the court has authority to dismiss the case from its docket, but I can find no authority to condition a dismissal upon payment of costs. Costs are assessable only where there is a conviction, (Section 19.1-320 of the Code of Virginia), except in those cases coming under the purview of Section 19.1-18. The costs follow the conviction as the shadow follows the substance. Without a conviction (fine or imprisonment) there could be no imposition of costs. The costs are no part of the punishment. See the cases of Anglea v. Commonwealth, 10 Gratt., 51 Va. 696, and Commonwealth v. McCue, 109 Va. 302.

I am, therefore, of the opinion that the trial justice is without authority to require of the defendant the payment of costs as a condition to dismissing the charge in the warrant.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Cost of Grand Jury—Payable by Defendant who Pleads Guilty. (175)

Costs—Criminal Procedure—Grand Jury—Payable by Defendant who Pleads Guilty. (175)

November 29, 1960

HONORABLE BERTHA G. ABBOTT, Clerk
Circuit Court of Lancaster County

This is in reply to your letter of November 22, 1960, in which you asked to be advised if an accused who pleads guilty to a felony indictment is chargeable for the cost and allowance of the grand jury who returned the indictment.

I am of the opinion that your inquiry should be answered in the affirmative. By virtue of § 19.1-320 of the Code of Virginia of 1950, as amended, an accused is liable for the cost of his conviction. The clerk is required to make up a statement of all the expenses incident to the prosecution, and execution for such expenses is issued and proceeded with in the same manner as if there had been a judgment in favor of the Commonwealth for such amount.

The fact that the accused pleads guilty to a felony indictment does not alter the mandate that he be charged with the costs incident to his trial, a portion of which is the expense of the grand jury.

CRIMINAL PROCEDURE—Dismissal of one Charge Mandatory if Accused Convicted on Either When Charged for Driving Under Influence and Reckless Driving. (166)

Motor Vehicles—Operating While Under Influence and Reckless Driving—Conviction on One Charge Requires Dismissal of Other. (166)

November 15, 1960

HONORABLE JULIUS GOODMAN
Commonwealth’s Attorney of Montgomery County

This is to acknowledge receipt of your letter of November 2, 1960 in which you ask my opinion as to the applicability and effect of Section 19.1-259.1 of the Code of Virginia in each of several given situations. For the sake of clarity, I shall treat each question individually and in the sequence in which it is stated in your letter which is quoted in part for this purpose.

"If a State Trooper or any other legal arresting officer on the highways of this State follow a person operating a motor vehicle because of excessive speed of the motor vehicle and said speed is in excess of 75 miles per hour (which would be reckless driving), and after overcoming the person who was operating a motor vehicle at such excessive speed the officer finds the person has been drinking intoxicating beverages and also makes a charge against him for driving under the influence of intoxicants under Section 18.1-54, the officer also makes another charge against the person for reckless driving, to-wit: operating a motor vehicle over the highways at a speed in excess of 75 miles per hour.

"What I would like to know is:

"In the hearing of such a case before the County Court on both charges at the same hearing would the conviction of driving under the influence, under Section 18.1-54 of the Code automatically dismiss the charge of reckless driving against the person, and vice versa and at the same hearing should the person be convicted of reckless driving, exceeding the speed limit of 75 miles per hour automatically under Section 19.1-259.1 dismiss the charge against said person for driving under the influence."
As a background to the interpretation of this section, it may be well to consider Section 19.1-259 (formerly Section 19-232) which states in part:

"If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others."

The purpose of that Section was to prevent a second conviction for the same act where that act constituted a violation of more than one statute or ordinance. With reference to that section, however, it was held in Hundley v. Commonwealth, 193 Va. 449, that a person could be convicted of both reckless driving and driving under the influence although each charge grew out of the same occurrence since these were two separate acts and prosecution for one was not a bar to prosecution for the other.

Section 19.1-259.1 passed by the General Assembly of 1960 is as follows:

"Whenever any person is charged with a violation of § 18.1-54 or any similar ordinance of any county, city, or town and reckless driving growing out of the same act or acts and is convicted of one of these charges, the court shall dismiss the remaining charge."

Unlike the older Section, this Section concerns itself only with reckless driving and driving under the influence of intoxicants. It does not state "if the same act be a violation of two or more statutes." It states "whenever any person is charged" with the two specifically named violations growing out of the same act or acts, upon conviction of one of these charges, the court shall dismiss the remaining charge. Accordingly, it is my opinion that in the situation which you have described, a conviction either under Section 18.1-54 or of reckless driving would require that the court dismiss the remaining charge.

You have further inquired as follows:

"Is there any provision under the Code whereby a person at the time of arrest on the highway for a charge of reckless driving such as exceeding the speed limit or crossing the double line or any other acts classed as reckless driving, and when arrested is found to also be under the influence of intoxicants which would be a violation of Section 18.1-54 of the Code that the party could be found guilty, if the evidence warrants it for both reckless driving and driving under the influence, and in other words is there any provision with reference to arresting a person for reckless driving and you also find at the time of arrest that he is also under the influence of intoxicants that the two charges could be classed as 'not growing out of the same act or acts,' as set out in Section 19.1-259.1 of the Code."

There is no code provision by which the two charges described would necessarily be classed as not growing out of the same act or acts. The determination as to what constitutes a separate act must be made from the facts and circumstances surrounding each case. It is my opinion that where a person is arrested for reckless driving whereupon he is found to be under the influence of intoxicants and charged with these two specific offenses, both charges would be considered "growing out of the same act or acts" as contemplated by Section 19.1-259.1 of the Code.

Your final question is contained in the following paragraph of your letter:

"Also should a person be arrested on the highway for reckless driving such as exceeding the speed limit or crossing the double line or any other act that is classed as reckless driving under the statute, and when arrested by the officer is found to be under the influence of intoxicants, and is charged under two separate warrants, one for reckless driving and the
other for driving under the influence, or violating Section 18.1-54, would the defendant have the right to plead guilty to the reckless driving charge and then ask the Court to dismiss the driving under the influence warrant under Section 19.1-259.1 of the Code."

Once the defendant is brought to trial on the reckless driving charge it is my opinion that he may plead guilty and by so doing be virtually assured of conviction, which under Section 19.1-259.1 would require the court to dismiss the charge of violating Section 18.1-54. The order in which the cases on the docket shall be tried, however, rests in the sound discretion of the court and the court may make such special orders in reference thereto as may seem proper. Under the circumstances which you have described, I should think the Commonwealth's Attorney would recommend that the defendant be first tried on the warrant charging the violation of Section 18.1-54, and if no conviction results therefrom, then upon the reckless driving charge.

CRIMINAL PROCEDURE—Double Jeopardy—Indictment Must Be Valid in Order to Place Defendant in Jeopardy. (359)

May 18, 1961

HONORABLE WILLIAM R. BLANDFORD
Commonwealth's Attorney for Powhatan County

This is to acknowledge receipt of your letter of May 15, 1961, in which you state in part:

"I would appreciate an answer to the below-mentioned question after giving the following facts:

"A true bill was returned by the Grand Jury of Powhatan County against B for the crime of being a felon and escaping from the custody of the State Penitentiary Farm. B was arraigned and on his plea of not quilty the jury was empanelled. At this point it was detected by the Commonwealth Attorney that the indictment failed to end with '... against the peace and dignity of the Commonwealth of Virginia' which made the indictment a complete nullity. At the next term of Court the Grand Jury found a true bill against B on the same crime but with a proper indictment.'"

Section 106 of the Virginia Constitution states in part:

"Indictments shall conclude 'against the peace and dignity of the Commonwealth.'"

The omission of the quoted words renders the indictment fatally defective. Guynn v. Commonwealth, 163 Va. 1052. In order to constitute double jeopardy, it must be shown that the accused pleaded to a valid indictment. Inasmuch as the first indictment was fatally defective, which rendered it a complete nullity, the plea thereto did not place the accused in jeopardy.

It is, therefore, my opinion that trying the accused (B) on the proper (second) indictment does not place him in double jeopardy.

CRIMINAL PROCEDURE—Preliminary Hearing—When Accused Entitled to Under § 19.1-163.1 of Code. (317)

April 11, 1961

HONORABLE WILLIAM H. LOGAN
Commonwealth's Attorney for Shenandoah County

This is in reply to your letter of April 4, 1961 in which you request my interpretation of Section 19.1-163.1 of the Code of Virginia of 1950, as amended. You are
particularly interested in my view as to the necessity of a preliminary hearing in Shenandoah County in a situation where persons have committed felonies in that county and have been arrested in some other jurisdiction.

The section of the code here involved reads as follows:

"No person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question of whether there is reasonable ground to believe that he committed the offense and no indictment shall be returned in a court of record against any such person prior to such hearing unless such hearing is waived in writing."

I am enclosing a copy of a letter addressed to Honorable Emory L. Carlton, Commonwealth's Attorney for Essex County, under date of June 22, 1960, in which I expressed the view that the foregoing statute should be construed as being applicable only in those instances in which the accused had been arrested on a charge of felony prior to the indictment. Hence, a person already under indictment by the grand jury in Shenandoah County at the time of arrest in some other jurisdiction, would not be entitled to a preliminary hearing upon his return to Shenandoah County by virtue of this section of the code.

On the other hand, in the situation posed in your letter, it appears, that the fugitive from Shenandoah County would not have been indicted at the time of arrest in some other jurisdiction. Thus, before an indictment can be returned to the Circuit Court of Shenandoah County, I am of the opinion that such persons would be entitled to a preliminary hearing in that county for the purpose of determining whether there exists any reasonable ground to believe that they committed the offense.

CRIMINAL PROCEDURE—Section 19.1-259.1 of Code Construed. (213)

December 30, 1960

HONORABLE J. FORESTER TAYLOR, Judge
Civil and Police Court and Juvenile and Domestic Relations Court
City of Staunton

This is to acknowledge receipt of your letter of December 20, 1960 which reads as follows:

"I call your attention to Va. Code (1950), Sec. 19.1-259.1. It seems to me that the language of that statute is mandatory and admits of no exceptions. However, I have heard a different view expressed.

"If a law enforcement officer observes a motor vehicle weaving from side to side on a highway, forcing other traffic onto the shoulder, and the officer proceeds to stop the driver and to charge him with both reckless driving and drunk driving, can he be convicted of both offenses?

"If the court hears the two charges together, and receives and accepts a plea of not guilty to the charge of drunk driving and a plea of guilty to the charge of reckless driving, can it then proceed to try and convict the defendant on the charge of drunk driving?"

There is enclosed a copy of an opinion dated November 15, 1960 addressed to the Honorable Julius Goodman, Commonwealth's Attorney of Montgomery County, Christiansburg, Virginia, which I believe covers the exact points raised by your questions.
With reference to your first question, you will observe that the opinion held that a conviction either under Section 18.1-54 or of reckless driving would require that the court dismiss the remaining charge.

Likewise, referring to your second question, you will notice that the opinion held that a conviction under a plea of guilty to the charge of reckless driving would require the court to dismiss the charge of violating Section 18.1-54 which grew out of the same act. It suggests, however, that this situation might be avoided by controlling the order in which the defendant is tried upon the respective warrants.

CRIMINAL PROCEDURE—Special Police May be Appointed to Police Private Property. (110)

Cities and Towns—Responsibility of Town to Police Private Property Where Large Gathering of Public Assemble. (110)

September 23, 1960

HONORABLE C. S. GLASGOW
Town Attorney
Lexington, Virginia

This is to acknowledge receipt of your letter of September 21, in which you request my opinion as to the rights and the responsibility of the Town of Lexington to police the area of the Washington and Lee University Athletic Field (private property) within the corporate limits of the town.

You state that the Washington and Lee University authorities have requested the town to furnish police during athletic events on this area, which events are largely attended by the public.

Section 15-57, as amended, certainly vests the members of the town police force with authority and duty to use their best endeavors to prevent the commission of crime (including offenses against ordinances of the town) and to preserve good order within the corporate limits of the town. Section 15-539 is not applicable as the area to be policed is within the corporate limits of a town and not outside the limits of a city, as contemplated in that section.

Section 19.1-28, formerly Section 18-21, vests the circuit courts with authority to appoint special police (conservators of the peace) upon the application of the Boards of Visitors or Trustees of any university. This section contemplates that these special police are to be paid by the applicant (the University in this instance). I am inclined to think that this section also contemplates that it is the primary duty of an institution, college, university, etc., to bear the cost of this policing, as its activities caused the congregation or gathering of large numbers of persons. Of course, the town or city where such institution or college is located also has a responsibility to maintain order, etc. However, its responsibility is secondary certainly where such activities which cause the public to congregate are conducted on private property. It can be argued that there is an implied duty on the part of such institution, college or university to have such police appointed and bear the cost thereof, if the necessity therefor arises. However, I can find no statute expressly placing the duty on a private institution to police its premises.

I am, therefore, of the opinion that if the Washington and Lee University fails to have special police appointed by the court under Section 19.1-28, then the Town of Lexington must police this area with its own police force.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Suspension of Sentence—Courts May Place Defendant on Probation Even Though Previously Convicted of Forgery or Other Felony. (385)

June 26, 1961

HONORABLE WILLIAM C. FUGATE
Commonwealth’s Attorney of Lee County

This is to acknowledge receipt of your letter of June 26, 1961, in which you state that a seventeen-year-old boy was recently indicted on three charges of forgery and the uttering of a forged instrument in Lee County. About the same time, similar charges were placed against the same defendant in Wise County. The Circuit Court of Wise County, upon the defendant’s plea of guilty of the charges of forgery and of breaking and entering, found the defendant guilty and placed him on probation. The judgments of conviction in the Wise County Circuit Court were entered during the latter part of May, 1961.

You ask whether or not the Circuit Court of Lee County can suspend the judgments of conviction which may be imposed upon the defendant for the charges now pending in Lee County. You also state that the officials in both Wise and Lee County believe it to be to the best interest of the defendant and the Commonwealth that the defendant be placed on probation.

It is generally held that, at common law, the courts do not possess the power to delay the imposition or execution of sentence for crimes. (Richardson v. Commonwealth, 131 Va. 802)

In 1916 courts of record were authorized by statute to suspend sentence in specified instances. That statute, formerly §4486 of the Code of 1919, is now codified as §19.1-299 of the Code of 1950, as amended, and reads as follows:

"Upon a conviction in a court of record of the charge of larceny, forgery or uttering or attempting to employ as true such forged writing, knowing it to be forged, the court may, in its discretion, suspend sentence during the good behavior of the person convicted, provided that he has not been previously convicted of a like offense or any felony."

Were this statute the only one germane, I would be constrained to the conclusion that the Circuit Court of Lee County is without authority to now suspend imposition or execution of sentence in the case in question, in view of the previous conviction of the defendant. Subsequent legislation on this subject, however, must be read in conjunction with §19.1-299 of the Code.

In 1918 the General Assembly enacted general legislation which covers the field of suspension of sentences and probation of criminals. These statutes, now codified in Article 2, Chapter 11 of Title 53 of the Code of Virginia of 1950, are highly remedial and must be liberally construed. (Richardson v. Commonwealth, supra; Dyke v. Commonwealth, 193 Va. 478)

Section 53-272 of the Code of 1950, as amended, reads in part as follows:

"After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances, in mitigation of the offense, or if it appears compatible with the public interest, and in any case after a child has been declared delinquent or dependent, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence, or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior, for such time and under such conditions of probation as the court shall determine***."
CRIMINAL PROCEDURE—Suspension of Sentence—Courts may Suspend Portion of Jail Sentence even Though Defendant is Confined. (369)

May 26, 1961

HONORABLE P. O'S. FOSTER
Clerk, Municipal Court

This is to acknowledge receipt of your letter of May 25, 1961, in which you state:

"Does this Court have the authority to reopen a case following conviction of a misdemeanor?

Frankly, it has been our practice, for time immemorial, to reopen cases of persons committed to jail, for the purpose of suspending jail time upon payment of fines and costs. In other cases, the Court, for humanitarian reasons, has reopened cases and given a suspended sentence for period of twelve months during good conduct, or upon the recommendation of jail physician.

"Your opinion in this instance will be appreciated."

Section 53-272 of the Code of Virginia reads, in part, as follows:

"In case the prisoner has been sentenced for a misdemeanor and committed, or in case a jail sentence has been imposed upon the prisoner upon conviction of a felony, the court, or judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence."

It is, therefore, my opinion that where a prisoner is incarcerated in a jail on a misdemeanor charge, the court may suspend the unserved portion of the sentence.

CRIMINAL PROCEDURE—Violators Arrested in Elizabeth River Tunnel—How Charged. (305)

Motor Vehicles—Traffic Violations in Elizabeth River Tunnel—Should be Charged for Violation of Title 46.1, Not City Ordinance. (305)

April 4, 1961

HONORABLE P. O'S. FOSTER, Clerk
Municipal Court
Portsmouth

This is to acknowledge receipt of your letter of March 27, 1961, in which you make the following inquiry:

"The Elizabeth River Tunnel Commission Police invariably make arrests for traffic violations on the Portsmouth side of the tunnel, which cases are brought in our Traffic Court for trial, and we request that you kindly arrange to furnish your opinion as to whether or not all fines and forfeitures collected upon conviction, shall be credited to the City of Portsmouth, if, for violation of City Ordinances."

Section 46.1-182 of the Code, formerly Section 46-199, provides as follows:

"(a) In such counties, cities and towns in which the governing body shall adopt the ordinances authorized by §§ 46.1-180 and 46.1-181, all fines imposed for a violation of such ordinances shall be paid into the county, city or town treasury, as the case may be. Fees shall be disposed of according to law."
"(b) But in all cases in which the arrest is made or the summons is issued by an officer of the Department of State Police or of any other division of the State government, for violation of the motor vehicle laws of the State, the person arrested or summoned shall be charged with and tried for a violation of some provision of this title and all fines and forfeitures collected upon convictions or upon forfeitures of bail of any person so arrested or summoned shall be credited to the Literary Fund. Willful failure, refusal or neglect to comply with this provision shall subject the person who is guilty thereof to a fine of not less than ten dollars nor more than fifty dollars and may be ground for removal from office. Charges for dereliction of the duties here imposed shall be tried by the court of record having jurisdiction over the officer charged with its violation." (Italics supplied).

The Elizabeth River Tunnel District was created by Chapter 130 of the Acts of Assembly of 1942. The Elizabeth River Tunnel Commission is the governing body of said District and, as such, is a division of the State government within the meaning of Section 46.1-182, supra. Paragraph (b), 46.1-182, supra, places the duty upon the arresting officer if he be a member of the State Police or a police officer of any other division of the State government to charge the individual with a violation of the State law, and he must be tried accordingly. The fines imposed are credited to the Literary Fund. It would follow, therefore, that the city of Portsmouth is not entitled to these fines. This is in accordance with the view expressed by my predecessors in office, the Honorable Abram P. Staples, (see Report of the Attorney General, 1938-1939, p. 113), and the Honorable J. Lindsay Almond, Jr. (see Report of the Attorney General, 1953-1954, p. 144). It is, therefore, my opinion that the fines and forfeitures collected upon conviction of an individual arrested by the Elizabeth River Tunnel Commission Police charged with the violation of motor vehicle laws of this State should be paid to the Literary Fund. Both the said police and the officers issuing the summons should be apprised of their duty in connection with the aforesaid act.

CRIMINAL PROCEDURE—Warrant Must Specify an Offense—Charging Sus- picion not Sufficient. (103)

September 21, 1960

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth's Attorney for the City of Hampton

This is to acknowledge receipt of your letter of September 20, 1960, which reads in part as follows:

"I request an opinion as to whether or not a warrant charging 'unlawfully and feloniously is suspected of a felony' and then naming the felony is a valid warrant."

Your attention is invited to Section 19.1-91 of the Code of Virginia (1950) as amended, which reads as follows:

"On complaint of a criminal offense to any such officer he shall examine on oath the complainant and any other witnesses, or when such officer shall suspect that an offense punishable otherwise than by a fine has been committed he may, without formal complaint, issue a summons for witnesses and shall examine such witnesses. If such officer sees good reason to believe that an offense has been committed, he shall issue his warrant reciting the offense and requiring the person accused to be arrested and brought before a court of appropriate jurisdiction of the county or corporation, and in the same warrant require the officer to whom it is directed to summon such
witnesses as shall be therein named to appear and give evidence on the examination. But in a city or town having a police force, the warrant shall be directed 'To any policeman of such city or town, and shall be executed by the policeman into whose hands it shall come or be delivered.' (Italics supplied)

The offense of which an accused is charged and for which he is arrested and held should be clearly set forth in the warrant; otherwise, the validity thereof could be seriously challenged. An accused must be charged with the crime and not as a suspect. I am, therefore, of the opinion that a warrant charging "unlawfully and feloniously is suspected of a felony, to-wit: (here name the felony)“, is not valid.

CRIMINAL PROCEDURE—When Accused Entitled to Blood Test—Not Applicable When Charged with Manslaughter. (122)

October 5, 1960

Honorable W. Carrington Thompson
Member House of Delegates

I am in receipt of your letter of September 28, 1960, in which you call my attention to Section 18.1-55 of the Virginia Code and inquire whether or not an individual—alleged to have been operating a motor vehicle while under the influence of intoxicants and arrested for involuntary manslaughter as a result of an ensuing accident—is entitled "to be informed of his right to a blood test and to receive full assistance from the arresting officer in the event such a request is made."

In pertinent part, Section 18.1-55 of the Code of Virginia (1950) as amended, provides:

"In any criminal prosecution under § 18.1-54, or similar ordinance of any county, city or town, no person shall be required to submit to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood; however, any person arrested for a violation of § 18.1-54 or similar ordinance of any county, city or town, if within two hours of the time of the alleged offense, shall be entitled to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood, provided the request for such determination is made within such time. Any such person shall, at the time of his arrest, if within two hours of the time of the alleged offense, be informed by the arresting authorities of his right to such determination, and if he makes such request, the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness." (Italics supplied)

Section 18.1-54 of the Virginia Code forbids any person to operate a motor vehicle while under the influence of alcoholic intoxicants. The above quoted statute confers the right to a blood alcohol determination upon "any person arrested for a violation of Section 18.1-54 or similar ordinance of any county, city or town" if the arrest is made within two hours of the time of the alleged offense and the accused requests such a determination within that time. The statute in question also prescribes that any person so arrested shall—at the time of his arrest, if within two hours of the time of the alleged offense—be informed by the arresting authorities of his right to a blood alcohol determination and that, if request is made, full assistance in obtaining such a determination with reasonable promptness shall be rendered by the arresting authorities.

In light of the language of the statute italicized above, I am of the opinion (1) that Section 18.1-55 of the Virginia Code confers no right to a blood alcohol deter-
mination upon an individual arrested for involuntary manslaughter and (2) that an individual so arrested is not entitled to be informed of such right or to receive full assistance of the arresting authorities in obtaining such a determination should request therefor be made.

In this connection, I would call your attention to the provisions of Sections 19.1-98, 19.1-100, 52-20 and 52-21 of the Virginia Code concerning the duty of law enforcement officials to bring arrested persons before courts of appropriate jurisdiction or before an officer authorized to issue criminal warrants in the county or city in which the arrest is made, and to the decisions of the Supreme Court of Appeals of Virginia in *Winston v. Commonwealth*, 188 Va. 386, 49 S. E. (2d) 611, and *McHone v. Commonwealth*, 190 Va. 435, 57 S. E. (2d) 109, in which the effect of a failure on the part of law enforcement officials to discharge such statutory obligation was considered and discussed.

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**DEEDS OF TRUST—Recordation—When Resident Trustee Required. (36)**

**Recordation—Security Trusts—When Resident Trustee Required. (36)**

*Honorable J. Fulton Ayres*

Clerk, County of Accomack

July 26, 1960

I acknowledge your letter of the 25th, requesting a construction of Section 55-58.1 of the Code of Virginia, as amended. Your letter reads, in part, as follows:

"For years, several loan companies and banks in the state of Maryland have been recording chattel mortgages in this county and under (1) of the above section, I do not know whether or not they are still legal. It seems that if we do admit them to record, under (3) of this section, the Clerk is responsible for any discrepancy.

"Since Deeds of Trusts must designate a Trustee who is a resident under the new legislation, this is clear, but as to a non-resident Mortgage, we are in doubt."

It will be observed that Chapter 565 of the Acts of Assembly, 1960, amended the Code by adding Section 55-58.1. It is further noted that Section 55-58 is a part of Article II, Chapter 4, which Article deals with "Form and effect of deeds of trust; sales thereunder; assignments; releases." While this new Section of the Code provides that the term, "security trust" shall include a deed of trust, mortgage, bond, or other instrument, it is obvious from a careful reading of the section that it refers principally to deeds of trust and that its primary object is to provide that only residents of Virginia and corporations chartered under the laws of Virginia or the United States of America, whose principal office is within this State, be designated as the trustee of a security trust.

Responding specifically to your inquiry, I am of opinion that Section 55-58.1 of the Acts of Assembly, 1960, does not affect the legality of chattel mortgages such as you mention in your letter, and that it is in order to admit them to record. I am assuming that you are referring to a true mortgage, and not to a deed of trust on personal property in which there is a named trustee.

Paragraph 3 of Section 55-58.1 provides that Clerks shall not admit any security trust (which I construe as meaning a deed of trust) for recordation or filing which does not state the residence address of the trustee or trustees named therein. This obviously refers to instruments in which there is a trustee designated and not to other types of security.

While Clerks are expressly forbidden to admit for recordation any security trust which does not give the residence address of the trustee or trustees, nevertheless, if, through inadvertence or error, such instrument is admitted by the Clerk for recordation or filing, it will be in all respects legal, for the statute specifically provides that in such event it shall be conclusively presumed that the security trust complies with all the requirements of Section 55-58.1.
REPORT OF THE ATTORNEY GENERAL

DESERPTION AND NON-SUPPORT—Illegitimate Child—Admission of Paternity Before Court in Criminal case Admissible in Evidence in Paternity Suit. (205)

Witnesses—Admission of Witness as to Being Father of Illegitimate Child May be Admissible in Evidence in Subsequent Paternity Suit. (205)

December 19, 1960

HONORABLE WILLIAM T. INGRAM
Superintendent
Department of Public Welfare
Chatham, Virginia

This is to acknowledge receipt of your letter of December 15, 1960, in which you state in part:

"A, a female, is indicted for malicious wounding of B, a male. At the trial B testifies as a witness for the Commonwealth and states under oath that he is the father of A's child, though they have never been married. This evidence had nothing to do with the malicious wounding charge except to show the relationship of the parties.

"After the termination of the malicious wounding case the question arises as to whether or not B can be compelled to support his child by A, pursuant to § 20-61.1 of the Code when the only evidence available to the Commonwealth is the testimony of B in the malicious wounding prosecution.

"Your official opinion is requested as to whether or not this testimony is such an 'admission' as contemplated by § 20-61.1."

In the 1958 General Assembly section 20-61.1 of the Code was amended by adding the following language:

"Notwithstanding the provisions of § 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."

It would seem that the judge of the court or other court officer before whom he testified, admitting the paternity of the child, could testify in the paternity proceeding concerning any admission made by this witness. The court in the case of Distefano v. Commonwealth, 201 Va. 23, construed this statute before the 1958 amendment applied. The decision is not germane to your inquiry.

I am therefore of the opinion that the testimony of witness B is an admission as contemplated by section 20-61.1, Code of Virginia (1950) as amended; and can be admitted in evidence in a proceeding under Chapter 5, Title 20, Code of Virginia.

DOG FUND—Surplus Must be Transferred to General Fund at End of Fiscal Year. (11)

July 11, 1960

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of June 22, 1960, enclosing a copy of a letter to you from Mr. Roby K. Sutherland, Treasurer of Pulaski County, dated June 13, 1960, which reads as follows:

"Upon a review of the pertinent chapters of the Acts of Assembly, 1960, it is noted that under an amendment to Code Section 29-184.2 contained in
Chapter 30, Page 39, of the Acts of 1960, the last line of subparagraph C with reference to the Dog Fund, directs 'any sum remaining may be transferred to the General Fund of the county at the end of the fiscal year.'

"Amendments to the same section of the Code are contained in Chapter 413, Page 656 of the Acts of 1960 in which, in subparagraph C, it is directed 'any sum remaining shall be transferred to the General Fund of the county at the end of the fiscal year.'

"As you will observe, the language contained in the amendment of Chapter 30 uses the permissive 'may', whereas the language contained in Chapter 413 contains the mandatory 'shall.'

"Preparatory to making the necessary transfers and the closing of our books for the fiscal year on June 30th, I would like very much to have your opinion as to our duty and obligation with reference to any balance which may be in our dog fund at June 30th.

"It is my opinion that our Board of Supervisors would prefer for any ending balance to be carried forward in the fund rather than to be transferred to the General Fund, but in order to be absolutely sure of our position, we would like very much to have an interpretation from your office of the conflicting directions contained in the amendments above referred to."

Chapter 30 of the Acts of Assembly, 1960, was approved by the Governor on February 17, 1960, and consequently became a law on that date. The title to Chapter 30 contained the following language:

"An Act to amend and reenact §29-184.2, as amended, of the Code of Virginia, relating to the enforcement of dog laws in counties by dog wardens and to dog license taxes."

Section 1 of Chapter 30 begins as follows:

"Be it enacted by the General Assembly of Virginia:

"1. That §29-184.2 as amended, of the Code of Virginia, be amended and reenacted as follows:

This chapter contained no general repealing provisions and provided that its provisions were to become effective as of June 27, 1960.

On the other hand, Chapter 413 of the Acts of Assembly, 1960, was approved by the Governor on March 30, 1960, and therefore became a law on that date. The title to Chapter 413 contained the following language:


Section 1 of Chapter 413 begins as follows:

"Be it enacted by the General Assembly of Virginia:

"1. That §29-184.2, as amended, of the Code of Virginia, be amended and reenacted as follows:" (Emphasis added).

This chapter also contained no general repealing provisions and provided that its provisions were to be effective immediately, namely, on March 30, 1960. It is also noted that the amendments to Section 29-184.2 in this chapter were more elaborate than those contained in Chapter 30.

In view of the above, I am of the opinion that, even though there was no express repealing clause in Chapter 413, this chapter nevertheless repealed by implication the
provisions of Chapter 30. This is because both acts were passed by the General Assembly at the same session and, as there is an irreconcilable conflict in their provisions, the act last approved by the Governor is deemed to repeal the prior act. Chapter 30 became a law on February 17, 1960, and remained so until March 30, 1960, when it was repealed by the passage of Chapter 413.

In Sutherland Statutory Construction, 3rd Ed Vol. 1, Section 2020, is the following statement:

"However, when two acts of the same session cannot be harmonized or reconciled, that statute which is the latest enactment will operate to repeal a prior statute of the same session to the extent of any conflict in their terms."

And, in Commonwealth v. Sanderson, 170 Va. 33 (1938), the Supreme Court of Appeals said:

"The repeal by implication is not favored, but if inevitable is as effective as is an express statutory mandate.

"While as a general rule the repeal of a statute by implication is not favored, it is clearly recognized by all of the authorities that such a repeal is called for where there is substantial conflict between the two statutes being considered, and the subject matter of the first statute is fully covered by the second. (Page 39 of opinion).

"* * There are other conflicts between these statutes. So far as the exemptions claimed are concerned, there is a head-on collision. In such a case, that last approved by the Governor must prevail." (Page 41 of opinion).

In answer to your specific inquiry, I am of the opinion that the mandatory language in Chapter 413, rather than the permissive language in Chapter 30, controls and, therefore, the remaining balance of the special fund resulting from dog license taxes must be transferred to the general fund of the county at the end of the fiscal year.

**DOG LAWS—Authority of County to Pay Claim for Damages Incurred by One Assisting Dog Warden. (57)**

August 5, 1960

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

This is in reply to your letter of July 26, 1960, in which you request my opinion as to the authority of the County to pay a claim presented by a resident of the County who sustained damage to his person and clothing while assisting the dog warden in subduing a vicious dog.

I am of the opinion that the only authority for the payment of public funds in such instances is that contained in § 29-203 of the Code relating to the treatment of persons bitten by an animal suspected of having rabies or hydrophobia. Unless the dog in question was suspected of having rabies or hydrophobia, I am of the opinion that the County may not honor the claim which had been presented for medical treatment and property damage.
REPORT OF THE ATTORNEY GENERAL

DOG LAWS—County Adopting Ordinance—Population Change Does Not Affect Validity. (274)

Counties—Population Change Has No Effect Upon Ordinances Enacted Pursuant to Authority Based on Population. (274)

March 7, 1961

HONORABLE WILLIAM H. LOGAN
Commonwealth's Attorney for Shenandoah County

This is in reply to your letter of February 28, in which you refer to the 1954 amendment to Section 29-184 of the Code of Virginia which fixes the maximum dog license taxes which may be charged in a county within the population bracket of between 21,001 and 21,200. You state that prior to the 1960 census Shenandoah county came within this population bracket, but that the population has increased so that the county no longer qualifies in this population category.

You state that the board of supervisors has recently, by resolution, employed a dog warden and is considering adopting an ordinance fixing the license fees in accordance with the rates applicable on account of the 1954 amendment to Section 29-184. You wish to know whether or not there is any provision in the Code which would permit the continuance of the rate as fixed in the 1954 amendment.

I wish to call your attention to subsection (c) of Section 29-184.2 of the Code. Under this section any county adopting an ordinance providing for a dog warden in the county as provided therein may fix the amount of license tax at any amount not in excess of $5.00 per dog.

Therefore, in my opinion, the board of supervisors of your county may continue the license taxes which it invoked in 1955 or it may make the license taxes in any amount not to exceed $5.00 per dog.

DOG LAWS—County License Fund—Use of—Warden Salary and Expenses Must Be Paid First. (297)

Counties—Dog Ordinance—Fund From Licenses Must be Used to Pay Warden Salary Before Payment of Damage Claims. (297)

March 29, 1961

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

This is in reply to your letter of March 23, 1961, which I quote:

“King George County recently adopted the dog warden system pursuant to the enabling law enacted by the General Assembly. Our dog warden receives a salary of $125.00 per month for his services; and this salary is paid out of the dog fund as prescribed by law.

“A sheep farmer in this county has presented to our Board of Supervisors numerous large claims for alleged damages by dogs. On a recent appeal, a Circuit Court jury gave this farmer judgment for $1,450.00. Other large claims have been made in the past and more are expected in the near future. All such claims, of course, are being paid out of the dog fund.

“The Board of Supervisors has requested an opinion as priorities of such claims as regards the dog warden's salary. Virginia Code Section 29-209 specifies certain priorities for specified items, but does not mention the salary of the dog warden. It is my feeling that worker's salary (wages) should have priority.”
Section 29-184.2 of the Code of Virginia of 1950, as amended, pursuant to which the Dog Warden for King George County was appointed, reads in part as follows:

"§ 29-184.2. * * *

"(c) In such county the amount of the dog license tax, which in no event shall be more than five dollars per dog, shall be fixed by ordinance adopted by the governing body of such county, and thereafter the tax imposed under § 29-184 shall not apply therein. The funds collected for dog license taxes 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 that 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 salaries and expenses of the dog warden and deputy dog wardens from such special fund. Any sum remaining shall be transferred to the general fund of the county at the end of the fiscal year."

(Italics supplied)

From the foregoing quoted provision, you will note that the provision relating to the payment of salaries and expenses from the special fund is mandatory, while the disposition of the fund pursuant to §§ 29-206 and 29-209 of the Code is permissive. Hence, it appears fairly manifest that the priorities of payment set forth in § 29-209 of the Code do not apply to this special fund until an amount sufficient to pay the salary and expenses of the dog warden has been set aside.

DOG LAWS—Game Warden—Liability for Killing Stray Dog. (306)
Boards of Supervisors—Not Liable for Act of Game Warden in Killing Stray Dog. (306)

HONORABLE W. EARLE CRANK
Commonwealth's Attorney
for Louisa County

This is to acknowledge receipt of your letter of March 28, 1961, in which you state in part:

"Louisa County employs a Dog Warden for the purpose of enforcing the dog laws. The Game Warden, at the request of a citizen, took up a supposed stray dog which had no tag and shot and killed the dog before holding him for five days. It later developed that the owner of the dog had kennel license and that this dog had escaped. The owner of the dog is threatening to bring suit against the Game Warden.

"The Chairman of the Board of Supervisors of Louisa County has requested me to write and get your opinion as to whether or not the Board of Supervisors, under the above circumstances, is authorized to make an appropriation to pay the owner of the dog in order to satisfy the owner and prevent the suit against the Game Warden."

Section 29-199 of the Code imposes the duty upon the game warden (now the dog warden in counties where the board of supervisors has appointed one) to kill a dog of unknown ownership upon which the license has not been paid. Section 29-194.1 of the Code empowers the governing body of a county to provide for a dog pound and may require that any dog which has been so confined for a period of five days and which has not been claimed by the owner to be destroyed or otherwise disposed of by the game warden. The proceeds of the dog licenses (dog fund) can only be used for the purposes prescribed by the statute, Section 29-209 of the Code as amended. I can
find no statutory authority which would empower a board of supervisors to pay a claim under the above circumstances against game wardens. I am expressing no opinion as to the question of liability on the part of the game warden. If he is liable, the county would not be responsible for his tortious acts. The doctrine of respondeat superior does not apply against the county.

I am, therefore, of the opinion that there is no authority vested in the board of supervisors which would warrant them to pay this claim against the game warden.

DOG LAWS—License Fees—Disposition when County has not Adopted Ordinance Pursuant to § 29-184.2 of Code. (217)

January 6, 1961

HONORABLE WILLIAM C. FUGATE
Commonwealth's Attorney for Lee County

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

"On January the 1st, 1960, I assumed the duties of the office of Commonwealth Attorney for Lee County and at the same time this County received a completely new Board of Supervisors. Immediately thereafter we found the following conditions to exist in regard to the Dog Laws. In accordance with the powers given to the local Board of Supervisors under Virginia Code Section 29-184.2 (1958) the old Board of Supervisors did on February the 4th, 1959, relieve our local game warden of the responsibility of enforcing the Dog Laws, and on March the 1st, 1959, a County Dog Warden was appointed to enforce the Dog Laws. No County Dog Ordinance was adopted at that time. Going into the matter in the early months of 1960, we found that 29-184.2(c) provided that under such conditions, that is where a Dog Warden was appointed, a County Dog Ordinance should be enacted thereby allowing a disposition of the funds in accordance with 29-206 and 29-209 except that 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. Since February the 4th, 1959, the Game Warden has been relieved of his duties and the County has been bearing the full expense of paying a Dog Warden. Effective as of July the 6th, 1960, a valid County Dog Ordinance was adopted and is now in full force and effect. The question now arises regarding the 15% of the total Dog License sold for the fiscal year of July the 1st, 1959, through June the 30th, 1960, which percentage amounts to $1,045.65. We realize, of course, that at the time that the old Board decided to proceed under 29-184.2 that they should have passed a County Dog Ordinance; nevertheless, we have been supporting solely the salary for the Dog Warden during that period. We feel therefore that we should not be compelled to submit this 15% or that we should be assisted by the State in the payment of the Dog Warden's salary on some equitable percentage if we are required to submit the payment.

"We seek your advice concerning this matter, asking your assistance and counsel as to what would be proper action for us to take, bearing in mind our desperate financial circumstances which we are not alone in experiencing along with other Counties in the Southwest."

Subsequently, you furnished us with a copy of the resolution adopted by the board of supervisors on the 4th day to February, 1959, as well as copies of orders entered by the judge of the circuit court appointing a county dog warden.

The action taken by the board of supervisors of your county was pursuant to Chapter 14 of the Acts of the extra session of 1959, approved February 4, 1959,
which Act contained an emergency clause and became effective on that date. This Act was an amendment to Section 29-184.2 of the Code of Virginia. This amendment, however, did not in any way affect the provisions of subsections (a) and (c) of that Code section. Under subsection (a), the board of supervisors, in its discretion, was empowered to provide for the enforcement of the dog laws. This subsection (a) provided that the judge of a circuit court should appoint an officer to be known as the dog warden, who should have exclusive jurisdiction as to the enforcement of the dog laws in the county. According to the resolution and court orders which you have furnished, the provisions of subsection (a) were complied with.

Subsection (c) reads as follows:

“In such county the amount of the dog license tax, which in no event shall be more than five dollars per dog, shall be fixed by ordinance adopted by the governing body of such county, and thereafter the tax imposed under §29-184 shall not apply therein. The funds collected for dog license taxes 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 that 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 salaries and expenses of the dog warden and deputy dog wardens from such special fund. Any sum remaining shall be transferred to the general fund of the county at the end of the fiscal year.” (Italics supplied)

No such ordinance was adopted by the board of supervisors at that time. Therefore, the treasurer of the county continued to collect dog licenses under the provisions of Section 29-184 of the Code. The language of subsection (c) is in no way difficult to interpret. It expressly provides that after a proper ordinance has been adopted levying a dog license tax, the tax imposed under Section 29-184 shall no longer apply. This subsection further provides for the method in which the funds collected shall be disposed of—that is, they shall be disposed of as provided in Sections 29-206 and 29-209, except that upon the adoption of such an ordinance the county treasurer shall not be required to remit to the State treasurer the fifteen percentum of the gross receipts from the sale of dog licenses.

You state that the board of supervisors on July 6, 1960, adopted a valid county dog ordinance as contemplated by subsection (c). Prior to the adoption of this ordinance the county could not enforce the collection of the licenses except pursuant to the provisions of Section 29-184. Until such time as a valid county ordinance was adopted, we see no escape from the conclusion that the fifteen percentum required to be paid to the State under Section 29-206 must be paid.

We have considered the question as to whether or not the board of supervisors may at this time amend its ordinance of July 6, 1960 so as to make it retroactive to March 1, 1959. We can find no authority to justify a favorable conclusion in this respect. The counties may only exercise those powers which are delegated to them by the General Assembly and, in this instance, as is pointed out in subsection (c), the tax imposed under Section 29-184 continues in effect until after the adoption of the ordinance.

It is possible that the General Assembly could by appropriate legislation relieve the county of the payment of this percentage for the period involved.

**DOG LAWS—License Tax—Minimum Amount and Use of Proceeds.** (362)

May 26, 1961

HONORABLE A. A. RUCKER
Commonwealth’s Attorney for Bedford County

This is to acknowledge receipt of your letter of May 24, 1961, requesting my opinion on the interpretation of sections of the Code pertaining to the dog license tax and the use of the money derived therefrom. I shall answer your questions seriatim.
Regarding your question as to whether or not the County Board of Supervisors legally and properly may pay from the fund derived from the sale of dog tags a bill for the medical and surgical treatment of a person bitten by a dog which was not rabid and was not suspected of being rabid, although the injury in question was a laceration of the face and eye, and much more than the usual dog bite injury, Section 29-203 limits the authority of the Board of Supervisors to pay the cost of necessary treatment in those cases where the person is bitten by a rabid dog. It is my opinion, therefore, that inasmuch as the dog in this instance was not rabid, there is no authority to pay the cost of medical treatment. This is in accordance with the opinion of this office rendered on August 5, 1960, to the Honorable William F. Parkerson, Jr., Commonwealth's Attorney of Henrico County, a copy of which is enclosed.

Your second inquiry is whether there is any minimum amount of dog license tax imposed under Section 29-184.2(c). There is no minimum prescribed for the tax under this section, and the board of supervisors may fix any tax, so long as it does not exceed the sum of $5.00.

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**DOG LAWS—Ordinances—County May Enact Comprehensive Regulations to Replace Previously Adopted or Ordinances on Same Subject which may have Doubtful Validity.** (157)

November 2, 1960

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

This is in reply to your letter of October 26, 1960, in which you advised that the Board of Supervisors of the County of King George has appointed a dog warden and now anticipates the enactment of an ordinance covering the regulation of dogs generally. Inasmuch as the County has existing regulations controlling dogs running at large during certain months, inoculation for rabies, and license taxes, the Board is interested in determining whether or not the former ordinances should be repealed and a comprehensive ordinance enacted to govern all phases of dog control.

Section 29-184.4 of the Code of Virginia of 1950, as amended, provides as follows:

"The governing body of any county to which the provisions of §§ 29-184.2 and 29-184.3 are applicable may enact local ordinances corresponding in nature and scope, and not in conflict with, the provisions of this chapter, and may repeal, amend or modify such ordinances; provided, no governing body of a county may provide penalties for violating a provision of an ordinance adopted pursuant to this section which is greater than the penalty imposed for a similar offense under the provisions of this chapter."

By virtue of the foregoing statute, the County of King George is authorized to adopt ordinances regulating dogs to the same extent as is provided in Chapter 9 of Title 29 of the Code of Virginia of 1950. This section of the Code was enacted by the 1959 Special Session of the General Assembly. Prior to that time there existed some doubt as to whether the local governing bodies were authorized to legislate in this field, and to what extent. See King v. Arlington County, 195 Va. 1084.

I am of the opinion that any doubtful validity of local ordinances which may have been adopted prior to the enactment of § 29-184.4 of the Code may be resolved by now embracing such regulations in a new comprehensive ordinance on the same subject.
REPORT OF THE ATTORNEY GENERAL

DOG LAWS—Owner can be Required to Pay for Confinement Only when Authorized by Statute. (30)

July 25, 1960

HONORABLE A. A. RUCKER
Commonwealth's Attorney
Bedford County

This is in response to your letter of July 14, 1960, which reads, in part, as follows:

"Section 29-195 of the Code of Virginia has to do with the general subject of 'Rabid dogs.' The second paragraph of Section 29-195 provides for the confinement of suspected dogs under certain conditions therein set forth, the confinement to be under competent observation for such a time as may be necessary to determine a diagnosis. It is not stated at whose expense this confinement is to be.

"The Bedford County Board of Supervisors has requested me to request your opinion as to who should pay the expenses attending the confinement and observation of a suspected dog in a case where the ownership of the dog is known, where the dog has bitten a person, and where the owner of the dog either refuses to confine and observe the dog properly or refuses to pay for such confinement and observation by the County Dog Warden."

This matter is principally controlled by the provisions of § 29-195 of the Code of Virginia, which reads as follows:

"Upon proof that a rabid dog is at large and has bitten other animals, an emergency shall exist and the governing body of any county, city or town shall have the power to pass an ordinance which shall become effective immediately upon passage, requiring owners of all dogs therein to keep the same confined on their premises unless leashed under restraint of the owner in such a manner that persons or animals will not be subject to the danger of being bitten thereby. The governing body of any county, city or town shall also have the power and authority to pass ordinances restricting the running at large in their respective jurisdiction of dogs which have not been inoculated or vaccinated against rabies and to provide penalties for the violation thereof.

"Dogs showing active signs of rabies or suspected of having rabies shall be confined under competent observation for such a time as may be necessary to determine a diagnosis. If confinement is impossible or impracticable, such dog shall be destroyed.

"Every person having knowledge of the existence of an animal apparently afflicted with rabies shall report immediately to the local health department the existence of such animal, the place where seen, the owner's name, if known, and the symptoms suggesting rabies.

"Any dog bitten by an animal known to be afflicted with rabies shall be destroyed immediately or confined in a pound, kennel or enclosure approved by the health department for a period of six months at the expense of the owner; provided that if the bitten dog has been vaccinated against rabies within one year, the dog shall be re-vaccinated and confined to the premises of the owner for thirty days.

"At the discretion of the director of a local health department, any animal which has bitten a person shall be confined under competent observation for ten days, unless the animal develops active symptoms of rabies or expires before that time." (Emphasis added)

In the fourth paragraph of the above-quoted section, there is set forth a specific authorization which empowers the county to require the owner of a dog to pay the expenses of confinement when said dog has been bitten by an animal known to be
afflicted with rabies. Under the factual situation as set forth in your letter, the dog in question has bitten a person and is suspected of having rabies. This dog may be confined for observation, pursuant to paragraph two or five of § 29-195 of the Code. These two paragraphs are silent as to who is to pay the expenses of such confinement. In the absence of any statutory authority, I am of the opinion that the Board of Supervisors is not empowered to require that the owner of a suspected dog pay the expenses incurred in the confinement and observation of his dog when such dog is confined pursuant to paragraph two or five of § 29-195 of the Code.

Your attention is directed to § 29-209 of the Code which provides in part that: “After paying fifteen percentum 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 for control of rabies ***.” It is obvious that it is essential that dogs suspected of having rabies be confined in order to control the spread of this disease.

I am of the opinion that the Board of Supervisors is authorized to pay the expenses incurred in the confinement of dogs suspected of having rabies for observation.

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**DOG LAWS—Owners' Liability for Damage to Sheep. May be Sued Jointly or Severally. (113)**

**HONORABLE JULIUS GOODMAN**  
Commonwealth's Attorney for Montgomery County

This is to acknowledge receipt of your letter of September 23, 1960, in which you state in part:

“I would like to have your opinion as to your interpretation of the statute as to the following:

“If the game warden or other information shows that 2 dogs were in sheep, one getting away without knowing who the owner was, if any owner, and one dog was definitely identified as being owned and the owner being named, would the named owner be responsible, under said Section 29-202 for the liability of the entire obligation of damages or only one-half?”

Section 29-202 of the Code of Virginia (1950), as amended, expressly imposes liability on the owner of the dog causing damage to livestock or poultry. The statute cannot be construed limiting the common law liability of the owner of a dog for damages committed by it. The owner of a dog which has caused damages becomes a joint *tort feasor* through the action of his dog. Hence, he is liable for the entire damage although another dog owned by another person may have contributed to the acts which caused the damage. Such an owner, if he paid the entire damages, would have the right of contribution from the owner of the other dog.

I am, therefore, of the opinion that the owner of the identified dog in this instance would be responsible to the owner of the sheep for the value thereof or to the county (which has paid the owner), as the case may be.

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**ELECTIONS—Ballot—Must be Handed to Judge of Election. Statute Not in Conflict with Section 21 of Va. Constitution. (181)**

**HONORABLE JAMES C. TURK**  
Member of State Senate

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

“At the request of one of my constituents in the Twenty-first Senatorial District, I respectfully seek your formal opinion on the following question:
"May a duly qualified voter personally and without aid deposit his ballot in the ballot box, or is he required to hand it to the judge of the election?

"Section 24-247, Code of Virginia of 1950, as amended, directs that the voter fold the ballot 'and hand the same to the judge of the election who shall place the same in the ballot box . . .'

"However, the third clause of Section 21 of the Constitution of Virginia provides that the voter shall, 'unless physically unable, prepare and deposit his ballot without aid . . .'

"Accordinly, it would appear that the statute is inconsistent with the Constitution."

Section 24-247 of the Code of Virginia reads as follows:

"The elector shall fold the ballot with the names of the candidates on the inside and hand the same to the judge of the election, who shall place the same in the ballot box without any inspection further than to assure himself that only a single ballot has been tendered and that the ballot is a genuine ballot, for which latter purpose he may, without looking at the printed inside of the ballot, inspect the official seal upon the back thereof."

This provision appears in the Code of 1919 as Section 162 and was first enacted as Section 122h of Chapter 587 of the Acts of 1902-3-4, approved on January 11, 1904.

Chapter 587 of the Acts of 1902-3-4 was enacted by the General Assembly following the adoption of the Constitution of Virginia of 1902 for the purpose of implementing the new election laws contained in that Constitution which had become effective July 10, 1902. The Constitution of 1902 contains the same language with respect to the conditions of voting as is now contained in Section 21 of the Constitution.

It appears, therefore, that the General Assembly did not construe the phrase "prepare and deposit his ballot without aid" to mean that the voter would be required to deposit the ballot in the ballot box without aid, but that it construed the Constitution as authority for legislation requiring the voter, unless he came within one of the exceptions, to mark his ballot and deposit it with the judges of election without aid.

In as much as this interpretation by the General Assembly of this constitutional provision has been in effect continuously since 1904, in my opinion, we must assume that the statutory provision in question is valid and not in violation of Section 21 of the Constitution.

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ELECTIONS—Electoral Board—County Board May Not Appoint Substitute to Act Pursuant to § 24-220 of Code. Substitute May Perform Duties Under § 24-225 of Code. (250)

February 21, 1961

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

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

"I would like to inquire as to whether or not the Henrico County Electoral Board may exercise the authority pursuant to the provisions of § 24-220 to designate some person other than a member of the Electoral Board to perform the duties required in accordance with the provisions of § 24-219 of the Code. I observe that Henrico County does not meet the classification for counties mentioned in § 24-220 but that it is vested with the authority of § 15-10(1) of the Code. I would also understand that the Henrico County Electoral Board may designate some person other than a member of the
Board to perform the duties required by the provisions of § 24-225 in view of the 1950 amendment to this section. I would appreciate your opinion as to whether or not this interpretation is correct."

As pointed out in your letter, the county of Henrico does not qualify under Section 24-220 since it does not come within the population bracket set forth therein.

Section 15-10 of the Code to which you refer, relates to the powers of a board of supervisors with respect to promulgation and enforcement of ordinances and, in my opinion, nothing in this section may properly be construed as authorizing the Electoral Board of the county adjacent to a city of 125,000 or more to appoint a substitute under Section 24-220.

In my opinion the provisions of Section 24-219 of the Code are applicable to Henrico county and it is mandatory under the Electoral Board that one of its members shall perform the duties required under this section.

Section 24-225 of the Code is applicable to all of the counties and the Electoral Board of Henrico county would have authority to designate a person other than a member of the Board to perform the duties prescribed by this section.

ELECTIONS—Electoral Board—Secretary entitled to Per Diem plus Mileage. (193)

HONORABLE E. A. CHRISTIAN
Member Board of Supervisors
Louisa County

This is in reply to your letter of December 10, which reads as follows:

"I have a question to ask you regarding the compensation allowed members of County Electoral Boards and trust you can give me a reply promptly.

"Section 24-37 of the Code of Virginia as amended reads as follows:

"'The secretary of the electoral board shall receive from the county, city or town for each day of actual service the sum of ten dollars; provided that the governing body of any county, city or town may supplement the compensation herein prescribed for the secretary. Each other member of the electoral board shall receive from the county, city or town, respectively, for each day of actual service the sum of seven dollars and fifty cents, and the same mileage as is now paid to jurors; provided that no member of such board shall receive from the county, city or town respectively, more than one hundred fifty dollars in any one year exclusive of mileage.'"

"At the last meeting of the Board of Supervisors at Louisa the secretary of the electoral board presented a bill for services rendered from June 25, 1960 to December 6, 1960 amounting to $230.25 plus $31.06 for mileage which was paid, and which I questioned the legality of, would like to have your opinion on this matter since his salary has not been supplemented by the governing body of this county. He charged the county for 137 and one half hours plus 11 hours at $1.50 per hour for writing letters, etc., and we have made no agreement with him to pay such a price and frankly I don't think it is proper at all.

"Since there is nothing in the Code regarding mileage for secretary of the Electoral Boards, do you think that he is entitled to mileage like other Board members?"
REPORT OF THE ATTORNEY GENERAL

I am enclosing copy of an opinion issued by this office on April 17, 1956 to Honorable Elmer R. Duncan, Chairman of the Electoral Board of Fairfax County. Since this opinion was rendered, Section 24-37 has been amended in the first sentence so as to add after the words "ten dollars" a semi-colon and the following language:

"provided, that the governing body of any county, city or town may supplement the compensation herein prescribed for the secretary."

This amendment has the effect of authorizing the governing body of any city or any county to pay the secretary of the electoral board an amount in excess of $10.00 per day for services. Of course, the governing body is required to pay the secretary the $10.00 per diem for each day of actual service. You state that the board of supervisors approved the payment of the bill submitted by the secretary and, in my opinion, under this statute the board was authorized to approve the bill as presented.

With respect to the expenses, I call attention to Section 24-38 of the Code, which reads as follows:

"The secretary of the board shall in addition to the per diem provided for in the preceding section be allowed his expenses not to exceed three hundred dollars in any one year."

It would seem, therefore, that the action of the board of supervisors with respect to the pay for services, as well as reimbursement for expenses, is permitted by law. A county official is entitled to seven cents per mile when travelling in his own automobile on official business. See Sections 14-5, 14-5.2 and 14-5.4 of the Code. Section 14-5.2 was amended at the 1960 session and, therefore, is found in the supplement to Volume 3 of the Code.

However, in so far as Louisa County is concerned, the amendment did not have any effect upon this section as it was prior to the amendment.

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ELECTIONS—Officials—Eligibility of Persons Receiving Pensions from U. S. (152)

HONORABLE W. HOWARD ELLIFRITS
Member, House of Delegates

October 27, 1960

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

"Please advise me as soon as possible if there is any restriction on citizens serving as Judges and Clerks of election if they receive compensation from the state or federal governments in the nature of Social Security, Civil Service or pensions for war services of any nature."

Section 24-198 of the Code of Virginia provides as follows:

"No person shall act as a judge or clerk of any election who is a candidate for, or the deputy or employee of any person who is a candidate for, any office to be filled at such election, or who is the deputy of any person holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof."

Under this section, if a person is in the employment of the United States Government he is disqualified from serving as a judge or clerk of election. A person who is
receiving benefits under the Social Security Act would not be deemed to be in the employment of the United States. The same conclusion would be applicable to a person who is receiving a pension from the United States. Furthermore, under Section 2-29(2) of the Code of Virginia, persons who receive a pension, Social Security or Federal Retirement benefits from the United States are not disqualified from holding office.

You will note that Section 24-198 does not prevent an employee of the State from serving as a judge or clerk of an election, but it does prohibit persons who hold an elective office of profit or trust of the State, county, city or town from acting as such an election official.

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ELECTIONS—Poll Tax List—Correction—Effect of Certificate from Treasurer. (165)

Taxation—Poll Tax—Correction. (165)

November 14, 1960

HONORABLE CLIFTON C. SIMMS
Treasurer for Grayson County

This is in reply to your letter of November 10, which reads as follows:

"Will you please give me the ruling on the following question?

"After the Poll Tax List has been certified to the Clerk and sent to the printers, and printed, the corrected list also made and signed by the Circuit Judge and Clerk, I found that a qualified voter had been omitted. On finding this error I immediately sent a certification to this voter of three years paid capitation tax which she presented to the judges of the election. One of the judges questioned the legality of this procedure and would not permit her to vote until she presented her paid tickets which agreed with the certification I had given her. I thought when a Treasurer certified to a voter that all taxes due to be paid, were paid, this would be sufficient evidence to allow them to vote."

The procedure for correction of the list prepared by the treasurer under Section 24-120 of the Code is set out in Section 24-123 of the Code. The only provision with respect to voting upon the certificate of a treasurer in lieu of being on the certified list is contained in Section 24-128 of the Code and this applied to persons who have transferred from one jurisdiction to another jurisdiction. Section 24-124 of the Code provides that the certified list shall be conclusive evidence of the facts therein stated for the purpose of voting.

In connection with this question I am enclosing copies of the two opinions issued by the Honorable Abram P. Staples, former Attorney General. One of these opinions is dated December 9, 1935 and was furnished to W. L. Whittington of Woodlawn, Virginia, and published in the Report of the Attorney General for 1935-'36, at page 71. The other opinion is dated July 29, 1935 and addressed to Honorable Charles W. Crush, Commonwealth's Attorney of Montgomery County and published in the same volume of our reports at page 90.

This office has never taken a position contrary to the opinions expressed by Mr. Staples.

A subsequent opinion was furnished to Honorable Levin Nock Davis, Secretary of the State Board of Elections, by Attorney General Almond, which opinion is dated April 3, 1935, and reported in the Report of the Attorney General for 1934-55, at page 95. A copy of this opinion is also enclosed.
ELECTIONS—Precincts—Change in Boundary—Name of Consolidated Precincts May be Same as Prior Name For One Precinct. (328)

April 21, 1961

HONORABLE C. H. DAVIDSON, JR.
Commonwealth’s Attorney for Rockbridge County

This is in reply to your letter of April 15, in which you state that it is your intention to file a petition in the Circuit Court of Rockbridge County under the provisions of Section 24-46 of the Code for the purpose of altering the boundaries of certain precincts in Kerr’s Creek Magisterial District and that it is the intention of the voters in the two precincts to be consolidated to have the consolidated precinct designated as Kerr’s Creek.

You further state:

“I feel that the County Electoral Board and the Board of Supervisors would have no objection to the new name of the consolidated precinct, however, this could be confusing where a precinct in an election district would have the same name as the election district, when a separate and different named precinct also remains in the same election district.”

Under the statute it is within the discretion of the court in which the petition is brought, to designate the name of the precinct or to change the name of any precinct. I can find nothing in the statute which would prohibit the judge from designating the precinct by the same name as the Magisterial District in which the precinct is located.

ELECTIONS—PRIMARY—Absentee Ballot—When Application Must Be Made to Registrar. (358)

Elections—Primary—When Absentee Voter May Cast Ballot in Person. (358)

May 18, 1961

HONORABLE W. CARRINGTON THOMPSON
Member, House of Delegates

This is in reply to your letter of May 17, which reads as follows:

“Your official opinion is requested as to what date is the last day on which a registrar may receive an application for an absentee ballot for the Democratic Primary of July 11th.

“As I construe § 24-321 the application must be received by the registrar not later than July 3rd.

“Further, assume that a duly qualified absentee voter will be physically present at his precinct after the deadline prescribed by § 24-321, but before the day of election, can he in his application to his registrar, request that his ballot be held by the Secretary of the Electoral Board and delivered to him in person between those dates and without forwarding necessary postage to the registrar?

“In other words, the voter would like to send his application to the registrar before the deadline, and then within the eight day period receive his ballot in person from the Secretary of the Electoral Board, execute and return it to him in person without mail delivery and without forwarding postage to the registrar.”
With respect to your first question, the application must be received by the registrar not later than July 3rd. The time is computed pursuant to §1-13.3 of the Code.

In my opinion, your second question must be answered in the affirmative. Under §24-323 failure to enclose the necessary postage shall not render void a vote otherwise legally cast. Under §24-327 the electoral board may deliver the ballot to the applicant in person, and under §24-328 an absentee voter may return his ballot to the electoral board in person.

ELECTIONS—Primaries—Duty to Vote for Party Nominees in Preceding General Election in Order to Participate. (114)

Elections—Party Committee—Oath—Same Requirement As That for Party Primaries. (114)

September 28, 1960

MR. R. PAUL SANFORD
Member, Danville Democratic Committee
Danville, Virginia

This will acknowledge receipt of your letter of September 27, in which you quote the oath required in the Democratic Party Plans (page 4, paragraph 6), which reads as follows:

"I, ........................................, do state upon my sacred honor that I am a member of the Democratic Party; that I voted for all the nominees of the Democratic Party in the last preceding general election in which I participated and in which the Democratic nominee or nominees had opposition; and I hereby on my honor pledge myself to support all nominees of the Democratic party in every election as long as I shall remain a member of this committee."

You state:

"The first part of the oath gives us no concern, but that part beginning with the words 'and I hereby on my honor pledge myself to support all nominees of the Democratic party in every election as long as I shall remain a member of this committee' is the basis for considerable conflict in interpretation. Do you or not believe that if the words 'in Virginia' were inserted after 'every election' the meaning of the oath would be carried out?

"Frankly, I take the position that in order to complete the Party Plan in all of its stages, the oath not only extends to general elections in Virginia but to national general elections or elections involving presidential, congressional and senatorial candidates. The county and city committees are responsible for the calling of mass meetings for the purpose of electing delegates to the State Democratic Convention, and at the State Democratic Convention delegates are elected to the National Convention, where the candidates for president and vice president are nominated. It therefore appears to me that if we participate from the mass meeting to the point of nomination of a man for president and vice president, the oath has reference to both state and national elections."

The oath under consideration is similar to the oath contained in the Party Plans on page 12, paragraph 2, which is the oath that may be required of persons offering to vote in a Democratic primary.

It is also similar to the oath required of a person who files as a candidate in a primary election.

With respect to the question as to whether or not a person who offers to vote in a primary would be prevented from participating therein if in the next preceding election
he voted for electors who were not designated by the Democratic party of this State has been considered by three of my predecessors in this office. I am enclosing copies of these opinions, as follows:


The same test of eligibility with respect to voting or being a candidate in a primary applies to a person who serves on a local Democratic committee.

You will note that Attorney General Staples directed attention to the fact that at that time five sessions of the General Assembly had been held since Attorney General Saunders gave his opinion, and that no amendments to the law had been made contrary to the construction given by Colonel Saunders. Twenty-one years have now elapsed since Judge Staples concurred in the interpretation of the statutes and no action to the contrary has been taken by the General Assembly. Furthermore, the Democratic Party has had several opportunities at its State Convention to adopt a contrary view.

In light of these facts, I feel that the construction of these election provisions by the distinguished men who have held the office of Attorney General prior to my term, is firmly established as the policy of the General Assembly and the Democratic Party.

I am of the opinion that the local committee would not have authority to amend the oath in question by inserting the words “in Virginia” as suggested in your letter.

The Party Plans, at paragraph 2, under the heading, “General Provisions,” at page 14, provides as follows:

“The district or local committees shall have the power to adopt such further by-laws or rules and regulations as they shall deem necessary or expedient, and whenever such by-laws or rules or regulations are not in conflict with the State Primary Laws, the Democratic Party Plan or the Primary Plan of the Democratic party, then they shall be valid and binding and shall be construed to be part of the law of the party.”

In my opinion such an amendment would be in conflict with State law and the regulations contained in the Party Plans. The question under consideration is of state-wide application and may be considered and passed upon only by the members of the Democratic Party in State Convention or by legislative action.

ELECTIONS—Primary—Filing Fee for Candidate for Governor. (214)

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

January 4, 1961

This is in reply to your letter of December 20, in which you request my advice as to the amount of the filing fee required of a candidate for Governor in the primary election in July, 1961.

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 candidate.”
By reference to Item 24 of the Appropriation Act covering the period from July 1, 1960 through June 30, 1962 (Chapter 610, Acts of Assembly, 1960), you will note that the salary of the Governor is fixed at $20,000 per annum, with the following proviso:

"It is provided, however, that on and after the beginning of the term of the Governor of Virginia taking office in January, 1962, the salary of the Governor shall be $25,000 per annum."

Therefore, the salary of the Governor for which the primary of 1961 will be held will be $25,000 per annum.

Although this appropriation is for the time from the date of the Governor's inauguration until June 30, 1962, nevertheless, under Section 72 of the Constitution the Governor's salary may not be increased nor diminished during the period for which he shall have been elected.

In my opinion the provisions of Section 24-398 of the Code must be construed to apply to the salary attached to the office during the candidate's term should he be elected, if the amount of such salary can be determined at the time the candidate files, rather than the salary being paid to an incumbent at the time of the primary. Therefore, in my opinion, the correct filing fee for the office of Governor is two per-centum of $25,000, or $500.00.

ELECTIONS—Registrar—Assistants Must be Residents of County in Which Appointed. (182)
Public Officers—Assistant Registrar—Must be Resident of County in Which Appointed. (182)

December 5, 1960

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of December 2, with which you enclosed a letter dated November 25 from Mrs. Elsie B. Tate, Registrar of Henrico County, in which you present the question as to whether or not a non-resident of the county of Henrico may act as assistant registrar in such county.

The positions of registrar and assistant registrar are public offices within the meaning of Section 32 of the Constitution of Virginia. Under this constitutional section it is necessary that such officers reside in the county or city for which they are appointed.

Therefore, in my opinion, a person who is a qualified voter in the city of Richmond would not be eligible for appointment as registrar for a jurisdiction outside the city of Richmond.

ELECTIONS—Registrars—Fees for Transferring Voters When Town Becomes City. (85)

September 2, 1960

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

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

"The enclosed letter, with enclosure, has been received from Mr. C. Arthur Ware, Secretary of the Electoral Board of the City of South Boston.
"The City of South Boston became a city of the second class effective January 1, 1960. The registrar for the new county precinct and the former registrar of the precinct including what is now the city, and the new registrar for the city have rendered bills for the transfer of 1738 names from the county registration books to the city registration books. In other words, both registrars have submitted bills for this work, and the question is whether the city shall pay the county registrar for making up the list for the city.

"I have examined Section 15-105 of the Code, the last paragraph of which section states: 'Such registrars shall receive for making the transfers required in this section a fee of $.04 for each name so transferred, to be paid by the city.' However, in certain cases there could be more than one precinct in the incorporation of a city, and for this reason I am not sure whether under this section the city should pay both the county registrar and the city registrar in a matter of this kind. Therefore, I would appreciate it if you will give me your opinion, and return the enclosed correspondence with your reply."

Section 15-105 of the Code is applicable only to registrars of a city established under the provisions of Chapter 6 of Title 15 of the Code. In my opinion it has no application to the registrars of the county. Under this provision the electoral board of the newly formed city is required to appoint a registrar for each voting precinct within such city. The registrar, or registrars, so appointed are required to transfer from the county registration books to the city registration books the names of all persons who are registered voters in the county and who have by reason of the establishment of the city become residents thereof. Under the terminal paragraph of Section 15-105 the city registrar is entitled to receive from the city four cents for each name so transferred. Under this section there is no obligation upon the city to pay any fees to the county registrar for services rendered in connection with the transfers.

Sections 24-89 and 24-90 of the Code do not specifically relate to a situation as is presented by you. These sections relate to the duties of a registrar of a city or county when the boundary of the election districts are changed in accordance with the provisions of Chapter 5 of Title 24, rather than to a change of jurisdiction for voting purposes from a county to a city under Chapter 6 of Title 15. However, since the county registrar, under circumstances such as you have presented, was, of course, required to perform certain services in connection with the transfer of the names of the voters affected by the establishment of the city from the county books to the city books, I think that the county registrar would be entitled to compensation to be paid by the county as prescribed in the terminal sentence of Section 24-90 of the Code, which reads as follows:

"For such services as may be rendered by the registrars under this section, the board of supervisors of the county or the council of the city, as the case may be, shall make proper allowance."

ELECTIONS—Residence—Voters Who Move From One Precinct to Another. (314)

MR. LINWOOD E. TOOMBS
Secretary
Henrico County Electoral Board

This is in reply to your letter of March 30, which reads as follows:

"On several occasions in recent elections the question has been raised to the undersigned as to whether or not a person, who has moved his residence
from one precinct to another within the same county or to another county, should be allowed to vote in the precinct from which he moved.

"The undersigned has been of the opinion, as has the Henrico County Electoral Board, that there should be no question on the matter as § 24-17 and § 24-22 of the Code of Virginia, 1950, were very specific in that a person must have been a resident of the precinct in which he offers to vote for at least 30 days preceding the election, unless however, a period of less than 30 days has expired from the date he moved to the date of the election in which he seeks to vote.

"I have had several calls in recent months from interested persons, which indicate that opinions previously issued from the Attorney General's office led them to believe that the Henrico Board was misinterpreting the above code sections. To date our Board has been unable to obtain any specific information regarding the opinions.

"Would you please let me know whether we are correct in our interpretation of the above code sections or whether a change in the instructions previously given to our election officials should be made."

Whenever a voter moves his residence from one precinct to another precinct located in the same county, or to another county, with the intention of permanently abandoning his former place of residence and establishing his residence in the place to which he has moved, then the applicable statutes relating to transfer of his registration apply.

If such voter has so moved to another precinct within the same county at least thirty days prior to the next regular election, he is entitled to be transferred from his former precinct to his new precinct at any time before the election day on which he wishes to vote ends. The thirty day provision with respect to such transfer does not apply in such cases. Section 24-85 of the Code.

Whenever such a voter moves to another county and has permanently abandoned his residence in the county in which he has been residing and has established his residence for a period of six months in the county to which he has moved, he is entitled to be transferred at any time up to and including the regular registration day, which is thirty days prior to the election. Code Section 24-86.

Whether or not a person who has moved from one precinct to another—either in the same county or to another county—may vote at the precinct where he has voted prior to moving depends upon whether he has actually abandoned his former residence and has established his residence at another place. The judges of election are the sole election officials who have authority to pass upon this matter. The Electoral Board has no authority over such a matter. The statutory procedure to be followed in cases where the judges, on their own initiative, or any voter may raise a question regarding the qualification of a voter is set forth in Sections 24-253 and 24-254 of the Code. In such cases the decision of the judges of election may be contrary to the views of all other persons—including the other election officials of the county—nevertheless, the vote is valid if the judges permit such person to vote.

The functions and duties of electoral boards are set out in Title 24 of the Code and they are exercised, it would seem, prior to the opening of the polls. When an electoral board has made all the necessary arrangements for an election—such as providing voting places, printing ballots, appointing judges and clerks, distributing ballots to the judges, and any other details necessary to prepare for the election, the passing upon the qualifications of persons who offer to vote, the counting of the votes, the making and filing the result of the election, and such other duties as are placed upon the judges and clerks, are beyond the control of the electoral board. When the polls open the judges are in charge free from the direction of any other officials.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Section 23 of the Constitution—Residents of Elks Home Not Pau-
pers. (44)

HONORABLE A. A. RUCKER
Commonwealth's Attorney for Bedford County

July 28, 1960

This is in reply to your letter of July 20, which reads in part as follows:

"This letter is being written following my reading of your letter of January 12, 1960, to Mr. H. P. Scott, Bedford County Clerk, and the letter of Hon. J. Lindsay Almond, Jr., then Attorney General, dated May 23, 1952, to Hon. Levin Nock Davis, both letters concerning this same general subject, each of which letters is before me at this time.

"I am advised by the authorities of the Elks National Home that the residents of the Elks National Home fall within three general categories insofar as the payment of their maintenance and expenses is concerned, to-wit:

"(1) Those who pay nothing.

"(2) Those who pay all of their maintenance and expenses.

"(3) Those who pay a part but less than all of their maintenance and expenses.

"I assume that as to the first category, being those who pay none of their maintenance and expenses there is no question, and that under the provisions of Section 23 of the Virginia Constitution these individuals are excluded from the privilege of registering and voting. In your opinion is this assumption on my part correct?

"I further assume that as to the second category, being those who pay all of their own maintenance and expenses there also is no question and that insofar as Section 23 of the Constitution is concerned they are not excluded from the privilege of registering and voting. In your opinion is this assumption on my part correct?

"It is as to those individuals in the third category, being those who pay a part but less than all of their maintenance and expenses that I am most doubtful. For instance, one individual who has presented himself to vote deposited $200.00 in escrow at the Home when he entered the Home some months ago, this $200.00 to be used to help defray his burial expenses when he dies. This individual has no income except a $33.00 per month Social Security check which is received by the authorities at the Home, of which the Home turns over to him $25.00 per month for his spending money and the Home applies the balance of $8.00 per month onto his maintenance charge of $88.80 per month leaving a balance of $80.80 per month which is paid in equal parts by his Home Lodge where he came from and by the Grand Lodge. I assume that this man falls within the classification of being a pauper and therefore is excluded by Section 23 of the Constitution from the privilege of registering and voting. In your opinion is this assumption on my part correct?

"In your opinion would it be correct to say that a resident of the Home who pays from his own funds less than fifty per cent of the cost of his maintenance is a pauper and is excluded from registering and voting under the provisions of Section 23 of the Virginia Constitution?

"Where should the line be drawn in considering Section 23 of the Constitution between being a pauper and not being a pauper?"

I am of the opinion that the term "pauper", as contained in Section 23 of the State Constitution does not apply to persons who are residents of the Elks National Home. This conclusion is applicable to residents of similar institutions. I am unable to find any decisions in the courts of this State on the point. I think, how-
ever, that the term "pauper" as used in our Constitution with respect to disqualification for voting relates to persons who are supported entirely from public funds. In Words and Phrases, Volume 31A, page 160, I find reference to cases from Massachusetts and Pennsylvania which support this conclusion. These cases are in Re Barnes, 180 Atl. 718; Opinion of Judges, 28 Mass. (11 Pick.) 538; Opinion of Justices, 124 Mass. 596.

In 70 C.J.S., at pages 7 and 8, it is stated:

"As a general rule a person is not a pauper within the meaning of the poor laws if there are relatives or other persons legally liable for his support, and able and willing to support him; and it has been held that a person being adequately supported by persons other than public authorities or private charities, such as friends or relatives, is not a pauper, although possessed of no property, whether or not the persons furnishing the support are legally or morally obliged to do so."

Residents of fraternal homes, such as the Elks Home at Bedford, are persons who have made provision for this type of support. It is generally assumed that one of the purposes of organizations such as this is to provide shelter and sustenance to its unfortunate members and to prevent them from becoming public charges. Persons who, during their better days, have made provision for protection against periods of inability to support themselves cannot, in my opinion, be deemed to be paupers to the extent that they lose their right of suffrage. This is true, even though their support has become entirely charitable on the part of the fraternal organization.

The views expressed herein make it unnecessary that I comment upon the separate categories set out in your letter.

ELECTIONS—Special Election—May Be Held on Same Date as Primary. (365)

June 5, 1961

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of June 1.

The question presented is whether or not the Circuit Court can call a special election to be held on July 11, the primary election date, for the purpose of electing members of the Council for the city of Buena Vista to fill vacancies which have occurred. Such election would be held pursuant to the charter provisions of the city of Buena Vista.

I know of no law which would prohibit a special election being held on the same date as the primary election. Of course, in that event there would have to be a separate set of election officials appointed for the purpose of conducting the special election.

ELECTIONS—Town Council—Member Cannot Qualify for Office Unless a Resident for One Year. (66)

August 11, 1960

HONORABLE WILLIAM C. FUGATE
Commonwealth's Attorney for Lee County

This is in reply to your letter of August 9th, in which you state that at the election for town officers at St. Charles, Virginia, held on June 14, 1960, one of the persons
whose name appeared on the official ballot as a candidate for town council was not a resident of the town. You state this person had never resided in the town and was not qualified to vote in said election.

It appears that the number of councilmen to be elected was six and that the person under consideration received the sixth highest number of votes and was declared elected by the commissioners of election.

