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

From July 1, 1961 to June 30, 1962

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1962
Letter of Transmittal

July 19, 1962

HONORABLE A. S. HARRISON, JR.
Governor of Virginia
State Capitol
Richmond, Virginia

My dear Governor Harrison:

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, 1961 through June 30, 1962, and includes opinions rendered by the Honorable Frederick T. Gray, Attorney General from May 1, 1961 through January 13, 1962.

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,

ROBERT Y. BUTTON
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>Robert Y. Button</td>
<td>Culpeper County</td>
<td>Attorney General</td>
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<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>
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<tr>
<td>Francis C. Lee</td>
<td>Chesterfield County</td>
<td>Assistant</td>
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<tr>
<td>Robert D. McIlwaine, III</td>
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<td>Reno S. Harp, III</td>
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<td>Marie L. Waddill</td>
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<td>Eleanor W. Tilley</td>
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<td>Secretary</td>
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<td>Mabel G. Hurt</td>
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<td>Mary Kathryn Church</td>
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<td>Margaret E. Bennett</td>
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<tr>
<td>Helen B. Bowles</td>
<td>Goochland County</td>
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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., upon his resignation on April 30, 1961, and served until January 13, 1962.
<table>
<thead>
<tr>
<th>Name</th>
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<td>Edmund Randolph</td>
<td>1776-1786</td>
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<td>James Innes</td>
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<td>Philip Norborne Nicholas</td>
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<td>James Robertson</td>
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<td>Sidney S. Baxter</td>
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<td>Willis P. Bocock</td>
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<td>John Randolph Tucker</td>
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<td>Thomas Russell Bowden</td>
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<td>Charles Whittlesey (military appointee)</td>
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<td>James C. Taylor</td>
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<td>Raleigh T. Daniel</td>
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<td>James G. Field</td>
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<td>Frank S. Blair</td>
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<td>Rufus A. Ayers</td>
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<td>R. Taylor Scott</td>
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<td>R. Carter Scott</td>
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<td>A. J. Montague</td>
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<td>William A. Anderson</td>
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<td>Samuel W. Williams</td>
<td>1910-1914</td>
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<td>John Garland Pollard</td>
<td>1914-1918</td>
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<tr>
<td>*J. D. Hank, Jr.</td>
<td>1918-1918</td>
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<tr>
<td>John R. Saunders</td>
<td>1918-1934</td>
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<tr>
<td>+Abraham P. Staples</td>
<td>1934-1947</td>
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<td>†Harvey B. Apperson</td>
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<td>§J. Lindsay Almond, Jr.</td>
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<td>#Kenneth C. Patty</td>
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<td>A. S. Harrison, Jr.</td>
<td>1958-1961</td>
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<td>Frederick T. Gray</td>
<td>1961-1962</td>
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<tr>
<td>Robert Y. Button</td>
<td>1962-</td>
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*Hon. J. D. Hank, Jr., was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard and served until February 1, 1918.

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

†Hon. Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of Hon. Abraham 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., upon his resignation on April 30, 1961, and served until January 13, 1962.
CASES DECIDED IN THE SUPREME COURT OF APPEALS


Clark, Tom Willie v. Commonwealth. From Circuit Court, City of Martinsville. ABC violation. Affirmed.


Cunningham, W. K., Jr., Superintendent of the Virginia State Penitentiary v. Glenn W. Frye. From the Hustings Court, City of Richmond, Part II. Sent back with directions that a writ of habeas corpus be issued, returnable to the Circuit Court of Smyth County. Reversed.

Dean, Lizzie v. Commonwealth. From Hustings Court, City of Richmond. Forfeiture of motor vehicle for ABC violation. Dismissed for failure to comply with Rules.


Griffin, Leslie Francis, Jr., et al. v. Board of Supervisors of Prince Edward County. Mandamus to compel appropriation of funds for operation of public schools. Mandamus denied.

Hanbury, Joseph V. v. Commonwealth of Virginia. From Corporation Court, City of Lynchburg. Plaintiff in Error convicted of forgery in twenty-two similar cases. Action affirmed.


Hayden v. Commonwealth. From Circuit Court of Norfolk County. Lottery. Affirmed.

Hayward, Tempy Dearhart v. Commonwealth of Virginia. From Hustings Court, City of Richmond, Part II. Petition for writ of error. Denied.


REPORT OF THE ATTORNEY GENERAL


CASES PENDING IN SUPREME COURT OF APPEALS


Mawyer, Annie P. v. Commonwealth of Virginia. From Circuit Court of Nelson County. Plaintiff in Error convicted of driving while under the influence of intoxicants. Pending.

Parsley, William W. v. Commonwealth of Virginia. Petition for writ of error from the Circuit Court of New Kent County upon conviction of reckless driving and operating after operator's license revoked. Pending.


White, Samuel M., Jr. v. Commonwealth of Virginia. From Circuit Court, City of Richmond. Plaintiff in Error convicted of driving while license revoked. Pending.

Williams, Stancil v. Commonwealth. From Circuit Court of Norfolk County. Murder. Pending.

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


Dearhart, Hayward Tempy, Jr. v. Virginia. From Hustings Court, City of Richmond, Part II. Plaintiff in Error convicted of armed robbery. Certiorari denied.

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


Jones, Claude O., Jr., v. W. K. Cunningham, Jr., Superintendent, Virginia State Penitentiary. Reversed with directions that a plenary hearing be held by the District Court.


Yaege, Charles F. v. The Director of the Department of Welfare and Institutions. Judgment of the District Court reversed with the direction that a plenary hearing be held.

CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


Commonwealth of Virginia, Department of Mental Hygiene and Hospitals, v. Otis Oakes, et als. Circuit Court of Pittsylvania County. Decree entered directing payment for maintenance and care of incompetent.


Commonwealth of Virginia, ex rel. State Board of Medical Examiners v. C. E. Wright, Jr. Court of Law and Chancery, City of Norfolk. Defendant enjoined from the practice of chiropody.


In re Estate of Victor J. Stoessel. Circuit Court, Fairfax County. Suit for probate and construction of will. Probate granted and will construed.


May, Kathleen Burke v. State Highway Commissioner. Circuit Court, City of Richmond. Suit to set aside final order in condemnation proceedings. Dismissed upon motion of petitioner.

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 alnun as a noxious weed seed. Pending.


Pickett, Rupert J., v. City of Richmond. Hustings Court, City of Richmond, Part II. Suit to restrain enforcement of Virginia public assemblage statute. Dismissed.


Shell Oil Company v. Commonwealth of Virginia. Circuit Court of the City of Richmond. Application to secure reimbursement of taxes paid on aviation fuel. (Two cases). Pending.

Shore, James V., et al. v. Commonwealth of Virginia. Hustings Court, City of
Richmond, Part II. Suit to restrain collection of State peddler's license. Dismissed as to Commonwealth.


Tucker, L. Grafton, Committee for Irene Frances Bateman, an incompetent, v. Mary Old Bateman, et al. Circuit Court, City of Lynchburg. Decree entered directing committee to pay Western State Hospital for support of incompetent.


HABEAS CORPUS CASES

A total of 245 habeas corpus cases 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

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. Dismissed at cost of plaintiff.

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. Suspension period expired. Petition dismissed.


Emigh, Samuel Albert v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Fairfax County. Appeal from an action of the Commissioner revoking operator's license under Section 46.1-420. Dismissed on motion of petitioner.


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 operators' 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 operator's license under Section 46.1-417 and suspending
registration under Section 46.1-418. Action of the Commissioner affirmed and petition dismissed.

*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.

*Igle, 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. Dismissed on motion of petitioner.


*Mawyer, George Lee v. C. H. Lamb, Commissioner, Virginia Division of Motor Vehicles.* Circuit Court of the City of Richmond. Appeal from an action of the Commissioner revoking operating privileges under Section 46.1-417. Pending.

*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. Petition for temporary injunction restraining the Commissioner from revoking operators' licenses and suspending registration privileges under Section 46.1-442. Injunction dissolved.


*Nunnally, Robert E. v. C. H. Lamb, Commissioner, Division of Motor Vehicles.* Circuit Court of Chesterfield County. Petition to enjoin the Commissioner from revoking operator's license under Section 46.1-419. Injunction denied.


*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.

*Smith, Paul Kent v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Commonwealth of Virginia.* Circuit Court of Franklin County. Appeal from an action of the Commissioner revoking operator's license under Section 46.1-419. Action of 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.


Wilkerson, Robert Carroll v. Chester H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the County of Henrico. Appeal from an action of the Commissioner revoking operator's license under Section 46.1-419. Pending.

Wolfe, Paul Luther v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Augusta County. Appeal from an action of the Commissioner revoking operator's license and suspending registration certificates and plates under Sections 46.1-449 and 46.1-167.4. Notice of insurance furnished—suspension withdrawn—petition dismissed.

CASES TRIED OR PENDING BEFORE THE STATE CORPORATION COMMISSION OF VIRGINIA

(Complainants include the Attorney General of Virginia and the Commissioner of the Division of Motor Vehicles.)

Commonwealth of Virginia v. William H. Webb, G. & S. Leasing Corporation and Goad & Slocombe, Inc., (two cases covering the license years ending March 31, 1960 and 1961, heard together). Actions under Section 56-304.12 seeking to:

1. Revoke classification of certain vehicles as nonresident operating under reciprocity and classify same as resident requiring Virginia registration and licensing. Judgment for the Commonwealth.

2. Obtain judgment in the sum of $15,176.25 for license fees on vehicles held by the Commission to be required to display Virginia license plates. Pending.

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


LeCompte, 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. Grace G. Anderson, and 216 other similar suits for collection of unemployment compensation taxes. Circuit Court of the City of Richmond. Some were contested and some were not.


CASES TRIED OR PENDING IN THE CIRCUIT COURTS OF THE STATE IN WHICH THE STATE WATER CONTROL BOARD WAS INVOLVED


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

August 14, 1961
November 15, 1961
November 27, 1961
December 20, 1961
December 22, 1961
January 4, 1962
January 5, 1962
January 8, 1962
March 10, 1962
March 30, 1962
March 30, 1962
April 19, 1962
April 26, 1962
May 22, 1962

Robert Glory
Herman Grady Rector
Ernest M. Palinchak
William Lee Barber
Fred C. Evans, Jr.
Russell R. Swain
Robert Lee McKenny, Sr.
Paige R. Blakely, Jr.
William Meade
Cleveland B. Lewis
John Lee Bousman
Bonnie Connelly
Robert Elliott and Albert Elliott
Clarence Collins
OPINIONS

ALCOHOLIC BEVERAGE CONTROL LAWS—Forfeiture of Contraband—Procedure when no search warrant issued.


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

This is in reply to your letter of June 11th in which you request my advice as to the procedure, and as to the costs, in county courts for forfeiture of articles of personal property deemed contraband under § 4-53 of the 1950 Code of Virginia as amended, and seized by officers without a search warrant.

Section 4-55 of the Code appears to be the applicable section governing procedure for the forfeiture of such contraband articles where the seizure is made with a warrant. In sub-section (a) it is contemplated that proceedings may sometimes be had when the seizure was "without a warrant." In sub-section (b) providing for the hearing and determination, however, the procedure outlined appears to provide only for those cases in which the seizure was made with a warrant.

The legislature in 1960 adopted § 19.1-358, et seq., providing for forfeiture proceedings in a court of record in cases where a different mode of forfeiture is not prescribed. While the matter is not entirely free from doubt, it is suggested that the Commonwealth's Attorney may institute forfeiture proceedings under these sections when seizure is made without a warrant.

Section 19.1-371 is applicable to the costs of such proceedings in a court of record.

ANNEXATION—County Obligations—Bonds issued to provide sewerage system in area annexed—City must assume obligation.

HONORABLE LLOYD C. BIRD
Member, Senate of Virginia

This is in reply to your letter of January 2, 1962, from which I quote as follows:

"A question has been raised on which I need your advice."

"We can assume that a county issues general obligation bonds for the purpose of providing waste disposal facilities. While the bonds would be an obligation on the county, it is presumed that they would be retired by a service charge imposed on the users.

"The question is—what would happen in case a part of the county were annexed? We presume that the area annexed would be the revenue producing portion of the county, that is, the area using the disposal facilities.

"Your comments will be appreciated."

The answer to your question may be found in §15-152.12 of the Code of Virginia, which reads, in part, as follows:
REPORT OF THE ATTORNEY GENERAL

"§ 15-152.12 The court, in making its decision, shall balance the equities in the case, and shall enter an order setting forth what it deems fair and reasonable terms and conditions, and shall direct the annexation in conformity therewith.

* * * * *

"(b) To require the assumption by the city or town of a just proportion of any existing debt of the county or any district therein;

"(c) To require the payment by the city of a sum to be determined by the court, payable on the effective date of annexation, to compensate the county for the value of public improvements, including but not limited to the paving of public roads and streets, the construction of sidewalks thereon, the installation of watermains, or sewers, garbage disposal systems, fire protection facilities, bridges, public schools and equipment thereof, or any other permanent public improvements owned and maintained by the county at the time of annexation; and further to compensate the county in not more than five annual installments for prospective loss of net tax revenues during the next five years, to such extent as the court in its discretion may determine, because of annexation of taxable values to the city; . . ."

In my opinion, under the facts stated in your letter the City would be required to assume a part of the bonded indebtedness, which would be in proportion to the part of the waste disposal facilities acquired by the City. Likewise, I believe the City would be required to compensate the County for its "equity" in facilities acquired by the City.

ARREST—Search of Premises—Officer may search if in possession of arrest warrant.

Miss Ruth J. Sizemore
Clerk of the Town of Clarksville

November 20, 1961

This will acknowledge receipt of your letter of November 7, 1961, requesting my opinion on behalf of the Town of Clarksville as to when and under what circumstances a search of premises in which an accused is present may be made by an officer. In your letter you state, in part:

". . . the officer had a Criminal warrant for subject's arrest and the town would like a ruling from you if officers had the authority to enter subject's home or any dwelling that subject is believed to be in, without a search warrant."

I am enclosing a copy of an opinion rendered on April 26, 1957, by the then Attorney General, Honorable J. Lindsay Almond, Jr., in which he stated his opinion that in this State a policeman may make a forcible entry into a private dwelling and make an arrest without a warrant where he has heard a breach of the peace being committed, although he may not have seen the breach of the peace being committed. This is contained in the Report of the Attorney General (1956-1957), p. 83, and adds strength to my opinion that your inquiry must be answered in the affirmative.

The rule is well settled that an officer may enter premises for the purpose of executing a criminal warrant for the arrest of a person who is within such prem-
The rule is expressed in 6 Corpus Juris Secundum—Arrests—Section 14, page 615, as follows:

"The doctrine that a man's house is his castle has no application to criminal process, and, under the familiar rule that no man can have a castle against the king, a person who is armed with a warrant of arrest is entitled, after due demand, to break the outer or inner door of the dwelling house of the person sought, in order to arrest him for either felony or misdemeanor, at least where it amounts to a breach of the peace. Although there is some authority to the contrary, it is generally held that a person executing a warrant may break the outer or inner doors of a dwelling of another in which the person described in the warrant has taken refuge. This right may be exercised in the night as well as in the day."

Likewise, the rule is set forth in 4 American Jurisprudence—Arrests—Section 83, page 58, in the following manner:

"A sheriff or police officer, in making an arrest under a warrant, has authority to break open the outer or other doors of a dwelling house of the person whose arrest is directed by the writ, and enter and search the dwelling to arrest the offender, even though it is during the night time. This right to break the outer doors to make an entrance includes, of course, the right to break open the doors of different rooms and chambers in the house to make a thorough search of the premises. From this it follows that an officer who has a warrant for the arrest of a person in a house and who, upon being refused admittance, breaks the door, cannot be treated as a trespasser, even though, upon search, the defendant named in the process is not found or shown to be in the dwelling at the time. In order that an officer may have the right to enter, it is not necessary that the house be the property of the defendant; it is sufficient if it is a house in which, for the time being, he is dwelling."

Section 19.1-94 of the Code of Virginia provides that the officer to whom a warrant of arrest is directed may pursue an accused and arrest him anywhere in the State. It is, therefore, the opinion of this office that an officer who has a criminal warrant for a person's arrest may enter the person's home or any other dwelling in which the accused is located, or any premises where there is reasonable probability that the accused is within, without having a search warrant for such premises.

ARREST—State Police—May arrest and require identification of accused although off duty and not in uniform.

MOTOR VEHICLES—Traffic Violations—State police may enforce while off duty and out of uniform.

Honorable Meredith C. Dortch
Commonwealth's Attorney for
Mecklenburg County

This is to acknowledge receipt of your letter of September 14, 1961, in which you state in part:
"A state trooper, off duty, out of uniform, and operating his private automobile, observes a traffic violation.

"1. Can the officer, under such circumstances, legally stop the offender, arrest him or give him a ticket?

"2. Can the officer, under such circumstances, legally stop the offender, require his identity, and later obtain a warrant and arrest him?"

I shall answer these inquiries seriatim.

The first question is answered in the affirmative. All police officers enforcing the provisions of Chapter 1 through Chapter 4, Title 46.1 (which includes traffic laws) are required by § 46.1-6 of the Code to be uniformed at the time of enforcement or display their badge or other sign of authority. This office has ruled that a member of the State Police is not required to be in uniform in order to make a valid arrest. See Report of the Attorney General, 1951-1952), p. 152. I am enclosing a copy of that opinion, in which I concur. Sections 19-74 and 19-75, referred to in the opinion, are now §§ 19.1-95 and 19.1-96. Pursuant to the provisions of § 46.1-178 of the Code of Virginia, where a person is arrested for the violation of the provisions of the Motor Vehicle Code, Title 46 of the Code of Virginia, where the offense is punishable as a misdemeanor, the officer is required to release the individual if he agrees to appear and answer a summons which is issued by the officer on the spot. If the person apprehended refuses to promise in writing to appear in obedience to the summons, the officer should take such person to a judicial officer having authority to issue warrants and allow bail. Although the State Trooper may be off duty and not in uniform at the time, I am of the opinion that this section of the Code is applicable and must be observed.

The answer to your second question is also in the affirmative. The owner, operator or chauffeur of any motor vehicle, upon the request of a police officer in uniform or exhibiting his badge of authority, is required by paragraph (c) of § 46.1-7 of the Code to exhibit his operator's permit and the registration card of the vehicle to such police officer. The failure of the officer to arrest the person committing a traffic violation in his presence would not preclude the officer at a later time from obtaining a warrant and making an arrest thereunder. I am enclosing a copy of an opinion issued by the Honorable J. Lindsay Almond, Jr., then Attorney General, on February 23, 1951, in a letter to the Honorable Louis Lee Guy, a member of the House of Delegates, in which it was held that police officers may stop drivers and require them to display their license certificates. See, Report of the Attorney General, (1950-1951), p. 202.

ATTORNEYS—Fees—May be allowed for representing juvenile in criminal case.

CRIMINAL PROCEDURE—Costs—Attorney fee may be allowed for representing minor.

HONORABLE C. VINCENT HARDWICK
Judge of County Courts
Tappahannock, Virginia

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

"Section 16.1-173 of the Code provides that the Judge of the Juvenile and Domestic Relations Court shall appoint a probation officer or a discreet and competent attorney at law as guardian ad litem to represent the interests of the child or minor in certain instances. Quite
often a probation officer should not be appointed as guardian ad litem because of circumstances surrounding the case.

"In several instances lately I have had to appoint attorneys at law to serve as guardians ad litem of children and minors in preliminary hearings on felony charges.

"In your opinion do these lawyers have to serve without compensation or are they entitled to be paid from State funds on order of the Court."

I do not find that there is any specific authority contained in Title 16.1 of the Code for payment of a fee to an attorney at law for his services as guardian ad litem under an appointment pursuant to § 16.1-173 of the Code.

In my opinion, a reasonable fee for this service may be paid out of the appropriation for criminal charges under the provisions of § 19.1-315 of the Code. That section provides that—

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

Payments allowed under this provision for services performed in a court not of record for which no other provision is made for payment, may be authorized by following the procedure set forth in §§ 19.1-317 through 19.1-319.

AUTOMOBILE GRAVEYARDS—1962 amendment to § 33-279.3 of Code construed—When hedge or fence required.

HONORABLE JULIUS GOODMAN
Commonwealth’s Attorney for Montgomery County

This is to acknowledge receipt of your letter of May 17, 1962, requesting my opinion as to the application of § 33-279.3 of the Code of Virginia (1950) as amended by Chapter 8, Acts of 1962. This section reads as follows:

"(a) For the purpose of this section, 'automobile graveyard' means any lot or place which is exposed to the weather and upon which more than five motor vehicles of any kind, incapable of being operated, and which it would not be economically practical to make operative, are placed, located or found.

"(b) No automobile graveyard shall hereafter be established within five hundred feet of any State highway in this State.

"(c) No automobile graveyard shall hereafter be established within one thousand feet of any primary State highway, except on land which has been specifically designated or zoned for such use by the governing body of the county or city in which it is proposed to be established.

"(d) Any person who maintains an automobile graveyard, any part of which is within five hundred feet of any State highway, shall erect and maintain a fence or hedge around such automobile graveyard. Such fence or hedge shall be at least six feet high and sufficient to conceal such automobile graveyard from the view of a person standing at the same
level as such graveyard; provided, however, that no fence or hedge shall be required in any case when erection thereof would not effectively conceal a substantial portion of such automobile graveyard from the view of a person on such highway.

"(e) Any person violating any provision of this section shall be guilty of a misdemeanor and punished as provided by law. Each day's subsequent violation shall constitute a separate offense."

I shall answer your inquiries seriatim.

"Suppose an automobile graveyard is along the highway of the State and the land on which the automobile graveyard is located is down below the level of the highway, say for instance, fifteen or twenty feet below the level of the highway, does this section mean that the person operating such automobile graveyard would have to build his fence fifteen or twenty feet to reach the level of the highway, plus at least six feet above the level of the highway."

The statute requires a fence or hedge at least six feet high and sufficient to conceal the automobile graveyard from the view of a person standing at the same level as the graveyard. However, no fence or hedge is required unless it would effectively conceal a substantial portion of such graveyard from the view of a person on the highway. In the case you mention, a fence could be erected so that the graveyard would be concealed from the person standing on the same level thereof, but it would not be concealed from the view of a person on the highway. Therefore, the answer to your question is in the negative.

"An automobile graveyard having an unusual topography of running up and down a mountain side facing State highway or a primary State highway, where would the law hold that a person would have to be standing in order to cover that portion of the statute which states as follows:

"' x x x Such fence or hedge shall be at least six feet high and sufficient to conceal such automobile graveyard from the view of a person standing at the same level of such graveyard.'"

The statute contemplates in this connection that topography of the land where the graveyard is located be level or substantially level so that a fence of a reasonable height would in fact conceal such a graveyard from the view of a person on the highway. The law does not require a person to do a vain or useless thing.

"Thirdly, what would the law class as a substantial portion of such automobile graveyard being concealed from the view of a person on such highway?"

A definitive answer cannot be made to this question. The facts and circumstances surrounding the situation in each case would govern and would be the basis upon the finding that a substantial portion of such automobile graveyard was in fact concealed from the view of a person on such highway.

"Fourthly, does the subsection D also mean that if it takes six or sixty feet to conceal the view of a person standing at the same level as such graveyard, is that also the meaning as to the height of the fence necessary to be built to comply therewith?"
As stated above, unless the erection of such a fence or hedge conceals a substantial portion of the automobile graveyard from the view of a person on the highway, there is no requirement for the same. Obviously, a person could stand in close enough proximity to the fence to conceal such graveyard from his view, provided the fence is higher than his eye level (at least six feet in height). I do not believe that the statute contemplates the erection of a fence sixty feet in height. Unless the graveyard can be concealed from the view of a person on the highway by the erection of a fence of reasonable height, Section (d) of the statute would have no application.

BOARDS OF SUPERVISORS—Chairman—Vacancy to be filled by election by board.

HONORABLE WILLIAM H. LOGAN
Commonwealth's Attorney for Shenandoah County

June 18, 1962

This is in reply to your letter of June 11, 1962, which reads, in part, as follows:

"The Board of Supervisors of Shenandoah County has for many years past been reorganizing at the January meeting of each year, by electing its Chairman and assigning the different members to the several committees. For the past two or three years, I am advised, they have also elected a Vice-chairman, which is permissible under Title 15, Section 233 of the Code.

"On the 15th day of May, 1962, the Chairman of the Board of Supervisors resigned, and the question now has presented itself whether or not the Board should reorganize and elect its Chairman to complete the year or until a new reorganization, or whether or not the Vice-chairman would succeed to the title of Chairman. It would appear by inference upon reading Title 15-235 that a reorganization would be contemplated since it contains language 'shall direct its then Chairman to sign such record.'"

Section 15-233 of the Code reads as follows:

"They shall, at their first meeting after their election, choose one of their number as chairman, who shall preside at such meeting and all other meetings during the year, if present. The board may also elect a vice-chairman who shall, if so elected, preside at meetings in the absence of the chairman and may discharge any other duty of the chairman during his absence or disability. In case of the absence from any meeting of the chairman and vice-chairman, if any, the members present shall choose one of their number as temporary chairman."

This section does not provide that the vice-chairman shall automatically succeed to the position of chairman when that position becomes vacant. Therefore, in my opinion, the board should proceed to fill the vacancy by electing any one of its members to hold that position. Under a ruling by former Attorney General Staples, copy of which I am enclosing, whoever is elected to fill the vacancy will be entitled to hold the position until the end of the current four-year term for which the members of the board were elected. The enclosed opinion is published in the Report of the Attorney General (1940-'41), p. 17.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Compensation—Minimum fixed by statute.

HONORABLE W. CARRINGTON THOMPSON
Member, House of Delegates

This is in reply to your letter of January 6, 1962, relating to § 14-56.1 of the Code, which provides for the compensation payable to members of the boards of supervisors of the counties. This section provides that after January 1, 1960, the annual compensation to be allowed each member of the board in the county of Pittsylvania shall be "not less than six hundred fifty dollars."

You have requested my opinion as to whether or not there is any maximum for your county and, if so, what is the maximum.