You have presented two questions:

1. Can this person legally qualify and hold the office in question?
2. If he is not entitled to the office, may the candidate who received the seventh highest vote "lawfully qualify and be sworn in as councilman, if he met the other necessary qualifications?"

The answer to question (1) is found in the last sentence of Section 15-487 of the Code, which is as follows:

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

Under this provision of the Code, I am of the opinion that the person who received the sixth highest vote is disqualified from holding the office in question.

With respect to question (2), I am of the opinion the answer must be in the negative. Although the person who received the sixth highest vote was not entitled to have his name placed on the official ballot, it was nevertheless on the ballot and he received a sufficient number of votes to be elected. Had his name not been on the ballot, it does not necessarily follow that the person who attained seventh place would have been chosen by the voters for sixth place. If there were more than seven candidates one of those below seventh place might have been selected by a sufficient number of voters to attain the sixth place. Furthermore, the voters could have inserted by the write-in method for sixth place the name of a citizen who had not filed.

The commissioners of election have canvassed the vote and have made their certificate, which shows the result of the election. I know of no procedure under which the commissioners may now review their action and make a new certificate.

If the person who received the seventh highest number of votes should take the oath of office and qualify, his entitlement to the office would certainly be in doubt.

In my opinion, only those candidates who received the five highest number of votes may qualify for the office. This will cause a vacancy to exist which may be filled in the manner provided in the town charter if there is such a provision in the charter. If the charter does not contain a provision of this nature, then the vacancy should be filled in accordance with Section 24-145 of the Code. Under this section the vacancy would be filled by an appointment made by the circuit court of the county, or by the judge in vacation. The candidate who attained seventh place, if in all respects eligible, could, of course, be appointed.

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ELECTIONS—Town Election—Annexation—Persons in Newly Annexed Territory May Vote if Qualified. (288)

March 16, 1961

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of March 14, in which you enclosed a letter to you from Mr. R. Franklin Edwards, Secretary of the Electoral Board of Isle of Wight County, pointing out that by decree of a three-judge court, certain territory was annexed to the town of Smithfield, effective December 31, 1960.
A timely appeal was filed from this decree to the Supreme Court of Virginia and up to this time the Supreme Court has not decided whether or not it will grant an appeal. In all probability, in the normal course of Supreme Court procedure, the decision of the Court will come down sometime in April as to whether an appeal is granted.

If an appeal is granted then the persons living in the annexed territory will not be eligible to vote in the town election to be held in June 1961 because their status as citizens of the town will not have been determined by election day. However, if the Supreme Court between now and the June election denies the appeal and the order of the circuit court becomes final, then those persons who live in the annexed territory and who have paid their poll taxes within the time prescribed for eligibility to vote in the June election and who have been properly registered in the county will be automatically eligible to be transferred to the town registration books and will be entitled to vote in the town election. Section 15-152.24 of the Code.

As this office has stated from time to time, registration on town registration books is a right to which voters residing in a town are entitled, provided they are registered by the precinct registrar on the general registrar books. No new application for registration is required.

With respect to that portion of your letter in which you express doubt concerning the statement made by Mr. Edwards to the effect that those who reside in a newly annexed territory may pay their poll taxes on or before May 6, 1961, and register before the books close and be eligible to vote in the town election on June 13, I concur with your conclusion because, under the law, in order for a person to be qualified to vote in the June 13 election such person must have paid his poll taxes six months prior to that date.

It might be well for the town registrar to make a survey of the registered and qualified voters in the territory involved in the annexation proceedings so that in the event the Supreme Court denies the appeal, he will be in position to promptly place these names on the town books in time for the June election.

I enclose a copy of each of the following opinions, relating to registration on the town books.

Opinion to R. Page Morton

Opinion to Stanley A. Owens

I also enclose an opinion of December 20, 1957 which was published in Report of Attorney General for 1957-'58, which relates to the eligibility of annexed citizens to vote in a city or town.

ELECTIONS—Town Registrars—Duties. (43)

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

July 28, 1960

This is in reply to your letter of July 22, to which is attached a letter from Mrs. Daisie Showard, which reads in part as follows:

"Mrs. Kathryn Tolbert has been appointed Town Registrar, and I have turned over to her the Town Registration Books. I was told to retain the County Books and to continue to register those living out of town.

"Will you answer the following questions for me?"
REPORT OF THE ATTORNEY GENERAL

"Do both I and the Town Registrar sit for registration prior to the Primary and General Election?"

"Does the Town Registrar post the notices in town and I in the District?"

Mrs. Showard, who is the registrar for the precinct, is the proper person to receive applications and register voters who live both within and outside the corporate limits of the town. Mrs. Kathryn Tolbert who has been appointed town registrar does not have authority to receive and pass upon applications for registration.

This office has ruled on several occasions that the function of a town registrar is confined to posting upon the town registration books the names of those persons who are registered upon the general registration book and who live within the corporate limits of the town.

Whenever the precinct registrar, Mrs. Showard, registers a voter and such voter lives within the corporate limits of the town, Mrs. Showard should notify Mrs. Tolbert that such person has registered so that Mrs. Tolbert can place the person's name upon the town's books.

In this connection I enclose for Mrs. Showard's benefit copies of two opinions issued by this office and which are found in Report of Attorney General for 1949-50, at pages 114 and 115, respectively.

I am enclosing two copies of each opinion so that Mrs. Showard can have an extra copy to furnish to Mrs. Tolbert.

Town registrars are appointed under the provisions of Section 24-56 of the Code. This section has specific reference to registrars for elections to be held for the purpose of selecting town officials. It will be noted that the electoral board of the county is required to appoint the registrar for town elections not less than fifteen days prior to the date of election. This provision of the Code is in conflict with Sections 24-74 and 24-75 of the Code to the extent that these latter sections refer to towns. We have considered the reference to registrars of towns in these latter sections to be applicable only where the town is a separate precinct of a county and all the voters of that precinct reside in the corporate limits of the town. In such a case the town registrar would be a registrar appointed for that electoral district pursuant to Section 24-52 of the Code and be required to comply with Sections 24-74, 24-75 and all other sections of Chapter 6, Title 24 of the Code applicable to the duties of registrars generally.

With reference to the two questions presented by Mrs. Showard, the answer to each question is in the negative.

This office has ruled on several occasions that the requirement that persons must register thirty days prior to an election does not apply to the registration books maintained for elections of town officers only. Persons who have been registered by the precinct registrar thirty days prior to election day, may be placed on the books maintained for town elections at any time, even on the day of the town election.

FEES—Sergeant of City of South Norfolk not Entitled to Fee Under Section 14-85 of Code. (192)

Public Officers—City Sergeant of South Norfolk—Not Entitled to Fee Under Section 14-85 of Code. (192)

December 9, 1960

HONORABLE J. K. HOLLAND
City Sergeant
City of South Norfolk, Virginia

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

"The office of Sergeant in the City of South Norfolk, Virginia operates on fees only. No salary is paid this office."
REPORT OF THE ATTORNEY GENERAL

"The Corporation Court for the City of South Norfolk tries civil, criminal and chancery cases.

"Please advise whether or not the Sergeant of South Norfolk would be entitled to the fee allowed in 14-85 Code of Virginia, 1950, as amended."

After conferring with the State Compensation Board, I find that the office of sergeant in the city of South Norfolk is on a fee basis due to the provisions of Section 14-95 of the Code in as much as the city of South Norfolk does not operate a jail.

Under Section 14-95 the provisions of Section 14-85 are applicable to the circuit courts and to the city courts mentioned therein. Unfortunately, the corporation court of the city of South Norfolk is not contained in Section 14-85 and, for that reason I must conclude that the sergeant of your city is not entitled to the compensation allowed under Section 14-85, even though such sergeant may be compensated upon a fee basis. The only way I know to correct this situation is for the General Assembly to amend Section 14-85 in order to include the corporation court of the city of South Norfolk.

FEES—Summoning Witness in Criminal Case—Cannot be Demanded in Advance.

(9) July 8, 1960

HONORABLE W. D. REAMS, JR.
Commonwealth's Attorney for
Culpeper County

This is in reply to your letter of June 16, 1960, which reads in part as follows:

"(1) In a criminal case, when the defendant requests that his witnesses be summoned, must he pay the sheriff his fee for summoning them before the sheriff is required to serve the summons?

"This question is not clear to the Judge of the County Court or myself in the light of sections 14-96, 14-108, 14-82, 14-188 and 14-111.

"(2) If your answer to question (1) is in the affirmative, is the clerk of the court commanded by section 14-111 to refund the fee if found not guilty?

"(3) When there is a prosecutor in a criminal case, is he required to pay the sheriff his fee before the sheriff serves the summons, or is this an appearance for the Commonwealth?

"(4) If the prosecutor is required to pay for his summons, in what case is the clerk required to refund his fee?"

On April 22, 1954, this office rendered an opinion to the Honorable W. Carrington Thompson, Commonwealth's Attorney for Pittsylvania County (Opinions of the Attorney General, 1953-1954, p. 89) stating that a sheriff cannot demand in advance from a defendant the prescribed fees for the issuance and execution of witness summons, and it is my opinion that the same is also true in respect to a witness to be summoned by the prosecutor. Enclosed is a copy of this opinion setting forth the reasons therefor.

Courts—Municipal Police Court is Not "Court Not of Record" within Meaning of § 19.1-338 of Code. (206)

December 20, 1960

HONORABLE RHEA F. MOORE, JR.
Clerk, Tazewell County Circuit Court

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

"Mr. James W. Harman, Jr., Town Attorney for the Town of Tazewell, has raised a point on which we would like to have an opinion.

"The charter for the Town of Tazewell provides for a police justice to hear town cases, and each year, the Town Council has seen fit to appoint the Mayor as such police justice. The town has quite a number of cases each year in which it does not collect the fines and/or costs imposed in these cases, and it is desirous of getting judgments against these parties so as to possibly recover at some time in the future. The town attorney has inquired of this office, if the town under is charter with provision for a police justice, being a court not of record, can proceed against these defendants under Section 19.1-338 of the Code of Virginia, 1950, as amended. We would appreciate an opinion from you if this section is applicable to town courts: if it is not, is there another section which is applicable? Or, if there is no provision in the Code for such cases, is it necessary to proceed in the regular civil manner to get a judgment against these individuals?"

It would seem that under the provisions of § 16.1-70 the municipal court of the town of Tazewell may not be included in the designation "courts not of record." It will be noted that § 19.1-338 relates to fines imposed by "courts not of record." By reference to Chapter 5 of Title 16.1 of the Code, it will be observed that the police courts of towns are "courts of limited jurisdiction." Section 16.1-70, contained in this chapter, provides as follows: "Unless otherwise specifically provided such police courts shall not be included in the designation 'courts not of record' as used in this Title, * * *.* Section 16.1-5 in the first paragraph thereof, provides that 'whenever the words 'courts not of record' appear in this title they shall, unless otherwise specifically provided, mean and include all courts in the Commonwealth below the jurisdictional level of the circuit and corporation courts.' It would seem, therefore, that under Title 16.1 of the Code courts of limited jurisdiction are not to be classified as "courts not of record."

In examining § 19.1-338 we find that it concerns fines imposed in a case tried before a court not of record. § 19.1-5 provides that "the words 'courts not of record' * * * as used in this title (19.1) unless otherwise clearly indicated by the context in which they appear, shall have the respective meanings assigned to them in Chapter 1 (§ 16.1-1, et seq.) of Title 16.1 of this Code." Chapter 1 and Section 16.1-70 must be considered together. Considering all of these sections, it would seem that we cannot conclude that the provisions of § 19.1-338 are applicable to courts of limited jurisdiction such as the police justice court of Tazewell.

I am unable to find any statutory provision comparable to Section 19.1-338 that would be applicable to towns.

Under § 5-14 of the charter of the town of Tazewell the police justice has the power to take bond as security for the payment of fines and costs. It would seem that in case of forfeiture of any such bond the trial officer would have the right to issue a warrant for the collection thereof, which warrant, however, would have to be returnable before the county court as prescribed by Section 16.1-75. (See Section 16-7-76 (2).)
REPORT OF THE ATTORNEY GENERAL

FIRE LAWS—Not Applicable to Towns Disposal of Garbage Pursuant to Health Department Directive. (320)

HONORABLE R. H. MARriott
Judge, Fauquier County Court

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

"An apparent conflict between several sections of the Code of Virginia of 1950 as amended has arisen, and the opinion of your office would be appreciated.

"The Town of Warrenton owns and operates an incinerator and trash dump at which points burning of trash and garbage takes place each working day. The site is approximately 400 feet from or beyond the Town's corporate limits, thus placing the operation in the confines of the County of Fauquier. The incinerator and trash dump are operated in conformity with the regulations provided by the State Board of Health with particular reference to Sec. 32-9 of the Code.

The site, however, is within three hundred feet of some woodland, and the State Forester has issued or is in the process of having issued a criminal warrant charging a town employee with violation of the section under Title 10 dealing with Conservation of the Commonwealth's Natural Resources, with particular reference to Sections 10-61 and 10-62. The Fire Warden has directed that the burning of trash and garbage be discontinued before 4:00 P. M. under the Fire Burning Laws, now in effect. To cease such operation would create a definite health hazard for the citizens of the Town of Warrenton in that the collection of and disposal of garbage and trash would have to be discontinued until after May 1st when it will again become lawful to burn prior to 4:00 P. M.

"My main points of inquiry are as follows: (1) Under Section 10-61 where in the third paragraph of that section, 'a person' is defined, and includes a corporation, does that intend to include a municipal corporation? (2) If the answer is yes to that inquiry, how can the Town then conform to the regulations of the State Department of Health with respect to the disposal of trash and garbage which are collected as a municipal function?"

Section 32-9 of the Code, to which you refer, as amended by Chapter 646 of the Acts of 1954, is as follows:

"The Board may regulate the method of disposition of garbage or sewage and any other refuse matter in or near any incorporated town, city, or unincorporated town or village of this State. The Board is authorized and directed through joint studies with authorized representatives of common carriers, to consider control devices and to investigate possible devices where none exists to control the discharge of human waste from common carriers."

This section must be read along with the provisions of Section 10-62(b). This office has heretofore expressed the opinion that if it appears to the court upon a warrant for violation of Section 10-62(b) that the inflammable material ignited is so guarded and protected as to render the material when ignited incapable of spreading fire, the court would be warranted in finding the defendant not guilty. In the case which you have presented the town authorities have complied with the regulations of the State Board of Health with respect to disposal of trash and garbage. If you find that the incinerator and the method of burning the refuse will not tend to spread the fire, then I think you would be justified in finding that the employee of the town is not guilty. Section 10-62(b) is not to be construed as to prohibit towns from disposing of such refuse in a careful manner and in accordance with regulations of the State Board of Health.
I enclose copy of an opinion rendered by this office on May 3, 1955, to Honorable L. H. Shrader, which opinion is published in Report of Attorney General for 1954-55, at page 113, and relates to this subject.

FUNERAL DIRECTORS AND EMBALMERS—License—Constitutionality of 1960 Amendment to Statute. (50)

August 2, 1960

Honorable Wade S. Coates
Commonwealth's Attorney for Tazewell County

This is in reply to your letter of July 29th, which reads as follows:

"At the recent session of the General Assembly, Section 54-260.25 of the Code was amended by Chapter 356, so as to provide for the issuance of a Funeral Director's license to persons who meet certain qualifications set forth therein.

"Mr. James W. Peery of Tazewell, Virginia, filed with the Virginia Board of Funeral Directors and Embalmers on July 7, 1960, an application which meets all of the qualifications and conditions of the amendment. He has received a letter from the Secretary of the Board stating that at a meeting held on July 26, 1960, the Board rejected Mr. Peery's application upon the ground that the amendment to said Code section is unconstitutional.

"It is stated in this letter that this action was taken upon advice of counsel for the Board.

"I will appreciate it very much if you will advise me whether or not the Board made a request of you for an opinion with respect to this matter. If so, I will appreciate your furnishing me with a copy of your opinion.

"If the Board did not seek your advice as chief counsel for the State and all of its agencies, I will appreciate it very much if you will furnish me with your opinion as to the constitutionality of this legislation."

You are advised that this office has received no request from the Virginia Board of Funeral Directors and Embalmers for an opinion on the constitutionality of Section 54-260.25 of the Code of Virginia, as amended by Chapter 356 of the Acts of Assembly of 1960. I did discuss the matter informally with several members of the Board on one occasion and indicated to them my views.

The Board does employ private counsel, and the Board's action in rejecting the application of Mr. James W. Peery was taken upon advice of such counsel.

The Virginia Board of Funeral Directors and Embalmers was created by Act of the General Assembly of Virginia, and it is the opinion of this office that the General Assembly has the power to provide the type of examination to be administered to those applying for funeral directors' licenses, and also the power to provide by statute that, under certain circumstances and conditions, applicants for such a license, who meet reasonable specified qualifications, shall be excused from the requirement of such an examination, and shall be entitled to a license.

It is, therefore, my opinion that Section 54-260.25 of the Code of Virginia is constitutional, and that an applicant who meets the qualifications prescribed therein for those persons as to whom no examination is required, is entitled to a funeral director's license.

Since this is a matter about which there is a difference of opinion between private counsel for the Board and the Office of the Attorney General, it will be necessary for a court of competent jurisdiction, in a proper proceeding, to determine if Mr. Peery is entitled to the license, in event the Virginia Board of Funeral Directors and Embalmers adheres to its position and does not issue the license voluntarily.
REPORT OF THE ATTORNEY GENERAL

GAME AND INLAND FISHERIES—Bear and Deer Damage Fund—Not to be Used to Pay Forest Warden. (247)

HONORABLE C. H. DAVIDSON, JR.
Commonwealth’s Attorney for Rockbridge County

This is to acknowledge receipt of your letter of February 15, 1961, in which you state in part:

"I have been directed by the Board of Supervisors of Rockbridge County to inquire of your office whether or not the money now standing to the credit of the Rockbridge County Bear and Deer Damage Stamp Fund could be used for financing a full time Chief Forest Warden for Rockbridge County."

Chapter 208 of the Acts of Assembly of 1950 provides that it shall be unlawful for any person to hunt bear or deer in Washington, Grayson, Bath or Rockbridge County without first obtaining a special stamp for a fee of $1.00 annually. A part of Section 2 of that chapter is as follows:

"The money received from the sale of such special stamp shall be paid to the county treasurer to the credit of a special fund, and the net amount thereof, or so much as is necessary, shall be used for the payment of damages to crops or livestock by deer or bear in the county, whenever such damage amounts to ten dollars or more. Such payments shall be limited to the net amount accruing in the special fund from the sales of such stamps in the particular county during the license year in which the damage occurred and any surplus remaining at the end of such year shall remain in such fund and be used for the conservation of wild life in the county under the direction of the board of supervisors. * * *"

Section 10-56 of the Code, which provides for the duties of forest wardens, is as follows:

"The duties of the forest wardens are to (1) enforce all forest laws of this State, (2) protect the State forests, (3) see that all rules, regulations and laws for the protection of the State forests are enforced, (4) report violations of the forest laws to the State Forester, (5) assist in apprehending and convicting offenders."

Although the protection of the forest from fire indirectly helps to conserve the wild life, I do not think that the above statute (Chapter 208, Acts of 1950) is broad enough to permit the expenditure of these funds for the employment of a forest warden. You are probably aware of our opinion to the Honorable Daniel W. McNeil, dated October 14, 1955, (Report of the Attorney General (1955-1956) p. 88) in which we held that the surplus of this fund could be used for the payment of the compensation of a special game warden. The services of a Forest Warden are not, in my opinion services that would be considered as directly related to the conservation of wild life in the county.

GAME AND INLAND FISHERIES—Bear and Deer Damage in Smyth County—Pine Seedlings Not Included as Crops—Not Compensable from License Fund. (231)

HONORABLE ROBERT I. ASBURY
Commonwealth’s Attorney for Smyth County

This is to acknowledge receipt of your letter of January 26, 1961, in which you state in part:
"I have been requested by the Board of Supervisors of Smyth County, Virginia, to request your opinion on the construction of Chapter 86 of Acts of Assembly, approved February 20, 1952, contained in Acts of Assembly for Virginia, Volume, 1952, at page 102.

"On January 7, 1961, Mr. 'X' appeared before the Clerk of the Board of Supervisors of Smyth County and made a statement under oath that he had 30 acres of 'white pines' destroyed by bear and/or deer, the said request made pursuant to the referred to Chapter 86.

"... As you will see, the question the Board is concerned with is whether or not the referred to trees are crops within the purview of the referred to Chapter 86.

"There are several definitions of 'crops' in 21 MJ at page 241, one of which is as follows: 'The term "crops" will, nothing appearing to the contrary, be given its usual and ordinary meaning as comprehending only such products of the soil as are annually planted, severed and saved by manual labor, as cereals, vegetables, grass maturing for harvest, or harvested, etc., but not grass on land used for pasturage ...'

The pertinent portion of Chapter 86, Acts of the General Assembly (1950) is as follows:

"It shall be unlawful for any person to hunt bear or deer in the county of Smyth without having first obtained a special stamp as herein provided, the annual fee therefor being as follows: for residents of the State of Virginia, one dollar; for non-residents of the State of Virginia, five dollars. The stamp shall be adhesively affixed to the back of the current season's hunting license issued such person who shall cancel the same with his initials in ink.

"The money received from the sale of such special stamp shall be paid to the county treasurer to the credit of a special fund, and the net amount thereof, or so much as is necessary, shall be used for the payment of damages to crops or livestock by deer or bear in the county, whenever such damage amounts to ten dollars or more ..."

The fact that these white pine seedlings were planted by the claimant does not in my opinion place them in the category of a crop. The term "crop" in the statute would have to be given its ordinary meaning as in the definition cited by you in 21 M. J., page 24, supra. This is in accord with the cases cited in Words and Phrases, Volume 10, page 547 et seq.

I am, therefore, of the opinion that the term "crop" as used in the aforesaid statute does not include pine seedlings.

GAME AND INLAND FISHERIES—Confiscation of Vehicle Used to Kill or Transport Deer—Owner must have Notice of Illegal Use. Lien Holder Not Protected. (189)

Motor Vehicles—Confiscation under § 29-145. Owner must have Notice of Illegal Use. Lien holder not Protected. (189)

HONORABLE CHESTER F. PHELPS
Executive Director
Commission of Game and Inland Fisheries

December 8, 1960

This is in reply to your letter of December 2, 1960, which reads as follows:

"The question has been asked as to confiscation of vehicles under Section 29-145 whether the wording 'used with the knowledge or consent of the
owner thereof' means the knowledge or consent for general use or the knowledge or consent for the specific purpose of killing or transporting deer.

"Also, under Chapter 10 of Title 29 would the vehicle confiscated be sold subject to a lien thereon?"

While the question is not entirely free from doubt, I am of the opinion that the better view would indicate that § 29-145 of the Code of Virginia be construed so as to require knowledge or consent of an owner that his vehicle or boat is to be used by another for the purpose of illegally killing or transporting the carcass of a deer in order to subject the vehicle or boat to forfeiture as provided in that section. Section 29-145 of the Code reads as follows:

"Every vehicle, boat or firearm used with the knowledge or consent of the owner thereof, in killing or attempting to kill deer between a half hour after sunset on any day and a half hour before sunrise the following day, and every vehicle or boat used in the transportation of the carcass, or any part thereof, of a deer so killed shall be forfeited to the Commonwealth, and upon being condemned as forfeited in proceedings under chapter 10 of this title the proceeds of sale shall be disposed of according to law."

The foregoing quoted section should be construed together with § 29-222 of the Code, which provides as follows:

"Any person concerned in interest may appear and make defense to the information, which may be done by answer on oath. Ignorance of the respondent or other contestant, that the property seized was being used in violation of law, shall be no defense. Nor shall it be ground of defense, that the person by whom the property was used in violating the law has not been convicted of such violation. The information shall be independent of any proceeding against such person or any other for violation of law."

It is to be noted that § 29-222 of the Code provides that ignorance on the part of any respondent that the property being forfeited was being used in violation of the law shall be no defense to the action. This section would not be applicable, however, if the section of the Code providing for the forfeiture provides that the owner must have knowledge of the illegal act as a condition precedent to the property being subjected to forfeiture.

I am, therefore, of the opinion that a vehicle or boat owned by someone other than the person killing a deer between the hours specified in § 29-145 of the Code is not properly subject to be confiscated and forfeited to the Commonwealth unless the vehicle or boat is being used illegally with the knowledge or consent of the owner that it was to be so used.

Your question relating to the rights of a lien holder on property being forfeited pursuant to Chapter 10 of Title 29 of the Code is to be answered in the negative. As pointed out in my reply to your first inquiry, § 29-222 of the Code provides that ignorance of a respondent or other contestant that the property seized was used in violation of law shall be no defense. This statute was construed as being applicable to lienors and upheld by the Virginia Supreme Court of Appeals in the case of Quidley v. Commonwealth, 190 Va. 1029.

The provisions of § 29-145 of the Code do not afford the same protection to a lien holder of a vehicle or boat being used to kill or transport the carcass of a deer killed within the time limits specified therein, as is accorded the owner thereof when the vehicle is being used for that purpose without the knowledge and consent of such owner. Therefore, a boat or vehicle which is subject to confiscation and forfeiture may be sold without recourse on the part of the lien holder. Quidley v. Commonwealth, supra.
GAME AND INLAND FISHERIES—Criminal Prosecutions—Killing Deer Out of Season and Illegal Possession are Separate Offenses. (73)

Criminal Procedure—Conviction of One Offense Not a Bar to Prosecution on Separate Criminal Charge Unless Both Offenses Arise from Same Act. (73)

August 26, 1960

HONORABLE CHESTER F. PHELPS
Executive Director
Commission of Game and Inland Fisheries

This is in reply to the letter of August 16, 1960, written in your absence by Mr. Webb Midyette, in which he asks to be advised as to whether § 19.1-259 of the Code of Virginia of 1950, as amended, would bar prosecution of a person on two separate charges of (1) violating the statute on illegal possession of wild game, and (2) taking deer out of season in violation of the rules and regulations of the Commission of Game and Inland Fisheries.

Section 19.1-259 of the Code reads as follows:

"If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the State statute."

The Supreme Court of Appeals of Virginia had occasion to construe this statute in the case of Hundley v. Commonwealth, 193 Va. 449. The Court there stated:

"Section 19-232 contemplates a conviction of an act or offense prohibited by two or more statutes or ordinances. If a defendant is tried and convicted under one statute or ordinance for the violation of a prohibited act or offense and a prosecution is later instituted under another statute or ordinance which covers the same act or offense, then the first conviction, properly pleaded, would bar the prosecution."

The probing question to be determined in applying this statute is whether the same act is a violation of two or more statutes. If more than one act is involved, § 19.1-259 of the Code is not applicable. The test of the identity of acts or offenses is whether the same evidence is required to sustain them; if not, then the fact that several charges relate to or grow out of one transaction or occurrence does not make a single act or offense where two separate acts or offenses are defined by statute.

To be guilty of illegal possession of wild game does not necessarily mean that the accused must be the person who killed the game. Conversely, one who kills game out of season is not necessarily the person who possesses the game. Proof of one offense does not necessarily prove the other.

I am, therefore, of the opinion that the separate offense of killing deer out of season and illegal possession of wild game are not the same act as contemplated by §19.1-259 of the Code; hence, conviction of one offense would not bar prosecution of the remaining charge.
REPORT OF THE ATTORNEY GENERAL

GAME AND INLAND FISHERIES—Deer Bag Limit—Not exceeded by Killing Doe and Buck in Same Day in County Where the Season is Closed for Does. (212)

December 29, 1960

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

This is to acknowledge receipt of your letter of December 23, 1960, in which you request my opinion on the following question:

"If a person kills a doe deer and on the same day kills a buck deer in Appomattox County has this person violated the law regulating the daily bag limit?"

Your attention is invited to the following:

Chapter 13, Acts of 1960, provides:

"It shall be unlawful to kill any doe deer in the counties of Appomattox and Buckingham between July 1, 1960 and June 30, 1962, notwithstanding any provision of law or regulation of the Commission of Game and Inland Fisheries to the contrary."

Section 29-129.1 (last amended in 1960) provides in part:

"... the Commission shall have power... to prescribe the seasons and bag limits for hunting, fishing, trapping or otherwise taking such wild birds, animals and fish by regulation adopted as provided in this article..." (Italics supplied).

Section 29-2, as amended, provides:

"(p) Closed season means that period of time fixed by the Commission during which wild animals, birds or fish may not be taken, captured, killed, pursued, hunted, trapped or possessed."

"(r) Bag or creel limit means the quantity of game or fish or furbearing animals that may be taken, caught, or possessed during a period fixed by the Commission."

The aforesaid Commission has adopted regulations pursuant to Sections 29-125 and 29-129.1 of the Code. These regulations provide in part:

"DEER SEASON AND BAG LIMITS: The season for hunting deer shall begin the third Monday in November and close January 5, statewide, with the following exceptions:

* * * *

"BAG LIMITS: The lawful bag limit for deer shall be one buck a season, statewide, with the following exceptions:

* * * *

"(b) One a day, two a season, bucks only in Appomattox, Brunswick, Buckingham, Charles City, Dinwiddie, Greensville, James City, Lunenburg, New Kent, Nottoway, and Prince Edward counties."

Section 29-163, as amended, provides:

"Any person taking any game or any fish during the closed season, or who exceeds the bag limit for game or fish, shall be fined not less than twenty-five dollars nor more than two hundred fifty dollars."
Closed season is in counter distinction to open season during which a specified kind of game may be lawfully killed or taken. Bag limit refers to the quantity of game permitted to be killed or taken during open season. In this instance, the Commission has specified the open season during which only buck deer may be killed in Appomattox County. Hence, it would follow that a doe deer could not be included in the bag limit and the killing of the doe deer would not constitute a violation of the bag limit but would be a violation of Chapter 13, Acts of 1960, as well as of Section 29-163 of the Code.

Therefore, your question must be answered in the negative; that is to say, in my opinion the bag limit is not violated by a person who has killed a doe deer on the same day he kills a buck deer in Appomattox County.

GAME AND INLAND FISHERIES—Hunting License—When Necessary for Indians. (125)

Indians—Hunting License—Required when Hunting off Reservation. (125)

October 7, 1960

HONORABLE JOHN PAUL CAUSEY
Commonwealth’s Attorney for
King William County

This is to acknowledge receipt of your letter of September 17, 1960, in which you state:

"The question has been raised with me as to whether Indians resident on a tribal reservation are required to have hunting licenses to hunt outside of the limits of such reservation. As you know, there are tribal reservations for both the Pamunkey and Mattaponi tribes in King William County. I have always informally taken the position that Indians resident upon either of these reservations are not required to have licenses to hunt within the confines of the reservation. The question has now arisen as to whether a license is required for such Indians to hunt outside of the limits of the reservation, and I shall appreciate your opinion upon this question."

The hunting license tax is imposed by Chapter 5, Title 29 (Section 29-51), of the Code of Virginia. There are set forth therein exemptions from the license requirements. Indians are not expressly exempted by these statutes.

This office has held that members of the tribes of the Pamunkey and Mattaponi Indians are exempt from all taxes, State, local, and otherwise. (Report of the Attorney General, 1917, page 160; Report of the Attorney General, 1918, page 96.) In 1957 it was held by my predecessor, The Honorable J. Lindsay Almond, Jr., that the members of these tribes were exempt from the payment of the county automobile license tax. (Report of the Attorney General, 1956-1957, page 183.)

While consistency might indicate that members of the Pamunkey and Mattaponi tribes, who actually reside on their respective reservations, should not be required to obtain a hunting license to hunt in King William County outside the limits of their reservations, I hesitate to extend the rulings that far, in the absence of legislative authority.

If the members of these tribes are entitled to a hunting license in King William County, they would be entitled to the same license in any other County in the State. There is no provision in the statute for the issuance of such a license without payment of the fee. For a member of the tribes to hunt without the necessary license would bring about practical difficulties in the enforcement of the law. Should an Indian be questioned by a law enforcement officer he would not have a hunting license in his possession, and the question of identification would then be posed. He would have to establish his membership in one of the tribes and his residence on the reservation.
I am in entire sympathy with the long-standing policy of Virginia to grant Indians immunity from the payment of certain taxes, and believe that if this matter is brought to the attention of the legislative body, members of the said tribes, residing on the reservation, will be permitted to hunt without obtaining a hunting license. I am further of opinion that this exemption should be granted by the General Assembly, rather than by an interpretation from this office. It is therefore, my suggestion that you confer with the respective Chiefs of these tribes and advise them to obtain such hunting licenses for the current year and for 1961. If they wish to present this matter at the next session of the General Assembly, I am confident someone from this office will appear before the Committees in their behalf.

GAME AND INLAND FISHERIES—Laws Applicable within Certain Areas Comprising Quantico Marine Base. (177)

Federal Property—Quantico Marine Base—Game Laws Applicable to Certain Portions. (177)

MR. WEBB MIDYETTE, Chief
Law Enforcement Division
Commission of Game and Inland Fisheries

This is in reply to your letter of November 21, 1960, written in the absence of Director Phelps, in which you asked to be advised if the Virginia game laws are applicable on the Quantico Marine Base which lies partly in Stafford, Fauquier and Prince William Counties. The reply to your inquiry depends upon the territorial portion of the Marine Base involved. The United States exercises exclusive jurisdiction over a small portion of the Base and concurrent jurisdiction in other portions. In the latter instances the laws of Virginia are applicable and should be enforced by game wardens to the same degree as in the surrounding non-military portion of the county.

A graphic representation of the various parcels of land comprising the Base was prepared under the direction of Major R. E. Sullivan, U.S.M.C., in July of this year in which the jurisdictional areas are delineated. It is suggested that you contact the Public Works Officer at Quantico in order to determine the area over which the Commonwealth of Virginia has ceded exclusive jurisdiction to the United States at the Quantico Marine Base.

GAME AND INLAND FISHERIES—Licenses—Special Permit for National Forest—No Exemptions. (309)

HONORABLE GEORGE E. HOLT, Clerk
Circuit Court of Botetourt County

This is in reply to your letter of April 4, 1961, in which you ask to be advised if persons exempt from the requirement of obtaining fishing licenses under § 29-55 of the Code are required to purchase a National Forest stamp in order to fish in such areas as is required under § 29-117 of the Code.

Section 29-117 of the Code reads as follows:

"No resident or nonresident shall hunt, fish, or trap on any lands in the national forests in this State without first obtaining, in addition to the
regular resident or nonresident license, a special permit to hunt, fish, or
trap on such areas in the national forests as the Commission and the Forest
Service may agree upon."

You will note that the requirement for a special permit to hunt, fish or trap in the
National Forests is in addition to the regular license. There is nothing in Article 3,
Chapter 6 of Title 29 of the Code which would indicate that the General Assembly
intended to exempt anyone from the requirement of obtaining the special permit for
National Forest areas. I am of the opinion that anyone fishing in the National Forests
must first obtain the special permit required in § 29-117 of the Code.

GAME AND INLAND FISHERIES—Motor Vehicle Confiscation When Used in
Violation of § 29-145—Must be Used to Kill or Transport Deer. (190)

Motor Vehicles—Confiscation and Forfeiture Pursuant to § 29-145. Must be Used
to Kill or Transport Deer. (190)

December 8, 1960

HONORABLE ROBERT M. WOLFENDEN, JR.
Game Warden for Wythe County

This is in reply to your letter of November 30, 1960, which I quote:

"I would like your opinion on the application of Sections 29-145 and 29-
222 to the following set of facts:

"An automobile driven by the owner, which has a lien in favor of a third
party, duly recorded, was driven along the road at night and the owner got
out of the car and shot and killed a deer during the time prohibited
by Section 29-145. He left the deer there and walked to the home of a brother-
in-law, where he asked the brother-in-law if he could borrow his truck for a
little while. The brother-in-law said, ‘yes’ and the truck was driven up to
where the deer lay and the carcass of the deer was transported in the truck
to a point where the driver was apprehended by a Game Warden.

"I would like your opinion as to the following matters:

"(1) Under the circumstances, was the car being used in killing the deer?

"(2) If it was, is the owner of the lien protected?

"(3) Do the words ‘knowledge or consent’ apply to a vehicle used in
transporting the carcass of a deer?"

Section 29-145 of the Code of Virginia of 1950, as amended, reads as follows:

"Every vehicle, boat or firearm used with the knowledge or consent of the
owner thereof, in killing or attempting to kill deer between a half hour after
sunset on any day and a half hour before sunrise the following day, and
every vehicle or boat used in the transportation of the carcass, or any part
thereof, of a deer so killed shall be forfeited to the Commonwealth, and upon
being condemned as forfeited in proceedings under chapter 10 of this title
the proceeds of sale shall be disposed of according to law."

I presume that the accused discovered the deer within range of the highway by
happenstance while operating his vehicle for some purpose other than in search of
game. There is no indication in your letter that he used the headlights for the purpose
of aiding in the taking of the deer in question. I am, therefore, of the opinion that the
car was not being “used in killing” a deer within the meaning of § 29-145 of the Code.

Your remaining inquiries are answered in my letter of even date to Honorable
Chester F. Phelps, Executive Director for the Commission of Game and Inland Fish-
eries, a copy of which is enclosed herewith.
August 8, 1960

HONORABLE CHESTER F. PHELPS
Executive Director
Commission of Game and Inland Fisheries

This is in reply to your letter of July 29, 1960, in which you asked to be advised as to the authority of the Commission of Game and Inland Fisheries to permit the propagation and sale of trout for human consumption, both domestically and for export.

Section 29-108, a portion of Article 2, Chapter 6 of Title 29 of the Code of Virginia of 1950, as amended, relating to issuance of permits by the Commission, provides as follows:

"The fee for a permit to breed and raise rainbow trout and brook trout for sale from a privately owned hatchery where the same are artificially raised shall be five dollars."

Section 29-148 of the Code of 1950, as amended, prohibits the taking, possessing, selling, etc., of any species of bass or trout. In 1956 this section was amended so as to permit the importation of trout which have been propagated and raised in a hatchery or by other artificial means. In the 1958 Session of the Legislature the limitation in this section, confining the selling of trout to those which are imported, was deleted. The section now provides, in so far as here germane, as follows:

"* * * Any provision of this title to the contrary notwithstanding, it shall be lawful to sell or offer to sell for human consumption trout which have been lawfully acquired provided such trout have been propagated and raised in a hatchery or by other artificial means."

"The Commission of Game and Inland Fisheries shall by appropriate regulation establish a practical system of identification of trout so offered for sale for table use."

In view of the foregoing statutory provisions, I am of the opinion that trout propagated and raised in a hatchery or by other artificial means may be offered for sale in the State for human consumption if properly controlled by permit issued by the Commission of Game and Inland Fisheries. The Commission should promulgate the necessary regulations to establish a practical system of identification as contemplated in § 29-148 of the Code.

The answer to your inquiry relating to interstate shipment of trout raised pursuant to § 29-148 of the Code will depend upon the statutes in the states to which the shipments are proposed. In the absence of statutory prohibition against offering for sale or transporting trout into another state, trout raised in Virginia may be offered for sale in other states under the same conditions as is any other commodity offered for human consumption.

March 22, 1961

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney of Augusta County

This is in reply to your letter of March 15, 1961, in which you request my opinion on two questions, the first being set forth in your letter as follows:
"Section 127 of the Rules and Regulations of the Commission of Game and Inland Fisheries provides as follows:
"'It shall be lawful to take carp and gar from the public waters of the State, except waters stocked with trout, by means of bow and arrow from March 1 to October 31, inclusive, daylight hours only. Provided, however, it shall be unlawful to use a cross-bow or poison arrows at any time for this purpose.
"'All persons taking fish in this manner shall be required to have a regular fishing license.'
"The first question is whether the words 'Public waters' would be interpreted to be the same as 'waters of the State,' as defined in Section 62-69, Code of Virginia,'"

There appears to be no statutory or administrative definition of "public waters" as used in the statutes and rules and regulations pertaining to fishing. I do not believe the term is synonymous with "State waters" or "waters of the State," since those terms vary with the purpose for which they are being used. See §§ 62-11, 62-69 and 62-174.2 of the Code of Virginia.

In common parlance, the word "public" relates to nation, state or community at large, as opposed to "private." As construed by the courts in other jurisdictions, "private waters" have been held to be those waters confined to land which is exclusively owned, to the exclusion of other owners. Hence, if a lake or pond is connected, either continuously or at intervals, with other bodies of water so as to permit fish to move to and from the two places, the water is not private, 15 A.L.R. 2d 754.

Applying this general principle to the regulation here in question, I am of the opinion that it applies to all waters in the State, except those bodies of water upon private lands which are isolated from other bodies of water upon the lands of others.

Your second inquiry is set forth in your letter as follows:

"Augusta County has an ordinance which makes it unlawful to fish on Sunday without the land-owners' permission in writing. The same is true on any day except Sunday if the land is posted, in which event written permission must be granted, and if the land is not posted, ordinarily, oral permission must be granted.

"The second question, therefore, involved is whether the fact that the taking of carp, etc., in public waters is permitted by the regulations, it would mean that this would supercede the Augusta County ordinance so that a person who does not obtain permission from the landowner along the water could not be prosecuted.'"

Chapter 439, Acts of Assembly of 1950, pursuant to which the ordinance in question was adopted, provides in part as follows:

"§ 1. In any county with an area of more than nine hundred square miles and having a population of less than fifty thousand it shall be unlawful to fish on private property between 12 o'clock midnight Saturday and 12 o'clock midnight Sunday without the written permission of the landowner or his duly authorized agent or member of his household, which written permission must specifically permit fishing on Sunday and must be carried on the person of permittee as is required with respect to a fishing license, and said written permission shall be required whether the land is posted or not.

"§ 2. The provisions of this act shall be in addition to all provisions of law and rules and regulations having the force and effect of law.'"

I see no conflict between the foregoing Act of Assembly and the regulation of the Commission. The regulation prescribes an open season for a particular method of taking carp and gar fish in public waters. The ordinance provides limitations upon
any method of fishing on private property in Augusta County. As pointed out above, it is entirely possible to have public waters flowing through private property.

I am of the opinion that one must comply with the provisions of the County ordinance when taking carp and gar fish from public waters if such fishing is undertaken on private property in Augusta County.

GARNISHMENT—Extent That Employees’ Wages Are Exempt Under Section 34-29 of the Code. (111)

September 26, 1960

HONORABLE W. H. YEAMAN
Director of Finance
Martinsville, Virginia

This is to acknowledge receipt of your letter of September 13, 1960, in which you enclose a schedule of garnishment exemptions, and request my opinion as to whether it conforms to the provisions of Section 34-29 of the Code, effective July 1, 1960. I am of the opinion that this schedule does not conform. I shall discuss the various pay bases of a householder separately.

(1) Consider where the employee is paid on a monthly basis. If the wage is from 0 to $100.00, then the minimum exemption of $100.00 applies. When the employee is paid over $100.00, he is entitled, in addition to the exemption of $100.00, 75% on every dollar paid over $100.00 until the wage of $166.66 is reached, when the maximum exemption of $150.00 applies.

For instance, suppose the employee is paid $120.00. This exceeds the minimum exemption by $20.00. 75% of $20.00 is $15.00. Add this to the minimum of $100.00 and you would have $115.00, which would be the total exemption in this case.

(2) Where the employee is paid on a semi-monthly basis and the wage is from 0 to $50.00, then the minimum exemption of $50.00 applies. When his wage is more than $50.00 but does not exceed $83.33, he is entitled to the minimum exemption of $50.00, plus 75% on every dollar in excess of $50.00 until the wage of $83.33 is reached, when the maximum exemption is applicable. Over the wage of $83.33, the maximum exemption of $75.00 applies.

(3) Where the employee is paid on a bi-weekly basis and his wage is from 0 to $46.00, then the minimum of $46.00 applies. Where his wage is more than $46.00 but does not exceed $78.00, he is entitled to a minimum exemption of $46.00 plus 75% on every dollar in excess of $46.00 until the wage of $78.00 is reached, when the maximum exemption of $70.00 is applicable. Where the wage is over $78.00, the maximum exemption of $70.00 applies.

(4) Where the employee is paid on a weekly basis and receives from 0 to $23.00, the minimum exemption of $23.00 applies. Where he is paid over $23.00, he is entitled, in addition to the exemption of $23.00, 75% on every dollar paid over $23.00 until the wage of $39.00 is reached, when the maximum exemption of $35.00 applies.

The non-householder is entitled to an exemption of 50% of that of the householder.

Enclosed herewith you will find a copy of my letter of June 20, 1960, to the Honorable Joseph V. Gorman, Judge of the Municipal Civil Court of Lynchburg, concerning the 1960 amendment to Section 34-29 of the Code.

July 13, 1960

HONORABLE GEORGE F. WHITLEY, JR.
Trial Justice of Smithfield

This is in reply to your letter of July 9, 1960, which reads as follows:

"The recent Legislature amended Section 8-441 of the Code by adding provisions limiting and restricting the issuance of Garnishment Summons against wages.

"One view in this area is that the effect of these amendments is to prevent a judgment creditor who has not obtained a garnishment summons on his judgment prior to the effective date of the amendments from obtaining a Summons until 18 months have passed since his judgment was entered, unless he is covered by subsections (3) through (6). Under this view, for example, a judgment creditor cannot obtain a garnishment summons based on a Judgment granted on an open account for jewelry until 18 months after the date of the Judgment.

"Another view is that the judgment creditor, in the above instance, can obtain a garnishment on his first judgment against a debtor and can obtain subsequent garnishments on the same judgment until it is satisfied, but cannot obtain a garnishment on another judgment against the same creditor within the 18 months period.

"I would appreciate your opinion as to which of the above views is correct."

The amendments (effective as of June 27, 1960) which were added to Section 8-441 of the Code of Virginia by the General Assembly at its 1960 session read as follows:

"No summons under this section shall be issued at the suggestion of the judgment creditor or his assignee against the wages of a judgment debtor unless the judgment creditor, his agent or attorney shall allege, under oath, in his suggestion that:

"(1) The summons is based upon a judgment upon which a prior summons has been issued but not fully satisfied; or

"(2) No summons has been issued upon his suggestion against the same judgment debtor within a period of eighteen months, other than under the provisions of paragraph (1) above; or

"(3) The summons is based upon a judgment granted against a debtor upon a debt due or made for necessary food, rent or shelter, public utilities including telephone service, drugs, or medical care supplied the debtor by the judgment creditor or to one of his lawful dependents, and that it was not for luxuries or nonessentials; or

"(4) The summons is based upon a judgment for a debt due the judgment creditor to refinance a lawful loan made by an authorized lending institution; or

"(5) The summons is based upon a judgment on an obligation incurred as an endorser or comaker upon a lawful note; or

"(6) The summons is based upon a judgment for a debt or debts reaffirmed after bankruptcy.

"Any judgment creditor who knowingly gives false information upon any such suggestion made under this chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished accordingly."
I am of the opinion that subsection (2) states the general rule of the above amendment in that a judgment creditor can have issued only one garnishment summons against a judgment debtor during an eighteen months period regardless of the number of judgments obtained against the debtor during this period. The exceptions to this restriction on a judgment creditor to issue garnishment summons within an eighteen months period are set forth in subsections (1), (3), (4), (5) and (6) of the amendment. Thus, under subsection (1), a judgment creditor whose initial garnishment summons has failed to satisfy his judgment can have as many additional summons issued within an eighteen months as are necessary to satisfy the judgment. Moreover, if a judgment is obtained on the grounds set forth in subsections (3), (4), (5) and (6) of the above amendment, then there also is no limitation on the number of garnishment summons that can be issued during this period.

The following examples illustrate the foregoing:

Example 1: On July 1, 1960, A obtains a judgment in the amount of $100.00 against B on an unpaid account for jewelry purchased. A can have a garnishment summons issued on this judgment against C, the employer of B, by alleging under oath that the conditions in subsection (2) of the above mentioned amendment exist, namely, that A has had no other garnishment summons issued within an eighteen months period against B.

Example 2: The same facts as set out in Example 1 except that A obtains only $25.00 from C as a result of the garnishment summons issued on his judgment. B then changes jobs on July 25, 1960, and is employed by D. A can now have a garnishment summons issued against D by alleging under oath that the conditions in subsection (1) exist, namely, that the summons is based on a judgment upon which a prior summons has been issued but not fully satisfied. Likewise, A can have as many other summons issued as are necessary to satisfy the $100.00 judgment, irrespective of the eighteen months limitation.

Example 3: Same facts as set out in Examples 1 and 2 except that A obtains on July 30, 1961, a second judgment in the amount of $200.00 against B on an unpaid account for a T. V. set purchased. Under the provisions of subsection (2), A cannot have a garnishment summons issued on this judgment as a summons had been issued against B on the first judgment within an eighteen months period. The provisions of subsection (1) would not be applicable as there was no prior summons issued on the second judgment.

GARNISHMENT—Notice to Judgment Debtor—How Served when Personal Service is Made. (340)

May 1, 1961

HONORABLE LEO P. BLAIR
Associate Judge
Municipal Court—Civil Division

This is to acknowledge receipt of your letter of April 20, 1961. In your letter you state:

"C. Judgment Creditor, obtained a judgment against defendant D in this court and thereafter instituted garnishment proceedings against D and his employer E. The High Constable to whom process was directed obtained personal service on E, but was unable to locate D, and marked his return as to D 'Not Found'.

"E filed his answer in the proceeding and attached thereto a check payable to C in the amount $50.00 representing monies that he had in his possession belonging to D."

You express the opinion that the procedure set forth in Section 8-441 of the Code is applicable. I agree with you. The pertinent portion of that section reads as follows:
“On a suggestion by the judgment creditor that, by reason of the lien of his writ of fieri facias, there is a liability on any person other than the judgment debtor, or, that there is in the hands of someone in his capacity as personal representative of some decedent a sum of money to which a judgment debtor is or may be entitled as creditor or distributee of such decedent, upon which sum when determined such writ of fieri facias is a lien, a summons may be sued out of the clerk's office of the court in which the judgment is, or, if rendered by a trial justice, may be issued by a trial justice, or sued out of the clerk's office to which an execution issued thereon has been returned as provided in §16-35 against such person; and a copy thereof shall be served on the judgment debtor as well as on such person, or, if he be a non-resident, he shall be proceeded against by publication, according to the provisions of § 8-71 unless the summons was sued out from a trial justice, in which case, there shall be no order of publication.” (Italics supplied).

It will be noted that this section provides that a copy of the process shall be served on the judgment debtor as well as such person (indebted to the judgment debtor). In the case of Levine Loan Company v. Sharke, 140 Va. 713, the Court held that the notice required by the statute must be given the judgment debtor. This case, however, was in a court of record.

I have examined the Code of 1919 and the Code of 1887 and find the same language used in the antecedents to this section. I am unable to find any reported case concerning the question of the validity of a judgment against the garnishee issued in a court not of record where the judgment debtor is not been given notice. The purpose of the notice to the judgment debtor is to give him an opportunity to plead payment or other defenses which he may have. Unless the judgment debtor is served with notice, either actual, substituted or constructive, there would be serious doubt as to the validity of the judgment rendered against the garnishee directing him to pay the funds in hand to the judgment creditor, as it is elementary that a defendant in all cases must be given notice, otherwise there would be a failure of due process.

The last clause of the sentence of the statute, to-wit, “or, if he be a nonresident, he may be proceeded against by publication, according to the provisions of § 8-71, unless the summons was sued out from a trial justice, in which case, there shall be no order of publication”, only applies in those cases where the defendant is a non-resident. In the case to which you refer the judgment debtor is not a non-resident; however, he could not be found by the officer. Hence, this portion of the statute has no applicability in this particular case.

The question arises, then, as to the meaning of the term “shall be served on the judgment debtor.” If service had been effected in the mode provided for in Section 8-51, there would be no problem, but such is not the case here. Then, it would follow that the judgment debtor must be served by a notice of publication under Section 8-71 of the Code in order to validate the proceeding. That section applies not only to a non-resident, but it also applies to any person whose whereabouts have not been determined after due diligence has been used by or on behalf of the plaintiff. As the money in the hands of the garnishee who is under the control of the court, the proceeding is somewhat similar to one in rem, but in order to dispose of the funds, service on the interested party must be actual, substituted or constructive, which can be effected by following the procedure in Sections 8-71 and 8-72 of the Code. You will notice that under the latter section, a copy of the order of publication is mailed to the defendant at his last known address and is posted by the clerk at the front door of the courthouse in the county or corporation, etc. Furthermore, that Section (8-72) concludes by stating that “the court in any case, if deemed proper, may dispense with such publication in a newspaper.”

Hence, it is my opinion that the proper procedure for you to follow in such a case would be to have the plaintiff, or someone in his behalf, execute an affidavit to the effect that due diligence has been used to ascertain in what county or corporation the defendant is, without effect. Upon this affidavit an order of publication should be issued and sent to the last known address of the defendant and posted by the clerk on the front door of the courthouse, and publish the same in a newspaper unless such publication in a newspaper be dispensed with by the judge. (8-72).
REPORT OF THE ATTORNEY GENERAL

GARNISHMENT—Proceeding Under Section 8-441 of Code—Cannot Issue Until Execution Writ is in Hands of Serving Officer. (286)

HONORABLE HUGH T. ADAIR
Clerk of Municipal Court
Bristol, Virginia

March 15, 1961

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

"The correct procedure to follow in issuing garnishments under Section 8-441 of the Code of Virginia, as amended, has been in doubt on many occasions in this office. May we use the following illustrations and request that you render an opinion in each:

(a) It is our understanding that the issuance of an execution must precede the issuance of any garnishment, however, is it possible for the execution and garnishment to be issued at the same time?

(b) A creditor requests that a garnishment be issued on a judgment rendered prior to June 27, 1960. Such judgment is on a debt made for clothing, execution has been issued and returned to the Court. Which paragraph should be checked on the Suggestion for Summons in Garnishment?

(c) Illustration B. is again used with the exception of the date of judgment being after the effective date of the Amendment to Section 8-441. Can the same paragraph on the Suggestion be checked?

(d) Illustrations B. and C. are again used, but one garnishment has previously been issued on the judgment. Can a second garnishment be issued within an 18-month period?

"In each of these illustrations, the judgment is on a debt for clothing, which apparently is considered to be a luxury or non-essential item under Paragraph 3. We are asking for the application of this Section to a judgment upon a debt for non-essentials."

With respect to question (a) under the provisions of Section 8-441 of the Code, a summons on suggestion (garnishment proceedings) may be issued by reason of a lien on intangible property created by a writ of fieri facias. No lien is created by the issuance of a writ of fieri facias until such writ is delivered to the sheriff or other officer to be executed. See Code Section 8-431. Thus a judgment creditor is not in position to execute the suggestion and make the affidavit required by Section 8-441 until such time as the writ of fieri facias has been delivered to the officer for execution. If the sheriff or other officer is in your office at the time the execution (writ of fieri facias) is issued and it can be delivered to such officer it will then be proper for the judgment creditor to execute the summons on suggestion and make his affidavit to the same while the sheriff or other officer is still available. You would then be in position to issue the garnishment papers and deliver them to the officer, who would then be in position to serve the garnishment papers upon the defendants named therein.

With regard to question (b) it would be necessary for the judgment creditor to make oath as to paragraph (1) of Section 8-441 of the Code.

The same answer is applicable to question (c).

With respect to question (d) the answer is in the affirmative.

For your information I am enclosing copies of several opinions relating to Sections 8-441 and 34-29 of the Code, some of which cover other phases of the garnishment statutes.
REPORT OF THE ATTORNEY GENERAL

GARNISHMENT—Wages Exempt—Maximum Not Affected by Number of Dependents. (173)

November 28, 1960

HONORABLE W. FRANCIS BINFORD, Judge
Prince George County Court

This is to acknowledge receipt of your letter of November 18, 1960, in which you state in part:

"Under section 34-29 of the Acts of 1960, a minimum and maximum exemption is set up for wages exempt of a laboring man or woman.

"Will you please advise me if the courts are to be guided by the schedule set up in Section 34-29, regardless of the number of children a laboring man or woman may claim as a householder?"

Section 34-29 of the Virginia Code, amended in 1960, provides that the wages of a laboring man or woman who is a householder "shall be exempt from distress, levy, garnishment or other process to the extent of the minimum exemption set out in the schedule of minimum and maximum exemptions hereinafter provided; in addition to the minimum exemption seventy-five per centum of such wages or salary as exceeds the minimum exemption but not in excess of the maximum exemption, shall be exempted".

The provisions of the section allowing additional exemptions based upon the number of dependent children were repealed by Chapter 498, Acts of 1960.

I can find nothing in this statute which would indicate that the court could consider the actual condition of the householder in respect to the number of his dependents in determining the amount of exemption to which he is entitled.

____________________________

HEALTH—Quarantine—Breaking Conditions Constitutes Misdemeanor in Jurisdiction When Quarantine Exists. (112)

Criminal Procedure—Where Crime Committed. Violation of Quarantine. (112)

September 26, 1960

DR. MACK I. SHANHOLTZ, Commissioner
Department of Health

This is to acknowledge receipt of your letter of September 20, 1960, in which you request my opinion as to whether a person who is ordered quarantined or isolated in a particular sanatorium, and who refuses or fails to comply with such an order by leaving the sanatorium without permission, can be prosecuted under the provisions of Section 32-85.4 of the Code in a jurisdiction other than that in which the sanatorium is located. The pertinent portion of said section reads as follows:

"Any person who fails or refuses to comply with the provisions of an order of quarantine or isolation issued to him or who violates the condition of any temporary release from quarantine shall be guilty of a misdemeanor and upon conviction shall be confined in such place as the court may designate, for a term not exceeding one year. . . ."

The question presented is whether the court in the county within which the sanatorium is located, from which the person has absented himself, has exclusive jurisdiction to try such a person, or whether he may also be tried in any other county or city where he is present.

Section 16.1-123 of the Code (1950), as amended, expressly vests the county courts with exclusive jurisdiction except as otherwise provided therein "for the trial of all
other misdemeanors arising therein." The general law is expressed in Volume 23 of Corpus Juris Secundum as follows:

"§ 174.—An offense is committed in that locality in which the acts constituting the same are done."

On page 266 it is stated:

"At common law a prosecution must be had in the county or district in which the offense was committed."

Again, on page 286, it is stated:

"The offense of escape from prison, must, under some statutes, be prosecuted in the county where the escape occurred, while under others the convict may be tried in any county of the state."

From what you state, it is clear that the offense arises in the jurisdiction (county) within which the sanatorium is located, and not in the county where the person happens to be or resides after his departure from the sanatorium. The above statute does not make this offense (breaking quarantine) a continuing one and does not provide that the offense can be tried in any locality other than the one in which it was committed. Of course, the statute could be so amended and thereby afford simpler means of administration.

I am, therefore, of the opinion that the question you present should be answered in the negative, and that the court exercising jurisdiction over the locality in which the sanatorium is located has exclusive jurisdiction to try such an offense as you describe.

HEALTH—Release of Information on X-Rays—May Act upon Request of Physician. (287)

Dr. Mack I. Shanholtz, Commissioner
Department of Health

I am in receipt of your letter of recent date in which you request an opinion upon the propriety of your department's releasing x-ray films, or information concerning such films, to physicians other than the particular physician designated by the subject at the time the x-ray photograph is taken.

You state that the films concerning which you inquire are taken for screening purposes and are stored indefinitely so that they will be available to a physician who may wish to have information concerning the appearance of his patient's lung at an earlier date. You also advise that some 200,000-300,000 of such films are taken each year by x-ray units of the State Health Department, that numerous requests for such films or reports thereon are received from physicians, and that frequently the physician making such request is the subject's "new physician" rather than the one designated by the subject at the time the individual x-ray was taken.

I am of the opinion that, upon receipt of such a request by a subject's new physician, officials of the State Health Department (1) may properly infer that the subject in question has authorized the inquiring physician to receive such information and (2) may make such information available to the subject's new physician without requiring written permission from the subject himself.
REPORT OF THE ATTORNEY GENERAL

HONORABLE H. H. HARRIS
State Highway Commissioner

This is in reply to your letter of May 18, 1961, in which you raised several questions relating to the acquisition of the Rosslyn Connecting Railroad for use of right of way for Interstate Route 66.

I shall answer your questions in the order in which they were submitted.

1. "May the State Highway Commission purchase the entire right of way of the Rosslyn Connecting Railroad under the provisions of Title 33, Virginia Code of 1950, Sections 33-117.2 and 33-117.4, or other law? Our files indicate the residue area is estimated at 9 1/2 acres. In view of the 10-acre limitation on excess takings under the cited statutes, verification of this point is essential."

By letter of May 31, 1961, addressed to M. Ray Johnson by Mr. C. E. Owen, Jr., I was advised that a total of 9.46 acres lie outside of the area to be acquired for highway purposes.

Section 33-117.2 of the Code of Virginia of 1950, as amended, provides in part:

"In acquiring rights of way for highway construction, reconstruction, or improvement, lands incidental to such construction, reconstruction, or improvement, the State Highway Commission is authorized and empowered, whenever a portion of a tract of land is to be utilized for right of way, or a purpose incidental to the construction, reconstruction or improvement of a public highway, to acquire by purchase or gift, the entire tract of land or any part thereof, whenever the remainder of such tract or part thereof can no longer be utilized for the purpose for which the entire tract is then being utilized, * * * or the highway project will leave the remaining portions without a means of access to a public highway, or whenever in the judgment of the State Highway Commission the resulting damages to the remainder of such tract or part thereof lying outside the proposed right of way, or the area being acquired for a purpose incidental to the construction or improvement of a public highway will approximate or equal the fair market value of such remaining lands; provided, however, that the State Highway Commission shall not acquire the remainder of such tracts where the remaining portion is in excess of ten acres."

This statute provides that the State Highway Commission may purchase the residue portions of lands of less than ten acres provided, among other reasons, (a) the remainder of the lands can no longer be utilized for the purpose for which the entire tract was utilized prior to the time of the taking or (b) if, in the judgment of the State Highway Commission, the resulting damages to the remainder of the tract lying outside of the proposed right of way will approximate or equal the fair market value of such remaining lands.

I am of the opinion that the Commission may purchase the remaining portions of the Rosslyn Connecting Railroad provided the State Highway Commission determines that either of the aforesaid conditions are found to be applicable.

2. "If so, may the Highway Commission transfer the portion not required for Interstate Route 66 to the United States under Section 33-117.4 or other laws?"

Section 33-117.4 of the present Code provides in part:

"The State Highway Commission may lease, sell or exchange such residue parcels of land upon such terms and conditions as in the judgment of the
Commission may be in the public interest; provided, however, the Com-
mmission shall not use such parcels for any commercial purpose. ** *

I am of the opinion that the Commission may transfer to the United States the
portion of the Rosslyn Connecting Railroad lying outside the proposed right of way.

(3) "May the Highway Commission condemn and obtain prompt pos-
session of the portion required for right of way under the provisions of Sec.
33-70.1 et seq. or other laws?"

I presume the question is whether the State Highway Commission may file a certif-
icate of deposit pursuant to Section 33-70.1, et seq., and obtain prompt possession
prior to the institution of condemnation proceedings.

Section 33-57 provides in part:

"The State Highway Commissioner is hereby vested with the power
to acquire by purchase, gift, or power of eminent domain such lands, structures,
rights of way, franchises, easements and other interest in lands, including
lands under water and riparian rights, of any person, association, partner-
ship, corporation, or municipality or political subdivision, deemed to be
necessary for the construction, reconstruction, alteration, maintenance and
repair of the public highways of the State and for these purposes and all other
purposes incidental thereto may condemn property in fee simple and rights
of way of such width and on such routes and grades and locations as by the
Commissioner may be deemed requisite and suitable ** *."

(Emphasis added)

I am of the opinion that the State Highway Commissioner, acting pursuant to the
terms of this statute, has the authority to acquire the necessary right of way from the
Rosslyn Connecting Railroad Company by condemnation and to proceed in accordance
with the provisions of Section 33-70.1, et seq., of the Code to take possession of the
property in question.

(4) "Is the Rosslyn Connecting Railroad a separate corporate entity?
Does the corporate entity hold legal title to its right of way? Does it own
the fee? Does either the Philadelphia, Baltimore and Washington Railroad or the
Pennsylvania Railroad have any legal interest in the right of way?"

The Rosslyn Connecting Railroad Company is chartered in Virginia as a separate
corporate entity by the State Corporation Commission. It is also registered with the
Interstate Commerce Commission. According to title examination conducted by the
law firm of Jesse, Phillips, Kendrick & Gearheart, of Arlington, Virginia, the fee
simple title to the right of way in question is vested in the Rosslyn Connecting Rail-
road Company.

Based on information obtained from the State Corporation Commission, it is my
understanding that 1950 shares of the 2000 outstanding shares of stock of the Rosslyn
Connecting Railroad are owned by the Philadelphia, Baltimore and Washington
Railroad Company and 5 shares are owned by each of the corporation's ten directors.
The Philadelphia, Baltimore and Washington Railroad Company is in turn leased
to the Pennsylvania Railroad Company.

There are no leases or deeds of trust of record in the counties in which the real
property of the Rosslyn Connecting Railroad Company is located.

It would appear that the Rosslyn Connecting Railroad Company is a separate
corporate entity and that neither the Philadelphia, Baltimore and Washington Rail-
road Company nor the Pennsylvania Railroad Company has any legal interest as such
in the right of way in question.

(5) "Assuming the Rosslyn Connecting Railroad owns the fee title to
its entire right of way, is the measure of compensation limited to its value
for railroad purposes or may consideration be given to its highest and best
use?"
In all condemnation proceedings a landowner is entitled to receive compensation for the fair market value of the land taken, together with damages to the remaining lands. In determining fair market value, the Supreme Court of Appeals of Virginia has held that commissioners in eminent domain proceedings are to determine this value upon a consideration of all uses to which the land may be reasonably adapted and to award compensation upon the basis of its most advantageous and valuable use, having regard to the existing business demands of the community or such as may be reasonably expected in the immediate future. See *Pruner v. State Highway Commissioner*, 173 Va. 307, 311.

I am of the opinion that consideration may be given to the highest and best use of the property.

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**HIGHWAYS—Condemnation Proceedings—Should be Treated as Chancery Matter.**

(249)

Clerks—Records in Highway Condemnation—Treated as Chancery Suit. (249)

February 20, 1961

**HONORABLE ROBERT D. HUFFMAN, Clerk**

Circuit Court of Page County

This is to acknowledge receipt of your letter of February 14, 1961, in which you request my opinion on the following question:

"We are now advised that the Supreme Court of Appeals of Virginia has recently held that such cases should be treated as Law cases. Shall we continue the practice of handling them as Chancery matters?"

The cases to which you apparently refer are *May v. Bruce*, 202 Va. 78, and *Brown v. May*, 202 Va. 301. In the *Brown* case, the Court held that the trial court had the same power over Commissioners' Reports as it has over verdicts of juries in civil actions. This was nothing new as the statute; that is, Section 33-64, formerly 1969(j), contained this language when it was reenacted in 1940, Chapter 380, to-wit:

"... The court or the judge, as the case may be, shall have the same power over the Commissioners' report as it now has over verdicts of juries in civil actions."

In the *Brown* case, the Court stated:

"The appellants now say for the first time in this proceeding that we should reverse the order of the court below because it was brought on the equity side of the court instead of the law side. They say that eminent domain proceedings are to be brought on the law side of the court, and cite our recent holding in *Dove v. May*, 201 Va. 761, 762, 763, 113 S. E. 2d 840, 841.

"The appellants have not been prejudiced under the procedure followed. They filed responsive pleadings and participated in the hearings without raising the question they now raise. The suit was brought in the circuit court which has both law and equity jurisdiction presided over by the same judge. The procedure outlined under title 3, chapter 1, article 5 was followed, and would have been no different if the proceeding had been filed on the law side of the court. It is not a jurisdictional matter, and it now becomes immaterial as to which side of the court the proceedings were had, since a hearing has been held on the merits without objection. The appellants could have moved to transfer the suit to the law side of the court under § 8-138, Code of 1950, and since they made no such motion they waived their rights and cannot now complain. See *Norfolk and Western R. Co. v. Allen*,"
122 Va. 603, 608, 609, 95 S. E. 406, 407. The fact that the court of equity proceeded to administer legal remedies and establish legal rights as a substitute for a court of law, rather than as a court of equity, does not under the circumstances of this case constitute such an error as to require a reversal. Smith v. Smith, 92 Va. 696, 698, 24 S. E. 280; Iron City Bank v. Isaacsen, 158 Va. 609, 637, 164 S. E. 520, 529. Hence there is no merit in the appellant's contention.

"For the reasons given, the order of the court below is modified to read that the rights and easements to use the additional areas, marked in green, as shown on the plat filed with the description of each parcel in the trial court, required for the proper execution and maintenance of the construction of the project, are temporary rights and easements and shall cease and determine when that part of the project adjacent to all the lands taken in this proceeding has been completed, at which time the State highway commissioner shall have no further right to or interest in the use of the rights and easements obtained. A copy of the order entered in the court below, with its modification or amendment made here, shall be spread both on the chancery order book pursuant to §17-28, Code of 1950, and the common law order book of the Circuit Court of Buchanan County by its clerk, and he shall index in the proper index to deeds in his office the names of all parties to the original proceeding, making reference to the order here modified or amended.

"The State highway commissioner having substantially prevailed, all costs involved in this appeal shall be borne by the appellants."

Your attention is invited to the following:

Section 33-66 of the Code of Virginia (1950) reads as follows:

"Either party may apply for a writ of error to the Supreme Court of Appeals as in other cases at law and a supersedeas may be granted in such cases in the same manner as now provided by law in cases other than cases of appeals of right."

Section 33-65, last amended in 1960, reads as follows:

"All costs of the proceedings in the trial court under this article which are fixed by statute shall be taxed as any other suit in equity and shall be borne by the Commissioner. The court may in its discretion tax as a cost a fee for a survey for the owner, such fee not to exceed fifty dollars." (Italics supplied).

In neither of the above cases did the Court consider or construe Section 33-65, as amended in 1960. As the judgments rendered by the trial court which were being reviewed in these cases were both rendered during 1959, the decisions could hardly have any bearing on the 1960 revision of the statute.

Your attention is also invited to Section 17-28 of the Code, dealing with order books which, among other things provides:

"... in any proceeding brought for the condemnation of property, all proceedings, judgments and decrees of the court shall be recorded in the chancery order book of the court." (Italics supplied).

The 1960 revision of Section 33-65, supra, definitely places such condemnation proceedings in the category of chancery causes and supersedes the language in Section 33-66, supra.

It is, therefore, my opinion that condemnation proceedings, in which the State Highway Commissioner is petitioner, should be treated as chancery case in respect to costs and the same should be recorded in the Chancery Order Book.
HONORABLE J. E. POINTER, JR.
Commonwealth's Attorney for Gloucester County

This will reply to your letter of January 17, 1961, in which you present the following questions:

1. Does the State Highway Commission under section 33-12 (3) of the Code have the authority to adopt a regulation permitting parking for two hours or for any limited time along Route 17 in the Village of Gloucester, and if so, would such regulations have to be published as set forth in Section 33-19 of the Code?

2. Does the County of Gloucester under Section 46.1-180 of the Code have the authority to adopt an ordinance permitting parking for two hours or for any limited time along Route 17 in the Village of Gloucester, and, if so, would the enforcement of such an ordinance be the duty of the County Sheriff's department or the Virginia State Police or both?

Route 17 is a portion of the "State Highway System", which is also referred to as the "Primary System of State Highways". The State Highway System was created by Chapter 10, Acts of the General Assembly of 1918, and was established, constructed and maintained exclusively by the State Highway Commission. It has been so maintained continuously since that time. The Commission has been given the authority by virtue of Section 33-12 (3) to make rules and regulations not in conflict with the laws of this State, covering traffic on and the use of this system. It would thus appear that the jurisdiction and control of the State Highway System is vested in the State Highway Commission.

Section 46.1-180 of the Code of Virginia of 1950, as amended, provides:

"§ 46.1-180. Powers of local authorities generally; limitations on authority; necessity for signs and markers; maximum penalties.—(a) In counties, cities and towns the governing body may adopt ordinances to regulate the operation of vehicles on the highways of such counties, cities and towns not in conflict with the provisions of this title and may repeal, amend or modify such ordinances and may erect appropriate signs or markers on the highway showing the general regulations applicable to the operation of vehicles on such highways. No governing body of any county, city or town may:

(1) Increase or decrease the speed limit within their boundaries unless such increase or decrease in speed shall be based upon an engineering and traffic investigation by such county, city or town and unless such speed area or zone is clearly indicated by markers or signs; provided, however, that the governing body of any city or town, by ordinance, may authorize the city or town manager or such officer thereof as it may designate, to reduce for a temporary period not to exceed sixty days, without such engineering and traffic investigation, the speed limit on any portion of any highway of the city or town on which men are working or where the highway is under construction or repair.

(2) Enact ordinances requiring vehicles to come to a full stop or yield the right of way at a street intersection if one or more of such intersecting streets has been designated as a part of the State highway system in a town which has a population of less than thirty-five hundred people."
"(b) No such ordinance shall be deemed violated if at the time of the alleged violation the sign or marker placed in conformity with this section is missing or is substantially defaced so that an ordinarily observant person under the same circumstances would not be aware of the existence of the ordinance.

"(c) No governing body of a county, city or town may provide penalties for violating a provision of an ordinance adopted pursuant to this section which is greater than the penalty imposed for a similar offense under the provisions of this title."

I am of the opinion that the above quoted provisions do not refer to those portions of the highways within counties which constitute portions of the State Highway System. There are several provisions in the Code which are persuasive in this regard. Section 46.1-248 (b) provides in part:

"No vehicle shall be stopped except close to and parallel to the right-hand edge of the curb * * * except that a vehicle * * * may be parked at an angle where permitted by the State Highway Commission or local authorities with respect to streets and highways under their jurisdiction."

Section 46.1-180.1 refers to

"* * * any city, town or county operating its own system of roads * * * ."

It is noted that Section 46.1-180 provides that the counties, cities and towns may erect appropriate signs or markers on the highways showing the general regulations applicable to the operation of vehicles on such highways. However, Section 46.1-173 provides:

"The State Highway Commission may classify, designate and mark State Highways * * * under the jurisdiction of this State. * * * The driver of a motor vehicle, trailer or semi-trailer shall stop, slow down or regulate the speed * * * to accord with the requirements of road signs erected upon the authority of the State Highway Commission or subject to the provisions of Sections 33-35, 33-36 and 33-115 by local authorities in cities and towns and failure of such driver to comply with this provision shall constitute a misdemeanor * * * ."

It is impressive that after defining "municipal corporation" to include cities of the first class and cities of the second class and incorporated towns, the General Assembly at the same time it enacted Section 46.1-180 also enacted Sections 15-77.55 and 15-77.59:1. Section 15-77.55 provides:

"A municipal corporation may regulate and control the operation of motor and other vehicles and the movement of vehicular and pedestrian traffic and traffic on streets, highways, roads, alleys, bridges, viaducts, subways, overpasses and other public ways and places, provided such regulations shall not be inconsistent with the provisions of Article 2 (Section 46-198, et seq.) [now 46.1-180] of Chapter 4 of Title 46 of this Code, or any amendment or revision thereof or provisions of law which are successor thereto."

Section 15-77.59:1 provides:

"Nothing contained in this Chapter shall have application to any highway, road, street or other public way which constitutes a part of any of the State Highway Systems."

The conclusion that Section 46.1-180 was not to include highways within the State Primary System is supported by the implication arising from the later enactment of Chapter 151, Acts of the General Assembly of 1960, which provides in part:
"The governing body of any county having a density of population in excess of two thousand per square mile may by ordinance provide for the regulation of parking on State highways, streets and public roads within its limits designated in such ordinance ** provided, however, that the parking shall not be regulated under the provisions of this act on any highways constructed and maintained by the State Highway Commission except in accordance with a plan for the regulation of parking thereon approved by the State Highway Commission."

If the General Assembly had intended to give the county the authority to regulate traffic upon the State Primary System, the above enactment would have been unnecessary. I am, therefore, of the opinion that the County of Gloucester would not have authority to adopt an ordinance regulating parking along Route 17 in the Village of Gloucester.

Section 33-12 (3) does give to the State Highway Commission the authority to regulate parking upon the State Highway System and this authority would include parking restrictions for limited periods of time. The State Highway Commission has promulgated a rule and regulation concerning parking on the State Highway System. Section 13 of the Rules and Regulations of the State Highway Commission provides:

"All areas maintained by the State Department of Highways for parking, picnicking or recreational purposes shall be considered as parts of the State Highway System for the purposes of rules and regulations of the State Highway Commission. No person shall violate any parking regulations or restrictions duly posted in such area or any other part of the State Highway System. No person, firm or corporation shall deface, injure, knock down or remove any such signs or restrictions, legally posted nor use any such area contrary to such signs or restrictions."

HIGHWAYS—Secondary System—Abandonment Causes Title to Revert to Owner of Fee Unless Right-of-Way Was Acquired in Fee. (93)

HONORABLE KENNETH M. COVINGTON
Commonwealth's Attorney
Henry County

This is in reply to your letter of September 7, 1960, in which you request my opinion as to the necessity of a deed of conveyance of property formerly a part of the secondary road system in Henry County which has been abandoned pursuant to § 33-76.12 of the Code of Virginia. The portion of the highway in question was abandoned by the Henry County Board of Supervisors after approval from the State Highway Commission, and upon determination by the Board that the altered road serves the same citizens as the old road. The abandoned portion of the road adjoins property owned by the First Baptist Church at Bassett, Virginia. You have asked two questions, which I quote from your letter:

"(1) Does title to real estate encompassed in a secondary road abandoned pursuant to the procedure set forth in § 33-76.12 revert to adjoining property owners by operation of law?"

"(2) If, in light of § 33-76.11, a deed of conveyance is necessary to transfer title to such abandoned roadway should such deed be executed by the Board of Supervisors of Henry County or the State Highway Commission?"

Upon abandonment of a road in the secondary system of State highways, whether by the procedure set forth in § 33-76.8 of the Code or by the alternative method set
forth in § 33-76.12 of the Code, the section of the road so abandoned no longer re-
 mains a public road. I point this out simply to distinguish the effect of such aban-
donment from the effect of a discontinuance of a highway as a part of the secondary
system of State highways as provided in § 33-76.7 of the Code.

Whether a deed of conveyance is necessary to divest the public of its rights in an
abandoned highway, or whether title to such abandoned highway reverts to the
adjoining landowners by operation of law depends upon the nature of the interest
acquired by the public when the right of way for such highway was established.

In those instances in which an easement only was acquired by the public, abandon-
ment of the road results in a reversion of all rights and interest to the owner of the
underlying fee, without further action by the public or highway authorities. In the
absence of evidence to the contrary, the fee is presumed to be in the abutting land-
owners. If the highway is the boundary line between different tracts of land, the
presumption is that the reversion to each owner is to the center of the highway.

When the right of way was acquired by the public in fee, whether by the County
or the State Highway Commissioner, the fee remains in the acquiring authority after
abandonment. Sections 33-76.6, 33-76.11, and 33-76.22 of the Code authorized the
conveyance of such land when the State Highway Commissioner or local governing
body (depending upon which acquired title thereto) determines that such land is no
longer necessary for public use. Section 33-76.6 is applicable when the land was
acquired for the primary system of State highways; § 33-76.11 is applicable when the
land was acquired for the secondary system of State highways; § 33-76.22 is
applicable when the land is owned by the public, but is not a part of either State
system of highways at the time of abandonment as a public road.

In view of the foregoing, I am of the opinion that no deed of conveyance is neces-
sary in order to revest title to the abandoned section of the road in question in the
First Baptist Church, provided that an easement only was acquired for the right
of way and the First Baptist Church is the owner of the underlying fee of the aban-
donated portion of the highway.

HIGHWAYS—Streets in Subdivisions—Drainage Easements—May Be Required
as Condition to Taking Streets into Secondary System. (345)

HONORABLE PHILIP LEE LOTZ
Commonwealth’s Attorney for
Augusta County

This is in reply to your letter of April 15, 1961, in which you request an opinion as
to whether the State Highway Department has a right to require that a drainage
easement for a street system be provided from the point where drainage water leaves a
subdivision to the nearest “live” stream, as a condition precedent to accepting the
subdivision streets into the State Highway system for purposes of maintenance.

The secondary system of street highways had its genesis in the Acts of Assembly of
1932, Chapter 415, page 872, commonly referred to as the Byrd Road Act. The
provisions of that Act, with slight modifications, are now codified as Sections 33-44,

Section 33-44 of the Code defines the secondary system of State highways.

Section 33-46 confers upon the State Highway Commission the control, supervi-
sion, management and jurisdiction of the secondary system of State highways,
which powers were vested in the several governing bodies of the counties prior to the
enactment of the Byrd Road Act.

Section 33-141 of the Code places a limitation upon the provisions of Section 33-46
of the Code to the extent of retaining in the governing bodies of the several counties
the same powers as were vested in them prior to the enactment of the Byrd Road Act
in 1932, with respect to the establishment of new roads for the secondary system.
This section, therefore, provides that the counties shall have the power to incorporate new roads into the secondary system of State highways located within such counties.

Section 33-141 of the Code provides, in part:

"... that no expenditure by the State shall be required upon any new road so established or any old road, the location of which is altered or changed by the local road authorities, except as may be approved by the Commissioner..."

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 roads.

This office has previously held that the State Highway Commissioner may require a deed for the right-of-way as a condition precedent to the acceptance for the purposes of maintenance of a new secondary road. (Opinions of the Attorney General, 1958-1959, pp. 146-147).

It would appear reasonable for the State Highway Commissioner to require that the drainage easements accompanying such roads be of such a nature as not to subject the State to litigation by adjacent landowners.

I am, therefore, of the opinion that the State Highway Commissioner has the power to require that an easement be provided to the nearest natural water course, as a condition precedent to the acceptance of the road for State maintenance. A natural water course has been defined as one where the water has been accustomed to gather and flow along a well-defined channel, which by frequent running has worn or cut into the soil. See: Howlett v. South Norfolk, 193 Va. 564.

HIGHWAYS—Subdivision Streets—Streets Are Public and May Not Be Restricted by Subdivider to Particular Users. (56)

Counties—Subdivision Streets—Subdivider Cannot Be Compelled to Maintain for Public. (56)

August 5, 1960

HONORABLE THOMAS A. WILLIAMS
Commonwealth's Attorney
Northumberland County

This is in reply to your letter of July 27, 1960, which I quote:

"The Board of Supervisors of Northumberland County, on February 29, 1960 enacted a Subdivision Control Ordinance pursuant to Title 15, Chapter 23, Article 2, and the Clerk of said County is prohibited from recording a plat until same is approved by the Board or its duly authorized agent.

"The recording of a plat under 15-792 of the Code of Va., shall operate to transfer in fee simple to the county 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 or passage over the same.

"The present owner of a certain subdivision has complied with the ordinance and is ready to have a plat recorded of his subdivision. He wants to maintain all streets indefinitely and restrict their use to the property owners and their guests.

"Question 1: Can a plat be recorded of a subdivision in a county with a subdivision ordinance and not have its streets owned by the county in fee simple and have its streets restricted from public use?
"Question 2: Can the County of Northumberland require a subdivision owner to maintain the roads and streets for any given length of time for the benefit of the public generally, pursuant to a subdivision ordinance?" 

When one places a plat of a subdivision to record pursuant to Article 2, Chapter 23, Title 15 of the Code, the streets therein are transferred to the county. Thereafter, the control and jurisdiction over such streets are in the public authorities, the subdivider having no greater rights therein than any other adjacent owner, except for minor privileges as set forth in § 15-792 of the Code.

I am of the opinion that one cannot at once comply with the provisions of Article 2, Chapter 23, Title 15 of the Code and continue to restrict the use of the streets in a subdivision to adjacent property owners and their guests.

While I entertain grave doubt that the County would be authorized to require an owner of a subdivision to maintain the streets therein for any given length of time, I am aware of no objection to requiring a subdivider to improve the streets to a particular standard as a condition precedent to recommending such streets be included in the secondary system of State highways.

HOSPITAL—State—Church Cooperation in Establishing—MCV May Not Contract with Church For Operating Church Owned and Controlled Hospital. (295) 

March 27, 1961

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

This is in reply to your letter of March 17, 1961, which has reference to a proposed plan for the construction of a church-supported children's hospital through the joint efforts of the Virginia Methodist Conference and the Medical College of Virginia.

The "statement of mutual interest" enclosed with your letter outlines a preliminary understanding between the parties. For clarity, the plan may be considered in six stages, outlined generally as follows:

1. MCV is to provide a suitable site in the College area, either by sale or lease to the Methodist Church.

2. The Methodist Church is to construct the necessary buildings with the understanding that the land and improvements thereon would revert to the Medical College of Virginia in the event the Methodist Church should withdrew support.

3. A board of trustees for the hospital would be elected by the Virginia Conference of the Methodist Church.

4. The board of trustees would enter into arrangements with the Medical College of Virginia for the operation of the hospital by the Medical College of Virginia.

5. The Medical College of Virginia would be responsible for the operation, but general admission policies would be agreed upon by the Medical College and the board of trustees.

6. The board of trustees would pay the operating costs of the hospital, plus a reasonable fee not exceeding ten percent.

You have requested my advice on the legal propriety of the proposed arrangements, particularly with reference to:

"(1) MCV providing a site by sale or lease to the proposed hospital; (2) MCV entering into suitable arrangements with the Methodist hospital's separate Board of Trustees for operation of the hospital and determin-
nation of admission policies; and (3) whether such arrangements, including either sale or lease of the site, require enabling legislation."

At the outset, may I express my sincere appreciation of such a laudatory endeavor as is here contemplated. Worthy as the purpose may be, however, extreme caution must be exercised to assure against undertaking a venture which runs counter to constitutional safeguards separating the church and State. See Sections 16, 58 and 67 of the Constitution of Virginia, and the First and Fourteenth Amendments to the Federal Constitution.

While I realize that such cooperative hospitals are being conducted in other states, I am not aware of the terms of the agreements between the States and churches, or any court decisions construing those agreements. Hence, we can only be guided by the general principles enunciated by the courts in closely related questions.

There have been several decisions in which the courts have unhesitatingly vitiating legislation which had as its purpose aiding or supporting of religious or sectarian groups or institutions with public funds. 22 A.L.R. 1312; 55 A.L.R. 320; 142 A.L.R. 1083; 42 Am. Jur. 767, Public Funds, § 66.

The Supreme Court of Kentucky has held that church-founded and controlled hospitals might be included in a hospital-aid program if they were operated on a non-profit basis, open to the public of all creeds, and not teaching religion or preferring any one sect over another. Conversely, the Supreme Court of South Carolina suggested that it would not go so far, saying that constitutional prohibitions precluded the allocation of public funds in any manner to any hospital or health center which is wholly or in part under the direction or control of any church, or of any religious or sectarian denomination, society or organization.

In a closely allied question, the Supreme Court of Appeals of Virginia held that an appropriation which would authorize payment of tuition and other designated expenses of children attending sectarian schools, violated the provisions of the Virginia and Federal Constitutions guaranteeing religious freedom and the separation of the church and State.

Section 67 of the Constitution of Virginia reads as follows:

"The General Assembly shall not make any appropriation of public funds or personal property, or of any real estate, to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society; nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the State; except that it may, in its discretion, make appropriations to nonsectarian institutions for the reform of youthful criminals; but nothing herein contained shall prohibit the General Assembly from authorizing counties, cities, or towns to make such appropriations to any charitable institution or association."

While the proposed plan for the operation of the church-owned hospital by the Medical College of Virginia does not contemplate a direct appropriation to the Virginia Methodist Conference, I entertain doubts as to the validity of any direct or indirect aid by the Medical College of Virginia which would be financed by public funds.

Obviously, if land is to be made available to the Church and the hospital is to be owned and controlled in part by the Church through its board of trustees, the participation by the Medical College of Virginia would fall within the ambit of Section 67 of the Constitution of Virginia.

In view of the foregoing, it appears unnecessary to express a view on the particular phases of the proposed plan as requested in your letter. So long as the Church is to retain ownership of the structure, and in a large measure control operations, I am of the opinion that the Medical College of Virginia could not enter into the arrangements for the construction and operation of the hospital.
HOSPITAL AUTHORITY—Appointment of Commissioners. (52)

August 3, 1960

HONORABLE W. Roy SMITH
Member, House of Delegates

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

"I am enclosing copy of letter I have just received from Mr. George Bokinsky, Administrator of Petersburg General Hospital.

"Would you kindly give me your opinion on the following matters of concern to the Petersburg Hospital Authority:

"(1) Is the Hospital Authority of the City of Petersburg authorized by the code to increase its membership or does such increase require authorization of the City Council?

"(2) Does the provision requiring nomination for vacancies to be submitted 'by the remaining members of the Hospital Authority' mean all of the remaining members, or merely a majority of those remaining?"

Section 32-220, as amended, of the Code provides that a hospital authority "shall consist of not more than fifteen commissioners appointed by the mayor." Under this section as it read prior to the amendment by Chapter 305, Acts of 1960, the number of commissioners was fixed and limited to nine members. The amendment became effective on March 15, 1960, and it does not contain any provision changing the status of the nine members who were at that time serving as commissioners. Therefore, in my opinion, those members who were on the Commission on March 15, 1960, are continued in office until their respective terms expire and until their successors have been appointed and have qualified.

The provision with respect to tenure of office as it appeared in Section 32-220 prior to the amendment was not changed. Therefore, unless there are vacancies created by the expiration of the terms of members who were in office on March 15, 1960, the Authority is confronted solely with the question as to the manner of appointing the six new members. If the six places constitute vacancies as contemplated in the third paragraph of this section, then the members serving under prior appointment should submit to the mayor nominations for appointments in accordance with that paragraph. I am inclined to the view that these six extra places should be considered as vacancies to be filled upon recommendation of the present members.

Therefore, with respect to your first question, neither the existing Commission nor the Council may make the appointments necessary to increase the membership to fifteen. The mayor is the only official who has power of appointment and the persons appointed must appear on the list of recommendations made by the Commission. If the mayor is not satisfied with the list of persons submitted to him, the statute provides that he "may successively require any number of additional nominations."

The statute provides that "a majority of the Commissioners shall constitute a quorum." Therefore, with respect to your second question, I am of opinion it is not necessary that all of the remaining members must concur in a recommendation, but that a recommendation made by a majority of such members would meet the statutory requirement.

HOSPITAL AUTHORITY—Appointment of Commissioners. (78)

August 23, 1960

HONORABLE W. Roy SMITH
Member, House of Delegates

This is in reply to your letter of August 17, relating to my opinion furnished you on August 3, 1960 with respect to Section 32-220 of the Code as amended by Chapter 305, Acts of Assembly, 1960. Your letter is as follows:
"With further reference to the matter about which we recently corresponded in connection with the Petersburg General Hospital, I am enclosing copy of a letter received today from Mr. George Bokinsky, Administrator.

"Under the law affecting hospital authorities, who has the responsibility for deciding the size of the authority's membership? Could the present membership be reduced? Is there a minimum as well as maximum membership set forth?"

At the time the Authority at Petersburg was organized, it was established as an Authority consisting of nine commissioners. This number was then mandatory under the provisions of Section 5 of Chapter 186, Acts of Assembly of 1946, which section was codified as Section 32-220 of the Code.

Chapter 305, Acts of 1960, contains no language abolishing the board of commissioners which was necessarily established and appointed under Chapter 186, Acts of 1946. The amendment by Chapter 305, Acts of 1960, instead of providing that the membership shall consist of nine commissioners, provides that the Authority shall consist of not more than fifteen members. In this event, in order to preserve the ratio of members composed of city residents as was contained in the law when originally passed, it is provided that at least two-thirds of the members shall be residents of the city and that five may be from any adjacent city, county or counties. I am of the opinion that the amendment to the act does not envision a decrease in the number of commissioners of an Authority established under Chapter 186, Acts of 1946. That portion of Section 32-220 relating to the terms of office of the commissioners, and the filling of vacancies is the same now as it was prior to the 1960 amendment, and this, in my opinion, further indicates that the General Assembly did not intend by enactment of Chapter 305 to do anything more than authorize an enlargement of the Board of Commissioners to fifteen members. The use of the phrase "not more than fifteen members" would seem to imply that it is not mandatory that the Board shall be increased to that number. The maximum number that may be on the Board is fifteen.

The statute is completely silent as to who has the responsibility for deciding whether the number of commissioners shall be increased. It would appear that the commissioners now serving and the mayor might confer and jointly determine whether or not there is cause for enlarging the board. In event it be decided to enlarge the board, the mayor will have the appointing power as outlined in my opinion of August 3rd. Such procedure would certainly be consistent with the tenor of the amendment.

Since the statute is silent as to who has authority to require an increase in the membership, you can understand that I am not in position and do not presume to do more than suggest that the matter be determined by mutual agreement between the members of the board and the mayor.

HOUSING AUTHORITIES—Members—Must be Residents of Political Subdivision For Which Authority was Created. (136)

Public Officers—Residence—Member of Housing Authority Must be Resident of Political Subdivision for which Created. (136)

October 17, 1960

Honorable William B. Spong, Jr.
Member of the State Senate

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

"The City Council of Portsmouth has requested from our City Attorney, Mr. J. S. Livesay, an opinion on whether a resident of Norfolk County
might be reappointed to the Portsmouth Redevelopment and Housing Authority.

"Mr. Livesay has requested that I obtain an opinion from your office on this matter. I am enclosing herewith a memorandum prepared by Mr. Livesay relative to this and would appreciate an opinion from your office."

You attach to your letter a memorandum prepared by Honorable J. S. Livesay, city attorney of Portsmouth, in which he expresses his opinion with respect to this matter.

The statutes pertaining to housing authorities (Title 36, Chapter 1) do not specifically provide that the commissioners appointed thereunder shall be residents of the city or county in which a Redevelopment and Housing Authority is located. However, under the provisions of this chapter the territorial limits of such an Authority coincides with the territorial limits of the city or county for which it is created, and it is clear that such Authorities are political subdivisions of the Commonwealth and that the commissioners of such Authorities are public officers.

In this latter connection I call your attention to Section 32 of the Constitution of Virginia, which provides, in part, as follows:

"Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other subdivision of the State wherein he resides, 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." (Italics supplied).

The word "subdivision" as used in Section 32 of the Constitution must, in my opinion, be construed to have the character of a "political subdivision," a phrase frequently used by the General Assembly when establishing political entities of the State, counties and cities.

The Constitution of the State of Texas—Section 20, Article 16—in an amendment in 1891, read as follows:

"The legislature shall at its first session enact a law whereby the qualified voters of any county, justices' precinct, town, city (or such subdivision of a county as may be designated by the commissioners' court of said county), may by a majority vote determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."

In the case of Efird v. State, 80 S. W., p. 529, the court pointed out that the word "subdivision," as used in the Constitution, meant some known political subdivision of a county—"that 'such subdivision of the county as may be designated by the commissioners' court meant subdivision of like character—political subdivision of a county."

In C. J. S., Vol. 72, page 223, I find a discussion of the term "political subdivision" which I will not quote at length and in which this statement is found:

"Broadly speaking, a political subdivision of a state is a subdivision thereof to which has been delegated certain functions of local government."

It will be noted that Section 32 of the Constitution of Virginia contains an exception "that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill certain positions and posts in special categories not important to a resolution of the pending question. This would imply that the residence and voting qualifications do apply to an office such as we now have under consideration. The person in question neither resides nor votes in the political subdivision constituting the Housing Authority."
The word "subdivision" as contained in Section 32 of our Constitution, in so far as I can determine, has not been construed by our Supreme Court to mean "political subdivision," and it may be that an interpretation of this term by the court would be advisable.

In light of the language of Section 32 of the Constitution italicized above, I am constrained to believe that a commissioner of a Redevelopment and Housing Authority must reside within the territorial limits of the political subdivision constituting the Authority. To this extent, my view concerning the residence requirements applicable to a commissioner of a Redevelopment and Housing Authority is at variance with that expressed by Mr. Livesay in the memorandum accompanying your communication.

INSURANCE—State Employees Group Policy—Beneficiary—When Insured’s Estate Takes. (169)

Virginia Supplemental Retirement System—Group Life Insurance—Beneficiary When Estate is Named by Insured. (169)

November 17, 1960

HONORABLE CHARLES H. SMITH, Director
Virginia Supplemental Retirement System

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

"Persons entitled to payment of insurance under the group life insurance policy issued to The Board of Trustees of the Virginia Supplemental Retirement System are set forth in Section 51-111.67:10, Code of Virginia.

"It will be noted the amount of group life insurance and group accidental death and dismemberment insurance in force on any employee at the date of his death shall be paid, upon submitting valid claim by the beneficiary, or beneficiaries, designated by the insured, under the provisions of the Virginia Supplemental Retirement System, or other retirement systems administered by The Board, unless a different beneficiary, or beneficiaries, have been designated for the group insurance. In the event a designation has not been made, an order of precedence is established.

"If a beneficiary, or beneficiaries, have been designated, in the manner provided in Section 51-111.67:10, Code of Virginia, with provision for payment to The Estate if the beneficiary, or beneficiaries, predecease the insured, should the payment be made to The Estate, rather than in accordance with the order of precedence established in the Section?"

You attached to your letter Form VSRS-1, in which paragraph 17 reads as follows:

"I, the undersigned, do hereby designate....................................., whose address is............................................................. and whose relationship to me is that of..................................... as the beneficiary to whom I request the Board of Trustees of the Virginia Supplemental Retirement System to pay the total amount of the accumulated contributions standing to my credit in the retirement system in the event of my death either before or after my retirement on a retirement allowance."
"I hereby authorize the said Board of Trustees to make payment to the beneficiary named above, and agree, on behalf of myself and my heirs and assigns, that payments so made shall be a complete discharge of the claim and shall constitute a release of the Virginia Supplemental Retirement System from any further obligation on account of the benefit. I hereby direct that, should I survive the above-mentioned beneficiary, the amount which otherwise would have been payable to the beneficiary shall be paid to my estate or to such other beneficiary as I shall hereafter designate by written designation filed with the Board of Trustees in accordance with the rules and regulations prescribed by it.

(Signature of Member)

As I understand your first question, you wish to know whether or not—in those instances where members of the Retirement System have executed Form VSRS-1 only, including paragraph 17, and the designated beneficiary dies before the policy becomes payable—the proceeds of the insurance under Section 51-111.67:10 will go to the estate of the insured rather than in the manner provided in one of the first four orders of payment as set forth in said Section 51-111.67:10. The answer to this question is that the insurance would go to the estate of the insured who has executed such form VSRS-1, in case his first named beneficiary should predecease him.

With respect to your second question—that is, the last paragraph of your letter—in any case where an insured has designated that his insurance shall be payable to his estate and no alternative designation is made, then the proceeds of the insurance would be payable to the personal representative of the decedent, and not in the order set forth in the latter part of Section 51-111.67:10.

JAMESTOWN FOUNDATION—Corporation—Cost of Operation—Not to be Deducted from Revenues Prior to Deposit into State Treasury. (49)

HONORABLE PARKE ROUSE, JR.
Jamestown Foundation

This is in reply to your letter of July 13, 1960, in which you request my opinion to clarify the roll of the corporation created by the Jamestown Foundation pursuant to Chapter 498, Acts of Assembly of 1958. This corporation, which is the successor to the Virginia 350th Anniversary Celebration Corporation, has the responsibility of buying and selling certain goods and services and conducting some promotional affairs of the corporation and the Foundation.

You are specifically interested in determining (1) whether the corporation is authorized to pursue a course of business under applicable corporate laws; (2) whether expenses paid by the corporation for promotion, entertainment, franchise, fees, licenses and special events for promoting Jamestown Festival Park may be considered in the same light as any other commercial corporation; (3) if the corporation may deduct from gross revenues such expenses of operations, whether or not they be in direct sales cost, in determining net revenues which are obligated to the Foundation.

The answers to your inquiries are governed, to a large extent, by the same general principles enunciated in my letter to you under date of May 20, 1955, relating to the powers of the Virginia 350th Anniversary Celebration Corporation. The subject of that letter was the corporation's power to borrow money. At that time I advised that the corporation was an instrumentality of the Virginia 350th Anniversary Commission and the Commonwealth of Virginia, and, as such, had no greater power than that conferred upon the Commission; hence, no authority existed for the borrowing of money.
The presently existing non-profit corporation, like its predecessor, was established as an instrumentality to assist in the details of administering the affairs of the Foundation (See § 9-98 of the Code of Virginia of 1950, as amended). This corporation has only those powers expressly conferred or which may be inferred by necessary implication, since the Foundation may not create a corporation with greater powers than those conferred by the Act of Assembly which created the Foundation.

One of the major distinctions between the powers conferred upon the Jamestown Foundation by Chapter 498 of the Acts of Assembly of 1958 and those conferred upon its predecessor by Chapter 449, Acts of Assembly of 1954, is in the provision now codified as § 9-99 of the Code, which reads as follows:

"The Foundation, acting by and through the corporation authorized by § 9-97, may contract debts and obligations to the extent of its anticipated revenues. Such debts and obligations shall be paid only from the revenues of the Foundation."

Even with this additional power conferred upon the Foundation, the corporation created by the Foundation may not engage in many activities permitted corporations created under general corporate laws. Lynchburg, etc., Ry. v. Dameron, 95 Va. 545.

Since the corporation is merely an instrumentality of the Foundation, the revenues derived from its operations are to be paid into the State treasury. Section 9-98, Code of Virginia, and § 21, Chapter 610 (Appropriation Act), Acts of Assembly of 1960.

While §9-99 of the Code provides that the debts and obligations of the Foundation, acting by the corporation, are to be paid only from revenues of the Foundation, it is to be noted that the Appropriation Act for the current bennium carries no appropriation for the operations of the corporation as distinguished from those of the Foundation. Therefore, all contractual debts and obligations and other expenses of the corporation must be paid from the appropriation to the Foundation in the current Appropriation Act.

Since the revenues of the corporation must be paid directly into the State treasury, and disbursements made by warrants on the Treasurer, it will be improper for the corporation to deduct any sums from revenues received in its operations prior to payment of such funds into the State treasury.

JUDGES—SALARY—May Not Be Diminished During Term of Office. (355)

HONORABLE FRED W. BATEMAN
Member of the Virginia State Senate

This will acknowledge receipt of your letter of May 12, in which you request the opinion of this office with respect to the questions presented in a letter to you from Mr. Robert B. Smith, as follows:

"The Council fixes the budget for the City of Newport News on a calendar year basis. The budget for 1961 was fixed in December, 1960. This budget sets forth appropriations of funds for various items for the various departments, including funds for salaries, office expenses, capital expenditures debt, etc. During the year the Council is free to make revisions in the budget, but such changes have not been numerous.

"The budget for 1961 sets forth in detail the salaries and expenses for the various courts of record. Included is the section for our Corporation Court. In it the appropriation is made for the City's contribution toward the salary of the Judge of this court, which supplements the State's salary."
The present Judge of the Corporation Court has announced his retirement, effective July 1, 1961, and the Governor has appointed his successor. It should be pointed out that the Corporation Court Judge receives a greater supplement than does the Circuit Court Judge, but the former has been in office for a longer period of time.

"The Question is: Can the City Council revise (downward, for example) the City’s budgeted supplementary salary for the Corporation Court Judge effective July 1, 1961 when the new appointee takes office? The question might be phrased differently: Is the City’s budgeted share of the judge’s salary budgeted for the Corporation Court itself, and not necessarily for the man serving as the Judge? If the Council cannot revise downward the supplementary portion of the Judge’s salary, as of July 1, can the Council do so in fixing the budget for the 1962 year?"

Sections 102 and 103 of the Constitution of Virginia are as follows:

§ 102: "Judges shall be commissioned by the Governor. They shall receive such salaries and allowances as shall be prescribed by law, the amount of which shall not be diminished during their term of office. Their term of office shall commence on the first day of February next following their election. Whenever a vacancy occurs in the office of judge, his successor shall be elected for the unexpired term. The General Assembly may enact such laws as it may deem necessary for the retirement of the said judges with such compensation and such duties as it may prescribe."

§ 103: "The salaries of judges shall be paid out of the State treasury, but the State shall be reimbursed for one-half of the salaries of each of the circuit judges by the counties and cities composing the circuit, according to their respective populations, and of each of the judges of a city of the first class by the city in which such judge presides; except that the entire salary of the judge of the circuit court of the city of Richmond shall be paid by the State. A city may increase the salary of its circuit or city judge, or any one or more of them, such increase to be paid wholly by such city and not to be diminished during the term of office of such judge. A city containing less than ten thousand inhabitants shall pay the salary of its city judge."

It will be observed under these provisions of the Constitution that the salary paid to a judge may not be diminished during his term of office. This inhibition applies to the portion paid by a city as well as the portion paid by the State. Section 102, applicable to State salary, provides, that it "shall not be diminished during their term of office." Section 103 provides that "A city may increase the salary of its circuit or city judge, or any one or more of them, such increase to be paid wholly by such city and not diminished during the term of office of such judge."

A proper determination of the question depends upon whether the inhibitions contained in the Constitution refer to the office or to the incumbent who is appointed to fill a vacancy occurring during a term. I am of the opinion, and this conclusion is supported by an opinion issued by this office on May 15, 1957, to the Commonwealth’s Attorney of the city of Radford, that "term" as used in the Constitution relates to the fixed period of time for which an office may be held. I enclose copy of this opinion which is published in the Attorney General Report for 1956-'57, at page 207. In this opinion we were construing Section 121 of the Constitution, wherein "terms of office" and "tenure of office" appear, and a sharp distinction was drawn between the two phrases. The distinction applies here.

I am unable to find any decisions by our Supreme Court of Appeals with respect to this matter. However, a leading case (cited in 48 C.J.S., page 997) holds that whenever a judge is appointed to fill a vacancy a new term is not created. The term of office for judges of courts of record in Virginia is fixed at eight years. Sections 96 and 99 of the Constitution. Section 102 of the Constitution provides: "Whenever a vacancy occurs in the office of judge, his successor shall be elected for the unexpired term."
The tenure of office of a person who has been appointed to fill a vacancy is, in my opinion, of a different duration than the term of office as fixed by the Constitution or by statute.

Quoting from the case to which I have referred—Clark v. Frohmiller, 88 Pac. (2) 542—we find that court quoting from a case cited therein, as follows:

"A term of office, when the period of the term is fixed by Constitution or statute means the period designated by the Constitution or statute. There should be a certainty and a fixedness about the words 'his term of office.' They were not intended to depend on the mere accident of appointment or election, to fill a vacancy for a month or a year. When a person is appointed or elected to fill a vacancy in a term he merely fills out the term of his predecessor. He does not enter on a new term of office, as does a person who is elected or appointed and takes office at the beginning of the term as fixed by law."

In light of the inhibitions contained in the Constitution and the logic of the reasoning contained in the case which I have cited, I am of the opinion that the Council of the City of Newport News is prohibited from diminishing the salary of the new judge from the amount being paid to the present incumbent during the remainder of his present term.

JUSTICE OF THE PEACE—Fees in Connection with Garnishments. (83)

Garnishment—Fees—Justice of Peace May Charge Fifty Cents for Administering Oath. (83)

Honorable David A. Lyon III
Secretary and Treasurer
Association of Justices of the Peace

August 30, 1960

This is in reply to your letter of August 27, which reads as follows:

"I have been requested by several Justices in the State to ask your opinion on the following:

"(1) Under Section 8-441, page 784, of the 1960 Acts of the Assembly, it appears to be mandatory to furnish a sworn affidavit with each garnishment action.

"QUESTION: Is the cost of the affidavit allowable as part of the court costs?"

"(2) In attachment cases the petition used and sworn to, has six numbered paragraphs setting forth the legal grounds giving the right to bring the attachment action. The petitioner selects the one applicable to his case. See attached form.

"QUESTION: Would a form similar to this attachment petition be sufficient for the affidavit in the case of garnishment actions?"

"(3) In attachment cases prepared by a Justice of the Peace the form is filled in and the oath administered by the Justice.

"QUESTION: Can a Justice of the Peace take affidavits in garnishment cases in which the Justice is requested to do so by the plaintiff or his agent?

"(4) Chapter 581, page 891, of the 1960 Acts of Assembly, lists the fees a Justice of the Peace may charge.

"QUESTION: Is the fee mentioned in paragraph numbered 3 the correct fee for affidavits prepared in cases for the issuance of garnishee actions?"
I shall answer the questions in the order stated:

(1) A justice of the peace has no authority to issue a summons in garnishment proceedings. The judge or clerk of a county court or the clerk of a court of record may issue such summons and the oath required by Section 8-441 of the Code may be administered and certified by a justice of the peace. The fee of a justice of the peace for such service would, in my opinion, be fifty cents. This service, in my opinion, is the type of service contemplated by Section 14-135(2) of the Code rather than paragraph (3) of this section. Paragraph (3) prescribes the fee "for taking and certifying affidavits or depositions of witnesses." The oath required by Section 8-441 is not the oath of a witness.

With respect to whether or not this fee may be included as a part of the costs, you are referred to Section 8-449, which reads as follows:

"Unless such person appear to be liable for more than is so delivered and paid, there shall be no judgment against him for costs. In other cases, judgment under §§ 8-444 and 8-447 may be for such costs, and against such party, as the court may deem just."

(2) With respect to the form to be used in connection with a summons in garnishment, I am enclosing copy of a form that has been adopted by the clerk of one of the counties which I think would be sufficient.

(3) The answer to your question number (3) is in the affirmative.

(4) With respect to this question, in my opinion, the answer must be in the negative, as explained in my answer to your question number (1).

I am enclosing copies of opinions which have gone out of this office in connection with the new garnishment statute which may be of interest. These opinions are dated July 13, 1960, August 11, 1960 and June 20, 1960 and were sent to Honorable George F. Whitley, Jr., Trial Justice of the Isle of Wight County, Honorable S. W. Swanson, Clerk of Circuit Court of Pittsylvania County and Honorable Joseph V. Gorman, Judge of the Municipal Civil Court, Lynchburg, Virginia, respectively.

JUSTICE OF PEACE—Fee in Criminal Cases. (16)
Fees—Justice of Peace—Criminal Cases. (16)

HONORABLE LLEWELLYN S. RICHARDSON
Judge, Municipal Court
Norfolk, Virginia

July 12, 1960

This is in reply to your letter of July 11, which reads as follows:

"I have seen articles in our local newspaper to the effect that you had ruled fees for justice of the peace in criminal matters effective June 27, 1960 (14-136) is of no effect because of some mix-up in its enactment.

"It will be appreciated if you will advise the writer proper fees to be charged as set out in the above section."

Section 14-136 of the Code was amended by Chapter 278, Acts of Assembly of 1960. This amendment to paragraph (1) of this section allows a justice of the peace a fee of $2.00 when the fee is collected from the defendant or other person for the defendant. Prior to this amendment the maximum fee in such cases was $1.50.
There was no other legislation affecting Section 14-136 at this session of the General Assembly and, therefore, the amendment permitting the fee of $2.00 is in effect from June 27, 1960.

This case is different from the one discussed in our opinion of July 6th to Honorable Martin F. Clark relating to the conflicting legislation with respect to Section 14-132.

JUSTICE OF PEACE—May Not be Appointed to Act in Circuit Which Consists of Several Counties. (253)

February 21, 1961

HONORABLE EDWARD E. WILLEY
Member, Virginia State Senate

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

"Will you kindly let me have your opinion as to whether the judge of a judicial circuit consisting of several counties may, under our statutes, appoint a justice of the peace who will have the power to act in all counties in the circuit."

The authority of a judge of a circuit court to appoint a justice of the peace is limited to a magisterial district. Such justice of the peace, however, after his appointment and qualification under the provisions of Section 39-4 of the Code, has jurisdiction throughout the county in which his magisterial district is located.

There is no statute which would authorize a judge of a circuit court to appoint a justice of the peace with authority to exercise the powers of his office in all of the counties of the judicial circuit. The jurisdiction of the justice of the peace would be limited to the county in which he resides and in which the magisterial district for which he was appointed is located.

JUSTICE OF PEACE—No Authority Beyond City or County for which Elected or Appointed. (252)

February 21, 1961

MR. E. R. HUBBARD
Justice of the Peace
Wise, Virginia

This is to acknowledge receipt of your letter of February 18, 1961. I shall answer your inquiries seriatim.

"1. Can a justice of the peace who was elected or appointed for and by the City of Norton, Virginia can he or they issue civil warrants for people who live out of the city limits of Norton, Va., and out of town in Wise County, Va."

No. By the term "people", I understand that you mean persons against whom civil claims are being asserted. The civil warrant must be issued in the city wherein the justice of the peace has jurisdiction (Section 39-1, Code of Virginia (1950) ), and must be made returnable in the county or city wherein the defendant resides. (Section 39-5 of said code). Such a justice of the peace would not have authority to issue a civil warrant against a person residing outside the corporate limits of Norton.
"2. And can he or they [such justices of the peace] write criminal warrants for people out of the city limits of Norton, Va."

No. Such a justice of the peace would have the authority to issue criminal warrants only if the crime was committed within the corporate limits of the city of Norton or within one mile beyond the city limits. (Section 39-1 of the said Code). See, opinion of the Attorney General in letters to the Honorable J. T. Rodgers, Justice of the Peace, dated August 21, 1952 (Annual Report of the Attorney General, 1951-1952, p. 133, and to the Honorable W. Francis Binford, dated November 7, 1958 (Annual Report of the Attorney General, 1958-1959, p. 158.)

"3. And also can any justice of the peace for Wise County, Va. issue civil warrants for people who live in city limits of Norton, Va., and if so can these people be tried [in] other court place for Wise County, Virginia, such as Wise, Appalachia, Big Stone Gap, Pound, Coeburn and St. Paul, and which did make the accounts in these towns but later moved to the city of Norton, Virginia?"

No. A justice of the peace for Wise County has only jurisdiction within the county. (Section 39-4 of the said Code). The civil warrant which he issues must be made returnable in the county before the county court. (Section 39-5 of the said Code). Even if the obligation or debt on which the claim is based was incurred by the debtors in towns outside the city and these debtors later move to Norton, this would not vest a justice of the peace in Wise County with jurisdiction to issue warrants against them.

"4. I also would like to know if any justice of the peace has a legal right to make felony bonds."

Yes. By the term "felony bond", I take it you mean a bail bond issued in a felony case. Pursuant to Section 19.1-110 a justice of the peace before whom a person is brought charged with a misdemeanor or a felony may admit him to bail.

JUVENILE AND DOMESTIC RELATIONS COURT—Child Placed in Custody of Parents Cannot be Extradited—Responsibility of Parents. (67)

HONORABLE C. VINCENT HARDWICK, Judge
Westmoreland County Court

August 11, 1960

This is to acknowledge receipt of your letter of August 8, 1960, in which you request my opinion as to the following:

"A minor has been found to be in violation of the Juvenile and Domestic Relations Court Law and committed to the State Department of Welfare and Institutions. Pending transfer to Richmond, however, he is released in the custody of his parents rather than being confined to jail awaiting notification by the State Department that they have facilities for taking care of the minor. Upon such notification, about ten days later, it is determined that the minor is not with his parents and has not been for about a week. The parents disclaim any knowledge of his whereabouts but rumors indicate that he may be out of the State.

"Under the above circumstances are the parents guilty of any violation of the law. Is the minor a fugitive and may he be proceeded against in the manner provided by statute for fugitives?"
The child was released to the custody of his parents under the provisions of Section 16.1-197 of the Code. I do not find any specific statute governing the duties of such custodians or prescribing penalties for their failure to carry out their duties as such. However, it would seem to me that where a custodian is negligent in performing his duties or where he aided and abetted the child to escape, he would be guilty of contempt. If the parents in this case deliberately permitted the child to escape or their gross or culpable negligence resulted in his escape, they could be charged for obstructing or impeding the administration of justice in violation of Section 18.1-310 of the Code of Virginia of 1950 as amended.

It is, therefore, my opinion that under the circumstances narrated by you, it would be impossible to obtain a conviction in violation of Section 18.1-310, supra, unless there is additional evidence to establish their connection with the boy's escape.

From what you state, the child in this case was found to be within the purview of the Juvenile and Domestic Relations Court Law pursuant to Section 16.1-179 of the Code, and hence he is not denominated as a criminal. Of course, you could issue a warrant for his arrest under the provisions of Section 16.1-27, but this could only effect an apprehension within this State. Section 19.1-73 provides for the procedure to have a person charged with crime extradited. Certainly, a juvenile who is indicted or who is treated as an adult by the Juvenile and Domestic Relations Court under the provisions of Section 16.1-177.1 of the Virginia Code can be extradited. However, in this particular case, the child has apparently committed no indictable crime nor been adjudged a criminal.

It is, therefore, my opinion that the child cannot be extradited.

JUVENILE AND DOMESTIC RELATIONS COURTS—Conviction of Child not to Deprive Him of Rights. (172)

Mr. William P. Campbell
Probation and Parole Officer

This is to acknowledge receipt of your letter of November 18, 1960, in which you state that on April 1, 1954, a boy seventeen years of age was tried in the Augusta County Trial Justic Court on a charge of breaking and entering; sentenced to jail for twelve months, which sentence was suspended, and then placed in probation. You make the following inquiry;

"I would appreciate it if you would advise me whether or not under the above circumstances Via would have lost his political rights and if so what procedure should be taken to have these rights restored."

Section 23 of the Virginia Constitution states:

"The following persons shall be excluded from registering and voting . . . persons convicted after the adoption of this Constitution either within or without this State of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery or perjury . . . ."

The charge of breaking and entering is encompassed in Section 18.1-88 of the Code, which section makes such a charge a felony. Section 73 of the Constitution of Virginia empowers the Governor to remove political disabilities consequent upon conviction of offenses. Although you state that this party was tried by the Augusta Trial Justice Court, I take it that you mean he was tried by the Juvenile and Do-
mestic Relations Court of that county. The Jurisdiction of the Juvenile Court extends to all persons who are charged with having violated the law prior to the time since the person became eighteen years of age. (Section 16.1-158). Under the provisions of Section 16.1-177.1, a child over the age of fourteen may be convicted of a misdemeanor by such court and treated in the same manner as an adult. This, however, was not done in the case you mention, because there the charge was that of a felony and apparently the court handled the matter in the usual and customary manner. Only an examination of the court records would determine the action taken by the court. Your attention is invited to Section 16.1-179, which reads as follows:

"Except as otherwise provided, no adjudication or judgment upon the status of any child under the provisions of this law shall operate to impose any of the disabilities ordinarily imposed by conviction for a crime, nor shall any such child be denominated a criminal by reason of any such adjudication, nor shall such adjudication be denominated a conviction.

"The disposition made of a child or minor or any evidence given in court concerning him shall not operate to disqualify the child in any future civil service application or appointment or military or naval enlistment."

Hence, it would seem that where the Juvenile and Domestic Relations Court has assumed jurisdiction and imposed a punishment on a child, such adjudication is not considered a conviction for a crime and imposes no disabilities ordinarily resulting from a conviction for a crime.

I am, therefore, of the opinion that it will be unnecessary for this young man to seek executive clemency as he is, from what you state, not suffering from any disabilities resulting from being tried in the Juvenile and Domestic Relations Court of Augusta County in 1954.

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction of Offenses Committed by Adults. (23)

July 15, 1960

HONORABLE KERMIT V. ROOKE, Judge
Juvenile and Domestic Relations Court

I am in receipt of your letter of July 13, 1960, in which you call my attention to Section 16.1-158(7) of the Virginia Code and present the following situation and inquiry:

"On June 6, 1960 a Justice of the Peace of the City of Richmond issued a warrant of arrest on the complaint of a police officer of the City of Richmond, charging an adult citizen with the following violation of an ordinance of the City: 'Did unlawfully operate a certain automobile in a reckless manner'. On the same day the Justice of the Peace acting on the complaint of the same officer issued a warrant of arrest against said adult citizen charging the violation of the laws of the Commonwealth of Virginia as follows: 'Did unlawfully operate a certain automobile and did injure one John Lee Jefferson, a minor of the age of 16 years, and did feloniously fail to stop and take an account of the said accident or render aid to the injured party.' Both of these warrants were executed and made returnable to the Traffic Court of the City of Richmond, and on July 8, 1960, the Judge of that Court transferred both cases to this Court, noting upon each warrant that his reason for so transferring the case was that the complaining witness was under the age of 18 years.

* * * *

"It will be greatly appreciated if you will advise me whether these warrants should be tried in this Court or in Traffic Court of the City of Richmond."
Section 16.1-158(7) of the Code of Virginia (1950) as amended, in pertinent part provides:

"Except as hereinafter provided, each juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, and within one mile beyond the corporate limits of said city, concurrent jurisdiction with the juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving:

* * * *

"(7) The prosecution and punishment of persons charged with ill-treatment, abuse, abandonment or neglect of children or with any violation of law which causes or tends to cause a child to come within the purview of this law, or with any other offense against a child except murder and manslaughter; provided, that in prosecution for other felonies over which the court shall have jurisdiction, such jurisdiction shall be limited to that of examining magistrate."

It would appear that the offense charged in the first warrant mentioned in your communication is that of the reckless operation of a motor vehicle in violation of a city ordinance and that the offense charged in the second warrant is that of failure to stop a motor vehicle at the scene of an accident and make the report and render the assistance required by Section 46.1-176 of the Virginia Code. I am constrained to believe that neither of these offenses involves the "ill-treatment, abuse, abandonment or neglect" of a child, or a violation of law which "cause or tends to cause a child to come within the purview" of the Juvenile and Domestic Relations Court Law, or "any other offense against a child" within the meaning of the above quoted statute. Essentially, the violations of law charged in the warrants under consideration do not involve offenses against, or injury to, a child, and I do not believe that such violations should be deemed within the ambit of Section 16.1-158(7) of the Virginia Code merely because a child is injured in an accident resulting from or associated with the specific offenses in question.

I, therefore, concur in the view expressed in your communication that the offenses charged in the warrants concerning which you inquire are not cognizable by the Juvenile and Domestic Relations Court of the City of Richmond under Section 16.1-158(7) and that such warrants should be referred for disposition to the Traffic Court of the City of Richmond.

JUVENILE AND DOMESTIC RELATIONS COURTS—Parent and Child—Duty of Child to Support Not Absolute—Not Necessary for Petition to Allege Financial Condition of Child. (126)

HONORABLE O. RAYMOND CUNDIFF, Judge
Juvenile and Domestic Relations Court
Lynchburg, Virginia

October 10, 1960

I am in receipt of your letter of October 5, 1960, in which you call my attention to Section 20-88 of the Virginia Code which relates to the duty of children to provide, or assist in providing, for the support of their parents under certain circumstances. In this connection, you state:

"I would appreciate your giving me your opinion as to whether or not the petitioner should allege in the petition, at the time it is filed in accordance with the statute, that the defendant has sufficient earning capacity or income to contribute towards his parents' support, or is it sufficient that the petitioner allege that they do not know defendant's income or earning capacity."
Section 20-88 of the Code of Virginia (1950) as amended, provides:

"It shall be the joint and several duty of all persons sixteen years of age or over, of sufficient earning capacity or income, after reasonably providing for his own immediate family, to provide or assist in providing for the support and maintenance of his or her mother or aged or infirm father, he or she being then and there in necessitous circumstances.

"If there be more than one person bound to support the same parent or parents, the persons so bound to support shall jointly and severally share equitably in the discharge of such duty. Taking into consideration the needs of the parent or parents and the circumstances affecting the ability of each person to discharge the duty of support, the court having jurisdiction shall have the power to determine and order the payment, by such person or persons so bound to support, of that amount for support and maintenance which the court may seem just. Where the court ascertains that any person has failed to render his proper share in such support and maintenance it may, upon the complaint of any party or on its own motion, compel contribution by that person to any person or authority which has theretofore contributed to the support or maintenance of the parent or parents. The court may from time to time revise the orders entered by it or by any other court having jurisdiction under the provisions of this section, in such manner as to it may seem just.

"Where such courts have been or shall be established, the juvenile and domestic relations court shall have exclusive original jurisdiction in all cases arising under this section. Where no such courts have been established, jurisdiction for the enforcement of this section shall be vested in the corporation or hustings courts in cities and in the circuit courts of the counties. The person accused, or whose estate is to be subjected, shall have the same right of appeal as is provided by law in other cases.

"All proceedings under this section shall conform as nearly as possible to the proceedings under the other provisions of this chapter, and the other provisions of this chapter shall apply to cases arising under this section in like manner as though they were incorporated in this section. Prosecutions under this section shall be in the jurisdiction where the parent or parents reside.

"Any person violating the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five hundred dollars or imprisonment in jail for a period not exceeding twelve months, or both." (Italics supplied)

As you point out in your communication, the duty imposed upon children by the above quoted statute is not absolute, but is conditioned upon a child's financial ability to support, or assist in supporting, his parent or parents after reasonably providing for his own immediate family. Bagwell v. Doyle and Russell, 187 Va. 844, 48 S. E. (2d) 229. Moreover, the statute in question prescribes that all proceedings thereunder shall conform as nearly as possible to proceedings under the antecedent provisions of Title 20, Chapter 5, of the Virginia Code, and that such provisions shall apply to cases arising under Section 20-88 of the Virginia Code as though such provisions were incorporated in that statute.

Particularly pertinent in this latter connection are Sections 20-64 and 20-65 of the Virginia Code, which respectively provide:

"§ 20-64.—Proceedings under this chapter may be instituted upon petition, verified by oath or affirmation, filed by the wife or child or by any probation officer or by any State or local law enforcement officer or by any State or local public welfare officer upon information received, or by any other person having knowledge of the facts, and the petition shall set forth the facts and circumstances of the case." (Italics supplied)

"§ 20-65.—Upon the filing of such petition the court or the judge in vacation may cause an investigation of the case to be made by a probation officer
or other person designated for that purpose who shall report thereon to the court and the court, after considering the report and hearing the complainant, may in its discretion dismiss the petition, or cause the husband or father, as the case may be, to be brought before it by summons or warrant issued by the court, and thereupon it shall proceed to hear and determine the case on its merits. If no such investigation be ordered the court shall forthwith issue its summons or warrant against the husband or father and upon its execution proceed as above provided." (Italics supplied)

In light of the provisions of the statutes quoted immediately above, I am of the opinion that, in an appropriate case, a local public welfare officer may file a petition under Section 20-88 of the Virginia Code, verified by oath or affirmation, in which petition such officer alleges—upon information received—that the child against whom the proceedings are being instituted possesses sufficient earning capacity, after reasonably providing for his own immediate family, to provide for or contribute to the support of his parent or parents who are in necessitous circumstances. Although it does not appear from the language of Section 20-64 that such local public welfare officer need have personal knowledge of the earning capacity of the child sought to be charged with the duty of parental support, I do not believe that a petition in which ignorance of such child's earning capacity is alleged should be filed. In any event, the court in which a petition under Section 20-88 is filed may cause an investigation of the case to be made before process is issued, and the court may dismiss the petition, after considering the report and hearing the complainant, if the court is of opinion that sufficient evidence of the earning capacity of the child has not been produced.

JUVENILE AND DOMESTIC RELATIONS COURTS—Prisoners Under Age of 18 Years Must be Separated from Adult Prisoners even though Tried as Adult. (218)

HONORABLE FREDERICK L. WRIGHT
Clerk of Court
Juvenile and Domestic Relations Court of Roanoke

This is to acknowledge receipt of your letter of December 28, 1960, in which you request my opinion on the following question:

"What we are mainly concerned with is whether a child over the age of fourteen after having been adjudicated an adult, sentenced to serve time in jail, must be separated from the adult prisoners or whether he can be grouped with the others inasmuch as he has been dealt the same punishment?"

Sections 16.1-196 and 16.1-177.1 of the Code of Virginia (1950), respectively provide:

"§ 16.1-196.—No person known or alleged to be under the age of eighteen years shall be transported or conveyed in a police patrol wagon, or confined in any police station, prison, jail, or lockup, or be transported or detained in association with criminals or vicious or dissolute persons; except that a child fourteen years of age or older may, with the consent of the judge, clerk or the juvenile probation officer, be placed in a jail or other place of detention for adults in a room or ward entirely separate from adults."

"§ 16.1-177.1.—If a child fourteen years of age or over is charged with an offense which, if committed by an adult, would be a misdemeanor, and the court deems that such child cannot be adequately controlled or in-
duced to lead a correct life by use of the various disciplinary and corrective measures available to the court under this law, then the court may, in such cases try such child and impose the penalties which are authorized to be imposed on adults for such violations."

You express the view that these sections appear to be in conflict. Section 16.1-177.1 authorizes the court to impose, under certain circumstances, the same penalty on a child as that imposed upon an adult. Section 16.1-196 deals with the manner in which any child under the age of eighteen shall be detained or confined providing that the child should be separated from adults in a different room or ward. This has nothing to do with the punishment imposed upon the child by the court. Section 16.1-197 also provides for separate detention cells for children under eighteen years of age. It would follow that in all jails or places used for confining prisoners, such juveniles must be separated from adults.

It is, therefore, my opinion that any child over the age of fourteen upon whom the court has imposed a penalty which would be ordinarily imposed upon adults for the same offense should be separated from adult prisoners while serving time in jail.

JUVENILE AND DOMESTIC RELATIONS COURTS—When Court Must Order Investigation of Mental, etc., Condition. (53)

HONORABLE BENJ. L. CAMPBELL, Judge
Juvenile and Domestic Relations Court

August 4, 1960

I am in receipt of your letter of July 28, 1960, in which you call my attention to the amendments to Section 16.1-176(b) of the Virginia Code which were made during the recent regular session of the General Assembly of Virginia. You request an opinion upon the effect of these amendments.

Section 16.1-176(a) of the Virginia Code prescribes that the various juvenile and domestic relations courts of the Commonwealth—after an investigation as prescribed in Section 16.1-176(b) and a hearing thereon—may either retain jurisdiction of certain cases involving juveniles or certify them for proper criminal proceedings before an appropriate court of record. Section 16.1-176(a) also prescribes that the Attorney for the Commonwealth may present certain cases involving juveniles to the grand jury of an appropriate court of record and that the return of a true bill by the grand jury shall terminate the jurisdiction of the juvenile and domestic relations court over such cases.

Prior to the enactment of the amendments which you mention in your communication, Section 16.1-176(b) of the Virginia Code in pertinent part provided:

"In all cases under this section the court shall, unless such information is otherwise available to it from a prior investigation and report to another court, require an investigation of the physical, mental and social condition and personality of the child or minor and the facts and circumstances surrounding the violation of the law which is the cause of his being before the court . . . Provided, however, if the mandatory provisions of this section have been complied with by the juvenile court and the results thereof certified to a court of record, the latter need not order such investigation." (Italics Supplied).

As recently amended, the above quoted provisions of the Virginia Code now prescribes:

"In all cases under this section the court may, unless such information is otherwise available to it from a prior investigation and report to another court, require an investigation of the physical, mental and social condition
and personality of the child or minor and the facts and circumstances surrounding the violation of the law which is the cause of his being before the court . . . Provided, however, if an investigation and report has been made by the juvenile court and the results thereof certified to a court of record, the latter need not order such investigation." (Italics supplied).

Prior to the effective date of the recent amendments, the statute under consideration required that an investigation of the type prescribed in paragraph (b) thereof be conducted in all cases embraced within the statute. The investigation in question was made mandatory by the statute, and unless it had previously been ordered by the juvenile and domestic relations court and the results thereof certified to the court of record, the latter court was required to order such an investigation conducted.

I am constrained to believe that juvenile and domestic relations courts are still required—by the initial sentence of Section 16.1-176(a)—to order an investigation of the type described in paragraph (b), before such courts may decide whether or not they will retain jurisdiction of a case under the statute or certify the matter for proper criminal proceedings before an appropriate court of record. With this exception, it would appear that such investigations are no longer mandatory under the provisions of Section 16.1-176 of the Virginia Code, as recently amended.

JUVENILE COURTS—Probation Officers—State's Part of Compensation. (81)

August 29, 1960

HONORABLE W. ROY SMITH
Member, House of Delegates

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

"I would appreciate your official opinion on the following question: "In view of (1) the language of Section 16.1-150 of the Code of Virginia, which states that the 'Commonwealth shall reimburse' localities one-half of the compensation of judges, associate judges, clerks and other employees of juvenile courts out of funds appropriated for the payment of criminal costs, and in view of (2) the fact that the criminal fund is a 'sum sufficient' appropriation, by what authority can the Department of Welfare and Institutions withhold the state's reimbursement?

"This presents quite a problem to localities which formulate their budgets dependent on state reimbursement and then do not receive what had been counted on."

In addition to your letter, I have received further information from Mr. Roy F. Ash, city manager for the City of Petersburg.

Due to the provisions of Section 16.1-206 of the Code, I am of the opinion that Section 16.1-150 is not intended to apply to probation officers. Section 16.1-206 reads as follows:

"The compensation of probation officers appointed in accordance with § 16.1-205 shall be fixed by the governing body of the city or county in which they serve, in accordance with regulations of the Department, and shall be paid out of the county or city treasury; provided that one-half of such compensation shall be reimbursed to the city or county by the State from funds appropriated to the Department of Welfare and Institutions."

This section, you will note, specifically provides that one-half of the compensation of the probation officers shall be reimbursed to the city or county by the State from funds appropriated to the Department of Welfare and Institutions.
The Appropriation Act for the biennium commencing July 1, 1958 and ending June 30, 1960, in Item 403, makes an appropriation for reimbursement of the cities and counties for salaries of probation officers appointed under Section 16.1-206 of $192,000 for the first year and $199,000 for the second year.

I consulted with Mr. W. L. Lukhard, Chief, Bureau of Accounting for the Department of Welfare and Institutions, and he states that the appropriation made in Item 403 was not sufficient to make reimbursements thereunder for the fiscal year July 1, 1958 to June 30, 1960, for more than eleven months.

In connection with the appropriation made in the criminal fund for criminal charges which is Item 65 of the Appropriation Act for 1958-60, I find that it is provided therein that out of that appropriation shall be paid not exceeding $190,000 the first year and $200,000 the second year for reimbursing counties and cities under the provisions of Section 16.1-150 of the Code. I understand from Mr. Lukhard that, due to the limitation which I have pointed out, only about 45% of the expenses covered by this item could be reimbursed during the last biennium.

JUVENILES—Attorney Appointed to Represent under Section 16.1-173 of Code not Entitled to Payment from Public Funds. (146)

Attorneys—Fees—Not Entitled to be Paid from Public Funds for Representing Minor Pursuant to Section 16.1-173 of Code. (146)

October 24, 1960

HONORABLE LEON OWENS
Commonwealth’s Attorney for Russell County

I am in receipt of your letter of October 14, 1960, in which you make inquiry concerning possible remuneration of attorneys appointed to represent the interests of a child or minor pursuant to Section 16.1-173 of the Virginia Code.

In this connection, I am of the opinion that Section 19.1-317 of the Virginia Code to which you refer in your communication, does not contemplate the payment of attorneys appointed in accordance with the provisions of Section 16.1-173 of the Virginia Code, nor have I been able to discover any other provision of Virginia law which authorizes or directs payment out of public funds for services of the type under consideration.

LIBRARIES—Librarian Certificates—Authority of State Board over Certification Conditions. (154)

October 28, 1960

HONORABLE RANDOLPH W. CHURCH
State Librarian

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

"Under Section 54-268 of the Code this Board issues a librarian’s professional certificate to applicants who meet any one of the following conditions: (1) graduation from a library school accredited by the American Library Association; (2) passage of an examination given by the Board; (3) submission of satisfactory credentials as defined by the Rules of the Board as noted below; and (4) proven service, prior to July 1, 1937, as librarian or full-time professional assistant in any library in Virginia to which the law applies."
"Under Section 54-267 of the Code and consistent with Title 9, Chapter 1.1 of the Code (General Administrative Agencies Act), this Board has issued Rules (copy attached) setting out procedures and defining, Rule 6, the nature of credentials. Under this definition credentials are limited to proving certain types of service in libraries outside of the Commonwealth. Since questions have been raised before this Board as to its unwillingness to interpret credentials as relating to service in Virginia libraries after July 1, 1937, we would appreciate your opinion on the following:

"(1) In view of the prior service limitation in Section 54-268, noted above, does this Board have a legal right to define credentials in terms of service in Virginia libraries after July 1, 1937?

"(2) If the Board does have this right, would it not be necessary, to amend the rules, to follow procedures set out in Sections 9-6.8, 9-6.6 and 9-6.4 of the Code?"

The terminal paragraph of Section 54-268 of the Code is not, in my opinion, a restriction upon the power of the Library Board to promulgate regulations establishing a basis upon which librarian certificates may be awarded. The Board may adopt regulations under which a certificate based upon service as a librarian or full time professional assistant subsequent to July 1, 1937, may be issued without examination within the scope of the provisions of the first paragraph of this section of the Code.

Therefore, in my opinion, the Board does have the right to define credentials in terms of service in Virginia libraries after July 1, 1937.

With respect to question (2), I feel that any amendment to your rules and regulations should be adopted in accordance with the procedure in Chapter 1.1 of Title 9 of the Code.

LIBRARIES—State Library Board—Grant to Municipality—Permissible to Town even Though Associated with Regional Library. (233)

February 6, 1961

HONORABLE RANDOLPH W. CHURCH
State Librarian

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

"The Wythe-Grayson Regional Public Library has been operating under a regional board appointed to represent the two counties (Sections 42-5, 42-9 of the Code) and has been receiving State and Federal funds from the State Library Board. In the fiscal year, 1960-'61, it has failed to meet the standards of the State Library Board (Section 42-28 of the Code) and funds have been withheld.

"The town of Wytheville is seeking a municipal grant (Section 42-26 of the Code,) and the question has arisen as to whether it can now qualify independently from Wythe-Grayson for State funds even though it is associated with the regional system.

"I should appreciate your opinion as to whether the State Library Board may make such a grant."

In my opinion the State Library Board would have authority under Section 42-26 of the Code to make a grant to the town of Wytheville so long as the regional public library is ineligible to receive funds from the State Library.

In my opinion the limitations set forth in Section 42-23 would not preclude the State Library Board from making this grant to the town of Wytheville.
**LIBRARIES—State Library Board—Not Required to Hold Public Hearing on Petition to Amend Rules and Regulations.** (201)

**Administrative Procedure—Agency Not Required to Hold Hearing on Petition Filed to Amend Rules and Regulations.** (201)

December 16, 1960

**HONORABLE RANDOLPH W. CHurch**
Secretary
State Board for the Certification of Librarians

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

"This Board has received a petition to amend its rules by the addition of a new section respecting the granting of librarians' certificates on the basis of credentials.

"Under Section 9-6.8 of the Code, any interested person may petition an administrative agency requesting the amendment of a rule, and in normal course such agency would pass on such a petition, and if a change was deemed advisable such an amendment would be acted upon after advertisement and public hearing under the provisions of Code sections 9-6.4 and 9-6.6.

"I should appreciate your opinion as to whether it is necessary or proper for an agency to advertise and hold a public hearing on any proposed amendment which the agency has officially rejected."

Under Section 54-267 of the Code, the State Board for the Certification of Librarians is authorized to promulgate rules and regulations as therein set forth, which, if promulgated, would be in accordance with the provisions of Chapter 1.1, Title 9 of the Code, which prescribes the procedure to be followed by State agencies in such matters. Section 9-6.8 of the Code provides that:

"Any interested person may petition an agency requesting the promulgation, amendment or repeal of any rule."

Your question, as I understand it, is whether or not it is mandatory under Section 9-6.8 of the Code that your agency shall hold a public hearing on every petition filed thereunder. In my opinion, there is no such mandate. The Board, in my opinion, may examine such petitions and may reject them without placing them upon its agenda for further consideration at a public hearing.

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**LOTTERIES—Consideration—Participation in Enterprise Without Charge or Purchase Does Not Constitute Consideration Under Section 18.1-340.1 of Virginia Code.** (304)

April 4, 1961

**HONORABLE ELWOOD H. RICHARDSON, JR.**
Attorney for the Commonwealth
Hampton

I am in receipt of your letter of March 27, 1961, in which you inquire whether or not a certain promotional program would contravene the anti-lottery laws of Virginia. Section 18.1-340 et seq., Code of Virginia (1950) as amended. As outlined in your communication, the enterprise in question would be conducted in the following manner:

"A senior high school student in the Peninsula area is eligible to be awarded a $1,000.00 Scholarship to any college or university of their choice
if he registers with one of the participating service station dealers. In con-
sideration for this scholarship, it is hoped that the registered candidate will
invite their friends and relatives to do business with these dealers.

"Each time a person comes into a participating station, whether he
purchases anything or not, he will be issued a ballot in order that he may
vote for the student of his choice to be the recipient of the above award."

Particularly pertinent to the resolution of your inquiry is Section 18.1-340.1 of the
Virginia Code which prescribes:

"In any prosecution under § 18.1-340, no consideration shall be deemed
to have passed or been given because of any person's attendance upon the
premises of another; his execution, mailing or delivery of an entry blank; his
answering of questions, verbally or in writing; his witnessing of a demon-
stration or other proceeding; or any one or more thereof, where no charge is
made to, paid by, or any purchase required of him in connection therewith."

It would appear from your communication that the only requirement imposed
upon students as a condition of eligibility to receive a scholarship is registration with
one of the service station dealers participating in the venture under consideration.
No charge is made to or paid by any student, nor is any purchase required or service
demanded of him, in connection with such registration. Moreover, as you point out,
no charge is made to or paid by an individual, nor is any purchase required of him,
in connection with the procurement or execution of a ballot for the student of his
choice. I am, therefore, of the opinion that no consideration within the meaning of
Section 18.1-340.1 of the Virginia Code would be deemed to have passed or been
given in the conduct of the program concerning which you inquire, and that such
activity would not constitute a lottery under the anti-lottery laws of Virginia.

MARRIAGE—Invalidity Due To Prohibition in Former Divorce Decree—Cured
Under Certain Circumstances. (259)

HONORABLE WILLIAM B. HOPKINS
Member, Virginia State Senate

This is in reply to your letter of February 24, in which you present the following
questions:

"A was divorced from B on July 23, 1933 in Virginia and the divorce de-
cree provided that neither party shall remarry within six months from the
date of the entering of the decree. C was divorced from D on August 23,
1933, in Virginia, and the divorce decree likewise provided that neither
party shall remarry within six months from the date of the entering of the
decree. On October 31, 1933, A and C were married to each other in Johnson
County, Tennessee. A and C lived together as husband and wife in Virginia
until the death of A on September 10, 1957.

"The questions presented are (1) does Section 20-118 of the Code of
Virginia as amended at the 1960 Session of the Legislature validate the
marriage of A and C; and (2) does C have the status of the lawful widow of A
under said section?"

Section 20-118 of the Code was amended by Chapter 399 of the Acts of 1960 so as
to strike out all of the section following the word "marriage" in the second line and, in
lieu thereof, substitute the italicized language. The entire section now reads as follows:

"§ 20-118. On the dissolution of the bond of matrimony for any cause
arising subsequent to the date of the marriage, * if objections or exceptions
are noted or filed to the final decree and a bond is given staying the execution thereof, the court shall decree that neither party shall remarry pending the perfecting of an appeal from said final judgment of the trial court.

"Marriages heretofore celebrated in violation of any prohibition against remarriage shall not hereafter be deemed to be invalid because of the violation of such prohibition, provided that the parties to such a marriage have continued to reside together as husband and wife until the first day of July 1960, or until such time as one of the parties dies prior to July one, nineteen hundred sixty and provided further, that no litigation pending on the effective date hereof shall be affected hereby."

It will be noted that under the second paragraph of Section 20-118 as amended, marriages celebrated before the effective date of the amendment shall not thereafter be deemed to be invalid because of a violation of the prohibition contained in this section prior to its amendment, provided that the parties to such marriage continue to reside together as husband and wife until the first day of July 1960, which was four days after the amendment became effective, or until such time as one of the parties dies prior to July 1, 1960. It is further provided that no litigation pending on June 27, 1960, shall be affected by the amendment.

Under the state of facts presented by you the husband who had violated Section 20-118 by marrying on October 31, 1933, within the prohibitive six-month period, died on September 10, 1957, which was prior to July 1, 1960. The marriage of October 31, 1933, was void under the decision in Heflinger v. Heflinger, 136 Va. 289.

The portion of the amendment validating such a marriage where one party dies prior to July 1, 1960 should not, in my opinion, be construed to mean that such death would have to occur between June 27, 1960, the effective date of the Act, and July 1, 1960. The amendment is remedial in character and it must be construed so as to achieve the obvious beneficent purposes of the Act. Therefore, I am of the opinion that the marriage was validated by the Legislature by the enactment of the amendment, unless litigation with respect to the matter was pending on June 27, 1960.

With respect to your question as to whether C is the lawful widow of A, if there was no such litigation pending on the effective date of the amendment, the marriage, as I have pointed out, was, in my opinion, validated subject to the limitation that any property rights of others that may have vested upon the death of A are not affected by the amendment.

MARRIAGE—Issuance of License After Divorce—No Duty on Clerk to Ascertain Legal Effect of Foreign Divorce Decree. (343)

HONORABLE THOMAS R. MILLER, Clerk
Hustings Court of the City of Richmond

May 2, 1961

This will reply to your letter of April 28, 1961, in which you inquire whether or not you may properly issue a marriage license under the following circumstances described in your communication:

"The applicant exhibited to me a divorce decree from the Court of .........., Mexico, wherein the Plaintiff had flown down to Mexico from his usual residence in Stamford, Conn., on one day, obtained this decree, his wife being domiciled in the United States, her appearance in Mexico being by an attorney appointed on that day, the Plaintiff returning to Conn. the next day."
This office has previously ruled that there is no duty upon the clerk of a court to ascertain the relationship of parties applying for a marriage license, and that it is not "incumbent upon the clerk of the court to investigate the legal effect of divorces granted" in other jurisdictions. See Report of the Attorney General, 1941-1942, pp. 90, 91; cf., Report of the Attorney General, 1938-1939, p. 163. In light of these rulings, I am of the opinion that you may properly issue a marriage license in the situation concerning which you inquire.

MARRIAGE-LICENSE—Must Be Obtained in State Where Solemnized Prior to Ceremony. (364)

June 5, 1961

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

This is in reply to your letter of June 1, which reads, in part, as follows:

"A complex situation has arisen here and we shall appreciate your opinion thereon. A man from Shenandoah County, Virginia, procured a license in West Virginia to marry a lady whose home was in West Virginia. They appeared before a licensed minister in Page County, Virginia, who performed the rites of matrimony on this West Virginia license. Subsequently the minister realized he made a mistake and should not have performed the ceremony. He and the aforesaid couple then came to this office and procured another license. The same minister thinking that the previous ceremony was sufficient did not go through the ceremony again but executed and returned the license certificate to us.

"Our question is whether we may again issue a license to this couple so that the ceremony may be properly and legally performed."

Under the state of facts presented by you, there is a doubt as to the validity of the marriage ceremony which was performed. The license which was issued in the State of West Virginia did not, of course, authorize the marriage ceremony to be performed outside the State of West Virginia. No ceremony was performed under the license issued in your county, and therefore, there has been no marriage pursuant to said license. In view of the circumstances, I am of the opinion that it would be proper for you to issue an additional license to this couple so that the ceremony can be performed under the authority of such license. Another way of remedying the situation would be for this couple to return to West Virginia to the jurisdiction in which the original license was issued and obtain a new license from that office and have a ceremony performed in the State of West Virginia by a person who is qualified in that jurisdiction to perform the marriage ceremony.

I am enclosing copy of an opinion issued by this office on January 24, 1952, published in Report of the Attorney General for 1951-'52, at page 101, which involved a related question. You will note in that opinion the Attorney General stated that "the simple way out would be for them to secure a license and have the ceremony performed as directed by law."

You did not state the date of the issuance of the license by your office. If sixty days have not elapsed, any additional license issued within that time should be of duplicate of the original and having the same expiration date as the original. See § 20-14.1 and the opinion of this office in the Report of Attorney General for 1959-'60, at page 223.
REPORT OF THE ATTORNEY GENERAL

MAYORS—Authorized to Issue Warrants for Violations of Town Ordinances—Where Returnable. (45)

July 29, 1960

HONORABLE W. CARRINGTON THOMPSON
Member House of Delegates

This is in reply to your letter of July 26, 1960, in which you request my opinion as to the jurisdiction of the Mayor of the Town of Gretna to issue warrants for violations of town ordinances and before whom such warrants are returnable.

The Mayor of the Town of Gretna presided over a municipal court prior to the reorganization of courts not of record by enactment of Chapter 555 of the Acts of Assembly of 1956, subsequently codified as Title 16.1 of the Code of Virginia: hence, that court continues as a court of limited jurisdiction within the meaning of § 16.1-70 of the Code, which provides, in part, as follows:

"All existing courts in cities and towns created under former § 16-129, and all similar courts created under the provisions of municipal charters, which courts are presided over by mayors, justices of the peace, police justices or other trial officers however designated and the jurisdiction of which is limited to cases involving violations of city or town ordinances or of cases instituted for the collection of city or town taxes or assessments or other debts due and owing to such city or town, are hereby continued with the same jurisdiction and powers heretofore conferred upon them and shall, on and after July 1, 1956, be designated and known as the police courts of the respective cities and towns. The trial officer presiding over each such court shall thereafter be known as the police justice of such city or town. * * * ."

Section 16.1-75 of the Code provides, in part, as follows:

"* * * Any mayor or other trial officer authorized to preside over a court of limited jurisdiction under this chapter shall, however, have within his territorial jurisdiction, the same power to issue attachments, warrants and subpoenas within the jurisdiction of such county court as is conferred upon the judge of the court, and he shall also have power to grant bail in any case in which he is authorized by general law to grant bail, and to receive his fee therefor. But any such attachment, warrant or subpoena shall be made returnable before the county court for action thereon."

In view of the foregoing, I am of the opinion that the Mayor of the Town of Gretna may issue warrants charging violations of town ordinances, which warrants are returnable to the County Court of Pittsylvania County.

MEDICINE—Board of Medical Examiners—By-Laws Governing Examinations Not Subject to Administrative Agencies Act. (88)

September 7, 1960

DR. R. M. COX, Secretary
Virginia Board of Medical Examiners

This is to acknowledge receipt of your letter of August 31, 1960, to Mr. D. Gardiner Tyler, in which you enclosed a copy of the by-laws of the Board of Medical Examiners adopted in 1955 and a copy of the amendments thereto adopted by the board in December, 1959. You inquire as to whether the provisions of the "General Administrative Agencies Act", Chapter 1, Title 9, Code of Virginia (1950) must be followed in order that these by-laws and amendments may be valid.
Under the provisions of the aforesaid act, the term "rule" is defined as follows:

" 'Rule' means 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 or of the State government, nor regulations of which notice is customarily given to the public only by markers or signs, nor mere instructions."

(§ 9-6.2 (b)).

The Board of Medical Examiners has authority to adopt rules, regulations and by-laws under the provisions of Section 54-291 of the Code, which reads as follows:

"The Board may prescribe rules and regulations and by-laws for its own proceedings and government, and the representatives of each branch of the healing arts examined hereunder shall prescribe rules and regulations and by-laws for their own proceedings and government.

"No by-law or rule by which the vote of a majority of the Board is required for any specified action shall be suspended or repealed by a smaller vote than that required for action thereunder."

An examination of the said by-laws and amendments thereto indicate that the same are prescribed for the government and proceedings of the board relative to the conducting of examinations of applicants who desire to qualify for the practice of medicine, etc., which concern the internal management or operation of the board in this particular.

It is the opinion of this office that the said by-laws and amendments are not the character of rules and regulations included under the provisions of the General Administrative Agencies Act, supra. Therefore, it is not necessary for you to have the same published and filed in accordance with that act.

MEDICINE—Board of Medical Examiners—Eligibility of Members for Reappointment—Two Term Limitation does not Include Partial Term when Appointed to Fill Vacancy in Unexpired Term. (148)

Dr. R. M. Cox
Secretary-Treasurer
Board of Medical Examiners

This is in reply to your letter of October 19 to Governor Almond, which letter he has forwarded to this office with the request that we furnish you with an official opinion regarding the question raised by you.

You state that one of the present members of the Board whose term will expire June 30, 1961, was first appointed a member of the Board to fill the unexpired term ending June 30, 1956. You wish to know whether or not this person is eligible for appointment to the term beginning July 1, 1961 and expiring June 30, 1966.

Section 54-283 of the Code provides that the term of office for the members of the Board of Medical Examiners shall be five years. This section reads as follows:

"The term of office of the members of the Board shall be five years, or until their successors are appointed and have qualified, and they shall be men learned in their particular school of practice and duly licensed, active practitioners in this State.

"As the terms of office respectively of the members expire by limitation the Governor shall appoint, to fill the vacancies so occasioned, qualified
persons whose terms shall be for five years from the day on which that of their immediate predecessors expired. All vacancies occurring on the Board shall be filled by the Governor."

Section 54-285 of the Code relates to the limitation as to the number of terms as may be served. This section reads as follows:

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

This section was enacted by Chapter 195 of the Acts of Assembly, 1944, and it was provided that incumbency during the current term when the Act became effective constituted the first of two successive terms with respect to eligibility for appointment. There is no comparable language in the Act referred to or any amendments thereto providing that service as an appointee to fill a subsequent unexpired term shall constitute the first of two successive terms.

The phrase "term of office" has generally been construed to refer to a term fixed by law, as distinguished from tenure of office. Tenure of office generally refers to the time an individual actually holds an office. Words & Phrases, Vol. 41; 67 C.J.S., p. 195.

In as much as the Board member about whom you inquire will not have served two terms as fixed by law, I am of opinion that he is eligible for reappointment to an additional term.

MEDICINE—BOARD OF MEDICAL EXAMINERS—Physical Therapist—When License May be Issued Without Examination. (31) 

Licenses—Physical Therapist. Under What Conditions to be Issued. (31) 

July 25, 1960

DOCTOR RUSSELL M. COX, Secretary 
Virginia Board of Medical Examiners

This is to acknowledge receipt of your letter of July 18, 1960 in which you request my opinion as to the applicability of Section 15-310.1 of the Code concerning the licensing of a physical therapist. You state that this applicant is now on active duty with the Armed Forces at Fort Lee, Virginia and is practicing her profession as a physical therapist there. It seems that this person made an application on January 14, 1959 for a license. That on February 29, 1960 your Board requested this person to return the license inasmuch as it had been erroneously issued, which request was refused. This person was not practicing in Virginia immediately prior to June 27, 1958 as she was in Texas from 1956 to 1958. However, she had practiced at the Maryview Hospital in Portsmouth, Virginia, from 1947 to 1951. You state that there was no question about her professional qualifications as a physical therapist. She has now re-applied for a license for the year beginning July 1, 1960 and her application has not yet been acted upon. You ask two specific questions:

1. Was an error made in licensing this person under the "grandfather" clause?

2. Having issued her a license, do we have the legal authority to refuse her registration for this fiscal year?
The statute under which this party seeks to be licensed is Section 15-310.1 of the Code, which reads as follows:

"The Board shall grant a certificate or license to practice physical therapy without examination to any person who:

(a) Applies for such license or certificate by March one, nineteen hundred fifty-nine or, who, if serving in the armed forces of the United States of America on June 27, 1958, applies for registration within six months after discharge, separation or release from the Armed Forces; (b) On June 27, 1958, has met the requirements listed in paragraphs (a), (b), (c), and (d) of § 54-308.1; (c) Is practicing physical therapy, as defined and limited in this chapter, full time in the State of Virginia and was so practicing on and for at least one year prior to June 27, 1958, or the date of his application, or, if serving in the Armed Forces on June 27, 1958, was practicing full time in the State of Virginia for at least one year prior to June 27, 1958; and (d) At the time of making such application pays a fee of thirty dollars to the Board."