Sections 14-56 and 14-57 of the Code, which apparently would have fixed a maximum for your county, have been repealed by Chapter 340, Acts of 1960, effective January 1, 1960. Since there is no limitation contained in § 14-56.1 with respect to the County of Pittsylvania, except as to the minimum salary, in my opinion, there is no limitation as to the maximum compensation each member may be paid.

BOARDS OF SUPERVISORS—Control Over Appropriations—Surplus funds revert to general fund for future appropriation.

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

This is in reply to your letter of November 29, 1961, which I quote:

"The Arlington County School Board recently advised the County Board of its unanticipated revenue during 1960-61, which results in a surplus of $372,439.93, copy of which is attached, and the Arlington County School Board then requested the County Board to appropriate this sum of money to the capital budget for 1961-62 to finance certain enumerated construction projects, copy of which is also attached.

"This poses several questions upon which I desire your advice. The first question is: 'Do these funds go into the general fund of the County?' The last sentence of Section 15-577 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.'

"Assuming that your opinion is that this money reverts to the General Fund, then several further questions arise. Section 15-576 of the Code reads in part:

"This budget shall be accompanied by (1) a statement of the contemplated revenue and disbursements, liabilities, reserves and surplus or deficit of the county, city or town as of the date of the preparation of the budget.'

"Since this surplus was not discovered or ascertained at the time of the consideration of the budget for 1961-62, must it now be held to be considered with the budget for 1962-63? If this money may now be
appropriated as a matter of interim budgeting, is it necessary under Section 15-582 to give at least 30 days' notice and a public hearing prior to the appropriation of this money?

"It has been estimated that this sum of money on the Arlington County budget amounts to approximately 10 cents on the tax levy. Is it, therefore, in effect, a tax increase if the consideration of this surplus in the 1962-63 budget is avoided by the procedure of interim budgeting and appropriation.

"Assuming that this money reverts to the General Fund and may now be appropriated, is it within the power of the governing body, after hearing and compliance with Section 15-582, to appropriate these funds (1) as requested by the Arlington County School Board, (2) for specific school purposes other than those requested by the Arlington County School Board, and (3) for general county use?"

In answer to your first inquiry, I am of the opinion that the funds in question must be paid into the general fund and thereafter be expended only when duly appropriated by the governing body of the county. This conclusion is borne out by § 58-839 of the Code, as well as § 15-577 of the Code.

In reply to your second inquiry, I am of the opinion that the governing body may appropriate this surplus at any time, whether through a monthly, quarterly, or semi-annual appropriation, or by holding over this sum for an annual appropriation for the 1962-63 fiscal year.

Your inquiry relating to the applicability of § 15-582 of the Code is now academic only, inasmuch as this section was repealed during the 1959 Special Session of the General Assembly. At any rate, I do not believe this surplus is an additional tax levy; hence, this section of the Code would not have been applicable.

The purposes for which these funds may be utilized depend upon the sources from which they emanated. It does not appear that any of the surplus was created from a tax levy specifically laid for school purposes. I am, therefore, of the opinion that the funds arising from county sources may be appropriated by the governing body for general county purposes. As to those State and Federal funds specially earmarked for school purposes, I believe they can be utilized only for the purpose for which they were appropriated. In appropriating these school funds the governing body is free to follow the recommendations of the School Board, or expend these funds for other school purposes.

BOARDS OF SUPERVISORS—Control Over Water System—May increase rate to finance extension of Service—Referendum not binding.

WATER AND SEWERAGE SYSTEMS—Boards of Supervisors Control—May increase rate to finance extension.

MR. ELMO O. BALDWIN
Supervisor, Madison District
of Amherst County

January 30, 1962

This will reply to your letter of January 13, 1962, in which you present the following situation and inquire:

"On November 7, 1961, a referendum was submitted to the voters of the Madison Heights Sanitary District for the issuance of $400,000
district bonds guaranteed by general revenue for the extension of water mains in the Sanitary District.

"The referendum was voted down. In spite of this, the majority of the Amherst County Supervisors is in favor of raising the rates of the present water users to finance the same extensions that were voted on in the referendum.

* * * * *

"Please give me your opinion as to the legality of the above question as soon as possible, as our next meeting will be on Feb. 5th, and I would like to have this information before that time."

The control and operation of the system to which you refer is vested by the Sanitary District Law—Code of Virginia (1950), §§ 21-113, et seq.,—in the Board of Supervisors of Amherst County, which is authorized "to fix and prescribe the rates of charge for the use of any such system or systems, and to provide for the collection of such charges." Section 21-118(5), Code of Virginia (1950), as amended. In Abbott v. Board of Supervisors, 200 Va. 820, the Supreme Court of Appeals of Virginia sustained an exercise of this power by the Board of Supervisors of Amherst County, following defeat of a bond issue referendum, and declared that, in the absence of fraud, "the discretion of the Board in raising rates is not subject to judicial interference." Id. at p. 823.

In light of the above-mentioned decision, I am of the opinion that the Board of Supervisors of Amherst County is not precluded by the result of the bond issue referendum from raising the rates of charge for use of the system in question.

BOARDS OF SUPERVISORS—Member as Member of Planning Commission—May not be paid extra.

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

This is in reply to your letter of February 6, 1962, in which you request my opinion as to whether the member of the County Planning Commission, who is also a member of the Board of Supervisors, may be compensated for his service as a member of the Planning Commission.

Section 15-916 of the Code of Virginia, relating to the compensation of county planning commissions, reads in part as follows:

The board of supervisors of any county may create and appoint a county planning commission for the county. The commission shall consist of not less than five nor more than fifteen persons, one of whom may be the county manager, county executive, county engineer or county director of public works, when such officers are provided for as parts of the county administration, and one of whom may be a member of the board of supervisors. * * * The board may provide for the payment of expenses and a reasonable compensation for members of the commission who are not county employees." (Emphasis added)
I am of the opinion that the words "county employees," as used in the foregoing quoted provision, was intended by the General Assembly to include the member of the board of supervisors as well as the county manager, county executive, county engineer or county director of public works. The intent would appear to be to compensate the members of the commission who are not already being compensated by the county.

I draw to your attention House Bill No. 10 which is now pending action in the current session of the General Assembly. This bill relates to the zoning, planning and subdivision of land, and should it be enacted into law, it is possible that the foregoing conclusion will be altered.

BOARDS OF SUPERVISORS—Members May Not Contract With County—Applies to member of partnership installing water system to be transferred to county.

February 8, 1962

HONORABLE ERNEST P. GATES
Commonwealth's Attorney for Chesterfield County

This is in reference to your letter of January 23, 1962, in which you enclosed a proposed agreement between Horner and Newell, a partnership, and the County of Chesterfield, Virginia, concerning the construction of a water system on some property in the County, wherein one of the owners is Irving G. Horner, Chairman of the Board of Supervisors of Chesterfield County.

You asked to be advised if this contract is in violation of § 15-504 of the Code of Virginia (1950), as amended.

The pertinent portion of this Section is as follows:

"No supervisor * * * shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors * * * or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency thereof, or in the sale or furnishing of supplies or materials for such county * * * (Emphasis added)

This office rendered an opinion on May 31, 1950, to the Honorable R. A. Bickers, Commonwealth's Attorney for Culpeper County, in which it was held that §15-504 of the Code clearly prevented a corporation from selling parts to a local school board, since a member of the board of supervisors had a controlling interest in such corporation. See Report of the Attorney General, (1950-1951), pp. 29-30.

I am of the opinion that the partnership interest which Mr. Horner, a member of the Board of Supervisors, has in the subject of the contract prevents the partnership from contracting with the County.

REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Procedure to reconsider measure acted upon at previous meeting.

April 2, 1962

HONORABLE REGINALD H. PETTUS
Commonwealth's Attorney for Charlotte County

This is in reply to your letter of March 30, 1962, which reads as follows:

"At a recent meeting of the Board of Supervisors, the Board voted on an issue 4 to 2. The meeting was then adjourned to a later date, at which time two of the members of the previous meeting were absent. The same issue was again brought up, and the vote rescinded the earlier action due to the absence of the two members.

"One of the supervisors has asked my opinion as to the propriety of this action. I told him that I did not know, but that the matter could be brought up at the next meeting; however, he requested that I write to you for your opinion."

In my opinion the only question here is whether or not there was a quorum present at the adjourned meeting. In Charlotte County the board consists of six supervisors and, therefore, under §15-242 of the Code four would constitute a quorum. I know of nothing that would prevent the four members who met at the adjourned meeting from acting upon a motion to reconsider the vote previously taken.

BOARDS OF SUPERVISORS—Rewards—No authority to offer reward when crime committed in adjoining county.

July 12, 1961

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

This is in reply to your letter of July 7, 1961, which I quote in full:

"Section 15-573 of the Code authorizes the Board of Supervisors of a County to offer a reward not exceeding $500.00 for the arrest and conviction of a criminal 'when any felony has been committed or attempted to be committed therein.'

"The question propounded to me is this: Where a resident of this County has been brutally murdered approximately a mile over the line in an adjoining County, would the Supervisors of this County have authority to offer a reward for the arrest and conviction of the felon?"

I am of the opinion that your inquiry must be answered in the negative. Inasmuch as the General Assembly has conferred express authority upon the boards of supervisors of the counties to offer rewards under conditions specified in §15-573 of the Code, it is doubtful that there exists any authority to offer rewards in any other instances not contemplated by that statute. In order to offer such a reward, I believe the offense must have occurred within the county wherein the reward is to be offered.
BONDS—State Officers—Section 85 of Constitution interpreted.

PUBLIC OFFICERS—Bonds—Section 85 of Constitution interpreted.

MR. L. DANIEL CROOKS
Treasurer, Medical College of Virginia

April 3, 1962

This is to acknowledge receipt of your letter of March 16, 1962, in which you enclosed the Comprehensive Dishonesty, Disappearance and Destruction Insurance Policy which purports to cover all the employees of the Medical College of Virginia. You state that the question has been raised whether or not this insurance policy complies with the requirements set forth in Section 85 of the Constitution of Virginia.

Section 85 of the Constitution of Virginia is as follows:

“All State officers and their deputies, assistants or employees, charged with the collection, custody, handling or disbursement of public funds, shall be required to give bond for the faithful performance of such duties; the amount of such bond in each case, and the manner in which security shall be furnished, to be specified and regulated by law.” (Italics supplied).

This office has held that this section of the Constitution is not self-executing. Report of Attorney General, (1942-1943), p. 181. There does not seem to be a general statute in conformity with the terms of this section of the Constitution, which would require all persons who handle public funds to be covered by such a bond. I do not believe that §49-12 is such a statute, as we find the following language therein:

“Every bond required by law to be taken or approved by or given before any court, board or officer, unless otherwise provided, shall be made payable to the Commonwealth of Virginia, with surety deemed sufficient by such court, board or officer. Every such bond required of any person appointed to or undertaking any office, post or trust, and every bond required to be taken of any person by an order or decree of court, unless otherwise provided, shall be with condition for the faithful discharge by him of the duties of his office, post or trust . . . .” (Italics supplied).

This would limit its application to these cases when bonds are required by law.

The Medical College of Virginia is a public corporation and as such a State Institution owned by the Commonwealth of Virginia. It is operated and managed by a Board of Visitors appointed by the Governor. Attention is invited to §§23-50, 23-50.1, 23-50.2 and 23-50.3 of the Code of Virginia, as amended, which sections prescribe the powers, functions and purposes of the College, etc. The Board of Visitors must prescribe the policy to be followed in the administration of the College.

The above section of the Constitution serves as a declaration of public policy of the Commonwealth with respect to the matter of surety bonds covering public officers and employees. Report of Attorney General (1942-1943), p. 181. This office has heretofore held that blanket bonds may be furnished as long as they are conditioned upon the faithful performance of duty on the part of the employees concerned. Report of Attorney General, (1950-1951), p. 90.

I can find no statute which directs that the Board of Visitors of the Medical College have its employees bonded. Hence, whatever bond is furnished would not
be a statutory bond but, as a matter of policy, the Board of Visitors should require the inclusion of the faithful performance clause therein. The College has undoubtedly attempted to follow the general policy of the State by securing the said insurance policy.

An examination of this insurance policy discloses that it is equivalent to a Public Employees' Honesty Blanket Bond. However, it does not comply with the general policy of the State, supra. The faithful performance bond is much broader than the so-called “honesty bond”. The kind of bond which should be used in this instance is either the “Public Employees' Faithful Performance Blanket Bond,” or the “Public Employees’ Faithful Performance Blanket Position Bond,” depending upon the circumstances of the particular situation existing. The selection of the class of bond is in the discretion of the administrative authorities of the department or institution involved.

Therefore, I am of the opinion that the aforesaid insurance policy does not comply with the general policy of the State which is, that there should be a faithful performance bond covering public employees who handle public funds.

BONDS—Surety on Bail Bonds—Agents of authorized insurance company not professional bondsmen.

INSURANCE—Surety on Bail Bond—Agents of authorized insurance company not required to obtain professional bondsmen license.

HONORABLE WILLIAM B. S P O N G, JR.  
Member, Virginia State Senate

October 5, 1961

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

“I have been requested to obtain an opinion from your office concerning the right of the City of Portsmouth to require a business license from the agent for United Bonding Company. This company has qualified to transact fidelity and surety insurance in the Commonwealth of Virginia and does so through agents. The agents of course, are simply performing as professional bondsmen.  

“The City has charged one of the agents of United Bonding Company with violating the City Business License Ordinance. I suppose the related question to this matter would be: Does the specific ordinance of the City of Portsmouth take precedence over the exemption spelled out in the last paragraph of Section 58-371.2 of the Code?”

As I understand your letter, United Bonding Company is the surety upon the bail bonds and its agent merely executes such bonds on behalf of the surety. Under such circumstances, the agent, in my opinion, is not acting as a professional bondsman. United Bonding Company, being qualified to write fidelity and surety insurance, is, of course, exempt from the provisions of §58-371.2 and, therefore, counties and cities have no authority to enact or enforce an ordinance requiring the bonding company to obtain a license as a professional bondsman.

Any ordinance which requires an agent of an exempt bonding company to obtain a license under §58-371.2 is, in my opinion, not enforceable.

Your question, therefore, is answered in the negative.
CITIES—Council of City of Newport News may appoint new members to school board prior to termination of existing terms.

SCHOOLS—School Boards—When appointed by City of Newport News.

HONORABLE FRED W. BATEMAN
Member, Virginia State Senate

June 8, 1962

This is in reply to your letter of June 6, 1962, in which you request my opinion with respect to certain questions presented by Mr. Harry E. Atkinson in a letter to you dated June 6, 1962. I quote from that letter as follows:

"Facts:
"The present City Council of Newport News was elected for a term of four (4) years and took office on June 30, 1958, the term thereof to end on 1 July 1962. (Newport News City Charter Sec. 3.01, Chapt. 141. Acts of Assembly 1958) The present council on 1 July 1958 appointed members of the school board for a term of 4 years to commence on 1 July 1958. (Charter Sec. 19.02)
"Of the present 7 member council only 3 of them are candidates for re-election in the general election set for 12 June 1962. The successful candidates in the councilmanic general election will hold their organizational meeting on July 2, 1962, inasmuch as 1 July falls on a Sunday in 1962. (Charter Sec. 4.03)

Problem:
"The present council proposes to appoint to the school board persons to fill expiring terms of those incumbent members appointed for a term of 4 years on 1 July 1958.

"Question Presented:
"1. Will a vacancy occur on the school board during this council's official life due to expiration of the term of office of the incumbent school board members who were appointed for a term of 4 years commencing on 1 July 1958?
"2. Assuming the above question to be answered in the negative, can this outgoing council fill an office that will not become vacant during the term of this council’s official life?"

Section 19.02 of the Charter of Newport News reads as follows:

"§ 19.02. The school board of the Consolidated City shall be composed of seven trustees who shall be chosen by the council to serve for a term of four years; provided, however, that as to the term of office of the trustees of the first school board so appointed, four of said trustees shall be appointed for a term of two years and thereafter all of said trustees shall be appointed for a term of four years. Any vacancies occurring on the school board shall be filled by the city council for the unexpired term. All trustees shall be residents of the City."

The School Board of Newport News is appointed under this charter provision, and § 22-89 of the Code is not applicable. Inasmuch as the terms of the four trustees will expire at the same time the terms of the members of the City Council will expire, it follows that there will not be any actual vacancies on the School
Board during the normal life of the present Council. The answer to the first question is, therefore, in the negative. Furthermore, the present members of the School Board will continue to hold office subsequent to July 1, 1962, until their successors have been appointed and qualify. See Section 33 of the Virginia Constitution. The reference to vacancies in § 19.02 of the City Charter relates to vacancies generally caused by resignation or death of a member.

With respect to the second question, the Council of the City is a continuing body and its authority to exercise its powers is not affected by the fact that at a certain time the membership of the Council may change. In the absence of a statute or charter provision to the contrary, the Council may exercise the same powers at the end of the term for which it was elected as may be exercised by the Council—composed of new members—at the beginning of a term. The power of a council to act is not dependent upon the length of time the members may continue to hold the office—the power is dependent upon the legality of the membership at the time action is taken.

I can find nothing in the City Charter or State statutes that would prohibit the Council of Newport News from electing members of the School Board prior to July 1, 1962, for terms of four years, commencing on July 1, 1962.

For the reasons stated, I am of the opinion that the second question must be answered in the affirmative.

CITIES—Council—Has no power to amend charter—May not contract with city.

HONORABLE W. GARLAND TURNER
Commissioner of the Revenue for
Pittsylvania County

May 9, 1962

This is in reply to your letter of May 7, 1962, in which you present the following questions:

"1. Is it legal for a city council to amend its city charter, to allow city Councilmen or other city officials to do business with the city, overriding the 1950 Code of Virginia as amended in Section 15-508, pertaining to city or town officials not to have interest in contract with, or claim against, city or town?

"2. Is it legal for a city council to appropriate city taxpayers' money to reimburse real estate developers for improvements to their property in certain sections of the city?"

A city council does not have the power to amend a city charter. This can be done by the General Assembly pursuant to the provisions of Section 117 of the State Constitution. If the charter of the city in question was amended by the General Assembly so as to provide special provisions contrary to § 15-508 of the Code, in my opinion the charter provision prevails in that city.

With respect to your question 2, it will be necessary for me to have a copy of the charter provision granting such authority to the council, and also a copy of the resolution of council.
CITIES—Law Enforcement—Sergeant has authority under § 15-417 of Code to return prisoners under § 19.1-74 of Code.

SHERIFFS AND SERGEANTS—City sergeant is official to return prisoners under § 19.1-74 of Code.

May 28, 1962

HONORABLE ALFRED H. GRIFFITH
Commonwealth’s Attorney for Buena Vista

This is in reply to your letter of May 25, 1962, which reads as follows:

"I would appreciate if you would advise me of any law that gives the City Sergeant EXCLUSIVE right to go after prisoners.

"It is my opinion that the Chief of the Police Department has the right to either go or designate someone else to go for him to return prisoners from another City, County or State to the local jail, but that the exclusive right is not given to the Sergeant of the City.

"There is also a question: Can the City Manager give this exclusive right to the City Sergeant and not to the Police Department?"

A city sergeant is a constitutional officer, and his duties are such as may be prescribed by the provisions of the city charter and general law. The provisions of § 15-417 of the Code and § 3.942 of the Charter of Buena Vista are applicable. Under these sections the authority, powers and jurisdiction of the sergeant are the same as granted to sergeants of other cities of the same class in this State. The code section to which I have referred provides that the city sergeant in this State shall exercise the same authority and powers of sheriffs in counties. Neither the city council nor the city manager, in the absence of specific statutory authority, may diminish the powers of a city sergeant. I find no such authority in the present Charter of Buena Vista. While the city council may by ordinance charge the city sergeant with certain responsibilities, it, of course, cannot take away any of his statutory authority.

The sergeant is one of the officers designated by statute to apply to the Governor for a requisition for the return of escaped convicts. See § 19.1-74 of the Code. The chief of police would have no authority in matters of this nature.

The police force of the City of Buena Vista is established under §§ 5.907 through 5.910 of the City Charter, designated as Article 5A of Ch. 325, Acts of 1952. (See § 2 of Ch. 361, Acts of 1954, at p. 465). The members of the police force are appointed by the city manager who is appointed by the city council. See Charter §§ 3.907 and 3.909. The duties of the police are prescribed in §§ 5.907 through 5.910, and are subject to the supervision of the city manager.

In light of these charter and statutory provisions, I must conclude that the sergeant of the City of Buena Vista is the chief law enforcement officer and may exercise the authority to determine who shall be designated to apprehend persons charged with criminal offenses within the city—such persons being found in another jurisdiction. He is the principal officer of the courts of the city in the enforcement of the criminal statutes of the State.

There is also a duty upon all police officers of the city to enforce the criminal laws of the State and the ordinances of the city. They are specifically charged with the duties prescribed in § 5.909 of the charter of the city.

In answer to your second question, inasmuch as the police force is under the direction of the city manager, in my opinion, the manager may direct the chief of police to refer all such matters to the city sergeant.
CITIES—Property—Sale of facilities financed by bond issue—Disposition of proceeds.

WATER AND SEWERAGE—Systems—Sale-Disposition of proceeds when facilities financed by bond issue.

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

October 6, 1961

This is in reply to your letter of October 4, 1961, to which you have attached a letter from the treasurer of the City of South Norfolk, together with certain copies of proceedings had in connection with the issuance of bonds for the purpose of constructing a sewer system for the city, and copies of contracts between the city and Hampton Roads Sanitation District Commission relating to the sale by the city to the Commission of certain sewerage facilities. A part of this sewer system was built from bond issue funds and a part from general fund appropriations.

The question presented is whether the proceeds of the sale to the Commission of the sewer system that was financed from the sale of bonds should be held in reserve to be used for the retirement of the bonds now outstanding.

The exhibits that you have presented show that the bonds are general obligations of the city. They are not revenue bonds which are payable from service charges, and no lien upon the system was created by the issuance of the bonds. Under such circumstances, it is my opinion that the governing body of the city may direct that the proceeds of the sale of sewer systems shall be placed in the general fund, without regard to the source of the funds from which they were constructed.

This opinion is based upon the assumption that the charter of the City of South Norfolk does not contain any provisions relating to the disposition of funds received from a sale of this nature, and that the city council had authority to contract with the Hampton Roads Sanitation District Commission in such manner.

CITIES—Second class unless population exceeds ten thousand.

HONORABLE FRANCES R. ROBENS
Clerk, Circuit Court of Buena Vista

January 29, 1962

I am in receipt of your letter of January 22, 1962, in which you present the following situation and inquiry:

"In 1892, by a Special Act of the Legislature, the town of Buena Vista was incorporated as a city. Our records fail to show whether Buena Vista was incorporated as a city of the first or second class. At that time Buena Vista had a Corporation Court. In 1937 the Corporation Court was changed to a Circuit Court and was included in the Eighteenth Judicial Circuit. There is some confusion existing now, as to whether or not Buena Vista was originally chartered as a city of the first class and, if so, whether or not such classification is still in force and effect. I would appreciate a ruling from the Office of the Attorney General as to whether or not, at this time, Buena Vista is classed as a first or second class city."
So far as I have been able to discover, the Charter of the City of Buena Vista, which was approved February 15, 1892, does not specify that the City of Buena Vista was originally incorporated as a city of the first class. See, Acts of Assembly (1891-92), Chapter 225, p. 364, et seq. Further, in this connection, Section 98 of the Constitution of Virginia (1902), in part, provides:

"Cities having a population of ten thousand or more, as shown by the last United States census, or other census provided by law, shall be cities of the first class and those having a population of less than ten thousand, as thus shown, shall be cities of the second class."

Since it does not appear that the City of Buena Vista was originally incorporated as a city of the first class, or that the city has attained a population of ten thousand inhabitants or more and undergone transition to a city of the first class as prescribed in § 15-110, et seq., of the Virginia Code, I am of the opinion that Buena Vista—having a population of 6,300 according to the 1960 census—would be a city of the second class.

CITIES AND TOWNS—Transition to City of Second Class—Town officers to continue as city officers until successors qualify.

PUBLIC OFFICERS—Town officers continue as city officers upon transition to city of second class.

HONORABLE JOHN H. RUST
Attorney for the City of Fairfax

July 11, 1961

This is in reply to your letter of July 6, 1961, in which you make several inquiries relating to the transition of the Town of Fairfax into a city of the second class pursuant to Chapter 6 of Title 15 of the Code of Virginia. You state that the Town became a City on June 30, 1961 by order of the Circuit Court of Fairfax County.

Your first inquiry relates to the establishment of a court not of record. Under the charter granted the Town of Fairfax (Chapter 357, Acts of Assembly 1954) the Mayor of the Town has jurisdiction over the Municipal Court. This court has only the limited jurisdiction specified in the charter or in § 16.1-70 of the Code of Virginia, (1950), as amended.

Section 16.1-37 of the Code of Virginia, (1950), as amended, (a portion of Chapter 2 of Title 16.1) reads, in part, as follows:

"The trial justice court in each county on July 1, 1956, shall continue as the county court of such county, with territorial jurisdiction over such county and over any city within the county for which a municipal court with general civil and criminal jurisdiction has not been established. * * *

Since the City of Fairfax does not have a municipal court with general civil and criminal jurisdiction, I am of the opinion that the County Court of Fairfax continues as the court not of record within the City of Fairfax, and the Mayor continues as Judge of the Municipal Court of the City of Fairfax.

All civil and criminal jurisdiction normally exercised by the County Courts, including preliminary hearings in felony cases arising in the City of Fairfax, should be conducted by the County Court of Fairfax County.
Your second inquiry relates to the responsibilities of the Justices of the Peace who previously served with the Town of Fairfax. In similar vein you have also inquired as to whether you are now disqualified from acting as City Attorney, in view of the fact that you reside outside the corporate limits of the City of Fairfax.

Section 15-83 of the Code provides, in part, that all charter provisions of a town not in conflict with Chapter 6 of Title 15 of the Code are to continue in effect when the town becomes a city of the second class, and the town officers are to continue as city officers until their successors are elected or appointed and qualified. I am of the opinion that this section applies with equal force to the Justices of the Peace and the Town Attorney previously serving the Town of Fairfax.