Analyzing this section, paragraph (a) applies to the time in which the application can be made; paragraph (b) that the applicant must be qualified professionally and paragraph (d) the applicant must pay a fee when the application is filed. There seems to be no question that this person has met the requirements in these paragraphs. Insofar as paragraph (c) is concerned there seems to be doubt whether she comes within that category. The first clause of that section, paragraph (c), provides that the applicant must show that he is practicing physical therapy full time in Virginia and was so practicing at least one year prior to June 27, 1958 or the date of his application. This clause applies to all applicants except those that are serving in the Armed Forces. The last clause of Section (c) applies only to persons serving in the Armed Forces. It is noted that the language is practically the same as the applicant must show that he was practicing in Virginia for at least one year prior to June 27, 1958 but the phrase "or the date of his application" is omitted. Certainly this last clause is placed there for the benefit of those persons that are serving in the Armed Forces to enable them to qualify when they can show that they have practiced their profession in Virginia for a full year prior to June 27, 1958. I do not think this is limited to the year immediately preceding June 27, 1958. If it were, there would be no purpose of having this particular clause in the statute, as the applicant would come within the same category as others that are not in the Armed Services. Obviously the purpose of this clause is to enable those individuals who were practicing their profession in Virginia prior to the time they entered the Armed Forces, which time was prior to June 27, 1958 or who have practiced in Virginia while members of the Armed Forces for a year prior to June 27, 1958 to secure a license without undergoing an examination.

The answer, therefore, to your question number one is that there was no error made by your Board in licensing this individual as a physical therapist under the so-called "grandfather" clause. It would follow, therefore, that the answer to question number two would be in the negative.

MEDICINE—Practice—What Constitutes. (84)

Medicine—License to Practice—Contract Medical Officers for United States Exempt. (84)

Dr. R. M. Cox
Secretary-Treasurer
Board of Medical Examiners

This is in reply to your letter of August 31, which reads as follows:
"I am writing to ask for an interpretation as to 'what constitutes practice.'"

"It has come to my attention that a civilian doctor is employed in the Dispensary of our local Navy Yard, practicing on both civilian personnel that work in the yard and live in the community and dependents of military personnel that live in the community. This doctor is not licensed to practice medicine in the State of Virginia. I have read carefully Section 54-276.6 of the Code and it would seem to me that this doctor is not covered by this section. The legal authority in the Navy Yard claims that the doctor is so covered.

"An interpretation from your office will be very greatly appreciated."

With respect to "what constitutes practice," I direct attention to Section 54-273(3) and 54-275 of the Code. In my opinion the doctor in question is engaged in the practice of medicine. I shall not presume to enlarge upon the definitions contained in these two sections.

As I construe your letter, the main question is whether or not the practice of medicine in the manner stated comes within the exemptions set forth in Section 54-276.6 of the Code. This section is as follows:

"Nothing in this chapter shall be construed to affect or interfere with the performance of the duties of any commissioned or contract medical officer or physical therapist in active service in the Army, Navy, Coast Guard, Marine Corps, Air Force, Public Health Service or Marine Hospital Service of the United States while so commissioned and serving."

I assume that this doctor is a "contract medical officer." The logical interpretation of this phrase is that it applies to a civilian doctor who is employed by one of the designated agencies of the United States government to perform medical services for such agency. The contract between the doctor and the agency must be within the limits of the authority of the agency under the federal laws and regulations. Service performed by a doctor when confined to his duties set out in his contract of employment, if within the scope of the authority of the naval yard, would, in my opinion, come within the exemption.

MENTAL HOSPITALS—Temporary Care—Commitment Following Observation.

(62)

August 8, 1960

Dr. Hiram W. Davis, Commissioner
Department of Mental Hygiene

This is in reply to your letter of August 3, to which you attached a letter to you under date of July 28 from Dr. Howard H. Ashbury, Superintendent of Eastern State Hospital, which reads as follows:

"We are enclosing Verifax copies of letters from Judge DeHardit of Gloucester, Virginia in regard to his refusal to commit two of our patients from Temporary Care to regular commitment under Statutes 37-109 and 37-110.

"It would be greatly appreciated if you, in relation to these commitments, could have the Attorney General give us a ruling on this Statute or let us know, if we must hold the commissions at this hospital and try to collect the fees from the community.

"The number of temporary admissions are growing rapidly and we are apprehensive over holding this type admission beyond forty-five days."
It is noted from the copies of the letters from Honorable John E. DeHardit, judge of the county court of Gloucester County, that he has declined to approve commitment papers sent to him under Section 109 of the Code. Judge DeHardit suggested that commitment proceedings be held at the hospital with two physicians present and counsel for the patient, so that the commitment may be made in the regular manner.

I am of opinion that the position taken by Judge DeHardit is proper.

Section 37-109 of the Code was amended by Chapter 154, Acts of 1958, so as to read as follows:

"If any person admitted under §§ 37-103 to 37-106 is found upon observation to be mentally ill, epileptic or mentally deficient within forty-five days after he is admitted to the hospital, he may be committed as provided in Article 1 of the chapter. The superintendent of the hospital to which the person has been admitted shall notify the judge of the circuit or corporation court, or judge of the county or city court from which the person was received. The superintendent shall forward with the notification two copies of the medical certificate and the order of commitment."

This section, you will note, now provides that whenever a person who is admitted for observation under Article 3, Chapter 3, Title 37, is found to be mentally ill, epileptic or mentally deficient within forty-five days after he was admitted to the hospital, he may be committed as provided in Article 1 of Chapter 3 (Sections 37-61, et seq.).

Although Section 37-110 of the Code was not amended, it would seem that its provisions are no longer applicable.

I suggest that the procedure outlined in Sections 37-61, et seq., be followed in all such cases. In that event the fees and expenses provided for in Section 37-75 of the Code will be applicable.

MENTAL HYGIENE AND HOSPITALS—Authority of Board to Pay For Cost of X-Ray and Vaccination of Employees. (352)

May 11, 1961

DR. HIRAM W. DAVIS, Commissioner
Department of Mental Hygiene and Hospitals

This is to acknowledge receipt of your letter of May 3, 1961, in which you state in part:

"The State Hospital Board has under its jurisdiction five mental hospitals, two training schools and the Virginia Treatment Center for Children. The primary purpose of these institutions is care and treatment of our patients.

"As a further protection to the welfare of the patients it has been the practice for a number of years at the hospitals to require a physical examination, chest X-Ray, laboratory examination, smallpox vaccination and typhoid injections. These are all approved public health preventive measures, and have been provided by the hospital staffs at no cost to the employees. Likewise, booster injections of typhoid vaccine are administered on a yearly basis.

"The medical staff recommends the continuation of the above procedures, and is doing so until further notice.

"Since the physical examinations with the above inclusions entail some expenditure of State money, the question has been raised: Is this a valid and constitutional expenditure of State money within the budget appropriations?"
I find no statute which requires or permits the inoculation, vaccination and chest X-rays of State employees. Of course, the money appropriated for the operation of State hospitals and institutions which you mention may be used at the discretion of the Hospital Board for the accomplishment of the purposes for which the same are maintained. The employees connected with such hospitals are exposed to hazards to which other State employees are not ordinarily subjected, and which would no doubt make it necessary that they submit to these inoculations, vaccinations and examinations from time to time. It is not only for the best interest of the employee, but also to the interest of the State that they remain in good health so long as they are employed.

I think it can be said that this type of service rendered State employees is incidental to the proper operation of such institutions. Unless the contract of employment is conditioned upon the employee's furnishing at his own expense evidence of these inoculations, vaccinations and examinations, it is my opinion that it is proper that the money appropriated for the operation of these hospitals, training schools and centers be used for this purpose.

MENTAL HYGIENE AND HOSPITALS—Commitment Proceeding—Notice to be Given Commissioner of Mental Hygiene and Hospitals. (333)

April 25, 1961

DR. HIRAM W. DAVIS, Commissioner
Department of Mental Hygiene and Hospitals

This is to acknowledge receipt of your letter of April 21, 1961, in which you enclosed a copy of a letter from the Honorable John R. Porter, Jr., Clerk of the Court of Hustings for the City of Portsmouth, dated April 10, 1961, in which he raises the following question:

"Under Section 37-77 of the Code of Virginia it has been the practice of this office to send notification of the filing in this clerk's office of the record of proceedings before a lunacy commission, etc., to-wit: Form No. DMH 1017. Many of these commitments are from courts other than this Municipal Court, and it is my interpretation of this statute that we would be required to file this notice in any instance where commitment papers are filed in this office for indexing, regardless of the forum of the adjudication or hearing itself . . . ."

After a commitment proceeding has been accomplished, one copy of the proceeding is transmitted to the Superintendent of the hospital or colony to which admission is sought, and the other copy is filed with the clerk of the court of the county or city in which deeds are admitted to record, in accordance with the provisions of Section 37-69 of the Code. The clerk then enters the copy in a book and properly indexes the same. Your attention is referred to Section 37-77 of the Code, which reads in part:

"As soon as the record of proceedings before a commission wherein a person is found to be mentally-ill, mentally-deficient, epileptic or inebriate, is filed in the office of the clerk of the court pursuant to § 37-69, such clerk shall at once notify the Commissioner of Mental Hygiene and Hospitals, giving the name and age, sex, and color of the mentally-ill, epileptic, mentally-deficient, or inebriate person, the date of the finding of the commission and the custody to which the mentally-ill, epileptic, mentally-deficient or inebriate person was committed."
It would follow from this statute that when the commitment proceedings are filed under the provisions of Section 37-69 of the Code in the appropriate clerk's office, the clerk thereof must notify the Commissioner of Mental Hygiene and Hospitals, regardless of the forum in which the adjudication or hearing took place. I am, therefore, of the opinion that the procedure followed by Mr. Porter in this connection is correct.

MENTAL HYGIENE AND HOSPITALS—Sewage Disposal Service by City—Obligated to Pay for Service. (72)

August 23, 1960

HONORABLE ALFRED E. H. RUTH, Director
Department of Mental Hygiene and Hospitals

This is in reply to the letter of August 16, 1960, written in your absence by Mr. William C. Lewis, in which he inquires as to whether it is legally proper for the Department of Mental Hygiene and Hospitals to pay the sewage service charge demanded by the City of Staunton, Virginia, in connection with the Western State Hospital.

The State is a user of the sewage disposal services offered by the City of Staunton and is subject to the same service charges as is any other user. I am, therefore, of the opinion that the Board is legally obligated to honor the bill submitted by the City of Staunton for this service charge.

MENTALLY ILL—Commitment—Children—Responsibility of Parents for Expense of Care. (371)

Parent and Child—Responsibility for Care of Child in Mental Institution—When Parents Must Bear Expense. (371)

June 8, 1961

HONORABLE ALFRED E. H. RUTH
Director of Mental Hospitals
Department of Mental Hygiene and Hospitals

I am in receipt of your letter of June 2, 1961, in which you present the following situation and inquiry:

"The question has come up as to the legal responsibility of parents of dependent children committed to our mental hospitals by the local Welfare Departments.

"The case in question is one where a child was committed to the local Department of Public Welfare by the Juvenile & Domestic Relations Court and subsequently committed to one of our mental hospitals by that agency.

"We will appreciate your opinion as to whether or not the parents would be liable in such cases for support payments under Section 37-125.1 of the Code of Virginia."

Section 37-125.1 of the Code of Virginia (1950) as amended, provides:

"Any person who has been or who may be committed or admitted to any hospital for the mentally-ill or colony for the epileptic or 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 one hundred twenty-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).

Also pertinent to the question posed in your communication is Section 16.1-185 of the Virginia Code, which prescribes:

"Whenever a child is committed by the court to any institution or agency, public or private, the court may, after giving the parents reasonable opportunity to be heard, order and decree that such parents shall pay in such manner as the court may direct such sum, within their ability to pay, as will cover in whole or in part the support of such child; and if the parents willfully fail or refuse to pay such sum, the court may proceed against them as for contempt or for nonsupport. When payment is ordered to be made to the court, the court shall, on or before the tenth day of the month following receipt thereof, forward such payment to the institution or agency, public or private, to which such child has been committed."

In this connection, I am forwarding to you a copy of an opinion of this office, dated August 4, 1959, to the Honorable Kermit V. Rooke, Judge of the Juvenile and Domestic Relations Court of the City of Richmond, in which it was ruled that the obligation of parents to support a child who has been committed to an institution or agency by a juvenile and domestic relations court may be enforced by such court "pursuant to the authority conferred and in the manner prescribed in Section 16.1-185 of the Virginia Code." See Report of the Attorney General, 1959-1960, pp. 111, 113. In light of this opinion, I am constrained to believe that the parents of a child who has been committed to one of the mental hospitals of the Commonwealth by a juvenile and domestic relations court would not be liable under Section 37-125.1 of the Virginia Code for the expenses of such child's care, treatment and maintenance if the juvenile and domestic relations court in question has exercised the authority conferred upon it by Section 16.1-185 and has specified the amount, if any, which shall be paid by the parents for the support of the child committed. However in those instances in which (1) a child is committed by a juvenile and domestic relations court which does not exercise the authority conferred upon it by Section 16.1-185 of the Virginia Code or (2) a child is committed by a tribunal or commission other than a juvenile and domestic relations court, I am of the opinion that parents of such child would be liable for the expenses of his care, treatment and maintenance in accordance with the provisions of Section 37-125.1 of the Virginia Code.

MENTALLY ILL—Commitment—Cost of Proceeding—Borne By State When Person Already Confined in Institution at Time of Proceeding. (354)

May 15, 1961

DR. HIRAM W. DAVIS, Commissioner
Department of Mental Hygiene and Hospitals

This is in reference to your letters of May 3 and May 10, 1961. From the enclosures in these letters it appears that eleven persons were committed to the Eastern State Hospital for observation under the provisions of Section 37-99 of the Code of Virginia. Subsequent thereto, regular commitments proceedings were held; the procedure in Section 37-61, et. seq., (Article I, Chapter 3, Title 37) being followed. Commitment was not made after observation under Section 37-102. However, all these patients
remained in confinement at the hospital after being placed there for observation under Section 37-99, and were so confined at the time they were formally committed. The question presented is whether the Eastern State Hospital is liable for the commitment fees incurred as a result of the formal commitment proceedings.

Section 37-75 of the Code provides in part:

"... and provided that if any person at the time of commitment be confined to any State supported institution such fees shall be paid by the State."

The Honorable J. Lindsay Almond, Jr., while he was Attorney General, held that such fees were payable by the State in a letter to the Honorable B. Hunter Barrow, dated April 25, 1957, (Annual Report of the Attorney General, 1956-1957, p. 139), a copy of which is enclosed herewith. In a letter to you, dated October 20, 1959, the Honorable Albertis S. Harrison, Jr., then Attorney General, concurred in this view. (Annual Report of the Attorney General, 1959-1960, p. 234). I am in accord with these views.

Therefore, it is the opinion of this office that inasmuch as the eleven patients were in the custody of and confined in the said hospital at the time they were adjudged mentally ill by formal commitment proceedings, the fees for such commitments are payable by the State from the funds appropriated for the maintenance and operation of the aforesaid hospital.

MENTALLY ILL—Commitment—Physicians Summoned under § 37-62 of Code Entitled to Fee Although Staff Members of State Institution. (178)

November 29, 1960

HONORABLE RHEA F. MOORE, JR., Clerk
Tazewell County

This is in reply to your letter of November 25, 1960, in which you request my opinion as to the propriety of the Board of Supervisors' payment of physicians' fees in commitment proceedings instituted pursuant to Article 1, Chapter 3 of Title 37 of the Code of Virginia when it appears that the physicians are staff members of a State-supported institution.

Section 37-75 of the Code of Virginia of 1950, as amended, provides for the expense of commitment of a person alleged to be mentally ill or mentally defective to be paid by the county or city of which such person was a legal resident at the time of such commitment. The fees, costs and expenses incurred in connection with the examination, when paid, may be recovered from the person so examined, or from his estate, or from the person at whose request the proceedings were instituted.

I presume that the two physicians whose bills are in question were summoned to act on the Commitment Commission pursuant to § 37-62 of the Code of Virginia. If so, I am of the opinion that they are entitled to the $10.00 fee specified for such services, even though they may be employed as staff physicians at a State-supported institution, such as the University of Virginia Hospital.

MENTALLY ILL—Commitment to Institution—Proceeding to Compel Payment of Support of Dependent is Civil in Nature. (230)

February 1, 1961

HONORABLE ROBERT I. ASBURY
Commonwealth's Attorney for Smyth County

This is to acknowledge receipt of your letter of January 25, 1961, in which you state in part:
"Will you please give your opinion concerning the following factual situation and State law concerned therewith.

"The facts are as follows: A is the husband of B. B was committed to Southwestern State Hospital at Marion, Virginia in 1944. The Department of Mental Hygiene and Hospitals has investigated, from time to time, the ability of A to pay part of the expenses for the care, treatment and maintenance of Mrs. B at the said hospital, as required by Section 37-25.4 of the Code of Virginia of 1950, as amended. However, A has been unwilling to make a voluntary contract with the Department for support and maintenance of B. C, the son of A and B, has also been unwilling to make a voluntary agreement with the Department. The investigation made by the Department indicates that both A and C are financially able to comply with the requirements of Section 37-125.1.

"The Department has contacted me as Attorney for the Commonwealth in Smyth County and requested that I institute proceedings on behalf of the Department requiring A and C to contribute to the support of B.

"Section 37-25.1 sets out who is liable for expenses on the monthly limit, which, in my opinion, should be sufficient to cover the proceedings against A. Section 20-88 imposes the legal liability on C.

"My question is one of procedure. Must I proceed in the Smyth County Court against both A and C on a petition for order of support, or must I proceed on the chancery side of the Circuit Court of Smyth County?"

The procedure under Chapter 5, Title 20, of the Code, including Section 20-88, before the Juvenile and Domestic Relations Court is criminal in nature. Hence, if a person is adjudged guilty of non-support and directed to contribute to the support of his parent and fails to do so, he may be punished by contempt, fine or imprisonment. The procedure under Article 6, Chapter 3, Title 37, of the Code is civil in nature. This is manifested by the language in Section 37-125.12, to-wit:

"Any order or judgment rendered by the court hereunder shall have the same force and effect and shall be enforced in the same manner as any judgment in favor of the Commonwealth."

I am, therefore, of the opinion that upon receiving a notice from the Department of Mental Hygiene and Hospitals, the Commonwealth’s Attorney should proceed in a court of record in carrying out the duties imposed upon him under Section 37-125.7 of the Code (1950) as amended.

MENTALLY ILL—Commitment—Where Patient Confined Before and After Commissioned Order. Source of Payment of Expense of Confinement. (384)

HONORABLE PAUL D. BROWN, Judge
County Court of Arlington County

June 22, 1961

This is in reply to your letter of June 13, 1961, in which you make several inquiries concerning the disposition of persons arrested pursuant to Chapter 3 of Title 37 of the Code, both before and after the commitment proceeding therein contemplated. You are particularly interested in my views regarding the proper place of dentention for nonviolent persons, the extent of custodial care required over persons confined in a hospital and the cost of such confinement.

Section 37-61 of the Code reads as follows:

"Any circuit or corporation judge, or any trial justice, when any person in his county or city is alleged to be mentally-ill, epileptic, mentally-de-
ficient or inebriate, upon the written complaint and information of any respectable citizen, shall issue his warrant, ordering such person to be brought before him. The judge or justice may issue the warrant on his own motion.

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

As may be noted, this statute, as well as those following, is silent as to the disposition of the person while awaiting the hearing or during the proceeding; however, subsequent statutes clearly prohibit confinement in jail following commitment, except under specified circumstances. See § 37-78, et seq.

The extent to which the Legislature has gone to guard against the confinement of such persons in jail after the commitment would strongly indicate that some place of detention other than the jail should be made available before the commitment. Manifestly, precautions against confinement in jail prior to commitment is no less important to the welfare of the person concerned than is confinement after such commitment.

If the person arrested must be confined while awaiting the finding of the commission, I think the place of detention is a matter to be determined by the judge upon whose warrant such proceeding is being held. Whether a continual guard by the sheriff or his staff is warranted would depend upon the peculiar circumstances of the individual case. In the absence of some evidence which would indicate a propensity toward violence, dangerous conduct, or a tendency to escape, I would think ordinary hospital supervision would be sufficient.

While there is no statutory provision expressly authorizing the incurring of any expense in the confinement of such persons before commitment, I am of the opinion that § 37-75 of the Code is ample authority from which to draw such implication. That section provides in part as follows:

" *** All expenses incurred, whether such person be committed to any State hospital or colony or not, including the fees, attendance mileage aforesaid, shall be paid by the county or city of which such person was a legal resident at the time of such commitment; provided, that if such person's residence is not established in the State of Virginia, costs shall be paid by the State, and provided that if any such person, at the time of commitment, be confined in any State-supported institution, such fee shall be paid by the State. ***"

Your second area of inquiry relates to the confinement of non-violent persons following the commitment order.

Section 37-72 of the Code places the responsibility for the safekeeping and proper care of any person committed upon the sheriff until delivered to the assigned institution or its authorized agent. While awaiting such delivery, the sheriff is required to care for such patients in a hospital or other institution mentioned in § 37-71 of the Code, except in certain cases not here material.

As to the necessity of providing constant surveillance by the sheriff, I should think this to be a determination within his sound discretion. He should, of course, be guided by the circumstances of the individual case.

I am aware of no statute which fixes the standard charge for temporary hospital care, either before or after the commitment order. Section 37-71 of the Code designates the source of the funds for payment, but is silent as to the amount. That section reads in part as follows:

" *** The cost of care before removal to the State hospital or colony to which the patient is committed is to be paid from the State treasury from the same funds as for care in jail."
It is worthy of note that § 37-80 of the Code specifies the allowance for confinement in jail in those instances in which such confinement is permitted. Had the General Assembly intended to limit the allowance for hospital care, it could have easily done so when specifying the fund from which such expense is to be paid. I am of the opinion that the charge for such confinement is that fixed by the hospital or other approved institution, and is to be paid from the State Treasury.

MOTOR VEHICLES—Attempting to Operate Stalled Vehicle Under Influence of Intoxicants—Violation of Statute. (241)

Criminal Procedure—Granting Commonwealth Continuance Not Violation of Rule Against Double Jeopardy. (241)

February 15, 1961

HONORABLE WILLIAM P. HAY, JR., Judge
Prince Edward County Court and
Juvenile and Domestic Relations Court

This will reply to your letter of February 8, 1961, in which you inquire whether or not Section 18.1-54 (formerly 18-75) of the Virginia Code, which forbids any person to drive or operate an automobile or motor vehicle while under the influence of alcoholic intoxicants, would apply to the following situation described in your communication:

"A person is apprehended under the wheel with motor running, of a vehicle situated on a railroad track in such a manner that there is no traction obtainable but the rear wheel with the left rear wheel turning or spinning. The vehicle appears to be unable to move in any direction. No one has seen the operator actually move the vehicle.

"The person is charged under the Statute driving under the influence, the question of intoxication is not in issue, as the blood test is more than sufficient to show the degree of intoxication.

"The accused, when first spoken to by the officers makes the following statement to them: 'I am going to Pamplin, get in and I will take you with me'."

In this connection, I am forwarding to you a copy of an opinion of this office, dated April 20, 1954, to the Honorable Meredith C. Dortch, Commonwealth's Attorney for Mecklenburg County, in which a substantially identical situation was considered. See Report of the Attorney General, 1953-1954, p. 138. In light of the views expressed in the enclosed opinion, I am constrained to believe that the incident you mention would fall within the prohibition of the statute in question.

You also present the following situation and inquiry:

"A warrant charging a speeding violation in which the speed check was made by Radar is called and read to the accused, who enters a plea of not guilty, the trial has begun, and the Commonwealth realizing it does not have all the necessary witnesses present to comply with the Statutes, requests a continuance. Having placed the defendant in jeopardy, is the Commonwealth entitled to a continuance at this stage?"

I do not believe that the constitutional proscription forbidding a person's being put twice in jeopardy for the same offence would preclude the granting of a continuance in the above stated instance. See Ashlock v. Commonwealth, 108 Va. 877, 61 S. E. 752; Benton v. Commonwealth, 91 Va. 782, 21 S. E. 495. In light of the well settled rule that a motion for continuance is one addressed to the sound discretion of the court, I am of the opinion that resolution of the question of whether or not the Commonwealth would be entitled to a continuance in the situation you outlined would depend upon a consideration of all the circumstances of the case.
MOTOR VEHICLES—Bicycles—Sirens not Prohibited. (82)
Crimes—Sirens on Bicycles—Not Unlawful. (82)

August 29, 1960

MR. ROBERT L. DeHAVEN, Sheriff
Frederick County

This to acknowledge receipt of your letter of August 24, 1960, in which you state in part:

"We have many complaints of bicycles equipped with sirens.
"Would like to know, if in your opinion, Section 46.1-284, Code of Virginia, covers our problem, or if there is any other Act forbidding such activity."

Section 46.1-284 of the Code makes it unlawful for a vehicle to be equipped with a siren which is not authorized and approved by the Superintendent of State Police. However, in Section 46.1-1(34) the term "vehicle" does not apply to devices moved by human power, which would include bicycles. The following sections of the Motor Vehicle Code mention bicycles, to-wit: 46.1-229, 46.1-235 and 46.1-263. However, none of these applies to the use of sirens.

I am, therefore, of the opinion that Section 46.1-284 is not applicable in regulating sirens used on bicycles.

MOTOR VEHICLES—Blood Test for Alcohol—Effect of Failure of Officer to Properly Reseal Blood Sample Container. (318)

April 11, 1961

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

I am in receipt of your letter of April 8, 1961, in which you present the following situation and inquiry:

"If a person is arrested and prosecuted for driving under the influence of intoxicants and requests a blood test, as provided by the statute, and the officer fails to seal the bottle in which the blood sample is mailed to the State Chemist and due to this fact the said Chemist refuses to analyze the blood sample, would such prove fatal to the prosecution if the defendant pleads not guilty?"

"It would be assumed, in the above situation, that if the Commonwealth introduced testimony of witnesses who saw and observed the accused at the time of the arrest and it subsequently developed that the blood sample was not analyzed due to the situation set out above and that the accused would move to strike the evidence introduced on behalf of the Commonwealth."

This office has previously ruled that the Commonwealth may be deprived of its right to proceed with the prosecution of an accused—for violation of Section 18.1-54 of the Virginia Code, or a similar ordinance or any county, city or town—in those instances in which the failure to obtain a blood alcohol determination is occasioned by the failure of the Commonwealth's officers properly to perform the duties enjoined upon them by Section 18.1-55 of the Virginia Code. See, Report of the Attorney General, 1956-1957, pp. 169, 172.

In this connection, I am forwarding to you a copy of an opinion, dated August 31, 1956, to the Honorable Carter R. Allen, Commonwealth's Attorney for the City of Waynesboro, in which a question substantially identical to that which you present was considered. As you will note from the discussion of the terminal question posed in
Mr. Allen's communication, no dispositive answer to the question you present can be given; however, as indicated in the concluding paragraph of the enclosed ruling, I am of the opinion that if it can be established that the failure of an arresting official properly to reseal an accused's blood sample container did not deprive the accused of evidence material to his defense which he would otherwise have obtained, such failure would not have the effect of defeating the Commonwealth's prosecution.

MOTOR VEHICLES—Blood Test—Police Officers May Reseal Blood Sample Container Under § 18.1-55. (15)

July 12, 1960

HONORABLE T. GRAY HADDON
Attorney for the Commonwealth for City of Richmond

This will reply to your letter of July 5, 1960, in which you present the following situation and inquiry:

"The defendant was arrested in the City of Richmond for operating an automobile while under the influence of intoxicants. In due course, the accused requested a blood alcohol test and was taken to the Medical College of Virginia Hospital where, after the preliminary steps, a nurse withdrew 10 c.c.'s of blood and placed it in the vial provided in these cases which was being held by one of the arresting officers. This officer in the presence of the nurse then replaced the cork in the vial containing the blood sample with an anti-coagulate substance, and shook up the vial to mix the two, calling all these facts to the attention of the accused. The sample was then resealed and forwarded in the proper manner to the office of the Chief Medical Examiner.

"The question at issue is whether or not the provisions of Code section 18-75.1 have been complied with, since it was the police officer and not the nurse, who resealed the vial and shook it up."

Section 18-75.1 of the Virginia Code, now codified as Section 18.1-55 of the Code of Virginia (1950) as amended by Chapter 358 of the Acts of Assembly (1960), in pertinent part provides:

"Only a physician, registered professional nurse or laboratory technician, shall withdraw blood for the purpose of determining the alcoholic content therein. The blood sample shall be placed in a sealed container provided by the Chief Medical Examiner. Upon completion of taking of the sample, the container must be resealed in the presence of the accused after calling the fact to his attention. The container shall be especially equipped with a sealing device, sealed so as not to allow tampering, labelled and identified showing the person making the test, the name of the accused, the date and time of taking. The sample shall be delivered to the police officer for transporting or mailing to the Chief Medical Examiner."

While the legislation under consideration specifically provides that only a physician, registered professional nurse or laboratory technician shall "withdraw blood" for the purpose of determining its alcoholic content, the statute does not expressly command that the container into which the blood sample is placed shall be resealed only by a physician, nurse or laboratory technician. Although the terminal sentence of the above quoted language would appear to support an inference that such container would be resealed by someone other than "the police officer" to whom the blood sample is delivered for transporting or mailing to the
Chief Medical Examiner, I am constrained to believe that this inference is not sufficiently strong to compel the conclusion that there has been a failure of compliance with the statutory requirements in the situation you present. I am, therefore, of the opinion that the situation concerning which you inquire does not involve a substantial departure from the requirements of the statute under consideration.

MOTOR VEHICLES—Disposition of Funds Collected from Special Fuel Act. (100)

Taxation—Disposition of Funds Collected by Commissioner of D. M. V. under Special Fuel Tax Act. (100)

September 16, 1960

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This is to acknowledge receipt of your letter of September 13, 1960, which reads as follows:

"This refers to Chapter 14 entitled Special Fuels Tax Act of Title 58 and, more particularly, to Sections 58-744 and 58-733 therein.

"The tax levied by Section 58-744 is imposed at the rate of 7 cents per gallon by virtue of an amendment enacted by the 1960 session of our General Assembly. While this same session also amended Section 58-733, it did not alter its direction that the Commissioner of the Division of Motor Vehicles shall also pay at the rate of 6 cents a gallon, less certain refunds, for each and every gallon of aviation fuel sold and delivered or used in this State into the treasury, as a special fund, to be disbursed upon order of the State Corporation Commission for certain purposes.

"We are now in the process of preparing our records to provide for the payment by transfer of monies properly collected under 58-744 into this special fund for the first quarter of the fiscal year. The funds in question have been collected on a tax imposed at the rate of seven cents per gallon. The statute directing the disposition of these funds (58-733) provides that we shall pay into the fund at a rate of 6 cents per gallon.

"Will you be good enough to advise me of your opinion as to the proper action by this department in disposing of these funds where we are collecting a tax imposed at 7 cents per gallon and the disposition calls for disbursement at the rate of 6 cents per gallon. If it is your opinion that payment should be made at the 6 cents per gallon rate indicated in the statute, will you advise me further as to the proper disposition of the remaining funds which will be in excess by virtue of the 1 cent differential in the two statutes involved.

"As this accounting should be accomplished on or slightly after October 1, I will appreciate your early advices."

Section 58-744 was amended both in Chapter 398 and Chapter 603 of the Acts of 1960. Section 58-733 was amended by Chapter 398. Inasmuch as Chapter 398 was approved on March 30, 1960, and Chapter 603 was approved on April 1, 1960, Section 58-744 as enacted in Chapter 603 supersedes and repeals that section as enacted in Chapter 398 in so far as it is inconsistent therewith. Hence, that section as found in Chapter 603 must be administered in a manner which would also give effect to the section as found in Chapter 398, as far as it is possible. The provisions of said section are as follows:

"A tax at the rate of seven cents per gallon is hereby imposed upon all fuel sold or delivered by any supplier to any licensed user-seller, or used by
any such supplier in any motor vehicle owned, leased or operated by him, or delivered by such supplier directly into the fuel supply tank of a motor vehicle, or imported by a user-seller into, or acquired tax free by a user-seller or user in this State for resale or use for the propulsion of a motor vehicle.

"Except that fuel sold to the United States or any of the governmental agencies thereof or to the State of Virginia or any political subdivision thereof shall not be subject to tax hereunder.

"Notwithstanding any other provision of law, after (1) the refunds authorized by law, and (2) administrative expenses authorized by law, one-seventh of the revenue derived from the tax hereby imposed shall be transferred to a special fund designated 'The Primary and Secondary Highway Emergency Fund,' one-half of which fund shall be allocated to the secondary system of highways as provided by law and one-half of which fund shall be allocated to the primary system of highways as provided by law." (Chapter 603)

Section 58-733 is as follows:

"The tax imposed by this chapter is levied for the purpose of providing revenue to be used by this State to defray in whole or in part the cost of construction, reconstruction and maintenance of the public highways of this State and the regulation of traffic thereon, and for no other purpose except that the Commissioner of the Division of Motor Vehicles shall also pay at the rate of six cents a gallon, less refunds made in accordance with law, for each and every gallon of aviation fuel sold and delivered or used in this State into the treasury, as a special fund, to be disbursed upon order of the State Corporation Commission, on warrants of the Comptroller to defray the cost of the administration of the laws of this State relating to aviation and for the construction, maintenance and improvement of airports and landing fields to which the public now, or which it is proposed shall, have access, and for the promotion of aviation in the interest of operators and the public generally." (Chapter 398)

My opinion is that the payment should be made at the rate of six cents per gallon as indicated in Section 58-733. As you have collected a tax of seven cents on every gallon of fuel, the additional one cent should be transferred into a fund earmarked by you as the Primary and Secondary Highway Emergency Fund. One-half of this fund should be allocated to the secondary system of highways, and one-half should be allocated to the primary system of highways as provided by law.

MOTOR VEHICLES—Farm Truck—Unlicensed Vehicle May Not Be Used to Transport Farm Laborers Upon Highways. (351)

DR. JOSEPH C. MOXLEY
Member, House of Delegates

This is to acknowledge receipt of your letter of May 2, 1961, which reads as follows:

"I would like to know if a farm truck without license plates, and operated only as a farm truck, would be allowed or could be used legally to haul farm labor to and from work on farm?

"Also, would like to know if liability insurance on farm machinery when operated on highway would cover the farm truck used only for farm purposes.

"Will appreciate, very much, a ruling on these matters as soon as convenient."

May 10, 1961
REPORT OF THE ATTORNEY GENERAL

The requirements and limitations pertaining to the use of farm trucks without registration and license plates are embodied in Section 46.1-45 of the Code of Virginia, 1950, as amended, the pertinent portion of which 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 adjoining, 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.”

Exemptions from the provisions of the tax laws of this State are strictly construed against the taxpayer. Any use of the exempted motor vehicles described in this Section, therefore, must come squarely within the stated limitations. The highway use of such vehicles is limited to crossing or traveling along the highway from one point of the owner’s land to another, or moving farm produce and livestock from the farm to a storage house or packing plant, provided the distance is not in excess of ten miles, or for proceeding to and from a repair shop. Accordingly, your first question, insofar as it may otherwise relate to transporting farm laborers upon any highway, must be answered in the negative.

With respect to your last question, I believe it would be unwise for me to attempt to advise you regarding liability insurance on farm machinery, as I am confident you can secure better advice on this question from your agent, particularly in view of the fact that I do not have before me the policy which would govern coverage.

MOTOR VEHICLES—Insurance—Uninsured Motorists Endorsement—Not Applicable to Passenger in Uninsured Motor Vehicle. (326)

April 19, 1961

HONORABLE BLAKE T. NEWTON
Member of the State Senate

This is to acknowledge receipt of your letter of April 13, 1961 in which you request an opinion under the facts stated as follows:

“I am writing you to request your ruling on the following statement of facts in connection with an automobile collision involving an insured motorist and an uninsured motorist:

"On February the tenth, 1961, at Hague, Virginia, at eleven o’clock P.M. on Route 202, an uninsured car operated by Grover T. Lee, Tucker Hill, Virginia, was in collision with car owned and operated by Mrs. Elwood Cope, of Hague, Virginia. Mrs. Cope's automobile was insured and this policy had mandatory coverage 'S' protection against uninsured motorist endorsement."
One Elijah Hall was a passenger in the uninsured car of Grover Lee, and sustained injuries. I am attorney for the said Elijah Hall; Question, is Mr. Hall afforded coverage under the policy of Mrs. Elwood Cope? My particular question is, is Mr. Hall afforded coverage within the meaning of the definition of an insured as listed in item no. (3) of paragraph no. II of the insured Motorist Endorsement of Mrs. Cope's policy?

"You might notice that in item no. (3) Paragraph no. II is the following language: 'Any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injuries to which this endorsement applies.'

"I am enclosing herewith a copy of the endorsement carried by the policy, titled 'Coverage U—Family Protection Against Uninsured Motorist.' I wish you would return this form to me when you send the answer to my inquiry."

Section 38.1-381 of the Code of Virginia of 1950 as amended, reads, in part, as follows:

"(a) No policy or contract of bodily injury liability insurance, or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, shall be issued or delivered in this State to the owner of such vehicle, or shall be issued or delivered by any insurer licensed in this State upon any motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the named insured and any other person responsible for the use of or using the motor vehicle with the consent, expressed or implied, of the named insured, against liability for death or injury sustained, or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle by the named insured or by any such person.

"(b) Nor shall any such policy or contract be so issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of § 46.1-1 (8), as amended from time to time, of the Code herein. Such endorsement or provisions shall also provide for no less than five thousand dollars coverage for injury to or destruction of the property of the insured in any one accident but may provide an exclusion of the first two hundred dollars of such loss or damage.

"(c) * * * the term 'insured' as used in subsections (b), (d), (f), and (g) hereof, means the named insured and, while resident of the same household, the spouse of any such named insured, and relatives of either, while in a motor vehicle or otherwise, and any person who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above; * * *"

While paragraph (a) of this statute is for the benefit of a party who has suffered damages occasioned by the negligent operation or use of the insured motor vehicle, the endorsement required by paragraph (b) provides for the recovery by the insured for damages to which he is legally entitled from the owner or operator of an uninsured motor vehicle. By reference to the statutory definition of the term "insured," as stated in paragraph (c), supra, which specifies all classes included, it seems clear that passengers in an uninsured motor vehicle are not included in the coverage of this endorsement.

The language which you have quoted from item 3 of paragraph II of the Uninsured Motorists Endorsement of Mrs. Cope's policy allows recovery by any person, with respect to damages to which he is entitled "for care or loss of services because of bodily injury to which this endorsement applies." The effect of this, however, is not
to extend the application of the endorsement as such recovery is contingent upon the bodily injury of someone included within the insured class. Otherwise, it would not qualify as "bodily injury to which the endorsement applies." Since a passenger in the uninsured motor vehicle is not included in the insured class, the endorsement does not apply to him, and he could not recover for his injuries under this endorsement.

It is my opinion, therefore, that Mr. Hall, as a passenger in the uninsured motor vehicle is not afforded coverage under the uninsured motorists endorsement of the policy covering the insured vehicle nor under the definition of an "insured" as stated in paragraph II of such endorsement of Mrs. Cope's policy. Under the stated circumstances, the motor vehicle liability policy could cover his damages only upon his establishing a case of negligence under the public liability provision as required by paragraph (a) of the statute quoted herein.

The copy of the endorsement titled "Coverage U—Family Protection Against Uninsured Motorists," which you included with your letter, is herewith returned, as requested.

MOTOR VEHICLES—License and Registration—Not Required for Portable Ditch Digging Machine. (276)

March 9, 1961

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

This is to acknowledge receipt of your letter of March 4, 1961, in which you state:

"Will you please advise me, at your earliest convenience, whether or not, a man engaged in the business of plumbing, is required to have a license or a permit on a portable ditch digger, which he moves from place to place along the public highways, by being towed by another licensed motor vehicle."

The question presented is whether this portable ditch digger is a trailer within the meaning of the Motor Vehicle Code which requires trailers to be licensed. I take it that the ditch digging apparatus is permanently affixed to and mounted upon a set of wheels. Section 46.1-1(33) of the Code of Virginia (1950) as amended defines the term "trailer" as follows:

"Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle."

As the portable ditch digger is not designed to carry property or passengers, it is not a trailer within the meaning of the statute. This office has heretofore held that a two-wheel contrivance upon which a manhole pump is mounted is not required to be licensed. This opinion is expressed in a letter to the Honorable C. H. Lamb, Commissioner of the Division of Motor Vehicles, dated May 26, 1954, and found in the Annual Report of the Attorney General '1953-54' page 134, a copy of which is enclosed.

I am, therefore, of the opinion that such a portable ditch digger permanently affixed and mounted upon wheels is not required to be licensed as a trailer so long as it remains in the same condition as described.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—License Fees—Exemptions—Vehicles Owned by Resident and Leased to Federal Government are Subject to Tax. (368)

June 6, 1961

HONORABLE STIRLING M. HARRISON
Commonwealth’s Attorney of Loudon County

This is to acknowledge receipt of your letter of May 19, 1961 which reads as follows:

"An automobile dealer in my County rents cars to the Federal Government for the use of its employees. These vehicles are licensed in the name of the dealer for security reasons as the employees aforesaid do not wish their identity disclosed. The dealer does not know where these vehicles are housed.

"The Town of Hamilton has imposed a license tax of $10.00 on automobiles within the Town of Hamilton as provided for under Section 46.1-65 of the Code. Section 46.1-66 sets forth the limitations on the imposition of such taxes. These vehicles are licensed under Section 46.1-149, sub-section 6.

"The question upon which I would appreciate your opinion is whether or not these vehicles are subject to the imposition of the Town of Hamilton tax."

Section 46.1-41 of the Code of Virginia of 1950, as amended, is as follows:

"Except as otherwise provided in §§ 46.1-42 through 46.1-49, 46.1-119 and 46.1-120 every person, including every railway, express and public service company, owning a motor vehicle, trailer or semitrailer intended to be operated upon any highway in this State shall, before the same is so operated apply to the Division for and obtain the registration thereof and a certificate of title therefor." (Underscoring Supplied)

Section 46.1-1 (20) defines the word "person" as "every natural person, firm, partnership, association or corporation."

The pertinent portion of paragraph (18) of Section 46.1-1 gives the following definition for the word "owner":

"A person who holds the legal title of a vehicle or, in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee or in the event a mortgager of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgager shall be deemed the owner for the purpose of this title, except that in all such instances when the rent paid by the lessee includes charges for services of any nature or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor shall be regarded as the owner of such vehicle and the vehicle shall be subject to such requirements of this title as are applicable to vehicles operated for compensation; *** " (Underscoring Supplied)

If the lease for rental of the vehicles in question does not provide that title shall pass to the lessee upon payment of the rent stipulated, and the facts which you have stated certainly indicate no such provision, then the automobile dealer, by application of the afore-mentioned paragraphs of Section 46.1-1 of the Code, remains the "owner."

Since titling and licensing follow ownership, in my opinion, there is no exemption merely by virtue of the fact that the vehicles are rented to the Federal Government and they are subject to Virginia registration and licensing as a prerequisite to being operated upon any highway in this State.

Section 46.1-65 of the Code of Virginia, paragraph (a) states in part as follows:

"Except as provided in § 46.1-66 counties, incorporated cities and towns may levy and assess taxes and charge license fees upon motor vehicles,
trailers and semitrailers; * * * The amount of the license fee or tax imposed by any county, city or town upon any class of motor vehicles, trailers or semitrailers shall not be greater than the amount of the license tax imposed by the State on vehicles of like class."

You do not show whether or not the dealer who owns the vehicles in question is a resident of the Town of Hamilton, although you state that he is in your county. This fact may be significant in view of the following limitation contained in Section 46.1-66:

"(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:
"(1) A similar tax or license fee is imposed by the county, city or town of which the owner is a resident;"

If the dealer who owns these vehicles is a resident of the Town of Hamilton, I see no reason why that Town may not impose a license tax, not in excess of that imposed by the State, for these vehicles. However, if the owner is only a resident of the county, or some town therein other than the Town of Hamilton, and the county or town in which the owner is a resident has imposed the local license tax, then in my opinion, the Town of Hamilton would be prohibited by this limitation contained in Section 46.1-66, from imposing any license fee.

MOTOR VEHICLES—License Plates—When Temporary Use on Other Vehicles Permitted. (353)

May 12, 1961

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney of Rockbridge County

This is to acknowledge receipt of your letter of May 5, 1961 which reads as follows:

"A matter has arisen in our jurisdiction making it necessary that I seek your opinion as to the interpretation of Sections 46.1-110 and 46.1-110.1, of the Code of Virginia, under the following state of facts:
"On January 19, 1961, John Doe, a *** student, was involved in an accident in Rockbridge County, while driving an automobile loaned to him by X Motor Company, since his car was being repaired at X Motor Company. This garage loaned Doe a 1957 Pontiac Stationwagon and transferred the 1960 Tennessee license plates from Doe's automobile to the 1957 Pontiac. Doe was not issued any transfer of license plates by the X Motor Company, nor was he issued a certificate by the Commissioner.
"Did X Motor Company, under Section 46.1-110.1, have lawful authority to transfer the license plates without a certificate being issued? Would such use of plates extend to the owner of an automobile bearing Tennessee license plates? Would the owner or the garage, or both, be subject to prosecution under Section 46.1-130?"

Section 46.1-110.1 of the Code of Virginia of 1950 as amended, which was enacted by the 1960 General Assembly, is as follows:

"The owner of a motor vehicle to which license plates have been assigned by the Division of Motor Vehicles may remove such plates from such motor vehicles and use them upon another motor vehicle owned by a person operating a garage or owned by a motor vehicle dealer provided such use does not extend for more than five days and provided such use is limited to the time during which the first motor vehicle is being repaired or while such second motor vehicle is loaned to him for demonstration, as provided by § 46.1-110."
As you know, Section 46.1-110, enacted in 1952, provides that the Commissioner of the Division of Motor Vehicles may grant a special permit for the temporary use of the license plates assigned to one motor vehicle upon another motor vehicle, provided the latter is owned by a dealer in whose repair shop the vehicle to which the plates were assigned is being repaired. The statute provides, however, that this be accomplished by means of a joint application by such dealer and the person whose vehicle is being repaired, showing to the Commissioner's satisfaction that an emergency exists. It further provides that such permit shall be evidenced by a certificate issued by the Commissioner showing certain data, such as the motor number or identification number of the vehicle on which such plates are to be used, the person to whom issued and the date of issuance.

One aspect of Section 46.1-110.1, supra, is that it enlarges upon Section 46.1-110 by making such use applicable also to a "motor vehicle owned by a person operating a garage." Since Section 46.1-110.1, which contains only one sentence, closes with the phrase "as provided by § 46.1-110," it is my interpretation that its application is contingent upon compliance with Section 46.1-110, as to issuance of certificate by the Commissioner and it would be unlawful in any such case to transfer the license plates without first obtaining the certificate from the Commissioner.

The instance, which you have described, involved the transfer of Tennessee license plates to the garageman's vehicle. I do not believe that such use of plates as contemplated by these statutes would extend to the owner of an automobile bearing foreign (out of state) license plates. Section 46.1-110.1 refers to license plates which "have been assigned by the Division of Motor Vehicles." The statute, thus, in effect at least, limits its application to Virginia license plates. Furthermore, the Commissioner would not be in a position to aver the authenticity of any foreign license plates under these circumstances and would not have the proper bases for issuing a temporary Virginia certificate.

In regard to your final question, it is my opinion that both the owner of the vehicle and the garage owner would be subject to prosecution. Any such action may be brought under Section 46.1-16, which covers all violations of Sections 46.1-1 through 46.1-347 for which no other penalty is provided. I believe Section 46.1-130 has reference only to violations occurring under Article 6 of Title 46.1, which comprises Section 46.1-121 through 46.1-130.

MOTOR VEHICLES—Licenses—Taxicabs—May be Imposed Pursuant to Section 46.1-65 of Code by Towns Not Included in Section 56-291.4 of Code. (115)

Taxation—Taxicabs—License Tax by Towns. (115)

September 29, 1960

HONORABLE HANSEL FLEMING
Commonwealth's Attorney of Dickenson County

This is to acknowledge receipt of your letter of September 23, 1960 in which you request the opinion of this office concerning the local authority to tax the operation of taxicabs under the circumstances set forth in your letter, which states in part:

"The Town of Clintwood in Dickenson County has an ordinance prohibiting the operation of taxicabs upon the corporation streets, except upon the payment of a privilege tax in the amount of $60.00 per year for each taxi-cab so operated.

* * * *

"I would appreciate very much an opinion from your office as to whether such an ordinance is limited by Section 46.1-65 of the Code or Section 46.1-149 of the Code as to the tax imposed upon such vehicles by the State, or
whether a town may properly impose such a tax for the privilege of operating a taxicab business within the town without being limited as to these sections.

"I might add that Section 56-291.4, specifically authorizing imposition of license tax upon taxicabs, does not appear to be applicable within Dickenson County."

Section 46.1-65, paragraph (a) of the Code of Virginia, 1950 revised, states in part:

"Except as provided in § 46.1-66 counties, incorporated cities and towns may levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers ** The amount of the license fee or tax imposed by any county, city or town upon any class of motor vehicles, trailers or semitrailers shall not be greater than the amount of the license tax imposed by the State on vehicles of like class. Such license fees and taxes shall be imposed in such manner, on such basis, and for such periods, as the proper authorities of such counties, cities and towns may determine, and subject to proration for fractional periods of years in the manner prescribed in § 46.1-165."

(Italics Supplied)

It will be noted from the foregoing that Code Section 46.1-65 not only grants to certain political subdivisions, including towns, the power to tax motor vehicles but also subjects them to the limitations contained in this section. Since this section limits the amount of license fee or tax imposed by any town to the amount of license tax imposed by the State on vehicles of like class, we must refer to Virginia Code Section 46.1-149, paragraph 7, which is as follows:

"90¢ per hundred pounds of weight or major fraction thereof for a taxicab and other vehicle kept for rent or hire operated with a chauffeur for the transportation of passengers, which operates or should operate under permits issued by the Corporation Commission as required by law. This subsection does not apply to vehicles used as common carriers."

Since Dickenson County does not come within the purview of Virginia Code Section 56-291.4 which permits certain towns and counties to tax a person, firm, association or corporation operating a taxicab, I am of the opinion that the ordinance of the Town of Clintwood is limited by Sections 46.1-65 and 46.1-149 of the Code of Virginia and may not require a license tax exceeding the ninety cents per hundred pounds of weight as prescribed in the latter section.

MOTOR VEHICLES—Licenses—Taxicabs—When Towns May Impose License Tax. (211)
Taxation—Taxicabs—When Towns May Impose. (211)

December 28, 1960

HONORABLE BERNARD MAHON
Commonwealth's Attorney for Caroline County

This is to acknowledge receipt of your letter of December 19, 1960 with which you enclosed a copy of an ordinance of the Town of Bowling Green in order that I might give my opinion as to its validity. The ordinance and your letter are quoted in respective order:

"Be it ordained that effective May 15, 1949 a license tax of $15.00 per year payable on or before May 15th of each year shall be placed on all taxicabs or other for-hire vehicles picking up passengers within the town limits of the Town of Bowling Green. Operation of any taxi-cab or for hire
vehicle in violation of this ordinance shall be subject to a fine of $10.00 for the first day violation and $2.50 for each day thereafter any such vehicle shall be operated without the payment of said license tax.

"Effective May 15, 1949.

"Please give me your opinion as to the validity of the enclosed ordinance enacted by the Town of Bowling Green. Section 56-291.4 of the Code of Virginia, 1950, as amended allows certain counties or towns within certain counties to impose a license tax on taxicabs. Caroline County, where the Town of Bowling Green is located, is not one of the named counties in this statute.

"If the ordinance is valid, what is the purpose of the above mentioned statute?"

There is enclosed a copy of an opinion dated September 29, 1960 addressed to the Honorable Hansel Fleming, Commonwealth's Attorney of Dickenson County, Cliftonwood, Virginia, in which it was held that a town not included in Section 56-291.4 of the Code of Virginia as amended was limited in its taxing of motor vehicles to Sections 46.1-65 and 46.1-149 of the Code of Virginia. By reading that opinion you will notice that although, as you have stated, Section 56-291.4 of the Code of Virginia as amended does not apply to Caroline County, the authority for levying license taxes on motor vehicles by incorporated towns is found in Section 46.1-65 of the Code.

This Section permits any incorporated town to levy license fees on motor vehicles within the stated limitations and subject to the exceptions contained in Code Section 46.1-66. The first provision of the latter named Section is as follows:

"No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when: (1) A similar tax or license fee is imposed by the county, city or town of which the owner is a resident;"

The net effect of these statutes is to allow the local taxing authority, either town or county, but not both, to levy a license tax on all motor vehicles, including taxicabs, not to exceed in amount the license tax imposed by the State on vehicles of like class. By further reference to the enclosed opinion, you will notice that the rate which governs the annual State license fee for taxicabs is stated in Code Section 46.1-149 paragraph (7).

It is, therefore, my opinion that, subject to the limitations of the statutes herein cited, the Ordinance of the Town of Bowling Green, levying an annual license tax of $15.00 on taxicabs, is valid.

In answer to your other question, the purpose of Section 56-291.4, in my estimation, is to permit the regulation of the taxicab business in the localities to which it applies. By this statute certain counties and towns are granted the further authority to require a license tax from every person, firm, association or corporation operating a taxicab or other motor vehicle for the transportation of passengers for a consideration within the boundaries of such county or town. No limitation is placed upon the amount of tax which may be levied and the companion Sections 56-291.6 and 56-291.7 permit the authorities of these certain counties and towns to prescribe regulations as to driver qualifications, location of stands, the rates charged and the general operation of such vehicles.

MOTOR VEHICLES—Local License Tax—Both County and Town within County May Impose Tax—Subject to Limits in §§ 46.1-65 and 46.1-66. (235)

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

This is to acknowledge receipt of your letter of January 23, 1961 which presents several questions, relative to the imposition of motor vehicle license fees by local authorities, as follows:
The Board of Supervisors of Appomattox County want to know whether or not they can impose a county auto license tax on cars kept in an incorporated town in the county if the town has already imposed a license tax on such vehicles.

Also they would like to know whether or not an incorporated town in a county can impose a tax on cars in such town if the county has already imposed such a tax and if the town may impose such a tax what effect it would have on the county tax.

Section 46.1-65 of the Code of Virginia of 1950, as amended, states in part:

"(a) Except as provided in § 46.1-66 counties, incorporated cities and towns may levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers; provided that no such taxes and license fees shall be assessed or charged by any county upon vehicles of owners who are residents of any town located in such county which constitutes a separate school district approved for operation when such vehicles are already subject to town license fees and taxes.

"The amount of the license fee or tax imposed by any county, city or town upon any class of motor vehicles, trailers or semitrailers shall not be greater than the amount of the license tax imposed by the State on vehicles of like class. Such license fees and taxes shall be imposed in such manner, on such basis, and for such periods, as the proper authorities of such counties, cities and towns may determine, and subject to proration for fractional periods of years in the manner prescribed in § 46.1-165.

"(d) If in any county imposing license fees and taxes under this section, a town therein imposes like fees and taxes upon vehicles of owners resident in such town, the owner of any vehicle subject to such fees or taxes shall be entitled, upon such owner displaying evidence that he has paid the amount of such fees or taxes, to receive a credit on the fees or taxes imposed by the county to the extent of the fees or taxes he has paid to such town. Nothing herein contained shall be construed as depriving any town now imposing such licenses and taxes from increasing the same or as depriving any town not now imposing the same from hereafter doing so, but subject to the limitations provided in the foregoing paragraph. The governing body of any county and the governing body of any town in said county wherein each impose the license tax herein provided may provide mutual agreements so that not more than one license tag in addition to the State tag shall be required.

"Except as provided by this paragraph (d), no vehicle shall be subject to taxation under the provisions of this section in more than one jurisdiction."

Section 46.1-66, paragraph (b), of the Code of Virginia of 1950, as amended, is as follows:

"Except as provided in § 46.1-65 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."

These statutes grant counties, incorporated cities and towns generally the authority to impose taxes and license fees upon motor vehicles, subject, however, to certain provisions. One of these provisions, you will observe, prohibits any county from assessing license fees upon vehicles owned by residents of any town located in such county which constitutes a separate school district approved for operation when such vehicles are already subject to town license fees and taxes. Provided that the incorporated town alluded to in the first paragraph of your letter does not constitute a "separate school district", it is my opinion that the Board of Supervisors of Appo-
mattox County may impose a license tax on motor vehicles, notwithstanding the fact that the town has already imposed a license tax on the vehicles owned by its residents. Under these circumstances, however, each town resident owner of a vehicle is entitled to a credit on the fee imposed by the county to the extent of the fee he has paid to the town for that same vehicle. It may be seen, therefore, that where the license fee imposed upon any vehicle by the town is equal to or greater in amount than the fee imposed upon such vehicle by the county in which the town is located, the net result is that the county would collect no fee for the vehicle so taxed by the town. In this case the full amount of the license fee imposed by the county is offset by the license fee paid to the town. On the other hand, if upon a private passenger automobile owned by a resident of the town, for example, the county imposes the maximum annual license fee of $10.00 while the town located within the county imposes an annual license fee of only $5.00 then both town and county would each collect $5.00 license fee on the vehicle. In such instance the governing body of the town and the governing body of the county may provide mutual agreements so that not more than one license tag in addition to the State tag shall be required.

Further referring to Section 46.1-65, paragraph (d) previously cited herein, you will note the following: "Nothing herein contained shall be construed as depriving any town now imposing such licenses and taxes from increasing the same or as depriving any town not now imposing the same from hereafter doing so." In an opinion handed down by the Virginia Supreme Court on January 16, 1961 in the case of Town of Ashland, et al v. Board of Supervisors for Hanover County, the Court upheld the authority of the General Assembly to classify a town within a county as a separate territorial taxing district to impose license taxes on motor vehicles owned by the town's residents while the county has such a tax. From the statute itself, supported by this recent court decision, it seems clear that an incorporated town in a county may impose a license tax upon vehicles of resident owners in such town even though the county has already imposed such a license tax. The effect of this would be that the county must allow a credit on the license tax equal to the amount of such tax paid to the town on any motor vehicle owned by a resident of the town.

MOTOR VEHICLES—Local License Tax—Refund Not Required for License Returned During License Year. (234)

Honorable Robert I. Asbury
Commonwealth's Attorney of Smyth County

This is to acknowledge receipt of your letter of January 23, 1961 which reads as follows:

"The Board of Supervisors of Smyth County passed a motor vehicle license ordinance pursuant to Section 46.1-65 of the Code of Virginia of 1950, as amended. The ordinance appears to comply with the referred to statute and includes a schedule of prorating the license fee as required by the state law. Revenue derived from the sale of all county motor vehicle licenses under this ordinance is applied to the School Board of Smyth County. May I have your opinion on this question: Is it a requirement of the law that a refund be paid to any person who returns a license during the one-year period covered by the license fee? Also, may I have your opinion on this point, in view of the fact that revenue derived from this source is applied to the School Board of Smyth County, must the refund, if proper, be paid from the school fund of Smyth County by draft issued by the School Board on said fund?"

Section 46.1-65 of the Code of Virginia of 1950, as amended, states in part, as follows:

"The amount of the license fee or tax imposed by any county, city or town upon any class of motor vehicles, trailers or semitrailers shall not be greater
than the amount of the license tax imposed by the State on motor vehicles of like class. Such license fees and taxes shall be imposed in such manner, on such basis, and for such periods, as the proper authorities of such counties, cities and towns may determine, and subject to proration for fractional periods of years in the manner prescribed in § 46.1-165."

Section 46.1-165, to which Section 46.1-65 refers, deals only with the prorating of license fees upon issuance, stipulating that such fee shall be one half of the annual fee when the license is issued during the period beginning on the first day of October and ending on the fifteenth day of January and one third of the annual rate when the license is issued after the fifteenth day of January in the same license year. No mention of refunds is made in this section. Section 46.1-97 of the Code of Virginia of 1950, as amended, sets forth the requirements for refund of a portion of the State license fee under certain given conditions by the Commissioner of Motor Vehicles. This section, however, is not incorporated by reference, nor is any mention made of it in Section 46.1-65 which gives the counties the authority to charge license fees. Neither is there any reference to the subject of refunds in Section 46.1-66 which places certain limitations on the imposition of such taxes and fees imposed by counties, cities and towns under Section 46.1-65.

Accordingly, it is my opinion that there is no requirement of the law that a county pay a refund to any person who returns a license during the one year period covered by the license fee. Having answered your first question in the negative, consideration will not be given to your second question which appears conditioned upon an affirmative answer to the first.

MOTOR VEHICLES—Operating Farm Truck After Revocation of License—When Exempt from Prosecution Under Section 46.1-350. (380)

HONORABLE WM. M. McCLENNY
Commonwealth's Attorney of Amherst County

June 14, 1961

This is to acknowledge receipt of your letter of May 24, 1961 in which you ask for an opinion as to whether or not a man driving a farm truck between farms on the highway is exempt from prosecution for driving while his license is suspended under Section 46.1-350 of the Code of Virginia of 1950, as amended.

Section 46.1-350 of the Code of Virginia of 1950, as amended, states in part as follows:

"(a) No person resident or nonresident 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 § 18.1-59 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."

In this regard, there is also for consideration, Section 46.1-352 of the Code of Virginia, which reads as follows:

"No person shall be required to obtain an operator's or chauffeur's license for the purpose of driving or operating a road roller, road machinery or any farm tractor or farm machinery or vehicle defined in § 46.1-45, temporarily drawn, moved or propelled on the highways."
There have been several prior opinions on this question, although none was written within the past few years. The last two such opinions may be found in the Annual Report of the Attorney General of Virginia for the period 1955-1956. One, dated May 29, 1956 (Pages 138-139) concluded "that a person driving a motor vehicle not required to be licensed during the period of revocation or suspension can be prosecuted under Section 46.1-347.1 (now Section 46.1-350). The other, dated November 22, 1955 (Pages 139-140) expressed the opinion "that where a person's driving license has been revoked by the Motor Vehicle Commissioner for a period of time that during that period he can lawfully drive a farm tractor or implement of husbandry as defined in Section 46-45." (now Section 46.1-45). "However, if he has been convicted of drunken driving, the conviction deprives him of the right to drive upon the highways of Virginia." While the language of Section 46.1-350 (formerly Section 46-347.1) offers reason for the view expressed in the opinion first quoted above, I believe that an overall consideration of the present statutes, in light of certain statutory additions and revisions since effected, substantiate the last quoted opinion, although this was written a few months prior to the other. Section 46.1-349 states that no person shall drive upon the highways without an operator's license except those expressly exempted in Sections 46.1-352 through 46.1-356. Section 46.1-352, previously quoted, states that no person shall be required to obtain a driver's license to drive any vehicle defined in Section 46.1-45. Logically, it would seem that where, by statute, no operator's license is required to drive certain vehicles under given circumstances, the revocation of the operator's license would have no effect as to the operation of those certain vehicles under the given circumstances, which together comprise an exemption from the requirement of being licensed.

As to the matter of drunken driving, however, the Supreme Court has held that a person may be convicted for driving under the influence of intoxicants or self-administered drugs on a private lane or driveway and it is not necessary for conviction that the person drove on a public highway. Section 18.1-59 of the Code of Virginia states that such conviction shall of itself operate to deprive the person so convicted "of the right to drive or operate any such vehicle, conveyance, engine or train in this State." This provision is self-executing and does not rest upon an order of suspension of operator's license. Commonwealth v. Ellett, 174 Va. 403.

It is my interpretation that a person so convicted, since he has lost the very right itself to drive, under the wording of this statute, could be prosecuted for driving while his privilege is revoked, except as stipulated in Section 46.1-352.1 of the Code of Virginia, enacted in 1958, which reads as follows:

"The conviction of a person for driving under the influence of intoxicants or some other self-administered drug in violation of any State law or local ordinance shall not operate to prevent or prohibit such person from operating a farm tractor upon the highways when it is necessary to move such tractor from one tract of land used for agricultural purposes to another tract of land used for the same purposes, provided that the distance between the said tracts of land shall not exceed five miles."

(Underscoring Supplied)

Certainly if the legislature intended that a person convicted of driving under the influence of intoxicants or self-administered drugs be permitted to drive the vehicles described in Section 46.1-45, which is much more inclusive, during such period of revocation, then the last quoted section would be superfluous. It will be noted that the person so convicted may only drive a farm tractor not to exceed five miles between farms.

You did not state the nature of the offense resulting in conviction in the case in question. In view of the foregoing, however, it is my opinion that if the conviction was for driving under the influence of intoxicants or self-administered drugs he may be prosecuted under Section 46.1-350 for operating the farm truck, but if the license was suspended for any other reason he would be exempt from prosecution for driving within the limits authorized by Section 46.1-45.
MOTOR VEHICLES—Operating Vehicle in Reckless Manner Synonymous with Reckless Driving. (47)

HONORABLE C. H. LAMB, Commissioner  
Division of Motor Vehicles

This is to acknowledge receipt of your letter of July 28, 1960 in which you request my opinion as to whether you are authorized to act under the provisions of Section 46.1-417 (e) of the Code revoking the driving license of a person under the following circumstances:

The Division received an abstract from the county court indicating that this person was convicted of reckless driving, offense being committed August 24, 1958. Subsequent thereto you received an abstract of conviction from the circuit court of the same county indicating that the same individual had been convicted on September 9, 1959 on the charge of "operating a motor vehicle in a reckless manner" found guilty by the jury and fined $100.00. As the judgment was suspended for a period of ninety days the clerk did not make his report until December 10, 1959. Copies of the warrant and judgment of the court have been furnished you and discloses the following charge:

"did on the 18th day of May 1959 unlawfully operate a motor vehicle on the State Highway in a reckless manner resulting in an accident—(amended to read) having been convicted of the same offense within the past 12 months.—(RHP)".

The abstract of conviction should, of course, specify the charge of which the defendant is found guilty, but the abstract is not conclusive on this point. The records of the court are decisive in this respect.

In defining the term "reckless driving", the statute, Section 46.1-189 provides in part:

"any person who drives a vehicle upon a highway recklessly or at a speed or in a manner so as to endanger life, limb or property of any person shall be guilty of reckless driving;" (Italics supplied)

The term "to unlawfully operate a motor vehicle in a reckless manner," is synonymous with "unlawfully driving a vehicle recklessly" and constitutes the offense of reckless driving.

I am well aware of the problem that you face in administering these revocation statutes. The clerk of the court in this case in sending you the abstract of conviction in accordance with the duties required of him under the provisions of Section 46.1-413 could have described the offense as "reckless driving" and this would have simplified the manner by doing so. However, it seems to me that in a case of this character where the obvious intent of the abstract of conviction is to portray the information that the defendant was convicted of reckless driving, you should act or, if doubtful as to the meaning, make further inquiry from the court in which the defendant was tried.

It is the opinion of this office that this individual was found guilty of the offense of reckless driving as indicated by the judgment of the court on September 9, 1959 (the offense having been committed on May 18, 1959). Therefore, you have the authority under the provisions of Section 46.1-417 (e) of the Code to revoke the driving license of this individual.
MOTOR VEHICLES—Operator—Prohibitions—Minors Under Eighteen Years May be Prohibited in Cities and Certain Counties. (140)

Cities and Towns—Motor Vehicles—Any City May Prohibit Operation by Minors Under Eighteen Years. (140)

October 19, 1960

MR. PHILIP N. BROPHY
City Attorney
City of Falls Church

This is to acknowledge receipt of your letter of October 12, 1960 in which you ask my opinion as to the proper interpretation of Section 46.1-357 of the Code of Virginia of 1950, as amended, as it relates to the situation set forth in the following excerpts from your letter:

"I recently received from our City Manager a request for advice regarding the authority of the City of Falls Church to enact an ordinance which would prohibit any person under sixteen years from driving upon the streets of the City."

"As you know, the City of Falls Church has a little over 10,000 population."

For many years, the motor vehicle laws of this State have prohibited certain minors from operating motor vehicles over the streets and alleys of any city in this State which prohibited them from so doing by a proper city ordinance. Referring to the Acts of General Assembly of 1932, we find under Chapter 385, Section 7, paragraph (b), the following:

"An operator's license may be issued to a minor between the ages of fourteen and sixteen years, upon proper application therefor and upon satisfactory evidence that such minor is mentally, physically and otherwise qualified to drive a motor vehicle with safety; provided further, that no such minor shall drive a motor vehicle on the streets and alleys of any city in this state if prohibited from so doing by a proper city ordinance." (Italics Supplied)

While the age group for minors included in this section was changed by Act of Assembly of 1942 from "between the ages of fourteen and sixteen years," and again by Act of General Assembly of 1958 from the latter phrase to "under the age of eighteen years," the underscored proviso remained in the statutes in substantially the same wording until the General Assembly, in its regular session of 1960, rephrased it as it now appears in Section 46.1-357, paragraph (b) which reads as follows:

"No minor under the age of eighteen years shall drive a motor vehicle on the streets, roads, highways and alleys of any city, or of any county having a population greater than one hundred and thirty thousand in this State if prohibited from so doing by a proper city or county ordinance."

Reviewing House Bill No.103 which made this change, it is noted that the purpose stated in the heading was to "allow certain counties to prohibit such persons from driving." Nothing was deleted with relation to the clause prohibiting such minors from driving in any city which had enacted a proper ordinance so prohibiting them. Rather, the avowed purpose of the change in the statute was to extend the right to certain counties to enact such an ordinance. The limitation as to "population greater than one hundred and thirty thousand" refers only to counties. This interpretation is strongly supported by the phrasing and punctuation of this section of the statute in addition to the historical background and stated purpose of the enlargement of the statute by the 1960 General Assembly.
It is, therefore, my opinion that the purview of this statute includes any city in this State, regardless of population, which has enacted a proper ordinance so prohibiting such minors from driving.

MOTOR VEHICLES—Operator—Prohibitions—Minors Under Eighteen Years May be Prohibited in Cities and Certain Counties. (145)

Counties—Motor Vehicles—Any County having Population Over 130,000 May Prohibit Operation by Minors Under Eighteen Years. (145)

October 24, 1960

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

This is to acknowledge receipt of your letter of October 17, 1960 in which you ask my opinion regarding the situation outlined in your letter as follows:

"The 1960 Session of the General Assembly adopted an amendment under Section 46.1-357 of the Code which provides

"'No minor under the age of 18 years shall drive a motor vehicle on the streets... of any county having a population greater than 130,000 in this State if prohibited from doing so by a proper... county ordinance.'"

"Pursuant to this the Board of County Supervisors of Fairfax County have requested me to prepare an ordinance which would in effect prohibit anyone under the age of 16 years from obtaining a driver's license. From a practical viewpoint, it would seem that if the legislature gave the county the right to raise the age of a licensed driver from 15 to 18 the county would have the authority to stop somewhere in between."

In answering your question, consideration should first be given to Section 46.1-25 of the Code of Virginia, which is as follows:

"The administration of the motor vehicle license, registration and title laws, the issuance, suspension and revocation of operators' and chauffeurs' licenses, the examination of applicants for, and holders of operators' and chauffeurs' licenses, the administration, training, disciplining and assignment of examiners of applicants for operators' and chauffeurs' licenses, the administration of the safety responsibility laws, fuel tax laws and such other laws or parts of laws involving the former Division of Motor Vehicles in the Department of Finance as are not covered by § 52-4, shall be in the Division of Motor Vehicles established by this chapter."

It will be noted that the authority for the issuance of a driver's license rests with the Division of Motor Vehicles. Virginia Code Section 46.1-357 paragraph (b) makes it unlawful for any minor under the age of eighteen years to drive a motor vehicle in a county having a population greater than one hundred and thirty thousand in this State if prohibited from so doing by a proper county ordinance. The county so qualifying under this statute may prohibit the stated minors from driving in that county only. At the same time the Division of Motor Vehicles may issue a driver's license to anyone of such minors and this license would be valid anywhere outside of such county.

It is, therefore, my opinion that while the County of Fairfax is without authority to prohibit anyone from obtaining a driver's license it may, if it has a population of over one hundred and thirty thousand, enact an ordinance prohibiting minors under eighteen years of age from driving within its boundaries. It is further my opinion that by inclusion, it may enact such ordinance prohibiting minors under the age of sixteen years from driving within the county.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Operator's License—Driving After Revocation—Not Town Offense. (33)

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

July 26, 1960

This is in reply to your letter of July 18, 1960, which has further reference to my letter addressed to you under date of July 11, 1960, pertaining to the operation of a motor vehicle without an operator's license. You asked to be advised if a town warrant would be permissible in charging a person for operating a motor vehicle after his license has been revoked.

By virtue of the Operator's and Chauffeur's Act (Chapter 5, Title 46.1), the State has preempted the field of licensing operators of motor vehicles. The only exception is found in § 46.1-353 of the Code, relating to drivers of taxicabs and other for hire passenger vehicles.

While local authorities have been granted limited powers to enact ordinances to regulate the operation of vehicles upon the highways of counties, cities and towns, such authority does not extend to the requirement of operators' licenses, nor the imposition of a penalty for the failure to have such license.

I am, therefore, of the opinion that operating a motor vehicle after revocation of an operator's license constitutes an offense against the State only, and the violator must be arrested on a State warrant.

MOTOR VEHICLES—Operator's License—Failure to Have—Constitutes Offense Against State, not Town. (13)

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney
Montgomery County

This is in reply to your letter of July 8, 1960, which I quote in part as follows:

"Where an incorporated town issues town warrants for violation of town ordinances and said cases are heard before the mayor of said town, as provided by the statute law of Virginia, can the officers of said town, where a person is operating a car on the streets thereof without an operator's license, issue either a town warrant for the failure to have the operator's license or do the officers have to issue a State warrant for the failure to have an operator's license to drive?

"The incorporated town has adopted the provisions of the Motor Vehicle Laws as ordinances of said town."

Section 46.1-353 of the Code of Virginia, 1950, as amended, provides as follows:

"Counties, cities and towns of this State are hereby expressly prohibited from requiring any other operator's license or local permit to drive, except as herein provided, provided that cities, towns and counties which have now in force or hereafter adopt regulations for the licensing of drivers of taxicabs and other similar for hire passenger vehicles and for the control of the operation of such for hire vehicles may impose and enforce regulations in addition to the provisions of this chapter."

Operating a motor vehicle without an operator's license constitutes an offense against the State only, for the counties and towns are expressly prohibited from
regulating the licensure of operators other than drivers of taxicabs and other for hire passenger vehicles. I am, therefore, of the opinion that a person operating a motor vehicle in a town without a State operator's license must be charged on a State warrant rather than a town warrant.

A similar view was expressed by this office in a letter of May 19, 1953, addressed to the Honorable L. McCarthy Downs, Auditor of Public Accounts, by Attorney General Abram P. Staples. (See Report of Attorney General for 1942-43, at page 34)

MOTOR VEHICLES—Operators’ License Non-Resident Twice Convicted of Speeding Charge—Examination Required. (382)

June 15, 1961

HONORABLE HALE COLLINS
Member of the Virginia State Senate

This is to acknowledge receipt of your letter of June 2, 1961, in which you request an opinion as to whether or not Section 46.1-383 requires a non-resident, who has been convicted twice of speeding, to take an examination. You furnished the additional information, by way of a copy of a communication from the Commissioner of the Division of Motor Vehicles, that the non-resident’s operating privilege was revoked for a period of sixty days because of his (two) convictions of speedy in Virginia.

Section 46.1-383 of the Code of Virginia of 1950, as amended, reads as follows:

“... The Division shall, upon receipt of a record that an 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 an operator or chauffeur is incompetent or otherwise not qualified under this chapter to be licensed, may, upon written notice of at least fifteen days to the person 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 or privilege to operate a motor vehicle in this State of such person or permit him to retain such license or privilege to operate a motor vehicle in this State, or may issue a license subject to such restrictions as are authorized to be imposed by § 46.1-378. Refusal or neglect of the person to submit to such examination or comply with such restrictions shall be grounds for suspension or revocation of his license or privilege to operate a motor vehicle in this State.” (Underscoring Supplied)

A non-resident who is properly licensed in his state and who is not required to obtain an operator’s or chauffeur’s license in this State, operates in Virginia by virtue of the privilege accorded him. This privilege is extended to the non-resident as a practical sort of courtesy or reciprocity and endures during proper compliance with our motor vehicle laws. The State is not obligated to extend this privilege where such non-resident has been found disqualified to drive or convicted of certain violations which, under our laws, require its suspension.

The above quoted statute states that “The Division Shall, upon receipt of a record that an 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 *** require him to submit to an examination to determine his fitness to operate a motor vehicle upon the highways of this State.” Considering the phraseology, including the words, “or having any other good cause to believe that an operator or chauffeur is
incompetent or otherwise not qualified," I am led to the inescapable conclusion that the statute finds its basis in the theory that such involvement on the part of an operator or chauffeur is sufficient cause for questioning his qualifications to drive upon the highways of this State. The statute further states that upon conclusion of such examination, the Division may suspend or revoke the license or privilege. Also, it states that refusal or neglect to take the examination shall be grounds for suspension or revocation of his license or privilege to operate a motor vehicle in this State.

In view of the foregoing, it is my opinion that the statute applies to resident and non-resident alike, and the privilege of the non-resident in question to drive upon the highways of Virginia is contingent upon his compliance with the Division’s requirement issued pursuant to this Section.

MOTOR VEHICLES—Operator’s License—Revocation For Speed Limit Violations—Section 46.1-419 Applied. (329)

April 21, 1961

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

This is to acknowledge receipt of your letter of April 14, 1961 in which you present two questions pertaining to the application of Sections 46.1-197 and 46.1-419 of the Code of Virginia of 1950, as amended.

Inasmuch as an interpretation of these statutes was expressed in my letter of December 15, 1960 addressed to the Honorable W. Carrington Thompson, Chatham, Virginia, I am enclosing herewith a copy of that opinion. The question there raised was whether or not the requirements found in Section 46.1-197 must be established before the Commissioner of the Division of Motor Vehicles could suspend an operator’s license for two convictions of speeding violations occurring within a year. As you will observe this question was answered in the negative for the reasons stated therein. For the same reasons, your question number (2), "Does the Commissioner of the Division of Motor Vehicles have the authority, in view of Section 46.1-197, to revoke the license of a person convicted of a second offense which occurred in a city under Section 46.1-419?" is answered in the affirmative.

In regard to your question number (1), "Which of these two sections are applicable where one conviction is in a city?" you will notice that Section 46.1-197, as quoted in the enclosed opinion of December 15, 1960, beginning within the fourth line from the bottom of Page 2, states the following: "Nothing contained in this section shall apply to speed violations which occur in cities and towns." However, Section 46.1-419, which is applicable in this case, has no such limitation.

MOTOR VEHICLES—Operator’s License—Revocation for Two Convictions of Speeding. Commissioner Not Limited by Requirements of § 46.1-197 of the Code. (197)

December 15, 1960

HONORABLE W. CARRINGTON THOMPSON
Member, House of Delegates

This is to acknowledge receipt of your letter of December 7, 1960, which reads as follows:

"Your official opinion is requested as to the proper interpretation of § 46.1-419 and § 46.1-197, the latter statute being amended and re-enacted by Chapter 159 of the Acts of Assembly of 1960."
"The latter statute provides for suspension of operator's license on two convictions of speeding within one year provided each violation occurs outside of cities or towns; that the speed limit is exceeded by more than five miles in each instance; and that the maximum speed limit where the violation occurred is 45 miles per hour or more.

" § 46.1-419, which appears to me to be an administrative statute, does not contain the additional requirements set out above, nor does it provide the period of suspension, this, within limits being in the discretion of the Commissioner.

" I am aware of your opinion under date of September 20, 1955 dealing with these statutes prior to the 1960 re-enactment. See OPINIONS of the ATTORNEY GENERAL 1955-'56, page 146. Your official opinion is requested as to whether or not the additional requirements now contained in § 46.1-197 must be established before the Commissioner of Motor Vehicles can suspend an operator's license for two convictions of speeding within one year."

Inasmuch as you have stated that you are aware of the opinion of September 20, 1955 which expressed the view that Section 46-416.1 of the Code was in no way limited to Section 46-215.1, it will not be necessary to quote that former opinion at this time. Section 46.1-419 is identical to former Section 46-416.1, which it replaces, except that the present version shows applicability to "findings of not innocent in the case of a juvenile," as well as to convictions. This addition was made in 1958 and since that time no further changes have been made in this section.

Former Section 46-215.1, added to the Code in 1952, was as follows:

"When any person shall be convicted of violating any law of this State which designates the maximum speed limit for the operation of motor vehicles and the judge or jury shall find that such person exceeded the prescribed speed limit by more than five miles per hour, then in addition to any other penalties provided by law, the operator's permit of such person may be suspended for a period of ten days. For the second and each subsequent conviction within the period of one year, in addition to any other penalties provided by law, the operator's permit of such person shall be suspended for a period of sixty days. Nothing contained in this § 46-215.1 shall apply to speed violations which occur in cities and towns. Nor shall the provisions of this section apply in any case unless the applicable legal speed limit is forty-five miles per hour or more. In case of conviction the court or judge shall require the delivery of the operator's permit to the court, where it shall be held in accordance with § 46-195.1. The provisions of §§ 46-59 and 46-425 shall not apply to any person whose license is revoked under the provisions of this section."

Section 46.1-197, which now replaces former Section 46-215.1, is quoted below for ready comparison.

"When any person shall be convicted for the second and each subsequent time within the period of one year of violating any law of this State which designates the maximum speed limit for the operation of motor vehicles and the judge or jury shall find in each case that such person exceeded the prescribed speed limit by more than five miles per hour, then in addition to any other penalties provided by law, the operator's permit of such person shall be suspended for a period of sixty days. Nothing contained in this section shall apply to speed violations which occur in cities and towns. Nor shall the provisions of this section apply in any case unless the applicable legal speed limit is forty-five miles per hour or more. In case of conviction the court or judge shall require the delivery of the operator's permit to the court, where it shall be held in accordance with § 46-195.1. The provisions of §§ 46.1-418 and 46.1-438 shall not apply to any person whose license is revoked under the provisions of this section."
It will be noted that the clause contained in the first sentence of the Act of 1952 (Section 46-215.1), which provided that whenever any person violated the maximum speed limit of this State "then in addition to any other penalties provided by law, the operator's permit of such person may be suspended for a period of ten days," was deleted when the 1960 reenactment was made. Otherwise, the substantive elements of former Section 46-215.1 are all embodied in Section 46.1-197. However, I do not find any requirements in the latter statute which were not included in the former, except the words "in each case" with reference to the excess speed of five miles per hour.

In consideration of the foregoing, it is my interpretation that Section 46.1-197 directs itself to the judge or jury trying certain cases as defined therein and has no application to Section 46.1-419 which makes it incumbent upon the Commissioner of the Division of Motor Vehicles to act in accordance with the terms of the latter named statute, which is much more inclusive. I am, therefore, of the opinion that the Commissioner of the Division of Motor Vehicles, in administering Section 46.1-419, is in no way limited by the requirements of Section 46.1-197.

MOTOR VEHICLES—Overweight Violation—State Truck Operated by Convict—Who is Criminally Responsible? (227)

January 30, 1961

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

This is to acknowledge receipt of your letter of January 14, 1961 which reads as follows:

"I would appreciate your giving me your opinion with reference to the following situation:

"1. Would a State convict driving a State truck under the orders of the Superintendent or other official or employee of the State Penitentiary be criminally responsible for driving such vehicle on a State Highway under a charge of being overloaded?

"2. If such convict is not criminally responsible under these circumstances due to the fact that he is acting under orders of an official or employee of the State Penitentiary for which he could be penalized for refusal to obey such orders, would the official or employee giving the orders resulting in such overloading be criminally responsible for such violation?"

Section 46.1-339 of the Code of Virginia of 1950, as amended, states in part:

"(a) The maximum gross weight and axle weight to be permitted on the road surface of any highway shall be in accordance with the provisions of this section."

Section 46.1-341 of the Code of Virginia of 1950, as amended, reads:

"Any violation of §§ 46.1-339 and 46.1-340 shall constitute a misdemeanor and shall be punishable as provided in § 46.1-16."

Paragraph (a) of Section 46.1-342 of the Code of Virginia of 1950, as amended, is as follows:

"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."

There appears nothing in the law which would prevent the conviction of a State convict who violated a statute while he was serving a prison term. Undoubtedly he would be held accountable for any violations he committed while acting upon his own initiative. However, as pointed out many years ago in the case of Ruffin v. Commonwealth, 21 Gratt (62 Va.) 790, the convict, during his term of service in the penitentiary, is in a state of penal servitude to the State. He is for the time being the ward of the State. Under the circumstances which you have described in question 1 of your letter, in which the convict is acting under orders of the Superintendent or other official of the State Penitentiary, I am of the opinion that he would not be criminally responsible for driving such overloaded truck.

Section 53-38 of the Code of Virginia of 1950, is as follows:

"While the convicts are employed in any work on the public grounds, or property outside of the penitentiary, they shall be attended by a sufficient guard and shall be subject to the orders of such guard."

When a guard or other official of the State Penitentiary requires the convict to perform an act and there is no deviation from the order in the performance, then the act becomes that of the guard or other official issuing the order. An official of the State Penitentiary is not immune from being penalized for violations of the law. It is my understanding that each official, employee or guard is instructed along this line when he enters upon employment in that capacity. It is interesting to note that in the case of Commonwealth v. Stiff, 144 F. Supp. 169, the United States District Court for the Western District of Virginia at Harrisonburg on August 24, 1956, decided that a federal employee operating a vehicle owned by the United States on official business of the United States was not, because of such ownership and operation, immune from the operation of the state law limiting the weight of vehicles on the public highways of this State. In that case a fine of $885.00 (liquidated damages) was imposed upon the operator of the vehicle.

While every effort should be directed toward the prevention of such violations, it is my opinion that a State official giving the orders resulting in such overloading, in violation of the statute, would be criminally responsible for the violation.
The purpose of the town ordinance is to prohibit parking of any motor vehicle on portions of specified streets within the Town of Amherst between specified hours. The penalty for violation of the ordinance is a fine of not less than $1.00 and not more than $5.00 for each violation.

The regulation of parking by cities and towns has been expressly authorized by the General Assembly through enactment of § 46.1-252 of the Code of Virginia of 1950, as amended. This delegation of the police power to town authorities was held to be valid in the case of Town of Leesburg v. Tavenner, 196 Va. 80.

I am of the opinion that there is no constitutional objection to the enactment of such an ordinance by the Town of Amherst.

MOTOR VEHICLES—Reciprocal Agreements—Exemption from Registration in Virginia Accorded only to Non-Residents Engaged in Interstate Commerce. (363)

May 25, 1961

HONORABLE A. A. RUCKER
Commonwealth's Attorney of Bedford County

This is to acknowledge receipt of your letter of May 17, 1961 in which you request an opinion as to whether or not the owner of a highway tractor-trailer rig is required to obtain Virginia registration and license tags under the circumstances set forth in the following paragraph of your letter:

"Owner Jones came to Virginia in March of the year 1960. He owns his own highway tractor-trailer rig which he has leased to the Smith Brothers of Mobile, Alabama. Smith Brothers have a contract for hauling with Reynolds Aluminum Company of Richmond, Virginia. Owner Jones' rig is registered and licensed in Alabama and not in Virginia. Owner Jones lives in a house trailer owned by him and parked in Roanoke County. Owner Jones drives his rig for Smith Brothers, the lessees, and owner Jones has an Alabama chauffeur's license."

Section 46.1-41 of the Code of Virginia of 1950, as amended, which states the basic requirement that owners must secure registration and certificate of title, is as follows:

"Except as otherwise provided in §§ 46.1-42 through 46.1-49, 46.1-119 and 46.1-120 every person, including every railway, express and public service company, owning a motor vehicle, trailer or semitrailer intended to be operated upon any highway in this State shall, before the same is so operated, apply to the Division for and obtain the registration thereof and a certificate of title thereof."

The facts which you have stated do not qualify the owner under any of the exception statutes named in the quoted Section. He, therefore, must register the vehicle in Virginia unless he comes under the reciprocity agreement now in effect.

At the present time this State is a party to the "Fourteen State Reciprocity Agreement," which governs the operation of interstate motor vehicles owned by residents of the several signatory states, including the state of Alabama, to the extent permitted by the law of each of the fourteen member states. Under the term of this agreement, which supersedes certain statutes to the extent stated in the agreement itself, a resident of Alabama, for example, who has duly licensed his vehicle in that state may operate a "motor carrier of property for hire" in the State of Virginia without limitation as to the number of trips, when operated strictly in interstate commerce. However, any vehicle registered and licensed in another member state, if located in or operated from a base in this State for a period of thirty days, is required to be
registered in this State. As a prerequisite to any intrastate operation of a motor vehicle in this State, the vehicle, regardless of residency of ownership, must be registered and licensed in Virginia.

The privileges extended under any of our reciprocity statutes or agreements, insofar as the registration and licensing of vehicles in Virginia is concerned, have no application to owners who are residents of this State. Section 46.1-1 of the Code of Virginia, Paragraph (16), which defines a "nonresident," also defines "resident" under certain circumstances set forth in Subsection (b) as follows:

"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."

Inasmuch as the facts stated in your letter do not show whether or not Jones has been so employed for the requisite period of sixty days in this State, I am not in a position to determine the applicability of Subsection (b).

The pertinent portion of Subsection (c) thereunder, however, reads as follows:

"A person who has actually resided in this State for a period of six months, whether employed or not, shall be deemed a resident for the purposes of this title."

If I correctly interpret your statement, "Owner Jones came to Virginia in March of the year 1960," to mean that he has resided in this State since that time, then certainly under the provision of Subsection (c) he is a resident of this State for the purposes of Title 46.1, and is required to have Virginia registration and license tags for his tractor-trailer rig.

MOTOR VEHICLES—Reckless Driving and Improper Parking—Both Occurring on Private Parking Lot—Only One Criminal Offense. (293)

Crimes—Reckless Driving on Private Parking Lot Open to Public—Criminal Offense. Improper Parking Not Criminal Offense. (293)

March 23, 1961

HONORABLE WILLIAM GOODE
Commonwealth's Attorney
City of Clifton Forge

This is in reply to your letter of March 15, 1961, in which you request my opinion as to whether the operators of two motor vehicles may be charged for reckless driving and improper parking, due to a collision which occurred on the privately owned and publicly used C. & O. Company's parking lot in the City of Clifton Forge.

Section 46.1-190 of the Code of Virginia of 1950, as amended, provides in part as follows:

"A person shall be guilty of reckless driving who shall:

" (k) Drive or operate any automobile or other motor vehicle upon any driveway or premises of a church, or school, or of any recreational facilities or of any business property open to the public, recklessly or at a speed or in a manner so as to endanger the life, limb or property of any person."

In view of the express language of the foregoing statute relating to business property which is open to the public, I am of the opinion that the operator of the moving vehicle may be charged with reckless driving, even though the motor vehicle was not being operated at the time on a public highway. This case can be easily
distinguished from the case of Prillaman v. Commonwealth, 199 Va. 401, involving the operation of a motor vehicle on private property after the operator's license had been suspended.

As to the operator of the parked vehicle, I am unaware of any statute under which he may be prosecuted for improper parking. The statutes pertaining to parking have reference to public highways, except on publicly operated parking lots. As pointed out in the Prillaman Case, supra, the statutory definition of "highway" in § 46.1-1 of the Code is not broad enough to extend to private property, even though it may be open for public travel.

MOTOR VEHICLES—Reckless Driving—Court not Required to Accept Plea of Guilty at Time of Trial for Violating Section 18.1-54 of Code. (357)

Criminal Procedure—Disposition of Dual Charge Under Section 19.1-259.1 of Code. (357)

HONORABLE MARK D. WOODWARD, Judge
Juvenile and Domestic Relations Court
of Page County

May 17, 1961

This is to acknowledge receipt of your letter of May 8, 1961 in which you request an opinion as to the application of Section 19.1-259.1 of the Code of Virginia of 1950, as amended, with regard to the propriety of your action (1) in refusing to accept a plea of guilty of reckless driving at the beginning of the trial for driving under the influence of intoxicants, and (2) refusing to dismiss the reckless driving charge until the expiration of the appeal period, upon the conviction for driving under the influence of intoxicants.

The situation is described in the following quoted portion of your letter:

"Recently, in a case charging reckless driving and driving under the influence in violation of the ordinances of the Town of Luray, when the matter first came on to be heard, the defendant, by counsel, requested that the cases be heard together. This the Court refused to do and the prosecution desired trial first on the driving under the influence charge. Thereupon, the defendant, by counsel, tendered a plea of guilty to the reckless driving charge. After argument, the Court refused to accept the plea and stated that the reckless driving charge would not be heard until the disposition of the driving under the influence charge. The position of the defense was that it could tender a plea of guilty to reckless driving and the Court had to accept the same."

Section 19.1-259.1 of the Code of Virginia is as follows:

"Whenever any person is charged with a violation of § 18.1-54 or any similar ordinance of any county, city, or town and reckless driving growing out of the same act or acts and is convicted of one of these charges, the court shall dismiss the remaining charge."

A copy of a previous opinion regarding the applicability and effect of this statute, which was addressed to the Honorable Julius Goodman, Commonwealth's Attorney of Montgomery County, Christiansburg, Virginia, and dated November 15, 1960, is enclosed herewith. In the final paragraph thereof you will find the following, which is applicable to the situation which you have described: "Once the defendant is brought to trial on the reckless driving charge it is my opinion that he may plead guilty and by so doing be virtually assured of conviction, which under Section 19.1-259.1 would require the court to dismiss the charge of violating Section 18.1-54."
The order in which the cases on the docket should be tried, however, \textit{rests in the sound discretion of the court} and the court may make such special orders in reference thereto as may seem proper."

As indicated in the above cited opinion, the court may set the order in which the charges will be heard and in the matter in question you elected to first hear the charge of driving under the influence of intoxicants. As pointed out by our Supreme Court in \textit{Hundley v. Commonwealth}, 193 Va. 449, reckless driving and driving under the influence of intoxicants are two separate acts or offenses, so defined by statute, and the same evidence is not required to sustain each of these charges. It follows that a court would not be bound to accept a plea of guilty to reckless driving on the charge of driving under the influence of intoxicants. It is, therefore, my opinion that your action in refusing to accept the plea of guilty of reckless driving at the beginning of the trial for driving under the influence of intoxicants was proper.

Section 16.1-132 of the Code of Virginia of 1950, as amended, gives any person convicted in a court not of record of an offense not felonious, the right to appeal at any time within ten days from such conviction, \textit{whether or not such conviction was upon a plea of guilty}. Since the effect of such appeal is to annul the judgment of conviction of the court not of record, the conviction cannot become final until the expiration of the ten day period. It is my interpretation that the dismissal of the remaining charge, as required by Section 19.1-259.1, previously set forth herein, should be upon the conviction becoming final. Accordingly, it is my opinion that you were correct in refusing to dismiss the reckless driving charge until the disposition of the driving under the influence charge becomes final.

\textbf{MOTOR VEHICLES—Registration and Licensing—Trailers—Special Boat Hauling Device which Falls Within Definition Must be Licensed. (142)}

\textbf{Motor Vehicles—Trailers—Boat Hauling Device Constitutes. (142)}

\textbf{October 20, 1960}

\textbf{COLONEL C. W. WOODSON, JR.}
Superintendent of the Department of State Police

This is to acknowledge receipt of your letter of October 14, 1960 in which you ask my opinion as to whether certain requirements must be met in connection with the use of equipment mentioned in the following paragraphs of your letter:

"Enclosed are photographs of an apparatus used for transporting a boat over the highways of this State."

\textbullet{} \textbullet{} \textbullet{}

"In view of your letter of April 22, 1959, concerning the 'Holmes Speed King Dolly', I shall appreciate your advice as to whether the device shown in the attached photographs is required to be registered, licensed, inspected and have lights and other safety equipment installed thereon."

Referring to Virginia Code Section 46.1-1, paragraph (34), we find the term "vehicle" is defined as:

"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 stationery rails or tracks."

The apparatus shown in the pictures you submitted certainly is a "vehicle" by this definition. Paragraph (33) in the same Section defines "trailer" as follows:
"Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle."

This apparatus meets the requirements necessary for classification as a trailer inasmuch as it is a vehicle without motive power and designed for carrying property, namely, a boat, wholly on its own structure. Further, it is designed for being drawn by a motor vehicle and this is equally true whether or not the boat being transported or part of it is the medium for attachment to the motor vehicle drawing it. You will note that the "dolly" referred to in my letter of April 22, 1959 did not meet the definition of "trailer" as given in the definitive statute, in that it was not designed to carry property "wholly on its own structure." Here, the situation is different in that all of these requirements are met.

Having arrived at the conclusion that this apparatus in fact constitutes a trailer as defined by the Code, it is my opinion that your questions must be answered in the affirmative.

MOTOR VEHICLES—Registration—Foreign Corporation Liable for Fees Under Certain Circumstances. (42)

HONORABLE EMMY L. CARLTON
Commonwealth's Attorney of Essex County

July 27, 1960

This is to acknowledge receipt of your letter of July 21, 1960 in which you request my opinion as to whether the John Doe Corporation is required to obtain 1960 registration plates for the tractors owned and operated by the corporation. Quoting from your letter, the facts in connection with this case are as follows:

"The John Doe Transportation Corporation operates a fleet of tractor-trailer combinations, both intra-state and inter-state, transporting miscellaneous freight and exempt commodities. This corporation was incorporated under the laws of the State of Delaware in the early part of 1960. The corporation has its major operational terminal in Hampton, Virginia but has listed an address in Dover, Delaware. Most of the freight transported, if not all of it, originates in Tidewater, Virginia. The major stockholder of the corporation is a Virginia resident. This corporation has applied to the Virginia Corporation Commission for exemption cards for tractors and has been issued 1960 exemption cards under Section 56-304 of the Code. The trailers are not owned by the corporation, but are owned by a partnership consisting of officers and stockholders of the John Doe Corporation. The partnership has obtained Virginia registration plates for the trailers. The tractors and trailers were licensed in Virginia in the year of 1959, since both the tractors and trailers were owned by the partnership during that year. There has been no change in the operation of these tractors and trailers since the incorporation under the laws of the State of Delaware. In the year 1960 the corporation "purchased Delaware registration tags for the tractors, but continued to purchase Virginia registration tags for the trailers. It is my understanding that Virginia and Delaware have entered into a reciprocal agreement concerning motor vehicles. I have a photostatic copy of such an agreement dated May 5, 1943."

You will note that paragraph ten of the agreement with Delaware expressly states that the provisions thereof only apply to those who retain their status as nonresidents with respect to the reciprocating states and are licensed in their home state only. In other words, reciprocity is not granted by Virginia to a resident of Virginia. In this connection see the case of D. C. Hall Company v. State Highway Commission,
REPORT OF THE ATTORNEY GENERAL

(Texas) 330 S. W. 2d 904 (1959) in which it was held that the benefits of the Texas-Mississippi Reciprocal Agreement were not available to the company which was a resident of both of the contracting states. Hence, the real question presented in this case is whether or not the John Doe Corporation is a resident of Virginia within the meaning of the Motor Vehicle Laws. You will find that Section 46.1-1(16) provides that:

"(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; * * * *" 

I take it that those foreign corporations which are doing business in this State (whether they are authorized or not) are residents within the meaning of this statute. In regard to the matter of "doing business in this State," see Sections 13.1-102 and 13.1-113 and the cases of Carnegie v. Art Metal Construction Company, 191 Va. 136 and Rock-Ola Manufacturing Corporation v. Werts, 249 F 2d 813. Officers of a foreign corporation operating without a certificate of authority are subject to penalty, Section 13.1-281 of the Code of 1950 as amended. Therefore, such a corporation cannot avoid the payment of taxes by failing to secure a certificate of authority from the State Corporation Commission.

The State Corporation Commission issues exemption cards or warrants under the provisions of Article 8, Chapter 12, Title 56, Section 56-304 if the motor vehicles are required by law to be licensed by the Division of Motor Vehicles; and identification markers, if the motor vehicles are not required to be licensed by said Division (Section 56-304.1). The Division of Motor Vehicles is not required to review the application before the same is acted upon by the State Corporation Commission. As the issuance of this authority by the State Corporation Commission is based on information furnished by the applicant, this action by the State Corporation Commission would not preclude the Commonwealth from requiring the owner to license his (its) vehicles in proper cases.

It is my opinion that if it could be shown that the vehicles of the John Doe Corporation are being operated from and controlled by the Virginia office of the company to the exclusion of one in any other state then this concern would be doing business in Virginia and would be a resident of Virginia within the meaning of the statute, and its vehicles should be licensed in this State.

MOTOR VEHICLES—Registration—Voluntary Fire Department Automobiles—When Licensing Required. (275)

March 8, 1961

HONORABLE A. A. RUCKER
Commonwealth's Attorney of Bedford County

This is in response to your letter of March 1, 1961 from which I quote the following:

"The Stewartsville-Chamblissburg Volunteer Fire Department, Inc., is a volunteer fire department located in Bedford County. I am advised that an automobile was donated to this fire company; that this automobile does not have permanently attached to it any fire-fighting apparatus; that this automobile is not used by a volunteer lifesaving or first aid crew or rescue squad; that this automobile is painted a distinguishing color and that it conspicuously display in letters of the requisite height the identity of the Volunteer Fire Department to which it belongs.

"I further am advised that this automobile is used in conveying the fire chief and other members of the fire department to and from fires; further that it is used in conveying fire department personnel to and from fire drills, fire prevention lectures, court appearances having connection with the
activities of the fire department; that it is used in taking both members of the fire department and others to and from the fire house for work on the fire house and fire-fighting equipment; that it is used in collecting donations for fire department sponsored dinners, carnivals, etc., in placing posters and other advertising for fire department sponsored dinners, carnivals, etc., and is used in fact wherever it is needed in connection with any and all phases of the activities of this fire department.

"A question has been raised as to whether or not this vehicle, under the conditions outlined above, comes within the exemption provided by Code Section 46.1-46 from the necessity of having annual registration, license plates, etc.

"I shall appreciate your advising me of your opinion on this matter."

The pertinent portion of Section 46.1-46 of the Code of Virginia of 1950 as amended, is quoted below:

"No person shall be required to obtain an annual registration certificate and license plates or to pay the fee prescribed therefor pursuant to the provisions of this chapter for any fire-fighting trucks, trailers and semi-trailers upon which there is permanently attached fire-fighting apparatus when such vehicles are owned or under exclusive control of a volunteer fire department, or for ambulances or other vehicles owned or used exclusively by such volunteer fire departments or volunteer lifesaving or first aid crews or rescue squads; provided that any such vehicle is used exclusively as an ambulance or lifesaving and first aid vehicle..."

It may be seen that the vehicle you have described does not qualify as fire-fighting equipment since it is not a truck, semitrailer or trailer and has no permanently attached fire-fighting apparatus. Obviously it is not an ambulance, either by definition or by use. That leaves one other possibility under this statute, namely, the classification "other vehicle owned or used exclusively by such volunteer fire departments or volunteer lifesaving or first aid crews or rescue squads."

You have stated that this automobile is not used exclusively as an ambulance or lifesaving and first aid vehicle but, in fact, is used altogether for a number of other purposes. Although these purposes may inure to the benefit of the volunteer fire department, this is not sufficient to bring the vehicle within the rather narrow confines of the exemption statute. Under the provisions of the statute, such vehicle must be "used exclusively, as an ambulance or lifesaving and first aid vehicle." Accordingly, it is my opinion that the vehicle under consideration is not exempt from annual registration and license plates.

MOTOR VEHICLES—Regulation of Parking By Cities and Towns. (267)
Cities and Towns—May Regulate Parking on Streets. (267)

HONORABLE JAMES M. THOMSON
Member of the House of Delegates

March 6, 1961

This is to acknowledge receipt of your letter of February 16, 1961 which reads as follows:

"I would like to request our attorney general's opinion in regard to the legality of a snow plan for the City of Alexandria, Virginia, which would require that cars be equipped with appropriate devices and would further require that parking be restricted at certain times on certain streets."
"Sec. 2.04 (g) provides that the City shall have the power
" 'To regulate the operation of motor and other vehicles and exercise control over traffic in the streets of the city and provide penalties for the violation of such regulations, provided that ordinances or administrative regulations adopted by virtue of this subsection shall not be inconsistent with the provisions of the motor vehicle code of Virginia . . .'

"Sec. 46.1-180 of the Code of Virginia provides:
" 'In counties, cities and towns the governing body may adopt ordinances to regulate the operation of vehicles on the highways of such counties, cities and towns not in conflict with the provisions of this title . . .'
"I would appreciate it if you would tell me whether or not, under the above provisions or any other provisions of our Code or City Charter, we would be permitted to require the use of chains or snow tires and to restrict parking for the purpose of snow removal."

The general powers of cities and towns to enact ordinances to control local parking are found in Section 46.1-252 of the Code of Virginia of 1950 as amended, which reads in part as follows:

"The council or other governing body of any city or town may, by a general ordinance, provide for the regulation of parking within its limits, * * * determine the time during which a vehicle may be parked * * * including specifically the right and authority to classify vehicles with reference to parking and to designate the time, place and manner such vehicles may be allowed to park on city or town streets; * * *"

In the case of Town of Leesburg v. Tavenner, 196 Va. 80, the Virginia Supreme Court held that the above statute in conjunction with a city or town charter and an ordinance pursuant thereto providing for the regulation of parking within the city or town was sufficient delegation of the State Police power to permit the city or town to act.

It is, therefore, my opinion that the City of Alexandria may restrict parking for the purpose of snow removal from its streets, with the exception of any State or Federal highway, if any, upon which the control and regulation of traffic has not been delegated to the city. I know of no statute, however, which would grant any city or town the authority to require the use of chains or snow tires.

MOTOR VEHICLES—Regulation of Traffic—Authority in Counties under Sections 46.1-180 et seq. of Code. (174)

Counties—Power to Regulate Traffic. (174)

November 29, 1960

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

This is to reply to your letter of November 17, 1960, which reads as follows:

"During the 1956 Legislature, Title 46, Section 204, Code of Virginia, 1950, as amended, was amended to permit counties to adopt certain traffic regulations set out therein.

"Pursuant to this authority, the County of Surry adopted certain ordinances regulating traffic within the County.

"In checking recently for the Statutory authority for the County ordinances I found that in 1958 when the new Motor Vehicle Code was adopted, Section 204 was of course repealed along with the rest of the then existing
Motor Vehicle Code. A diligent search has not revealed any authority in the new Motor Vehicle Code or elsewhere in the Code for ordinances such as those adopted by this County.

"Will you please advise me as to whether or not there is any section in the Code providing for County ordinances regulating traffic, and if there is not, what the effect of repeal of the former statutory authority has on ordinances adopted pursuant to such authority?"

Title 46, Section 204, prior to the 1956 amendment, was as follows:

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

"But nothing in this section shall apply to the authorities or the ordinances, rules and regulations adopted by the authorities of any county which adjoins a city within or without this State having a population of one hundred and twenty-five thousand or more, provided such county has a trial justice; provided that nothing in this section shall apply to the authorities or the ordinances, rules and regulations adopted by the governing body of any county which adjoins two cities of the first class and within the boundaries of which said county is located any United States military camp, and provided, further, that the fines collected for the violation of such ordinances shall be paid to the State when the arrest is made by an officer of any division of the State government."

The 1956 amendment to this section permitting all counties in this State to adopt ordinances to prohibit certain acts, added the following:

"Nor shall this section be construed as prohibiting the governing body of any county, by ordinance duly adopted, from prohibiting any or all of the following acts on the highways in such county outside the limits of any incorporated town wherein traffic is regulated by town ordinances:

(1) Backing a vehicle unless such movement can be made with safety and without interfering with other traffic; or

(2) Operating any vehicle upon the highways in such county without giving his full time and attention to the operation of said vehicle; or

(3) Operating any vehicle upon the highways in such county and failing to keep the vehicle under proper control at all times.

"No ordinance so adopted shall impose any penalty in excess of the penalty prescribed in this chapter for reckless driving."

While the 1956 amendment gave counties in general the authority to adopt ordinances to control traffic to the extent of prohibiting the three stated acts, a more inclusive authority had already been given to cities and towns by the several code sections under Article 2, Chapter 4 of Title 46. The General Assembly of 1958, by an act to revise, rearrange, amend and recodify the Motor Vehicle laws of Virginia, gave the counties equal standing with cities and towns in the matter of regulating traffic locally. In this connection you are referred to Code Section 46.1-180 which is as follows:

"(a) In counties, cities and towns the governing body may adopt ordinances to regulate the operation of vehicles on the highways of such counties, cities and towns not in conflict with the provisions of this title and may repeal, amend or modify such ordinances and may erect appropriate signs or markers on the highways showing the general regulations applicable to the operation of vehicles on such highways. No governing body of any county, city or town, may:
"(1) Increase or decrease the speed limit within their boundaries unless such increase or decrease in speed shall be based upon an engineering and traffic investigation by such county, city or town and unless such speed area or zone is clearly indicated by markers or signs; provided, however, that the governing body of any city or town, by ordinance, may authorize the city or town manager or such officer thereof as it may designate, to reduce for a temporary period not to exceed sixty days, without such engineering and traffic investigation, the speed limit on any portion of any highway of the city or town on which men are working or where the highway is under construction or repair.

"(2) Enact ordinances requiring vehicles to come to a full stop or yield the right of way at a street intersection if one or more of such intersecting streets has been designated as a part of the State highway system in a town which has a population of less than 3,500 people.

"(b) No such ordinance shall be deemed violated if at the time of the alleged violation the sign or marker placed in conformity with this section is missing or is substantially defaced so that an ordinarily observant person under the same circumstances would not be aware of the existence of the ordinance.

"(c) No governing body of a county, city or town may provide penalties for violating a provision of an ordinance adopted pursuant to this section which is greater than the penalty imposed for a similar offense under the provisions of this title."

You will notice that this section does not limit the county authorities to the prohibition of the three acts enumerated in the old Section 46-204 quoted herein above, but gives the counties more extensive authority to regulate traffic. In this Section and those following, namely 180.1, 181, 182, 183, 184, 185, 186, 187 and 188, which comprise Article 2, Chapter 4 of Title 46.1, you will find stated the general powers of local authorities to regulate traffic.

Having answered your first question in the affirmative, I do not believe it is necessary to take up your second question, which is contingent upon the first, especially since, in my opinion, all authority in former Section 46-204 as amended in 1956, and much more is allotted to the counties under the present statutes cited.

MOTOR VEHICLES—Rescue Vehicles—Siren Required. (269)

MOTOR VEHICLES—Sirens—When Vehicle Which Transports Blood May Be Equipped With Siren. (269)

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

March 7, 1961

This is to acknowledge receipt of your letter of February 16, 1961, which reads as follows:

"The Norton Community Blood Bank, a non-stock, non-profit organization and sponsored by the Lions Clubs of Wise County operates a blood bank which serves the Park Avenue, St. Mary's Norton Community, Wise Memorial and other hospitals throughout the area. They have a central office in Norton and transport the blood by emergency vehicle to Grundy, Whitesburg, Wise and other places. I might point out in this connection that the Red Cross blood bank does not operate in the coal fields of Southwest Virginia, and this is the only blood program which the hospitals have in operation. As the trips of this vehicle are often considered a matter of life and death, the officials of the Blood Bank feel that this should be classed
as an emergency vehicle so that they can obtain a permit from the Superintendent of the State Police for the use of the siren as provided by Section 46.1-285 of the Code of Virginia.

"Would you please give me your opinion as to whether or not a vehicle transporting blood is an emergency vehicle entitled to a permit for a siren?"

Section 46.1-285 of the Code of Virginia of 1950 as amended, reads in part as follows:

"Every police vehicle and fire department vehicle and every ambulance or rescue vehicle used for emergency call shall be equipped with a siren or exhaust whistle of a type not prohibited by the Superintendent."

Since it is obvious that this is not a police or fire department vehicle or ambulance, it must be determined whether or not it qualifies as a rescue vehicle. While I do not believe that the transporting of blood would, in itself, qualify a vehicle as a rescue vehicle, it may do so under certain circumstances. Section 46.1-225 of the Code of Virginia of 1950 as amended, offers the following:

"As used in this chapter, the term 'rescue vehicle' is defined as any vehicle designed or utilized for the principal purposes of supplying resuscitation or other emergency relief where human life is endangered." (Underscoring Supplied)

You state that the trips of this vehicle are often considered a matter of life and death. You do not state the design of the vehicle or how often, if at all, the vehicle is used for non-emergency purposes. If the vehicle is used solely or principally for the purpose of supplying emergency relief where human life is endangered then, in my opinion, it would qualify under the statute as a rescue vehicle. In that case, no permit would be necessary as the statute (Section 46.1-285) requires that every rescue vehicle used for emergency calls shall be equipped with a siren "of a type not prohibited by the Superintendent."

MOTOR VEHICLES—Speed Limit—45 M.P.H. Applied to Vehicle Towing Boat Trailers. (32)

Honorable Ferdinand F. Chandler
Commonwealth's Attorney of Westmoreland County

This is to acknowledge receipt of your letter of July 20, 1960 in which you state in part:

"Will you please give me your opinion as to whether the speed limit of forty-five miles per hour, provided by paragraph (b) of Section 46.1-193 of the Code of Virginia, applies to a person driving a motor vehicle which is being used to tow a boat trailer?"

The portion of the statute to which you refer, reads as follows:

"No person shall drive any vehicle upon a highway of this State at a speed in excess of:

(b) Forty-five miles per hour if the vehicle is a truck, road tractor, tractor-truck, or combination of vehicles designed to transport property or is a motor vehicle being used to tow a vehicle designed for self-propulsion or a house trailer." (Italic supplied)
The two wheeled trailer on which the boat rests is a vehicle designed to transport property and with a passenger car constitutes a combination of vehicles within the meaning of this statute.

I am, therefore, of the opinion that where a boat is towed on such a trailer attached to the rear bumper of a motor vehicle that the speed limit of such a combination of vehicles is forty-five miles per hour.

MOTOR VEHICLES—Speed Limits—School Zone—25 m.p.h. when School Warning Blinking Sign Operating is Mandatory. (194)

Schools—Speed Limit for Motor Vehicles When Warning Sign is Operative in School Zone. (194)

December 13, 1960

HONORABLE BRADLEY ROBERTS
Member, House of Delegates

This is to acknowledge receipt of your letter of December 2, 1960 in which you ask my opinion as to whether or not a motorist is guilty of violating Virginia Code Section 46.1-193 under the facts stated in your letter, which reads as follows:

"John S. Battle High School is located on Route 11 between Bristol, Virginia, and Abingdon, Virginia. School convenes at 8:45 A. M. five days a week. The building is located about 800 feet from the highway and access thereto is gained over a roadway leading up a rather steep hill from the highway to the school.

"Fixed blinking signs have been placed at the side of the pavement on Highway 11 near the school pursuant to section 46.1-193. These signals are actuated by a mechanical timing device and are supposed to start flashing at 7:45 A. M. each school day. The first school bus is scheduled to arrive on the premises at 7:45 each morning. Through a malfunction or through error of the electrician who regulated the lights, the signals recently started flashing sometime before the hour designated by the school principal.

"A local resident traveling east on Highway 11 to his place of employment approximately one mile east of the school observed the lights flashing when he was going to work at about 7:37 A. M. on a school day. This resident knew that school had not convened and that it was not scheduled to convene until 8:45 A. M.; he observed that there were no children going to or from the school on the highway or visible from the highway. No school buses were in sight, although the state trooper observed one enter the school driveway about five minutes after the ticket was given. This resident assumed that by reason of the fact that school was not in session and because it was more than an hour before the time that the school was scheduled to convene that the signal was of no effect. He disregarded it and drove past the light at a speed of in excess of 25 miles an hour, but within the lawful limits for traffic on the highway outside of the school zone. He was stopped by a state trooper and given a ticket for failing to observe the speed limit of 25 m.p.h. in the school zone.

"The motorist contends that he is not guilty. He argues that he knew that school was not in session and that it was more than an hour before it was supposed to convene, hence he had the right to disregard the signal. He further argues that there are almost no students that walk to school, as most of them are transported in buses, and it is conceded that such of the children as may walk to school were not then in sight and were not due to be at school until the appointed hour. The motorist contends that the law was for the benefit of school children and since none could be affected that he should not be fined.
"The County Judge has requested that your opinion be obtained as to whether or not the motorist was guilty of violating the section in question."

The portion of Code Section 46.1-193 which has pertinent application to the situation you describe, is as follows:

"No person shall drive any vehicle upon a highway of this State at a speed in excess of:

* * * *

"(f) * * * *

"(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 present in the immediate vicinity. * * * 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. * * * * *

"(i) Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided in § 46.1-16."

While the statute stipulates that the "signs shall be in position for 30 minutes preceding regular school hours and for 30 minutes thereafter" it does not limit the use of the signs to those periods. It adds that the signs shall also be used "during such other times as the presence of children on such school property reasonably requires a special warning to motorists." It further places the duty upon the principal or other responsible school official or person designated by the school board to place the signs in the highway and remove them when their presence is no longer required. It is obvious that the school principal or other properly designated official may place the warning signs in the road at his discretion. If the children were required to be present at the school at some unusual hour, as for a special training session for example, the designated official would doubtless have authority to place the warning signs in the highway. Someone must be responsible for carrying out this additional safety measure and the statute provides that this shall be the official in charge of the school or other designated official who will know when the special device will be needed to warn motorists of the likelihood of the presence of children on the highway adjacent to the school grounds. To such a school official this statute is directive but sufficiently flexible to permit the necessary variations as to which days and what time of day or night the special warning devices will be needed.

As to the person driving a motor vehicle, on the other hand, this statute is specific in its prohibition. No person shall drive any vehicle at a speed in excess of twenty-five miles per hour between such school warning signs. I find nothing in the statute that gives the motorist the discretion to obey or disregard the sign as he may deem it proper. Whether or not the sign should be displayed is for the determination of the school authorities, not the motorist. The only duty placed upon the motorist by this statute is that he observe the speed limitation of twenty-five miles per hour when the school signs are displayed.

In accordance with the foregoing, it is my opinion that under the facts stated in your letter the motorist would be guilty of violating this Section.
NATIONAL GUARD—Summons and Warrant of Court Martial—Forms. (58)

August 5, 1960

MAJOR GENERAL PAUL M. BOOTH
The Adjutant General

This has reference to your letter of July 22, 1960, in which you enclosed a copy of the form of Military Summons and Military Warrant of Arrest presently being utilized by your Department. You have asked for my recommendation as to contemplated revisions in the forms.

While reference to the section of the Virginia Code, pursuant to which such processes are issued, may serve some beneficial purpose, there is no mandatory requirement that such a citation be entered upon the face of the process. So long as the process is to be executed by a sheriff or other officer specified in § 44-50 of the Code, I see no necessity in revising the present form of the summons or warrant. However, you state in your letter that the summons may be delivered by mail, or by a National Guardsmen temporarily acting as a Military Policeman. In such instances the summons should be revised in order to address the same to the accused, rather than to an officer who is to execute the summons. Failure to obey such an order to appear before the court would then necessitate the issuance of a warrant which would be executed pursuant to § 44-50 of the Code.

Attached hereto is a suggested draft for an order to appear (summons), which may be delivered to the accused either by mail or by some officer.

NURSES—Practice of Medicine—Extent Permissible During Emergency. (12)

July 11, 1960

MISS JULIA B. FISHER, Executive Secretary
Virginia State Nurses Association

This is in reply to your letter of June 16, 1960, which reads as follows:

"Recently two questions have come to the attention of the Virginia State Nurses Association. It is our feeling that your office could answer these questions for us. The questions are somewhat related according to the way they have been presented.

"The first question relates to the functions of nurses in time of disaster. We have been told that a number of years ago during the war, at the time civil defense units were set up, a state ruling was passed regarding extension of duties for nurses during a disaster or emergency period. These duties would involve functions which would ordinarily be beyond the scope of the nursing profession and would involve some things which would be carried out more customarily by physicians. Our specific question relates to whether or not this same ruling is in effect or whether it has been replaced by something more recent. We do not have the exact date of this ruling but would appreciate any information which you can give us.

"The second question is in relation to giving first aid treatment. We have been told that there is a limitation on the number of days during which a nurse can legally treat a person and it still be considered first aid or emergency treatment. Any information which you can give us regarding this would also be appreciated."

Section 54-275 of the Code of Virginia defines the practice of medicine and Section 54-276.1, which limits the provisions of this section, reads as follows:
"Nothing in this chapter shall be construed to prevent the furnishing of first aid or medical assistance in case of a genuine emergency in the absence of a qualified practitioner."

I am, therefore, of the opinion that the above section unequivocally authorizes a nurse in time of a disaster or an emergency to perform functions usually performed by licensed physicians, provided, of course, that the services of such a physician are not available.

In respect to your second inquiry, I know of no time limit that will restrict a nurse in rendering first aid or giving medical assistance in times of an emergency. The length of time that she can act will depend upon the facts and circumstances in each case. In one case, it may be only a matter of hours whereas in another case it may be a matter of days. As long as the nurse is acting in good faith in an emergency or in rendering first aid when the services of a physician are not available, it is my opinion that she will not be engaged in the unauthorized practice of medicine.

OPTICIANS—Licenses—Not Required of Optometrists. (232)

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

February 2, 1961

This is to acknowledge receipt of your letter of January 30, 1961 in which you request my opinion on the following question:

"... can a registered Optometrist hold himself out to the public as an Optician without first obtaining a certificate required in Chapter 14.1 of Title 54 of the Code? If a registered Optometrist is exempt from the provisions of Chapter 14.1 of Title 54, Code of Virginia, can that registered Optometrist violate the provisions of Section 54-398.23 without any sanctions being applied?"

Section 54-398.1 which is a part of Chapter 14.1, Title 54, Code of Virginia (1950) as amended, reads in part as follows:

"Nothing in this chapter shall apply to:

"(1) Any licensed physician or registered optometrist."

It would seem that none of the provisions of Chapter 14.1 is applicable to registered optometrists. The provisions with respect to sanctions or censures as contained in Section 54-388 are applicable to optometrists. Section 54-398.23 would not, in my opinion, apply to a person licensed under Chapter 14 of Title 54 of the Code, due to the fact that a registered optometrist is not required to hold a certificate as an optician under Chapter 14.1 Furthermore, the statute expressly provides that an optometrist may practice as an optician without being registered, as we find Section 54-398.3 provides as follows:

"On or after January 1, 1955, no person shall practice or offer to practice as an optician in this State unless he is the holder of a certificate or registration issued as hereinafter provided. However, no registered optometrist shall be required to obtain any certificate from the Board in order to practice or offer to practice as an optician."

Therefore, the answer to both your questions is in the affirmative.
OPTICIANS—License—Supplier of Optical Glasses Must Have License as Optician if He Supplies Anyone Other Than Those Specified in Section 54-398.2 of Code.

February 9, 1961

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

This is in reply to your letter of January 27, 1961, in which you ask to be advised as to whether the following described practice by an optical supplier constitutes such a practice as would require a license as a registered optician.

"A manufacturing company (employer) requires in many instances that their employees wear safety glasses in the performance of their duties. Those employees who are required to wear safety eyeglasses quite often need prescription eyeglasses. The employee is sent to a person who is authorized by State statutes to examine the eyes, such as; a licensed physician or a registered optometrist, for an eye examination and for a prescription for eyeglasses. The prescription is either tendered to the ophthalmic supplier by the licensed person or by a representative of the employer. The optical supplier fills the prescription for the eyeglasses and sends the eyeglasses in turn to the employer. The employer then issues the eyeglasses to the employee. The optical supplier bills the employer direct for the eyeglasses and, in some instances, the employer bills the employee for the total or partial cost of the eyeglasses."

Section 54-398.2 of the Code of Virginia provides in part as follows:

"(d) 'Optician' means any person, not exempted by § 54-398.1, who prepares or dispenses eyeglasses, spectacles, lenses, or appurtenances thereto, for the intended wearers or users thereof, on prescriptions from licensed physicians or registered optometrists, or as duplications or reproductions of previously prepared eyeglasses, spectacles, lenses, or appurtenances thereto; or who interprets such prescriptions or such duplications or reproductions, and in accordance therewith, measures, adapts, fits, and adjusts such eyeglasses, spectacles, lenses, or appurtenances to the human face."

The exemption set forth in § 54-398.1 of the Code, which is here germane, reads as follows:

"Nothing in this chapter shall apply to:

"(2) Any individual, partnership or corporation, engaged in supplying ophthalmic prescriptions and supplies exclusively to licensed physicians, to registered optometrists, to registered opticians, or to optical scientists;"

So long as a manufacturer of glasses supplies eyeglasses exclusively to licensed physicians, optometrists, opticians or to optical scientists, the manufacturer comes within the purview of the exemptions in the quoted portion of § 54-398.1 of the Code. Conversely, when a manufacturer supplies eyeglasses directly to an employer, or any other person not expressly excepted in § 54-398.1 of the Code, the supplier becomes an "optician" within the definition of § 54-398.2 of the Code. Accordingly, he must be registered as an optician.
ORDINANCES—County Not Required To Publish Proposed Ordinance In Full when Giving Notice of Intention. (221)

Counties—Ordinances—Notice of Intent—Not Required to Publish Ordinance in Full. (221)

January 16, 1961

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

This is to acknowledge receipt of your letter of January 9, 1961, in which you state in part:

"In the past, we have been publishing the required notice of an intention to pass a certain ordinance (describing the same in general terms) for two successive weeks, etc—and then after the Board of Supervisors has passed such ordinance, the Clerk then publishes the ordinance which has been adopted, or a summary thereof, etc. However, the Clerk and I have noticed that several near-by Counties have been publishing the full ordinance at the initial newspaper notice of the proposal of the Board to adopt such ordinance at a certain date, etc. Of course, since the recent amendment of the section of the Code permitting the advertising of a summary of such adopted ordinance, we presume these Counties in question, take advantage of such summary in order to reduce advertising costs.

"We will appreciate it if you will give us the benefit of your opinion as to whether the procedure we have been following is correct; or whether the matter is optional."

The pertinent portion of Section 15-8 of the Code of Virginia is as follows:

"The object of each such ordinance shall be expressed in its title.

"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, or by its title and an informative summary of such ordinance, once a week for two successive weeks in a like newspaper. If such publication is by title and informative summary the publication shall include a statement that a copy of the full text of the ordinance is on file in the clerk's office of the circuit court of the county."

( Italics supplied).


The question presented is whether it is necessary to publish the proposed ordinance in full when a notice of intention to propose the same for passage is given. Of course, it is permissible to publish the same in full, but so long as the notice includes a sufficient description in summary form the requirement of the statute is fulfilled. The obvious purpose of the notice is to make it possible for any citizen to appear at the meeting of the board of supervisors considering the proposed ordinance and either to advocate or object to its passage. Your question is, therefore, answered in the negative.

Hence, it is my opinion that the procedure which you have been following is correct.
OYSTERS—Leases from State—Governor has no Authority to Grant Moratorium on Rentals. (179)

November 30, 1960

HONORABLE WALTHER B. FIDLER
Member, House of Delegates

This will acknowledge your letter of November 29, which reads as follows:

"The oyster planters who lease oyster planting ground from the Commonwealth of Virginia have been having serious and widespread mortalities in their oysters, particularly in the lower Chesapeake Bay, as a result of a disease identified as MSX by the Virginia Fisheries Laboratory. If this disease continues to take its toll at anywhere near its present rate, many of these oyster planters will be forced to cease operation entirely.

"If this happens, these people will be in difficult financial straits and yet will be faced with paying ground rent on many acres of ground for a number of years, waiting for the disease to abate.

"My question is, does the Governor or the Commission of Fisheries have any authority to declare a moratorium on all oyster ground rental in the areas affected until the next session of the General Assembly?"

I have made a careful study of Title 28 of the Code, and I am unable to find that it contains any provision that would grant such authority to either the Governor or the Commission of Fisheries. I am not aware of any other statutory provision under which such a moratorium could be granted.

In my opinion, the only way these lessees may obtain relief from the payment of the annual rental (unless they surrender their leases as provided by Section 28-124(18) of the Code) would be by legislative action.

PERSONAL PROPERTY—Courts—Unclaimed Money—Effect of "Uniform Disposition of Unclaimed Property Act." (10)

Escheat—Personal Property—Unclaimed Money Held by Courts. (10)

July 8, 1960

HONORABLE WILLIS M. ANDERSON
Commissioner in Chancery
Court of Law and Chancery
City of Roanoke

This is in reply to your letter of July 1, 1960, written at the request of the Judge of the Law and Chancery Court of the City of Roanoke, in which you ask to be advised as to whether §§ 8-746 and 8-747 of the Code of Virginia of 1950 have been changed by the recently enacted Chapter 11.1 of Title 55 of the Code of Virginia, pertaining to the disposition of unclaimed property.

Sections 8-746 through 8-749 of the Code provide for the disposition of money which has remained in the custody or control of the courts of this State for a period of five years without having been claimed by those entitled thereto. Procedure is provided for the payment of such money into the State treasury and the recovery thereof by persons entitled thereto.

The "Uniform Disposition of Unclaimed Property Act" was enacted by the 1960 Session of the General Assembly of Virginia by Chapter 330, and is codified as Chapter 11.1, Title 55 of the Code. The purpose of this Act is to provide a uniform disposition of intangible personal property which is presumed to have been abandoned. Section 55-210.9 of the Code (a portion of the Uniform Act) provides as follows:
"All intangible personal property held for the owner by any State or federal court, public corporation, public authority, or public officer in this State, or a political subdivision thereof, that has remained unclaimed by the owner for more than seven years is presumed abandoned, provided, however, that this provision shall in no way affect the laws of this State relating to such property in the custody or control of any State court or on deposit or that may be deposited in a bank or other depository to the credit of any court in any cause, and provided further that if any federal statute provides for the distribution of any unclaimed property subject to the jurisdiction of a federal court, this statute shall not apply."

In view of the express provision that the foregoing statute shall in no way affect the laws relating to intangible personal property in the custody or control of the courts, I am of the opinion that the courts may continue to dispose of money in accounts which has remained unclaimed for five years pursuant to the provisions of §§ 8-746 and 8-747 of the Code.

PERSONAL PROPERTY—Uniform Disposition of Unclaimed Property Act—N
Effect Upon Funds in Hands of General Receiver For Courts. (296)
Escheat—Personal Property—Unclaimed Money in Hands of General Receiver For Courts. (296)

HONORABLE MARK D. WOODWARD
General Receiver
Circuit Court of Page County

March 27, 1961

This is in reply to your letter of March 20, 1961, in which you request my opinion as to the applicability of § 55-210.9 of the Code (portion of Uniform disposition of Unclaimed Property Act) upon moneys held by a general receiver of a court pursuant to § 8-725 of the Code.

Section 55-210.9 of the Code reads as follows:

"All intangible personal property held for the owner by any State or federal court, public corporation, public authority, or public officer in this State, or a political subdivision thereof, that has remained unclaimed by the owner for more than seven years is presumed abandoned, provided, however, that this provision shall in no way affect the laws of this State relating to such property in the custody or control of any State court or on deposit or that may be deposited in a bank or other depository to the credit of any court in any cause, and provided further that if any federal statute provides for the distribution of any unclaimed property subject to the jurisdiction of a federal court, this statute shall not apply." (Italics supplied)

I have previously expressed the opinion that the courts should continued disposing of money in accounts which has remained unclaimed for five years, pursuant to the provisions of §§ 8-746 and 8-747 of the Code. A copy of my letter of July 8, 1960, addressed to Honorable Willis M. Anderson, Commissioner in Chancery for the Court of Law and Chancery of Roanoke, is enclosed.

I am of the opinion that the view expressed in my letter to Mr. Anderson is applicable to moneys held by general receivers for the courts pursuant to § 8-725 of the Code.
PERSONNEL ACT—State Education Assistance Authority Subject to. (323)

HONORABLE JOHN W. GARBER
Director of Personnel

This is in reply to your letter of April 14, in which you request my advice as to whether or not the employees of The State Education Assistance Authority are to be regarded as excluded from the Virginia Personnel Act.

You call attention to the fact that this Authority is a political subdivision of the Commonwealth and subsection (e) of Section 4 of Chapter 494, Acts of 1960, authorizes the Authority to employ such employees and agents as may be necessary and “to fix their compensation to be payable from funds made available to the Authority by law.”

I am enclosing copy of an opinion which this office furnished to the Virginia State Ports Authority at Norfolk, under date of November 6, 1953 and which is published in the Report of the Attorney General for 1953-'54, at page 152. The Virginia State Ports Authority is also a political subdivision of the State and Section (f) (3) (Section 62-106.8 of the Code) authorizes that Authority to employ, fix and pay compensation of its employees.

I see no distinction between the question presented by the Virginia State Ports Authority and by you.

In my opinion the power conferred upon the Authority with respect to compensation is subject to other applicable statutes relating to personnel control.

PHYSICIANS—Confidential Communications—May Not Conceal Crime. (34)

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

This is in reply to your letter of July 7, 1960, in which you request that I refer you to any authority on the question of civil liability of a physician for disclosing to the sheriff information which was gained through his confidential relationship with a patient believed to have been a participant in the commission of a crime.

The privilege relating to confidential communications between physician and patient is a creature of statute, being unknown at common law. See 58 Am. Jr., Witnesses, §§ 363 and 401.

The gist of such statutes is to relieve the physician of the mandatory requirement to testify respecting any information which he may have acquired in attending a patient.

Section 8-289.1 of the Code of Virginia of 1950, as amended, provides as follows:

"Except at the request of, or with the consent of, the patient, no duly licensed practitioner of any branch of the healing arts shall be required to testify in any civil action, suit or proceeding at law or in equity respecting any information which he may have acquired in attending, examining or treating the patient in a professional capacity if such information was necessary to enable him to furnish professional care to the patient; provided, however, that when the physical or mental condition of the patient is at issue in such action, suit or proceeding or when a judge of a court of record, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such attendance,
examination or treatment shall be privileged and disclosure may be re-
quired. This section shall not be construed to repeal or otherwise affect the
provisions of § 65-88 relating to privileged communications between
physicians and surgeons and employees under the Workmen’s Compen-
sation Act: nor shall the provisions of this section apply to information com-
municated to any such practitioner in an effort unlawfully to procure a
narcotic drug, or unlawfully to procure the administration of any such
drug.”

It is to be noted that this statutory privilege is confined to testifying in a court
proceeding. It cannot be considered as a privilege to conceal the commission of a
crime. While the reported cases are few in number, the rule appears to be well
established that there is no privilege between physician and patient which would
permit the physician to refuse to disclose evidence of the commission of a crime, even
though gained through his confidential relationship with a patient. See 9 A.L.R. 1250.

For annotations as to the liability of a physician for disclosure of confidential
communications, you are referred to the following:

1 Am. Jur. 148, Abortion, § 43
58 Am. Jur. Witnesses, §§ 401, 422 and 436
53 C.J.S. 167, Libel and Slander, § 104

While a wrongful disclosure of confidential information may subject a physician
to civil liability, there can be no such liability for a disclosure on the witness stand
if the testimony is admissible in the case in which it is given, and is relevant to the
issues, or is admitted by the court over objection made to its admissibility. 41 Am.
Jur. 196, Physicians and Surgeons, § 75.

PHYSICIANS AND SURGEONS—Practice with Other Physicians or Surgeons—
Not Prohibited by Prohibitions Against Fee Splitting. (138)

October 18, 1960

HONORABLE LIGON L. JONES
Commonwealth’s Attorney for the City of Hopewell

This is to acknowledge receipt of your letter of October 6, 1960, in which you
request my opinion on the following questions, while will be answered seriatim.

“Does Section 54-276 of the Code prohibit a physician from employing
another physician to aid him in his general practice of medicine?”

That Code section provides as follows:

“No surgeon or physician shall directly or indirectly share any fee charged
for a surgical operation or medical services with a physician who brings,
sends or recommends a patient to such surgeon for operation, or such phy-
sician for such medical services; and no physician who brings, sends, or
recommends any patient to a surgeon for a surgical operation or medical
services shall accept from such surgeon or physician any portion of a fee
charged for such operation; provided, however, that nothing in this chapter
shall be construed as prohibiting the members of any regularly organized
partnership of such surgeons or physicians from making any division of their
total fees among themselves as they may determine or a group of duly licensed
practitioners of any branch or branches of the healing arts from using their
joint fees to defray their joint operating costs. Any person violating the pro-
visions of this section shall be guilty of a misdemeanor.” (Italics supplied).
It is my opinion that the statute does not prohibit the employment of one physician by another so as to aid the latter in the performance of the general practice of medicine.

"Does the section prohibit a physician either employing a surgeon or forming a partnership with the surgeon to engage in both general practice of medicine and surgical operations where the employer physician is not a surgeon?"

The first two sentences of this statute reveal its purpose—that is, to prohibit surgeons and physicians from splitting fees in cases where one physician or surgeon brings, sends or recommends a patient to another physician or surgeon. This statute, in my opinion, does not purport to forbid the establishment of bona fide partnerships between two or more persons engaged in the practice of medicine, even though the partners specialize in different fields of the medical profession. I do not construe the statute to prevent a partnership consisting of one member who is specializing in surgery and another member who specializes in another category of the healing arts or in the general practice of medicine. The terms of the partnership agreement could provide any arrangement with respect to expenses of operation and division of profits as may be determined by the contracting partners.

PINE TREE SEED LAW—Violators Posting Bond—No Particular Form Required. (176)

HONORABLE GEORGE W. DEAN
State Forester
Department of Conservation and Economic Development

November 29, 1960

This is in reply to your letter of November 22, 1960, in which you asked to be advised if there exists any particular form for the bond posted with the court pursuant to § 10-79.1 of the Code of Virginia of 1950, as amended.

The portion of the statute which is here germane reads as follows:

"When any person shall be convicted of failing to leave seed trees uncut as required by § 10-76 or § 10-76.1 of this article, the judge of the county court or the judge of the circuit court, as the case may be, shall require the person so convicted to immediately post with the court a cash deposit or a bond of a reputable surety company in favor of the State Forester of Virginia in the amount of five dollars for each and every seed tree adjudged to be in violation of this article.

"The judge of the county court or the circuit court shall cause the said cash deposit or surety bond to be delivered to the State Forester who shall hold the said cash or surety bond in a special account, until it is used or released as hereinafter provided. The purpose of the cash or surety bond is to insure that the general cutover area on which seed trees are found to be in violation shall be planted with tree seedlings of the same species as the trees cut in violation of this article in a manner hereinafter specified."

Since no particular form of bond is specified in the statute, I am of the opinion that the general form of indemnifying bonds will be appropriate. While not necessarily universal in application, the usual form simply obligates the surety to pay that amount which the principal would be liable to pay, not to exceed the amount of the bond, in the event the principal fails or refuses to perform the obligations imposed upon him. You may obtain such a bond form from a local bonding company representative.
PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Engineers—Name of Business May Contain Word "Engineers" Without Being Registered.  (312)

April 6, 1961

HONORABLE TURNER N. BURTON
Director
Professional and Occupational Registration

This is in reply to your letter of March 28, in which you refer to our opinion of January 7, 1960, relating to Chapter 3 of Title 54 of the Code of Virginia, and, specifically, to § 54-27.

You give three illustrations of firm names and request my advice as to whether or not in such cases the requirements of § 54-27 of the Code of Virginia would be violated. These illustrations are as follows:

1. Northern Engineers, Inc.
   Plumbing, Heating and Cooling Contractors
2. Jones Engineering Company
   Building Contractors
3. Southwest Engineers, Incorporated

In my opinion, neither of the illustrations furnished by you violates the Code section in question. The word "Engineers" used in these illustrations is part of the name of the concern and not necessarily intended to convey the impression that these firms are practicing professional engineering or offering to practice professional engineering.

PUBLIC BUILDING COMMISSION—Duty—Limits from City of Richmond to be Determined by Governor.  (144)

October 21, 1960

HONORABLE L. M. KUHN
Director of the Budget Division
State Capitol

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

"A meeting of the Public Buildings Commission was held on October 19, 1960. It considered, among other matters, the authority vested in the Statutes, Article 2, Chapter 8, Title 2, Volume 1, of the 1950 Code of Virginia as supplemented, with respect to action that might be taken by the Commission.

"The Chairman, based on action taken by the Commission during the aforesaid meeting, asked me to request your opinion as to whether or not the Commission has the legal authority to make recommendations to the Governor involving questions pertaining to the acquisition by the Commonwealth of real property which is not '... in or adjacent to the City of Richmond ...' Please, in your opinion, cover a situation where the boundary lines of the County may be adjacent to the boundary lines of the City of Richmond, but the location in the County of the real property may be some distance from the boundary lines of the City of Richmond."

The duties of the Virginia Public Buildings Commission are set forth in Section 2-77.4 of the Code, which reads as follows:

"The Commission shall assist and advise the Governor and the Director in the preparation and maintenance of the long-range site plan, and in the review of specifications and plans incident to the construction of buildings and improvements under this article." (Italics supplied).
It is provided in Section 2-77.2 of this Article (Article 2, Chapter 8, Title 2), as follows:

"The Director shall, subject to the written approval of the Governor:

"(a) Have prepared and, when necessary to meet changing conditions, amend a long-range site plan for the location of all State buildings, and improvements related thereto, in or adjacent to the city of Richmond.

"(b) Acquire with such funds as may be appropriated for that purpose the necessary land for effectuation of the plan.

"(c) Direct and control the execution of all authorized projects for the construction of State buildings and related improvements in or adjacent to the city of Richmond."

The phrase "adjacent to the city of Richmond" as used in this section does not, in my opinion, imply that the property outside the corporate limits of the city must actually abut upon the city limits. This article contemplates that in the development of the over-all plan it may extend to areas outside the city.

The distance from the city is a matter to be determined by the Governor and the Director of the Division of the Budget. The Commission shall assist and advise these officials with respect to any such plan.

PUBLIC CONTRACTS—Bonds—Subcontractor—Not Necessary to Obtain Bond From Another Subcontractor. (159)

Bonds—Public Contracts—Subcontractor not Required to Require Bond from Subcontractor. (159)

November 3, 1960

HONORABLE ALFRED W. WHITEHURST
Commonwealth's Attorney for City of Norfolk

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

"An insurance company of our city has presented a question to us concerning Section 11-23 which requires bonds on public contracts to insure labor and materials furnished to the principal.

"The question they would like answered is if the subcontractor sublets part of his work to a subcontractor whether he must require a bond from them. We would appreciate having your ruling on this matter."

Section 11-23 of the Code provides in part as follows:

"No contractor, as the lowest responsible bidder, shall subcontract any work required by the contract except under the following conditions: each subcontractor shall furnish, and the contractor shall require as a part of the agreement between the subcontractor and the contractor, a payment bond in the amount of 50% of the work sublet to the subcontractor, which shall be conditioned upon the payment to all persons who have, and fulfill, contracts which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract. Every such bond shall be construed, regardless of its language, as incorporating, within its provisions, the obligation to pay those persons who furnish labor or materials as aforesaid; provided, however, that subcontracts between the contractor and a manufacturer or a fabricator shall be exempt from the provision requiring a payment bond and provided further that subcontracts for less than $2,500.00 each are also exempt hereunder. Provision for said payment bonds shall be made a part of each agreement between the owner and the contractor."
This statute does not require a subcontractor who sublets part of his work to require a bond from his subcontractor. Therefore, in my opinion, it is not necessary for a subcontractor to obtain a performance bond from any person to whom he sublets a part of his contract.

PUBLIC FUNDS—Security for Deposits—Resolution Assuring Priority in Case of Insolvency Insufficient for National Banks. (55)

August 5, 1960

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney
Rockbridge County

This is in reply to your letter of July 22, 1960, in which you request to be advised as to whether the method proposed to be adopted by the banks of Rockbridge County for securing deposits of public funds by resolution of the banks' board of directors appears to be valid and sufficient for acceptance by the County Finance Board and County Treasurer.

I have reviewed the form of resolution proposed to be adopted by the banks of Rockbridge County as contemplated by § 58-944(b) of the Code, as well as the various enclosures with your letter of July 22, 1960.

While this form of security is, in my opinion, less desirable than the other forms specified in § 58-944 of the Code, the resolution appears to be in accord with the provisions of subsection (b) of that section. As to the validity thereof, I am of the opinion that in so far as a State bank is concerned, the Treasurer is protected. However, I entertain some doubt as to whether such a resolution would constitute sufficient security where the Federal banks are involved. To my knowledge there has never been a ruling from any responsible source that such a security as contemplated in subsection (b) of § 58-944 of the Code is not in conflict with the statutes creating the Federal Deposit Insurance Corporation or the regulations adopted pursuant thereto, in so far as national banks are concerned. Neither can I find any court determination on the question of whether a national bank may, under Title 12, § 90, U. S. C. A., obligate itself to give preference to the payment of public funds deposited in the bank in the event of insolvency or failure of the bank.

For a similar view expressed by my predecessor in office, Honorable J. Lindsay Almond, Jr., see Opinions of the Attorney General, 1953-54, pages 157-159.

PUBLIC OFFICERS—City Council—Members May Contract with Housing and Redevelopment Authority. (223)

January 18, 1961

HONORABLE LIGON L. JONES
Commonwealth's Attorney
Hopewell, Virginia

This is in reply to your letter of January 17, which reads as follows:

"I have been requested by a member of the City Council of the City of Hopewell to advise him whether it would [be] a violation of Section 15-508 of the 1950 Code of Virginia as amended for him to submit a bid to the Hopewell Redevelopment and Housing Authority for the construction of a building located on their premises. I would appreciate your advice."
I understand that the Housing Authority of Hopewell was established under the provisions of Chapter 1 of Title 36 of the Code. Under Section 36-4 such an Authority is created as a political subdivision of the State. Section 36-16 of this Title prohibits the commissioners, officers, agents and employees of the Authority from acquiring any interest in contracts made by the Authority, but it fails to contain any such prohibition with respect to members of the council and other officers of the city in which the Authority is located.

Section 15-508 prevents a member of a city council from being party to or having any interest, directly or indirectly, "in any contract, subcontract, or job of work, or materials, or the profits, or contract price thereof, or any services to be performed for the city * * * under any contract or subcontract * * * ."

In my opinion, the prohibitions of this section would not apply to contracts between a member of the city council and the Authority, unless the city council has authorized the expenditure of funds under its control for the project.

PUBLIC OFFICERS—Compatibility—Clerk in Post Office Cannot Serve as Registrar. (164)

Elections—Registrars—May not Accept Position as Clerk in Post Office. (164)

HONORABLE J. EDGAR POINTER, JR.
Commonwealth's Attorney for Gloucester County

November 14, 1960

This is in reply to your letter of November 12, in which you inquire whether or not a registrar of a voting precinct in your county is eligible to accept the position of substitute clerk to the postmaster of a third-class post office.

Under Section 31 of the Constitution, it is provided as follows:

"No person, nor the deputy of any person, holding any office or post of profit or emolument, under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof, shall be appointed a member of the electoral board, or registrar or judge of election."

This section of the Constitution is implemented by Section 24-31 of the Code. It is clear from this constitutional provision that, if the registrar in question accepts the position offered to her in the post office, she will no longer be eligible to serve as registrar of her precinct.

PUBLIC OFFICERS—Compatibility—Clerk of County Court May Not Serve as Deputy Clerk of Circuit Court. (338)

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

April 28, 1961

This will reply to your letter of April 6, 1961, in which you inquire whether or not the clerk of the County Court of Amelia County may also qualify and serve as a deputy clerk of the Circuit Court of Amelia County.

I am of the opinion that your inquiry should be answered in the negative. Section 15-486 of the Virginia Code provides, inter alia, that no person holding the office of
count Clerk shall at the same time hold any other office, elective or appointive, with certain exceptions not material to the question you present. The terminal paragraph of this statute also prescribes:

"If any person shall be elected or appointed to two or more offices except as herein provided, his qualification in one of them shall be a bar to his right to qualify in any of the offices enumerated, and if any person while holding any of such offices shall be appointed or elected to any other office, his qualification in such office shall thereby vacate any of the above offices he then holds, except as provided above."

This office has previously ruled that the above mentioned statute prevents the clerk of a circuit court from simultaneously holding the office of clerk of a trial justice court. See Reports of the Attorney General, 1933-1934, p. 81; 1937-1938, p. 121. While admitting that the matter is not entirely free from doubt, we have also ruled that the prohibitions enunciated in Section 15-486 of the Virginia Code are applicable to the deputies of the officials designated in the statute, unless such deputies are specifically excepted. See, Reports of the Attorney General (1959-1960) p. 272; (1950-1951) p. 262. In light of the foregoing, and in the absence of express statutory authorization, I am constrained to believe that the clerk of the County Court of Amelia County may not simultaneously hold the office of deputy clerk of the Circuit Court of Amelia County.

PUBLIC OFFICERS—Compatibility—Doubtful if Deputy Sheriff May Serve as Dog Warden. (220)

January 12, 1961

HONORABLE J. B. COWLES, JR.
Commonwealth's Attorney for the City of Williamsburg

This is in reply to your letter of January 11, in which you request my advice as to whether or not a deputy sheriff may be appointed and qualify as dog warden for a county and continue to hold the office of deputy sheriff at the same time.

I am enclosing copy of an opinion rendered by former Attorney General Abram P. Staples on August 26, 1942, to the Auditor of Public Accounts of Virginia, in which he held that a deputy sheriff could act as a game warden. This opinion is published in the Report of the Attorney General for 1942-'43, at page 189.

Since that opinion was rendered, this office has subsequently taken the position that on account of the provisions of paragraph 5 of Section 15-486 of the Code, the only other office which a deputy sheriff may hold is that of town sergeant. You have referred to the opinion dated March 16, 1956, and published in the Report of the Attorney General for 1955-'56, at page 156, rendered to Honorable C. A. Sumpter, Commonwealth's Attorney of Floyd County. In this opinion we cited the case of Credit Company v. Commonwealth, 155 Va. p. 1033. In this case the court did not expressly state that by accepting the office of Prohibition Inspector a deputy sheriff would automatically forfeit that office. The court did state, however, that on account of the provisions of Section 15-486 when a deputy sheriff is appointed and qualifies as a State Prohibition Inspector, he should thereupon resign as deputy sheriff.

In light of the opinions rendered by this office subsequent to Attorney General Staples' opinion and the statement of the Supreme Court of Virginia in the above case, it is my opinion that there is grave doubt as to whether or not a deputy sheriff would be entitled to hold that office and the office of dog warden for a county at the same time.
PUBLIC OFFICERS—Compatibility—Federal Government Employee May Not Serve on County School Board. (339)

Schools—Board Members—Eligibility—Federal Government Employee May Not Serve on Board. (339)

May 1, 1961

MR. GILES H. MILLER, JR.
Chairman
Culpeper County School Electoral Board

This is in reply to your letter of April 27, in which you request my advice as to whether an Area Engineer of the Soil Conservation Service, who is compensated entirely by the federal government is eligible to serve on the Culpeper County School Board while engaged in such employment.

Section 2-27 of the Code of Virginia provides as follows:

"No person shall be capable of holding any office or post mentioned in the preceding section, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, ipso facto, vacate any office, or post of profit, trust or emolument under the government of this Commonwealth or under any county, city, or town thereof." (Underlining supplied).

I am of the opinion that under this section of the Code the person under consideration is not eligible to be a member of the local school board so long as he continues his present employment.

Sections 2-28 and 2-29 of the Code contain certain exceptions to the provisions of Section 2-27, none of which apply to this case.

PUBLIC OFFICERS—Compatibility of Office—Justice of Peace May Not Serve as Clerk of Reassessment Board. (195)

Justice of Peace—Compatibility of Office—May Not Serve as Clerk of Reassessment Board. (195)

December 14, 1960

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

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

"Our Board of Supervisors is meeting Thursday night, December 15, 1960, and it desires an opinion at that time that has just arisen.

"Isle of Wight County will have a general reassessment of real estate in 1961 and your opinion as to whether or not a Justice of the Peace may be employed as secretary or clerk of the general reassessment board and continue as a Justice of the Peace at the same time will be appreciated."

In my opinion, the employment of a justice of the peace by the General Reassessment Board of the county in the capacity of clerk or secretary of the Board is prohibited by the provisions of Section 15-504 of the Code of Virginia.
PUBLIC OFFICERS—Incompatibility—Employee of City School Cannot Receive Fees Paid by City While Acting as Assistant City Coroner (Medical Examiner).

September 21, 1960

HONORABLE WILLIAM B. SPONG, JR.
Member of Senate

This is to acknowledge receipt of your letter of September 16, 1960, in which you state:

"I am in receipt of a letter from John A. MacKenzie, who represents the Portsmouth School Board, requesting an opinion from your office as to whether Dr. T. Elmore Jones may continue to serve as assistant coroner in the City of Portsmouth if he becomes physician for the Portsmouth City School Board."

Section 15-508 of the Code of Virginia (1950) as amended prohibits a member of a city council or any paid officer of the city, during the term for which he is elected or appointed, from being interested, directly or indirectly, in a contract for services to be performed for the city for pay under any contract. The physician employed by a city school board is a paid officer of the city. Coroners are now known as medical examiners. They are appointed for the city or county by the Chief Medical Examiner under the provisions of Section 19.1-40 of the Code, as amended. They receive a fee of ten dollars paid by the State in each case unless the deceased was a legal resident of the city or county in which his death occurred, in which event such county or city shall be responsible for the fee. See Section 19.1-42 of the Code.

Hence, the medical examiner (coroner) does receive pay from his city in those cases where the deceased was a resident of the city. This office has heretofore held that a mayor cannot share in compensation for services rendered as counsel for a city school board by his law firm (Report of the Attorney General, 1958-1959, page 11).

I am, therefore, of the opinion that a physician employed by the Portsmouth City School Board cannot serve as assistant city coroner (medical examiner) in cases where his fee is paid by the city.

PUBLIC OFFICES AND OFFICERS—Compatibility—Federal Employee as Member of Local School Board. (27)

Schools—Boards—Federal Employee as Member. (27)

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

This will reply to your letter of July 15, 1960, in which you inquire whether or not an individual employed by the United States Government at the Naval Weapons Laboratory at Dahlgren, Virginia, may serve as a member of the School Board of the Town of Colonial Beach.