While the General Assembly expressly provided that the residence of county officers within a town which is transposed into a city of the second class shall have no effect upon the ability to hold such county office, no similar provision has been made for town officers who continue to reside in the county following the transition into a city of the second class. Section 15-95 of the Code provides as follows:

"All other officers of the town shall be and continue officers of the city until the expiration of the term for which they were chosen or until they are removed according to law or their offices abolished by the common council."

In view of this express provision and the language in § 15-83 of the Code, I am of the opinion that you may continue to serve as City Attorney despite the fact that you reside outside the corporate limits of the City of Fairfax.

You have also asked to be advised as to whether or not the present officers should be elected in November, 1961. Section 15-90 of the Code provides for the election of the mayor and council at the next general election of city officers to be held on the second Tuesday in June after the city is declared to be a city of the second class. With respect to the City of Fairfax, this election should be held on the second Tuesday in June, 1962.

As to all other municipal offices, the election for the City should be held at the general election of State officers in November, 1961, pursuant to § 15-91 of the Code.

CIVIL PROCEDURE—Annexation—Legislature may change procedure in pending litigations.

CITIES AND TOWNS—Annexation Procedure—General Assembly may amend procedure applicable to pending litigation.

February 13, 1962

HONORABLE WILLIAM F. PARKERSON, JR.
Member, House of Delegates

This is in reply to your letter of January 11, 1962, addressed to my predecessor in office, in which you ask to be advised as to whether the General Assembly of Virginia may amend the statutory procedure relating to annexation by municipalities as set forth in §§ 15-152.2, et seq., of the Code and, more specifically, whether such amendments may be made applicable to judicial proceedings which have been instituted, but have not proceeded to final judgment at the time such amendments become effective.

I am of the opinion that your inquiry is to be answered in the affirmative.

The extension or contraction of municipal corporate limits prior to the adoption
of the present Virginia Constitution was purely a legislative function. See *Town of Strasburg v. Chandler*, 124 Va. 91, 97 S. E. 313. The present status delegating certain functions to the judiciary have their genesis in Section 126 of the Constitution of Virginia, which reads as follows:

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

The constitutionality of various provisions of the statutes adopted pursuant to this section of the Constitution has been sustained in several Virginia cases. See cases cited in *Town of Falls Church v. County Board of Arlington County*, 166 Va. 192, 184 S. E. 459.

While I am aware of no decided case precisely on point, I entertain no doubt as to the power of the General Assembly to alter or abolish existing statutory procedures for annexing new territory even though there may be pending cases instituted prior to the effective date of such legislative enactments.

The municipalities of Virginia derive their powers from the State. They are political subdivisions of the State, and any legislation regulating or affecting them does not amount to a contract, the obligation of which cannot be impaired by modifying or repealing the legislation in question without impinging upon the Constitution of the United States prohibiting the impairment of the obligation of contracts. Neither can it be said that such amending legislation deprives anyone of due process of law, nor denies equal protection under the law. As succinctly stated by the United States Supreme Court in the case of *Hunter v. Pittsburgh*, 207 U. S. 161:

"* * * The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. * * * The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.*"

CIVIL PROCEDURE—Bankruptcy—Utility service charges owed municipality may be discharged.

TOWNS—Debts Due from Bankrupt—May be discharged—Town must have notice of proceeding.

HONORABLE B. J. DAVIS
Trial Justice for the
Town of Amherst

April 16, 1962

This is in reply to your letter of March 27, 1962, in which you request my opinion as to whether obligations owed a municipality are dischargeable in a bankruptcy proceeding of which the municipality had no notice.

By virtue of Section 17 (a) of the Bankruptcy Act, taxes are the only debts due a municipality which are not dischargeable in bankruptcy merely because the
municipality is a governmental agency. It is quite possible, however, that the various obligations which have been incurred by the bankrupt here in question have not been discharged, in view of the fact that the municipality was not given notice of the bankruptcy proceeding. Section 17 of the Bankruptcy Act reads, in part, as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, County, district or municipality (2) are liabilities for obtaining money or property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; * * * ."

CIVIL PROCEDURE—Costs—Service of Process—Fee to be charged for serving warrant with affidavit attached.

COURTS—Costs—Fee for serving warrant with affidavit attached.

HONORABLE STUART F. HEAD
Judge, County Court of Albemarle County

September 26, 1961

This is in reply to your letter of September 25 in which you request my advice as to the officer's fee for serving a warrant or motion for judgment in an action on contract, to which is attached an affidavit and copy of account as provided in § 8-511 of the Code. You refer to § 16.1-88 wherein it is provided that "the affidavit and the account if there be one may be attached to the warrant or motion, in which event the combined papers shall be served as a single paper."

The fee allowed to an officer for service of a process of this nature and making return thereof is fixed at seventy-five cents by Code § 14-116(1). When the affidavit and the account are attached to the warrant or motion for judgment, it becomes a single paper or a single process. Only one service is made and only one return is required of the officer. The return on the process should show that the warrant or motion for judgment as the case may be, was executed by delivering a copy of the process, with affidavit and account attached, to the person named in the warrant.

In my opinion the answer to your question is in the negative.
CLERKS—Circuit Court—Duty to issue execution in criminal cases.

CRIMINAL PROCEDURE—Expense of Prosecution—Clerk to issue execution.

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

April 25, 1962

This is to acknowledge receipt of your letter of April 20, 1962, in regard to the duty of clerks of circuit courts to issue executions on criminal judgments in compliance with § 19.1-320 of the Code of Virginia (1950), as amended. You ask my opinion as to whether this statute has become more or less obsolete and if the clerks should continue to perform the duties prescribed therein.

Section 19.1-320 reads as follows:

“In every criminal case the clerk of the circuit or corporation court in which the accused is convicted, or, if the conviction be before a court not of record, the clerk to which the judge thereof certifies as aforesaid, shall, as soon as may be, make up a statement of all the expenses incident to the prosecution, including such as are certified under the preceding section, and execution for the amount of such expenses shall be issued and proceeded with; and chapter 14 (§ 19.1-323 et seq.) of this title shall apply thereto in like manner as if, on the day of completing the statement, there was a judgment in such court in favor of the Commonwealth against the accused for such amount as a fine.”

At the time the execution is issued, the same should be docketed in the judgment docket book.

It is noted that when the statutes concerning criminal prosecutions were revised and amended by Chapter 366, Acts of 1960, this section was retained and no material amendments were made. From a practical standpoint, I realize that there is little reason to warrant the procedure thereunder; however, inasmuch as the statute still remains in effect and the Legislature has not seen fit to repeal it, I am of the opinion that it is the duty of clerks of circuit courts to administer the same and execute the duties prescribed therein.

Attention of the legislature should be called to the problem created by this statute so that it may be repealed, amended or modified.

CLERKS—Compatibility—Acting as attorney in fact for surety company—May be improper.

HONORABLE SAMUEL W. SWANSON
Clerk, Circuit Court of Pittsylvania County

January 2, 1962

This is in reply to your letter of December 22, 1961, which reads as follows:

“I will appreciate it very much if you will give me your opinion on
the following question: Is it legal and proper for a Clerk or Deputy Clerk of a Circuit Court of this Commonwealth to execute surety bonds as attorney in fact for surety companies in their office? I refer to bonds of Special Commissioners, Administrators, Executors, Guardians, etc.

"I am quite sure an opinion has been handed down from your office on this question in recent years. If so, send me a copy of same."

I find that this office has not published an opinion with respect to the question presented by you.

I am not aware of any statute that would prohibit a clerk from representing surety companies as agent and attorney in fact in writing bonds of the type mentioned by you. In some instances the clerk may have the right to exercise discretion in determining the amount of bond required by fiduciaries who qualify in his office, which might raise a question as to the propriety of the clerk determining the amount of the bond, thus affecting the amount of the premium and the commissions thereon to which the clerk, in his capacity as agent, would receive for his services.

The clerk, of course, is prohibited under the provisions of § 15-504 of the Code from acting as agent in such transactions where the premium or any part thereof is paid out of county funds.

CLERKS—Fees—Effect of amendments to §§ 14-132 (6) and 19.1-337 of Code.

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

June 29, 1962

This is in reply to your letter of June 28, 1962, which reads as follows:

"I have been checking the advance sheets of the last session of The General Assembly and I find on page 874, Chapter 546 two amendments to the Code of Virginia.

"The first being an amendment to Section 14-132(6) changing the clerk's fee from $0.25 to $1.25 and the second being an amendment to Section 19.1-337 leaving out the reference to the Commonwealth.

"I would like to have your opinion on the question of what the fee is that should be taxed in the County Court for the Clerk of the Circuit Court. Should it be a total of $2.50, being made up of $1.25 under each of the aforementioned sections, or is it $1.25?

"I would appreciate an early reply as there seems to be some doubt in the minds of some of us as to the correct amount."

The effect of the amendments to §§ 14-132 and 19.1-337 of the Code of Virginia, as contained in Chapter 546 of the Acts of Assembly of 1962, is, in my opinion, as follows:

It increases the amount to be collected by the county court and transmitted to the clerk of the court of record under paragraph 6 of § 14-132 by one dollar—that is, the clerk's fee under this section is increased from twenty-five cents to one dollar and twenty-five cents.

The effect of the amendment to § 19.1-337 was to delete the references to Commonwealth cases. In my opinion this amendment has the effect of allowing the clerk a fee of one dollar and twenty-five cents for his services performed
REPORT OF THE ATTORNEY GENERAL

under §§ 19.1-335 and 19.1-336, whether or not the case was a Commonwealth case or for a violation of a local ordinance.

These amendments do not authorize a fee of $2.50. The fee remains at $1.25.

CLERKS—Fees—Maximum allowed for services to board of supervisors under § 33-160 of Code—May not exceed maximum compensation under § 14-155 of Code.

BOARDS OF SUPERVISORS—Clerks—Fee allowed under § 33-160 of Code—When clerk may not accept.

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

This is in reply to your letter of April 27, 1962, which reads as follows:

"Section 33-160 of the Code of Virginia as amended, provides that the Clerk of the Board of Supervisors 'shall receive for the duties to be performed by him under the provisions of this chapter, compensation to be fixed and allowed to him by the board or other governing body not less, however, than one hundred dollars and not to exceed three hundred dollars per annum.'

"I am now receiving from the Board of Supervisors of this county, the sum of Two hundred dollars pursuant to this section.

"Will you advise me if I am entitled to compensation under this section, as the payment of same to me has been questioned?"

Section 33-160 of the Code of Virginia, (1950), as amended, reads as follows:

"Except in the county of Henrico the clerk of the board of supervisors or other governing body of a county shall receive for the duties to be performed by him under the provisions of this chapter, compensation to be fixed and allowed to him by the board or other governing body not less, however, than one hundred dollars and not to exceed three hundred dollars per annum."

If the foregoing statute is the only Code section here involved, you are entitled to any sum fixed by the Board of Supervisors between the minimum and the maximum amounts specified. While you did not state the basis for this payment having been questioned, it is possible that the amount allowed by the County under this section has brought into operation §§ 14-149, 14-150 and 14-155 of the Code relating to the maximum compensation to be allowed a clerk of court. Any compensation allowed you by the Board of Supervisors in excess of $2500.00 must be taken into consideration when determining your total annual compensation pursuant to § 14-155 of the Code. It is entirely possible that the payment to you pursuant to § 33-160 of the Code could result in your receiving more than $2500.00 from the County Treasury and, therefore, would be taken into consideration when determining the amount to which you are entitled each year prior to remitting any excess to the State Treasury pursuant to §§ 14-149 and 14-150 of the Code.

You did not state the amounts or the various sources of funds being paid into your office; hence, I cannot state categorically whether you may retain the $200.00 being allowed by the Board of Supervisors pursuant to § 33-160 of the Code.
Mr. Hugh V. White, Jr.
Executive Director
Commission on Constitutional Government

This is in reply to your letter of May 9, 1962, in which you request my opinion as to whether the Commission on Constitutional Government may recover the cost of producing publications prepared for distribution in instances where the recipient wishes to redistribute material without charge, or when the recipient proposes to sell the material.

The Act creating the Commission on Constitutional Government provided in part that the Commission shall make available to interested persons facts concerning the relationship between the States and the United States, among other things, and to publish information by book, pamphlet or otherwise. The Act further provides that the expenses incident to the preparation shall be paid from funds appropriated by law. Chapter 223, Acts of Assembly (1958).

You advise that House Bill No. 213, which was enacted into law by the recently adjourned session of the General Assembly provides authority to sell publications, but that Act will not become effective until June 29, 1962.

In view of the express provisions in the Act creating the Commission that the expenses incurred are to be paid from appropriated funds, I am of the opinion that the publications of the Commission must be distributed without charge until the effective date of the 1962 legislative act providing for the sale of publications.

You realize, of course, there is no mandatory requirement that the Commission distribute the publications.

HONORABLE Hugh V. White, JR.
Executive Director
Commission on Constitutional Government

This is in reply to your letter of June 14, 1962, which has reference to our previous correspondence pertaining to the sale of publications prepared by the Commission on Constitutional Government. You now wish to be advised if the Commission may sell publications to persons or organizations pursuant to the authority granted by the 1962 amendment to Chapter 223 of the Acts of 1958, if the Commission knows that the publications are to be resold either at cost or at a profit.

I am of the opinion that your inquiry is to be answered in the affirmative. The authority conferred by Chapter 52, Acts of Assembly of 1962, authorizes the Commission to make charges for its publications, whether in bulk or single copies, as it deems appropriate. The fact that such publications are to be resold in no manner restricts the authority of the Commission in making the initial sale.
CONSERVATION AND ECONOMIC DEVELOPMENT—No authority to participate in loans for creating local employment.

HONORABLE MARVIN M. SUTHERLAND
Director, Department of Conservation and Economic Development

This is in reply to your letter of November 28, 1961, in which you advise that the Governor has designated the Department of Conservation and Economic Development as the agency to administer the provisions of the Area Redevelopment Act as provided in Public Law 87-27, enacted by the 87th Congress. You have requested my opinion as to the constitutionality of State participation in loans made by the Area Redevelopment Administrator under the Act.

The stated purpose of the Area Redevelopment Act is to overcome the under-employment hardship in specified critical areas through the cooperative efforts of the federal government and the several States by providing an additional source of financing for local projects that will create new and permanent employment opportunities in such critically distressed areas. Section 6 of the Act provides the conditions for loans for commercial and industrial purposes. One of the conditions therein specified is that not less than ten per centum of the aggregate costs be supplied by the State or any agency, instrumentality or political subdivision thereof, as equity capital or as a loan repayable only after the Federal financial assistance has been repaid.

Section 185 of the Constitution of Virginia reads in part as follows:

"Neither the credit of the State, nor of any county, city or town, shall be, directly or indirectly under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation, nor shall the State, or any county, city, or town subscribe to or become interested in the stock or obligations of any company, association, or corporation, for the purpose of aiding in the construction or maintenance of its work; nor shall the State become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work; * * *"

To the extent that the Area Redevelopment Act would require participation in loans by the State or political subdivisions thereof, I am of the opinion that such Act is violative of the foregoing quoted provision of the Virginia Constitution. Accordingly, I am of the opinion that the Commonwealth of Virginia cannot legally participate in the loans contemplated by Section 6 of the Area Redevelopment Act.

CONTRACTORS—Registration—Certificate not to be issued jointly to corporation and stockholder.

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

This is in reply to your letter of May 28, 1962, which reads as follows:

"A question has arisen as to whether a Contractor's Registration
Certificate may be issued under the provisions of Title 54, Chapter 7, Code of Virginia, to include authority for a corporation and the principal stockholder of such corporation to bid or contract a job in the name of both, as 'JOHN DOE, INCORPORATED and JOHN DOE.' The reason would be to increase available assets to include those of the individual as well as those of the corporation.

"The language in Sections 54-113 (2), (3) and (4), 54-128 and 54-129 would seem to preclude issuance of a certificate to joint venturers on the basis of a single application, but with separate and independent financial statements, and such has been the interpretation applied by this board."

In the illustration given by you, "John Doe, Incorporated" and "John Doe" are separate entities. If each of these entities is the holder of a certificate issued by the State Registration Board for Contractors, he may engage in a joint venture of the nature mentioned by you without the necessity of obtaining an additional certificate. If only one of the parties to the venture is the holder of a certificate, it will be necessary for the other party to apply for and obtain a certificate. Each entity must hold a separate certificate; that is, each entity is treated as a separate contractor. The mere joining of the two entities into a common venture for the purpose of bidding on or performing a contract, does not have the effect of creating a new entity. The statute requires every person (as "person" is defined therein) to obtain a certificate of registration.

In my opinion, a combination such as illustrated by you is not a person within the meaning of the statute.

COSTS—Paupers—Not required to pay at time of bringing action—Writ tax and clerk's fees not taxed.

COURTS—Costs—Not to be taxed in action instituted by paupers.

January 2, 1962

HONORABLE WALKER R. CARTER, JR.
Clerk of Courts of Roanoke City

This is in reply to your letter of December 21, 1961, which reads as follows:

"A wrongful death action was instituted here by an administrator who made affidavit (an heir making similar affidavit) upon which the Court permitted suit as a poor person under Code Section 14-180.

"This case was compromised for $650.00 on December 15, 1961. A copy of the final order is enclosed. It does not denominate any portion of the recovery as costs. Administrator having earlier been permitted to qualify without payment of tax and clerk's costs was required after recovery to pay such tax and costs ($11.00) for qualification as administrator. Claim has now been made upon him for the payment of the tax and clerk's cost ($15.00) for instituting the wrongful death action.

"Question has been raised whether tax and clerk's costs are payable in either or both cases under the circumstances of this particular mat-ter."
Since no costs were included in the amount recovered from the defendant, it is clear from the wording of § 14-180 of the Code that the tax and clerk's cost of $15.00 may not be required of the plaintiff. In this connection, I refer to an opinion to you, dated October 3, 1961, relating to the writ tax.

The statute permits a court to allow a person who qualifies by reason of his poverty "to sue or defend a suit therein, without paying fees or costs." The relief granted by this section, in my opinion, relates only to the fees and costs directly incident to the suit. The tax and costs required in connection with the administrator's qualification are not, in my opinion, such as are contemplated by the statute.

COUNTIES—Appropriations—Authority to aid branch college located in county or adjacent city.

STATE INSTITUTIONS—University of Virginia—Branch college in City of Lynchburg—Adjacent counties may appropriate funds to aid.

HONORABLE LAWRENCE R. THOMPSON
Member, House of Delegates

This is in reply to your letter of January 17, 1962, in which you state that there is a proposed enlargement of the Extension Division of the University of Virginia within the City of Lynchburg into a two-year branch College. You have requested my opinion as to whether the Board of Supervisors of Campbell County, or any other county contiguous to the City of Lynchburg, may appropriate public funds to be used for such items as library books and equipment, laboratory equipment and building alterations in connection with this branch College.

Section 15-15.1 of the Code of Virginia reads as follows:

"The governing body of any county, city or town may, subject to written advice from the Governor that the gift is acceptable, convey to the Commonwealth by deed of gift any land, either heretofore or hereafter acquired, which, in the discretion of such governing body, is not required for the purposes of such county, city, or town, provided such land is to be used for establishment, operation or maintenance of a branch of a State-supported college or university. For the purpose of acquiring such land the governing body may appropriate a portion of the general funds of such county, city or town.

"The governing body of any county, city or town in which, or contiguous to which a branch of a State-supported college or university has been established may appropriate a portion of the public funds thereof for capital outlays in connection with, and the operation or maintenance of, any such branch."

In view of the express legislative authority set forth in the foregoing statute, I am of the opinion that the boards of supervisors of the counties contiguous to the City of Lynchburg may appropriate funds for capital outlays, and operation and maintenance, in connection with the proposed enlargement of the University of Virginia Extension Division.
COUNTIES—Appropriations—May not appropriate funds to planning commission to be accumulated beyond budget period.

Honorale William C. Fugate
Commonwealth's Attorney for
Lee County

This is in reply to your letter of November 22, 1961, which reads as follows:

"Under the statutes so made and provided, a Lee County Planning Commission has been established for our County.

"The Commission would desire to approach the Board of Supervisors for an annual appropriation and that this appropriation remain in the Commission's account from year to year until it has grown to the point where sufficient funds would be available for a sizeable investment. There is doubt where an appropriation not expended by the end of the appropriation year can remain in that account for the purpose which they desire."

Chapter 18 of Title 15 of the Code of Virginia, (1950), specifies that budgets for the localities be prepared on the basis of a fiscal year. Section 15-577 of the Code expressly provides that no money shall be paid out or become available for expenditure until the governing body has first made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure. I am of the opinion that the proposed plan of the Planning Commission cannot be effected. The unexpended balance of the funds appropriated to the Commission during any current appropriation period will lapse at the expiration of that period, and can only be expended if reappropriated by the governing body. (See § 58-839 of the Code.)

COUNTIES—Authority to contract with city for supplying water to county users.

WATER AND SEWERAGE SYSTEMS—Counties may contract with city for service to county users.

Honorale Kenneth M. Covington
Commonwealth's Attorney for Henry County

This is in reply to your letter of April 3, 1962, which reads as follows:

"The governing bodies of the city of Martinsville and Henry County are considering a question as to whether or not they can enter into valid arrangements under which the city of Martinsville would extend its water supply system and sewer system into the county so as to provide these facilities for industrial plants to be located in the county. These plants would be located on property owned by a non-profit corporation.

"It is contemplated that the contract between the two governing bodies will provide that the city of Martinsville will pay all of the costs incident to the extension of the water system and that the county will reimburse the city for the cost incurred by the city in this undertaking by appropriating to the city each year out of the general revenues of the county an amount equal to one-half of the local taxes collected..."
by the county on the real estate and other local tax sources from the 
property included in the industrial park area. It is not contemplated 
that this arrangement will result in the county owning an interest in 
the proposed water facilities. The obligation of the county will terminate 
at such time as the city has been fully reimbursed for the principal 
amount of the cost of extending such water and sewer facilities.

"I will appreciate your opinion as to whether or not the governing 
body of Henry County may legally enter into an arrangement of this 
nature."

Your attention is directed to Article 1 of Chapter 22 of Title 15 of the Code 
which contains the general provisions with respect to the powers of cities and 
towns to extend and enlarge waterworks and other public utilities within and 
without the limits of the city as well as the power of such cities to enter into 
such contracts with the counties with respect to services of this nature. Section 
15-715 of the Code specifically authorizes cities to extend and enlarge their water 
works facilities without the limits of the city and to generally do those things 
necessary to accomplish this purpose.

Section 15-725 of the Code, you will note, authorizes counties and cities, 
through their respective governing bodies, to enter into such contracts and agree-
ments as they may deem proper for or concerning the acquisition, construction, 
maintenance and operation of any project. "Project" is defined in § 15-724, and 
it is noted that it includes water supply and waterworks. These statutory provi-
sions do not expressly provide that a project under this article must of necessity 
be jointly owned by the contracting parties and I am of the opinion that it would 
be a valid exercise of the powers of the board of supervisors to enter into an 
agreement of the nature set forth in your letter.

COUNTIES—Authority to Expend Funds for Watershed Projects—Limits—Method-
ods for financing.

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney for Augusta County

March 20, 1962

This is in reply to your letter of March 16, 1962, which reads as follows:

"I have been asked by the Board of Supervisors of Augusta County, 
Virginia to obtain from you an opinion regarding Section 15-11, Code 
of Virginia, which was last amended in 1960.

"We have reached the conclusion that under the language of Section 
15-11 the county may expend unlimited funds on development of water 
resources, subject only to the approval of the Board of Supervisors.

"The Board of Supervisors would also like to know whether they have 
the power of eminent domain with reference to the development of water 
resources."

Your question relates to the expenditure of unlimited funds for the development 
of "water resources," but the Code section under consideration refers to "waters-
shed projects." The procedure for establishing and financing watershed projects 
is set forth in Article 9 of Chapter 1 of Title 21 of the Code. Under the provi-
sions of this Article, the project would be financed by the proceeds of a special 
tax levied against the property owners in the watershed district. No general fund 
expenditures are contemplated under Article 9 for such a project. Therefore,
if the county itself is establishing the watershed project, in my opinion, it must be financed out of the special funds available under Article 9, Chapter 1 of Title 21, rather than out of the general fund.

If, however, a watershed project is being developed and established in the county by the federal government and the county desires merely to make contributions to such a project, then, in my opinion, there is no limit upon the amount of contribution it may make out of the general fund.

An additional statutory method by which counties may develop water resources is found in Chapter 22.1 of Title 15 of the Code.

With respect to the power of eminent domain, if the county should proceed under Article 9 of Chapter 1 of Title 21, it would have the power of eminent domain under the provisions of § 21-112.21 of the Code.

COUNTIES—Bond Issues—Form of resolution calling for referendum.

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

March 22, 1962

This will acknowledge receipt of your letter of March 19, 1962, in which you request clarification of my opinion to you of February 20, 1962, relating to § 15-666.29 of the Code. In that letter I stated that in my judgment it is not necessary for the resolution of the board of supervisors to state that it is advisable to contract a debt and issue general obligation bonds of the county to finance any project; that if the resolution meets the requirements of (a) and (b) of said section it will be sufficient compliance with the statute. Upon adoption of such resolution it will, of course, be presumed the board has determined that it is advisable that a debt be contracted and financed in the manner stated in the resolution, but such action by the board would not obligate its members to favor the issuance of bonds in the referendum.

You have presented the following question:

"Can the Board of Supervisors lawfully request the ordering of an election as provided in said Code section without first officially determining that it is advisable to contract the debt and issue general obligation bonds to finance the School Board building project mentioned?"

The answer is in the affirmative.