It would thus appear that the individual concerning whom you inquire would be prohibited by the provisions of Section 2-27 of the Virginia Code from serving as a member of the School Board of the Town of Colonial Beach, unless such individual is employed at the Naval Weapons Laboratory in one of the capacities specified in Section 2-29(9) or Section 2-29(10) of the Virginia Code.
PUBLIC RECORDS—Destruction—Audit Working Papers May be Destroyed when No Longer Necessary in Judgment of Auditor of Public Accounts. (266)

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

March 6, 1961

This is in reply to your letter of February 17, 1961, in which you ask to be advised if there exists any legal objection to your proposed practice of disposing of audit working papers after a specified number of years, retaining as a permanent record the official report on audits prepared from such papers. You have suggested that you would retain the papers for the current audit year and the nine preceding audit years.

The general rule applicable to the destruction of public records is codified as § 42-59 of the Code of Virginia, which reads as follows:

“No agency of the State government shall sell, destroy, give away or discard any record or records, unless specifically so authorized by law, without first having informed the State Librarian, and the Comptroller. The State Librarian, or his deputy, and the Comptroller, or his deputy, shall examine such records: and those records considered by the head of the agency, or his deputy, the State Librarian, or his deputy, and the Comptroller, or his deputy, as having no administrative or historical value or value as financial records may be destroyed or otherwise effectively disposed of. But no land or personal property book shall be destroyed.”

I think it quite manifest that all personal or informal notes and other working papers of the personnel of the office of the Auditor of Public Accounts do not fall within the purview of records having some historical or administrative value. The report prepared from such paraphernalia is the essential record which is to be considered as a public record.

I am of the opinion that the determination as to the length of time for retention of working papers is a matter resting in the sound discretion of the Auditor of Public Accounts. If you are of the opinion that ten years is a sufficient time during which such papers should be retained, I am aware of no legal objection to their destruction after that time.

PUBLIC RECORDS—Destruction of—County Records Must be Photographed or Micro-photographed First. (124)

Schools—Board—Without Authority to Destroy Its Records. (124)

HONORABLE ROBERT I. ASBURY
Commonwealth's Attorney for Smyth County

October 7, 1960

This is to acknowledge receipt of your letter of October 3, 1960, in which you state that the School Board of Smyth County has adopted the following resolution:

“Resolved, that the County School Board of Smyth County request the approval of the Judge of the Circuit Court to destroy paid invoices more than five years old.”

You ask my opinion as to whether there is any authority to destroy these records.
Any public officer who destroys a public record in his care would find himself in a very precarious position, unless specifically authorized by statute to do so, as we find that Section 18.1-306 of the Code, as amended, provides:

"If a clerk of any court or other public officer fraudulently make a false entry, or erase, alter, secrete or destroy any record in his keeping and belonging to his office, he shall be confined in jail not exceeding one year and fined not exceeding one thousand dollars." (Italics supplied)

The General Assembly has expressly authorized the destruction of records of certain departments under certain circumstances, including those of the Division of Motor Vehicles (Section 46.1-36); those of the State Highway Department (Section 33-16); certain records of municipal and county courts (Sections 16.1-117 and 16.1-118); certain tax tickets of a county treasurer with the approval of the Auditor of Public Accounts (Section 58-987), and paid tax tickets after being photographed or micro-photographed (Section 58-919.1). Section 2-6 of the Code permits the destruction of records of State departments after they have been photographed or micro-photographed, upon approval of the Governor. Likewise, the Comptroller may destroy records after they have been photographed or micro-photographed under authority of Section 2-174, as amended. Section 42-59 provides that no agency of the State government shall destroy any record unless specifically authorized by law, without first having informed the State Librarian and the Comptroller. This section does not apply to the records of a county school board.

Section 15-5.1 provides that county records, after being photographed or micro-photographed, may be destroyed in the discretion of the governing body (board of supervisors). I am unable to find any statute which would permit the destruction of county records such as those kept by a county school board, unless they are first photographed or micro-photographed.

I am, therefore, of the opinion that the School Board of Smyth County would be without authority to destroy paid invoices, unless the Board of Supervisors specifically authorizes the same, and then only after the records have been photographed or micro-photographed. (Section 15-5.1 of the Code, as amended.)

RECORDATION—Miscellaneous Lien Book—Abolished By Enactment of Section 43-4.1 of Code. (348)
Clerks—Recordation of Documents in Miscellaneous Lien Book—Now to be Recorded in Deed Book. (348)

May 4, 1961

HONORABLE G. GARLAND WILSON
Commonwealth's Attorney
City of Radford

This is in reply to your letter of April 27, 1961, which reads as follows:

"Would you please give me your opinion as to whether or not Section 43-4.1 of the 1960 Amendment to the Code of Virginia requires that all miscellaneous liens of whatever kind and nature be recorded in the Lien Book.

"I am unable to reconcile the provision of 43-4.1 with Section 17-61 which mentions the items to be recorded in the Miscellaneous Lien Book.

"As I construe 43-4.1, it applies only to mechanic liens provided for in Title 43 and excepting the mechanic liens, all the documents mentioned in 17-61, would still be recorded in the Miscellaneous Lien Book."
Section 43-4.1 of the Code of Virginia of 1950, as amended, reads as follows:

"Notwithstanding the provisions of § 43-4 or any other section of this title, or any other provision of law requiring documents to be recorded in the miscellaneous lien book in the clerk's office of any court, on and after July one, nineteen hundred sixty all memoranda or notices of liens or other documents theretofore required to be recorded in such miscellaneous lien books shall be recorded in the deed books in such clerk's office, in lieu of the miscellaneous lien book and shall be indexed in the general index of deeds, and such general index shall show the type of such lien."

(Italics supplied)

The foregoing statute manifestly specifies the deed book in the clerk's office as the place for recording all documents heretofore recorded in the miscellaneous lien book. Thus, by implication, the General Assembly has repealed § 17-61 of the Code.

I am of the opinion that there is no necessity for the clerks to continue maintaining a miscellaneous lien book, inasmuch as all documents heretofore recorded in such books must now be recorded pursuant to § 43-4.1 of the Code.

RIGHT TO PRIVACY—Written Consent of Infant Child Too Young to Give it, Not Required Under Section 8-650 of Virginia Code. (254)

Crimes—Using Picture to Advertise Without Consent—Child Not Capable of Granting Consent. (254)

February 23, 1961

HONORABLE ROYSTON JESTER, III
Attorney for the Commonwealth
Lynchburg, Virginia

I am in receipt of your letter of February 18, 1961, in which you forwarded to this office for consideration a copy of a communication you received from Mr. B. C. Baldwin, Jr., presenting the following situation and inquiry:

"The Lynchburg National Bank and Trust Company has obtained the permission of Continental Illinois Bank to run an advertisement similar to one used by Continental which includes the picture of a father from the locality holding two infant children. Two parents with infant children have expressed their willingness to pose for the ad and the question has arisen whether under Section 8-650 of the Code of Virginia, as amended, the picture of an infant may be used for advertising purposes, when the infant is of such tender years as to be incapable of giving consent."

Section 8-650 of the Virginia Code provides:

"A person, firm, or corporation that knowingly uses for advertising purposes or for the purpose of trade, the name, portrait, or picture of any person resident in the State, without having first obtained the written consent of such person, or if dead, of his surviving consort, or if none, his next of kin, or, if a minor, of his or her parent or guardian, as well as that of such minor, shall be deemed guilty of a misdemeanor and be fined not less than fifty nor more than one thousand dollars. Any person whose name, portrait, or picture is used within this State for advertising purposes or for the purposes of trade, without such written consent first obtained, or the surviving consort or next of kin, as the case may be, may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue
and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait, or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.” (Italics supplied.)

A literal construction of the above-quoted statute would compel the conclusion that the written consent of an infant child, as well as that of his parent or guardian, is required before a picture of such child may be used for advertising purposes. Yet, in those instances in which an infant child is of such tender years as to be incapable of giving it, the actual written consent of such child cannot be secured. In this connection, I do not believe that the statute in question should be construed to require the procurement of documents which are incapable of being obtained. Although the question is not entirely free from doubt, I am constrained to believe that if the parents—who are the natural guardians of the person of an infant child—give the appropriate written consent, both for themselves and for their child, utilization of a picture of the child for advertising purposes would not constitute a violation of Section 8-650 of the Virginia Code.

SAVINGS AND LOAN ASSOCIATIONS—May Not Do Business Out of State. Foreign Corporations May Not Transact Business in Virginia. (105)

HONORABLE L. HARVEY NEFF
Commonwealth's Attorney for Grayson County

This is in reply to your letter of September 2, 1960, in which you make two inquiries pertaining to § 6-201.48 of the Code of Virginia of 1950, as amended, which provides as follows:

“No person except corporations chartered and conducting the savings and loan business under the authority of the laws of this State, or corporations hereafter incorporated under the laws of this State for such purposes, shall engage in the savings and loan association business in this State; but nothing in this chapter shall prevent any person from lending money on real estate or personal security or collateral, or from guaranteeing the payment of bonds, notes, bills and other obligations, or from purchasing or selling stocks and bonds. No savings and loan association shall be incorporated in this State with authority to conduct its business outside of this State, nor shall any savings and loan association incorporated under the laws of any other state be authorized to do business in this State.”

You have asked to be advised if this section prohibits a savings and loan association organized in Virginia from advertising, soliciting and making loans on real estate outside of this State. You have assumed that one-third of the funds of the savings and loan association are derived from other States and that one-third of the loans made by the association would be made outside of Virginia.

The statute under consideration is unequivocal in the prohibition against the conducting of a savings and loan business in Virginia by any person other than corporations chartered in Virginia for such purpose, or corporations authorized to so do by the laws of this State. While “conducting a savings and loan business” is not clearly defined by statute, § 6-201.10 of the Code provides that savings and loan associations incorporated to do business in Virginia must provide in the articles of incorporation that it is organized primarily for the purpose of “enabling its members to borrow its funds upon giving security therefor by first mortgages or first deeds of trust upon real estate, for purchasing, making improvements, or removing encumbrances on real
estate, and for the accumulation of savings and earnings thereon." Hence, any corporation undertaking to do the type of business which comes within the purview of the purposes of a savings and loan association would be conducting a savings and loan business, in my opinion, and must, therefore, be chartered in Virginia for such purpose.

Inasmuch as § 6-201.48 expressly prohibits the incorporation of a savings and loan association with authority to conduct its business outside this State, any such business conducted by a Virginia corporation in other States would be without authority of law, constituting a misdemeanor as contemplated by § 6-201.51 of the Code of Virginia, and punishable as provided in § 18.1-9 of the Code.

Your second inquiry is whether § 6-201.48 of the Code prohibits a foreign savings and loan association from regularly making loans on real estate in Virginia.

It is to be noted that the statute expressly provides that "* * * nothing in this chapter shall prevent any person from lending money on real estate * * *." If the only business being conducted in Virginia by a foreign corporation is that of lending money on real estate, it is highly questionable as to whether such business is violative of § 6-201.48 of the Code; however, such operation would likely constitute a violation of § 13.1-135 of the Code of Virginia, which reads as follows:

"It shall be unlawful for any person, firm or association to transact business in this State as a corporation or to offer or advertise to transact business in this State as a corporation unless the alleged corporation is either a Virginia corporation or a foreign corporation authorized to transact business in Virginia. Any person who, individually or as a member of a firm or association, violates this section shall be guilty of a misdemeanor."

Prior to undertaking any prosecution for alleged violations of the statutes under consideration, I suggest that you may be assisted by consulting the Bureau of Banking of the State Corporation Commission.

SCHOOLS—Appropriations—Cash Appropriation May be Made in Addition to Amount Raised by Maximum Levy School Purposes. (325)

Honorable Woodrow W. Wilkerson
Superintendent of Public Instruction

I am in receipt of your letter of April 17, 1961, in which you call my attention to Sections 22-126 and 22-127 of the Code of Virginia (1950) as amended, and present the following questions:

"In view of the fact that one section refers to a specific school levy and the other section relates specifically to cash appropriations, does the tax levying body have the authority to make funds available through a combined levy and appropriation?

"Assuming the local tax levying body may, in its discretion, elect to provide funds through a specific school levy and a cash appropriation, would such board have the authority to levy the maximum rate of $3.00 and at the same time appropriate from general county funds an amount in addition to the amount received through the specific school levy?"

I am constrained to believe that both of your inquiries should be answered in the affirmative. This office has frequently ruled that the governing bodies of counties and cities may make cash appropriations for the establishment, maintenance and operation of public schools in addition to those funds raised by a specific school levy, even though the governing body "has already laid the maximum levy" for school purposes. See Reports of the Attorney General, 1940-1941, pp. 15, 16; 1938-1939, p. 221; 1937-1938, p. 135; 1931-1932, p. 161. Although Sections 22-126 and 22-127 of the
Virginia Code have been amended on several occasions since these rulings were rendered, the validity of the views expressed in the above cited opinions has not been altered by such amendments.

SCHOOLS—Authority of School Board to Select Site for School. (268)

March 7, 1961

HONORABLE LEWIS JONES, JR.
Commonwealth's Attorney for Middlesex County

This is in reply to your letter of March 2, which reads as follows:

"I have been asked to secure an opinion from your office based on the following facts:

"Middlesex County is having a problem concerning the selection of a site for the construction of a new consolidated school.

"The School Board has selected a site for its location and presented it to the Board of Supervisors with the normal request for appropriation of funds for construction.

"The Board of Supervisors has agreed to go forward with a program of construction, but has denied to do so if the site selected by the School Board remains the same. They have stated that the present site was not a proper site and as such they would not vote to appropriate the necessary funds. There would naturally be a large indebtedness upon the County, but they will not agree to take on this indebtedness on the site selected by the School Board, but they have flatly stated what site they would agree on.

"The School Board feels that the Board of Supervisors is usurping their authority by indirectly selecting a site.

"It is this question of whether or not the Board of Supervisors can refuse to appropriate the necessary money on these grounds, that I have been asked to inquire about."

I do not know of any way this matter can be resolved unless the school board and the board of supervisors can reach an agreement. It is the prerogative of the school board to select the site upon which a school facility shall be erected and it is the prerogative of the board of supervisors to determine whether or not they will appropriate the necessary funds.

Specifically relating to the last paragraph of your letter, in my opinion, the board of supervisors may, in its discretion, appropriate or refuse to appropriate, the necessary funds.

SCHOOLS—Boards—Power to Purchase Subject to County Ordinance Providing for Centralized Purchasing Officer—To What Extent Applicable. (128)

October 10, 1960

HONORABLE WOODROW W. WILKERSON
Superintendent of Public Instruction
State Board of Education

This is in reply to your letter of September 21, 1960, in which you pose several questions relating to expenditures by the County School Board of York County. Your questions will be answered in the order in which asked:
“(1) Is the County School Board of York County obligated and legally bound, in light of the specific responsibilities charged to the School Board by State law, to the resolution or local ordinance (copy attached) adopted by the Board of Supervisors for York County, establishing a Central Purchasing Agency and designating the County Executive Secretary to act as Purchasing Agent for all agencies, offices, and officers, including the York County School Board of York County?”

In counties which have employed an executive secretary the expenditure of public funds is subject to the provisions of § 15-551.12 of the Code of Virginia of 1950, as amended. The section reads as follows:

“The governing body of any county having an executive secretary is authorized to provide for the centralized competitive purchasing of all supplies, equipment, materials and commodities for all departments, officers and employees of the county including the county school board and the board of public welfare (all of which are in §§ 15-551.14 and 15-551.15 referred to as departments). Such purchasing shall be done by the executive secretary under the supervision of the governing body of the county.”

Manifestly, the Board of Supervisors of York County was empowered to enact the ordinance providing for centralized purchasing for all departments and officers, including the School Board. It follows that the School Board is compelled to comply with such ordinance.

“(2) If the County School Board of York County is bound by this local ordinance, then does the School Board retain authority to exercise its rights to be specific in regard to quality, brand, kind, nature, source, etc., of the materials, supplies and services furnished through the Purchasing Agent?”

As phrased, your second question is not susceptible to a categorical reply. While the School Board does have the responsibility to furnish schools, both as to supplies and services, the powers of the centralized purchasing agent for the county are quite broad as they relate to the purchasing of supplies and materials.

Section 15-551.3 of the Code provides in part as follows:

“The executive secretary shall be clerk to the governing body. It shall be his general duty:

“(12) To act as purchasing agent for the county; to make all purchases for the county subject to such exception as may be allowed by the governing body. He shall have authority to make transfer of supplies, materials and equipment between departments and officers, and employees; to sell any surplus supplies, materials and equipment and to make such other sales as may be authorized by the governing body. He shall have power, with consent of the governing body, to establish suitable specifications or standards for all supplies, materials and equipment to be purchased for the county, and to inspect all deliveries to determine their compliance with such specifications and standards, and if such deliveries are not in accordance with such specifications and standards it shall be his duty and he is empowered to reject the same. He shall have charge of such storerooms and warehouses of the county as the governing body may provide. He shall have the care and charge of all public buildings and the furnishings and fixtures therein under the control of the governing body.

“All purchases and sales shall be made under such rules and regulations as the governing body may by ordinance or resolution establish. Subject to such exception as the governing body may provide, he shall before making any purchase or sale invite competitive bidding under such rules and regulations as the governing body may by ordinance or resolution establish.
He shall not furnish any supplies, materials, equipment or contractual services to any department or office or employee, except upon receipt of a properly approved requisition and unless there be an unencumbered balance sufficient to pay the same.”

In view of the broad power vested in the executive secretary to establish specifications or standards and to provide for competitive bidding, it is not possible for the school board to specify brand or source of the supplies or materials furnished, unless the supplies be of a peculiar nature which only the school board could specify. In such event, it would appear unreasonable for the purchasing agent to adopt specifications or standards which would conflict with those of the school board. As an example, the purchase of a book can only be accomplished by specific name and from a particular source. In this event the purchasing agent would have no prerogative in changing the specifications of the school board. Conversely, the purchase of such general supplies as a pencil sharpener could be accomplished through competitive bidding on the specifications prepared by the purchasing agent.

Although the County Board’s resolution provides for the purchasing agent to procure services as well as materials and supplies, it should be noted that the provisions of §§ 15-551.3 (12) and 15-551.12 of the Code contemplate the centralized procurement of supplies, equipment, materials and commodities. It follows that the Board’s authority in the area of procuring services is unimpaired by the resolution of the Board of Supervisors requiring services to be requisitioned through the purchasing agent.

“(3) If the County School Board of York County retains its authority to make its own purchases of materials, supplies and services as per the responsibilities charged to the School Board by State law, does the local resolution or ordinance require that the School Board do so by requisition on forms to be provided by the Executive Secretary and subject to the approval of the Board of Supervisors for York County?”

In view of my replies to your preceding questions, it necessarily follows that it is necessary for the School Board to requisition supplies and materials on forms provided by the purchasing agent. The portion of the resolution of the County Board of Supervisors of York County, adopted on June 19, 1958, which subjects all requests for materials, supplies and services to the approval of the Board causes me some concern. I entertain grave doubt as to the authority of a governing body to disapprove an expenditure of funds which have been previously appropriated to the school board for school purposes. While the requirement for processing all purchases through a centralized purchasing agent is expressly authorized by § 15-551.12 of the Code, there is no express or apparent authority in the governing body of a county to disapprove the expenditure of funds appropriated for a particular purpose, nor to exercise visitorial powers over the school board as to items which may be purchased or the services which may be deemed necessary by the school board. After having been appropriated, such funds may be apportioned and expended by the local school authorities as in their judgment the public welfare may require.

“(4) Is it legal for the County School Board of York County, Virginia, representing the Bruton, Bethel, Grafton and Nelson magisterial districts of York County, to use a portion of the proceeds from sale of School Improvement Bonds, as represented by the attached enclosure, to finance the construction of a school bus garage to be used for the purpose of servicing, repairing and maintaining school buses owned and operated in the aforementioned magisterial districts?”

The resolution of the School Board, which was the basis for the issuance of the bonds in question, reads in part as follows:

“WHEREAS plans and specifications are now in preparation and development for improvement and construction of school facilities for the children
of Bruton, Bethel, Grafton and Nelson Districts of the County of York, Virginia,

"NOW THEREFORE BE IT RESOLVED, the County School Board of York County, Virginia hereby request the County Board of Supervisors of York County, Virginia to authorize the issuance and sale of such bonds in accordance with the general laws of the State of Virginia. (Section 15-666:32)"

The question submitted to the voters on July 21, 1959, was specific in the purpose for which the bonds were to be issued. While the question may have been couched in general language to provide school improvement funds, the fact that the purpose was specifically limited to "the construction of school buildings or additions to, or alterations of existing school buildings, and the furnishing and equipping of school buildings, or additions to school buildings in Bruton, Nelson, Grafton and Bethel Magisterial Districts in York County," precludes the use of such bond funds for any other purpose. Accordingly, I am of the opinion that the County School Board may not use a portion of the proceeds from the sale of such bonds to finance the construction of a school bus garage.

In view of my reply to the foregoing question, it will be unnecessary to reply to your inquiry relating to the use of the school bus garage after construction.

SCHOOLS—Compulsory Attendance—State Law—County Ordinance Necessary to Make Law Applicable. (378)

Courts—Jurisdiction Over Violations of Compulsory Attendance Law—Same as Violations of Other State Laws. (378)

June 13, 1961

HONORABLE DALE W. LARUE
Attorney for the City of Galax

This is in reply to your letter of June 1, 1961, in which you advise that the City of Galax is contemplating the adoption of a school compulsory attendance ordinance. You have requested my opinion as to the appropriate court in which to try violations, inasmuch as the jurisdiction of the Municipal Court is limited to the trial of violations of city ordinances and exclusive jurisdiction over juveniles and domestic relations matters is vested in the Juvenile and Domestic Relations Courts of the Counties of Carroll and Grayson.

The compulsory attendance laws are codified as Article 4, Chapter 12, Title 22 of the Code of Virginia. The State Board of Education is charged with the duty to see that the compulsory attendance law is properly enforced in those localities where it is applicable. The purpose of the ordinance contemplated by §22-275.24 of the Code is to make such law applicable in the particular locality. Thereafter, violators are punishable for violating the State statutes, not the local ordinance. (See Report of Attorney General, 1959-60, at pages 80-101).

In view of the foregoing, I think it manifest that violations of the compulsory attendance law in the City of Galax should be tried as other violations of State law.

SCHOOLS—Contracts for Purchases From Members of Board—Void, Unless Approved By Board of Education in Advance. (341)

May 1, 1961

HONORABLE WILLIAM C. FUGATE
Commonwealth's Attorney for Lee County

This will acknowledge your letter of April 22, enclosing copy of your letter of April 12 to the Department of Education, in which you present the following situation:
"We have a problem which has arisen under Code Section 22-213 in regards to one or two members of our County School Board.

"1. Building supplies were purchased from two firms of which two members of the School Board have a financial interest.

"A. In the first case, one member had roofing material left over from a building of his own which he sold to the School Board at wholesale cost. This material was needed by the Board and the member realized no profit what-so-ever from the sale.

"B. In the other case, a School Board member is manager and stockholder in a corporation which sold one hundred, eighty-two dollars and nineteen cents ($182.19) worth of building material to the Board based upon cost plus 10%. Some of these purchases were made on competitive bids. Invoices are filed in the School Board office which show how the costs were determined."

Transactions of this nature are expressly prohibited by the provisions of the Code section which you have cited. Under this section the permission of the State Board of Education is required before a member of the county school board may make a sale of the materials described in your letter to the school board. The transaction apparently has been completed with the exception of the payment and the question is whether or not the State Board of Education may now by resolution ratify and confirm what has taken place.

This Code section provides in part as follows:

"** * * Any contract of sale made in violation of this section shall be void, and if the claim or bill arising out of such a transaction be paid, the amount paid, with interest, shall be recovered by action or suit instituted by the Commonwealth's Attorney of the county, in the circuit court of such county, or by the Commonwealth's Attorney of the city in the corporation court of such city. * * *"

Inasmuch as the permission of the State Board of Education was not first obtained, it would seem that under the statute the contract of sale is void and that the school board is without authority to make payment for the materials purchased.

In my opinion, the State Board of Education does not have the power at this time to validate the transaction.

SCHOOLS—County School Board Not Authorized to Improve Town Street. (94)
Highways—Town Streets—County School Board May Not Participate in Improving. (94)

HONORABLE TYLER FULCHER
Division Superintendent
County School Board of Amherst County

September 12, 1960

This is in reply to your letter of September 9, in which you state that the Amherst County School Board owns and operates an elementary school in the corporate limits of the Town of Amherst; that the school is located on First Street which is used by the public and over which school buses travel when transporting children to and from the school.

The Town of Amherst is making an effort to have this street improved and in order to obtain assistance from the State Highway Department in connection with
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this project it is necessary that land adjacent to the street be acquired so that it will meet the requirements of the State with respect to its width.

You have presented the following question:

"Does the Amherst County School Board have the legal right to purchase land or an easement to be used for the purpose of widening a public street or highway over which school buses run?"

While it is true the school property would benefit by the improvement of the street, I am of opinion the county school board would not have authority to allocate funds under its control for expenditure on a public road located in a town within the county. The acquisition and maintenance of the public streets in a town are the responsibilities of the town, or of the town and the State Highway Department, when acting together under one of the plans available under the provisions of Title 33 of the Code.

SCHOOLS—Elementary—What Constitutes—Kindergartens Included. (123)

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

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

"A question has arisen in this jurisdiction concerning the application of Section 22-21.1 as adopted by the legislature in 1959. The question is whether the term 'elementary school' as used in this section includes a kindergarten. Mr. Woodrow W. Wilkerson, State Superintendent of Public Instruction, has expressed the feeling that the word elementary 'includes all work which is offered below the high school'. In view of this the Board of Supervisors of this county has requested me to obtain your opinion and I shall, as usual, be grateful."

In my opinion, Section 22-22.1 applies to kindergartens. Under Section 22-21 of the Code the State Board of Education in its discretion may recommend provisions for standards for public and nonpublic kindergartens and nursery schools. Section 22-21.2 authorizes local school boards to operate kindergarten schools as a part of the public school system. Thus, kindergartens are given legal sanction as a part of the public school system below the high school level. Section 22-21.1, in my opinion, is designed to place in the State Department of Education the authority to issue the permits provided for therein to the exclusion of the local authorities.

SCHOOLS—Funds May Not Be Expended for Capital Improvements on Buildings on Land Not Owned by School Board or Locality. (121)

National Guard—Armories—Used Jointly with School Board. May Not be Improved with School Funds When Land Owned by State. (121)

MAJOR GENERAL PAUL M. BOOTH
The Adjutant General

This is in reply to your letter of September 28, 1960, in which you ask to be advised as to the authority for the construction of an additional locker room at the National
Guard Armory at Radford, Virginia, the funds therefor to be furnished by the local School Board. From the enclosure with your letter, it appears that the armory is being utilized for the joint purposes of the School Board and the 684th Signal Company of the Virginia Army National Guard, and the existing facilities are inadequate. The armory is situated upon land owned by the Commonwealth of Virginia.

I am aware of no authority in a school board to expend funds for capital improvements on buildings not owned by the local governing body or the school board. A similar question was considered in a letter addressed to Honorable Robert S. Wahab, Jr., Commonwealth’s Attorney for Princess Anne County, by Attorney General J. Lindsay Almond, Jr., under date of May 16, 1956, in which he advised that a county school board was without authority to expend public funds for capital improvements on property held under a short-term lease. A copy of that letter is enclosed herewith.

SCHOOLS—Insurance—Bus Driver and Safety Patrol—Extent of Coverage. (331)

April 21, 1961

HONORABLE WOODROW W. WILKERSON
Superintendent of Public Instruction

This is in reply to your letter of April 10, which reads as follows:

"Several superintendents have advised us of their being informed by their respective insurance carriers that the present policies issued pursuant to Article 2, 'School Bus Insurance,' Chapter 13 of the Virginia School Code, would not provide complete coverage for school bus safety patrolmen.

"I shall be grateful to you for a statement of your opinion with respect to the following:

"(1) In the event of an accident on the part of a pupil who, for example, falls and breaks an arm while performing the duties of a patrolman off of the school bus and when, in such an instance, there is no negligence on the part of the school bus driver, is such a pupil patrolman covered by insurance pursuant to Section 22-288 of the Code?

"(2) If the answer to the foregoing question is in the negative, is it within the legal power of the State Board of Education to authorize and/or require local school boards to provide insurance coverage for pupil patrolman?

"I would like to report on this matter to the State Board of Education at its meeting on April 28 and I shall greatly appreciate your assistance."

In my opinion, the answer to question number (1) is in the negative. The insurance coverage contemplated by Article 2 of Chapter 13 of Title 22 is liability insurance which can only be in effect where there is negligence on the part of the carrier, which, in this instance, is the school bus, or, rather, the driver of the school bus.

In my opinion, the answer to your second question must also be in the negative. The State Board of Education has no authority with respect to such insurance coverage except as contained in the provisions of Article 2. The extent of the insurance coverage which may be required of the local school boards by the State Board of Education is limited to such insurance as is prescribed by statute.
SCHOOLS—Insurance—Coverage for Students When Passengers on Bus Extends to those Pupils Acting as Patrol When Bus is Stopped. (277)

March 9, 1961

MR. TYLER FULCHER
Division Superintendent
School Board of Amherst County

This is in reply to your letter of March 7, referring to a letter written by a member of my staff to R. L. Wimbish, Supervisor of Public Transportation, State Department of Education, in which it was stated that the insurance coverage contemplated by Section 22-288 of the Code includes school children who are passengers on a school bus and who, while in the custody of the school officials and the driver of the bus, and with their consent or at their direction, temporarily alight from the bus while it is loading or unloading school children—and act in the capacity of traffic patrol. We construe this section to be for the purpose of assuring insurance protection to these school children while performing this patrol duty. They are, during that time, in our opinion, passengers on the bus.

If the policy of insurance you now have does not provide for such insurance, and if it is not capable of being extended by endorsement to attain such coverage, then, in my opinion, there is a duty upon the local school authorities to procure a separate policy providing such protection to the extent provided by Section 22-285 of the Code.

SCHOOLS—Literary Fund Loan—Title Examination—Certificate of Clerk May Be Based on Title Report By Former Attorney for Commonwealth. (282)

March 14, 1961

HONORABLE W. D. REAMS, JR.
Commonwealth’s Attorney for Culpeper County

This will acknowledge receipt of your letter of March 10, in which you state that the School Board of Culpeper County is obtaining a loan from the Literary Fund and that the title to the property involved has heretofore been examined by a former Commonwealth’s Attorney. You wish to know whether or not it is permissible under the statute for the title at this time to be brought up to date and a supplemental report filed in which event there would be two title certificates filed with respect to the property.

You will note by examining Section 22-108 of the Code that the clerk of the circuit court is required to make a certificate as follows:

“One. That the title to the real estate has been examined and approved in writing by an attorney for the Commonwealth for such county or the city attorney of such city, and his report filed with the clerk of the court.

“Two. That the certificate of the attorney examining the title shows that the school board of the country of ____________________________, or of the city of ____________________________, has a good and sufficient title in fee simple to the real estate subject to the (following)(no) encumbrances.”

I would think that the clerk would be willing to make a certificate in connection with the present loan based upon the combined title reports filed. If the clerk is willing to make a certificate upon that basis, I see no objection to the procedure suggested by you.
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SCHOOLS—Loans—Taxation for Repayment May Not Be Levied on Separate Magisterial Districts. (308)

Counties—Loans from Literary Fund—May Not Be Repaid By District Levy. (308)

April 6, 1961

HONORABLE DUNCAN M. BYRD
Commonwealth’s Attorney for Bath County

This is in reply to your letter of March 31, 1961, in which you request an expression of my views regarding the proposed plan of the board of supervisors to finance school construction.

You state that two magisterial districts are to be served by a new school, the cost of which is to be financed in part by a loan from the Literary Fund. The Board of Supervisors apparently concurred in the action of the School Board in contemplation of repaying the loan by increasing an existing district levy in the two districts affected.

You are particularly interested in knowing if my letter of February 3, 1958, addressed to Honorable James O. Morehead, Superintendent of Bland County Schools, (Report of Attorney General, 1957-58, at page 241) and the Supreme Court decision in Henrico v. City of Richmond, 177 Va. 754, are to be so construed as to prohibit the proposed plan for repaying the loan from the Literary Fund.

In my letter of February 3, 1958, I expressed the view that if money was to be borrowed from the Literary Fund, it must be repaid by the levying of a county-wide tax, and not just a district tax. That conclusion was based on the decision in the case of Henrico v. City of Richmond, supra, the pertinent portion of which reads as follows:

"This leaves no room for doubt that the loans from the Literary Fund are county obligations which must be repaid by county levies on a county-wide basis." (177 Va. 802)

The evidence in that case showed that the loan to the County School Board was being repaid by a county-wide levy. The question before the Court was whether the obligation incurred by the School Board was a county obligation, a portion of which should be assumed by the City upon annexation. Thus, the Court did not have before it for determination the precise question as to the legal authority for the county to make a district levy for the purpose of repaying a loan from the Literary Fund.

In the earlier decision of Board of Supervisors v. Cox, 155 Va. 687, the Supreme Court of Appeals resolved the question of whether loans from the Literary Fund were obligations which could be incurred only after a vote of the people as contemplated by Section 115-a of the Constitution of Virginia. There again, the Court was not expressly called upon to pass upon the validity of a district levy to repay the loan, even though the facts in that case quite manifestly show that the loan was made for the purpose of constructing a school in the Buena Vista District of King and Queen County, and a levy was to be made by the Board of Supervisors in that district for the repayment of the loan. The Court there stated:

"Our conclusion is that the school board of King and Queen County is entitled to borrow the money applied for from the literary fund, provided it has otherwise complied with the law, and that the board of supervisors of that county, under the law, acted within its rights and performed its duty when it, by an order, levied an additional tax of ten cents on one hundred dollars, to repay the loan and interest." (155 Va. 711)

Thus, by implication at least, the Court may have condoned district levies for the purpose, although not expressly voicing approval to such a method of repayment.

Irrespective of the implications of the Cox case, or the practices of the counties prior to the Henrico v. City of Richmond decision, I am of the opinion that the conclusion is inescapable that the county boards of supervisors must now levy a county-
wide tax to repay loans from the Literary Fund. In view of the unequivocal construction placed upon the statute which provides the authority for levying a tax for the repayment of such loans, I would strongly advise against the proposed plan of the Board of Supervisors of Bath County to repay a loan from the Literary Fund by increasing the levy for the two magisterial districts affected by the school construction.

SCHOOLS—Loans From Virginia Supplemental Retirement System—Levy for Repayment Must be on County-Wide Basis. (327)

Counties—Loans from Virginia Supplemental Retirement System—Levy for Repayment Must be on County-Wide Basis (327)

April 20, 1961

HONORABLE DUNCAN M. BYRD
Commonwealth’s Attorney for Bath County

This is in reply to your letter of April 12, 1961 which has further reference to my letter addressed to you under date of April 6, 1961 relating to district tax levies for the repayment of school construction loans.

You have now asked to be advised if the governing body may levy a district tax for retiring bonds issued to secure a loan from the Virginia Supplemental Retirement System, as contemplated by Chapter 19.2, Title 15 of the Code of Virginia of 1950, as amended.

You have advised the governing body and the school board that bonds may be issued by the school board to repay a loan from the Virginia Supplemental Retirement System without a vote of the people, but Section 15-666.75 of the code makes it necessary for the governing body to make a general county-wide tax levy to retire those bonds.

I concur in your view.

SCHOOLS—Property. Sale of—Disposition of Proceeds—Must be Paid Into General Fund and be Reappropriated by Governing Body. (141)

October 19, 1960

HONORABLE THOMAS E. WARRINNER, JR.
Commonwealth’s Attorney for Brunswick County

This is in reply to your letter of October 17th, which reads as follows:

"On land belonging to the County School Board of Brunswick County, Virginia, there is a shed-type structure with concrete floor and special construction features which permitted it to be used by the citizens of Brunswick County for the sale of hogs. This building was constructed from funds provided by the Ruritan Clubs of Brunswick County and the cost of it ran into several thousand dollars. The Highway Department is condemning this building for highway construction purposes and a proceeding has been instituted to accomplish such condemnation. The School Board desires to file a petition for the disbursement of the appraised value to the School Board. This presents two problems in my opinion. The first relates to whether the money can be disbursed directly to the School Board or whether it has to be paid into the general fund of the County and by the Board of Supervisors again appropriated and the second relates to whether the School
Board can enter into any agreement permitting the money to be used by the Ruritan Clubs for the construction of a shed to replace the one which will have to be torn down.

"In my opinion the shed now on the premises is held in trust by the School Board for the benefit of the clubs that provided the cost of construction and seems both fair and legally correct for the Ruritan Clubs to be reimbursed to the extent that they can be for a replacement of the building. It would seem therefore that the structure is not in that sense school property and, if not, it would seem that the money could be disbursed to the Board, the holder of the legal title, and that the Board could carry out its agreement with the Ruritan Clubs and participate by such agreement in replacing the building with the assistance of the clubs. In all probability the building will be put on other property of the School Board and consequently the second relationship would be like the first.

"It would be appreciated if you would advise whether this money can be paid directly to the School Board or whether it will have to be paid back into the general fund once the check is drawn and whether the proceeds may be used to construct a new shed to replace the one that was built with an agreement between the School Board and the Ruritan Clubs."

It occurs to me that in the condemnation proceedings the commissioners should be requested to place separate values upon the lot owned by the school board and the improvements located thereon, which were built from funds donated by the Ruritan Clubs of Brunswick County. I think testimony should be taken for the purpose of establishing the agreement existing between the school board and the Ruritan Club so that the court in directing a distribution of the funds can require the amount realized from the sale of the building to be turned over to the Ruritan Clubs. The school board and the club can enter into a new agreement with respect to the replacement of the building.

I am enclosing copy of an opinion given by Honorable Abram P. Staples during the time he was Attorney General, in which he held that the proceeds of the sale of school property would be the property of the school board, and, under the statutes then in effect, would not have been subject to the appropriation power of the board of supervisors. This opinion is published in the Report of Attorney General for 1939-'40, at page 197. Code Section 676 referred to therein is now Section 22-147. Since the opinion by Mr. Staples was rendered, Section 15-577. of the Code has been amended. The last sentence of this section now reads as follows:

"No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the board, council or other governing body."

In my opinion under this amendment to Section 15-577 the proceeds of the sale of the lot (exclusive of the building) should go into the general fund of the county, subject to the appropriation power of the board of supervisors, thus making the opinion given by Mr. Staples no longer effective. At the last session of the General Assembly, Senate Bill No. 294 was introduced so as to amend Section 22-147 by adding thereto the following paragraph:

"The school board of any county shall have the power to expend the proceeds of any such sale upon the warrant of its chairman drawn on the county treasurer, and no appropriation of such expenditure by the governing body of the county shall be required."

This bill passed the Senate and the House but was vetoed by the Governor. Under this amendment, had it become law, the school board undoubtedly would have had authority to expend the proceeds from the sale of the lot without regard to the attitude of the board of supervisors. This amendment would have removed all doubt as to the effect of the amendment to Section 15-577 upon moneys received from this source.
I assume that the board of supervisors and the school board of your county will have no difficulty in coming to an agreement with respect to the disposition of the funds derived from the sale of the lot.

I am enclosing copy of a memorandum dated June 15, 1959, which was furnished by Honorable J. Gordon Bennett, Auditor of Public Accounts, to the county official shown thereon, in which the amendments to the Code with respect to the fiscal operations of county governments are discussed. This memorandum has the approval of this office.

SCHOOLS—Scholarship Grants—May Not Be Paid to Students Over Twenty Years of Age. (265)

HONORABLE WILLIAM J. PHILLIPS
Commonwealth's Attorney for Warren County

This will reply to your letter of March 2, 1961, in which you inquire whether or not "scholarship grants may be paid to students over the age of twenty years."

Provision for the payment of scholarships for the education of children of Virginia is made by Chapter 7.3 of Title 22 of the Virginia Code. Section 22-115.29 et seq., Code of Virginia (1950) as amended. In pertinent part, Section 22-115.30 provides that every child in the Commonwealth "between the ages of six and twenty" shall be eligible to receive a State scholarship, while Section 22-115.32 provides that every child, "between the ages of six and twenty" residing in a county, city or town which provides for the payment of local scholarships under the provisions of Article 1 of Chapter 7.3 shall be entitled to receive a local scholarship. Moreover, Section 22-115.36 authorizes the governing body of any county, city or town to expend funds for educational purposes in furtherance of the elementary and secondary education of children "between the ages of six and twenty years" residing in such county, city or town.

In light of the statutes mentioned above, I am of the opinion that only those children who are between the ages of six and twenty years are eligible for scholarships in accordance with the provisions of Chapter 7.3 of Title 22 of the Virginia Code and that such scholarships may not be paid to students over the age of twenty years.

SCHOOLS—Scholarships—County Must File Application with State Board of Education in Time Prescribed by Statute. (87)

HONORABLE ERNEST P. GATES
Commonwealth's Attorney for Chesterfield County

This is in reply to your letter of September 2, in which you state that an application filed with the local school board for scholarship allowance under the provisions of Chapter 53, Extra Session, 1959, was not filed with the State Board of Education within the time prescribed by a regulation of the Board and, as a result, was rejected. I understand that the application was timely filed with the local school board.

You further state:

"It would be most helpful if you would advise whether or not the State Board of Education can refuse payment, if so whether or not the County School Board and the Board of Supervisors have the authority to make payment of both the local share and the state's share of the scholarship grant and also if allowed, what procedure would be required."
Upon inquiry at the office of the State Board of Education, the Director of Finance of the Board stated that the unexpended balance in the appropriation made to the State Board for scholarship payments for the 1959-60 Session reverted at the end of the fiscal year 1959-60 and, for that reason, the Board has no funds for the payment of the claim. Under such circumstances, I am not aware of any procedure under which the Board may be compelled to allow the claim.

Neither Chapter 53 of the Acts of the Special Session of 1959, nor Chapter 448, Acts of 1960, prescribe a limitation upon the amount the locality may appropriate for scholarship grants. The grants by the locality should, of course, be uniform. This could be accomplished by action of the governing body of the county at this time appropriating out of current revenues to the School Board a sum sufficient to permit the School Board to adjust and pay claims for the preceding year which, though filed within time, were inadvertently left unpaid and this appropriation could include the amount the State would have paid had the claim been presented to the State within the proper time.

SCHOOLS—Scholarships—May be Used for Attending Private Nonsectarian School Outside Virginia. (198)

December 15, 1960

HONORABLE CARTER R. ALLEN
Commonwealth's Attorney for the City of Waynesboro

This will reply to your letter of December 14, 1960, in which you call my attention to the provisions of Section 22-115.29 et seq. of the Code of Virginia (1950) as amended and inquire "whether the provisions for scholarships therein made would include scholarships from the public funds of this State for the education of eligible children in nonsectarian private schools outside the State of Virginia.

As you point out in your communication, no limitation with respect to the geographical location of eligible non-sectarian schools is prescribed by the statute under consideration. Moreover, this office has previously ruled that the substantially identical language of Section 22-115.22 et seq. of the Virginia Code—the immediate predecessor of the instant statute—conferred upon "the children of Virginia . . . absolute freedom of choice in determining where they will pursue their education, subject, of course, to the school meeting the qualifications of law and the standards established by the State Board of Education." See, Report of the Attorney General (1959-1960) pp. 305-306. Consistent with the language quoted immediately above, I am of the opinion that scholarships authorized by Section 22-115.29 et seq. of the Virginia Code may be utilized in furtherance of the education of eligible children in nonsectarian private schools located outside the Commonwealth of Virginia.

SCHOOLS—Scholarships—Not Necessary to be Resident to Obtain. (120)

October 3, 1960

MR. GEORGE D. FISCHER
Commissioner of the Revenue of
Arlington

This is to acknowledge receipt of your letter of September 28, 1960, addressed to Mr. C. H. Morrissett, State Tax Commissioner, in which you make the following inquiry:
"The Judge Advocate General's office has inquired of me if a military man who is abiding in the State of Virginia solely in compliance with military orders assigning him to a post of duty in Virginia and claiming a domicile foreign to Virginia which he can substantiate, and thus be exempt from Virginia State and Local taxation under the terms of the Soldiers' and Sailors' Civil Relief Act, could apply for and receive a tuition grant to send his child to a private school without becoming legally domiciled in Virginia and subject to State and Local taxation as a resident of Virginia."

Chapter 7.3 of Title 22 of the Code of Virginia provides for grants for educational purposes. Section 22-115.30 of the Code of Virginia provides that every child in this Commonwealth between the ages of six and twenty who has not finished or graduated from high school and who desires to attend a non-sectarian private school shall be eligible and entitled to receive a State scholarship in the amount of $125.00 per school year, if attending elementary school, and $150.00 if attending high school. Section 22-115.32 in like language provides for local scholarships. I can find nothing in this chapter or elsewhere in the Code which requires that the parent should be a Virginia taxpayer as a prerequisite for the child to obtain one of these scholarships.

I am, therefore, of the opinion that the children of military personnel residing in this State are entitled to receive State and local scholarships under the aforesaid chapter of the Code.

SCHOOLS—SCHOOL BOARDS—Board not Required to Agree to Bond Issue After Referendum. (74)

Boards of Supervisors—Vote on Bond Issue May be Held at Time of General Election —Cost of Referendum Cannot be Borne by Public for "Straw vote." (74)

August 24, 1960

HONORABLE T. B. P. DAVIS
Commonwealth's Attorney for Greene County

This is in reply to your letter of August 16, 1960, in which you request my opinion as to certain questions arising in the financing of a new school building. I shall answer the questions seriatim.

"(1) Now, there are certain statutory provisions whereby funds for construction of school buildings may be obtained from the Literary Funds. In the event such a bond issue question carried and the vote were positive, would the Board of Supervisors if it so desired and the funds were available be properly carrying out the mandate if the funds were then obtained from the Literary Fund instead of issuing bonds?"

ANSWER: Once the election is held under the provisions of Section 15-666.31 of the Code and the qualified voters approve the contracting of the debt and issuing the bonds, the court must issue an order authorizing the Board of Supervisors to proceed to carry out the wishes of the voters. Under the provisions of Section 15-666.32, the Board of Supervisors, upon request of the school board, may issue the bonds. If, however, after the favorable election, the school board decides to obtain a Literary Fund loan, then the Board of Supervisors would be under no obligation to issue the bonds.

"(2) Would it be in compliance with law to take the sense of the qualified voters on the bond issue question at the date of the General Election in November?"

ANSWER: The answer is in the affirmative. There is nothing in the statutes which would prevent the holding of the election to take the sense of the qualified voters on a bond issue on the same date on which the general election is held in
November. This office has held that a referendum on the question of a school board issue may be presented to the voters at the time of the general election. (Report of the Attorney General, 1950-1951, p. 111).

"(3) If the County School Board and the Board of Supervisors concurred in submitting the question of borrowing or obtaining funds from the Literary Fund, in your opinion would there be any legal objection to 'taking the sense' of the voters to such a step either in a special election or at the General Election in November provided of course that the Judge of the Circuit Court acquiesced? I might say that to my knowledge there are no provisions in the Code which so provide since such a 'vote' is not required, however, I find nothing to prohibit such a course of action."

ANSWER: The answer is in the negative. As you know, loans may be obtained from the Literary Fund without a vote of approval by the people. Board of Supervisors v. Cox, 155 Va. 687. This being the situation, the expenditure of public funds on such an election would be illegal. Furthermore, the referendum would not be binding. However, I can perceive of no objection to a "straw vote" being taken at the same time and place where the general election is accomplished; provided it does not interfere with the general election and is conducted without public expense.

SCHOOLS—School Boards—Principals and Teachers—Authority Over Pupils Going to and Returning From Schools. (273)

March 7, 1961

HONORABLE LESLIE D. CAMPBELL, JR.
Attorney for the Commonwealth

This will reply to your letter of February 24, 1961, in which you call my attention to certain provisions of Sections 22-72 and 22-249 of the Virginia Code and make inquiry concerning "the authority, obligation and/or civil liabilities of a school board, principals and teachers as to the discipline and conduct of students prior to the time they reach school property and subsequent to the time they are discharged from school property."

In pertinent part, Sections 22-72 and 22-249 of the Virginia Code prescribe:

"§ 22-72.—The school board shall have the following powers and duties:

* * *

"(2) Rules for conduct and discipline. To make local regulations for the conduct of the schools and for the proper discipline of the students, which shall include their conduct going to and returning from school, but such local rules and regulations shall be in harmony with the general rules of the State Board and the statutes of this State."

"§ 22-249.—Teachers shall require of the pupils cleanliness of the person and good behavior during their attendance at school, and on their way there-to and back to their homes. * * *

As a general rule school boards, principals and teachers are authorized to make and enforce reasonable regulations governing the management and discipline of pupils in the public schools. Moreover, it appears to be well settled that the power of school authorities over the conduct of pupils is not limited to that occurring on school property during regular school hours, but extends to that of pupils on their way to or from school if such conduct directly affects the good order and welfare of the school. While such regulations may not permissibly deprive pupils of rights to which the law otherwise entitles them or alienates them from proper parental authority, they may subject
pupils to punishment for acts committed away from school property and outside of school hours which are detrimental to the interests of the school or adversely affect school discipline.

The general principles governing the liability of school authorities for the expulsion or suspension of pupils are well stated in 79 C.J.S. 451, Schools and School Districts: Section 503(d), in the following language:

"As a general rule a teacher and the members of a school board in exercising the power of expelling or suspending a pupil must exercise judgment and discretion, and are not liable in damages for errors of judgment in that respect if they act without malice, wantonness, or intention to wrong the pupil. They are not liable even though they act with malice if the expulsion is based on lawful grounds and made in a lawful manner. However, where a pupil is illegally excluded or expelled, both the teacher who expels him and the members of the school board who wrongfully order or advise it are liable to such pupil for damages, but a member of the board who has nothing to do with the expulsion is not liable. Where the statute places liability on city or district, liability for a wrongful expulsion or suspension is on the city or district in which the school is located, but no liability attaches under the statute for an irregular expulsion or suspension where the expulsion or suspension is justified and the irregularity is subsequently cured, or for a refusal to hear all the witnesses offered in the expulsion proceedings where the refusal is made in good faith."

For a review of the various authorities discussing individual aspects of the general question you present, I call your attention to 47 Am. Jur. 422 et seq., Schools: Sections 167-188; 79 C.J.S. 442 et seq., Schools and School Districts; Sections 493-505; Annotation, 41 A.L.R. 1312.

SCHOOLS—SCHOOL BoARDS—Town's Share in County Tax Levy. | (63)

Counties, Cities and Towns—School Levy—Share of Town in County Levy. (63)

August 9, 1960

HONORABLE E. B. STANLEY
Division Superintendent
Washington County Schools

I have been requested by Mr. William R. Cook, Town Manager of Abingdon, to review my opinion of July 29, 1960, to you which was in response to your inquiry of July 26, 1960.

Neither your letter nor my reply considered the provisions of Section 22-141.1 of the Code, which is a new section enacted by Chapter 531, Acts of Assembly, 1960.

It appears that the County of Washington provides funds for educational purposes from (1) the amount collected from a specific levy for such purposes and (2) appropriations made from the general fund to supplement the fund received from the specific educational or school levy.

Section 22-141 (1) applies only to the share to which a qualifying town is entitled from a specific levy for public school and/or educational purposes. Section 22-141.1 applies only to such town's share derived from a general or unit levy for such purposes. Where a county school fund is composed of funds derived from both sources, it follows that the provisions of both sections—22-141(1) and 22-141.1—must be complied with by the county school board and the county treasurer.

Therefore, pursuant to the provisions of Section 22-141.1 each town constituting a separate school district under this section is entitled to receive its pro rata share of
school funds appropriated by the governing body of the county out of the general fund for public school or educational purposes. This entitlement is in addition to payments made to the town under Section 22-141(1).

You will please disregard my opinion of July 29, 1960, which is replaced by this opinion.

SCHOOLS—Superintendents—May Not Work at Other Employment. Questionable if Writing Book is Permissible. (216)

January 6, 1961

HONORABLE TYLER FULCHER
Division Superintendent
County School Board of Amherst County

This is in reply to your letter of January 4, in which you request my advice with respect to the following:

"Does a Division Superintendent of Schools in Virginia have the legal right to publish a book or books in line with his work as Division Superintend-ent and thereby make his ideas available to his fellow Americans?"

"In giving your opinion, you, of course, shall be aware of the fact that the work of the Division Superintendent is very broad and comprehensive. Among his areas of duties are finance, instruction, instructional materials, guidance, administration, public relations, transportation, personnel, school construction, school building, maintenance, athletics, etc. In light of this, I would appreciate your opinion on the above-mentioned legal question."

Your attention is directed to Sections 22-38 and 22-40 of the Code, which read as follows:

§ 22-38: "Any vacancy in the office of division superintendent shall be filled by the school board or boards of the division.

"The office of any division superintendent shall be deemed vacant upon his engaging in any other business or employment during his term of office as such superintendent, unless such superintendent shall have been accepted for part time employment, or upon his resignation or his removal from office by the State Board, or other appointing power."

§ 22-40: "The State Board shall punish division superintendents of schools for neglect of duty, or for any official misconduct, by reasonable fines, to be deducted from their pay, by suspension from office for a limited period, or by removal from office."

In connection with these Code sections I am enclosing copy of an opinion issued by the Honorable Abram P. Staples during his term of office as Attorney General, to the Commonwealth's Attorney of Lee county. This opinion is published in the Report of Attorney General for 1940-'41, at page 134.

Whether or not the publishing of the book or books by you would be deemed to be in violation of Section 22-38 is a question to which I feel you should give serious consideration. I would suggest that before you undertake a work of this nature it might be advisable for you to consult the local school board and the State Board of Education and obtain their approval.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—Teachers—Not Prohibited from Selling Clothing and Gift Items to School Organization for Resale. (377)

June 12, 1961

HONORABLE C. HARRISON MANN, JR.
Member House of Delegates

This will reply to your letter of June 9, 1961, in which you present the following situation and inquiries:

"Is it lawful, in light of Code Sec. 22-213, for a teacher in the public schools who is also engaged as a partner in a business, to sell goods normally offered by his business to a school activity for resale by that activity to students at a profit in support of such school activity?

"The activity described is an extracurricular activity, and the sales involved would not be made between the school system and the private business. Proceeds of this activity, as in the case of proceeds of all other activities, must be accounted for, however, by the school operating the activity to the public school system of which it is a part.

"If such transaction is not unlawful under Sec. 22-213, is there any other section under which it would be unlawful?"

From your communication, it appears that the student publications activity of a local high school proposes to offer for sale to students and faculty members—on a profit making basis—certain items of clothing and miscellaneous gifts made up in school colors.

In this connection, I am of the opinion that the enterprise in question would not fall within the condemnation of Section 22-213 of the Virginia Code, nor do I believe that the venture would be prohibited by any other provision of the Virginia Code.

SCHOOLS—Temporary Loans—Not Permissible on a Magisterial District Basis. (131)

Schools—Temporary Loans—Constitutional Limitation. (131)

October 12, 1960

HONORABLE WILLIAM C. FUGATE
Commonwealth's Attorney for
Lee County

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

"Lee County is divided into five Magisterial Districts. We, of course, have a county school levy as well as a levy in each district, such levy being based upon the individual needs of each district for their schools. It is the desire of one of the districts to obtain a temporary loan in the amount of twenty-five thousand dollars ($25,000) in order to make an addition to one of the high schools. Virginia Code Section 22-120 dealing with temporary loans speaks only of the county school levy. It is our desire to know whether or not we may also consider the district school levy together with the county school levy in making a determination under 22-120 as to how much we may be authorized to borrow in a particular Magisterial District."

This office has previously expressed the opinion that there is no authority for a school board to make a temporary loan on a magisterial district basis. I am enclosing two opinions relating to this subject. These opinions are dated December 15, 1954.
and January 19, 1956, respectively, and were published in the Reports of the Attorney General for 1954-55 at page 201 and 1955-56, at page 185.

Any temporary loan made by the school board under Section 22-120 is subject to the provisions of Section 115-a of the Constitution, which provides that the General Assembly shall not authorize any school board of any county to contract any debt except to meet casual deficits in the revenue, a debt created in anticipation of the collection of the revenue in said county for the then current year, or to redeem a previous liability unless the question contracting the debt is submitted to the qualified voters for approval or rejection, and is approved by such voters. Therefore, under Section 22-120 the school board of the county, with the approval of the board of supervisors, may make a temporary loan within the limits set forth in said section to be paid out of the revenue collected for the current year which is 1960. This would not prevent the county school board and the board of supervisors from contracting another loan next year to be paid out of the revenues of that year if the county should find it necessary to do so.

SEGREGATION OF RACES—Public Places—What Constitutes—Lunch Counters Not Included. (80)

August 24, 1960

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

I am in receipt of your letter of August 23, 1960, which reads, in part, as follows:

“...if you would advise me whether or not in your opinion Section 18.1-356 of the Code of Virginia is applicable to restaurants, hotel dining rooms or lunch counters that are operated by merchants in their stores or places of business.

“If this section is not applicable, is there any statute in your opinion which requires separation of the races in eating establishments?"

Sections 18.1-356 and 18.1-357 of the Virginia Code comprise Article 6, Chapter 7, Title 18.1 of the Code of Virginia (1960), and respectively provide:

“§ 18.1-356. Duty to separate races at public assemblages.—Every person, firm, institution or corporation operating, maintaining, keeping, conducting, sponsoring or permitting any public hall, theatre, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons shall separate the white race and the colored race and shall set apart and designate in each such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage, certain seats therein to be occupied by white persons and a portion thereof, or certain seats therein, to be occupied by colored persons and any such person, firm, institution or corporation that shall fail, refuse or neglect to comply with the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense. (Italics supplied)

“§ 18.1-357. Failure to take space assigned in pursuance of preceding section.—Any person who fails, while in any public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage, to take and occupy the seat or other space assigned to them in pursuance of the provisions of the preceding section by the manager, usher or other person in charge of such public hall, theater, opera house, motion picture show or place of public entertainment or public assemblage, or whose duty is to take up tickets or collect the admission from the guests therein, or who shall fail to obey the request of such manager, usher or other person, as afore-
said, to change his seat from time to time as occasion requires, in order that
the preceding section may be complied with, shall be deemed guilty of
a misdemeanor and upon conviction thereof shall be fined not less than ten
dollars nor more than twenty-five dollars for each offense. Furthermore,
such person may be ejected from such public hall, theatre, opera house,
motion picture show or other place of public entertainment or public assem-
blage by any manager, usher or ticket taker, or other person in charge, of such
public hall, theatre, opera house, motion picture show or place of public enter-
tainment or public assemblage, or by a police officer or any other conservator
of the peace, and if such person ejected shall have paid admission into
such public hall, theatre, opera house, motion picture show or other place of
public entertainment or public assemblage, he shall not be entitled to a return
of any part of the same.” (Italics supplied)

Initially, it should be noted that the above quoted statutes are penal in character
and must be strictly construed. Moreover, the rules of ejusdem generis and noscitur
a sociis are clearly applicable in construing the general phrase “place of public en-
tertainment or public assemblage” appearing therein. When the statutes under
consideration are interpreted in light of these principles, I am constrained to believe
that your initial inquiry should be answered in the negative.

So far as I have been able to ascertain, the leading case in Virginia involving the
application of the above-stated rules of construction to a penal statute is Gates and
Son Co. v. City of Richmond, 103 Va. 702, 49 S. E. 965. In that case, the defendant,
a corporation whose principal place of business was located on Fourteenth Street in
the City of Richmond, was convicted in the trial court for an alleged violation of a
penal ordinance of the city prohibiting any person from constructing or placing “any
portico, porch, door, window, step, fence, or other projection” which extended into
any street. The specific obstruction there under consideration was a movable “gang-
plank” or “skid” some twelve feet in length, which extended from the front door of
defendant’s place of business across the sidewalk to delivery wagons in the street.

Utilizing the same rules of construction which I believe are indispensable to the
proper resolution of the questions you present, the Supreme Court of Appeals of
Virginia reversed the judgment of conviction entered by the trial court. With
respect to the character of the ordinance under consideration and its proper con-
struction, the Court pointed out (103 Va. at 704):

“This is a penal ordinance, and is, therefore, to be construed strictly. It is not to be extended by implication, and must be limited in its applica-
tion to cases clearly described by the language employed. The books abound with cases illustrating this principle, which is of universal application, except in particular instances in which the doctrine has been modified by statute...”

“* * * * * * * * *

“These and many other cases which could be cited to the same effect, tend to illustrate the jealousy with which courts regard any substantial
departure from this time-tested canon of construction. Its violation in-
volves a most dangerous innovation, and places persons accused of crime at
the mercy and arbitrary discretion of the judge who may chance to
preside in the particular case.”

In support of this view, the Court quoted the following language of Marshall,
C. J., in United States v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37:

“The rule that penal laws are to be construed strictly is perhaps not
much less old than construction itself. It is founded in the tenderness of
the law for the rights of individuals, and on the plain principle that the
power of punishment is vested in the legislative, not the judicial, department.
... The case must be a strong one, indeed, which would justify a court in
departing from the plain meaning of words, especially in a penal act, in
search of an intention which the words themselves do not suggest. To
determine that a case is within the intention of a statute its language must
authorize us to say so.

"It would be dangerous, indeed, to carry the principle, that a case which
is within the reason or mischief of a statute, is within its provisions, so far
as to punish a crime not enumerated in the statute, because it is of kindred
character with those which are enumerated."

See Jennings v. Commonwealth, 109 Va. 821, 63 S. E. 1080; Withers v. Common-

The Court also pointed out that the "kindred principles" of ejusdem generis and
noscitur a sociis must also be considered in ascertaining the correct interpretation
of the ordinance there under consideration. These two rules of construction are well
stated in 17 M. J. 325, Statutes: Section 62, and 17 M. J. 327, Statutes: Section 63,
respectively, in the following language:

"When a particular class of persons or things is spoken of in a statute
and general words follow, the class first mentioned must be taken as the
most comprehensive, and the general words treated as referring to matters
ejusdem generis with such class, the effect of general words when they
follow particular words being thus restricted. Things exceptional in
character are never legally deemed to be included or embraced in general
terms of disposition, prohibition or regulation of a class or classes of normal
or ordinary subjects mentioned. This principle is the basis or meaning of
the rule ejusdem generis.
* * * *

"It is a fundamental rule of construction that in accordance with the
maxim 'noscitur a sociis' the meaning of a word or phrase may be ascer-
tained by reference to the meaning of other words or phrases with which it is
associated. Language, though apparently general, may be limited in its
operation or effect where it may be gathered from the intent and purpose of
the statute that it was designed to apply only to certain persons or things, or
was to operate only under certain conditions.

"In the interpretation of statutes, words and phrases therein are often
limited in meaning and effect by necessary implications arising from other
words or clauses thereof . . . Also, a specific enumeration of words or objects,
as a rule, controls general words which follow, and limits them in their
operation to others of like kind."

Supportive of the foregoing statements are numerous decisions of the Supreme
Court of Appeals of Virginia:

Gates and Son Co. v. City of Richmond, supra.
Standard Ice Co. v. Lynchburg Diamond Ice Factory, 129 Va. 521, 106
S. E. 390.
Rockingham Cooperative Farm Bureau v. Harrisonburg, 171 Va. 339, 198
S. E. 908.
East Coast Freight Lines v. City of Richmond, 194 Va. 517, 74 S. E. (2d)
283.
Sellers v. Bles, supra.

Having indicated the various rules of construction requisite to the proper resolu-
tion of the question presented in the Gates case, supra, the Court concluded (103 Va.
at 707):

"Applying the foregoing well-settled principles to the case in judgment,
it is quite apparent that the offense charged is not embraced by the provi-
sions of the ordinance under consideration. The ordinance is plainly in-
tended to apply to obstructions and encroachments on the streets of a permanent character, and cannot without unwarranted enlargement of the ordinary scope and meaning of the language used, be made to embrace temporary obstructions such as are caused by the use of skids and similar appliances employed in loading and unloading wagons.

"If in the judgment of the city council the use made of the streets in this instance amounts to an undue interference with the rights of the public, the evil can be remedied by appropriate legislation. But the courts must construe the ordinance as they find it, and cannot enlarge its operation to meet the exigencies of particular cases."

Analysis of the language of Sections 18.1-356 and 18.1-357 of the Code of Virginia furnishes significant internal support for the view that the rules of *ejusdem generis* and *noscitur a sociis* apply with special emphasis in delineating the proper scope of these statutes and that the general phrase, "any place of public entertainment or public assemblage" must be interpreted as restricted to places of the same class as those denominated by the immediately preceeding specific terms. Although the general phrase in question is repeated seven times in the two enactments, it is never isolated from—but in each instance appears in conjunction with—the antecedent specific terms, "public hall, theatre, opera house" and "motion picture show." It is manifest that these specific terms embrace places of public entertainment customarily attended by large groups of people who are usually present collectively for protracted periods of time. By contrast, drugstores, variety stores, lunch counters, restaurants and cafeterias are not places of public entertainment and are usually attended by groups of people who are present only temporarily for the purpose of inspecting or purchasing merchandise or meals. Certainly, the particular establishments concerning which you inquire are not expressly embraced in the statute, and I am constrained to believe that such establishments are not of the same class as those which are specifically mentioned. Moreover, as previously indicated, the statutes under consideration must be limited in their application to cases clearly described by the language employed, and the scope of the enactments may not be extended by implication.

In light of the principles heretofore discussed, and the decision of the Supreme Court of Appeals of Virginia in *Gates and Son Co. v. City of Richmond*, supra, I am of the opinion that drugstores, variety stores, restaurants, lunch counters and cafeterias should not be deemed to be included within the ambit of Sections 18.1-356 and 18.1-357 of the Code of Virginia.

I am not advised of any statute in Virginia which requires separation of the races in eating establishments. Such separation is, in the discretion of the owner of such an establishment, permissible.

Section 18.1-173 of the Code deals with the offense of trespass and it is designed to protect the rights of the owner or those in lawful control of private property. Under this statute, any person who shall, without authority of law, go upon the premises of another, after having been forbidden to do so, either orally or in writing, is guilty of a misdemeanor. Therefore, while there is no statute which requires separation of the races in eating establishments, there is a statute which protects the owner whose policy is to separate the races and who does, in fact, operate a segregated restaurant or other eating establishment.

SHERIFFS—Deputy as Jailer—Must be Resident of State One Year to Qualify.  
(147)

Boards of Supervisors—May Contract with Jailer for Purposes of Feeding Prisoners.  
(147)

HONORABLE SAMUEL H. ALLEN  
Commonwealth's Attorney for Lunenburg County  

October 24, 1960  

This is in reply to your letter of October 20, in which you state that a former resi-
dent of the State of New Jersey purchased the "Lunenburg Inn" and moved to Lunenburg County from the State of New Jersey on or about October 1, 1960. This person has applied for the position of jailer of Lunenburg County and he also wishes to enter into a contract with the county to feed the prisoners in the county jail.

You state that you have advised the sheriff that in your opinion this gentleman is not eligible for appointment as deputy sheriff or county jailer until such time as he has been a resident of Virginia for one year and of the county for six months. Under Section 53-168 of the Code the sheriff of the county shall be keeper of the jail located in such county. The sheriff may appoint a deputy so serve in the capacity of jailer. See Watts v. Commonwealth, 99 Va. 872. This office has held on several occasions that a deputy sheriff must have the same qualifications for office as the sheriff. Therefore, until such time as this applicant has resided in the State of Virginia for one year and in the county of Lunenburg for six months, he is ineligible to hold the position of deputy sheriff.

With respect to the question as to whether or not the county is prohibited under Section 15-504 from contracting with the jailer to feed the prisoners depends upon an interpretation of the last paragraph of Section 15-504, which reads as follows:

"Nor shall this section apply to the compensation of sheriffs or their deputies who also serve as jailers for their counties; nor to the employment of a sheriff of a county or his deputy as janitor for a county building or buildings."

You will note that under this provision the prohibitions of Section 15-504 do not apply to the compensation of sheriffs or their deputies who also serve as jailer for the county.

Section 53-175 places on the sheriff the responsibility to furnish food, clothing and medicine to jail prisoners, which shall be purchased at prices as low as reasonably possible. The sheriff shall obtain invoices or itemized statements of account from each vendor of such food and other necessities, which he shall certify as required by such section. These invoices shall be forwarded to the State Board of Welfare when a request for reimbursement by that agency is made by the local governing body. Attention is directed to Sections 15-178 and 15-179 of the Code.

Sections 53-176 of the Code provides as follows:

"All meals for prisoners of which the Commonwealth shares in the cost shall be prepared at the jail kitchen or other kitchen supervised by the jailer unless permission is first obtained from the Director to purchase meals from restaurants or establishments engaged in the business of serving meals or from individuals, provided that this requirement shall not be applicable in an emergency."

It will be seen that under this latter section meals for jail prisoners may be purchased from restaurants or individuals if permission is first obtained from the Director of Public Welfare.

In light of the provision that appears in the last paragraph of Section 15-504, which I have quoted herein, I am constrained to express the opinion that the board of supervisors, with the prior approval of the Director of Public Welfare, may contract with a deputy sheriff, who is also jailer, and his wife to feed the prisoners from the restaurant owned by them at a compensation specified in the contract, such compensation to be paid upon invoices submitted as required by Section 33-175, duly certified by the sheriff.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS—Deputy on Hourly Wage is Paid “Fixed and Determined Salary” Within Purview of Section 46.1-6. (25)

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

This will acknowledge your letter of the 15th, which reads, in part, as follows:

"The Board of Supervisors for the County of Appomattox is considering passing an ordinance under Code Section 46.1-180 which Section authorizes a county to adopt certain traffic regulations as therein limited.

"Also I have read Code Section 46.1-6, a part of which section reads as follows, after stating that the sheriff or deputy may enforce the provisions of Chapters 1 through 4 (Code Section 46.1-1 through 46.1-347) provided, however: ‘that such officer shall be uniformed at the time of such enforcement or shall display his badge or other sign of authority and provided further that all such officers making arrest incident to the enforcement of this title shall be paid fixed and determined salaries for their services . . . .’

"What the Board has asked me and what I would like your advice on is whether or not a deputy sheriff who is paid at the rate of $1.00 per hour plus 7¢ a mile for the use of his car is considered as being paid: ‘fixed and determined salaries for their services.’"

I am of opinion that a deputy sheriff whose compensation is $1.00 per hour, is paid a “fixed and determined salary” within the purview of Section 46.1-6 of the Code of Virginia. The amount that this officer is to receive is a definite sum per hour. Only the aggregate amount depends upon the number of hours worked. The mileage is paid to reimburse him for his expenses in providing a motor vehicle for use in the performance of his duties.

Manifestly, the intent of this Section of the Code is to insure that no enforcement officer charged with the responsibility of enforcing the provisions of the Chapter which contains Section 46.1-6 shall have any financial interest in the making of an arrest or obtaining a conviction of the accused after the arrest is made. A deputy sheriff whose salary is a fixed amount per hour will receive no fees and his compensation will in no way depend upon the number of arrests made or the number of convictions obtained.

STATE CONVICT ROAD FORCE—May Not Be Used to Maintain Streets in Cities.

STATE CONVICT ROAD FORCE—May Not Be Used to Maintain Streets in Cities. (361)

HONORABLE W. F. SMYTH, JR., Director
Division of Corrections
Department of Welfare and Institutions

This is in reply to your letter of May 22, 1961, in which you ask to be advised as to the legality of employing State prisoners for work on city streets in the event the County of Arlington should become a city.

The legislative history governing the custody and use of convicts leads me to the conclusion that prisoners under the control of the Director of the Department of Welfare and Institutions may not be utilized for working upon streets within cities.

Section 53-57 of the Code of Virginia authorized the employment of convicts in public buildings, grounds and property at Richmond or elsewhere in the State, with the approval of the Governor. At first blush, this would appear to imply the necessary authority to work such convicts on public streets in cities; however, the General Assembly has dealt more specifically with the use of convicts elsewhere in the Code.
In establishing State Farms, the General Assembly expressly provided allotment of services of the Farm to all counties and cities. (See § 53-86 of the Code.)

In establishing the State Convict Road Force, the Legislature expressly provided that convicts constituting such forces are to be employed in the construction and maintenance of the State Highway System (primary system), and secondary system of State Highways. (See § 53-109 of the Code.) Prior to 1956, § 53-123 of the Code authorized the Director to enter into agreements with the proper authorities of any county, town or city to build and maintain roads and streets, provided it did not interfere with convict road force camps employed on the Primary and Secondary Systems of State Highways. This section of the Code was repealed in the 1956 Session of the General Assembly. Hence, it becomes rather obvious that the General Assembly has removed from the Director the previously existing authority to employ State prisoners on city and town streets.

Section 53-123.1 of the Code, providing for the use of convicts in those counties which operate their own road systems (such as Arlington County) is sufficient authority for the use of State prisoners on the existing road system of Arlington County. In the event the County should become a city, this section will no longer apply.

It should be noted that § 53-163 of the Code provides for establishment of chain gangs in the several cities, and that § 53-102.1 of the Code provides certain instances in which persons pending delivery to the State Convict Force may be worked on such chain gangs.

STATE EDUCATION ASSISTANCE AUTHORITY—May Enter into Automatic Notification Contracts with Banks. (311)

April 6, 1961

HONORABLE C. HARRISON MANN, JR.
Member House of Delegates

I am in receipt of your letter of March 27, 1961, in which you call my attention to certain provisions of Chapter 494, Acts of Assembly (1960), specifically to those portions of Sections 2 and 6 thereof which respectively provide:

"§ 2. In order to facilitate the college education of residents of this State and promote the industrial and economic development of the Commonwealth, The State Education Assistance Authority (hereinafter created) is hereby authorized and empowered to buy and sell obligations of students at State-supported institutions of higher education representing loans made to such students for the purpose of obtaining an education."

"§ 6. With the funds available to the authority, for purposes other than the payment of personnel and the lease or rental of offices or equipment, the Authority may acquire from any bank or other lending institution of this State a contingent interest not exceeding eighty per centum of any individual obligation; the total contingent interest of the Authority on all such obligations shall not exceed at any one time a sum equal to twelve and one-half times the total funds which the Authority can employ to acquire such contingent interests . . ."

In this connection, you present the following inquiry:

"The question has now arisen as to whether the Authority may make a contract with a bank so that the Authority's contingent interest will be automatic upon notification by the bank that a loan has been made, provided that the loan meets all the rules and regulations of the Authority. The alternative, of course, would be that the bank would have to obtain the prior agreement of the Authority to acquire the contingent interest before it could make the loan."
In light of the language contained in Sections 4(b), 4(d), 4(h), 7 and 8 of the enactment in question, I am of the opinion that the State Education Assistance Authority is empowered, in its discretion, to enter into contracts of the type concerning which you inquire.

STATE INSTITUTIONS—Longwood College—Tuition—Nonresident Service Personnel not Entitled to Reduced Rate. (186)

Schools—Tuition—Persons on Military Duty in State not Entitled to Reduced Rate. (186)

December 7, 1960

MR. JACOB H. WAMSLEY
Business Manager and Treasurer
Longwood College

This is to acknowledge receipt of your letter of December 1, 1960, in which you request my opinion as to whether a person, under the circumstances hereinafter set forth, should be charged the out-of-state tuition for attendance at Longwood College. You state in part:

"Enrolled at Longwood College for the first semester of the 1960-'61 session is a male student, Pfc. Joseph Galdi. He is attending Longwood College under an arrangement with the Army Education Service. He is a native of New Jersey but is stationed in Virginia at Camp Pickett and has been for approximately nine months."

The Boards of Visitors of the various state institutions determine the charges to be paid by state students and out-of-state students.

Section 23-7 of the Code of Virginia (1950) prescribes:

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

A person in the armed services does not acquire the status of a resident or citizen of Virginia by virtue of being stationed therein and is, therefore, not entitled to the reduced tuition charges accorded to residents or citizens of Virginia, and this office has so held. See letter to Mr. R. T. English dated May 28, 1958 (Annual Report of the Attorney General, 1957-1958, page 47.) I do not find any provision of the statute which would permit a serviceman to attend a state institution of higher learning on paying the charge made to Virginia students, although he may be attending the institution under an arrangement with the Army Education Service.

I am, therefore, of the opinion that this soldier is liable for the out-of-state tuition charge.

STATE SEAL—Use on Door of Governor’s Hotel Suite Door Not Prohibited. (264)

March 2, 1961

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

This is in reply to your letter of March 1, in which you request my opinion as to whether the use of the State Seal on the door of a hotel suite which is designated as the
“Governor’s Suite” would be a violation of the provisions of Article 2, Chapter 8 of Title 18.1 of the Code.

Section 18.1-426 of the Code provides as follows:

“This Article shall not apply to any act permitted by the statutes of the United States or by the laws of this State, or by the United States armed forces regulations, nor shall it apply to any printed or written document or production, stationery, ornament, picture or jewelry whereon shall be depicted such flag, standard, color, ensign or shield, with no design or words thereon and disconnected with any advertisement.”

In my opinion the use of the State Seal in the manner suggested comes within that section and, therefore, the prohibitions of Section 18.1-424 are not applicable.

STATE STUDENT LOAN FUNDS—Limitation on Amount Applicable Only When Utilized for Scholarships Rather than National Defense Student Loans. (133a)

Appropriations—State Student Loan Funds—How Expended—Section 32, Chp. 610 of 1960 Acts Construed. (133a)

October 14, 1960

HONORABLE L. M. KUHN
Director of the Budget
State Capitol

This will reply to your letter of October 6, 1960, in which you call my attention to Section 32 of Chapter 610 of the Acts of Assembly of 1960 and present the following inquiry:

“Does the limitation on the use of State student loan funds, as provided in sub-section (e), apply where these funds are used in the manner provided in sub-section (d-1) as the institutional contribution to the National Defense Student Loan Fund to establish loan funds at an institution under such Federal program?”