You suggest that I advise you as to the form of the initial resolution. The resolution, it seems, should commence with a recital of the fact that the school board of the county has filed with the board of supervisors its resolution requesting the board to take such action as may be necessary to cause a referendum to be held on the question of contracting a debt in the amount of $1,200,000 and issuing bonds for the payment thereof for the purpose of (state the purpose as set forth in the school board resolution) and finish the initial resolution substantially as follows:

"BE IT RESOLVED by the Board of Supervisors of Sussex County that the circuit court of said county be, and is hereby, requested to order an election to be held pursuant to the provisions of Article 3, Chapter 19.1 of Title 15 of the Code of Virginia, for the purpose of taking the sense of the qualified voters of Sussex County on the question of contracting a debt and issuing bonds for the purpose set forth in this initial resolution."
COUNTIES—Drainage Districts—Petition for proposed district—Who required to sign.

February 23, 1962

HONORABLE ERNEST P. GATES
Commonwealth's Attorney for Chesterfield County

This is in reply to your letter of February 20, 1962, which reads as follows:

"I have been requested to seek your opinion regarding the construction of Section 21-295 of the Code of Virginia.

"Please advise as to whether the petition required by that section is sufficient if it is signed by the owners of acreage equalling fifty-one per cent of the land within a proposed drainage district or whether, in addition to being signed by owners of fifty-one per cent of the land, it must also be signed by fifty-one per cent of all of the owners within the proposed district."

Section 21-295 of the Code provides as follows:

"Whenever a petition, signed by fifty-one per centum or more of the owners of land who own fifty-one per centum or more of the land, within a proposed drainage project, according to the county-land book or books or to the latest assessment lists of the county or counties in which such project is located, * * * ." 

In my opinion, under this provision the petition should be signed by at least fifty-one per centum of the owners of land who own at least fifty-one per centum of the land located within the proposed drainage project. I do not construe the statute to require that the petition be signed by fifty-one per centum of all the owners within the proposed district. As an illustration, the area included in the proposed project might consist of ten separate parcels of land owned by ten different landowners, and one of the landowners could possibly own more than fifty-one per centum of the total area. In that event the petition of that landowner would be sufficient. Of course, in the court proceeding all of the other landowners would have to be made party defendants to the petition.

COUNTIES—May not act as surety on contractor's bond.

HIGHWAYS—Contractor's Bond—May be required as condition precedent to state assuming maintenance cost.

June 11, 1962

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

This is in reply to your letters of May 24, 1962, and June 6, 1962, in which you make the following inquiries:

1. Whether or not subdividers in Norfolk County are required by law to post with the State Highway Department bonds which are commonly called "defect bonds" which are designed to guarantee the repair of any hidden defects in subdivision roads which occur within a period of one year from the date of the acceptance by the State Department of Highways of these roads into its secondary system.
2. Assuming the State Highway Department has the authority to require "defect bonds" is there any provision in law which would prohibit the county from being surety on such bonds?

Section 33-141, Code of Virginia (1950), as amended, vests the authority for the establishment of new roads to be added to the Secondary System in the County Board of Supervisors. However, this section also contains the following proviso:

"... 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."

Since §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 roads in the Secondary System, I am of the opinion that any reasonable requirement as a condition precedent to the acceptance of a new secondary road for maintenance by the Highway Department would be within the power of the State Highway Commissioner.

This office on prior occasions has held that under the above-quoted statute the State Highway Commissioner before accepting secondary roads for maintenance could require such roads to be generally established by a certain procedure (See Report of the Attorney General, 1945-1946, pp. 137-138), could require recordation of deeds conveying rights of way for such roads (See Report of the Attorney General, 1958-1959, p. 146), and could require drainage easements for such roads (See Report of the Attorney General, 1960-1961, pp. 160-161).

I believe that a requirement that a bond be furnished to guarantee that the road is properly constructed and will not become defective within a period of one year after acceptance for maintenance is a reasonable one. Therefore, I am of the opinion that the State Highway Commissioner has the authority to require the defect bond.

With reference to your inquiry as to whether the County could act as surety for the developer on such defect bonds, I am of the opinion that the answer must be in the negative.

Section 185 of the Constitution of Virginia reads in part as follows:

"Neither the credit of the State, nor of any county, city or town, shall be, directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation.""}

The above wording is broad enough to preclude the County from acting as surety on the defect bonds.

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COUNTIES—May purchase land from United States for park purposes as contemplated in PL 83-545.

HONORABLE G. DUANE HOLLOWAY
Commonwealth’s Attorney for York County

May 23, 1962

In response to your inquiry of May 10, 1962, I am of the opinion that the Board of Supervisors of York County is authorized by §§ 15-24 and 15-697 of
the Virginia Code to purchase land from the United States for the purpose of establishing a recreational area and park as authorized by Public Law 85-545, a copy of which you enclosed with your communication.

COUNTIES—No authority to charge fee for privilege of using public dump.

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

March 15, 1962

This is in reply to your letter of March 14, 1962, in which you state that the Board of Supervisors of Henry County has acquired real estate in two magisterial districts and has established thereon an area for the dumping of waste materials. This action was taken pursuant to the authority granted by § 15-707 of the Code.

You have requested my advice as to whether the Board may charge business establishments, such as service stations, motels, etc., a fee for the privilege of using the public dumps for the disposal of their waste materials. You have indicated that you doubt that such authority exists.

In my opinion no fee may be charged for such privilege.

Although there is no statute authorizing a county operating under § 15-8 of the Code to require the payment of such fee, I call your attention to Chapter 22.1 of Title 15 of the Code which authorizes any county to create an Authority for the purpose of operating "a garbage and refuse collection and disposal system."

An Authority established under that Chapter would, under § 15-764.12(i), possess the power to charge and collect fees for such service.

COUNTIES—No authority to increase age limit for persons permitted to operate motor vehicles.

MOTOR VEHICLES—Operators’ License—Age of driver—Counties have no authority to raise minimum to eighteen years.

HONORABLE H. RATCLIFFE TURNER
Commonwealth's Attorney for the County of Henrico

May 4, 1962

This is to acknowledge receipt of your letter of April 17, 1962, which reads as follows:

"An inquiry has been made of this office by a member of the board of supervisors as to whether or not Henrico County would have the authority under paragraph (b) of § 46.1-357 of the Code of Virginia of 1950, as amended, to enact an ordinance raising the age under which a minor shall be allowed to drive a motor vehicle in the county from fifteen years to eighteen years.

"Inasmuch as Henrico County is not a county having a population greater than 130,000, in order to exercise the authority contained in the above mentioned section it would be necessary to do so by virtue of § 15-10 of the Code of Virginia which raises two questions in my mind."
“(1) Would the fact that paragraph (b) of § 46.1-357 specifically mentions counties in a certain category prevent the application of § 15-10?

“(2) Would the language contained in the fourth paragraph of § 15-10 of the Code of Virginia of 1950, as amended, 'provided, however, that with the exception of such ordinances as are expressly authorized under §§ 46-200 to 46-206 and 46-212 no ordinance shall be enacted under authority of this section regulating the equipment, operation, lighting or speed of motor propelled vehicles operated on the public highways of such county, unless the same be uniform with general laws of this State regulating such equipment, operation, lighting or speed ...' prevent using § 15-10 as our authority for enacting an ordinance under paragraph (b) of § 46.1-357?"

Section 46.1-357 of the Code of Virginia permits the issuance of an operator's license to a minor over the age of fifteen years. Paragraph (b) thereunder is 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.”

This section is primarily prohibitive, in that certain members of the public who, although permitted to drive elsewhere in this State, are thereby prohibited from driving in specific areas under certain stated conditions. These areas are “any city”, or “any county having a population greater than one hundred and thirty thousand”. The conditions are that any such city or county prohibits them through a proper ordinance. Let us assume, for a moment, that a county of less than one hundred and thirty thousand population enacts an ordinance prohibiting persons under the age of eighteen years to drive. Such ordinance could possibly be operative only within such county. However, such county is neither a city nor a county having a population greater than one hundred and thirty thousand. The State law only prohibits minors under eighteen years of age from driving in cities and counties of over one hundred and thirty thousand population, in any event. Such ordinance, then, would be an enlargement of the statute and there would be no authority for its enforcement.

It is, therefore, my opinion that your first question must be answered in the affirmative. The conclusion so reached makes it unnecessary to consider your second question, and accordingly I shall reserve opinion in that regard.

COUNTIES—No authority to levy special tax within subdivision to pay for streets.

TAXATION—Special Levy—Cannot be laid upon land within subdivision for street improvements.

HONORABLE JOHN WARREN COOKE
Member, House of Delegates

February 13, 1962

This is in reply to your letter of February 8, 1962, in which you ask to be advised as to whether a county board of supervisors may levy special taxes within a subdivision of the county for the purpose of improving streets therein.
Section 168 of the Constitution of Virginia reads as follows:

"All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general law. The General Assembly may define and classify taxable subjects, and, except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes may be levied."

While there is nothing in the Constitution of Virginia to prevent the Legislature from creating separate taxing districts in a county for certain purposes, the law is well established that a tax levy must be uniform within the district which is to be benefited by the collection and expenditure of such tax. See Watkins v. Barrow, 121 Va. 236.

I am of the opinion that a subdivision within the county does not constitute a separate taxing district in which the board of supervisors may levy a special tax for street improvement.

COUNTIES—No authority to pay officers extra compensation for special work.

PUBLIC OFFICERS—Conflict of Interest—May not accept extra compensation for special work.

April 10, 1962

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

This is in reply to your letter of April 7, 1962, which reads as follows:

"Recently, a gentleman here in the County was stabbed to death by an unknown person and not captured at present. At the same time, a lady working in the home was severely stabbed but survived her injuries.

"As a result of this murder, it was necessary for a guard to be at the hospital to guard the patient and when she was released, a round the clock guard was established at her home. This will continue until further development in the case.

"Performing this guard duty, among others, were Deputy Sheriffs who work as Jailors and Dispatchers, the County Dog Warden who is a Special Policeman, and the Building Inspector for the County. All of these men are on the regular County payroll and this duty was performed on their off hours. The Dog Warden is subject to calls most any hour.

"Therefore, is it permissible for the Board of Supervisors to pay these men for this guard duty when they are already full-time employees of the County?"

I am unable to find any statute under which a board of supervisors is authorized to pay extra compensation to a full time county officer for services of this nature. The compensation of the sheriff and his full time deputies is governed by § 14-86 of the Code. The compensation of the other county officers is fixed
by the board of supervisors. You point out that all of the officers are on the regular county payroll. Each is a paid officer of the county.

Section 15-504 of the Code provides that no paid officers of the county shall become interested, directly or indirectly, in any contract made by or with any officer or person acting on behalf of the board of supervisors. The payment of extra or special compensation by the board of supervisors to these officers would, in my opinion, constitute a contract with the officers in violation of this section of the Code. The performance of the service and the acceptance of the compensation would be a contract prohibited by this section.

COUNTIES—Legal Investments—Bond funds may be deposited in banks on time deposits not longer than six months.

BANKS—Time Deposits—Counties may deposit funds not exceeding six-months periods.

Honorble C. A. Sinclair
Treasurer of Prince William County

April 2, 1962

This is in reply to your letter of March 30, 1962, which read as follows:

"Prince William County has some school construction bond funds which the County Board of Supervisors wishes to place with the several banks in the County on time deposit, open account. It is my understanding that the deposits will be made in accordance with the provisions of Sec. 2-299 of the Virginia Code, which provides that the period of deposit may not exceed six months.

"Please advise me whether or not under agreements with the several banks the deposits can be automatically renewed until notice of withdrawal is given, or, at the end of each six months period, will a resolution of the Board of Supervisors authorizing the deposit for another six months be necessary.

"I am informed that the State makes such deposits under an agreement which provides that if demand for the funds is not made the agreement shall be considered as renewed from time to time for successive periods until terminated."

This is a matter which was the subject of discussion last week with Mr. Sharp, Executive Secretary of your county. We advised Mr. Sharp that in our opinion deposits of the proceeds of bonds in interest-bearing time deposits and certificates of deposit could be made only for a period of six months and that no agreement with the bank in which such deposit is made may legally be entered into which would automatically renew the deposit for another six months, subject to previous notice of withdrawal being given.

In our opinion the deposit under § 2-299 must be limited to six months. Of course, at the end of the six months the funds may be again deposited in the same manner as the original deposit was made.
COUNTIES—Officers’ Travel Expenses—Tips may be paid or excluded in discretion of board.

PUBLIC OFFICERS—County Officers’ Travel Expenses—Tips may be paid or excluded in discretion of board.

HONORABLE R. E. TRICE, JR.
Commissioner of the Revenue for Louisa County

August 3, 1961

This is in reply to your letter of August 2, 1961, which reads as follows:

"I am writing to ask you for a ruling.

"As you know the State allows forty dollars per person toward the expenses of attending the Local Government Officials' Conference in Charlottesville each year for not over two from any office.

"My wife, who is my Deputy, and I attend each year and in the past I have presented a bill for just exactly what my expenses were while there. The Question is; are tips at the hotel includable as expense or not? Does the Board of Supervisors have the right to refuse to pay same if the entire expense does not exceed the forty dollars per person?"

I understand that the State Compensation Board has approved the payment of travel expenses not to exceed a total of $40.00 for each of not more than two persons from the office of the Commissioner of the Revenue for attendance at the Local Government Officials' Conference in Charlottesville each year, one-half of such expenses to be borne by the State and one-half to be borne by the locality.

Section 14-5.3 of the Code authorizes a county to reimburse any person traveling on business for the county, subject to certain exceptions which are not material here, on a basis not in excess of that provided in § 14-5 of the Code. The mandatory feature of § 14-5 applies to travel expense on State business only. Section 14-5.3 is permissive only and does not make it mandatory upon the governing body of the county to reimburse persons for travel expense when on official business for the county, but such governing body, when providing for reimbursement, may authorize the payment of expenses, including reasonable gratuities, such as tips. See, Report of Attorney General, (1960-1961), p. 65.

I am of the opinion, therefore, that the board of supervisors may, in its discretion, refuse to make reimbursement for tips.

COUNTIES—Ordinances—Driving under influence—Procedure for enactment.

HONORABLE WILLIAM H. LOGAN
Commonwealth’s Attorney for Shenandoah County

March 15, 1962

This is in reply to your letter of March 10, 1962, in which you request my advice as to the procedure in connection with adoption of an ordinance by the
board of supervisors of your county covering the matter of driving of motor vehicles under the influence of intoxicants pursuant to §15-553 of the Code. An ordinance of this nature must be enacted in accordance with the provisions of § 15-8(9), without regard to the provisions of (a), (b) and (c) of this section. These latter provisions apply to ordinances imposing a tax. The exact provisions of §15-8(9) which are applicable are 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."

In this connection I enclose copy of an opinion dated January 16, 1961 furnished the Commonwealth's Attorney of King George County and which is published in the Report of Attorney General, (1960-1961), p. 242, which opinion, I believe, will enable you to determine the proper method of publishing the ordinance.

COUNTIES—Planning Commission—Location of school building to be approved when master plan adopted.

SCHOOLS—Location subject to approval of planning commission when master plan adopted in county.

MR. LEONARD L. LONAS, JR.
Attorney for Prince William County School Board

March 29, 1962

This is in reply to your letter of March 26, 1962, in which you request my opinion as to whether the location and extent of school buildings come within the purview of § 15-923 of the Code of Virginia of 1950, as amended. You advise that the County of Prince William has adopted a part of a master plan for the county.

Section 15-923 of the Code reads, in part, as follows:

"Whenever the governing body of any county shall have adopted a master plan of the county or any part thereof, then and thenceforth no road, park or other public way, public ground or public space, no public building or structure and no public utility, whether publicly or privately owned, shall be constructed or authorized in the unincorporated territory of the county or region until and unless the proposed location and extent thereof shall have been submitted to and approved by such county planning commission. * * *"

From the foregoing quoted provision, I think it quite manifest that public
school buildings, like any other public building, may not be constructed within the county subsequent to the adoption of a master plan unless the proposed location and extent thereof shall have been submitted to the county planning commission.

COUNTIES—Planning Commission—Location of utilities owned by Sanitation Authority to be approved when master plan adopted.

WATER AND SEWERAGE SYSTEMS—County planning commission must approve location of utilities when master plan has been adopted.

March 5, 1962

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County

This is in reply to your letter of January 30, 1962, in which you inquire whether or not the Loudoun County Sanitation Authority established under the provisions of the Virginia Water and Sewer Authorities Act (Chapter 22.1, Title 15, Code of Virginia of 1950, as amended) is required to obtain from the County Planning Commission, under the provisions of § 15-923 of the Code of Virginia, (1950), specific approval for the location and extent of a water supply and/or sewage disposal utility.

Section 15-923, Code of Virginia of 1950, provides:

"Whenever any county planning commission shall have adopted a master plan of the county or any part thereof, and such master plan or part thereof shall have been approved by the board of supervisors of such county, then and thenceforth no road, park or other public way, public ground or public space, no public building or structure and no public utility, whether publicly or privately owned, shall be constructed or authorized in the unincorporated territory of the county or region until and unless the proposed location and extent thereof shall have been submitted to and approved by such county planning commission. But in case of disapproval, the commission shall communicate its reasons for disapproval to the board of supervisors of the county in which the public way, public ground, public space, public building, public structure or public utility is proposed to be located; and such board shall have the power to overrule such disapproval and upon such overruling such board or other official in charge of the proposed construction or authorization may proceed therewith. The failure of the commission to act within thirty days from and after the date of official submission to it shall be deemed approval, unless a longer period be granted by the submitting board, body or official." (Italics added).

While a sanitary authority created pursuant to Chapter 22.1, of Title 15, Code of Virginia, (1950), has broad powers conferred by statute, there is nothing in that Chapter which could be construed as an intent on the part of the Legislature to exempt such authority from the regulatory powers exercised by other governmental agencies functioning within the same area. The task of conforming public utilities and other improvements to the master plan of a county is one of the principal purposes for creating a planning commission.

In view of the express requirement for approval of public utilities, as set forth in § 15-923 of the Code, I am of the opinion that the Loudoun County Sanitation Authority must submit its plan to the County Planning Commission.
COUNTIES—Property—Authority to return vehicles donated to county for rescue work.

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

This will acknowledge receipt of your letter of September 6, 1961, in which you present the following statement of facts:

"A community in Norfolk County primarily through public subscription under the sponsorship of a non-profit corporation collected sufficient funds to purchase two motor vehicles. The motor vehicles were intended to be used for rescue work, including ambulance service, for the immediate community involved herein and were conveyed to Norfolk County by transfer of title. Since being conveyed to Norfolk County, the County from its general funds has paid for all maintenance and operation costs, insurance on the vehicles and has garaged the same on County property. In other words, since the vehicles were conveyed to the County by transfer of title the County has exercised all of the functions of ownership and responsibility for the same. A few months ago due to a misunderstanding the titles to the vehicles were, without authority, delivered to the organization that had sponsored and collected the funds for the payment of the vehicles and when this was called to my attention I arranged for the titles to be redelivered to the County and the vehicles were again entitled in the name of the County. The organization heretofore referred to has requested that the titles to the vehicles be transferred to the organization. I have examined the records of the Board of Supervisors and find no agreement of trust or otherwise in which the aforesaid organization and the County had any written understanding about the return of the vehicles or any restrictions on the delivery of the titles. The Board of Supervisors has asked me to rule upon whether or not it has the authority to return the vehicles to the aforesaid organization without compensation."

You have requested my advice as to whether, upon the foregoing facts, the board of supervisors has authority to transfer title in the motor vehicles to the nonprofit corporation without the payment of "an adequate monetary consideration."

We assume that the motor vehicles in question are the vehicles which were purchased by the Deep Run Voluntary Rescue Squad, a nonprofit corporation, and which were the subject of consideration by this office on April 17, 1961, in response to a letter from Allen D. Roberts, dated April 12, 1961. We were prohibited under the statute from furnishing an opinion to Mr. Roberts, but I am enclosing a copy of his letter as well as a copy of our reply.

As I understand the situation, the county received the vehicles under an arrangement, which was apparently verbal, by the terms of which the county would give aid to the rescue squad by maintaining the vehicles, pay the necessary insurance premiums thereon and furnish garage facilities. If this assumption is correct, I am of the opinion the parties may agree to terminate the arrangement, in which event I know of no reason why the county cannot return the vehicles to the rescue squad without receiving any other consideration.
January 30, 1962

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County

This has reference to your letter of January 13, 1962, in which you request my opinion with respect to the effect of a county subdivision ordinance within an area of two miles beyond the corporate limits of a municipal corporation situate within the county. Your letter reads, in part, as follows:

"The County of Loudoun has a duly adopted subdivision ordinance. There is within the county a municipal corporation that has not adopted a subdivision ordinance and when said county adopted its subdivision ordinance no notice was given this municipality as provided for in Section 15-787 of the Code. You will note Section 15-786 which provides that the corporation may adopt subdivision regulations within an area of two miles beyond its corporate limits. You will note that in Section 15-787 the phrase 'municipal jurisdiction' is used. You will also note in Section 15-781 that the powers granted in Article 2 of the Virginia Land Subdivision Act may be exercised by the adoption of subdivision regulations.

"My question concerns the construction and applicability of the term 'municipal jurisdiction' as set forth in Section 15-787 as the same relates to the two-mile area beyond the corporate limits of said town which has not exercised its prerogative of adopting a subdivision ordinance."

Section 15-787 of the Code of Virginia reads as follows:

"The governing body of any county may adopt regulations for subdivisions in the unincorporated area of the county, provided that whenever the governing body of a county desires to adopt subdivision regulations in the county area of municipal jurisdiction located within the county, then such county may proceed to adopt subdivision regulations in such area, except that no such regulations shall be finally adopted for such area by such county until the governing body of the municipality adjoining the same shall have been notified in writing of such proposed regulations, and requested to review and approve or disapprove the same, and if such municipality fails to notify the governing body of such county of its disapproval of such regulations within forty-five days after the giving of such notice, the same shall be considered approved." (Emphasis added).

In my opinion the term "municipal jurisdiction," as used in the foregoing quoted section, relates back to the area outside the corporate limits of the municipality over which the municipal corporation may apply subdivision regulations by virtue of § 15-786 of the Code. You will note from the portion of the statute which I have emphasized that the governing body of the county may adopt regu-
lations for subdivisions only in the unincorporated area of the county. Notice of such proposed regulations must be given to the municipality only when the regulations are to apply to the area of municipal jurisdiction located within the county. I think it follows that the "municipal jurisdiction" being here referred to lies beyond the corporate limits of the municipality, for the county could not adopt regulations affecting the area within the municipality.

The requirement that notice be given to the municipality is not conditional upon such municipality having in effect a subdivision ordinance which is applicable to the area beyond the corporate limits of such municipality.

In view of the failure of the county to provide the necessary notice to the municipality here involved at the time of adopting the county subdivision ordinance, I am of the opinion that such regulations are not applicable within the area within two miles of the incorporated town.

In view of my reply to your first inquiry, it will be unnecessary to reply to your other inquiries which relate to noncompliance with the county subdivision ordinance within the area of "municipal jurisdiction" within the county.

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COUNTIES—Subdivision Ordinance—When applicable to area within municipal jurisdiction.

SUBDIVISION OF LAND—County Ordinance—When applicable to area within two miles of town. How disputes settled.

February 27, 1962

HONORABLE N. C. SHARP
Executive Secretary
Board of Supervisors
Prince William County

This is in reply to your letter of February 21, 1962, in which you request my opinion as to the applicability of the Prince William County subdivision ordinance to the unincorporated area of that county. You advise that the ordinance was adopted in 1956, and at that time the governing body of all the active incorporated municipalities in the county were served with notice as is required by statute. Apparently no objections were raised by the town governing bodies; however, at that time the Town of Dumfries had an inactive charter, and the Town of Manassas Park was not then in being. You state that these two towns have now expressed a desire to regulate subdivisions in the County within two miles of the corporate limits.

Section 15-787 of the Code of Virginia empowers the governing body of any county to adopt regulations for subdivisions in the unincorporated area of the county, but, to be effective in the areas of municipal jurisdiction, the governing body of the municipality must be notified of the proposed regulations and given an opportunity to review the same.

Section 15-786 of the Code fixes the area of municipal jurisdiction within the county by the following language:

"The governing body of any city or incorporated town, as described below, may adopt subdivision regulations which shall be effective both
within its corporate limits and beyond within the distance therefrom set out below:

* * * *

"(3) Within a distance of two miles from the corporate limits of incorporated towns:

"Except that where the corporate limits of two municipalities are closer together than the sum of the distances from their respective corporate limits as above set forth, the dividing line of jurisdiction shall be halfway between the limits of the overlapping boundaries.

"No such regulations shall be finally adopted by any such municipality until the governing body of the county in which such area is located shall have been duly notified in writing by the governing body of the municipality or its designated agent of such proposed regulations, and requested to review and approve or disapprove the same; and if such county fail to notify the governing body of such municipality of its disapproval of such plan within forty-five days after the giving of such notice, such plan shall be considered approved. ***"

At the time of adopting subdivision regulations for the county, the governing body of Prince William County could not have notified the governing body of the Town of Manassas Park of its intention to adopt such regulations, since that Town was not then in being. While I am unfamiliar with the status of the Town of Dumfries, I assume from your letter that there was no governing body of that town at the time of the adoption of the county regulations.

I am of the opinion that the subdivision regulations of the County were applicable throughout the unincorporated area of the County at the time of the adoption of the subdivision ordinance, and shall continue to be applicable until the recently incorporated towns take the necessary action to exercise control within the areas of municipal jurisdiction as set forth in § 15-786 of the Code.

I have reached this conclusion due to my belief that the provisions of § 15-787 should not be so construed as to preclude regulation of subdivisions by municipalities which may be created subsequent to the adoption of county regulations. The authority extended to municipalities under § 15-786 of the Code would be meaningless if it could not be applied to municipalities which may be hereinafter incorporated. Accordingly, it is my view that any town incorporated subsequent to the adoption of county subdivision regulations may adopt subdivision regulations which would be applicable to the area of municipal jurisdiction outside the corporate limits as fixed by § 15-786 of the Code, provided the required notice is given the governing body of the county. In the event the governing bodies of the town and county cannot agree as to the regulations which are to apply to the area, the dispute should be settled pursuant to § 15-788 of the Code which reads as follows:

"In either event when a disagreement arises between the county and municipality as to what regulations should be adopted for the area, and such difference cannot be amicably settled, then after ten days prior written notice by either to the other, either or both parties may petition the circuit court of the county wherein the area or a major part thereof lies to decide what regulations are to be adopted. The court shall hear the matter and enter an appropriate order."