In pertinent part, the legislation to which you refer (Acts of Assembly 1960, p. 1065) provides:

“Each institution to which appropriations for student loans are made or have been made under this act is authorized to employ not exceeding twenty-five percentum of the unobligated balances in such fund available to the institution as of June 30 of each fiscal year to establish a system of scholarships for graduates of Virginia high schools in accordance with the terms hereof:

* * * *

“(d-1) It is further provided that any such institution may use all or any part of such scholarships as the institutional contribution to the National Defense Student Loan Fund for establishment of loan funds at the institution under such Federal program with such provision for repayment as appears proper to such institution.

“(e) It is provided, however, that there shall be no employment of State student loan funds for the establishment of scholarships as herein authorized that would reduce the unobligated balance in any such fund below 50 per cent of the unobligated balance in such fund on July 1, 1958.”

By its express terms, subparagraph (e) of the above quoted statute purports to impose a restriction upon the employment of State student loan funds when such funds are utilized “for the establishment of scholarships” as authorized in the pre-
ceding provisions of the statute. I am, therefore, constrained to believe that the limitation in question would not be applicable in those instances in which such funds are utilized as an institutional contribution to the National Defense Student Loan Fund as authorized in subparagraph (d-1) of the legislation under consideration.

STATUTE OF LIMITATIONS—Applies to County School Board. (349)

Civil Procedure—Statute of Limitations—Applies to County School Board. (349)

Counties—Statute of Limitations—Applies to Actions by Political Subdivisions. (349)

May 5, 1961

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

This will acknowledge receipt of your letter of May 3, inquiring whether or not the statute of limitations runs against a subdivision of the State, namely, the School Board of the County of Appomattox.

I believe that a county school board would come within the same category as a county. In the case of Johnson v. Black, 103 Va. 477, it was held that the statute of limitations ran against Norfolk county "in the same manner and to the same extent as against natural persons." At that time Section 8-35 of the Code, as it now exists, was in effect with the exception of the terminal sentence which was inserted in this section by the Code revisers of 1919. This amendment made by the Code revisers, however, did not affect the above Supreme Court case.

STATUTES—Conflict of Acts Passed at the Same Session of the General Assembly. (6)

Fees—Criminal Cases—Issuing Warrant—1960 Amendment to Section 14-132 of Code. (6)

July 6, 1960

HONORABLE MARTIN F. CLARK
Commonwealth’s Attorney for Patrick County

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

"Pursuant to our conversation of this morning relative to Section 14-132 of the Code of Virginia, it appears on page 346 of the Acts that Sub-Section 1 of Section 14-132 was amended and approved on March 15, 1960, whereby the issuing of a warrant for arrest provides for a fee of $2.00 to be charged by the Judge when the fee is collected from the defendant. Section 14-132 seems to have been again amended and approved on March 30, 1960, to become effective July 1, 1960, whereby Sub-Section 1 calls for a fee of $1.50 to be assessed against the defendant.

"The problem of our Court is which amendment is effective and what fee to be charged. It seems apparent that the Section amended dealt with only Sub-Section 6 and the second amendment failed to take into consideration the previous amendment."

Sections 14-132 and 14-136 of the Code were amended by Chapter 278, Acts of General Assembly of 1960, so as to increase the fee for services performed by judges and clerks of courts not of record and a justice of the peace from $1.50 to $2.00 where such services are performed by the issuance of certain criminal warrants. This chapter was approved by the Governor on March 15, 1960, and became effective on
June 27, 1960. By Chapter 368, Acts of 1960, Section 14-132 was amended, effective July 1, 1960, so as to substitute in paragraph (6) Section 19.1-335 of the Code instead of Section 19-310. This chapter left the fee allowed by Section 14-132 at $1.50. This latter chapter was approved on March 30, 1960, and it became effective on July 1, 1960.

An Act becomes a law at the time it is signed by the Governor. See Section 76 of the State Constitution. Mahoney v. Commonwealth, 162 Va. 846. Therefore, Chapter 278 became a Law on March 15, although its operative power did not become effective until June 27, 1960. Section 53 of the Constitution. Chapter 368 became a law on March 30, 1960, although its operative power by specific language did not become effective until July 1, 1960.

The Title to Chapter 368 is as follows:

"An Act to amend and re-enact § 14-132, as amended, of the Code of Virginia, relating to fees for services in criminal cases."

The enacting clause of this chapter is as follows:

"Be it enacted by the General Assembly of Virginia:

"That § 14-132, as amended, of the Code of Virginia, be amended and reenacted as follows: * * *.

At the time this Chapter became law, Section 14-132 had been amended by Chapter 278. While it may be true that it was not the intention of the General Assembly to nullify its prior amendment to Section 14-132 when it enacted Chapter 368, nevertheless, this latter Chapter, a subsequent law to Chapter 278, conflicts with the amendment contained in Chapter 278. The General Assembly is, of course, presumed to know what legislation it has passed during a session and the effect of subsequent legislation affecting legislation that has already been enacted at the same session. Subsequent legislation affecting the identical matter contained in a law passed at the same session, such as the allowance of fees under the same circumstances, must prevail if the fees fixed in the separate Acts are in irreconcilable conflict, as is the case here. See Sutherland Statutory Construction, 3rd Edition, Section 2020. Commonwealth v. Sanderson, 170 Va. 33.

I enclose a copy of an opinion rendered by the late Justice Staples during his tenure of office as Attorney General, in which he held that in cases where two statutes enacted at the same session of the Legislature are utterly inconsistent, the latter Act will prevail. See Report of Attorney General, 1940-41, at p. 173.

In the case of Commonwealth v. Sanderson, supra, the court had before it two Acts passed at the 1932 Session relating to the procurement of chauffeurs’ license by the Division of Motor Vehicles; being Chapter 342 and 385, respectively, the first having been approved March 26, 1932, and the latter on March 29, 1932. Neither Act contained an emergency clause and hence became effective ninety days after the adjournment of that Session of the Legislature.

The first Act (Chapter 342) provided that no charge should be made for the issuance of a chauffeur’s license to firemen, policemen or other officers of the State, or any of its political subdivisions. The exact language of the proviso is as follows:

"Provided that no charge shall be made for the issuance of a chauffeur’s license to firemen, policemen or other officers of the State, or any of its political subdivisions or agencies which may be necessary in connection with the operation of motor vehicles owned by the State, its political subdivisions or agencies."

The second Act (Chapter 285) contained this provision:

" * * On and after the first day of July, nineteen hundred and thirty-three, no other person, except those expressly exempted as hereinbefore
provided for, shall drive any motor vehicle on any highway in this State unless and until such person shall have satisfactorily passed the examination required by subsection (a) of this section and obtained either an operator's or a chauffeur's license, which shall be issued upon the payment of a fee of fifty (50) cents for each operator's license and a fee of two ($2.00) dollars for each chauffeur's license; and all such licenses so issued from the first day of July, nineteen hundred and thirty-three, until the thirtieth day of June, nineteen hundred and thirty-four, shall expire by their own limitation, on the last mentioned date; provided, that any chauffeur's license so issued within said period, shall upon the payment of a fee of five ($5.00) dollars, be issued to expire on the thirtieth day of June, nineteen hundred and thirty-six."

In a suit under the declaratory judgment procedure, the Circuit Court of the City of Richmond was of opinion that no license fee should be charged employees of the City of Richmond by virtue of the proviso contained in Chapter 342, Acts of 1932.

On appeal to the Supreme Court of Appeals, the lower court was reversed. The court said:

"The repeal by implication is not favored, but if inevitable is as effective as an express statutory mandate."

The Court then quoted from Sale v. Board of Education (W. Va.), 192 S. E. 173, as follows:

"While as a general rule the repeal of a statute by implication is not favored, it is clearly recognized by all of the authorities that such a repeal is called for where there is substantial conflict between the two statutes being considered, and the subject matter of the first statute is fully covered by the second."

The Court further stated:

"Inconsistencies cannot be reconciled. This is only possible where they are apparent rather than real. A casual view of approaching trains may make a collision appear inevitable, and yet they may pass on sidings not at first seen."

"Just how a statute which declares that no license charge shall be made to a certain class of chauffeurs and one which declares that such a tax shall be paid by them can be reconciled, we do not know. The act of March 29, 1932, assesses this charge against every one 'except those expressly exempted as hereinbefore provided for.'"

In this instance there is a head-on collision, and, in my opinion, the Act last approved by the Governor prevails. The fee allowed under Section 14-132(1) of the Code is one dollar and fifty cents ($1.50).
REPORT OF THE ATTORNEY GENERAL

SUBDIVISION OF LAND—County Ordinances—Apply to Area within Two miles of Towns. How Distance Measured. May 11, 1961

HONORABLE JULIAN UPDIKE, Clerk Warren County Circuit Court

This is to acknowledge receipt of your letter of May 9, 1961, in which you ask whether or not Chapter 269, Acts of Assembly of 1930, is still in effect. I find that this chapter is now incorporated in the 1950 Code as Article 5, Chapter 23, Title 15, Sections 15-807 to 15-818, inclusive.

You further inquire:

"Is this act still in effect and, if so, does it include the land within two miles of the Corporate limits of the Town of Front Royal, the Corporate limits of which have been extended twice since adoption of the provisions?"

Assuming the incorporated community of Front Royal is a town, the second inquiry must be answered in the affirmative. The ordinance heretofore adopted by the County Board applies to the area within two miles of a town, even though the boundaries of the town may have been extended subsequent to the enactment of the subdivision ordinance.

You further state in your letter:

"In measuring the distances of the land from the Corporate limits would it be in a direct line or as the roads lead to a given location?"

The distance would be measured by a direct line.

TAXATION—Bank Stock in Branch—County May Tax Although Principal Office is Located in City. (183)

Counties—Authority to Tax Stock of Bank Having Branch in the County. (183)

December 6, 1960

HONORABLE HORACE T. MORRISON Attorney for the Commonwealth King George County

This is in reply to your letter of December 3, 1960, in which you request my opinion as to whether the Board of Supervisors of King George County may tax the stock of a bank having two branches in King George County, but whose principal office is located in Colonial Beach, Virginia.

Section 58-476.5 of the Code of Virginia of 1950, as amended, reads as follows:

"Any county in this State in which is located, outside any incorporated town therein, a branch or branches of a bank whose principal office is located in some other county in this State or in any incorporated town anywhere in this State or in any city anywhere in this State may, by ordinance, impose a tax not to exceed eighty per centum of the State rate of taxation on such proportion of the taxable value of the shares of stock in such bank as deposits
through such branch or branches so located in such county, outside any incorporated town therein, bear to the total deposits of the bank as of the beginning of the tax year."

In view of the express statutory authority for a county to impose a tax on stock of a bank having a branch office in the county, even though the principal office is located in some other county or in an incorporated town anywhere in the State, I am of the opinion that the Board of Supervisors of King George County may tax the stock of the bank in question to the extent authorized by the foregoing quoted statute.

TAXATION—Board of Equalization—County of Fairfax May Create Board as Provided in Section 58-897 of Code. (271)

March 7, 1961

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

This is in reply to your letter of March 2, in which you present the following question:

"The question has arisen as to whether or not the County of Fairfax has the authority to set up a Board of Equalization as provided for in Chapter 19 of Title 58 of the Code. Section 58-897 of that chapter specifically provides that a county such as Fairfax (county executive form of government) may do so. However, Title 15-295 of the Code states:

"'In addition to the powers and duties hereinabove conferred, the governing body of any county which has provided for a department of assessments headed by a supervisor of assessments may, in lieu of the method now prescribed by law, provide for the annual assessment and equalization of assessments of real estate by such department. All real estate shall thereafter be assessed as of January first of each year. Any person aggrieved by any such assessment may apply for relief to the circuit court of the county as provided by law. The provisions of this section shall not, however, apply to any real estate assessable under the law by the State Corporation Commission.'"

"Fairfax County has a Department of Assessments and has provided for the annual assessment and equalization of assessments of real estate. It appears to me that the County having acted under this section may have precluded setting up a Board of Equalization. I would very much appreciate your opinion in this matter."

Subsequent to receiving your letter we conferred with you by telephone and we find that no Board of Equalization has been established under the provisions of § 15-295. As we understand it, the director of the Department of Assessments upon receiving a complaint reconsiders the assessment involved and makes another determination which may be the same as the original assessment, from which the person aggrieved has the right of appeal to the circuit court.

We have conferred with Honorable C. H. Morrissett, State Tax Commissioner, in connection with this matter, and he concurs with our view that under the procedure established by the board of supervisors pursuant to § 15-295, the board of supervisors is not precluded from appointing the Board of Equalization as contemplated by § 58-897 of the Code.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Changes in Assessment by Board of Equalization—When Effective. (196)

HONORABLE PHILIP P. BURKS
Treasurer, Bedford County

December 14, 1960

This will acknowledge your letter of December 13, in which you state that the county of Bedford had a general reassessment of real estate in 1959. This reassessment was effective for the year 1960. In your letter you make the following statement:

“If a board of equalization of real estate assessments is appointed in Bedford County, under the provisions of Section 58-898 of the Code of Virginia, for the year 1961, please advise whether the said board of equalization is authorized to increase or decrease assessments (Code of Virginia, Section 58-906) for the year 1961 to be reflected in the increase or decrease of levies for the said year 1961? Or, is the action of said board of equalization in 1961 in reducing or increasing assessments to be effective only in the year 1962 and subsequent years and not in 1961?”

You have referred to the opinion issued by former Attorney General Abram P. Staples on December 12, 1941 to the treasurer of Russell County and published in the Report of Attorney General for 1941-'42, at page 153. We have examined the statutes in effect at the time Mr. Staples rendered his opinion and have compared them with the provisions of Chapter 19 of Title 58 of the Code.

In our opinion the conclusion reached by Mr. Staples is applicable to the question presented by you. Under Section 58-910 of the Code the commissioner of the revenue, upon receipt of a copy of the order of the Board of Equalization changing an assessment, should adjust the assessment books accordingly. This section has not been amended and has the same effect as Section 346 of the Tax Code which Mr. Staples considered in his opinion. Such adjustments should be made for taxes for the calendar year in which the Equalization Board has entered its order changing the assessment.

TAXATION—Collection of Delinquents—Cannot Institute and Prosecute Proceeding to Collect Unless Attorney. (374)

Counties—Delinquent Tax Collector—Must be Attorney in Order to Institute Proceedings to Collect. (374)

HONORABLE W. FRANCIS BINFORD
Judge of the County Court of
Prince George County

June 13, 1961

This is to acknowledge receipt of your letter of June 9, 1961, in which you request my opinion as to whether a local delinquent tax collector appointed under Section 58-991 of the Code of Virginia has a right under that authorization to procure from the county court a civil warrant for such taxes and appear in court as agent of the Board of Supervisors.

Under said Section 58-991, a board of supervisors may employ a local delinquent tax collector who shall have all the power and authority to enforce collection by levy, distress or otherwise as the treasurers of the counties and cities have under the law. There is no specific authority in the statute which permits or directs a treasurer to proceed to collect taxes by suit as contemplated in Article 9, Chapter 20, Title 58, of the Code. The pertinent portion of Section 58-1016 of the Code, which is found in said Article 9, is as follows:
"Such proceedings shall be instituted and conducted in the name of the Commonwealth of Virginia, or in the name of the county, city, or town in which such taxes or levies are assessed, at the direction of the board of supervisors or other governing body of the county or the council of the town, by such attorney or attorneys as such board, council or other governing body may employ for the purpose." (Italics supplied).

This office has heretofore held that a board of supervisors may employ the services of the county treasurer or the deputy county treasurer as such attorney, if in fact they are qualified attorneys at law. See Opinions of the Attorney General, 1939-1940, p. 247, and 1952-1953, p. 228. The Honorable Abram P. Staples, former Attorney General, expressed the view in an opinion, dated May 14, 1940, to the Honorable E. W. Chelf, Commonwealth's Attorney for Roanoke County, that a delinquent tax collector who is not an attorney at law does not have authority to institute and prosecute suits for the collection of taxes (Opinions of the Attorney General, 1939-1940, p. 228). I am in accord with that view.

It is, therefore, my opinion that a local delinquent tax collector appointed under the provisions of Section 58-991 does not have authority to institute and prosecute a suit or action to enforce the collection of taxes under Article 9, Chapter 20, Title 58, and that in order to do so, he must be an attorney specifically authorized under the provisions of Section 58-1016 of the Code of Virginia.

TAXATION—Collection of State and Local Taxes—Costs—Not to be Collected in Tax Collection Cases in County and Municipal Courts. (14)

July 11, 1960

HONORABLE J. H. JOHNSON
Treasurer of the City of Roanoke

This is in reply to your letter of June 29, 1960, which reads, in part, as follows:

"Will you please give me an opinion with reference to the amendment set forth in the Acts of the 1960 General Assembly in Chapter 106 as follows, 'No such fee shall be collected in any tax case instituted by any county, city or town.' Does this amendment only mean that the tax collectors will not be required to pay cost in advance at the time suits are instituted, or does the amendment mean that no court cost or service fees shall be collected in case the taxes sued upon are paid before trial date, or in case a judgment is rendered will it include any cost or fee?

"My office also collects state licenses, state capital tax and state income taxes by warrant in debt and notice of motion for judgment. Does the amendment also have the same effect upon an elected treasurer collecting state taxes as a tax case instituted by any county, city or town?"

In so far as here germane, Chapter 106, Acts of Assembly of 1960, amends §14-133 of the Code of Virginia of 1950, as amended, to read 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. *No such fee shall be collected in any tax case instituted by any county, city or town.* (Amending language italicized)

"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."

The effect of the 1960 amendment to the quoted section of the Code is to exempt counties, cities and towns from the payment of the $3.00 fee prescribed therein as taxed costs in tax collection cases. Since no such cost is to be paid by the county, city or town, it will be unnecessary for the judgment to include the $3.00 fee as taxed costs.

I am of the opinion that the exemption from the payment of the fee prescribed in § 14-133 of the Code extended to cases instituted to collect State taxes and license fees even before the 1960 amendment to that section. This office has previously held that no costs are to be collected by a county court or its clerk in cases instituted to collect State taxes. I enclose herewith a copy of my letter of September 16, 1959, addressed to the Honorable G. Hugh Turner, Treasurer of Franklin County, wherein this view was set forth. See also the Annual Report of the Attorney General for 1957-58, pages 77-78.

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**TAXATION—Contractor License—Contractor having Principal Office in State Entitled to $25,000 Exemption if License Acquired in Another Political Subdivision.**

Honorable Howard B. Slough  
Commissioner of the Revenue for  
Buena Vista, Virginia

November 3, 1960

This is in reply to your letter of June 10, 1960, in which you state as follows:

"A non resident contractor is presently constructing a building within the City of Buena Vista, Virginia, and the contract price is in excess of $60,000.00. Our City Attorney has instructed me to issue a local license to the non resident contractor based on the contract price and on the assumption that the business will be done within the current tax year.  
"The contractor claims an exemption of $25,000.00. I should like to be advised as to your interpretation of the above quoted section of the tax code with regard to whether or not the non resident taxpayer is entitled to this claimed exemption."

Your question involves an interpretation of Section 58-299 of the Code of Virginia. This section was considered in an opinion issued by this office on July 11, 1956 to Honorable W. F. Stone of Martinsville, Virginia, and I am enclosing a copy of that opinion. You will find this opinion published in the Report of the Attorney General for 1956-'57, at page 255.

Upon receipt of your letter of June 10, we requested you to advise us whether or not the nonresident contractor was doing business and had his principal office in Rockbridge county, Virginia. We are today in receipt of your reply, which is dated June 27, 1960, but which shows a postmark of November 2, in which you state that the contractor in question does have a principal office in Rockbridge County, Virginia.

Consistent with the opinion furnished to Senator Stone, you are advised that, if the contractor in question has paid a local license tax to the county of Rockbridge...
or to any political subdivision located within such county, then he is entitled to the $25,000 exemption provided for in said Section 58-299 of the Code. If he has not paid a local license tax to the county or a political subdivision of the county, such as the town of Lexington, then he would not be entitled to the exemption of $25,000.

TAXATION—Deed and Deed of Trust on Property Conveyed to Historical Society Subject to State Recordation Taxes. (168)

November 15, 1960

HONORABLE J. FULTON AYRES, Clerk
Circuit Court of Accomack County

This will reply to your letter of November 10, 1960, in which you inquire whether or not a deed conveying real property to the Eastern Shore of Virginia Historical Society, Incorporated, and a deed of trust upon such property, would be subject to the taxes imposed by Sections 58-54 and 58-55 of the Virginia Code.

In this connection, I have examined the provisions of Section 58-64 of the Virginia Code—which specifies those deeds, deeds of trust and mortgages which are exempt from the taxes under consideration—and find no provision which would extend such exemption to deeds or deeds of trust upon real property conveyed to organizations of the type you mention. I am, therefore, of the opinion that the deed and deed of trust conveying property to the Eastern Shore of Virginia Historical Society, Incorporated, would be subject to the taxes imposed by Sections 58-54 and 58-55 of the Virginia Code.

TAXATION—Delinquent Personal Property Taxes—Lien Must be Established in Order to Attach Property, except When Tax Assessed Against Specific Property. (243)

February 16, 1961

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This is in reply to your letter of January 27, which reads, in part, as follows:

"When there are unpaid or uncollected personal property taxes and merchant’s capital taxes of a person or a business operated by an individual or by a partnership or corporation and a judgment has been had against that unpaid business by a third party and the Sheriff of the County has been ordered to and does sell the personal property and goods of the judgment lien debtor and the Sheriff has not distributed any of the money derived from the sale thereof, please advise what the proper procedure would be for the Treasurer to collect from the funds in the hands of the Sheriff the property taxes and merchant’s capital taxes due and past due from said debtor?"

"Cannot the claim of taxes also include penalties and interest to date of sale by the Sheriff?"

The assessment of personal property and merchants' capital taxes does not in itself create a lien upon the property of the taxpayer, unless the assessment is made against the specific piece of tangible personal property, (Drewey v. Baugh. 150 Va. 394). Generally speaking, it is necessary to establish the lien for taxes by distress or levying upon the personal property.

In the case you now have before you for determination there has been no action to perfect a lien upon any property of the delinquent taxpayer. It thus appears that the
treasurer must first effect a lien against the property of the taxpayer, unless, of course, the assessment was against specific property.

In as much as the personal property of the taxpayer in question has now been sold, I am aware of no process by which the proceeds of that sale can be attached by the treasurer, taking priority over previous liens. Should there be any surplus amount remaining in such fund after distribution as provided by statute, such residue could be attached by the treasurer.

TAXATION—Erroneous Assessment—Mineral Lands—Time for Correction. (202)

December 16, 1960

HONORABLE PHILIP LEE LOTZ
Attorney for the Commonwealth
Augusta County

This is in reply to your letter of December 6, 1960, in which you request my opinion as to the authority of the Commissioner of Revenue to make a corrected assessment for the years 1955-1958 on mineral lands which were assessed for real estate purposes between 1946-1958 at the value fixed in 1946. No special appraisal was made annually as is provided in § 58-774 of the Code of Virginia of 1950.

The authority of the commissioner of revenue to correct erroneous assessments of real estate is codified in Article 2, Chapter 22 of Title 58 of the Code of Virginia of 1950. It is to be noted that § 58-774.1 of the Code provides that applications for correction of erroneous assessments made on mineral lands pursuant to § 58-774 of the Code are to be processed in the same manner as provided in Chapter 22 of Title 58 of the Code. I am, therefore, of the opinion that the commissioner of revenue is bound by the time limitations contained in §§ 58-1141 and 58-1142 (a portion of Chapter 22) in processing applications for correction of assessments made on mineral lands.

TAXATION—Exemptions—Property Used for Income or Profit Not Exempt Under Section 183 of Constitution. (119)

September 30, 1960

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

This is in reply to your letter of September 27, 1960, which has further reference to the exempt status of a farm owned by the Virginia Baptist Home, Incorporated, which was the subject of my letter to you under date of September 20, 1960.

The 1958 farm report, enclosed with your letter, discloses a total of $40,693.14 as representative of farm products sold or used by the Baptist Home, Incorporated, with a total gross profit of $27,834.64. The value of farm products transferred to the home is included in the farm income, and you advise that the value so transferred was $19,000.00. It appears that the cost of operation of the farm for the year exceeded the total gross profits on farm products sold by $721.02.

It appears rather obvious that the dominant objective in maintaining the farm in question is to produce revenue, rather than supply food for the inmates of the Baptist Home, Incorporated, even though the profits from such operation may be applied to the general objects of the corporation.

I am of the opinion that the farm lands of the Virginia Baptist Home, Incorporated, do not come within the purview of the tax exemption provided in Section 183 of the Constitution of Virginia.

Being returned herewith is the farm report enclosed with your letter.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Exemptions—When Farm Property of Asylum Exempt Under Section 183 of Constitution. (102)

September 20, 1960

HONORABLE JOHN A. B. DAVIES
Commissioner of the Revenue for Culpeper County

This is in reply to your letter of September 12, 1960, from which I quote in part:

"I would appreciate it if you would advise me as to the exempt status of a farm of 198 acres owned by the Virginia Baptist Home for the Aged, Inc. The home operates this farm for raising produce for its own use, for raising hay for the dairy cattle and the sale of dairy products and possibly the sale of grain. Upon reading Section 58-12 of the Code of Virginia and as I understand Section 183 of the Constitution of Virginia this property is not exempt from taxation. I have exempted the main building or buildings of the Virginia Baptist Home for the Aged, Inc., which is directly across the road from the farm but do not feel the farm itself is exempt."

Section 183 of the Constitution of Virginia provides 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.

* * *

"(c) Real estate belonging to, actually exclusively occupied and used by, and personal property, including endowment funds belonging to Young Men's Christian Associations, and other similar religious associations, orphan or other asylums, reformatory, hospitals and nunneries, conducted not for profit, but exclusively as charities, also parks or playgrounds held by trustees for the perpetual use of the general public.

* * *

"Whenever any building or land, or part thereof, mentioned in this section, and not belonging to the State, shall be leased or shall otherwise be a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city, or town. But the General Assembly may provide for the partial taxation of property not exclusively used for the purposes herein named."

Whether or not the property in question is owned by a corporation coming within the purview of the foregoing quoted provision of the Constitution of Virginia, or the property qualifies for tax exemption, depends upon the nature and purpose of the organization, as well as the use being made of the property.

The Baptist Home, Inc. (name was changed by charter amendment in 1954), has set forth its principal purposes as being the acquisition of sufficient funds to establish and maintain a home for the aged and infirm, such home to be furnished completely gratuitously or upon such other conditions as may be prescribed. From this stated purpose, I presume that the over-all nature of this corporation is charitable and does
not operate for profit. Therefore, it appears that the Corporation comes within the
purview of Section 183 of the Constitution of Virginia under the classification of an
asylum.

In construing this section of the Constitution as it relates to the Y.M.C.A., the
Supreme Court of Appeals of Virginia has held that if the use made of rooms in a
building owned and operated by the organization has direct reference to the purpose
for which the organization was formed and tends immediately and directly to pro-
mote those purposes, then its use is within the provisions of the Constitution ex-
empting the property from taxation, although revenue and profit are derived there-
from as an incident to such use. On the other hand, the Court pointed out that, if the
dominant purpose in the use made of a part of the rooms was to obtain revenue or
profit, although it is applied to the general objects of the association, it would render
743. In an earlier case, the Court of Appeals drew a distinction between farm lands
operated for profit and lands farmed as an incidental use to the dominant purpose of
the Hampton Normal and Agricultural Institute. See Commonwealth v. Trustees
of Hampton Normal and Agricultural Institute, 106 Va. 614.

It is impossible for me to determine from your letter whether the 198 acres owned
by the Virginia Baptist Home, Inc., are being utilized primarily to provide produce
for the inmates or as a revenue producing project. If the dominant purpose in main-
taining this farm is to produce sufficient food for the inmates and livestock, without
any effort or intention to create a surplus for sale at a profit, I am of the opinion that
the farm is not taxable. Conversely, if you should determine that the available
evidence indicates that the dominant purpose is to raise sufficient produce and dairy
products to sell for a profit, I am of the opinion that the farm lands do not come with-
in the scope of the tax exemption provided in Section 183 of the Constitution of
Virginia.

TAXATION—Filing Affidavit of List of Heirs Imposes no Tax. (75)
Wills and Administration—Affidavit of List of Heirs to be Recorded in Will Book.
(75)

August 24, 1960

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

This is to acknowledge receipt of your letter of August 19, 1960, in which you state:

"Will you please be so kind as to advise us the proper book in which to
record an affidavit relating to real estate of intestate decedent, pursuant
to Section 64-127.1 of the 1950 Code of Virginia, as amended.

"Would the state recordation tax or state probate tax be collected on the
valuation of the real estate involved?"

Section 64-127.1 of the Code of Virginia provides that the clerk shall record and
index such affidavits as wills are recorded and indexed. I am, therefore, of the opinion
that such affidavit should be recorded in the will book.

The so-called State probate tax imposed under Section 58-66 applies only when
there is a will probated or where there is a grant of administration. In case of a
qualification, the list of heirs is recorded and indexed under Section 64-127, and
the tax prescribed by Section 58-66 applies. In the event there is no qualification of
the estate and an affidavit is filed under Section 64-127.1, there is no recordation or
probate tax imposed.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Interest and Penalty—Liability of Taxpayer Subsequent to Adjudication as Bankrupt. (117)

Miss Elsa B. Rowe
Treasurer of Northumberland County

This is to acknowledge receipt of your letter of September 27, 1960, in which you state that you filed a claim for taxes, including interest and penalties, on behalf of the County in a bankruptcy proceeding. You further advise that the Referee in Bankruptcy has disallowed that portion of the claim representing interest accruing after the bankruptcy, and penalties. You ask my opinion on the following question:

"Would the bankrupt now be liable for the penalty and interest accruing since the filing of the claim on August 15, 1959?"

Section 104, Title 11, United States Code Annotated (Bankruptcy Act), provides that taxes legally due and owing by the bankrupt to the United States, or to a State, or subdivision thereof, shall have priority in the distribution of the assets of the bankrupt. Interest on the taxes to the date of adjudication of a bankrupt is considered a part of the taxes, and is allowed. Penalties, however, are not allowed. Section 35, Title 11, United States Code Annotated (Bankruptcy Act), provides that debts due as taxes are not discharged in the bankruptcy proceeding.

I am, therefore, of the opinion that the answer to your question is in the affirmative; that is to say, the bankrupt is now liable for the penalty and for the interest on the taxes accruing since the date on which he was adjudicated a bankrupt.

TAXATION—License Fees—Magazine Salesmen—County Cannot Impose License Tax. (21)

Counties—No Authority to Impose License Tax on Magazine Salesmen. (21)

Honorable Downing L. Smith
Commonwealth’s Attorney
Albemarle County

This is in reply to your letter of July 6, 1960, in which you request my opinion as to whether the Board of Supervisors of Albemarle County may require magazine salesmen to register with the Sheriff of the County and pay a license fee of $25.00 per day for the privilege of selling magazines in the County.

I concur in your opinion that the Legislature has not given the counties authority to impose a license fee for the privilege of selling magazines in such counties. Such a license requirement would necessarily fall within the classification of a tax, and consequently, give rise to some very serious questions as to the constitutionality thereof. (See 9 A.L.R. 2d 728 and 127 A.L.R. 962.)

Section 15-8 of the Code of Virginia would appear to provide ample authority for the County to require registration with the Sheriff, for the purpose of identification, prior to selling magazines, provided no unreasonable conditions or limitations are placed upon such registration.
REPORT OF THE ATTORNEY GENERAL

TAXATION—License Fees—Magazine Salesmen—County Cannot Impose License Tax. (386)

Counties—No Authority to Impose License Tax on Magazine Salesmen—May Not Impose Criminal Penalty for Solicitation of Business. (386)

June 29, 1961

HONORABLE E. C. WESTERMAN, JR.
Commonwealth's Attorney for Botetourt County

This is to acknowledge receipt of your letter of June 27, 1961, in which you request my opinion on certain questions which will be answered seriatim:

"I would appreciate it if you would let me know whether or not Botetourt County may, by ordinance, prescribe a license tax on these people [itinerant magazine salesmen] and provide punishment in the event the license is not purchased."

There is no specific authority for a county to impose a license tax unless the county falls in certain classifications, as set forth in Section 58-266.3 of the Virginia Code. Botetourt County does not fall within that category. I am enclosing herewith copy of an opinion issued by this office on June 4, 1956, to the effect that unless the county fits within the classification of those counties permitted to impose license taxes, the county would not have authority to impose a license tax upon a business or profession. This opinion was furnished to Honorable Alonzo Beauchamp, Commonwealth's Attorney for Russell County and is published in Report of the Attorney General for 1955-56, at page 39. I am therefore, of the opinion that Botetourt County would not have authority to adopt an ordinance prescribing such a license tax.

"I would also like to know whether or not Botetourt County may, by ordinance, make it a misdemeanor for any person, firm, or corporation to solicit subscriptions for magazines or other periodicals in Botetourt County and prescribe punishment therefor."

The solicitation of subscriptions for magazines and other periodicals is an ordinary calling or business and has no connection with the public welfare. To prohibit this practice by making it illegal to engage therein would not be in the interest of public health, morals, safety or general welfare. (Moore v. Sutton, 185 Va. 481). I am, therefore, of the opinion that such an ordinance would be invalid from a constitutional standpoint.

TAXATION—Licenses—Local on Contractors—When Cities May Tax County Contractor. (89)

September 7, 1960

HONORABLE VICTOR J. SMITH
Commission of the Revenue
Harrisonburg, Virginia

This will acknowledge your letter of September 2, relating to Section 58-299 of the Code, in which you present the following question:

"Can a contractor who has a state license and whose principal office is in Rockingham County come into the City of Harrisonburg and do business without a City License providing his contracts are under $25,000, or does the City of Harrisonburg have the right to levy the contractor's license if this is the first locality in which he contracts other than his County of residence?"
You state that Rockingham County does not impose a license in such cases. In as much as the contractor in question has not paid a local license to the county, I am of opinion that he may be required to pay such license to the City of Harrisonburg. The object of the statute is to prevent the payment of other local license by a contractor who has paid such a license tax in the locality where his principal office or any branch office may be maintained, unless, of course, in cases where the amount of business done by any such contractor in any other locality exceeds the sum of $25,000.00 in any one year.

This question has been considered by my predecessor on at least two occasions. I am enclosing a copy of the most recent opinion which is dated July 11, 1956, and is published in the Report of the Attorney General for 1956-57 at page 253.

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TAXATION—Motor Vehicles—Owned Jointly by Nonresident Member of Armed Forces and his Wife—Subject to Personal Property Tax if Located in this State. (187)

December 7, 1960

MISS ELSA B. ROWE, Treasurer
County of Northumberland

This is to acknowledge receipt of your letter of November 25, 1960, in which you state in part:

"We have an assessment on our 1960 personal property book for an automobile titled and assessed to Mr. and Mrs. X. Mr. X is serving in the armed forces. The automobile was in this county on January 1, 1960, in Mrs. X's possession. * * * * *

"Please advise me as to the liability of Sergeant and/or Mrs. X for the tax."

As Sergeant X is stationed in Virginia by reason of military orders and is retaining his domicile in Pennsylvania, his personal property is not deemed to be located in Virginia so as to have a situs for taxation. This is in accordance with the provisions of the Soldiers' and Sailors' Act (50 U.S.C.A. App. 574). This office has held that such a serviceman is not liable for the personal property tax on his automobile although the same has been registered and licensed in this State. (Annual Report of the Attorney General, 1952-'53, page 237). See also the case of Dameron v. Brodhead, 345 U. S. 322, 97 L. ed. 1041.

However, the personal property here is the automobile jointly owned by the serviceman and his wife, each having an undivided interest therein. The situs of taxation of this automobile, it would seem, is in Virginia where it is physically located, and where it is in the custody and possession of the wife who is the owner of an undivided interest therein. There is no way by which the situs of the automobile for taxation may be divided. In my opinion, when a serviceman titles a car jointly with his wife, and the car is physically located in this State, the "situs" of the car for the purpose of personal property taxation becomes established in this State, and the serviceman thereby loses any exemption he might otherwise be entitled to.

I am, therefore, of the opinion under the circumstances presented by you that the automobile is subject to local property tax for the full amount of its assessed value.
This is in reply to your letter of January 12, 1961, in which you request my views as to the validity of an occupational license tax ordinance which has been proposed by the Richmond Tax Study Commission. In the letter of January 10, 1961, addressed to you by the Chairman of the Commission, it was also suggested that I express a view as to whether deductions of such a tax by employers would be proper under Virginia law, and whether the consent of the taxpayer would be necessary before the deductions could be made.

I have reviewed the rough draft of the suggested tax proposal, the gist of which is to impose a fixed amount of $6.00 annual tax upon any person who works in the City of Richmond more than ninety days in a calendar year, does not presently pay any other occupational license tax to the City, and earns from such work, or is compensated at, a rate of $150.00 or more per month.

For purposes of this letter, I presume that there is no question but that the proposed occupational license tax is a revenue-producing measure rather than a licensing or regulatory measure exercised under the police power.

I entertain grave doubt as to whether the validity of the proposed tax ordinance can be sustained. In the case of Williams v. City of Richmond, 177 Va. 477, 14 S. E. 2d. 287, a similar “catch-all” license tax, imposed by Chapter 10, § 166 of the City Code, was held by the Supreme Court of Appeals of Virginia to be violative of the Fourteenth Amendment of the Federal Constitution and of Article 1, Section 1 of the Virginia Constitution. The section of the Tax Code there involved provided as follows:

"License Tax Where None Prescribed. Any person, firm, association, partnership or corporation engaged in any business, occupation or profession in the city of Richmond for which no specific license is levied in this chapter shall pay a license tax of $50.00 per annum. Not prorated."

The major distinctions between § 166 of the Tax Code and the taxing measure now being considered lies in the reduction of the amount of the tax, and the exemption of persons who are compensated at a rate of less than $150.00 per month. While such distinctions may meet the objection that a fixed and invariable tax may be prohibitive and confiscatory as to some very small businesses and modest callings, which was condemned in the Williams case, I, nevertheless, entertain doubt that all objections raised in the Williams case can be successfully answered by such a tax.

Not only was the “due process” objection advanced in the Williams case, but § 166 of the Tax Code was apparently found by the Court to lack the necessary certainty of classification to meet the objection that the tax ordinance constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution. The Court indicated that the ordinance lacked that degree of certainty which is one of the prime requisites of a taxing measure, it being uncertain as to what was meant by " *** any person, firm *** engaged in business, *** for which no specific license tax is levied ***." The Court there stated:

" *** If this unceremonious lumping of the newsboy and the steel magnate, the music teacher and the dental laboratory, could be called a classification at all, it is certainly whimsical, irrational, capricious, and grossly unjust. In addition to its other infirmities, it is in contravention of the 'equal protection' provision of the Federal Constitution, and for that additional reason will not be allowed to stand." (177 Va. 492-93)
The Court indicated in the *Williams* case that the ordinance was incapable of being made certain by any proper authority. The Court stated:

"Not only is this catch-all section of the city tax code uncertain, but there is no provision for making it certain by any proper authority. The imposition of a license tax on any unnamed business rests solely in the hands of the commissioner of the revenue. The subject of a tax must be determinable from the statute or ordinance and must rest upon the judgment of the legislative body; not upon the whims of a ministerial officer. The intent of the legislative body must be found in the language used. Here the city council, in enacting § 166, expressed no intent to lay a tax on dental laboratories. Intent cannot be presumed, because the council has never exercised its judgment under § 166, or expressed any purpose to tax the petitioners. The license tax here is solely the result of the action of the commissioner of the revenue. He, and not the council, has selected the subject of taxation." (177 Va. 487)

In reply to the suggestion that the proposed ordinance may contain a provision for deductions of the tax by employers, either voluntarily or involuntarily, I am of the opinion that such a method of collection would likely be considered violative of § 58-851.2 of the Code of Virginia, and § 2.02(a) of the Charter of the City of Richmond. Both the Virginia Code provision and the City Charter provision prohibit direct or indirect tax on payrolls. While there may exist some question as to the precise meaning of a "pay roll tax," I entertain little doubt that any withholding from an employee's salary of any sum required by a tax ordinance would fall within the pale of this prohibition.

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TAXATION—Penalties—When Incurred under Section 58-963 of Virginia Code. (337)

HONORABLE G. M. WEEMS
Treasurer of Hanover County

April 28, 1961

This will reply to your letter of March 31, 1961, in which you make inquiry concerning the imposition of penalties for failure to pay local taxes in the following situations described in your communication:

"1. Treasurer has no address or mails tax statement to the best address available. Property owner neither receives the statement nor asks for one before penalty date. After penalty has applied, he claims he is not subject to penalty because he did not receive a tax statement.

"2. Taxpayer charged some irregularity in the assessment, and conferred with the Commissioner of the Revenue who apparently advised him that he would check into the matter. Nothing further was done until after the penalty date. Taxpayer upon receiving second notice contended he should not be subject to the 5% penalty. This was his first communication with the Treasurer's office.

"3. Taxpayer mailed check to the county treasurer for taxes on property which had been sold during tax year. It appeared that the taxes had been paid on the property and the check was returned by the treasurer to the taxpayer. After penalty date it was found that an error in the indexing in the Circuit Court Clerk's Office showed conveyance of the wrong lot and that the taxpayer still owned the lot upon which he wished to pay taxes and for which he had sent his check."

In this connection, Section 58-960 of the Virginia Code prescribes that the treasurer of every city and county in the Commonwealth shall send, not later than December
first, a bill or bills to each taxpayer assessed with taxes and levies for that year. Failure of any treasurer to comply with Section 58-960 constitutes a misdemeanor, punishable by a fine not exceeding five dollars. Moreover, Section 58-963 of the Virginia Code in pertinent part provides:

"Any person failing to pay any State taxes or county and city levies on or before the fifth day of December shall incur a penalty thereon of five per centum, which shall be added to the amount of taxes or levies due from such taxpayer, which, when collected by the treasurer, shall be accounted for in his settlements . . ."

I am of the opinion that the above mentioned statutes are not interdependent and that the penalty prescribed by Section 58-963 of the Virginia Code is incurred by the failure of a person to pay State taxes or local levies on or before the fifth day of December in any year, regardless of whether a bill has been mailed to or received by the individual in question. I, therefore, concur in your view that penalties would be incurred by the taxpayer in the first and second situations you present. I might add that the taxpayer in Example No. 2 may properly escape the statutory penalty by making timely payment in accordance with the assessment and thereafter requesting a refund of any overpayment.

I also concur in your view that the taxpayer in Example No. 3 would incur no penalty. In this instance, it appears that the taxpayer has made timely payment of the taxes in question, but that his check was returned to him by the treasurer. In such a situation, I am of the opinion that the taxpayer may properly submit a duplicate check, without penalty, in payment of such taxes.

TAXATION—Personal Property—Federal Areas—Counties May Not Impose Tax on Personal Property in Pentagon Building. (17)

July 12, 1960

HONORABLE GEORGE D. FISCHER
Commissioner of the Revenue of Arlington

This is in reply to your letter of July 6, 1960, which I quote in full:

"I enclose herewith a photocopy of my letter of December 31, 1959 requesting your opinion with respect to the local assessment of tangible personal property leased to the Federal Government and located in the Pentagon Building and tangible personal property owned by the Government but used by a private contractor in the operation of his private business in the Pentagon Building. In your reply to my original letter, you advised me in the negative as to both questions. However, in view of 1960 Legislature enacting House Bill No. 240 into new sections of the Virginia Code designated as 58-831.1 and 58-831.2, I am wondering if your negative answer to my two questions might now be reversed."

In my January 21, 1960, reply to your letter of December 31, 1959, I advised that the personal property located in the Pentagon Building was not subject to the ad valorem taxes assessed by Arlington County, irrespective of the ownership thereof. The basis for such a determination was the absence of Federal legislation or a provision in the deed of cession permitting the imposition of such a tax within the area to which exclusive jurisdiction has been ceded to the United States of America.

The object of §§ 58-831.1 and 58-831.2, Code of Virginia of 1950, as amended by the 1960 Session of the General Assembly, is to subject to local taxation that
personal property owned by any person and leased to the Federal government, as well as personal property owned by the Federal government and leased to any person engaged in business for profit.

As pointed out in my letter of January 21, 1960, the only Federal statute which has thus far been enacted to permit local tax assessment within Federal areas is codified as 4 U.S.C.A., § 104, et seq., and waives the exemption only to the extent that it permits the assessment of State taxes on motor fuels, sales or use taxes, and income taxes on income from transactions occurring or services performed in such Federal areas.

The effect of the enactment of §§ 58-831.1 and 58-831.2 of the Code is to remove the limitations existing in §§ 58-20 and 58-837 of the Code which confines the liability for such taxes to the taxpayer owning the personal property.

In view of the foregoing, I am of the opinion that the views expressed in my letter of January 31, 1960, are still applicable to your questions as to the taxability of personal property located in the Pentagon Building, where exclusive jurisdiction has been ceded to the Federal government.

TAXATION—Personal Property—Liability for Tax Lies Upon Owner as of First of January. (151)

October 26, 1960

HONORABLE VICTOR J. SMITH
Commissioner of the Revenue
Harrisonburg, Virginia

This is in reply to your letter of October 24, in which you set forth the following situation:

"Mr. A., who is a salesman, trades cars every two years. He generally sells the old car outright, and purchases a new auto.

"Following the above practice, he sold an older car in December of 1959, and on January 2, 1960, he purchased a new auto, title to which auto was dated January 2, 1960.

"Mr. A. filed his local Tangible Personal Property on time, and did not list said auto as he claimed he did not own the vehicle on January 1, 1960, which is the date set by the State Code for reporting of such property.

"The undersigned assessed the said auto for Tangible Personal Property taxation, on the theory that even though the vehicle was titled on January 2nd that the owner enjoyed the use and pleasure of said vehicle substantially for a full year less only one day.

"Mr. A. has protested the statutory assessment, and has obtained the services of an attorney who disputes the authority of the Commissioner of Revenue to make such assessment as contrary to Code Section 58-835.

"The question is: Has the Commissioner such authority to make a statutory assessment under the Virginia Tax Laws, or must the provisions of Code Section 58-835 prevail in such a situation."

Section 58-835 of the Code reads as follows:

"Tangible personal property, machinery and tools and merchants' capital shall be returned for taxation as of January first of each year. The status of all persons, firms, corporations and other taxpayers liable to taxation on any of such property shall be fixed as of the date aforesaid in each year and the value of all such property shall be taken as of such date."

In my opinion your question must be answered in the negative. Personal property assessments are made against the owner as of January 1 of each year. Section 58-4
of the Code fixes January 1 of each year as the date for making all assessments, unless otherwise specially provided. I am not aware of any statute containing provisions contrary to the sections of the Code cited herein.

In my opinion the assessment in this instance was erroneous.

Furthermore, if the dealer who owned the automobile on January 1 had his place of business in this State, the car constituted a part of his capital and was taxable as merchants' capital under Section 58-832 and other applicable sections of the Code.

TAXATION—Personal Property—Motor Vehicle—Assessable in Locality in Which Owner is Resident. (262)

Motor Vehicles—Taxable in Place of Residence. (262)

March 2, 1961

Honorable Franklin L. Kerns
Commissioner of the Revenue
Gloucester County

This is in reply to your letter of February 24, in which you request my advice with respect to the following state of facts:

"A taxpayer and resident here in Gloucester County works in the City of Norfolk for 5 days of the week, boarding there during the week and comes back to Gloucester County for the week-ends to be with her family. She is in Norfolk temporarily due to her employment. She is assessed for a poll tax and pays it here in Gloucester County for voting purposes.

"The City of Norfolk is attempting to collect an assessment on her automobile which she has reported here in Gloucester County and paid the tangible personal property tax for 1960. The City of Norfolk also requires her to buy a city automobile tag. The automobile is registered here in Gloucester County with the Division of Motor Vehicles and was in Gloucester County January 1st, 1960 under the circumstances as stated above.

"Under Code Section 58-834 what is the situs for the assessment of tangible personal property, Gloucester County or the City of Norfolk?"

In my opinion, the situs for the assessment for the automobile in question is in the county of Gloucester. The presence of the automobile in the city of Norfolk, is, in my judgment, transitory. The permanent place of abode of the owner of the car is in Gloucester county, and, for the purpose of taxation as personal property, that is the jurisdiction in which the property is located and used. The situs is not affected by the fact that the owner is away from home as an incident to her occupation or business. The jurisdiction for assessment by the Commissioner of the Revenue of Gloucester County cannot, in my opinion, be subject to serious challenge. The property may not, under any circumstances, be subject to assessment in more than one jurisdiction.

It would seem that this conclusion is supported by the case of Hogan v. County of Norfolk, 198 Va. 733.
TAXATION—Personal Property—Non-Resident Service Man Not Subject to Assessment on Yacht. (298)

Soldiers and Sailors Civil Relief Act—Taxation—Personal Property of Non-Resident Service Man Not Subject to Taxation in Virginia. (298)

Honorable John P. Beale
Commissioner of Revenue
Westmoreland County

March 30, 1961

This is in reply to your letter of March 27, 1961, in which you request my opinion as to the taxability of a yacht located in the Town of Colonial Beach which is owned by Lieutenant Colonel C. V. Padgett, who is assigned to the Pentagon.

The letter of March 7, 1961, addressed to the Treasurer of Colonial Beach by Lieutenant Colonel Padgett, copy of which was enclosed with your letter, indicates that the owner of the boat in question has maintained his legal residence outside Virginia since entry into the United States Army in 1942. For purposes of my reply, I assume as an undisputed fact that Lieutenant Colonel Padgett is correct in his assertion that he has not established legal residence in Virginia.

The pertinent provision of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.A. App. 574) provides in part that "for purposes of taxation by any State * * * such person shall not be deemed to have lost a residence or domicile in any State * * * by reason of being absent therefrom in compliance with military * * * orders, or to have acquired a residence or domicile in * * * any other State * * *." The said act further provides that " * * * personal property shall not be deemed * * * to have a situs for taxation * * *" in any State of which such person is not a resident or in which he is not domiciled.

In the case of Dameron v. Brodhead, 73 S. Ct. 721, the United States Supreme Court held the foregoing Act of Congress exempted from local taxation the personal property of a service man who was stationed in Colorado, even though the State of his legal residence did not subject such personal property to taxation.

I am constrained to conclude that the personal property here in question is not subject to taxation in Virginia. For a similar view expressed by my predecessor in office, see the Report of the Attorney General 1952-53, at page 237.

TAXATION—Procedure for Collection of Delinquent Taxes From Persons Indebted to Taxpayer. (29)

Honorable James W. Harman, Jr.
Attorney, Town of Tazewell

July 25, 1960

This is in reply to your letter of July 18, 1960, which reads as follows:

"Sections 58-1010, 58-1011 and 58-1012 of the Code of Virginia provide for the collection of taxes out of the estate in the hands of, or debts due by, third parties in connection with state, counties and cities. Section 58-850 gives the same rights to municipal corporations.

"The Town of Tazewell, Virginia, has directed me, as attorney for the Town, to proceed with the collection of delinquent real estate and personal property taxes for and on behalf of the Town and one of the methods which the Town desired to use was the procedure provided for in the above mentioned sections. Before actually proceeding thereunder, I felt that it was only proper that I discuss the matter with the local banks, and I was advised by one it was a matter of policy of the bank that they should not
pay over to the town, or any other taxing authority, the amount claimed for in the notice of lien to be served on them, unless and until judgment therefor was entered by the appropriate court.

"Please advise whether or not the defaulting taxpayer must also be summoned to appear before the appropriate Court, in addition to the third party? If the third party owing the taxpayer does appear and the town is proved to be correct in its assertion as to taxes due, is the Court to direct the payment of costs against the third party or against the taxpayer?

"In addition thereto, would it be necessary for the Town to secure from the Court a garnishment on the judgment? The statute makes the filing of the notice with the third party a lien on the estate, but then, when it provides for judgment before the Court, it gives no indication as to how the judgment should be enforced."

Sections 58-1010, 58-1011 and 58-1012 of the Code of Virginia read as follows:

"§ 58-1010. Any person indebted to or having in his hands estate of a person assessed with taxes or levies may be applied to in writing by the officer for payment thereof out of such debt or estate and a payment by such person of such taxes or levies, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed. From the time of the service by such officer of any such application, the taxes and levies shall constitute a lien on the debt so due from such person or on the estate in his hands. If the person applied to does not pay so much as may seem to the officer ought to be recovered on account of the debt or estate in his hands, the officer shall, if the sum due for such taxes or levies does not exceed two thousand dollars, exclusive of penalties and interest, procure from a justice of the peace or judge or clerk of a court not of record a summons directing such person to appear before the appropriate county court or municipal court, at such time and place as may seem reasonable; and if the sum due exceeds two thousand dollars, shall procure from the clerk of the circuit court of the county or corporation court of the city a summons directing such person to appear before such court on the first day of the next term thereof; provided that in all cases returnable before a county court or municipal court, any person so summoned shall have a right, if the sum due for such taxes or levies exceeds the sum of three hundred dollars, exclusive of penalties and interest, to remove the case to a court having jurisdiction of appeals from such county court or municipal court wherein the case was brought, and the procedure for and upon such removal shall be the same, mutatis mutandis, as is provided by § 16.1-92."

"§ 58-1011. If such summons be returned executed, and the person so summoned does not appear, judgment shall be entered against him for the sum due for such taxes and levies and for the fees of the clerk and of the officer who executes the summons."

"§ 58-1012. If the person so summoned appears, he shall be interrogated on oath and such evidence may be heard as may be adduced and such judgment shall be rendered as, upon the whole case, shall seem proper."

In view of the fact that Section 58-1010 does not expressly require the delinquent taxpayer to be made a party to the suit, it is my opinion that it is not necessary that he be summoned to appear. However, I do think it advisable to give him notice of the proceeding without making him a party defendant in order to prevent his later asserting that there was an erroneous tax collection of which he had no notice.

Further, it is my opinion that the court may direct the payment of costs against the third party, provided, of course, his indebtedness to the taxpayer is of sufficient amount. My reasons for this are that Section 58-1011 specifically provides for such payments when the third party does not appear and, in cases where he does appear,
Section 58-1012 provides that "such judgment shall be rendered as, upon the whole case, shall seem proper." This latter provision, in my opinion, is broad enough to include the payment of costs.

Finally, it is my opinion that it is not necessary that a garnishment be issued to enforce this judgment. The court may merely order the third party to make payment to the court sufficient to cover the taxes and costs involved, provided the third party is indebted to the taxpayer in such amount. Again, this is because of the above quoted language in Section 58-1012, and also because the issuance of a garnishment would be superfluous in that the third party is already before the court.

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**TAXATION—Real Estate—Classification on Basis of Character or Use for Purpose of Establishing Different Tax Rates.** (307)

April 5, 1961

**HONORABLE EDWARD E. LANE**
Member House of Delegates

This will reply to your letter of March 17, 1961, in which you present certain inquiries relating to the assessment of real estate taxes. These questions will be considered in the order stated.

"Under the present law, can residential real estate be separated into classifications by itself and taxed at a different rate from property not used solely and exclusively for residential purposes?"

"May real estate which is rental residential property be separated for the purposes of taxation and taxed at a different rate from other property not falling within this category?"

I am of the opinion that the above quoted inquiries should be answered in the negative. Existing law makes no provision for the separation of "residential real estate" or "rental residential property" from other real estate or property for the purpose of establishing a differential in applicable tax rates.

"Is it possible to make changes in the constitution and/or statutes of this state to allow localities by their own action to separate real estate used solely and exclusively for the residence of the owner and/or his family to be separated for the purposes of taxation and taxed at a different rate from all other real estate? If the answer to this is in the affirmative, would you outline what steps would have to be taken?"

"Would the answers to the above question apply to property which is residential but which may be rental property?"

In this connection, it appears that a definite division of judicial opinion exists upon the question of whether or not the classification of real estate on the basis of its character or use, for the purpose of establishing a differential in applicable tax rates, contravenes the rule of uniformity similar to that enunciated in Section 168 of the Virginia Constitution or the Fourteenth Amendment to the Constitution of the United States. Compare Simmons v. Ericson, 223 N. W. 342, with Great Northern R. Co. v. Whitefield, 272 N. W. 787; see also, 51 Am. Jur. 256, Taxation: Section 193; 84 C.J.S. 112 et seq., Taxation: Section 36; Annotations, 111 A.L.R. 1486 et seq., and 122 A.L.R. 724 et seq. I regret that I have been unable to discover any decision of the Supreme Court of Appeals of Virginia in which a question similar to that which you present has been considered, and in the absence of any closely related decisional authority, no dispositive answer to the concluding questions posed in your communication can be given. It would thus appear that the matter concerning which you inquire can be ultimately resolved only by the decision of an appropriate court of jurisdiction in the Commonwealth.
TAXATION—Real Estate—Constitutional Amendment to Permit Cities and Towns to Classify for Purpose of Establishing Different Tax Rates. (334)

April 26, 1961

HONORABLE EDWARD E. LANE
Member, House of Delegates

I am in receipt of your letter of April 18, 1961, in further connection with my opinion to you of April 5, 1961, concerning the assessment of real estate taxes. In your recent communication you make reference to the terminal paragraph of the above mentioned opinion and present the following inquiries which will be considered together:

"Assuming that a decision of an appropriate court in the State of Virginia is necessary to finally resolve the question posed, what amendments should be made in the Virginia Statutes or the Virginia Constitution in order to allow a decision of this classification for the purpose of taxation? What other steps should, if any, be taken?

"Assuming that it is necessary to amend the Virginia Constitution in order to separate the types of real estate as set forth in my inquiry of March 17, what steps are necessary to amend the Constitution and what section should be amended, and in what manner?"

In this connection, I am constrained to believe that Section 168 of the Virginia Constitution should be amended to empower the governing bodies of the various counties and cities of the Commonwealth (1) to classify real property for the purpose of taxation and (2) to impose different rates of taxation upon separate classes of property, such rates to be uniform upon all property in the same class. An amendment of this character could be effected by either of the methods enunciated in Article XV of the Virginia Constitution. Sections 196 and 197, Constitution of Virginia (1902) as amended.

TAXATION—Real Estate—Delinquent Taxes—How Land Auctioned. (324)

April 18, 1961

HONORABLE M. A. FIREBAUGH
City Treasurer
Harrisonburg, Virginia

This is to acknowledge receipt of your letter of April 13, 1961, requesting my opinion on several questions relating to the sale of real estate by a treasurer for delinquent taxes. I shall answer your questions seriatim.

"(1) At a delinquent tax sale where there are two or more bidders, is it incumbent upon the auctioneer to sell the subject property to the first bidder who bids in the amount required to pay the tax ticket for which the property is being sold, including penalty, interest and costs?"

Section 58-1030 of the Code, which empowers the treasurer to sell real estate for delinquent taxes, is as follows:

"Before making any such sale, the treasurer shall give general notice thereof by posting a printed list of the real estate to be sold at the front door of the courthouse of the circuit court of his county or corporation court of his city, as the case may be, and by publication thereof in one issue of some
newspaper published in his county or city or having general circulation therein, such list to be so posted and published at least thirty days before the day of sale. The list to be so published and posted shall contain the names of the persons in whose names such real estate was returned delinquent, a brief description of each parcel and the amount for the satisfaction of which each such parcel will be sold and shall have appended thereto a notice to the effect that each and every parcel of real estate therein mentioned, or so much thereof as may be necessary, will be sold at public auction on the second Monday in December of such year, between the hours of ten in the morning and four in the afternoon, at the front door of the courthouse of the circuit court of his county or corporation court of his city, to satisfy the levies, penalties, interest and charges due thereon, unless the same shall have been previously paid to such treasurer. The cost of printing and publishing such notices and all other proper expenses in connection with such sale shall be apportioned among the delinquents embraced in the lists, according to the amount of levies, penalties and interest due by them respectively."

It will be noted that the sale is only to satisfy the levies, penalties, interest and charges due; hence, the authority of the treasurer is limited in that he is not permitted to sell the property for more than the said levies, penalties, interest and charges. The answer, therefore, to this question is in the affirmative, it being the treasurer's duty to sell to the first bidder.

"(2) If what appears to be simultaneous bids are made, how is the successful bidder determined?"

The successful bidder is to be determined by the treasurer or the auctioneer acting for him. Section 58-1036 of the Code directs the treasurer to report the sales of the delinquent properties to the court within sixty days after the sale. In this report the name of the purchaser appears. Section 58-138 states in part:

"The court, if it finds the list [showing the land sold and the names of the purchaser] to be correct, or having corrected the same when there is error, shall confirm the report and order it to be recorded and properly indexed in a book kept for the purpose known as 'The Delinquent Land Book.'"

Hence, if there is a controversy as to the correct bidder or the ultimate purchaser, the circuit or corporation court is empowered to correct the treasurer's action accordingly. Of course, the burden would be on the interested party to assert his claim before the court and establish it by credible evidence.

"(3) If such is the case, is the action of the auctioneer in stating the property is sold to one or the other of such bidders the determining factor?"

The answer to this question is in the affirmative, in so far as the action of the treasurer is concerned: such action is subject to review by the court. See answer to No. 2.

"(4) If there are two equal bids for the delinquent amount, may bids be received above the amount required to satisfy the delinquency?"

The answer to this question is in the negative. The treasurer is not empowered to sell real estate for a greater amount than the tax levies, penalties, interest and charges.

"(5) If the answer to the last question is in the affirmative, how is the excess revenue to be pro-rated among the different categories of tax, penalty, interest, costs, etc., and if not pro-rated among these various categories, what account should be credited with this excess revenue?"

This question has been answered above.
HONORABLE J. B. FRAY
Treasurer of Madison County

This is to acknowledge receipt of your letter of March 17, 1961, in which you make further inquiry as to your duties in collecting taxes on real estate assessed in the name of a life tenant. Answers to your inquiries will be made seriatim. You state in part:

(1) "The life tenant as far as I can ascertain has no visible assets other than her life interest in the real estate. If I request the court to appoint a committee and this is done, is it implied in your letter that I should proceed to obtain judgment against the committee?"

Section 58-965 places upon the treasurer the duty to collect taxes which are not paid when due by distress or otherwise after making demand on the person chargeable with the taxes. Section 58-1001 provides that any goods and chattels belonging to the person assessed with taxes may be distrained therefor by the treasurer. Should such methods fail in accomplishing the collection of the taxes, payment therefor can be enforced by a suit. Section 58-1014. Hence, if the life tenant has a personal estate, the treasurer could apply to court and have a committee appointed. However, if there is no personal estate of any consequence, as indicated by you in this particular case it would be useless to proceed in this manner.

(2) "If I should rent this house and lot for taxes due, and the life tenant dies shortly after the rental agreement is entered into, would this death immediately terminate the agreement?"

Section 58-1003 empowers the treasurer to rent or lease real estate for the purpose of collecting the taxes. That section is as follows:

"Any real estate in the county or corporation belonging to the person or estate assessed with taxes or levies due on such real estate may be rented or leased by the treasurer, sheriff, constable, sergeant or collector, privately or at public outcry, after due publication, in the discretion of such treasurer, sergeant, sheriff, constable or collector, either at the front door of the courthouse or on the premises or at some public place in the community where the premises are situated, after giving not less than fifteen days' notice by printed or written notices posted at the front door of the courthouse and at three or more places in the neighborhood of the real estate to be leased. Such leasing shall be for a term not exceeding one year and for cash sufficient to pay the taxes or levies due on the real estate so rented and the costs and charges of advertising and leasing. When a lease is effected, the treasurer, sergeant, collector, sheriff or constable leasing such real estate shall put the lessee in possession thereof and for such purpose shall have like powers as those exercised by a sheriff acting under a writ of possession.

"The board of supervisors or other governing body of any county may, by resolution adopted by a majority of the members thereof by a recorded yea and nay vote, postpone the time when any real estate in such county may be rented or leased for the taxes or local levies for any year until after the fifteenth day of November of the next succeeding year."

The procedure set forth in the above section must be strictly followed; otherwise the lease would not be valid. See, United Construction, etc. Corporation v. Pontiac Apartment Corporation, 158 Va. 415. The property may be leased for a term not exceeding a year and for cash sufficient to pay the taxes plus the costs, charges, etc. If the procedure in this section is strictly followed, the lease is valid and would not expire or terminate upon the death of the life-tenant.
(3) "If all of this fails is it my duty to notify the present fee simple owners of the real estate of the status of the taxes?"

Although the fee simple owners of this real estate are not chargeable with the taxes until the death of the life tenant, and notice to them is not necessary, I would recommend that if these owners are ascertainable, you contact them and apprise them of the situation, especially if you intend to exercise your authority under Section 58-1003, supra, by renting the house. It may develop that these fee simple owners are willing to pay the taxes rather than permit the same to become delinquent.

TAXATION—Real Estate—Owner—Life Tenant Included as Owner and May Be Assessed Even Though Committed to Mental Institution. (281)

Mr. J. B. Fray
Treasurer of Madison County

This is to acknowledge receipt of your letter of March 9, 1961, in which you state in part:

"Under what Section can I collect 1960 local taxes against a life tenant?

"Briefly, my problem is this: Mr. (A) died and left a surviving consort without issue. A parcel of land is presently assessed on the land book in the name of the deceased, Mr. (A). The taxes have been paid for years by the surviving consort (widow) who is the life tenant, except for the year 1960. The life tenant was officially committed to a mental institution during the year 1960.

"From whom shall I now collect these taxes? If I return these taxes delinquent, will they be collectible after the death of the life tenant?"

Under the provisions of Section 58-796 of the Virginia Code (1950), taxes on real estate should be assessed in the name of the owner. The Supreme Court of Appeals of Virginia has held that the term "owner" includes life-tenant. See, Stark v. Norfolk, 183 Va. 282, Ceroli v. Clifton Forge, 192 Va. 118, and Richmond v. McKenny, 194 Va. 427. Therefore, the assessment should be made against the life-tenant.

You do not state whether the life estate was created by will or otherwise. Be that as it may, under the provisions of Section 58-771 of the Code an assessment in the decedent’s name would be valid. Furthermore, Section 58-815 states that no assessment on any real estate shall be held invalid because of any error, omission or irregularity made by the assessing officer unless it is shown by the person contesting the same that such error, omission or irregularity has operated to such person's prejudice.

I am, therefore, of the opinion that inasmuch as the life-tenant has now been committed to a mental institution, you should request her committee to pay the taxes for the year 1960 and subsequent years out of the estate of the life-tenant. The assessment should be changed to the name of the life-tenant as owner.

TAXATION—Real Estate—Town Property Exempt From County Tax even Though Part is Leased. (228)

Honorable Julius Goodman
Commonwealth’s Attorney for
Montgomery County

This is in reply to your letter of January 25, in which you present the following question:

"The Town of Christiansburg, Virginia, a municipality and a political subdivision of the Commonwealth owns a municipal building in said Town,
one-half thereof being rented to the Appalachian Power Company for which the Town receives rent.

"My question:

"Is that portion of the municipal building which is being rented by the Town as hereinabove set forth subject to being taxed by the County of Montgomery. In other words, would the Town of Christiansburg be exempt from the payment of tax to the County of Montgomery for any portion of said building from which they receive rent?"

Section 58-12(1) of the Code, to which you have referred, is an exact copy of subsection (a) of Section 183 of the constitution. There are no exceptions to this exemption. Therefore, in my opinion, no tax may be imposed by the county against this property.

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**TAXATION—Real Estate—Transfer Fee—Limited to One Dollar for Each Deed Even Though More Than One Tract Conveyed.**

October 12, 1960

MISS MARGARET B. BROWN
Clerk of Circuit Court for Culpeper County

This will acknowledge your letter of October 11, in which you request my advice as to the correct transfer fee in a case where more than one tract of real estate is conveyed by a single deed.

Section 58-816 of the Code provides that "for making an entry transferring to one person lands before charged to another, one dollar, which shall be paid by the person to whom the transfer is made, and shall be a compensation for all tracts in the commissioner's county or city conveyed by the same deed."

In light of this statutory provision, I am of opinion that a transfer fee of one dollar only may be charged in such cases.

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**TAXATION—Reassessment—Time Limit for Filing—May Not Be Used for Levying Tax Thereafter.**

May 2, 1961

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

This is in reply to your letter of April 24, 1961, which I quote in part as follows:

"The County of Alleghany conducted a general reassessment of real estate located therein during the year 1960, and the assessors were assisted by the State Department of Taxation.

"Code Section 58-791 provides that as soon as the reassessment is completed the original of the reassessment shall be filed in the Clerk's Office of the County, and Code Section 58-792 provides that the assessors shall
complete their work and comply with the provisions of Section 58-791 not later than December thirty-first of the year of such reassessment, and further provides that the judge of the Circuit Court may, for good cause, extend the time for completing such reassessment and for complying with Section 58-791 for a period not exceeding sixty days from the thirty-first day of December of the year of such reassessment.

"An order was entered by the Circuit Court of Alleghany County extending the completion date sixty days from December 31, 1960. During the sixty day extension period all work was completed except the typing of the book. This typing was completed after the sixty days had expired and the reassessment was actually filed on March 9, 1961."

You have requested my opinion as to the validity of the reassessment and the method of validating such assessments in the event it should be invalid.

Sections 58-791 and 58-792 of the Code of Virginia contemplate the completion and filing of the reassessment within the times specified therein. I am of the opinion that any reassessment filed later than the times specified in these sections may not be utilized for the current year for the purpose of levying real estate taxes.

I am aware of no manner in which the reassessment can be validated other than through curative legislation, such as that expressed in § 58-792.2 of the Code.

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TAXATION—Recordation—Bill of Sale and Easement Deed—Tax to be Assessed on Total Consideration. (106)

HONORABLE AUSTRIN EMBREY, Clerk
Circuit Court of Nelson County

September 22, 1960

This is in reply to your letter of September 16, 1960, which I quote in full:

"We enclose copy of an instrument purporting to be a 'Bill of Sale' and 'Deed of Easement' in which the total consideration is $1,475.00, of which $1,474.00 is for certain electrical facilities (transformers, etc.) and $1.00 is for an easement or right of way.

"This instrument has been presented to us for recording and we should like to know whether to collect the State recording tax on the whole consideration of $1,475.00 or only on the $1.00 consideration for the land rights."

I have examined the instrument which is identified as a Bill of Sale and a Deed of Easement wherein certain electrical transformers and structure were sold, and an easement for the maintenance of an electrical transformer station was conveyed. The instrument sets forth only one consideration, that being the sum of $1,475.00.

While there is no language in the instrument to indicate that the parties intended that the transformer structure was to be considered as personal property, or that $1.00 only was the true consideration for the conveyance of the easement, I am of the opinion that these factors are immaterial in the determination of the amount of recordation tax to be paid.

Section 58-54 of the Code of Virginia reads in part as follows:

"On every deed, except a deed exempt from taxation by law, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater."
Section 58-58 of the Code of Virginia provides in part as follows:

"On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for; **.""

Irrespective of the intention or arrangement of the parties, the instrument offered for recordation would be taxable on the full amount of the consideration mentioned therein. Whether the tax be assessed pursuant to § 58-54 of the Code as a tax on a deed, or pursuant to § 58-58 of the Code of Virginia as a tax on a contract, the rate would nevertheless be fifteen cents on every one hundred dollars or fraction thereof of the consideration or value.

TAXATION—Recordation—Deed and Agreement to Sell Land are Subject to Tax When Recorded. (246)

Clerks—Recordation—Deed and Agreement to Sell Land are Both Subject to Tax. (246)

February 17, 1961

HONORABLE RHEA F. MOORE, JR., Clerk
Circuit Court of Tazewell County

This is to acknowledge receipt of your letter of February 15, 1961, in which you state that in August, 1960, there was admitted to record in your office an agreement for the sale of certain real estate and you collected the tax imposed under Section 58-58 of the Code. A deed has now been presented by the vendees for recordation conveying the same property which was the subject of the agreement. You contend that the recording tax is assessable and request my opinion on the question of whether the recordation tax is applicable upon the recordation of the deed of bargain and sale.

It is my opinion that you are correct. These two transactions (the recordation of the agreement and the recordation of the deed of bargain and sale) do not come within the scope of Section 58-60 of the Code and, therefore, the recordation of the deed of bargain and sale is not exempt from the tax in accordance with that section. This office has so ruled. See, my opinion expressed in a letter to the Honorable Rudolph L. Shaver, Clerk of the Circuit Court of Augusta County, dated September 2, 1958, (Annual Report of the Attorney General, 1958-1959, p. 301), a copy of which is enclosed.

TAXATION—Recordation—Deed of Exchange—Instrument Subject to Tax. (134)
Deeds—Exchange Deeds Subject to Recordation Tax. (134)

October 17, 1960

HONORABLE THOMAS H. JAMES, Clerk
Northampton County Court

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

"Please advise me, as soon as possible, if a Deed of Exchange is exempt from recordation tax or if it is taxable.

"In this case I have in mind, I would say the value of the exchange of real estate is the same. Please inform me on this point, if it has any bearing on the question. The persons involved are merely making a trade of two lots of equal value."
The tax in this instance would be as prescribed in Section 58-54 of the Code of Virginia. In as much as this is an exchange of real estate, the tax would be based upon the actual value of the property conveyed to each person.

TAXATION—Recordation—Deeds of Trust—Must be Paid When Assigned. (203)
Deeds of Trust—Assignment—Subject to Recordation Tax. (203)

December 19, 1960

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

This will acknowledge your letter of December 14, in which you request my advice as to whether or not an assignment of a previously recorded deed of trust upon which the recordation tax was paid when such deed of trust was admitted to record is subject to a recordation tax.

You have submitted with your letter the assignment instrument, which I am returning herewith.

In my opinion the assignment is subject to the recordation tax provided for in Section 58-58 of the Code of Virginia. The amount of the tax would be based upon the balance of the debt secured by the deed of trust at the time the assignment was executed.

For your information I enclose herewith a copy of an opinion relating to this particular subject, which opinion is dated October 13, 1955 and was furnished to the clerk of the circuit court of Bedford County. This opinion is published in Report of the Attorney General for 1955-'56 at page 217.

TAXATION—Recordation—Deeds of Trust—Tax Based on Total Amount Secured Thereby. (270)

March 7, 1961

HONORABLE J. FULTON AVRES
Clerk of Circuit Court
Accomack County

This is in reply to your letter of March 2, in which you request my advice as to the amount of recordation fee you should collect where the deed of trust contains the following provisions:

"IN TRUST to secure unto the Cape Production Credit Association, Exmore, Virginia (hereinafter called 'Beneficiary'), its successors and assigns, the payment of the sum of SIX THOUSAND AND NO/100 Dollars ($6,000.00) evidenced by note or notes made, executed and delivered to the Beneficiary by the Grantor as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Amount</th>
<th>Interest Rate</th>
<th>Date of Maturity</th>
</tr>
</thead>
<tbody>
<tr>
<td>February 24, 1961</td>
<td>$6,000.00</td>
<td>6% per annum</td>
<td>December 15, 1965</td>
</tr>
</tbody>
</table>

"And also to secure unto the Beneficiary, its successors and assigns, the repayment of such future advances or loans as may be made by the Bene-
ficiary to the Grantor with a period of three (3) years from the date hereof, not exceeding, however, at any one time outstanding, the maximum amount of SIX THOUSAND AND NO/100 DOLLARS ($6,000.00) which future advances and loans shall be evidenced by note or notes hereafter to be executed as such advances or loans are made."

This is the same situation that was presented to us in your letter of March 16, 1960 except that the initial advance in that question was less than the maximum amount secured by deed of trust.

In this instance the maximum amount secured by the deed of trust is advanced when the loan is made. The opinion which we furnished you is dated March 16, 1960, and is published in the Report of Attorney General for 1959-'60, at page 362.

In my opinion, the maximum amount secured under this deed of trust is $6,000 and the recordation fee should be based upon that amount.

**TAXATION—Recordation—Option to Purchase Land—Taxed Pursuant to Section 58-58 of Code. (284)**

Costs—Jury in Civil Action—Not to be Taxed Against Party. (284)

March 15, 1961

HONORABLE J. PHIL BENNINGTON, Clerk
Circuit Court of Grayson County

This is in reply to your letter of March 10, 1961, in which you make the following inquiries:

"What State Taxes should be charged, if any, on recording options in deed books?"

"Should jury costs be charged to the losing party in civil suits?"

Your first inquiry is answered by § 58-58 of the Code of Virginia, which reads in part as follows:

"On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for; * * *."

I am of the opinion that your second inquiry must be answered in the negative. While § 19.1-320 of the Code of 1950, as amended, provides for the taxing of all expenses incident to the prosecution against the defendant when convicted, there is no comparable provision relating to the expense of civil litigation. Section 8-204 of the Code provides for the costs of civil juries to be paid out of the public treasury, and I am unaware of any statutory provision for the recovery thereof from the party against whom judgment is rendered.

A similar view has been expressed by my predecessors in office. See Reports of Attorney General, 1940-'41, at page 44; 1953-'54, at page 42.

**TAXATION—Retail Merchants Licenses—Not Required of Coal Mine Operator who Sells Coal Himself. (239)**

February 15, 1961

HONORABLE R. D. COLEMAN
Commonwealth's Attorney for Scott County

I am in receipt of your letter of February 11, 1961, in which you present the following situation and inquiry:
"Mr. Jones, Mr. Smith and Mr. Larkey are the joint owners of a coal mine in Scott County. All three of the owners perform all of the labor in mining and getting the coal to the surface. They do not hire any labor and they share equally the actual expenses of mining the coal. When the coal is brought to the surface, it is divided equally between the three owners. Mr. Jones and Mr. Smith sell their shares of the coal to customers who come to the mine for same. Mr. Larkey hauls his share of the coal from the mine in his own truck and sells it to customers throughout Scott County.