Without attempting to determine whether the foregoing conclusions will be affected, I draw to your attention House Bill No. 10, presently pending in this session of the General Assembly, which relates to zoning, planning and subdivision of land. If enacted into law, the aforementioned sections of the Code will be repealed and replaced by comparable legislation in Chapter 28 of Title 15 of the Code.
COUNTIES—Volunteer Fire Departments—Relief for firemen—When applicable.

July 21, 1961

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

This is in reply to your letter of July 18, 1961, in which you refer to §§ 27-41 and 27-42 of the Code relating to relief for volunteer firemen.

You state as follows:

"In this county we have a volunteer fire department which is unincorporated and is under no contract with the county. The question has been raised as to whether such a company is within Section 27-41 given above. Since the entire Title 27 of the Code deals primarily with fire departments under the control of counties and cities, it seems to me that the section in question may not apply to volunteer departments such as ours."

The provisions of §§ 21-41, etc., contained in Article 2, Chapter 4 of Title 27 of the Code are not effective in any county until the governing body of the county adopts its provisions pursuant to § 27-50 of the Code.

Article 2, Chapter 4, Title 27 of the Code was enacted by Chapter 384, Acts of 1928, and is not affected by any of the other provisions contained in Title 27.

COUNTIES—Zoning Ordinance—May be adopted when county Planning Commission has submitted tentative report.

ZONING—County may adopt ordinance after Planning Commission submits tentative report.

March 14, 1962

HONORABLE JESS JACKSON
Acting Attorney for the
Commonwealth, James City County

This is in reply to your letter of March 9, 1962, which I quote:

"The Board of Supervisors of James City County has created and appointed, under Section 15-916 of the Code of Virginia, a County Planning Commission, which has made and certified to the Board a rather comprehensive Zoning Plan, including text and maps, setting forth various suggested land uses for the whole County.

"The County Planning Commission has not made and adopted a master plan, as such, for the physical development of the unincorporated territory of the County, as provided by Section 15-918 of the Code of Virginia; nor has it filed with the Department of Conservation and Development any surveys, reports and master maps, as provided by Section 15-925 of the Code of Virginia.

"We should like to have your opinion as to whether or not the Board of Supervisors may validly enact the present Zoning Plan into law."

I presume that the Board of Supervisors will adopt the County zoning ordinance pursuant to Article 2, Chapter 24, Title 15, of the Code of Virginia (1950), as
amended. The power to adopt such regulations is conferred by § 15-844 of the Code, a portion of Article 2. Section 15-846 of the Code provides, in part, as follows:

"From and after the time when the county planning commission created in accordance with § 15-916 makes and certifies to the board of supervisors a zoning plan for the unincorporated territory of such county, including both the text of a zoning ordinance and the zoning maps, representing the recommendations of such planning commission for the regulations and districting, then the board of supervisors may by ordinance exercise the powers granted in §§ 15-844 and 18-545. After the preparation by such planning commission of its tentative report, the planning commission shall hold a public hearing thereon before submitting and certifying its final report to the board of supervisors. After receiving such certification from the planning commission and before the enactment of any such zoning ordinance, the board of supervisors shall hold a public hearing thereon, notice of the time and place of which shall be given by publication at least twice in some newspaper published in the county or having a general circulation therein, the second publication of such notice to be at least fifteen days prior to the holding of the hearing. Such notice shall state the place at which the text and maps as certified by the planning commission may be examined."

In view of the foregoing quoted provisions, I am of the opinion that the Board of Supervisors may adopt a zoning plan for the County, even though the Planning Commission has not yet completed a master plan for the County, as provided in § 15-918 of the Code of Virginia.

COUNTIES, CITIES AND TOWNS—Consolidation—Agreement to consolidate portion of county with city—Legality.

HONORABLE ERNEST P. GATES
Commonwealth’s Attorney for Chesterfield County

July 21, 1961

This is in reply to your letter of July 20, 1961, which reads, in part, as follows:

"The Board of Supervisors of Chesterfield County has been requested by the Council of the City of Richmond to appoint an Advisory Committee to attempt to draft a consolidation agreement to consolidate a portion of the County with the City, which would later be submitted to a referendum of the eligible voters in the whole County for their approval.

"Before taking action on the City’s proposal the Board desires certain clarification of the legality of the consolidation of a portion of the County with the City. There would be no point in appointing this committee if a partial consolidation of the County is not permitted.

"Specifically, I have been requested by the Chairman of the Board of Supervisors to seek your opinion regarding the legality under the present Virginia Statutes and Constitution of the consolidation of a portion of Chesterfield County with the City of Richmond; the portion of the County not so consolidated, if approved, would remain as Chesterfield County."
Title 15, Chapter 9, Article 4, of the Code of Virginia (1950), deals with the consolidation of counties, cities and towns. Section 15-220, which is the first section in the Article, reads as follows:

"By complying with the requirements and procedure hereinafter specified in this article, any one or more adjoining or adjacent counties or any one or more adjoining or adjacent cities or towns, or any of such counties, cities or towns where such counties, cities or towns, as the case may be adjoin or are adjacent to each other may consolidate into a single county or city, or into a single city and one or more counties, and the remaining portion of such counties not so consolidated with such city may be consolidated with each other or with adjoining or adjacent counties into one or more counties, or any such counties and cities may be consolidated into a single county or more than one county." (Underscoring supplied).

In my opinion, a portion of Chesterfield County may be consolidated with the City of Richmond, with the remaining portion of the County continuing as an independent political subdivision, under the provisions of this section. While some doubt may exist with respect to this question because of the omission of any reference to "a part of a county" in the opening clause of the section, I am inclined to the view that reference to "the remaining portions of such county" clearly indicates that there may be consolidation by a part of a county. A full reading of Article 4 adds weight to that belief, particularly § 15-231.3, which provides, in part, as follows:

"This article shall, without reference to any other statute, be full authority for the consolidation of such counties or parts thereof, and such cities and towns or any of them with an adjoining or adjacent city having a population in excess of thirty thousand or such city and one or more counties, it being the purpose of this article to provide an additional and supplemental method of consolidation applicable to such counties, cities and towns." (Underscoring supplied).

The underscored reference to "parts" of counties in my opinion, strongly indicates that under Article 4 a portion of Chesterfield County may be consolidated with the City of Richmond.

I call your attention to the provisions of Section 61 of the Constitution of Virginia, which may or may not be material, depending upon the plan of consolidation under consideration.

COUNTIES, CITIES AND TOWNS—Consolidation—Council of new city—Validity of plan calling for at-large member.

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

September 20, 1961

This is in reply to your letter of September 19, 1961, which reads as follows:

"The Board of Supervisors of Henrico County is considering a plan for the election of councilmen for the merged city in connection with the proposed consolidation of the County of Henrico and the City of Richmond.

"The plan of representation would divide the merged city-county
area into five boroughs, the present corporate limits of Richmond city being Richmond Borough, and each of the present county magisterial districts becoming, respectively, Brookland, Fairfield, Tuckahoe and Varina Boroughs.

"Five persons would be elected to council from Richmond Borough by the voters resident therein. One person would be elected to council from the Borough of Brookland by the voters resident therein, and so on for each of the boroughs of Fairfield, Tuckahoe and Varina. One candidate from the present county-wide area would declare as an at-large candidate from the boroughs of Brookland, Fairfield, Tuckahoe and Varina and would be elected by the combined voters of these four boroughs. The council would consist of ten members.

"The terms of office would be four years.

"Commencing with the election to be held on the second Tuesday in June, 1974, and thereafter, the combined qualified voters of the city would elect at large the ten members of council.

"The 1960 census enumeration for Richmond City is 219,958, and for Henrico County 117,339. The population figures by magisterial districts are estimated to be as follows: Brookland, 38,845; Fairfield, 31,445; Tuckahoe, 38,326; and Varina, 8,723.

"May I request your opinion as to whether this plan will meet the requirements of Section 121 of the Constitution."

I call attention to Section 117 of the Constitution which authorizes the General Assembly to provide for the organization and government of cities and towns without regard to, and unaffected by any of the provisions of Article VIII, subject to certain exceptions which do not include Section 121.

If this plan of representation is adopted in the manner provided by the Constitution, it will, in my opinion, be a valid provision.

COUNTIES, CITIES AND TOWNS—Consolidation—Pending annexation proceeding against county does not survive if county consolidates with another city.

Honorabale Willard J. Moody
Member, House of Delegates

February 20, 1962

This is in reply to your letter of February 16, 1962, in which you state that the City of South Norfolk and the County of Norfolk have taken steps to consolidate into a single city, and these political subdivisions are now seeking a charter from the Legislature. You have requested my opinion as to whether an annexation proceeding previously instituted by the City of Portsmouth against the County of Norfolk prior to the consolidation will be protected if there is nothing in the charter for the consolidated city specifically protecting the annexation suit.

Section 15-228 of the Code of Virginia of 1950 reads as follows:

"§ 15-228.—Any action or proceeding pending by or against any counties, cities or towns so consolidated may be perfected to judgment as if such consolidation had not taken place, or the consolidated city, or county or counties if any may be substituted according to where the cause of action arose."

The manifest purpose of this section is to assure the survival of pending actions
which may otherwise be said to have terminated along with the political subdivisions, as provided in § 15-227 of the Code, which reads, in part, as follows:

"§ 15.227.—Upon the day that the consolidation agreement or plan takes effect the continuance of the counties, cities and towns named in such agreement or plan other than the consolidated city and any county or counties provided for therein and any county only a portion of which is to be included within the consolidated city or any county or counties provided for in the agreement or plan shall terminate, as shall the terms of office and the rights, powers, duties and compensation of the officers, agents and employees of each such county, city or town other than the consolidated city specified in such agreement or plan. * * *

While the purpose of § 15-228 of the Code is not in doubt, not so free from doubt is the question of its applicability to a proceeding which by its very nature would have the effect of one city annexing a portion of the newly consolidated city. As you know, there is no provision in the law for one city to annex territory of another city. Yet, such would be the effect if the county and city here involved are to consolidate into a city prior to final judgment in the annexation proceeding. The annexation court convened to hear the petition filed by the City of Portsmouth against the County of Norfolk would, of necessity, be required to consider the political subdivisions as they exist at the time of passing judgment on the various matters required of it under the provisions of § 15-152.11 of the Code.

I am, therefore, gravely doubtful that § 15-228 of the Code would assure the survival of an annexation proceeding against the County of Norfolk subsequent to the time that County is abolished and the territory thereof consolidated into a new political subdivision along with the territory previously embraced in the City of South Norfolk.

COUNTIES, CITIES AND TOWNS—Merger—Council of new city—How districts established.

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

July 13, 1961

This is in reply to your letter of June 23, 1961, which reads as follows:

"The advisory committees of the City of Richmond and the County of Henrico are considering a plan for the election of councilmen for the merged city. The committees are considering a plan for the division of the entire merged area into four districts. There will be one member of council from each of the four districts to be elected at large, and five members to be elected at large from the city at large.

"May I request your opinion as to whether this plan will meet the requirements of Section 121 of the Constitution."

Under Section 121 of the Constitution the General Assembly may permit the council of a city to consist of either two branches or one branch "whose members shall be elected by the qualified voters of such city, in the manner prescribed by law. * * *

In my opinion, the proposed plan would not be in violation of this section.

I call attention to Section 117 (b) of the Constitution which authorizes the General Assembly by general law or by special act to provide for the organization
REPORT OF THE ATTORNEY GENERAL

and government of cities and towns without regard to, and unaffected by, any of the provisions of Article VIII of the Constitution, subject to certain exceptions which are not pertinent to this question.

It is my opinion, therefore, that the proposed plan for the division of the new city arising out of the merger into four districts or wards, the members of the council to be elected in the manner contemplated in your letter, would be a valid provision in a charter enacted in the manner provided in Article IV of the Constitution.

COUNTIES, CITIES AND TOWNS—Regional Park Authorities—Powers cannot be limited by political subdivisions.

PARK AUTHORITIES—Statutory powers cannot be limited by political subdivisions.

HONORABLE FITZGERALD BEMISS
Member, Virginia State Senate

March 7, 1962

This is in reply to your letter of March 2, 1962, relating to the authority of the governing bodies of political subdivisions with respect to regional park authorities. You enclosed a copy of a letter addressed to you by the Honorable L. McCarthy Downs, Jr., member of the Board of Supervisors of Henrico County, in which he suggests that the governing bodies of the City of Richmond and the Counties of Henrico and Chesterfield may consider the creation of a park authority more favorably if certain restrictions could be placed upon the powers of the authority. Particularly with respect to the exercise of the power of eminent domain and in incurring debts, the authority would be required first to obtain the approval of the governing bodies of the counties and the city. You have requested my opinion as to whether such limitations may be legally imposed.

Park authorities are created pursuant to Chapter 21.1, Title 15, Code of Virginia of 1950. Section 15-714.3 of the Code (a portion of Chapter 21.1) provides, in part, as follows:

D. Having specified the initial plan of organization of the authority, and having initiated the program, the governing bodies of any of the political subdivisions organizing such authority may, from time to time, by subsequent ordinance or resolution, after public hearing, and with or without referendum, specify further parks to be acquired and maintained by the authority, and no other parks shall be acquired or maintained by the authority than those so specified. However, if the governing bodies of the political subdivisions fail to specify any project or projects to be undertaken, and if the governing bodies do not disapprove any project or projects proposed by the authority, then the authority shall be deemed to have all the powers granted by this chapter.

By the foregoing quoted provision, it appears that the governing bodies of political subdivisions may specify the parks to be acquired and maintained by a park authority; however, I am aware of no other provision in the Chapter which could be construed as authority for the governing bodies to control or limit the functions of a park authority. Once it has been created, the authority becomes vested with the power of eminent domain and the power to incur bonded indebtedness by virtue of §§ 15-714.5 and 15-714.10 of the Code. These powers having been conferred by statute, the governing bodies of the creating political subdivisions cannot curtail such powers.
I am, therefore, of the opinion that the governing bodies of the City of Richmond and the Counties of Henrico and Chesterfield may specify which parks are to be acquired and maintained by the proposed park authority, but once created, the authority may exercise all the powers conferred by Chapter 21.1, Title 15, of the Code for acquiring and maintaining those parks specified, without further restrictions by the governing bodies of the three political subdivisions.

COUNTIES, CITIES AND TOWNS—Water and Sewerage Systems—When town must have approval of county before extending lines into county.

WATER AND SEWERAGE SYSTEMS—Town System Extended in County—When approval necessary.

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County

June 12, 1962

This will acknowledge receipt of your letter of June 7, 1962, in which you present the following questions:

"Is an incorporated town which extends its existing water system by laying a water main outside of the town limits, intended to serve three or more connections, required by the provisions of Section 15-754.1, Code of Virginia, 1950, as amended, to seek the approval of the County governing body for such an extension where

(a) the population of the County is less than 70,000 persons and the County is not contiguous to a city having a population in excess of 230,000 persons, and

(b) the existing town system was not installed in compliance with Article 5.1, Code of Virginia, 1950 (Sections 15-754.1 through 15-754.8) so as to bring it within the provisions of Section 15-754.5,

or is the town exempt from obtaining such approval by reason of the force of the second paragraph of Section 15-754.1?"

In an opinion to you, dated November 15, 1960, Report of the Attorney General (1960-1961), p. 346, this office stated that Article 5.1 of Chapter 22, Title 15 of the Code, is applicable to towns, although we qualified the statement by recognizing that the conclusion was not entirely free from doubt.

Assuming that this Article is applicable to towns, in my opinion the approval of the governing body of the county is necessary before the existing system may be extended in a county of a population of less than 70,000 and not adjoining a city having a population of 230,000, or more. You will observe that § 15-754.3 provides that the governing body so notified of the proposed establishment of a water system or the extension of any existing water system under the second paragraph of § 15-754.1 is authorized to disapprove the same upon a finding such as is set forth in § 15-754.3.

Section 15-754.5, to which you refer, does not, in my opinion, mean that non-compliance with the provisions of Article 5.1 in the first instance is relief from the necessity to comply with § 15-754.1, but it should be construed to mean that even though Article 5.1 was complied with in the first instance, it must, nevertheless, be followed in the same manner as in the case of an original application.
COURTS—Annexation Proceedings—No power to fix lower tax rate for newly acquired territory—Legislative action necessary.

ANNEXATION—Taxation—Legislative action necessary to fix lower tax rate in annexed territory.

TAXATION—Real Estate—Different tax rate in annexed territory—Legislative action necessary.

December 7, 1961

HONORABLE DAVID E. SATTERFIELD, III
Member, House of Delegates

This is in reply to your letter of December 6, 1961, from which I quote as follows:

"I will appreciate your opinion (1) whether under Section 15-152.12 or any other Section of the Code of Virginia there is any authority conferred upon an annexation court to decree a tax rate applicable to real estate in the newly annexed territory which on the effective date of annexation would be different from the rate then being applied to real estate already within the city limits, and (2) whether thereafter the governing body of the City can apply a tax rate on the newly annexed land different from that applied by it to the real estate which was within the corporate limits previous to annexation."

Section 15.152.12 provides, in part, as follows:

"The court, in making its decision, shall balance the equities in the case, and shall enter an order setting forth what it deems fair and reasonable terms and conditions, and shall direct the annexation in conformity therewith. * * *"

If consideration of the problem could be confined to the language of this particular Code section, it could well be argued that an annexation court does possess the power to decree a tax rate in an area annexed to a city different from the tax rate being applied in the area already within the city and that your question could be answered affirmatively. In my opinion, however, the consideration may not be thus confined.

Section 168 of the Constitution of Virginia provides for the uniformity of taxes within the territorial limits of the authority levying the tax, in this language:

"All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general law. * * *"

Section 169 of the Constitution provides an exception to the rule of uniformity in this language:

"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."

It is my opinion that in exercising the authority thus conferred upon it the General Assembly would be required to specify the period of years within which the lower tax rate may be imposed. I am further of the opinion that this requirement can be met by the General Assembly establishing a maximum period and
permitting some other body or entity to determine the specific period within the maximum that shall apply in a particular case. (See letter of even date herewith, addressed to Honorable J. J. Jewett, copy of which is enclosed).

If the language of § 15-152.12 were construed to permit a court to decree a different tax rate in an annexed area, it would, in my opinion, violate Section 168 of the Constitution, since the Legislature would not have complied with the requirement of Section 169 that it prescribe the period of years. I know of no other statutory provision covering the subject. It is, therefore, my opinion that an annexation court does not possess such power.

This answer to your first inquiry makes unnecessary consideration of the second question presented in your letter.

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COURTS—Corporation Courts—Hustings Court of Portsmouth constitutes within meaning of § 17-137.2 of Code.

October 13, 1961

HONORABLE WILLIAM B. SPOng, JR.
Member, Virginia State Senate

This is in reply to your letter of October 10, 1961 which reads as follows:

"The Committee on Courts of Justice of the Portsmouth-Norfolk County Bar Association has requested me to obtain an opinion from you concerning the Court of Hustings of the City of Portsmouth. Their interest is a study presently being conducted to determine the need for an additional Judge for that Court.

"Section 17-137.2 of the Code provides a method whereby a City in excess of 60,000 inhabitants may acquire an additional Judge for their Corporation Court. The questions specifically referred to me for your attention are:

"1. Whether Section 17-137.2 is applicable to the Court of Hustings for the City of Portsmouth.

"2. Whether or not there have been other instances in the State of Virginia wherein the above Code section has been used to acquire an additional Judge where the conditions were similar to those of the City of Portsmouth."

Section 17-136 of the Code is, in part, as follows:

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

* * * * *

"The corporation or hustings court of the city of Portsmouth, by whatever name known or called, shall be hereafter named and called 'The Court of Hustings for the City of Portsmouth'."

* * * * *

This section in antecedent by § 5905 of the Code of 1919 and §§ 3050 and 3051 of the Code of 1887, in which it is specifically declared that the court in the City of Portsmouth is a corporation court. By Chapter 259 of the Acts of
1950, § 17-136 of the Code (formerly § 5905 of the Code of 1919) was amended so as to include the second paragraph of that section which I have copied herein. Therefore, in my opinion, the Hustings Court of the City of Portsmouth is the Corporation Court of that city within the meaning of § 17-137.2. This answers your first question.

With respect to your second question, we are not advised as to whether or not an additional judge has been provided under a similar situation.

COURTS—County Court has no jurisdiction in city of second class when municipal court created.

HONORABLE R. BAIRD CABELL
Judge, Municipal Courts for the Town of Franklin

March 10, 1962

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

"The Town of Franklin became a city of the second class by order of the Circuit Court of Southampton County entered the 22nd day of December, 1961. The new city charter was recently endorsed by Governor Harrison as emergency legislation which had previously been approved by the General Assembly.

"I shall appreciate your advice as to whether, in your opinion, the County Court of Southampton County has concurrent territorial jurisdiction with the Civil and Police and the Juvenile and Domestic Relations Courts of the City of Franklin, as to matters arising within the territorial limits of the City of Franklin."

We have examined H.B. No. 286, which provides for a new charter for the City of Franklin, and we find that this bill provides for a Civil and Police Court. The jurisdiction of this court is set forth in Section 13.04 of the Charter. We are assuming that these provisions were not amended and that the court as established has the jurisdiction set forth in the bill. If this is true, in my opinion, the county court would not have concurrent jurisdiction with the municipal court in the City of Franklin. This conclusion is based upon the provisions of § 16.1-37 of the Code which provides that the territorial jurisdiction of the county court extends to any city within the county "for which a municipal court with general civil and criminal jurisdiction has not been established."

COURTS—Juvenile and Domestic Relations—May issue special work permit to child, regardless of age limits in § 40-109.

LABOR—Children—Special Permit—Court may issue, regardless of age limit in § 40-109.

HONORABLE C. G. ROWELL
Judge, Surry County Court

April 9, 1962

This will reply to your letter of April 3, 1962, in which you state that
application has been made to you for a special work permit authorizing a girl under sixteen years of age to work in a restaurant. Pointing out that § 40-109 of the Virginia Code forbids children of specified ages to engage in certain types of employment, you inquire whether or not § 16.1-158(6) of the Virginia Code empowers you to issue a special work permit to a child other than one "who is a ward of the court."

Section 16.1-158(6) of the Code of Virginia (1950) as amended, in part provides:

"... Except as heretofore 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:

* * * *

"(6) The enforcement of any law, regulation, or ordinance for the education, protection or care of children; provided, that in any case where a child over whom the court has jurisdiction is not qualified to obtain a work permit under other provisions of law, the court may, whenever the judge thereof in his sound judicial discretion deems it for the best interest of such child, grant a special work permit to such child, which permit shall be on forms furnished by the Department of Labor and Industry, but any special work permit granted pursuant to this authority shall be valid only for the employment for which it is issued, and may be restricted in any other manner, or cancelled at any time, by the court which granted the permit; and such permit shall conform, except as to the age of the child, to the provisions of chapter 5 (§ 40-96, et seq.) of Title 40 of this Code.

"The court shall forthwith transmit a copy of such permit to the Department of Labor and Industry, and shall likewise notify said Department of any subsequent restriction or cancellation of such permit." (Italics supplied).

It will be noted that the above-quoted statute authorizes the judge of a juvenile and domestic relations court to issue special work permits to children "over whom the court has jurisdiction" and does not limit this authority to children adjudicated by the court to be "within the purview of" the Juvenile and Domestic Relations Court Law. Section 16.1-178, Code of Virginia (1950), as amended. I am, therefore, of the opinion that the statute under consideration empowers the judge of a juvenile and domestic relations court to issue special work permits, without regard to the age limitations prescribed in § 40-109 of the Virginia Code, to any child residing within the limits of the territory for which such court is created. See, Report of the Attorney General (1959-1960), pp. 206-207.
The Town of Pound is considering appointing the substitute judge of the Wise County Court as its police judge. The charter of the Town, 1950 Acts of General Assembly, requires the appointment of a qualified voter of the town. The substitute judge resides in the City of Norton and is not a qualified voter in Pound. There seem to be provisions in the general statutes for the appointment of the county judge as judge of the various towns in the county for the trial of town ordinance violations. Would these apply to the substitute judge?

Chapter 552, Acts of 1950, provides for a charter of the Town of Pound. Section 1 of Chapter IV of said act outlines the duty and the authority of the Mayor, vesting him with jurisdiction to try violations of the town ordinances. The following language is included in said chapter:

"... provided, however, that the council may appoint a police justice or a judge for the town, who shall be a qualified voter of the town, and shall serve during the pleasure of the council." (Acts of 1950, p. 1208).

No express jurisdiction for such a police justice is prescribed in the charter. Section 16.1-70 of the Code, which was reenacted and revised in 1956, provides that the courts presided over by mayors, justices of the peace, police justices or other trial justices of the town only have limited jurisdiction to try cases involving violations of city ordinances, cases instituted for the collection of city and town taxes or assessments or other debts due and owing such city or town. It would appear, therefore, that a police justice appointed by the Town of Pound would exercise only the jurisdiction as prescribed in § 16.1-70, and would not be a court of general jurisdiction, as mentioned in § 16.1-67. That section of the Code is as follows:

"Any town within any county which under its town charter has a court not of record of general jurisdiction may likewise unite with such county, or with such county and with one or more other political subdivisions, in the employment of a single judge to preside over its
Hence, the Town of Pound could not unite with Wise County in the employment of a single judge to preside over its police court. There does not appear in the town charter any express authorization to unite with Wise County in this particular. It would follow, therefore, that the appointment of the local police justice for the town would be governed by the terms of its charter, and the jurisdiction of such police justice would be that outlined in § 16.1-70 of the Code.

It is, therefore, the opinion of this office that the present Substitute Trial Justice of Wise County could not be appointed as police justice of the town, as he is not a qualified voter of the Town of Pound, and for the further reason that there is no authority for the county and the town to unite in the employment of a single judge to preside over the police court of the town and over the County Court of Wise County. The police justice appointed by the council must be a qualified voter of the town in accordance with the terms of the charter.

COURTS—Municipal Police Court—No jurisdiction to try juvenile for traffic violation.

HONORABLE JOHN G. CORBOY
Judge, Municipal Court of Fairfax City

January 29, 1962

In response to your inquiry of January 24, 1962, I am writing to advise that I concur in your view that the Municipal Court for the Town of Vienna would not have jurisdiction to try cases involving juveniles accused of traffic violations.

In this connection, I am forwarding to you a copy of a former opinion of this office, dated February 16, 1954, to the Honorable C. S. Minter, Police Justice of Covington, Virginia, in which a similar question was considered and the identical conclusion reached under § 16-172.23 (now § 16.1-158) of the Virginia Code. See, Report of the Attorney General (1953-1954), p. 147.

CRIMES—Embezzlement—Partner may be prosecuted under § 18.1-109 of Code for converting partnership funds to own use.

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

January 8, 1962

This is in reply to your letter of December 19, 1961, in which you request my opinion concerning an indictment for embezzlement against the active partner of a partnership who converted partnership funds to his own use.

I have carefully considered the various authorities on this subject and have concluded that an active partner may be prosecuted under § 18.1-109 of the Code of Virginia on a charge of fraudulently converting partnership funds to his own use.

I am not unaware of the general rule to the effect that a partner cannot be convicted of larceny of partnership property which comes into his possession
during the course of the partnership business. This rule seems to be uniformly
followed whenever the question has been presented, even though there is a
dearth of cases on this point. The courts have concluded that embezzlement,
like the common law offense of larceny, is a crime involving the property of
another; hence, in the absence of a statute expressly providing otherwise, a co-
owner of specific property could not be subject to such a charge.

I do not believe that the stated rules on this point apply to a prosecution under
§ 18.1-109 of the Code of Virginia, if it can be established that the property
was being held in trust. The Virginia statute reads as follows:

“If any person wrongfully and fraudently use, dispose of, conceal or
embezzle any money, bill, note, check, order, draft bond, receipt, bill of
lading or any other personal property, tangible or intangible, which he
shall have received for another or for his employer, principal or bailor,
or by virtue of his office, trust, or employment, or which shall have been
entrusted or delivered to him by another or by any court, corporation or
company, he shall be deemed guilty of larceny thereof, and may be in-
dicted as for simple larceny. But proof of embezzlement under this section
shall be sufficient to sustain the charge. On the trial of every indictment
for larceny, however, the defendant, if he demands it, shall be entitled
to a statement in writing from the attorney for the Commonwealth of
what statute he intends to rely upon to ask for conviction.” (Emphasis
added)

From the portions of the quoted statute which I have emphasized, you will
note that I am laying stress upon the fraudulent use of money received by reason
of trust.

The incidents of a tenancy in partnership are set forth in § 50-25 of the Code
of Virginia. One portion of that section reads as follows:

“(2) The incidents of his tenancy are such that:

“(a) A partner, subject to the provisions of this chapter and to any
agreement between the partners, has an equal right with his partners
to possess specific partnership property for partnership purposes; but
he has no right to possess such property for any other purpose without
the consent of his partners.”

You will note that the quoted provision expressly confines the right of possession
to partnership purposes and no partner has a right to possess such property for
any other purpose without the consent of his partners. We can here conclude
that, in the case before us, the active partner had no right of possession of the
money which he wrongly converted to his own use.

While I have found no case on all fours with the case before us, I believe
the annotation in 41 A.L.R. 474, will support the proposition that a partner
may be prosecuted for embezzlement if a statute makes each partner a trustee for
the partnership. That annotation reads in part as follows:

“Where a statute made embezzlement by a ‘trustee or factor, carrier
or bailee,’ punishable, it referred not only to private persons, but also
to trustees, factors, carriers, or bailees for artificial persons. State v.
Journey (1913) 105 Miss. 516, 62 So. 354.

“Misappropriation of partnership funds by one of the general partners
does not constitute embezzlement under the general statutes denouncing
that offense, since to come within that statute the subject of the
embezzlement must be the property of another, and partnership property
is not, with reference to either partner, the property of another; nor
does such misappropriation fall within the statutory provision relating
specifically to embezzlement by a trustee, since the statutory provisions concerning the relations of partners, while they declare partners to be trustees for each other, do not make them trustees for the partnership."

I believe we are safe in saying that the money held by this active partner was held by him in trust for the partnership. Section 50-21 of the Code reads in part as follows:

"(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property."

While this question is not free from doubt, I do not believe that we should lend our condonation to this offense by assuming that a partner is immune from prosecution for fraudulently converting to his own use the money which he holds in trust for the partnership. I suggest that if such immunity is to be granted, it should be by a court of competent jurisdiction.

CRIMES—Investigation by Interviewing School Children—Permission of parents or school authorities not required.

SCHOOLS—Criminal Investigation—School children may be interviewed without consent of parents.

April 3, 1962

Honorable Ferdinand F. Chandler
Commonwealth's Attorney for Westmoreland County

This is to acknowledge receipt of your letter of March 29, 1962, in which you state:

"Will you please advise me, at your earliest convenience, if a law enforcement officer (Local or State) has the authority to come into a school and question the children in regard to a case which has occurred at or away from the school, without the consent of the school authorities and/or without permission of the parents."

The prohibition against unlawful searches does not apply to public buildings. The principal of a school and teachers, as far as the child is concerned, stand "in loco parentis." I know of no law which would permit a parent to deny a law enforcement officer the right to interview a child in the course of an investigation of an alleged crime.

The answer to the question raised is, therefore, in the affirmative.
CRIMES—Making False Report—Must be made to law enforcement official—Report to clerk of court no offense.

HONORABLE L. HARVEY NEFF, JR.
Commonwealth’s Attorney for Grayson County

May 3, 1962

This is in reply to your letter of April 30, 1962, in which you request my opinion as to whether a person making a false report of a theft to the Clerk of the Civil and Police Justice Court of Galax can be prosecuted for violation of §18.1-401, Code of Virginia (1950).

Section 18.1-401 of the Code reads as follows:

§ 18.1-401. It shall be unlawful for any person knowingly to give a false report as to the commission of any crime to any sheriff, deputy, member of the State Police, police officer or any other law enforcement official with intent to mislead. Violation of the provisions hereof shall be a misdemeanor.

In order to convict a person for giving a false report, the report must be made to an officer who is charged with the enforcement of the criminal laws of the Commonwealth. While in the broad sense of that expression a Clerk may be considered as a “law enforcement official,” I do not believe that such officers are those contemplated in the foregoing statute.

CRIMES—Principals—Reckless driving—Person in control of vehicle allowing another to operate in reckless manner may be guilty as a principal.

MOTOR VEHICLE—Traffic Regulations—Reckless driving—When person other than driver may be principal.

HONORABLE MARTIN F. CLARK
Commonwealth’s Attorney for Patrick County

January 8, 1962

This is to acknowledge receipt of your letter of December 23, 1961, in which you request my opinion regarding the criminal liability of one who has custody of the motor vehicle under the circumstances stated in the following paragraph, which I quote:

“The facts are that a nineteen year old boy while using a car registered to his father and used by the son on which the father made the payments permitted and consented to another subject while he had custody of said car to operate the same in a grossly, careless and reckless manner over an extended chase by the State Officers. My question being whether or not while he, the son, having custody of the said car and control thereof is responsible for its operation and could therefore be charged as a principal in the second degree.”
The point which you raise is not covered in the motor vehicle laws of this State, which, insofar as the offense of reckless driving is concerned, refer only to the driver of a vehicle. However, one who aids and abets a misdemeanor may be charged as a principal, as the law recognizes no degree in a misdemeanor. In 22 Corpus Juris Secundum, § 81, it is said that: "If one who aids and abets others in a misdemeanor would escape the penalty denounced against the crime, he must cease to act in complicity as soon as he has knowledge of the criminal character of the conduct." It is further stated that: "* * * in misdemeanors the law does not distinguish the participants therein, but all are alike guilty as principals; and this is true in statutory misdemeanors, whether or not the aiders and abettors are referred to in the statute."

In an opinion in the Report of the Attorney General, (1947-1948), pp. 115, 116, which opinion denied guilt of the violation of reckless driving by the owner of a vehicle who merely loaned his vehicle to another and was not present when the violation occurred, it was stated that: "Of course, if the owner was riding in the automobile and acquiesced in the reckless operation of the same, he may be guilty of aiding and abetting the commission of this separate offense." There, also, reference was made to the case of James v. Commonwealth, 178 Va. 28, which you cite. Although that was a felony case, it dealt rather extensively with the offense of reckless driving and stated that an owner may be held criminally responsible where he sits by the side of the operator and permits the violation without protest. While the accused was the owner of the vehicle in that instance, it would seem that his immediate right to control the operation of the vehicle, rather than the mere fact of the ownership, was the important factor.

The right to control the operation of a vehicle may be based upon something less than ownership. For instance, it may arise from the right of a lessee. This right to control also would extend to a bailee who is given custody of a vehicle for his own use and benefit. From the facts which you relate, I judge that the owner's son, who had the vehicle in his custody for his use, was riding in the vehicle and consented to the reckless driving during the extended chase by the State Officers. If this be true, it is my conclusion that the son could be charged as a principal.

CRIMES—"Sunday Closing Law"—Changes in 1960 amendment—Certain transactions deemed not works of necessity.

SUNDAY—Transacting Business on Sunday—1960 amendment to statute discussed—Certain transactions deemed not works of necessity.

HONORABLE FRED G. POLLARD
Member, House of Delegates

December 11, 1961

This is in reply to your letter of December 1, 1961, which reads as follows:

"It is my understanding of the amendments to the Sunday Closing Laws which were enacted by the General Assembly in 1960 that no changes were made in the existing law except to enumerate that certain specific transactions were determined not to be works of necessity or charity, and, except for these specific enumerations, the law is unchanged and is the same as it was prior to 1960.

"For instance, I have been asked whether the law has been changed with respect to the delivery of fuel oil to a home owner whose tank ran dry on Sunday. In my opinion the action of the Legislature in the
I interpret your inquiry as referring to that part of the law involving the definition of the offense as distinguished from those portions involving the penalties and remedies provided. Changes were made in these latter-mentioned provisions, with which I am sure you are familiar.

The language of the former Sunday closing law (§ 18-329) was quite different from that used in the present Sunday closing law (§ 18.1-358). In general, however, your observation is correct; i.e., except for the specific enumeration of certain transactions that "shall not be deemed" to be works of necessity or charity, the basic law is unchanged.

With respect to the delivery of fuel oil on Sunday, under the circumstances described in your letter, your conclusion is correct. In my opinion, the legality or illegality of such transaction was not affected by the 1960 amendment.

CRIMES—"Sunday Closing Law"—Operation of coin-operated laundry—Depends upon determination of necessity.

SUNDAY—Operation of Coin-Operated Laundry—May not constitute crime if necessity.

October 10, 1961

HONORABLE L. HARVEY NEFF, JR.
Commonwealth's Attorney for Grayson County

This is in reply to your letter of September 23, 1961, in which you request my interpretation of § 18.1-358 of the Code of Virginia (1950), as amended, as it relates to the operation of a business of a coin-operated laundry. You state that there is no attendant in the laundry and that customers who wish to use the facilities may go upon the premises and use the washers and dryers by inserting coins in the machines. You have requested my opinion as to whether the owner of the laundry, or the customers using the same, would be in violation of the afore-mentioned statute if such facilities are operated on Sunday.

Section 18.1-358 of the Code of Virginia of 1950, as amended, reads in part as follows:

"On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person to engage in work, labor or business or to employ others to engage in work, labor or business except in household or other work of necessity or charity. The exemption for works of necessity or charity contained in the preceding sentence shall not be deemed to include selling at retail or wholesale or by auction, or offering or attempting to sell, on Sunday, any of the following: * * * This section shall not apply to furnaces, kilns, plants, wholesale food warehouses, ship chandleries, and other business of like kind that may be necessary to be conducted on Sunday * * * ."

In the recently decided case of Mandell, et al. v. T. Gray Haddon, etc., at al., (not yet reported), the Supreme Court of Appeals, in upholding the constitutionality of this statute, made the following statement:

"The amended Sunday law contains the same general prohibition
against working or transacting business on Sunday, except in household or other work of necessity or charity, found in the old statute. It then declares as a matter of law that the exemption for 'works of necessity or charity' shall not include the sale of thirty specific types of commodities, none of which appears as being necessary to be sold on Sunday in order to promote health, safety and the general welfare, with six parenthetical 'exclusions.' The prohibition against the sale of the specified commodities is inclusive enough to close a great majority of stores while leaving open restaurants, drug stores, recreation centers and filling stations, which is in accordance with the general purpose and object of the law.

"Each of the 'exclusions' qualifies an otherwise broad generic category. They amount to no more than a recognition of the legislature that the broad language used in listing the prohibited commodities would include certain articles the sale of which it did not consider as a matter of law to be contrary to the object and purpose the legislation sought to accomplish. The 'exclusions' do not grant exemptions from the general prohibition of the statute, and if the sale of the specific excluded items was challenged the test of whether they were 'works of necessity or charity' would be determined by a jury unless, if, in the particular case reasonable minds could not differ on the question."

You will note that the purpose of the statute, as amended, has not changed from the objective of the original Sunday Closing Law. The test to be utilized in determining that which constitutes a work of "necessity or charity" remains the very same.

I do not believe that reasonable minds will differ as to whether the owner of the laundry is "engaged in business," for I think it fairly obvious that his business is that of maintaining and operating a self-service laundry. The fact that the owner or an attendant is not always physically present, or that the customer serves himself, is irrelevant.

On the other hand, I believe reasonable minds could very well differ as to whether the operation of such a business constitutes a work of "necessity." The Virginia Supreme Court of Appeals has pointed out that the word "necessity" is elastic and relative, and must be construed with reference to the conditions under which we live. *Pirkey Brothers v. Commonwealth*, 134 Va. 713, 114 S.E. 764; *Francisco v. Commonwealth*, 180 Va. 371, 23 S.E. (2d) 234.

Conceivably, there are areas of the State in which Sunday is the only day of the week during which many of the residents have the available time to wash clothes and a self-service laundry is the only practical means of performing that task. Under such circumstances, I think it fairly obvious that the washing of clothes would be considered as a work of necessity.

I am, therefore, of the opinion that your inquiries do not lend themselves to categorical answers, the final determination being dependent upon a finding of fact in each instance as to whether the operation of the laundry constitutes a "work of necessity." This determination may vary from community to community, depending upon the circumstances of each particular case. As pointed out by the Court of Appeals, this issue of fact must be decided by the jury. In making this determination of fact, the test laid down by the Court of Appeals in the case of *Francisco v. Commonwealth, supra*, is whether the work is reasonably essential to the economic, social or moral welfare of the people, viewed in the light of the habits and customs of the age in which they live and of the community in which they reside.
CRIMES—"Sunday Closing Law"—Sale of Christmas trees may not be violation.

SUNDAY—Sale of Christmas Trees—Probably not prohibited when Christmas falls on Monday.

December 19, 1961

HONORABLE W. B. F. COLE
Commonwealth's Attorney for the City of Fredericksburg

This is in reply to your letter of December 19, 1961, in which you request my opinion as to whether Christmas trees may be sold in Virginia next Sunday without resulting in a violation of the Sunday Closing Law.

The question to be resolved is whether the sale of Christmas trees on Sunday violates § 18.1-358 or whether such sales are included within the exemption for works of necessity or charity. In resolving this question it is first necessary that we consider the effect of the amendments adopted by the General Assembly in 1960.

I am enclosing a copy of an opinion under date of December 11, 1961, addressed to the Honorable Fred G. Pollard in which we commented on the effect of those amendments to the Sunday Closing Law, insofar as the definition of the offense is concerned. In that letter we stated:

"The language of the former Sunday closing law (§ 18-329) was quite different from that used in the present Sunday closing law (§ 18.1-358). In general, however, your observation is correct: i.e., except for the specific enumeration of certain transactions that 'shall not be deemed' to be works of necessity or charity, the basic law is unchanged."

I have carefully examined the list of specific transactions which the legislature has provided, "shall not be deemed" to be works of necessity or charity and, in my opinion, none of the specific categories is applicable to Christmas trees. I have considered and I now reject a suggestion that the term "farm produce" might include certain types of trees used for the purpose.

Having made this determination, we are next confronted with the question of whether the sale of Christmas trees is a work of necessity or charity. In the view which I take of the matter we need only consider the question of necessity. In attempting to resolve this question and others which arise under the statute with respect to transactions not within the list of specific transactions which I have previously referred to, it is important to bear in mind the fact that as to such transactions the law remains as it was prior to 1960 and the court decisions and usages prior to that date were not affected by the amendments and are to be carefully considered.

In the case of Francisco v. Commonwealth, 180 Va. 371, Mr. Justice Eggleston (now Chief Justice Eggleston), speaking for the Supreme Court of Appeals of Virginia, said:

"While we realize that the words are difficult to define, we think the following is a more practical definition: The work of necessity covered by the exception in the statute is not merely one of absolute or physical necessity, not merely something required to furnish physical existence or safety of person or property, but embraces as well all work reasonably essential to the economic, social or moral welfare of the people, viewed in the light of the habits and customs of the age in
which they live and of the community in which they reside. While the word necessity is elastic and relative, and should be construed with reference to the conditions under which we live, the elasticity should not be extended so far as to cover that which is merely desirable and not reasonably essential.

"Whether the act or work done in a particular case is reasonably essential to the economic, social or moral welfare of the people is ordinarily a question of fact for the jury and not a question of law for the court."

Because the court has said that the question of necessity is a "question of fact for the jury and not a question of law for the court" this office has been extremely reluctant to rule whether a particular transaction was or was not necessary, since our opinions are advisory only and a difference of opinion between our view and that of local authorities could result in one being charged with a criminal offense after acting on the strength of an opinion by this office. We have consistently advised individuals concerned to seek the advice of local law enforcement officers before proceeding with any transaction on Sunday about which they have a doubt.

I would make the same suggestion to those who might otherwise interpret what I shall now say to you as complete assurance that they may sell Christmas trees next Sunday with impunity.

I confine my ruling to the facts presented this year, when Christmas Eve falls on Sunday. On December 24, 1961, anyone desiring to use a Christmas tree this year who has not acquired one will find himself in the position of either acquiring one on Sunday or being required to do without. If he is to have it for Christmas morning there is no other day left on which it can be acquired. "Viewed in the light of the habits and customs of the age in which we live" and bearing in mind the very real disappointment and distress that could result in many cases if such sales were prohibited, I am of the opinion that, in the spirit of the season for which the tree is symbolic, such transactions become necessary next Sunday.

CRIMES—"Sunday Closing Law"—Sale of farm produce at place where grown —What constitutes "farm produce."

SUNDAY—Sale of Flowers and Vegetable Plants Where Grown—Permissible if "farm produce."

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

April 16, 1962

This is in reply to your letter of April 11, 1962, in which you request my opinion as to whether it is legal for a florist to sell vegetable plants and potted or cut flowers on Sunday, if the plants and flowers are grown by him and sold at the place where grown.

The answer to your inquiry turns upon the definition of "farm produce," as that term is used in § 18.1-358 of the Code of Virginia of 1950, as amended. That section reads, in part, as follows:

"On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person to engage in work, labor or business or to employ others to engage in work, labor or business
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except in household or other work of necessity or charity. The exemption for works of necessity or charity contained in the preceding sentence shall not be deemed to include selling at retail or wholesale or by auction, or offering or attempting to sell, on Sunday, any of the following: **** farm implements; lawn and garden equipment and supplies; farm produce (excluding sales of farm produce grown by the seller and sold at roadside stands or at the place where grown) or fresh, frozen or salt meats, poultry or seafood customarily inedible without further cooking or preparation (excluding smoked or cured hams). * * * *.

The decided cases wherein the courts have undertaken to define "farm produce," or similar expressions, are by no means uniform. See Keeney v. Beasman, 169 Md. 582, 182 A. 566, 103 A.L.R. 1515; Florida Industrial Commission v. Growers Equipment Co., 152 Fla. 595, 12 So. (2d) 889.

I am aware of no case precisely in point with the one here presented. In the final analysis, the question of the nature of the business must be passed upon by a court having before it the facts and the circumstances surrounding the case. I am, therefore, unable to provide a categorical reply to your inquiry.

CRIMES—"Sunday Closing Law"—Sales of specified items prohibited even when profits contributed to charity.

SUNDAY—Selling specified items unlawful even though profits contributed to charity.

HONORABLE ALFRED W. WHITEHURST
Commonwealth's Attorney for the
City of Norfolk

March 15, 1962

This is in reply to your letter of March 13, 1962, in which you request my opinion as to whether a merchant may sell on Sunday items included in those specified in § 18.1-358 of the Code of Virginia if the profits from such sales are contributed to charity.

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

In the case of Williams v. Commonwealth, 179 Va. 741, the Supreme Court of Appeals of Virginia had occasion to consider the term "work of charity" as used in the "Sunday Closing Law" prior to the 1960 amendments. In that case the Court held that the operation of a movie theater on Sunday did not constitute a violation of this law if the profits from the operation were donated to charity. The statute, § 4570, Code of 1936, at that time read, in so far as here germane, as follows:

"If a person on a Sunday be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars for each offense.***"

Section 18.1-358 of the Code of Virginia of 1950, as amended, (present Sunday Closing Law) now reads, in part as follows:

"On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person to engage in work, labor
or business or to employ others to engage in work, labor or business except in household or other work of necessity or charity. The exemption for works of necessity or charity contained in the preceding sentence shall not be deemed to include selling at retail or wholesale or by auction, or offering or attempting to sell, on Sunday, any of the following: ****.” (Emphasis added)

In the recent decision of Mandell, et al. v. T. Gray Haddon, etc., et al., 202 Va. 979, the Supreme Court of Appeals, in upholding the constitutionality of the amended statute, made the following statement:

"The amended Sunday law contains the same general prohibition against working or transacting business on Sunday, except in household or other work of necessity or charity, found in the old statute. It then declares as a matter of law that the exemption for 'works of necessity or charity' shall not include the sale of thirty specific types of commodities, none of which appears as being necessary to be sold on Sunday in order to promote health, safety and the general welfare, with six parenthetical 'exclusions.' The prohibition against the sale of the specified commodities is inclusive enough to close a great majority of stores while leaving open restaurants, drug stores, recreation centers and filling stations, which is in accordance with the general purpose and object of the law."

By the language which I have emphasized in the quoted statute, I think it quite manifest that the General Assembly has now expressly provided that the selling of any of the thirty specified items or commodities shall not be considered as a work of charity. To this extent, the decision of the Supreme Court of Appeals in the Williams case is no longer controlling.

CRIMES—"Sunday Closing Law"—Wholesale food warehouses exempt—What constitutes is question of fact.

SUNDAY—Sale of meat by wholesale food warehouse permitted.

HONORABLE W. C. DANIEL
Member, House of Delegates

This is in reply to your letter of October 17, 1961, from which I quote as follows:

"Many questions are raised as the result of the Virginia Supreme Court ruling on the Sunday closing law, Article 7—Section 18.1-358, and related sections, passed at the 1960 session of the General Assembly. "We have a specific situation here in Danville on which I would like an official ruling. A majority of our restaurants are open for business on Sunday. We have a local meat supplier which is often called upon to deliver needed items on Sunday. If one of our restaurants ran out of a given item and called the local meat supply house to replenish the supply, and the local meat distributor complied, would he be in violation of the law?"

As you have indicated, a number of vexing questions are being posed by the "Sunday Closing Law," and in most instances they do not lend themselves to
categorical answers. Such is true with respect to the question presented in your letter.

As you know, the prohibition provided by § 18.1-358 is contained in the first sentence thereof. That sentence and a subsequent pertinent portion of the statute reads as follows:

"On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person to engage in work, labor or business or to employ others to engage in work, labor or business except in household or other work of necessity or charity. The exemption for works of necessity or charity contained in the preceding sentence shall not be deemed to include selling at retail or wholesale or by auction, or offering or attempting to sell, on Sunday, any of the following: ***** farm produce (excluding sales of farm produce grown by the seller and sold at roadside stands or at the place where grown) or fresh, frozen or salt meats, poultry or seafood customarily inedible without further cooking or preparation (excluding smoked or cured hams). *** This section shall not apply to furnaces, kilns, plants, wholesale food warehouses, ship chandleries, and other business of like kind that may be necessary to be conducted on Sunday, *****."

The local meat distributor, under the facts set forth in your question, obviously would be engaged in business on Sunday and, therefore, he would be in violation of the law unless the type of business involved falls within one of the exemptions contained in the statute.

The answer to whether the particular business falls within one of the exemptions depends, in the first instance, on whether or not, as a factual matter, the "local meat supply house" involved is such as would be considered a "wholesale food warehouse."

If the "local meat supply house" is, in fact, a "wholesale food warehouse," its operation would be covered by the last sentence of § 18.1-358, which reads as follows:

"This section shall not apply to furnaces, kilns, plants, wholesale food warehouses, ship chandleries, and other business of like kind that may be necessary to be conducted on Sunday, nor to the publication, distribution and sale of newspapers or magazines, nor to the sale of motor fuels or oils, repair parts or accessories for immediate necessary use in connection with motor vehicles, boats or aircraft, nor to the operation of motion picture theatres, nor to sports, athletic events, scenic, historic and recreational and amusement facilities." (Underscoring supplied).

You will note that the quoted sentence completely exempts from the operation of the statute certain specified types of business, one of which is a "wholesale food warehouse." A question can be raised as to whether the underscored clause, "that may be necessary to be conducted on Sunday" applies only to "other businesses of like kind," or whether that clause also modifies "furnaces, kilns, plants, wholesale food warehouses, ship chandleries," etc.

You are aware, of course, that the opinions of this office are advisory only and would not serve as a bar to the prosecution of one operating in compliance with an opinion of this office if a court of competent jurisdiction should construe the statute at variance with our construction. For that reason, we have misgivings when advising as to the construction of a criminal statute on phases which have not been interpreted by the Supreme Court of Appeals of Virginia. This is particularly true where, as in the case under this statute, each act constitutes a separate offense, and four such offenses result in the premises being deemed a nuisance.