"Would Mr. Larkey be required to pay a Retail Merchant's License Tax under the provisions of Sections 58-320 and 58-321 of the Code of Virginia."

I am constrained to believe that your inquiry should be answered in the negative. In my opinion, coal mined under the circumstances you describe would not constitute goods, wares and merchandise "manufactured" by any "retail merchant" within the purview of Sections 58-320 and 58-321 of the Virginia Code. I am informed that this view is consistent with the administrative interpretation which has been uniformly placed upon the statutes in question by the Department of Taxation of the Commonwealth.

TAXATION—Sale of Delinquent Real Estate—Listing of Lands Previously Sold to Commonwealth is Optional with Treasurer. (258)

HONORABLE R. M. LOVING, JR.
Treasurer of Alleghany County

February 28, 1961

This is in reply to your letter of February 27, in which you present the following question:

"When advertising and publishing notice of Treasurer's sale of delinquent real estate (58-1030 Code of Virginia), is it necessary to re-advertise parcels that have, in prior years, been advertised for sale, sold to the Commonwealth, and remain unredeemed?"

The answer to your question is found in Section 58-1081 of the Code. Under the last sentence of this section the treasurer may include such parcel of real estate in his advertisement or, in his discretion, may omit it.

In this connection I am enclosing copy of an opinion published in the Report of this office for 1940-41, at page 176 and dated October 16, 1940, in which Attorney General Abram P. Staples issued a formal ruling involving Section 2500 of the Code of 1919. That portion of Section 2500 of the former Code to which he referred is now Section 58-1081.

TAXATION—Sales Tax—County of Henrico Not Authorized to Enact. (310)

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

April 6, 1961

I am in receipt of your letter of March 31, 1961, in which you inquire "whether or not the County of Henrico has the authority to enact a valid ordinance providing for a sales tax."

I have been unable to discover any provision of Virginia law which purports to authorize the County of Henrico to impose a local sales tax. I am, therefore, of the opinion that your inquiry should be answered in the negative. See Report of the Attorney General, 1959-1960, p. 107.
HONORABLE C. H. MORRISSETT
State Tax Commissioner

This is in reply to your letter of May 5, in which you refer to paragraph (c) of Section 9 of the Virginia Tobacco Tax Act (Chapter 14.2 of Title 58 of the Code) and especially to § 58-757.9(c) of the Code of Virginia, which reads as follows:

"Tobacco products enumerated herein may be sold by such duly qualified wholesalers, without revenue stamps affixed thereto, when sold to the United States or to any instrumentality thereof for resale to or for use or consumption by members of the armed services of the United States, provided the books and records, including original purchase orders and copy of invoices showing such sales are kept on file for a period of three years, subject to inspection by the Department."

This provision is an exception to the taxes levied upon the sale of tobacco products under § 58-757.1 of the Code. The burden is upon a taxpayer to show that he comes within an exception—U.C.C. v. Harvey, 179 Va. 202; U.C.C. v. Collins, 182 Va. 426. Inasmuch as veterans in the facilities of the Veterans Administration are not members of the armed services of the United States, no such showing is possible, and I am of the opinion that the tax imposed under Chapter 14.2 of Title 58 of the Code must be paid upon all tobacco products that are sold to such veterans. Therefore, I am constrained to express the opinion that you have no discretion in the matter.

TAXATION—Tobacco Tax Act—Applicable to Tobacco Products in Hands of Retailers upon Effective Date of Act. Distinguished from Motor Fuel Tax Increase. (28)

HONORABLE C. H. MORRISSETT
State Tax Commissioner

I acknowledge your letter of the 21st, with reference to the Virginia Tobacco Tax Act (Acts 1960, Chapter 392, p. 600), and especially concerning the taxes on any unstamped taxable tobacco products in the hands of retailers on August 1, 1960.

You are quite correct in your understanding that the opinion of this office, rendered June 21, 1960, with reference to the tax on gasoline in the tanks of a retailer or consumer on June 30, 1960, has no application to tobacco products in the hands of wholesalers and retailers on August 1, 1960. The reason will be found by a comparison of the Act which increased the gasoline tax, with the Virginia Tobacco Tax Act. The Tobacco Tax Act specifically provided that taxes shall be paid and collected on any unstamped tobacco products in the hands of wholesalers and retailers on August 1, 1960. The amendment to Section 58-711, increasing the rate of tax from 6¢ to 7¢ per gallon gasoline, did not so provide.

Our opinion with reference to the tax increase on gasoline was that the controlling rate of tax was that in effect when the dealer sold the motor fuel to a retailer, and that the amendment increasing the tax could not be construed to have imposed an additional tax upon the motor fuel remaining in the tanks of a retailer or consumer on June 30, 1960, if such motor fuel had been previously sold to the retailer or consumer by a dealer and the statutory tax in effect at the time of the sale had been paid to the dealer by the retailer or consumer.
REPORT OF THE ATTORNEY GENERAL

With further reference to the gasoline tax, there was no statutory provision made by the General Assembly under which the Division of Motor Vehicles was authorized to assess and collect from a retailer or service station operator the tax imposed, nor is there any statute requiring the retailer to collect from the consumer the tax imposed.

The simple answer to your inquiry, of course, is that in one instance (the Tobacco Tax Act) the General Assembly provided for the levying and the machinery for the collection of the tax on tobacco products in the hands of wholesalers and retailers on the date the Act went into effect, whereas in the other instance (gasoline tax increase) the General Assembly made no such provision for the levying and collection of the tax on motor fuel in the tanks of retailers or consumers on the effective date of the Act.

TAXATION—Trailer Camps—County May Impose License Tax. (279)

Counties—License Tax on Trailer Camps—Imposition Authorized. (279)

March 10, 1961

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

I am in receipt of your letter of March 6, in which you forwarded to this office a copy of an ordinance which was adopted by the Board of Supervisors of Loudoun County on July 6, 1959, and is known as the Trailer Camp Ordinance of Loudoun County. You inquire whether or not Section 2-5.10 of this ordinance—which imposes upon every person, firm, corporation or association engaged in the business of operating a trailer camp in Loudoun County, Virginia, an annual license tax of $50 for each trailer space used or held out for use within a trailer camp—may be enforced in light of the decision of the Supreme Court of Appeals of Virginia in County Board of Supervisors v. American Trailer Co., 193 Va. 72.

In view of your statement that the cost of "administering this ordinance by the County is nil," it seems clear that the license tax in question bears no relation to the cost of enforcing the ordinance and cannot be supported as a regulatory license within the purview of Section 35-61 et seq., of the Virginia Code. County Board of Supervisors v. American Trailer Co., supra.

However, I call your attention to the provisions of Article 1.1 of Chapter 6 of Title 35 of the Virginia Code (Sections 35-64.1 et seq.) which authorize the governing body of any political subdivision in the Commonwealth to levy and provide for the assessment and collection of license taxes upon the operation of trailer camps. These provisions of the Virginia Code were enacted as emergency legislation by the General Assembly of Virginia during its 1952 regular session—Acts of Assembly (1952) Chapter 592, p. 1036—immediately following the decision of the Supreme Court of Appeals of Virginia in the American Trailer Co. case and clearly authorize the imposition by a county of a license tax of $50 per trailer lot used or intended to be used as such. See Section 35-64.5, Code of Virginia (1950) as amended. Moreover, this office has ruled that a valid ordinance may be enacted pursuant to the authority granted by the statutory provisions under consideration. See Report of the Attorney General, 1952-'53, p. 233. If, upon a consideration of all the circumstances surrounding the adoption of the ordinance concerning which you inquire it appears that such ordinance was properly enacted as one imposing a revenue tax, I am of the opinion that the decision of the Supreme Court of Appeals of Virginia in County Board of Supervisors v. American Trailer Co., supra, would not preclude its enforcement.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Trailer Park License—County May Impose Tax on Trailer Park in Town. (80)
Counties—Authority to Impose License Tax on Trailer Park in Towns. (86)

September 7, 1960

HONORABLE W. HILL BROWN, JR.
Town Attorney
Manassas, Virginia

This is to acknowledge receipt of your letter of September 1, 1960, in which you state in part:

"Where a trailer park is located within the corporate limits of a town and a license tax is imposed on the person, firm, corporation or association who operates the trailer park, does the county, within which the town is located, have authority to impose an additional license tax on the person, firm, corporation or association operating the trailer park, under the authority of Sections 35-62, 35-64.1 and 35-64.2?"

Article 1.1, Chapter 6, Title 35 of the Code of 1950, as amended by Chapter 592, Acts of 1952, authorizes the governing body of any political subdivision to impose a license tax upon the operation of trailer camps and trailer parks placing the duty of the operator thereof to pay the license tax, and also to regulate the same. Article 2 of Chapter 6, Title 35, prescribes regulations to be enforced by the State Board of Health. These health regulations have no relation to the license tax prescribed under Article 1.1, supra. This office has heretofore held that both a town and the county in which it is located have authority to impose a license tax on the operation of the same trailer camp. (A copy of a letter to the Honorable Stirling M. Harrison, Commonwealth’s Attorney of Loudoun County, dated January 15, 1960, is enclosed.) Furthermore, Section 35-64.5 expressly provides that the payment under this article (1.1) does not exempt the payment of any license tax imposed under existing law. Hence, the imposition of a license tax under Section 35-64.1 would not affect the validity of a license imposed by a county under Section 35-62.

It is the opinion of this office that the County of Prince William has authority to impose a license tax on the operator of a trailer park located within the limits of the Town of Manassas, notwithstanding the fact that the town has already exacted a license tax from such operator.

TAXATION—Water System—Owned by Partnership—Assessed as Real Estate. (344)

May 2, 1961

HONORABLE JULIUS GOODMAN
Commonwealth’s Attorney
Montgomery County

This is in reply to your letter of April 21, 1961, in which you request my views as to the manner in which a natural spring and pipeline owned by Elliston Water Company, a Partnership, should be assessed for taxation.

Manifestly, a spring cannot be taxed as personal property. It is as much a part of the realty as is the land itself.

While circumstances may vary with the individual case, I believe the most practical means of assessing the pipeline owned by the Elliston Water Company would be as a fixture (real property) rather than personal property. You did not refer to any circumstances in your letter which would justify a conclusion that the pipeline was to
remain personal property, as opposed to real property. In the absence of evidence to the contrary, I am of the opinion that the pipeline became a part of the real estate in which it was installed. (See 57 A.L.R. 869-877).

In view of the foregoing, both the natural spring and the pipeline should be assessed at the fair market value and taxed as real estate owned by the Elliston Water Company.

TAXATION—Wills and Administration—Savings Accounts in Foreign State Constitute Intangible Personal Property and are Subject to Tax. (222)

HONORABLE WILLIAM S. HOLLAND, Clerk
Circuit Court of the City of Suffolk

January 18, 1961

This will reply to your letter of January 16, 1961, in which you inquire whether or not you are "correct in ruling that a deposit in a savings account in another state is subject to the qualification tax as provided in" Section 58-66 of the Virginia Code.

The statute to which you refer provides:

"On the probate of every will or grant of administration, not exempt by law, there shall be a tax of one dollar, when the estate, real, personal or mixed, passing by such will or by intestacy of the decedent, shall not exceed one thousand dollars in value at the time of the death of the decedent and for every additional one hundred dollars of value, or fraction of one hundred dollars, an additional tax of ten cents; provided, however, that the tax imposed by this section shall not apply to estates of decedents of one hundred dollars or less in value."

I am of the opinion that a deposit of a decedent in a savings account in another State would constitute intangible personal property and that the amount of such deposit passing by the will or intestacy of the decedent would be included in computing the tax imposed by Section 58-66 of the Virginia Code.

In this connection, I am returning the photostatic copy of the material relating to the recent decision of the Supreme Court of the United States in Thomas v. Virginia, No. 43, October Term, 1960 (decided November 21, 1960) which you included with your communication. The Thomas case involved the application of the Virginia inheritance tax to paper money of a decedent located at the time of his death in a safe deposit box in another State, and the decision of the United States Supreme Court in that case does not affect the validity of the position you have taken upon the question presented in your communication.

TORTS—Employees of Political Subdivision—Counsel to Defend May be Supplied in Some Instances. (60)

HONORABLE WILLIAM WELLINGTON JONES
Commonwealth's Attorney
Nansemond County

August 8, 1960

Schools—School Boards—Authority to Employ Counsel to Defend Employees in Tort Action. (60)

This is in reply to your letter of August 4, 1960, which I quote in part as follows:

"I would appreciate your opinion as to whether the School Board may employ counsel and expend funds to defend a civil suit brought against the
Principal and a teacher of a school for their alleged negligence in allowing a child to be hurt. The child in question fell from a tree which he had been told not to climb. This occurred during school hours. However, the suit is not against the School Board but against the Principal and the teacher personally."

In the case of Sayers v. Buller, 180 Va. 222, the Supreme Court of Appeals laid down the general principles applicable in such cases. In dismissing a tort action instituted against two State employees in their individual capacities, the Court stated as follows:

"There was no allegation that the defendants had stepped beyond the course of their employment. There were no facts alleged (as distinguished from the pleader's conclusion) to show that they were guilty of any wrongful conduct or acted wantonly or negligently. No facts were alleged to show that they exceeded the authority or directions given them. No facts were alleged to show that they were acting individually and on their own responsibility. On the other hand, it is quite clear from the allegations and the averments of the special plea admitted to be true by the plaintiff, that they were acting solely in their representative capacity as lawful and proper agents of the State and not in their own individual right.

"The special plea set forth the simple fact that the defendants, agents and employees of the State were acting solely for the State and their acts were the acts of the State.

"These facts were admitted to be true by the plaintiff. In this situation only a question of law was presented. The alleged act of the defendants was the act of the State. Their conduct cannot be separated, under the allegations, from the conduct of the State. The State cannot be liable, therefore the defendants cannot be liable.

"It would be an unwise policy to permit agents and employees of the State to be sued in their personal capacity for acts done by them at the express direction of the State, unless they depart from that direction.

"In the brief for the defendants this is said: 'The true rule would seem to be to require proof (and allegation) of some act done by the employee outside the scope of his authority, or of some act within the scope of authority but performed so negligently that it can be said that its negligent performance takes him who did it outside the protection of his employment.'

"With this statement we are in accord."

Where the damage complained of allegedly occurs by the actions or negligence of employees of the State or its political subdivisions while acting within the scope of their employment, the action is against the State or political subdivision, even though in form it be against the employees individually. The acts of the State or political subdivisions and those of the agents in such cases are inseparable. See Sayers v. Buller, supra.

Without the pleadings before me, it is impossible to categorically reply to your inquiry. The authority to employ counsel to defend the action against the employees of the School Board depends upon the facts and allegations in the case. If the employees are alleged to have committed torts while acting beyond the scope of their employment, the School Board would have no authority to expend funds for their defense. Conversely, if the damages are alleged to have occurred from actions of the employees while performing their governmental duties (which appears to be the instant case), the Board would be authorized to defend the action against them.
REPORT OF THE ATTORNEY GENERAL

TORTS—Libel Action Against Officials of School Board—When Board May Retain Counsel to Defend. (137)

Schools—Board has Authority to Retain Counsel to Represent Officers in Tort Actions if Committed While in Scope of Employment. (137)

October 18, 1960

HONORABLE W. H. SYKES, JR., Chairman
County School Board
Isle of Wight County

This is in reply to your letter of October 13, 1960, in which you asked to be advised as to the legal authority of the School Board of Isle of Wight County to employ counsel to assist in defending the Principal and Football Coach of Windsor High School in a libel action.

In the case of Sayers v. Buller, 180 Va. 222, the Supreme Court of Appeals laid down the general principles applicable in such cases. In dismissing a tort action instituted against two State employees in their individual capacities, the Court stated as follows:

"There was no allegation that the defendants had stepped beyond the course of their employment. There were no facts alleged (as distinguished from the pleader's conclusion) to show that they were guilty of any wrongful conduct or acted wantonly or negligently. No facts were alleged to show that they exceeded the authority or directions given them. No facts were alleged to show that they were acting individually and on their own responsibility. On the other hand, it is quite clear from the allegations and the averments of the special plea admitted to be true by the plaintiff, that they were acting solely in their representative capacity as lawful and proper agents of the State and not in their own individual right.

"The special plea set forth the simple fact that the defendants, agents and employees of the State were acting solely for the State and their acts were the acts of the State.

"These facts were admitted to be true by the plaintiff. In this situation only a question of law was presented. The alleged act of the defendants was the act of the State. Their conduct cannot be separated, under the allegations, from the conduct of the State. The State cannot be liable, therefore the defendants cannot be liable.

"It would be an unwise policy to permit agents and employees of the State to be sued in their personal capacity for acts done by them at the express direction of the State, unless they depart from that direction.

"In the brief for the defendants this is said: 'The true rule would seem to be to require proof (and allegation) of some act done by the employee outside the scope of his authority, or of some act within the scope of authority but performed so negligently that it can be said that its negligent performance takes him who did it outside the protection of his employment.'

"With this statement we are in accord. (180 Va. 228-229)

Without the pleadings before me, your inquiry does not lend itself to a categorical reply. In my opinion, the authority to employ counsel to defend the officials of Windsor High School depends upon the facts and allegations, the determining factor being whether or not the damages occurred while the defendants were acting within the scope of their employment. Where the damages complained of allegedly occur by the actions or negligence of agents or employees of the State or a political subdivision while acting within the scope of their employment, the action is against the State or political subdivision, even though in form it be against the agents or employees individually. The acts of the State or political subdivision and those of the agents or employees in such cases are inseparable. (See Sayers v. Buller, supra)."
Apparently the defense of immunity of the school officials from tort liability has not been asserted in this case, which leads me to assume that the tort is alleged to have been committed while acting beyond the scope of their employment. If my assumption be correct, the School Board would have no authority to expend public funds for their defense. Conversely, if there has been no allegation that the defendants stepped beyond the scope of their employment nor any facts alleged to show that they were guilty of any wrongful conduct, I am of the opinion that the Board would be authorized to defend the action against them.

TOWNS—Authority to Accept Gift of Land Situate Outside Corporate Limits. (98)

September 15, 1960

HONORABLE THOMAS E. WARRINER, JR.
Town Attorney
Lawrenceville, Virginia

In your letter of the 7th you request an opinion as to whether the Town of Lawrenceville can legally and properly take title to a parcel of land lying outside the corporate limits of the Town. As I understand it, the pertinent facts are these:

Craddock-Terry Shoe Corporation owns a parcel of land outside the corporate limits of the Town, a part of which is required for highway improvement along Route 58; the corporation has given the Commonwealth of Virginia an option to acquire the strip needed for highway purposes for a money consideration, which option has been accepted on behalf of the Commonwealth; the corporation has conveyed the strip in question to the Town of Lawrenceville subject to the option, and the Town has knowledge of the option.

While the question of whether a town may accept a gift of land lying outside its boundaries is not free from doubt, it appears that other factors render it unnecessary to answer this specific question. Since equitable title passed to the Commonwealth when it exercised its option, only the bare legal title could be transferred to the Town. It is suggested that a deed to the Commonwealth in which both the Town of Lawrenceville and the corporation unite would eliminate any question as to the validity of the title.

TOWNS—Council—Justice of Peace May be Elected. (171)

Public Officers—Compatibility—Justice of Peace May be Member of Town Council. (171)

November 28, 1960

MR. DAVID A. LYON, III
Secretary, Association of Justices of the Peace of Virginia

This is to acknowledge receipt of your letter of November 22, 1960, in which you request my opinion on the following question:

"Can a Justice of the Peace in a county also be an elective member of a Town Council at the same time?"

I can find no statute or constitutional provision which would prohibit a justice of the peace from being a member of a town council. Section 121 of the Virginia Constitution, implemented by Section 15-393 of the Virginia Code, provides that no member of any council shall be eligible to any office filled by the council by
election or appointment. Section 113 of the Constitution, implemented by Section 15-486 of the Virginia Code, provides that certain designated officers shall hold no other office, elective or appointive. However, justices of the peace are not included in these provisions. Furthermore, they are elected by the people. I cannot perceive how the office of justice of the peace and the office of councilman would be incompatible, as there is no contrary interests apparent.

I am, therefore, of the opinion that a justice of the peace is eligible and may serve as a member of a town council.

This is in accord with an opinion of this office issued on June 16, 1953, and published in the Attorney General's Report 1952-53 at page 134.

TOWNS—Council Members—May Not Sell Insurance Policy to Town. Not Required to Cancel Existing Policy Upon Being Elected to Council. (107)

September 22, 1960

HONORABLE BERNARD MAHON
Commonwealth's Attorney for Caroline County

This is in reply to your letter of September 20, in which you state that a member of the town council of the Town of Bowling Green is a partner in an insurance agency that writes insurance upon property owned by the town. You have requested my advice as to whether or not it will be necessary for the town to cancel the existing insurance because of the fact that the partner has become a member of the council.

Inasmuch as the insurance was written prior to the time this person became a member of the town council, I am of the opinion that it is not necessary for the town to cancel these policies of insurance, provided the premiums on all the policies were paid for their duration prior to September 1, 1960. It would, however, be a violation of Section 15-508 for this firm to renew the policies of insurance during the partner's tenure of office as councilman if he continues to have a financial interest in the insurance agency. In my opinion this section of the Code prohibits a member of a town council from being interested in any contract with the town upon which payments are required out of town funds during the councilman's tenure of office.

TOWNS—No Authority to Convey Real Estate Except Under Certain Circumstances. (280)

March 10, 1961

HONORABLE W. CARRINGTON THOMPSON
Member, House of Delegates

This is in reply to your letter of March 9, which reads as follows:

"The Town of Gretna, a municipality within Pittsylvania County, owns a tract of land which at present is not being used for any municipal purpose. The County School Board of Pittsylvania County is now in the midst of a building program and the officials of the Town of Gretna are desirous of having a new school located in that area and to that end are willing to donate this particular tract of land to the County School Board of Pittsylvania County for school purposes.

"The Town of Gretna is not a separate school district and all of the school property in the town is owned by the County School Board."
"Please give me your official opinion as to whether or not the Town of Gretna has the legal authority to donate this property, if it so desires, to the County School Board of Pittsylvania County."

There is no general law under which the governing body of a town is empowered to sell or otherwise dispose of the real estate owned by the town. At the 1956 session of the General Assembly an Act was passed which is numbered § 15-15.1 of the Code, authorizing counties, cities and towns to convey to the Commonwealth by deed or gift, under certain conditions, real estate to be used for the establishment, operation or maintenance of a branch of a State supported college or university.

There have been instances in which towns have conveyed real estate and the conveyance was subsequently validated by the General Assembly. One such instance involved a sale made by the town of Culpeper and is found in the Acts of 1936 at page 117.

Some town charters contain specific provisions authorizing the disposal of real estate owned by the town. We have examined the charter of the town of Gretna and it does not appear that this authority is contained in that charter.

TOWNS—No Authority to Regulate Number of Taxicabs to be Operated on Town Streets. (156)

Highways—Streets in Towns—Council May Not Limit Number of Taxicabs to be Operated. (156)

November 2, 1960

HONORABLE EARL C. BOYER, Mayor
Town of Fries

This is in reply to your letter of October 19, 1960, in which you ask my opinion in regard to the situation set forth in your letter as follows:

"The Town of Fries has an Ordinance which gives the Town Council authority to regulate the number of taxicabs that may operate within the corporate limits. We have one gentleman who has met all the requirements of Virginia laws to operate three cabs.

"The Fries Council has granted him permission to operate two of those cabs in Fries. In the meantime he has installed a two-way radio for his cabs, which he operates from within the Town of Fries.

"My question is, if a person living within the corporate limits calls for one of his cabs and the two that are authorized to operate in town are not available, could he legally call in the third cab to pick up the fare?"

I have been unable to discover any provision of Virginia law which authorizes the governing bodies of incorporated towns generally to regulate the number of taxicabs which may operate upon the streets of such towns. On the contrary, Section 56-291.4 et seq. of the Virginia Code authorizes towns situated in certain counties (not including the Town of Fries) merely to impose a license tax upon taxicabs, to prescribe reasonable regulations concerning the character and qualifications of the operators of taxicabs, to provide for the designation and allocation of taxicab stands and to regulate the rates and charges of such vehicles. I am constrained to believe that the limited authority specifically conferred upon certain towns by the above mentioned statutes tends to negate the existence of a general power in the governing bodies of all towns in the Commonwealth to regulate the number of taxicabs which may be operated upon town streets.
Moreover, I find no provision in the charter of the Town of Fries which specifically authorizes the governing body of the town to regulate taxicabs in any manner. In this connection, I do not believe that the authority conferred upon the town council "to regulate traffic on the streets" of the town and to provide for the safety and prosperity of the inhabitants thereof may properly be construed to empower the council to regulate the number of taxicabs which may be operated within the corporate limits of the town.

I am, therefore, of the opinion that a person who has satisfied the requirements of Virginia law necessary to authorize him to operate three taxicabs may legally operate such vehicles within the corporate limits of the Town of Fries.

June 8, 1961

HONORABLE FELIX E. EDMUNDS
Member of the House of Delegates

This is in reply to your letter of May 23, 1961, in which you request my opinion on the question which has arisen in the Town of Craigsville relating to the enforcement of town ordinances. You advise that the Town has not elected to appoint a police justice or a town sergeant, nor has an ordinance been adopted to invest the Mayor with the authority of a police justice, all of which are authorized by Chapter 28, Acts of Assembly of 1960.

You have asked if the Town ordinance may be enforced by the issuance of warrants by the Justice of the Peace for the County of Augusta, who resides in Craigsville, served by the Sheriff of Augusta County, and heard by the Augusta County Court.

While the Town of Craigsville has been granted the privilege of creating a police court, to be presided over by a police justice, or the Mayor, there is no mandatory obligation that it exercise such privilege. Until such court is established, the County Court of Augusta has jurisdiction within the Town by virtue of § 16.1-123 of the Code of Virginia of 1950, as amended, which reads in part as follows:

"Each county court shall have:

"(1) Exclusive original jurisdiction of all offenses against the ordinances, laws and by-laws of the county for which it is established and, except as otherwise provided herein, of the towns therein;

"(2) Except as herein otherwise provided, exclusive original jurisdiction within such county and the towns therein for the trial of all other misdemeanors arising therein;

"(3) Exclusive original jurisdiction within any city lying within the county, if no court of general criminal jurisdiction has been provided for such city by charter or under general law, for the trial of all misdemeanors arising therein except offenses against the ordinances of the city;"

I am further of the opinion that the issuance of warrants and the service thereof against violators of town ordinances may be undertaken by the Justice of the Peace and the Sheriff of the County of Augusta.
REPORT OF THE ATTORNEY GENERAL

TREASURERS—City to Provide Suitable Office Space—No Duty to Provide Air Conditioning Units. (38)

State Compensation Board—Expenses—May Allow City Treasurer's Office Air Conditioning Units. (38)

HONORABLE WALTER B. GENTRY
City Treasurer of Richmond

July 26, 1960

This is in reply to your letter of July 20, 1960, which I quote as follows:

"I have recently had a meeting with the State Compensation Board, Messrs. G. Edmond Massie, Chairman, and C. H. Morrissett and Gordon Bennett, members, requesting the purchase of four (4) air conditioning units for my office in the City Hall—the total cost of same being $967. This purchase would not necessitate an additional outlay by the Commonwealth, as I asked permission to transfer certain monies from accounts allotted me in my budget for 1960.

"The City of Richmond has spent approximately $500 in the past two weeks on the wiring in my office preparatory to the installation of said units.

"As you know, the treasurer's office of the City of Richmond works entirely separate from the other treasurers' offices of the state, being wholly and totally a state agency. The other treasurers' offices are state and city agencies and the expenses of the offices are shared proportionately.

"We have no one to turn to for help except the State Compensation Board and they have turned down my request for the four (4) window air conditioning units. All equipment, supplies, including electric fans have to be furnished us by the State and have been in the past as we are, as stated above, completely a state agency.

"I would therefore appreciate it if you will give me an opinion as to what source should furnish the above air conditioning units, viz., the State or City, in order that I may make application for installation."

Through the legislative mandate of § 14-77 of the Code of Virginia, the governing body of each county and city must provide suitable office space for the treasurer and commissioner of the revenue, together with necessary heat, water and janitor's service. Unless air conditioning can be construed as being necessary for "suitable office space," there is no obligation upon the city to install a cooling system in the treasurer's office.

I am constrained to the view that air conditioning while conducive to comfort, is not essential for suitable office space for a city treasurer. It is noteworthy that the General Assembly has excluded air conditioning as a mandatory requirement for such offices, while including heat, water and janitor's service in the provisions of § 14-77 of the Code of Virginia.

On the other hand, I am of the opinion that the State Compensation Board may allow the purchase of the four air conditioning units under its broad powers to fix expense allowances for the treasurer's office.

Section 14-77 of the Code of Virginia provides, in part, as follows:

* * * *

"The salary and expenses of any city treasurer who neither collects nor disburses local taxes or revenues shall be paid entirely by the Commonwealth and the salary and expenses of any city treasurer who disburses local revenues but does not collect the same shall be paid in the proportion of one-third by the city and two-thirds by the Commonwealth.

"In the case of each county and city treasurer except a city treasurer who neither collects nor disburses local taxes or revenues, and in the case of each
county and city commissioner of the revenue, the cost of such office furniture, office equipment and office appliances as may be specifically authorized by and included in the then current expense allowance made to such officer under the provisions of articles seven and eight of this chapter, shall be paid in the proportion of two-thirds by the county or city and one-third by the Commonwealth. The prices paid for such office furniture, office equipment and office appliances shall not be in excess of the prices available to the State if such purchases were made through the Division of Purchase and Printing. The words 'office furniture, office equipment and office appliances', as used in this paragraph, mean such items of this character as have a useful life of more than one year; and the word 'cost', as used in this paragraph may include a rental cost, in the discretion of the Compensation Board, in any case in which, in the opinion of the Board, such rental cost, in whole or in part, is properly includable in the expense allowance.

* * * *

"The governing body of each county and city shall provide suitable office space for the treasurer and commissioner of the revenue, together with necessary heat, light, water and janitor's service. The entire cost of providing such office space, heat, light, water and janitor's service shall be paid out of the local treasury."

The General Assembly has thus recognized office furniture, office equipment and office appliances as expense of the treasurer's office, which may be authorized by the State Compensation Board. In my opinion, portable air conditioning units would constitute office equipment and appliances, the cost of which may be included in the expenses allowed by the State Compensation Board for the operation of the treasurer's office (see Definitions in 6 C.J.S., page 74, and 30 C.J.S., page 295).

TREASURERS—Destruction of Old Records—Procedure to be Used. (313)

Public Records—Destruction—Treasurer May Destroy Certain Records. (313)

Honorable Dorothy K. Harvey
Treasurer of Amherst County

April 6, 1961

This is in reply to your letter of March 30, which reads as follows:

"We have stored in various places in the Court House and other buildings belonging to the County our old records as follows:

"Unpaid tax tickets.
"Office copies of tax tickets.
"Cancelled checks.
"Receipts for all monies received other than taxes.
"Bank deposits, etc.

"All of these records for the fiscal year 1957-'58 and subsequent years are filed in our office. I will thank you for an opinion as to what procedure we use to bring about the destruction of the records for the years prior to 1957. Also the number of years we are required to preserve these records."

Under the provisions of Section 58-987 of the Code of Virginia, the treasurer may destroy unpaid tax tickets referred to in Section 58-978 provided the certification of the Auditor of Public Accounts is obtained to the effect that these tickets are no longer needed for audit purposes.
Section 58-919.1 provides that:

"The treasurer may, with the consent of the governing body, cause all tax tickets, payment of which has been received, to be photographed or microphotographed, or recorded by any other process which accurately reproduces or forms a durable medium for reproducing the original, and may acquire, maintain and use such appropriate containers and files as shall be necessary to accommodate and preserve the reproductions so obtained.

"Whenever such reproductions shall have been made and placed in conveniently accessible files, and provision has been made for preserving, examining and using the same, the treasurer may, with the approval of the governing body, cause the tax tickets so reproduced to be destroyed.

"A reproduction thereof if substantially the same size as the original, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court.

"This section shall not apply to any tax tickets except those for taxes for a tax year more than five years prior to the tax year in which such photographing or microphotographing, or the recording by any other process which accurately reproduces or forms a durable medium for reproducing the original, is done.

"All costs incurred under this section shall be paid out of the county or city treasury."

Your attention is directed to the fact that under this section if the tickets are destroyed, the photographing or microphotographing equipment should be such that it will permit a reproduction of any tax ticket in the same size as the original so that it can be admissible as evidence in any judicial or administrative proceeding. Your attention is also directed to the fact that the provision for photographing or microphotographing the copies of the paid tax tickets "shall not apply to any tax tickets except those for taxes for a tax year more than five years prior to the tax year in which such photographing or microphotographing, or the recording by any other process which accurately reproduces or forms a durable medium for reproducing the original, is done."

I can find no authority for the destruction of cancelled checks, receipts for all moneys received other than taxes, bank deposits, etc. Therefore, it is my opinion that authority has been granted only for the destruction of unpaid tax tickets in the manner set forth in Section 58-987 and the destruction of office copies of paid tax tickets under the method and subject to the restrictions set forth in Section 58-919.1. Since the General Assembly has been specific as to those records which a treasurer may destroy, it is, therefore, my opinion also that under existing statutes you may not destroy cancelled checks, receipts for all moneys received other than taxes, bank deposits, etc.

TREASURERS—Duty to Determine Validity of Warrant for Expenditure of County Funds. (130)

October 11, 1960

MISS BETTY HANSEL
Treasurer, County of Highland

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

"The Corporation of Monterey has been compelled to build a sewerage disposal plant which is now under construction and nearing completion."
REPORT OF THE ATTORNEY GENERAL

"I am inclosing a copy of the Ordinance as adopted by the Town Council laying rates for the sewerage disposal service. Will you please give me your opinion in regard to payment of county warrant checks to the Corporation of Monterey for bills rendered September 30, 1960, for the first quarter's sewerage disposal service when the sewerage disposal plant has not yet been completed nor has any service been given.

"I am uncertain about signing the checks for these bills and am asking if you will please advise me if you concur in the decision of the Board of Supervisors and the School Board to pay these service charges."

There is a duty and responsibility upon the county treasurer to ascertain the validity of county warrants placed before him for his signature or to be paid by him out of county funds. This duty is outlined in Sections 15-253 through 15-257 of the Code. If the treasurer is satisfied that the warrant has been properly signed and there are sufficient funds on hand, I think it is the duty of the treasurer to pay the warrant.

It is within the power of the board of supervisors to make appropriations and determine what obligations of the county should be paid. If you are at any time doubtful about the validity of a warrant presented for payment, I feel sure that the Commonwealth's Attorney, in the exercise of his official duties, as prescribed in Section 15-257, will advise you.

In this connection I am enclosing copy of an opinion dated November 7, 1956, to the treasurer of Carroll County, Virginia, which relates to the duties of a treasurer in connection with county warrants. This opinion is published in the Report of Attorney General for 1956-57, at page 263.

TREASURERS—Term of Office Not Affected when City Creates Office of Finance to Relieve Treasurer of Duty Regarding Local Taxes—Salary is Paid by State. (200)
Public Officers—Compatibility—Member of Council May Not be School Teacher in City. (200)

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

December 15, 1960

This is in reply to your letter of December 14, 1960, in which you call attention to a provision in the charter of the city of Covington (Acts of Assembly, Regular Session 1958, Chapter 95), which authorizes the city council by ordinance to provide that the Director of Finance and not the city Treasurer shall collect, have custody and disburse all local taxes, revenues and funds which belong to the city and the school board. You state that the city council is considering the establishment of a department of finance and the adoption of an ordinance which will relieve the city Treasurer of the Collection of any local revenues. You call attention to Section 14-77 of the Code of Virginia which provides that the salary and expenses of any city Treasurer who neither collects nor disburses local taxes or revenues shall be paid entirely by the Commonwealth. You further state that the city Treasurer's present term of office began January 1, 1960 and will terminate on December 31, 1963.

In this connection you present the following question:

"The question presented is whether or not the provisions of said Section 5.021 of said charter can become effective by an ordinance of the city council during the present term of the city treasurer thereby eliminating any local contribution to the salary and expenses of said city treasurer as provided by said Section 14-77 of said Code."
In answer to your question, it is my opinion that the city council has authority to enact such an ordinance during the term of office for which the present Treasurer was elected. Such action would not in any way affect the term of office for which the Treasurer has been elected.

You present a second question as follows:

"Section 3.03 of said charter (Acts of Assembly, Regular Session, 1954, page 254) provides in part as follows:

'No member of the council shall during the term for which he was elected or for one year thereafter be appointed to any office of profit under the government of the city.'

'Would this provision of the charter prohibit a member of the city council from accepting a position as a teacher in the school system of said city?"

In my opinion the charter provision to which you refer would not in itself prevent a member of the town council from accepting a position as a school teacher due to the fact that a position as teacher is not an office.

However, in my opinion, the provisions of Section 15-508 of the Code prevent a member of the town council from accepting such a position. There is a contractual relationship between the city and the teacher under which the teacher receives a compensation payable out of city funds.

TREASURERS—Town—Bond—Amount to be Determined by Charter or Town Council. (19)

July 13, 1960

HONORABLE R. CROCKETT GWYN, JR.
Member of House of Delegates

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

"Judge T. L. Hutton has requested me to write you for an opinion regarding the fixing of a bond of Town Treasurers when the town is a separate school district and money is paid to the Town Treasurer by the County Treasurer pursuant to Section 22-141 of the Code of Virginia.

The question involved should the bond be fixed according to the amount of money paid to the Town Treasurer from all sources, state and local levies, or should it be fixed on the amount paid to the Town Treasurer by the County Treasurer on money due the town as a separate school district?

In the first case, the Town Treasurer handles approximately $400,000.00 and in the second case approximately $150,000.00 and a considerable amount of money is involved in the premium of the bond.

I might add that the money is disbursed as soon as collected and the Town Treasurer never carries a balance of more than $40,000.00"

Under Section 24-141 the county school board is directed to require the county treasurer to pay over to the town treasurer, if and when properly bonded, certain funds.

This section fails to state specifically who shall determine whether or not the town treasurer is properly bonded. Ordinarily, the council of the town, under the town charter, fixes and approves the bond of a town treasurer. I am not aware of any statute authorizing the judge of the circuit court to pass upon the sufficiency of a town treasurer's bond. Section 38-917 of the Code relates to county and city treasurers only. "When properly bonded," as used in this section, it would seem, relates to type and amount of bond required of the town treasurer by the town charter and the town council.
REPORT OF THE ATTORNEY GENERAL

I believe that it is the purpose of this provision to charge the county treasurer with the responsibility of determining whether the town treasurer is covered with a bond that complies with the requirements of the governing body of the town. In my opinion, whenever the town treasurer produces evidence of this nature to the county treasurer, it becomes the duty of the county treasurer to pay the funds which the town is entitled to receive under this section to the town treasurer.

A certificate of the town clerk or recorder (the custodian of the minutes of the town council) to the treasurer of the county stating that the town treasurer has executed a bond in the amount required by the charter of the town and the council will, in my opinion, be in compliance with Section 24-141.

TRESPASS—Not Indictable Criminal Offense at Common Law. (35)

HONORABLE W. CARRINGTON THOMPSON
Member House of Delegates

This is in reply to your letter of July 26, 1960, in which you request an opinion as to whether or not a bare trespass constitutes a criminal offense at Common law in Virginia.

On April 1, 1954, this office rendered an opinion to the Honorable George F. Abbitt, Jr., Commonwealth's Attorney for Appomattox County (Opinions of the Attorney General, 1953-1954, p. 57), stating that at common law a bare trespass was not a criminal offense unless it was attended by circumstances constituting a breach of peace, and that the only remedy for such trespass was a civil action for damages. Enclosed is a copy of this opinion.

UNFAIR SALES ACT—Tobacco Tax—Not to be Added to Invoice Cost to Wholesaler as Part of Wholesale Cost. (64)

Taxation—Tobacco Tax—Not a Part of Wholesale Cost. (64)

HONORABLE C. H. MORRISSETT
State Tax Commissioner

I am in receipt of your letter of July 29, 1960, in which you inquire whether or not the tax imposed upon cigarettes by the Virginia Tobacco Tax Act may properly be added to the invoice cost of cigarettes to a wholesaler for the purpose of computing the “cost to the wholesaler” under the Virginia Unfair Sales Act.

Essentially, the Virginia Unfair Sales Act—Section 59-9 et seq. of the Code of Virginia (1950) as amended—declares that the selling of merchandise at less than cost is an unfair method of competition contrary to public policy and forbids sales at less than cost in contravention of the policy of the Act. See Sections 59-13 and 59-14, Code of Virginia (1950) as amended. Section 59-10(3) of the Virginia Code defines “cost to the wholesaler” in the following manner:

“'Cost to the wholesaler' shall mean the invoice cost of the merchandise to the wholesaler or the replacement cost of the merchandise to the wholesaler within thirty days prior to date of sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (a) freight charges not otherwise included in the cost of the merchandise, (b) cartage to the retail outlet if done or paid
for by the wholesaler, which cartage cost shall be deemed to be no more than the lowest published common carrier rate available for such merchandise and in the absence of such published rate such cartage cost shall be deemed to be not less than three-fourths of one per centum of the cost of the merchandise to the wholesaler as herein defined, unless said wholesaler claims and proves a lower cartage cost, and (c) a mark-up to cover in part the cost of doing business, which mark-up, in the absence of proof of a lower cost, shall be not less than two per centum of the total cost of the merchandise at wholesale warehouse or outlet."

Since the tax imposed upon cigarettes by the Virginia Tobacco Tax Act is not included in the invoice cost of cigarettes sold to a wholesaler by a manufacturer, I do not believe that such tax may be considered an element of the "invoice cost of the merchandise to the wholesaler" within the purview of the above quoted definition. Moreover, no provision is made in the definition under consideration for adding such tax to the invoice cost in computing the tax to the wholesaler, nor does the Virginia Tobacco Tax Act—Chapter 392, Acts of Assembly, 1960—contain any provision prescribing that the tax on cigarettes shall be included in or added to the invoice cost of cigarettes to a wholesaler in computing the "cost to the wholesaler" under the Virginia Unfair Sales Act. I am, therefore, of the opinion that your inquiry must be answered in the negative.

VETERINARIANS—Dogs and Cats not "Livestock" within Meaning of Section 54-786. (167)

November 17, 1960

Mr. Turner N. Burton, Director
Department of Professional and
Occupational Registration

This is to acknowledge receipt of your letter of November 16, 1960, in which you state in part:

"Section 54-786, Code of Virginia, 1950, defines the Practice of Veterinary Medicine and Surgery. However, this section also provides as follows:

"'... But nothing in this chapter shall apply to residents of this State, who confine their practice solely to the castration, spraying or dehorning of livestock...'

The term "livestock" is not defined in the Code of Virginia. Hence, the ordinary meaning ascribed to that term should be applied. Webster's International Dictionary defines the word "livestock" to be: "Domestic animals used or raised on a farm, especially those kept for profit."

I am, therefore, of the opinion that the above quoted exemption does not include dogs and cats.

VIRGINIA INCOME TAX—Estates and Trusts—Non-Residents Taxable Under § 58-121 Beginning with Taxable Year 1962. (3)

July 1, 1960

Honoroble C. H. Morrissett
State Tax Commissioner

I am in receipt of your letter of recent date in which you point out that the General Assembly of Virginia, at its recent regular session, enacted House Bill No. 666, which
was approved by the Governor on April 1, 1960. This legislation amends Sections 58-101 and 58-121 of the Virginia Code and will appear as Chapter 609 of the Acts of Assembly of 1960. Your communication presents a question which may be stated in the following manner:

"For which taxable year will the amended provisions of Section 58-121 of the Virginia Code first be in force?"

As amended by Chapter 609 of the Acts of Assembly of 1960, Sections 58-101 and 58-121 of the Virginia Code provide:

"§ 58-101.—A tax is hereby annually levied for each taxable year upon every resident individual of this State, upon and with respect to his entire net income as herein defined for purposes of taxation, at rates as follows:

"Two per centum of the amount of such net income not exceeding three thousand dollars;

"Three per centum of the amount of such net income in excess of three thousand dollars but not in excess of five thousand dollars; and

"Five percentum of the amount of such net income in excess of five thousand dollars.

"A like tax is hereby annually levied for each taxable year at the rates specified in this section upon and with respect to the entire net income as herein defined for purposes of taxation, except as herein provided, from all property owned and from every business, trade, profession or occupation carried on in this State by natural persons not residents of the State. But a nonresident individual receiving income from labor performed, business done or property located in this State and income from labor performed, business done or property located outside of this State shall be taxable only upon the amount of income received by such taxpayer from labor performed, business done or property located within this State. The remainder of the income received by him shall be deemed nontaxable by this State. Nonresidents shall be taxed on income from estates and trusts only as provided in § 58-121.

"The taxes levied by this chapter shall be assessed, collected and paid as provided by law.

"This section shall be in force for the taxable year nineteen hundred sixty-two and for every taxable year thereafter, until otherwise provided by law."

"§ 58-121.—In the case of all income of the character described in paragraphs (4) and (5) of § 58-118, other than such income as is mentioned in the preceding section, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year, or if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the income of a beneficiary, not a resident, derived through such estate or trust, shall not be subject to taxation, except to the extent that such income is derived from real estate or tangible personal property located in this State, or from the operation of an unincorporated business or trade carried on in this State. In computing the tax payable by such nonresident beneficiary on income derived from real estate or tangible personal property located in this State, or from an unincorporated business or trade carried on in this State, the credits provided by § 58-104 shall be allowed."

The 1960 amendments here under consideration are contained in the italicized passages of the above quoted statute.
At the present time, Section 58-101 of the Virginia Code levies a tax upon the entire net income, as defined and limited, arising from (1) all property owned and (2) from every business, trade, profession or occupation carried on in this State by natural persons who are not residents of the State. By virtue of the provisions of Section 58-118 of the Virginia Code, a like tax is imposed with respect to the income of estates and trusts, including specifically:

* * * *

("(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct; and"

"(5) Income of an estate during the period of administration or settlement permitted by the first paragraph of Section 58-120 to be deducted from the net income upon which the tax is to be paid by the fiduciary."

See Code of Virginia (1950) as amended, Section 58-118(4) and (5).

Pursuant to these provisions of Section 58-121 currently in force, the tax imposed upon the income specified in subparagraphs (4) and (5) of Section 58-118 is not paid by the fiduciary, but is paid by the beneficiary or beneficiaries of the estates or trusts upon the basis of each beneficiary's distributive share of income. Moreover, the terminal sentence of Section 58-121 prescribes that, in such cases, the income derived from an estate or trust by a beneficiary who is not a resident of this State shall be taxable only to the extent provided in Chapter 4 of Title 58 of the Virginia Code. As heretofore pointed out, the tax upon the net income of non-residents of this State is limited by the provisions of Section 58-101 to net income derived from all property owned and every business, trade, profession or occupation carried on in this State.

In substance, the recent amendment to Section 58-121 further limits the extent to which the net income derived from an estate or trust by a beneficiary who is not a resident of this State shall be taxable. While such income is now taxable under Section 58-101 if it is derived from any property located in this State—including (1) real property, (2) tangible personal property and (3) intangible personal property—the recent amendment to Section 58-121 provides that such income shall be taxable only to the extent that it is derived from (1) real property located in this State or (2) tangible personal property located in this State or (3) an unincorporated business or trade carried on in this State.

Had Section 58-121 alone been amended by the General Assembly at its recent regular session, it would appear that the amended statute would have become effective on June 27, 1960, and would be in force for the taxable year 1960. However, Section 58-101 was simultaneously amended in the identical bill to provide that non-residents of this State should be taxed on income from estates and trusts only as provided in Section 58-121, such amended provision to be in force for the taxable year 1962 and for each taxable year thereafter.

Under familiar principles, the recent amendments to Sections 58-101 and 58-121 of the Virginia Code must be considered together in ascertaining the intent of the General Assembly, and the amended statutes should be construed in a manner which will give effect to both enactments. In view of the close inter-relationship between the two statutes prior to their recent amendment, and in light of the fact that the amendments to both statutes were embodied in the same bill and enacted simultaneously, these principles would appear to apply with particular emphasis in the instant situation. Manifestly, if Section 58-121 is construed to be in force for the taxable year 1960, the amendment to Section 58-101 is rendered meaningless and can have no effect. In light of this circumstance, I am constrained to believe that the amended statutes should be construed to have the following effect:

"Beginning with the taxable year 1962, non-residents shall be taxed on income from estates and trusts only as provided in Section 58-121 as amended."

I am, therefore, of the opinion that the amended provisions of Section 58-121 of the Virginia Code will first be in force for the taxable year 1962.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA MILITARY INSTITUTE—Cadet Dismissal—Right of Appeal—Board Has Discretion As To Whether Cadet May Appear For Hearing. (330)

April 21, 1961

J. RANDOLPH TUCKER, JR., ESQUIRE
Member, Board of Visitors
Virginia Military Institute

This is in reply to your letter of April 11, in which you quote Section 93(b) of the regulations of the Board of Visitors at VMI, which reads as follows:

"Any cadet dismissed from the Institute shall have the right of appeal to the Board of Visitors.

"Procedures for the hearing of an appeal or for the review of a dismissal action shall be as established by the Board of Visitors in accordance with the circumstances of individual cases."

You have presented the following question:

"Does the right of appeal given to a cadet by Section 93(b) of the Regulations entitle him as a matter of right to a personal appearance before the Board, or can the Board properly discharge its obligation under this Regulation by reviewing the record of the dismissal action and basing its decision solely on the record?"

In my opinion the answer to your question is in the negative. I think it is within the discretion of the Board to determine whether or not the cadet will be given an opportunity to make a personal appearance before the Board or whether the Board will consider the appeal upon the record.

VIRGINIA MILITARY INSTITUTE—State Cadets. Number to be Admitted. (5)

July 5, 1960

HONORABLE GEORGE R. E. SHELL
Superintendent
Virginia Military Institute

This is in reply to General Milton's letter of June 23, 1960, in which it was requested that I review the practice of admitting State cadets to Virginia Military Institute. General Milton's letter reads, in part, as follows:

"From time to time the question is raised by various State senators as to how State Cadets are admitted and the numbers provided for under the Code. The question has now been specifically raised concerning the provisions of Section 23-105 of the Code of Virginia—whether the statement that the Board shall admit as State Cadets not less than 50 young men means a total of not less than 50, including prior appointees still in the Corps of Cadets, or 50 new entries each year. For the period of my incumbency as Superintendent we have proceeded with a prior authorization of a total of 79 State Cadets in the entire Corps, which means that we annually can admit about 20.

"The Code further states that State Cadets shall be appointed from the senatorial districts but does not state they shall be selected by the State senator. We require the State senator's endorsement before consideration and endeavor insofar as is possible to appoint a State Cadet from each district."
"I would appreciate greatly your reviewing this matter as I will turn it over to General Shell for further consideration after he takes over as Superintendent the first of July."

Section 23-105 of the Code of Virginia of 1950 provides as follows:

"The board shall admit annually as State cadets, free of charge for board and tuition, upon evidence of fair moral character, not less than fifty young men, who shall be not less than sixteen nor more than twenty-five years of age; one of whom shall be selected from each of the senatorial districts as at present constituted, and the other fourteen from the State at large. Whenever a vacancy has occurred, or is likely to occur, in any district, due notice of the time and place of making the appointment to supply the vacancy shall be given. If, after such notice, no suitable person shall apply from such district, the vacancy may be supplied from the State at large."

I am of the opinion that the existing practice employed by the Board of Visitors in admitting State cadets is proper. The requirement that not less than fifty men be admitted annually as State cadets should be interpreted as a minimum number during any given year, and not as fifty additional entrants each year.

VIRGINIA MILITARY INSTITUTE—Use of Swimming Pool for Public Swimming Instructions. (8)

Colonel J. C. Hanes
Business Executive Officer
Virginia Military Institute

July 8, 1960

This is in reply to your letter of June 11, 1960, in which you state that the swimming pool at Virginia Military Institute will be open for six weeks this summer for the benefit of cadets attending the summer session, and that a cadet has been hired to act as lifeguard during this period at a compensation of $90.00. You further state that the Director of the Summer School has considered using these swimming facilities for the purpose of offering swimming instructions to the general public, and consequently you have requested an opinion in respect to the following:

1. Does the Board of Visitors of V. M. I. have authority to permit the cadet hired as a lifeguard to use the pool for public swimming instructions, to charge a fee therefor, and to pocket the proceeds himself?
2. Does the Board of Visitors have authority to permit the Director of the Summer School to offer public instruction and charge a fee therefor?
3. What is the liability of V. M. I. as an agency of the Commonwealth of Virginia for infections or other injuries sustained by members of the general public using this pool?
4. What policy should V. M. I. adopt in respect to the use of the swimming pool by members of the colored race?

These questions will be answered seriatim.

1. I have been unable to find any general or special legislation empowering the Board of Visitors of V. M. I. to permit a private individual to use the swimming pool for the above purposes, and I am, therefore, of the opinion that such use would be unauthorized.
2. I am of the opinion that the Board of Visitors can permit the Director of the Summer School to offer swimming instructions to the general public and charge a fee
therefor, as such use would be considered a portion of the general curriculum offered by this State institution. Of course, all fees collected would go into the State treasury and the Board of Visitors could, if it so desires, pay the cadet serving as lifeguard additional compensation for these swimming instructions to the general public.

3. It is my opinion that V. M. I., being an agency of the Commonwealth of Virginia, would have no tort liability of any nature whatsoever to persons using the swimming pool. It might be advisable, however, from the viewpoint of public relations, to inform persons using the pool that they are doing so at their own risk.

4. I am of the opinion that the Board of Visitors would have to adopt the same policy with respect to the use of swimming facilities as it has in respect to admission of students, namely, that no person would be denied use of the swimming facilities solely on the basis of race.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Eligibility for Membership—Commissioner of Accounts not an Employee for Purposes of Social Security Coverage. (170)

November 21, 1960

HONORABLE CHARLES H. SMITH, Director
Virginia Supplemental Retirement System

You have requested my advice as to whether or not commissioners of accounts qualify as employees of the State or a political subdivision for the purpose of social security coverage.

You have furnished this office with a memorandum prepared by the office of the general counsel of the Bureau of Old-Age and Survivors Insurance relating to this matter, which I have reviewed.

I find that on October 22, 1952, the Honorable J. Lindsay Almond, Jr., furnished you with an opinion with respect to this matter, which opinion, however, was not published. The opinion is as follows:

"I have reviewed your file regarding the eligibility of Commissioners of Accounts to qualify as employees of the State or a political subdivision for purposes of social security coverage. In my opinion an employee-employer relationship does not exist. Commissioners of Accounts are not paid 'wages' but are paid on a fee basis and, in my opinion, coverage of this group was not contemplated when the federal-state agreement was adopted."

I concur in the opinion of Attorney General Almond.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Group Insurance—Eligibility of Employees Who Are Reemployed Prior to Retirement Age. (65)

August 10, 1960

HONORABLE C. H. SMITH
Director
Virginia Supplemental Retirement System

This is in reply to your letter of July 21, in which you request my opinion with respect to the following questions:

1. Would a person retired for service or disability, on an immediate annuity, prior to July 1, 1960, be eligible for the group insurance provided
in Section 51-111.67:1 of the Code of Virginia if subsequently in service as an employee prior to attaining age sixty, in one of the eligible classes of employers set forth in Section 51-111.67:2?

"2. What if retired subsequent to July 1, 1960 with the facts otherwise the same?

"3. If of the opinion the retired person is eligible for the group insurance under 2, how would we determine the amount of insurance in force while employed and after separation from service?"

In my opinion questions 1 and 2 must be answered in the affirmative. Section 51-111.67:2 provides that—

"Elected and appointed employees who are eligible to participate in the group insurance provided for by this article are the following, provided if first employed or reemployed after June 27, 1960, age sixty has not been attained."

The requirements with respect to eligibility are uniform with respect to persons first employed or reemployed.

With respect to your question (3), it is my understanding that you have discussed the matter with a number of our staff and it was agreed that an opinion may be delayed pending further consideration.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Group Insurance—Political Subdivisions May Provide Policy for All Employees. (37)

HONORABLE CHARLES H. SMITH, Director
Virginia Supplemental Retirement System

This is in reply to your letter of July 21, 1960, which reads as follows:

"We respectfully request you advise whether a political subdivision, participating in the Virginia Supplemental Retirement System, as provided in Article 4, Chapter 3.2 of Title 51 of the Code of Virginia, covering only employees ineligible for membership in their local retirement system, may, by agreement, include all of the employees under the group insurance provided in Article 9 of Chapter 3.2 of Title 51 of the Code of Virginia. The local retirement system would be continued for the employees not participating in the Virginia Supplemental Retirement System."

Section 51-111.67:1 of the Code of Virginia reads as follows:

"§ 51-111.67:1. Board authorized to purchase group life and accident insurance policies.—The Board of Trustees of the Virginia Supplemental Retirement System, said Board of Trustees being hereinafter referred to as the Board, acting for and on behalf of the Commonwealth of Virginia, may and is hereby specifically authorized to purchase a contract or contracts of insurance with any life insurance company or companies incorporated or organized under the laws of and authorized to do business in this Commonwealth, with such reinsurance with a life insurance company or companies incorporated or organized under the laws of and authorized to do business in this Commonwealth as the Board may require, insuring elected and appointed officers and employees, hereinafter referred to as employees or individually as an employee, specified in § 51-111.67:2 who are eligible to participate in the group insurance authorized by this article, or any group or groups or class or classes thereof, including subsequently retired em-
ployees, under a policy or policies of group insurance providing life and accidental death and dismemberment insurance; and for such purposes the Board may agree to and pay from funds provided for such purpose the premiums or charges for carrying such contracts. Each policy so purchased shall contain a provision stipulating the maximum expense and risk charges for at least the first policy year, which charges shall have been determined by the Board to be on a basis consistent with the general level of such charges made by life insurance companies under policies of group life and accidental death and dismemberment insurance issued to large employers; in the event the Board at any time cannot on such a basis secure from any life insurance company incorporated or organized under the laws of Virginia the insurance herein provided for, then during the next succeeding two years the Board may secure such insurance from any life insurance company or companies authorized to do business in the Commonwealth."

Section 51-111.67:2 of the Code of Virginia, *inter alia*, reads as follows:

"§ 51-111.67:2. Eligible employees and officers.—Elected and appointed employees who are eligible to participate in the group insurance provided for by this article are the following, provided if first employed or reemployed after June 27, 1960, age sixty has not been attained:

* * * *

"(3) Employees of a political subdivision participating in the Virginia Supplemental Retirement System as provided in article 4 (§ 51-111.31 et seq.) chapter 3.2 of Title 51 of the Code of Virginia, and any act amendatory thereof or replacing such statute; provided that any such subdivision may, at any time prior to the effective date of the first group insurance authorized under this article, decline to participate therein, in which event the employees of such political subdivision shall not be deemed eligible for insurance under this article; provided, further, that any such political subdivision so declining to participate therein may, at any time during the two year period next succeeding the effective date of such first group insurance, elect to participate therein, in which event employees of such political subdivision shall thereafter become eligible to participate in such group insurance; on and after the expiration of the two year period next succeeding the effective date of such first group insurance, the election of any political subdivision so declining to participate therein to thereafter participate shall be subject to the approval of the Board and the employees of such political subdivision shall become eligible to participate in such group insurance on and after the date of such approval by the Board." (Italics supplied)

From the above, it is noted that Section 51-111.67:1 provides that the Board of Trustees of the Virginia Supplemental Retirement System may purchase group insurance for those employees specified in Section 51-111.67:2, and that this latter section makes eligible for group insurance "employees of a political subdivision participating in the Virginia Supplemental Retirement System." Thus, it is my opinion that the determination of whether or not a political subdivision may include one of its employees in the state group insurance plan is predicated upon whether or not the political subdivision itself is participating in the state retirement system and not whether the employee himself is participating in the state retirement system.

In answer to your specific inquiry, I am of the opinion that a political subdivision participating in the state retirement system may include all its employees under the state group insurance plan regardless of the fact that some of its employees are under the state retirement system and some are under a local retirement system.
REPORT OF THE ATTORNEY GENERAL

VITAL STATISTICS—Birth Certificates—when Registrar May Issue Short Form.

(97)

HONORABLE DEANE HUXTABLE
State Registrar
Bureau of Vital Statistics

This is in reply to your letter of September 2, 1960, with which you enclosed a copy of a letter, addressed to you, from Mr. Marvin F. Cole, in which a request is made for a certified copy of three specified birth certificates, showing only the information on the front side thereof. You have asked to be advised if the statutes and regulations of the State Board of Health authorize you to comply with the request for such copies. More specifically, you request my opinion as to whether a short form birth certificate may be issued which excludes information other than reference to parentage.

Chapter 18.1 of Title 32, Code of Virginia of 1950, as enacted by the 1950 Session of the General Assembly, completely recodified the law relating to the Bureau of Vital Statistics.

Section 32-353.26, Code of Virginia of 1950, as amended, provides in part as follows:

“(a) To protect the integrity of vital statistic records to insure their proper use, and to insure the efficient and proper administration of the vital statistics system, it shall be unlawful for any person to permit inspection of, or to disclose information contained in vital statistics records, or to copy or issue a copy of all or part of any such record except as authorized by regulation of the State Board of Health or when so ordered by a court of competent jurisdiction.” (Italics added)

Section 32-353.27, Code of Virginia of 1950, as amended, provides in so far as here germane as follows:

“In accordance with § 32-353.26 and the regulations adopted pursuant thereto:

“(a) The State Registrar of Vital Statistics shall upon request issue a certified copy of any certificate or record in his custody or of a part thereof. Each copy issued shall show the date of registration; and copies issued from records marked 'delayed', 'amended', or 'court order' shall be similarly marked and show the effective date. ** *

The statutory requirement to issue certified copies of certificates, or a part thereof is mandatory only when issued pursuant to the provisions of § 32-353.26 of the Code, and the regulations of the State Board of Health.

You have advised that § 12.1, paragraph (d), of the regulations of the State Board of Health provides as follows:

“Short form certified copies of birth certificates, or birth registration cards, which make no reference to parentage may be issued by the State Registrar.”

It is to be noted that the regulation above quoted does not specify what portions of birth certificates or birth registration cards are to be issued by the State Registrar. Neither does the regulation undertake to restrict the information to be included on short form copies. It simply permits the issuance of certified copies which make no reference to parentage. There is no other regulation relating to portions of certificates.

I am, therefore, of the opinion that the State Registrar may not issue a certified copy of a part of a birth certificate, except for the short form authorized by § 12.1(d) of the regulations of the State Board of Health.

September 15, 1960
WARRANTS—Execution of in Another County. (46)

July 29, 1960

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

This is in reply to your letter of July 19, 1960, which reads as follows:

"Recently I have had the following case to arise in Appomattox County and I would like to have the advice and help of your office: our sheriff of Appomattox County sent a criminal warrant to the Sheriff of Roanoke County; the warrant charged that the accused did issue a worthless check which was dishonored by the bank on which the check was drawn; the sheriff of Roanoke County returned the warrant stating that the County Judge had advised him, the Sheriff of Roanoke County, that the warrant was improperly drawn; therefore, he refused to serve it; the warrant was returned to the Sheriff of Roanoke County the second time and the warrant was sent back by the Sheriff of Roanoke County the second time with the same notation on it.

"I would like to know if there is any way that we can compel the Sheriff of Roanoke County to serve a criminal warrant which had been issued by the County Judge of Appomattox County. Also I would like to know if there is any authority providing that the County Judge of a local county has the prerogative to pass on a warrant issued by the Judge of another County in the State of Virginia and advise the Sheriff whether he shall or shall not serve the same."

If the warrant be issued for the arrest of a person who subsequently escapes from the jurisdiction, the warrant may be executed pursuant to § 19.1-94 of the Code, which provides, in part, 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 any person authorized to issue process under § 19.1-90, of a county or corporation other than that in which the warrant was issued, on being satisfied of the genuineness thereof, may endorse thereon the name and official character, and such endorsement shall operate as a direction of the warrant to an officer of such endorser's county or corporation."

If the accused be in another county or municipal corporation of the State at the time the process is issued, the warrant may be directed to any officer or to an officer of the territorial jurisdiction in which the accused is thought to be at the time.

Process duly issued by any officer specified in § 19.1-90 of the Code may be executed by any officer authorized to execute such process even though directed to another officer, if the process be delivered to such executing officer for that purpose. Section 8-44 of the Code of Virginia; Crosswhite v. Barnes, 139 Va. 471, 482.

The procedure in cases of arrest under a warrant issued by an officer in a territorial jurisdiction other than that in which the warrant is executed should be in accordance with § 19.1-99 of the Code, which reads as follows:

"When a warrant is issued in a county or corporation other than that in which the charge ought to be tried, the court before whom the accused is brought, shall, by warrant, commit him to an officer, and such officer shall carry him to the county or corporation in which the trial should be, and there shall take him before, and return such warrant to, a court of appropriate jurisdiction thereof, unless otherwise provided."
In reply to your second inquiry, I am of the opinion that it is not the prerogative of the county judge of one county to pass upon the merits of a warrant issued by an officer of another territorial jurisdiction, unless it be a warrant delivered to such county judge for endorsement as contemplated by § 19.1-94 of the Code. Although under a duty to execute any warrant directed to him or delivered to him for such purpose, the executing officer may determine if the warrant be void on its face. The execution of a void warrant could subject the officer to civil liability. 4 M.J. 77, Arrest, § 122.

WATER AND SEWERAGE SYSTEMS—Municipal Corporation—Must Notify County of Intention to Extend Lines Beyond Corporate Limits. (162)

Counties, Cities and Towns—Water and Sewerage Systems—Municipal Corporation Must Notify County before Extending Lines Beyond Corporate Limits. (162)

November 15, 1960

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

This is in reply to your letter of November 10, 1960, which I quote in part as follows:

"The Town of Leesburg proposes to construct a water and sewer line beyond its corporate limits to furnish water and sewer facilities to a Federal building which is to be erected in the near future.

"In your opinion, does the word 'corporation' as used in Section 15-739.7 and Section 15-754.1 include municipal corporations, and is it necessary for the Town of Leesburg, a municipal corporation, to notify the Board of Supervisors for the County of Loudoun of its intention to construct the said water and sewer line outside of its corporate limits as hereinafter described?"

Sections 15-739.7 and 15-754.1 of the Code of Virginia require "any person, firm, corporation or association" proposing to establish or extend a sewerage system or water supply system in a county to notify the governing body thereof prior to commencement of such construction.

Whether or not this requirement is applicable to municipal corporations extending water or sewage disposal services beyond the corporate limits is not free from doubt. I am constrained to the view that this doubt should be resolved in the manner which would best give effect to the purpose of the legislation involved. The purpose of Articles 3.2 and 5.1 of Chapter 22, Title 15 of the Code of Virginia, of which §§ 15-739.7 and 15-754.1 constitute a part, is to give the governing body of the counties an opportunity to investigate and approve or disapprove sewerage and water supply systems proposed to be established or extended in the county. It would, therefore, appear as essential for the governing body of a county to be apprised of proposed construction of such facilities by a municipal corporation as it is with respect to facilities constructed by any other person, firm, corporation or association.

In view of the foregoing, I am of the opinion that the Town of Leesburg should first notify the Board of Supervisors for the County of Loudoun of its intention to construct a water and sewer line outside the corporate limits as is being contemplated.
WELFARE AND INSTITUTIONS—Commissioner May Make Supplemental Payments of Public Assistance Under Certain Circumstances. (302)

April 4, 1961

HONORABLE RICHARD W. COPLELAND, Director
Department of Welfare and Institutions

This will reply to your letter of March 21, 1961, in which you present the following inquiry:

"I am writing to request your opinion as to whether the provisions of §§ 63-136 and 63-158 of the Code are applicable in situations in which public assistance payments do not conform to the standards and policies established by the State Board for determining the amount of assistance to be granted an applicant or recipient. More specifically, is there authority for the Commissioner to provide for supplemental payments in order to bring assistance payments up to the amount indicated by such standards and policies when the payments made by the local board are below the amounts so indicated?"

In this connection, Sections 63-119 and 63-145 of the Virginia Code prescribe that the amount of public assistance which any person shall receive under the provisions of Title 63, Chapter 6 and Title 63, Chapter 7 of the Virginia Code, respectively, shall be determined "in accordance with rules and regulations made by the State Board" of Welfare and Institutions. Moreover, Sections 63-135 and 63-157 declare that if any county or city shall fail or refuse to provide for the payment of assistance in accordance with the provisions of Title 63, Chapter 6 and Title 63, Chapter 7, respectively, the State Board shall, through appropriate proceedings, require the authorities and officers of such county or city to exercise the powers conferred and perform the duties imposed by Chapters 6 and 7 of Title 63.

In addition, Section 63-136, which is substantially identical to Section 63-158, of the Code of Virginia (1950) as amended, provides:

"For so long as such failure or refusal shall continue the State Board shall authorize and direct the Commissioner under rules and regulations of the State Board, to provide for the payment of assistance in such county or city out of funds appropriated for the purpose of carrying out the provisions of this chapter. In such event the Commissioner shall at the end of each month file with the State Comptroller and with the board of supervisors, council or other governing body of such county or city a statement showing all disbursements and expenditures made for and on behalf of such county or city, and the comptroller shall from time to time as such funds become available deduct from funds appropriated by the State, in excess of requirements of the Constitution of Virginia, for distribution to such county or city, such amount or amounts as shall be required to reimburse the State for expenditures incurred under the provisions of this section. All such funds so deducted and transferred are hereby appropriated for the purposes set forth in § 63-109 and the first paragraph of § 63-110 and shall be expended and disbursed as provided in § 63-111. This section shall not apply when the budget of the local board or department of public welfare has been approved by the Commissioner under § 63-69 and adopted by the local governing body. The foregoing provisions shall be null and void if the application thereof would in any manner interfere with the Statewide operation of a public assistance program or the receipt of grants from the federal government." (Italics supplied).

In light of the provisions of Title 63 outlined above, I am of the opinion that Sections 63-136 and 63-158 of the Virginia Code would be applicable to those situations concerning which you inquire. Cf., Report of the Attorney General, 1950-1951, pp. 20, 227. I am also of the opinion that—subject to the conditions stated in the
concluding provisions of Section 63-136 (and Section 63-158) italicized above—the Commissioner may provide for such supplemental payments as may be necessary to effect compliance with the standards prescribed by the rules and regulations of the State Board of Welfare and Institutions.

WELFARE AND INSTITUTIONS—Local Board May Reduce Payment to Recipient by Consideration of Other Income. (91)

September 8, 1960

HONORABLE JOEL W. FLOOD
Judge of the Fifth Judicial Circuit
of Virginia

This is in reply to your letter of September 5, in which you present the following question:

"I am writing to ask an opinion from you as Attorney General on a matter in Appomattox County, to-wit: where the local Welfare Board of a County has been making contributions to a widow and her minor children (legitimate) because of their destitute circumstances, if the widow and minor children recover a verdict in a case against the person who caused the death of the husband and father, can the Welfare Board reduce its payments because such money has been received?"

You state that there will be approximately $2,000 payable to the family as a result of the settlement of the claim for the wrongful death of the husband and father, and that you have been advised by the State Welfare Department that, if you direct the money to be paid to the widow and mother, such payment will decrease or wipe out completely the allowances she is now receiving under Title 63 of the Code.

In my opinion, the State Board of Welfare may reduce welfare allowances in the manner suggested. This conclusion is applicable also to local boards of welfare. The various programs for the granting of allowances under Title 63 require consideration of the property and income of the recipients. Sections 63-124, 63-145 and 63-209 of the Code. The State Board has broad regulatory power. See Section 63-25 of the Code.

You have presented the following further question:

"If you should reach the conclusion that the Welfare Department would be entitled to have the payments paid to the Mother charged against the small amount she is receiving from the Welfare Department, then if I directed that the payments be made to one or more of the children, which of course I have the authority to do, would this relieve the situation?"

In my opinion the answer to this question is in the negative. Any income that accrues to the widow or to the dependent children, regardless of the source, may be considered by the Welfare Department in making its determination with respect to the amount of assistance.

WILLS—PROBATE—Wills Executed in Foreign State May be Probated in Virginia if Statutory Requirements for Execution are Met. (383)

June 15, 1961

HONORABLE J. PHIL BENNINGTON, Clerk
Circuit Court of Grayson County

This is to acknowledge receipt of your letter of June 12, 1961, in which you state in part:

"I have been requested to probate a will for a resident of the State of North Carolina."
“The decedent executed a will for certain property located in Grayson County, Virginia, willing it to his sister. He owned other property in North Carolina and he attempted making a will in North Carolina, however, the will was not properly executed and was not probated.

“What I would like to know is whether or not I have the authority to probate the will that he executed for the property he owned in Grayson County, Virginia, or if the will should be probated in North Carolina and an exemplified copy sent to the Grayson County Clerk’s Office.”

As you know, Section 64-51 of the Code prescribes the mode of execution for a valid will. Said section is as follows:

“No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. If the will be wholly in the handwriting of the testator that fact shall be proved by at least two disinterested witnesses.”

So long as the requirements of this section are met, the will may be probated. It is immaterial whether the will has been probated or is susceptible of being probated in another jurisdiction. You are familiar with Section 64-88 which permits the probation of an exemplified copy of a will which has been probated in another State. That section provides that where the exemplified copy of the will is probated, in order to be valid as far as land transfers are concerned, the will must meet the requirements of the Virginia statute. The same reasoning would apply to the probation of a will although executed in a foreign jurisdiction and not probated there when offered for probate in Virginia.

It is, therefore, the opinion of this office that a will which is executed in a foreign jurisdiction and covers property both in that jurisdiction and in Virginia may be probated in Virginia provided it meets the requirements of the aforesaid section of the Code.

WITNESSES—Copy of Summons Should be Serviced by Leaving Copy with Person Served. (95)

Criminal Procedure—Copy of Warrant Summoning Witnesses Shall be Left with Witnesses. (95)

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

September 13, 1960

This is to acknowledge receipt of your letter of September 9, 1960, in which you state:

“Section 19.1-91 of the Code of Virginia provides as follows:

‘If such officer sees good reason to believe that an offense has been committed, he shall issue his warrant reciting the offense and requiring the person accused to be arrested and brought before a Court of appropriate jurisdiction of the county or corporation, and in the same warrant require the officer to whom it is directed to summon such witnesses as shall be therein named to appear and give evidence on the examination.’

‘I would like to have your opinion as to how said officer should summon such witnesses. Does he have to issue a witness subpoena for their appearance, or is it sufficient if he verbally informs them to be present in Court at the appointed time.’
Section 19.1-262 of the Code of Virginia states that the provisions of Sections 8-294 to 8-296, inclusive, shall apply to criminal as well as civil cases. Section 8-296 provides that a summons may be issued as prescribed in Section 8-44, commanding the officer to summon any person to attend on the day and place that such attendance is desired, etc. Section 8-44 provides that process from any court may be directed to the sheriff or sergeant of any county or city. Section 8-56 provides that any process may be served in the same manner and by the same person as prescribed for the service of a notice under Sections 8-51, 8-52 and 8-53, etc. Section 8-51 provides that a notice may be served by delivering a copy thereof in writing to the party in person. It would appear, therefore, that a copy of a summons for a witness should be left with the witness by the officer to whom it is directed.

I am, therefore, of the opinion that the officer to whom the warrant is directed should summons the witnesses listed therein by delivering a copy thereof to said witnesses.

ZONING—Planning Commission—Recommendation to Board of Supervisors to Reclassify—When Necessary. (319)

April 12, 1961

HONORABLE JOHN C. WEBB
Member, House of Delegates

This is in reply to your letter of April 5, relating to the application of John C. Webb and John C. Wood, trustees, to have rezoned from R-12.5 District to RM-2 District, certain real estate described in the application. It appears that the Planning Commission took the following action in connection with the application:

"Recommendation of the Planning Commission:

Based on information contained in the Apartment Plan recently completed by the Planning Staff and for reasons given by the Staff in its report the Commission recommends that the Board approve re-classification to RM-2 of the portion of the tract north of the southerly boundary of the Braddock Elementary School.

The Commission feels that the portion of the tract lying south of this school boundary should be considered for apartment development and recommends that action on that portion of the tract be deferred to afford the applicant opportunity to determine the question of whether access can be provided to this portion directly to Braddock Road and/or the Circumferential Highway.

The vote of the Commission on this resolution was unanimous."

The board of supervisors, in acting upon the recommendations of the Planning Commission, proceeded to approve for reclassification to RM-2 that portion of the tract north of the southerly boundary of the Braddock Elementary School and deferred action upon the portion of the tract lying south of this school boundary in accordance with the recommendation of the Planning Commission, pending additional information.

As I understand it, the question presented is whether or not the board of supervisors may now rezone or reclassify the southerly tract upon the original application and without the necessity of further action by the Planning Commission.

In my opinion, there is no statutory prohibition against the board of supervisors acting upon the pending application in the manner suggested in your letter—that is, I do not feel there is any necessity for a new application. However, since the Planning Commission deferred action on the southerly tract, in my opinion, it is necessary that the Commission make its recommendation as to the southerly tract before the matter may be acted upon by the board of supervisors. This would seem to be necessary under Section 15-847 of the Code. It is my understanding that Fairfax county has adopted its zoning ordinance under Article 2, Chapter 24, Title 15 of the Code.
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