With that caveat, it is my opinion that the clause "that may be necessary to
be conducted on Sunday" applies only to "other businesses of like kind," and, therefore, that the last sentence of the section quoted above grants a blanket exemption to "wholesale food warehouses."

If the "local meat supply house" is not, in fact, a "wholesale food warehouse," its operation on Sunday would be in plain violation, insofar as fresh, frozen or salt meats, poultry or seafood customarily inedible without further cooking or preparation is concerned, because the statute specifically provides that the sale of these items cannot be deemed to come within the exemption given "works of necessity." As to smoked or cured hams, it is my opinion that it was the intention of the Legislature to exclude the sale of them from the prohibition of the statute. Under a literal construction of the language of the statute, however, smoked or cured hams are merely excluded from that class of foods, the sale of which may not be deemed necessary, so that from a technical construction, the sale of smoked or cured hams is permissible only if their sale is a work of necessity. As I have indicated, it is my opinion that the Legislature intended to exclude these two items from the operation of the law completely, and I, therefore, conclude that a court, applying the rules of construction applicable to criminal statutes, would put such construction on the parenthetical clause "(excluding smoked or cured hams)."

I regret that the language of the statute does not permit me to give a more definitive answer, and I suggest that the proprietor of the establishment concerned seek an interpretation from the local Commonwealth’s Attorney before acting on the basis of my views.

CRIMINAL PROCEDURE—Appeal to Court of Record—Warrant charging two offenses—Accused cannot be prosecuted on charge which was dismissed in county court.

June 14, 1962

HONORABLE ROBERT C. GOAD
Commonwealth’s Attorney for
Nelson County

This is in reply to your letter of June 8, 1962, which reads as follows:

"Under the statute, we have been convicting defendants only of one offense when the warrant charges driving under the influence and reckless driving.

"I will appreciate your opinion on the following: In a case where both of the above charges are in the warrant, and the County Court convicts the defendant of driving under the influence and dismisses the reckless driving charge, and the defendant appeals to the Circuit Court, can the Commonwealth ask for a conviction of driving under the influence or reckless driving or is the Commonwealth restricted to a trial on the sole charge of driving under the influence in the Circuit Court?"

The practice of dismissing a reckless driving charge after conviction on a drunk driving charge is in accord with § 19.1-259.1 of the Code of Virginia (1950), as amended.

By virtue of § 16.1-123 (2) of the Code, the county court has exclusive original jurisdiction for trial of most misdemeanors arising in the county. Section 16.1-132 of the Code reads as follows:

"Any person convicted in a court not of record of an offense not felonious shall have the right, at any time within ten days from such
conviction, and whether or not such conviction was upon a plea of
guilty, to appeal to the circuit court of the county or corporation or
hustings court of the corporation, as the case may be. There shall also
be an appeal of right from any order or judgment of a court not of
record forfeiting any recognizance or revoking any suspension of sen-
tence." (Emphasis added)

I am of the opinion that the Commonwealth can only prosecute an accused
in the circuit court on the charge in the warrant for which he was convicted in
the county court. There having been no conviction of the accused in the lower
court on one of the charges in the warrant, the circuit court is without original
jurisdiction to try such person on the charge which was dismissed by the county

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CRIMINAL PROCEDURE—Bail—Fee depends upon bailing authority.

FEES—Criminal Cases—Amount to be charged for bail.

**HONORABLE FRED W. BATEMAN**
Member, Virginia State Senate

October 16, 1961

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

"I have been requested by one of our local judges to obtain a ruling
from you with respect to the proper amount to be charged when a
person is admitted to bail.

"Under Section 14-132(5) the fee seems to be $1.00 (this Section
was amended in 1960, however for the purpose of this letter assume
that the amendment does not apply to this inquiry).

"Section 19.1-124 seems to establish the fee at $2.00.

"Section 19.1-111 (third paragraph) suggests that the fee shall be
the same as provided by law for Justices of the Peace.

"Section 14-136 as amended, sets up the charges for Justices of the
Peace and under Paragraph (3) thereof it would appear that the fee
is $2.00.

"Would you please review the foregoing matters and let me have
your opinion as to what the proper charge is for fees pertaining to
bail bonds within the City of Newport News."

Section 14-132(5) provides for a fee of $1.00 to the judges and clerks of
courts not of record for admitting any person to bail.

Section 14-136 provides for a fee of $2.00 to a justice of the peace for a similar
service. Section 19.1-124 provides for a fee of $2.00 to a bail commissioner or
clerk of a court of record for admitting a person to bail. Under the third para-
graph of § 19.1-111 a fee of $2.00 is allowed to judges of Juvenile and Domestic
Relations Courts or to courts of limited jurisdiction, as defined in Title 16.1, for
admitting persons to bail under the circumstances set forth therein. This para-
graph does not relate to judges of courts not of record but relates to Juvenile and
Domestic Relations Courts established under § 16.1-143 of the Code and to
courts of limited jurisdiction as defined in Chapter 5 of Title 16.1. The first two
paragraphs of § 19.1-111 relate to courts not of record and the fee for admitting
persons to bail under these two paragraphs is $1.00, as established under §
14-132(5).
CRIMINAL PROCEDURE—Bail and Recognizance—Arrest of principal by surety on bond—Procedure to be followed by foreign surety.

August 3, 1961

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

This is in reply to your letter of August 1, 1961, which reads as follows:

"Section 19.1-44 of the Code of Virginia of 1950 as amended makes provision, among other things, for the arrest by a surety of his principal and for surrender to the court, etc.

"I take it that by virtue of this section there is no question of the right of a Virginia surety to arrest his principal in Virginia and to surrender him to the court in Virginia. I should appreciate your opinion as to whether under the provisions of this section or any other applicable law a surety who has gone on a bail bond in Tennessee can follow his principal into the state of Virginia and in Virginia arrest his principal and take him back to Tennessee.

"The quoted section makes no mention as to whether its provisions apply to parties without the state. It appears to me that under the conditions cited above in the Tennessee case if the surety can legally come into Virginia and arrest his principal and remove him from the state, the provisions of this section are unusually far-reaching and, I suspect, much more far-reaching than was intended by the legislature."

I assume that you intended to refer to Code § 19.1-144, inasmuch as § 19.1-44 does not relate to the subject matter.

In my opinion, § 19.1-144 is not applicable to a case such as you have presented. I believe, however, that the provisions of §§ 19.1-63, et seq., apply. Under § 19.1-63 a surety who has gone on a bail bond in another State for a person who has subsequently broken the terms of his bail and is found in Virginia, may make the complaint provided for in this section before any of the officers therein mentioned and such officer may then issue a warrant for the arrest of the person named in the warrant. If the crime is of the nature described in § 19.1-64, the arrest of such a person may be made by any peace officer or private person without a warrant and such person shall then be taken before a judge or other officer mentioned therein. §§ 19.1-65 through 19.1-71 relate to the further proceedings in connection with such cases.


MOTOR VEHICLES—Blood Analysis—Accused may introduce result in evidence, although not complying with § 18.1-55.

August 9, 1961

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

This will reply to your letter of August 1, 1961, in which you present the following situation and inquiry:

"Section 18.1-55 of the 1950 Code of Virginia amended to date pro-
provides in detail the manner in which blood drawn from an individual who is charged with operating an automobile while under the influence of alcoholic beverages, shall be tested by the Chief Medical Examiner to determine the amount of alcoholic content in said blood. The arresting officer informed the defendant who was charged with operating a motor vehicle while intoxicated, of his right to have a blood test to determine the alcoholic content thereof. The defendant refused and was later bonded and his attorney took him to a private physician where it is alleged that blood was extracted from the defendant not in the presence of any officer and sent to a private chemist outside of the state to make an analysis of said blood to determine the alcoholic content.

"The blood was not drawn in the presence of any officer, nor was it placed in a sealed container as provided by statute and was not mailed or delivered by a law enforcement officer. In other words, the taking of the blood and the examination thereof was a private affair between the defendant, his physician and his attorney. No officer at any time being present.

"I would like to know if the results of said examination by a private chemist made outside of the State of Virginia and not in accordance with Section 18.1-55 of the Code would be admissible in evidence in the trial of the defendant."

In this connection, I am forwarding to you a copy of an opinion of this office, dated May 23, 1958, to the Honorable C. H. Davidson, Jr., Commonwealth's Attorney for Rockbridge County, in which it was emphasized that § 18.1-55 (then § 18-75.1) of the Virginia Code bestows a right to a blood alcohol determination upon any person arrested for the offense of driving under the influence of alcoholic intoxicants. See, Report of the Attorney General (1957-1958), p. 175. I find nothing in the language of § 18.1-55 to indicate that the right to obtain a blood alcohol determination subject to compliance with the procedure prescribed by the statute in question was intended to foreclose the right of an accused to obtain such a determination by other means, or to preclude the admission of any other competent evidence relevant to the question of whether or not the accused was under the influence of alcoholic intoxicants at the time of the alleged offense. Indeed, the initial sentence of the concluding paragraph of § 18.1-55 provides that:

"Other than as expressly provided herein, the provisions of this section shall not otherwise limit the introduction of any competent evidence bearing upon any question at issue before the court."

In light of the foregoing, I am of the opinion that your inquiry should be answered in the affirmative.

CRIMINAL PROCEDURE—Blood Analysis—Failure to take test—City police officer having power of deputy clerk may issue warrant under § 18.1-55 of Code.

June 22, 1962

HONORABLE LEROY MORAN
Commonwealth's Attorney for City of Roanoke

This is in reply to your letter of June 20, 1962, from which I quote as follows:

"This is a request for an opinion with reference to Section 18.1-55-59
REPORT OF THE ATTORNEY GENERAL

Code of Virginia as amended, commonly called the 'Implied Consent Law.'

"One of the requirements of this law is that the accused, if he refuses the blood test, must be brought before a 'Committing Magistrate' who shall comply with the provisions of this section. Roanoke City does not have any Justices of the Peace or 'Committing Magistrates' as such.

"Under Section 28 of the Roanoke City Charter entitled CLERK OF THE MUNICIPAL COURT the second paragraph, which is set out below, contains a provision which allows members of the police force to act in the capacity of deputy clerks. This paragraph is as follows:

"In addition, the chief municipal judge may appoint such number of deputy clerks of the municipal court as may from time to time be authorized by ordinance of the council, who shall serve at the pleasure of the chief municipal judge and who may be members of the police force or other city employees but who shall not be entitled to special compensation as such deputy clerk unless otherwise provided by the council. Such deputy clerks shall have the power and authority to take affidavits, administer oaths and affirmations, issue civil warrants, abstracts of judgment and subpoenas for witnesses only, except that members of the police force appointed as deputy clerks hereunder shall have the additional power and authority to issue criminal warrants and processes within the jurisdiction, territorial and otherwise, of the municipal court, at such times as may be expressly designated by the chief municipal judge. Said papers shall be signed in the name of the municipal court by the deputy clerk as such deputy. (Acts 1956, ch. 393, p. 438.)"

"The query is as follows: Can members of the Roanoke Police Force, if authorized by the Roanoke City Council, qualify and act as 'Committing Justices' or 'Committing Magistrates' under Section 18.1-55-59 of the Code of Virginia in addition to their authority as set out in Section 28 of the Roanoke City Charter?

"I have discussed this with the Honorable Ran Whittle, Roanoke City Attorney, and both Mr. Whittle and I are of the opinion that they would so qualify."

The members of the police force, upon being appointed deputy clerks of the Municipal Court of Roanoke, as established under Chapter 393, Acts of Assembly of 1956, are authorized to issue criminal warrants and processes within the jurisdiction, territorial and otherwise, of the municipal court. By reference to Section 27 of the Charter of the City (Chapter 216, Acts of 1952), it appears that the municipal court has jurisdiction over all misdemeanors committed within the city. The terms "Committing Justices" or "Committing Magistrates" as used in Chapter 625, Acts of 1962, relate to any officer authorized to issue criminal warrants for violation of a state law. I am of the opinion, therefore, that police officers in the City of Roanoke who are appointed and qualify as deputy clerks of the municipal court of that city are qualified to perform the functions of "Committing Justices" or "Committing Magistrates" under the provisions of Chapter 625, Acts of 1962.

June 8, 1962

HONORABLE DAVID A. LYON, III
Secretary-Treasurer
Association of Justices of the Peace of Virginia

I am in receipt of your letter of June 5, 1962, in which you present certain questions concerning Section 18.1-55 of the Code of Virginia (1950), as amended, at the recent regular session of the General Assembly of Virginia.

In connection with your initial inquiry, this office has prepared the form prescribed by Section 18.1-55(g) of the Virginia Code, and printed copies thereof will be forwarded to the Commonwealth’s Attorneys of the various counties and cities on June 15, 1962, for distribution by them to the committing justices of their political subdivisions.

With respect to your second inquiry, I am of the opinion that the arresting officer or other official accompanying the person arrested for operating a motor vehicle while under the influence of intoxicants should be the complainant on the warrant mentioned in Section 18.1-55(h) of the Virginia Code.

CRIMINAL PROCEDURE—Convictions—When final.

COURTS NOT OF RECORD—When conviction final.

CRIMINAL PROCEDURE—When court may withhold action on warrant charging more than one offense—Section 19.1-259.1 construed.

June 27, 1962

HONORABLE ROBERT C. GOAD
Commonwealth’s Attorney for Nelson County

This is in reply to your letter of June 21, 1962, which reads as follows:

“Thank you for your letter of June 14th, concerning reckless driving—driving under the influence prosecutions.

“I have one further question about this matter, on which I will appreciate your opinion. In a case where the warrant charges reckless driving and driving under the influence, and the County Court convicts the accused only on the charge of driving under the influence, and the accused appeals this conviction to the Circuit Court, can the County Court withhold its judgment on the reckless driving charge: (a) until the appeal is dropped within the ten day period, and the judgment of conviction on the driving under the influence becomes final in this way, (b) until the appealed case is heard in the Circuit Court and becomes final by judgment of conviction in the Circuit Court, or by judgment of conviction in the Supreme Court of Appeals, before dismissing the
reckless driving charge; and in the event that the accused is found not guilty of driving under the influence on appeal, can the County Court then enter a judgment of conviction of reckless driving, assuming the facts justify such conviction?"

Section 19.1-259.1 of the Code of Virginia (1950), as amended, reads 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."

You will note that this section requires a conviction on one of the charges specified in order to make dismissal of the remaining charge mandatory. In Virginia the word "conviction" is construed to mean "final conviction," not being inclusive of cases on appeal. White v. Commonwealth, 79 Va. 611; Chewning v. Cunningham, 368 U.S. 447, 7 L. ed 2d 445, 82 S. Ct. 500.

There is no obligation upon the trial court to try the two charges at the same time, although it is free to so do. Neither can the accused direct the order in which the two prosecutions are conducted. The court may sever the two charges, disposing of the driving under the influence charge before proceeding on the second charge of reckless driving. See, Hundley v. Commonwealth, 193 Va. 449.

I am of the opinion that the County Court may withhold action on the reckless driving charge until the judgment on the first conviction is final, either because the appeal is dropped by the defendant, or the judgment is on appeal to the Circuit Court or the Supreme Court of Appeals. It follows that the trial court may enter judgment on the second charge in the event of a reversal of the judgment on the first charge.

CRIMINAL PROCEDURE—Costs—Civil liability—Not reduced by confinement in jail—No refund.

COSTS—Failure to Pay—Confinement in jail—Civil liability not reduced.

HONORABLE VALENTINE W. SOUTHALL
Judge, County Court of Amelia County

November 28, 1961

This is in reply to your letter of November 25, 1961, which reads as follows:

"Some months ago a man was convicted in my court on the charge of disorderly conduct. He was fined $25.00 and costs and at his request was given some time in which to pay the full amount. When he failed to pay the amount a capias was issued and he was taken to the Chesterfield jail, which is also the jail for Amelia County. After serving a considerable number of days, his employer decided that he wanted to get the prisoner out of jail and journeyed to Chesterfield C.H. and paid the full amount of the original fine and costs.

"Immediately upon his return from Chesterfield C.H. the employer contacted the clerk of my court and requested a refund based on the number of days actually served by the prisoner. The question is, first, is he entitled to any refund, and second, if so how much refund is he entitled to.”

This section expressly provides that nothing contained in that or the preceding section of the Code (§ 19.1-333) shall prevent the issue of a writ of fieri facias for the collection of the fine after the release from jail. The statute providing for a reduction of the civil liability is found in § 53-221 of the Code.

I am of the opinion that the party who paid the fine in question is not entitled to any refund.

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**CRIMINAL PROCEDURE—Issuance of Warrant After Summons Served—Proper to try accused in absence and tax cost of warrant.**

**COSTS—Warrant Issued After Summons Served and Accused Released—Proper to tax cost against defendant if convicted.**

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HONORABLE CHARLES T. TURNER  
Assistant Commonwealth's Attorney for  
Pittsylvania County

This is in reply to your letter of May 31, 1962, in which you request my opinion as to whether a defendant can be taxed with the cost of a warrant which is issued after he has been served with a summons to appear in court, if he is not served with a copy of the warrant and no execution is made on the warrant.

By virtue of § 19.1-92 of the Code of Virginia (1950), as amended, a copy of any process issued against a person charged with a criminal offense must be left with the person charged, except as provided in § 46.1-178 of the Code of Virginia (1950), as amended. The exception is provided in cases in which a person arrested for violation of the motor vehicle laws is issued a summons and released on his promise to appear without the necessity of taking such person before a justice of the peace or other officer authorized to grant bail. In the event the accused does not appear, he shall be deemed guilty of a misdemeanor regardless of the disposition of the charge upon which he was originally arrested. Under such circumstances, a copy of a warrant could not be served upon the accused.

Section 16.1-129.1 of the Code of Virginia (1950), as amended, makes it unnecessary to issue a warrant in order to try a person who has been arrested for a misdemeanor by an officer in the discharge of his duty, unless it be demanded by the accused or his attorney. This does not mean that a warrant should never be issued unless requested by the accused. By virtue of § 19.1-184 of the Code of Virginia (1950), as amended, a misdemeanant may be tried in his absence as if he had appeared and pleaded not guilty.

In view of the foregoing statutory provisions, I think good practice would dictate that a warrant be issued on a misdemeanor charge if the accused is to be tried in his absence. The warrant may be issued by a justice of the peace before the trial, or by the Court at the time of trial. I understand the practice varies in different areas of the State.

In response to your inquiry relating to the warrant fee, I am of the opinion that the accused, if convicted, must pay this fee as a part of the taxed costs, irrespective of the issuing officer. An accused convicted in his absence must pay this fee just as if he appeared at the trial and pleaded not guilty. The fact that he is not served with a copy of the warrant is immaterial to the taxing of this cost.
You also inquire if my answer would apply to all summons properly issued by any law enforcement officer in cases not covered in § 46.1-178 of the Code. My reply is in the affirmative.

CRIMINAL PROCEDURE—Modification of Judgment—Court must act within twenty-one days.

MOTOR VEHICLES—Reckless Driving—Revocation of license—Court has no authority to modify judgment after twenty-one days.

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

July 24, 1961

This is in reply to your letter of July 17, 1961, in which you request an opinion on the facts stated as follows:

"Assuming that a person has been convicted in the Circuit Court of Franklin County for reckless driving, and the court revoked his permit for ninety (90) days would the Judge of the said court, at a later date, have authority to enter an order stating that the permit was revoked, but he was making an exception to the revocation, giving the said person a right to operate his vehicle during a specified time, at or to a particular place to be designated by the court—the exception being made to enable the person to perform his duties where his employment necessitated the driving of a vehicle.

"Assuming that a person has been convicted of two offenses, within one year, of reckless driving, and his license has been revoked automatically by virtue of his convictions, is there any statute giving the Judge authority to make exceptions to the revocation, providing the court designated the time and place for the vehicle to be operated?"

In my interpretation, the answer to your first question may be found in those particular Rules of Supreme Court of Appeals of Virginia, which now govern the finality of judgments, orders and decrees, formerly controlled by § 17-31 of the Code of Virginia. Relative to this point, the pertinent portion of Rule 1:9 is as follows:

"All final judgments, orders and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified or vacated for twenty-one (21) days after the date of entry, and no longer * * *.” (Underscoring Supplied)

Our Supreme Court of Appeals has held that the trial court loses jurisdiction and power to reopen and change the judgment order or decree when the twenty-one days after final judgment have expired. It is my opinion, therefore, that the court could change the order so as to modify the revocation of permit only within the twenty-one day period following entry of final judgment but that thereafter the court would not have the power to modify the order in any way.

With reference to your second question, § 46.1-417 of the Code of Virginia requires that the Commissioner of the Division of Motor Vehicles shall revoke and not thereafter reissue during the period of one year, the license of any
person who has been convicted of two charges of reckless driving, when the offenses upon which they are based were committed within a period of twelve consecutive months. This revocation is mandatory. Section 46.1-437 of the Code of Virginia states, in part, as follows:

"No appeal shall lie in any case in which the revocation of the license or registration was mandatory except to determine the identity of the person concerned when the question of identity is in dispute."

This section, as well as the mandatory nature of § 46.1-417, was upheld in the case of Dillon v. Joyner, 192 Va. 559, and in several other cases, and both points are well settled.

In view of the foregoing, it is my belief that the Legislature has left no room for any discretion in the application of the revocation required in the situation outlined in your second question, and I am further of the opinion that there is no statute which would give the judge authority to make an exception or modification of such revocation.

CRIMINAL PROCEDURE—Parole—"Jail inmate" applies to misdemeanants and felons in § 53-135.1 of Code.

October 2, 1961

HONORABLE JAMES W. PHILLIPS
HONORABLE CHARLES P. CHEW
HONORABLE RALPH E. WILKINS
Members, State Parole Board

This is in reply to your letter of September 15, 1961, in which you request my opinion as to whether the words "jail inmate" in § 53-135.1 of the Code of Virginia applies to both misdemeanants and to persons convicted of felonies and sentenced to jail.

Section 53-135.1 of the Code of Virginia, 1950, reads as follows:

"The Director shall have the power to transfer any jail inmate whose sentence is final from a jail to any State or city farm, State industrial school or convict road camp; provided that any jail inmate whose sentences are final and excluding fines and costs total more than twelve months, shall in all instances be so transferred. After transfer, such inmate, if incarcerated in a State penal institution, shall then become a subject of parole under article 1 of chapter 11 of this title; provided further that nothing in this section shall interfere with the control and maintenance of the convict road force, State prison farm, State industrial schools, or State penitentiary, as provided by law."

In my opinion, the obvious purpose of this section was to insure that any person having a sentence in excess of twelve months to serve would be transferred from jail to a State or City farm, State industrial school or the convict road camp. The purpose of your inquiry is to determine whether such person becomes a subject of parole, and inasmuch as the statute makes no distinction between persons convicted of misdemeanors and those convicted of felonies, but rather ties the eligibility for parole to the fact of transfer, it seems clear to me that the section applies with equal force to either misdemeanants or felons.
CRIMINAL PROCEDURE—Parole—Person sentenced to die whose sentence commuted to life imprisonment by Governor—Not eligible for parole.

August 11, 1961

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

This will acknowledge receipt of your letter of August 8, 1961, which reads as follows:

"Sec. 53-251 of the Code of Virginia provides (1) that persons sentenced to die shall not be eligible for parole and (2) that persons sentenced to life imprisonment shall be eligible for parole after serving fifteen consecutive years.

"No mention is made of persons originally sentenced to die, whose sentences have been commuted to life imprisonment.

"Will you be good enough to let me have your opinion as to whether such persons are eligible for parole after serving fifteen consecutive years, the same as those persons originally sentenced to life imprisonment."

As you point out in your letter, § 53-251(2) provides that "persons sentenced to die shall not be eligible for parole." The Governor is empowered by Section 73 of the Constitution of Virginia to "commute capital punishment." The Governor exercises this power granted to him in conformity with the provisions of § 19.1-297 of the Code of Virginia, which reads as follows:

"The Governor shall not grant a pardon in any case before conviction. In any case in which he shall exercise the power conferred on him to commute capital punishment, he may issue his order to the superintendent of the penitentiary, requiring him to receive and confine (and the superintendent shall receive and confine) in the penitentiary, according to such order, the person whose punishment is commuted. To carry into effect any commutation of punishment, the Governor may issue his warrant directed to any proper officer; and the same shall be obeyed and executed."

An inmate who has been sentenced to die and whose sentence has been commuted by the Governor to imprisonment in the penitentiary for life, is confined by the Superintendent pursuant to an order of the Governor, as provided for in the above-quoted statute. It is manifest that such an inmate is not detained pursuant to a judgment of a court sentencing him to life imprisonment. I am, therefore, of the opinion that such an inmate has been sentenced to die within the meaning of § 53-251(2), and that he is confined in conformity with an order of the Governor.

In view of the foregoing, I am of the opinion that such a person is not eligible for parole after serving fifteen consecutive years as are persons originally sentenced to life imprisonment.
CRIMINAL PROCEDURE—Preliminary Hearing—Not required unless accused under arrest.

April 25, 1962

HONORABLE J. E. POINTER
Commonwealth’s Attorney for Gloucester County

This is in reply to your letter of April 23, 1962, which reads, in part, as follows:

"I should like for you to give me an opinion on the interpretation of Section 19.1-163.1 of the Code as it might apply to the following situation:

"Assume a person is arrested and given a preliminary hearing under a charge of robbery and is dismissed at the preliminary hearing because the evidence did not reveal that the property was taken from the victim’s person. Under such evidence is it necessary that this defendant be again arrested on a charge of grand larceny before his indictment or may I present this case directly to the grand jury on a charge of grand larceny?"

Section 19.1-163.1 of the Code of Virginia of 1950, as amended, 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."

In previous opinions of this office the foregoing statute has been construed to be applicable only in those instances in which the person “is arrested on a charge of felony.” See, Report of Attorney General (1959-60), p. 133; (1960-61), p. 99. Copies of those opinions are enclosed.

In the case presented in your letter the person is not now under arrest on a charge of felony, that charge having been dismissed at the preliminary hearing. I am, therefore, of the opinion that the person may now be indicted by the grand jury on a charge of grand larceny without the necessity of first arresting such person and conducting a preliminary hearing on that charge.

CRIMINAL PROCEDURE—Suspension of Sentence—Jail sentence under § 46.1-350 of Code may be suspended.

MOTOR VEHICLES—Driving After Revocation of License—Jail sentence may be suspended.

July 20, 1961

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

This is in reply to your letter of July 12, 1961 in which you request advice as to the following questions, which are quoted therefrom:
“(1) Whether the jail sentence provided in Paragraph B of Section 46.1-350 is mandatory, or whether the Judge may, in his discretion, suspend service of the jail sentence imposed under said section.

“(2) Did the revision of Title 18 and 19 of the Code by the Acts of 1960, in which Section 19-272 was deleted, have the effect of removing any restraint upon the court in suspension of sentences?”

If I may be permitted to consider your questions in inverse order, it may be helpful to ponder first the significance of former § 19-272, which read:

“Except when authorized by statute, no court, judge or trial justice shall suspend the entry or execution of a judgment in any criminal case.”

The weight of authority appears to be that, under the common law, courts do not have authority to suspend sentences in criminal cases except temporarily for special purposes, such as may be required, for instance, for the timely perfecting of a writ of error. It would follow that this section, which originally appears verbatim in the Code of 1919 as § 4925, was, in effect, only a restatement of the common law. If this be true, I see no reason why its deletion upon revision of the Code by the Acts of 1960, should have the effect described in your second question. In any event, the significance of this interesting question is erased by the fact that another statute, presently to be discussed, abrogates the common law which might otherwise control in absence of statute.

The power of any court having jurisdiction to hear and determine the offense to suspend the sentence is found in § 53-272 of the Code of Virginia, the pertinent portion of which is 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 bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, * * * the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence * * *.”

Concerning the substance of the quoted portion of the present statute, which was contained in the original statute, Acts of 1918, Chapter 349, the Virginia Supreme Court of Appeals in Richardson v. Commonwealth, 131 Va. 802, at p. 811 said: “* * * it is manifest that the authority either to suspend the imposition or execution of sentences is committed to the trial court judges.” In the same case, the Court also expressed faith in the constitutionality of the statute with respect to the clause granting trial courts the power to suspend sentences. I consider the power bestowed upon courts by this statute to be a general one which obtains in absence of a specific statutory clause to the contrary. Section 46.1-350 contains no such restraining clause. Accordingly, it is my opinion that the trial court may, in its discretion, suspend service of the jail sentence imposed under § 46.1-350, paragraph (b), of the Code of Virginia.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Trial held in county removed from that where court sessions usually held—Court house renovation not sufficient cause.

COURTS—Sessions—When permissible to hold in county removed from that in which sessions usually held.

February 16, 1962

HONORABLE LAWRENCE R. THOMPSON
Member, House of Delegates

I have reviewed the proposed bill which was enclosed with your letter of February 13, 1962. This bill has as its purpose an amendment to §§ 17-15 and 17-18 of the Code of Virginia relating to the authority of the circuit or corporation courts to hold sessions at places other than the place wherein sessions are normally held. Under certain circumstances, the court would be authorized to hold its session within the limits of the jurisdiction of which the circuit court is a constituent part or within the limits of the corporation of which the corporation court is the court.

While there is nothing in the Constitution expressly prohibiting such legislation, I entertain some doubt as to whether a session of the court held in a county removed from that in which a crime is alleged to have been committed would impinge upon the constitutional privilege of the accused to be tried by a “jury of his vicinage,” as is reserved to him in Section 8 of the Constitution of Virginia. The Supreme Court of Appeals of Virginia has construed the word “vicinage” to mean the vicinity which corresponds with the territorial jurisdiction of the court in which the venue of the crime is alleged. See Karnes v. Commonwealth, 125 Va. 758, 762, and Newberry v. Commonwealth, 192 Va. 819, 823.

While clearly established that there are circumstances which will justify the calling of a jury from a county or city other than that in which the crime is alleged to have been committed, I am of the opinion that the inconvenience caused by courthouse repairs would not be sufficient cause to conduct a criminal trial in a county removed from the county of the alleged offense.

CRIMINAL PROCEDURE—Venue—Separate violations committed in adjoining counties—Must be tried in county in which offense occurred.

MOTOR VEHICLES—Traffic Violations—Separate offenses in adjoining counties—Must be tried in county where occurred.

July 12, 1961

MR. FRANK L. SMITH
Sheriff of Charlotte County

This is to acknowledge receipt of your letter of June 29, 1961, which reads as follows:

“Paul C. Adams, Deputy Sheriff, Charlotte County, checked a car speeding at a rate of 65 miles per hour in Charlotte County, (and) this car went into Campbell County before it could be stopped and was checked at a speed in excess of 80 miles per hour.
"Can this man be tried for all of this in Charlotte County?"

The facts which you have stated show a speeding violation (65 miles per hour) in Charlotte County and a reckless driving violation (speeding in excess of 80 miles per hour) in Campbell County, since § 46.1-190 of the Code of Virginia declares that driving a motor vehicle upon the highway at a speed in excess of 75 miles per hour, in itself, constitutes reckless driving. The proper venue for trial of each of these offenses would be the respective county in which the violation occurred.

Regarding the jurisdiction of county courts in criminal matters, § 16.1-123 of the Code of Virginia, states, 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; * * *." (Underscoring supplied)

With reference to offenses which occur at or near the boundary line between counties, § 19.1-222 of the Code of Virginia, provides as follows:

"An offense committed on the boundary of two counties, or within three hundred yards thereof, may be alleged to have been committed, and may be prosecuted and punished, in either county, * * *.

Upon consideration of the foregoing and related statutes, it is my opinion that the answer to your question must be in the negative, unless the reckless driving (speeding in excess of 80 miles per hour) occurred within three hundred yards of the Charlotte County line.

DEPOSITS AND DEPOSITORIES—Savings and Loan Corporations—County may not deposit public funds.

COUNTIES—No authority to deposit funds in savings and loan corporation.

BANKS—Savings and loan corporations do not constitute for purposes of depositing county funds.

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

March 6, 1962

This is in reply to your letter of March 1, in which you state that you have advised the Board of Supervisors and the Director of Finance of Fairfax County that they "have no authority to deposit public moneys collected through general taxation in savings and loan institutions within Fairfax County unless and until (1) such institution complies with the requirements of Title 58, Sections 944 and 945 or 946 or 946.1 of the Code of Virginia requiring bond or pledge of securities and deposit thereof in another institution in an amount sufficient to protect the said public funds to be deposited or (2) such institution is insured by the Federal Deposit Insurance Corporation as provided by Title 58, Section 947 of the 1950 Code of Virginia to the extent of deposits ($10,000.00) by the County."
You state that the savings and loan institutions contemplated as depositories are insured by the Federal Savings and Loan Corporation, a government corporation, which is to some extent similar to the Federal Deposit Insurance Corporation, but you call attention to the Code provision specifically requiring that the insurance be with the Federal Deposit Insurance Corporation. You state that in your opinion the amount of deposits insured by the Federal Deposit Insurance Corporation may not be taken into consideration in determining the amount of securities to be deposited in escrow by the bank to insure a deposit. In my opinion you are correct in your conclusion with respect to this matter, but we question whether the county is authorized under any conditions to select a savings and loan corporation, whether federal or state, as a depository under the provisions of §§ 58-938 through 58-952 of the Code. Such institutions are not considered as banks within the meaning of § 58-939 of the Code.


DISTRICTS—Congressional Reapportionment—No duty on General Assembly to redistrict.

HONORABLE GARLAND GRAY
Member, Virginia State Senate

February 9, 1962

This is in reply to your letter of February 8, 1962, in which you request my opinion as to the need or desirability of legislation which would provide for redistricting Virginia's Congressional seats. You state that it has been suggested that it may only be necessary to re-enact the statute which provided for the present distribution of Congressional seats.

The number of Representatives in Congress to which each State is entitled is determined pursuant to § 2a, Chapter 1 of Title 2, U.S. Code. This section provides, in part, as follows:

"(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

"(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement, required by subsection (a) of this section, no State to receive less than one Member. ***"

From the foregoing quoted provisions, you will note that there is no mandatory requirement for the several States to redistrict, nor is there a prescribed time or method in which the redistricting of the States is to be undertaken. Congress has left the manner of redistricting to the States, but has provided a method for electing the representatives to which each State is entitled in the event the States do not redistrict after an apportionment which alters the number of representatives
to which each State is entitled. Subsection (c) of the aforementioned Code reads, in part, as follows:

"(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: ***"

The duty upon the General Assembly of Virginia to divide the State into districts corresponding in number to the number of representatives to which Virginia is entitled is imposed by Section 55 of the Constitution of Virginia, which reads as follows:

"The General Assembly shall by law apportion the State into districts, corresponding in number to the number of representatives to which it may be entitled in the House of Representatives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing as nearly as practicable, an equal number of inhabitants."

You will note that Section 55 of the Constitution provides no time in which the General Assembly must act, such as the requirement in Section 43 of the Constitution that Senate and House districts be reapportioned every ten years.

I am of the opinion that once the State has been divided into districts corresponding in number to the number of Congressional Representatives to which Virginia is entitled, there is no further necessity for legislation providing for redistricting Congressional seats.

Whether such redistricting legislation is desired at this session of the General Assembly presents a legislative question which I, of course, am in no position to pass upon. The Legislature is free to do so if it so wishes, but there is no legal compulsion that such action be taken. I draw to your attention that there has been at least one instance in which the General Assembly reapportioned Senatorial and House districts pursuant to the mandate in Section 43 of the Constitution, but did not redistrict the Congressional seats. This occurred during a decennial period in which the number of representatives to which Virginia was entitled did not change from the preceding decennial reapportionment.

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DOG LAWS—Recovery for Livestock Killed by Dogs—Negligence of owner of livestock not a bar.

HONORABLE REGINALD H. PETTUS
Commonwealth's Attorney for Charlotte County

June 18, 1962

This is in reply to your letter of June 14, 1962, in which you request my opinion as to whether or not the board of supervisors of your county should pay a claim for sheep killed by dogs, under the following facts:

"It appears from the evidence given before the Board of Supervisors that the landowner was very negligent in maintaining his flock of sheep, that he permitted the sheep to roam at large in a sparsely-settled area some distance from his home. The owner reported that about eighteen sheep were missing, and the dog warden went there and found that four sheep had been killed by dogs."
You state that some members of the board feel that since the owner of the sheep was negligent in the handling of the sheep, there is no liability upon the county to compensate the owner for the loss sustained.

Claims of this nature are payable under the provisions of § 29-202 of the Code. The first sentence of this section provides that:

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

The terminal sentence of this section places the duty upon a claimant for damages to "furnish evidence under oath of quantity and value to the governing body of the county * within ninety days after sustaining such damage."

Neither of these provisions contains any language that would authorize a board of supervisors to reject a claim on the ground that the owner may have permitted his flock of sheep to roam at large in a sparsely settled area. If this is the only question involved, in my opinion the claim should be allowed.

DOG LAWS—Sheep Killed by Dogs—Lambs must be alive at time of attack in order to compensate owner.

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

This is in reply to your letter of January 30, 1962, in which you request my opinion regarding the authority of the Board of Supervisors of Pittsylvania County to compensate an owner of sheep for damages suffered to his herd by reason of dogs which killed a number of such sheep and caused several others to give premature birth to lambs which were dead when foaled.

You have expressed the view that the Board of Supervisors has authority to pay the assessed value of the sheep which were killed, but has no authority to pay for the lambs. You base your opinion upon the provisions of § 29-202 of the Code of Virginia. I concur in your view. The General Assembly having expressly provided the basis for compensating owners for livestock in the County of Pittsylvania upon the basis of the assessed value of such livestock and the fair value of unassessed lambs or poultry, I am of the opinion that the Board is limited to this form of compensation. Inasmuch as the lambs were not in being at the time of the attack, and were never alive, I do not believe the County could compensate the owner for their loss.

ELECTIONS—Ballots—How marked—Effect of error.

MR. WALTER M. LOWRY, JR.
City Councilman of Fredericksburg

I have your letter of May 29, 1962, in which you ask three questions:

1. Is the mark "x" preceding a write-in candidate's name required to be boxed in?
Section 24-252 of the Code of Virginia provides as follows:

"§ 24-252. It shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (✓) or cross (X or +) mark or a line(—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

From this you will see that it is not necessary to place the box in front of the name, but it is necessary that the name be written out and be preceded by a check or cross mark or a line. An opinion of this office, dated September 14, 1959, to the Honorable T. W. Downing, Secretary of the Warren County Electoral Board, states, in part, as follows:

"If no such mark is placed in front of the name, then it may not be considered a valid vote."

2. Does the write-in’s name have to be spelled absolutely correct?

By an opinion of this office, dated October 9, 1959, to the Honorable B. W. Seay, Judge of the County Court of Fluvanna County, it was stated, in part, as follows:

"* * *, it is not necessary for the voter to accurately spell the name of the person for whom he is voting; it is sufficient if the name has been placed thereon in such manner that there can be no doubt in the minds of the judges of the election as to the identity of the person for whom the write-in vote is cast."

3. Does error on the ballot throw out the entire ballot or just the name in which the error occurs?

The error would only throw out the name in which the error occurred and not the entire ballot, unless for some other reason the entire ballot should be disregarded.

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ELECTIONS—Capitation Taxes—Exemptions—Members of armed forces when in active service in time of war.

TAXATION—Capitation Taxes—Exemptions.

TREASURERS—Duty to accept capitation taxes when tendered.

October 17, 1961

HONORABLE GEORGE W. TITUS
Treasurer, Loudoun County

This is in reply to your letter of October 12, 1961, which reads as follows:

"Please advise me if the members of Armed Services are required to pay capitation taxes.

"I have requests from various people requesting to pay their capitation taxes in Loudoun County. These people either live in Maryland or District of Columbia, file their state income tax in Maryland or
or District of Columbia but yet want to pay their capitation taxes in Virginia, also some of them own real estate in Loudoun but live in Maryland or District of Columbia and claim their residence there. Please advise if I am required to accept the payment of the capitation taxes from these individuals."

Chapter 2.1 of Title 24 of the Code, which implements Article XVII of the Constitution, exempts persons in the active service of the armed forces of the United States in time of war from the payment of poll taxes. I enclose an opinion dated March 12, 1959, and published in the Report of the Attorney General (1958-1959), p. 114, which relates to this matter as well as the absentee voting privileges of persons in the armed services. This office has never assumed the responsibility of ruling that these statutes are no longer in effect. Therefore, your first question is answered in the negative.

With respect to your second question, I am not aware of any statute authorizing a treasurer to refuse to accept the payment of capitation taxes when the same are tendered. This is true, although the person tendering payment has not been assessed therefor. Smith v. Bell, 113 Va. 667. It is not the prerogative of the treasurer to determine whether or not such a person is assessable for poll taxes for the years involved. Whether or not such a person is entitled to register and vote is a question to be determined by the election officials.

I am of the opinion therefore, that a treasurer may not refuse payment of poll taxes when tendered, even though he may feel that such person is not assessable for such tax.

ELECTIONS—Capitation Taxes—Members of Army Reserve must pay.

June 18, 1962

HONORABLE DOROTHY K. HARVEY
Treasurer of the County of Amherst

This is in reply to your letter of June 14, 1962, which reads as follows:

"The question was raised at a recent election whether or not a person who claims to be in the active Army Reserve could vote without the payment of state capitation taxes. The judges of this election have asked me to request that you render an opinion on this question prior to the July 10th primary."

Section 1 of Article XVII of the State Constitution provides as follows:

"No member of the armed forces of the United States, while in active service, shall be required to pay a poll tax or to register as a prerequisite to the right to vote in any and all elections, including legalized primary elections."

This section is implemented by Chapter 2.1 of Title 24 of the Code. You will note that under these provisions only those persons who are in active service as a member of the armed forces at the time they offer to vote or were discharged from active service on or after the first day of the calendar year preceding the year in which they offer to vote may enjoy the exemption from the payment of poll tax. It is possible, therefore, that a person who is in the active Army Reserve may have been in active service at a time that would give him the right to vote without payment of the poll tax.

It is my understanding that one who is in the active Army Reserve is not in the active service but is subject to call to return to the active service at any
time. I am of the opinion, therefore, that a person who is in the Army Reserve does not qualify to vote without the payment of the poll tax, unless he was discharged from active service on or after the first day of January of the calendar year preceding the year in which he offers to vote.

ELECTIONS—Districts—Petition for Changes—Not necessary to specify desired changes.

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

December 19, 1961

This is in reply to your letter of December 15, 1961, which reads as follows:

"I am requesting an opinion from you in regard to proceedings under Title 24, Chapter 5, particularly Section 24-46 of the Code of Virginia of 1950.

"The Board of Supervisors of a County is considering a petition to the Judge of the Circuit Court, requesting a review by the court of the present existing election districts, asking that the number be reduced by re-arrangement, consolidation or abandonment when necessary.

"The Board has no specific recommendations to make but that the number of voting places or districts are entirely too numerous and feel that the public would generally be served much better and more expeditiously by a reduction of the number of voting places or districts in the respective magisterial districts.

"My inquiry is whether or not the Board by a petition of a general nature, without specifically recommending possible changes, would be sufficient for the court to act on the matter of decreasing the number of voting districts or places in each magisterial district.

"In other words, if the court did act on a general petition, would it be proper under the statute?"

The statute does not specifically require the petition to outline the changes desired, but it seems that the Court would expect the petitioners to state what alterations and rearrangements are deemed necessary, giving the reasons, such as number of voters at each precinct, proximity of the precincts, etc.

The Court, after considering the testimony in support of the petition, may enter such order as it feels will be in the best interest of the people.

ELECTIONS—Eligibility to Vote in Town Election—Residence—How determined.

ELECTIONS—Residence—How determined.

HONORABLE LEON OWENS
Commonwealth's Attorney for Russell County

June 7, 1962

This is in reply to your letter of June 1, 1962, which reads as follows:

"The town of Honaker, in Russell County, Virginia, is holding its
regular election for members of the council, and the mayor, on June 12 of this year. A number of people in Honaker, including several candidates for council, have asked me whether or not voters, who are otherwise qualified to vote in said election who at one time resided in the town but have since moved physically from the corporate limits of the said town of Honaker, but continued to claim Honaker as their domicile, are eligible to vote in the town election.

"I have referred these people to earlier opinions of the Attorney General, but they have asked me to ask you for an opinion to determine if you are of the same opinion as previous Attorneys General."

I presume you have referred to former opinions of this office, such as may be found in the Reports of the Attorney General (1939-1940) p. 95, and (1947-1948) p. 77. The former opinion was rendered by Attorney Abram P. Staples and has been subsequently adopted by his successors in office. The applicable principles, with which I concur, are summarized in that opinion as follows:

If a person lives in a town and subsequently moves his physical residence beyond the limits of the town, the question of his legal residence is largely controlled by the intention of the individual involved. If, when he moved from the town, he intended to establish his legal residence in the county, then, of course, he may not continue to vote in the town. If, however, he is temporarily residing in the county, even though such residence may be of long duration, yet, if he has the intention of retaining his legal residence in the town with the further intention of returning at some future time, he may continue to vote there.

ELECTIONS—Paid advertisements published in special or general elections not subject to §24-406 of Code.

ELECTIONS—Special and General—Expenses governed by Chapter 17 of Title 24.

HONORABLE VICTOR P. WILSON
Member, Virginia State Senate

June 27, 1962

This is in reply to your letter of June 26, 1962, in which you request my advice with respect to the following question:

"I have been requested if Section 24-406 of the Code of Virginia, which requires any firm or corporation engaging in the publication of any newspaper, magazine or periodical and publishing the same provided that such articles so published are printed and placed at the beginning thereof in plain type, black face, Roman capitals in a conspicuous place the statement, 'Paid Advertisement' applies with equal force with special and general elections. **"

Section 24-406 of the Code is contained in Chapter 14 of Title 24, and this chapter relates to primaries and second primaries only. The language of § 24-406 states specifically that it is applicable to "any primary election or second primary election."

In my opinion, therefore, the answer to your question must be in the negative. The provisions relating to expenses in connection with general and special elections are contained in Chapter 17 of Title 24 of the Code, commencing with § 24-440.
ELECTIONS—Primary—Duty to vote for party nominees in preceding general election not applicable to presidential electors.

July 7, 1961

HONORABLE D. F. FLEET, JR.
Secretary, County Electoral Board for Tazewell County

This is in reply to your letter of June 30, 1961, which I quote in full:

"Section 24-367 of Virginia Election Laws states the requirements to vote in the Democratic Primary election July 11, 1961. The question has arisen whether this section of the law means what it says or not. For instance in this district last fall we voted in the presidential election and chose candidates for United States senator and for the House of Representatives. If a prospective voter turns up at the polls on July 11 who is unable or unwilling to swear that he is (1) a member of the Democratic party and (2) that he voted for all the Democratic candidates last fall, shall he or she be allowed to vote?

"Should a voter known or suspected to be a Republican apply for an absentee ballot and vote this ballot by mail, how may this voter be challenged and prevented from voting? Section 24-324 seems to say that an applicant for an absentee ballot in effect swears that he is eligible when he applies for the ballot with the application for it. If this is true and the absentee voter last fall did not support the Democratic candidates and will not swear that he did, then what is the procedure to follow?"

The qualifications for voting in a primary election are set forth in § 24-367 of the Code of Virginia. As applied to the forthcoming Democratic primary election, only Democrats will be eligible to vote in the primary, and such Democrats, if they have voted previously, must have voted for all the Party nominees in the last preceding general election in which they participated. Whether the term "Party nominees" embraces Presidential electors is a question which has been raised on numerous occasions. Apparently, it was first answered by this office on January 31, 1929, by the late Honorable John R. Saunders, then Attorney General. Colonel Saunders reached the conclusion that the term "Party nominees" does not include Presidential electors. On each subsequent occasion when the question has been asked, this office has adhered to the view expressed by Colonel Saunders.

In an opinion under date of May 26, 1939, the late Honorable Abram P. Staples, then Attorney General, discussed the question fully. I call your attention to the following language in that opinion, a copy of which I enclose:

"There have been five sessions of the General Assembly held since the above interpretation of the statute, but its provisos have not been amended. The construction then given it must therefore be accepted as correct under well settled principles of statutory construction. Atlantic & D. R. Co. v. Lyons, 101 Va. 11."

More than twenty-two years have passed since the opinion by Attorney General Staples. As I have indicated, the question has been asked and answered on several occasions. The opinions rendered have been given considerable attention by the news media. It is, therefore, my opinion that the rule of statutory construction relied upon by Attorney General Staples compels the conclusion that this is no longer an open question and that the opinion first expressed in 1929 must be accepted as correct.
I might call your attention to the fact that prior to 1924 the statute in question (§ 24-367 of the Code of 1950, which was § 228 of the Code of 1919) contained the statement: "No person shall be permitted to vote for the candidates of any party unless in the last preceding general election he voted for the presidential electors nominated by such party * * *." In 1924 the section was amended and this specific provision was omitted. This, in addition to the Code sections relied upon by Colonel Saunders, as set forth in the enclosed opinion, has convinced me that Colonel Saunders and my other predecessors have correctly interpreted the law.

In answer to your specific inquiry, I am of the opinion that any prospective voter may be challenged as to his qualifications, pursuant to § 24-253 of the Code and if the judges of election be satisfied that he is not a qualified voter, they should refuse to permit such person to vote.

With respect to absentee ballots, § 24-319 of the Code limits the privilege to duly qualified voters. As pointed out above, one of the qualifications for voting in a primary election is membership in the Party conducting such election. Thus, Republicans would not be entitled to vote by absentee ballot in a Democratic primary, by the same token which would disqualify them from casting a ballot in person.

When a prospective absentee voter signs and returns the ballot to the Registrar, that act is construed as an offer to vote in the election. By virtue of § 24-341 of the Code, the judges of election are required to determine the eligibility of the voter to cast his vote before the ballot is deposited in the ballot box. Should they, or any elector, have reason to believe any such absentee voter is not qualified to cast his vote in the primary election, it is the duty of the judges to withhold that ballot until the question of eligibility is determined.

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ELECTIONS—Primary in Cities—Section 24-345.3 of Code not applicable.

March 10, 1962

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

This is in reply to your letter of March 9, 1962, which reads as follows:

"Please be so kind as to advise me whether or not Section 24-345.3, as last amended, of the Code of Virginia is applicable in any way to candidates for election to the Council of the City of Norfolk for the Councilmanic election to be held in June, 1962, and, if it is applicable, in your opinion, just what such candidate should do in order to comply with it.

"Norfolk City Charter, passed in 1918, does not provide for a Primary, and does provide a method of nomination different from that prescribed by the State law."

In my opinion, § 24-345.3 of the Code does not apply to candidates for county, city and town offices. The 1960 amendment to this section (Chapter 383 of the Acts of 1960) was for the purpose of excluding counties and cities from the provisions of Chapter 13.1 of Title 24 of the Code.
ELECTIONS—Primary—Write in votes prohibited for Democratic County Committee—How vacancies filled—How ties broken.

November 8, 1961

HONORABLE WILLIAM F. PARKERSON, JR.
Commonwealth’s Attorney for the County of Henrico

This is in reply to your letter of October 31, 1961, which reads as follows:

“At the July 11, 1961 Democratic Primary election there were eligible for election in each precinct in Henrico county a total of three committeemen. In many precincts less than three persons qualified as candidates.

“In various precincts there were a number of write-in votes cast on the ballots. I observe that the general election laws provide for write-in votes (§24-252) whereas the primary election laws contain no such provision. I also note that an opinion letter of your office dated July 2, 1957, to the Honorable E. L. Turner, held that write-in votes in primary elections were not permissible. Inasmuch as this opinion dealt with the nomination of a person in a primary election, whereas the primary election of a committeeman results in his election as distinguished from a nomination, may I inquire as to whether write-in votes for precinct committeemen are permissible.

“At the same July 11, 1961 Primary four candidates qualified to have their names appear on the ballot and of these four candidates a tie vote resulted between the two candidates receiving the lowest number of votes cast. The commissioners of election certified the total of the votes cast for each candidate but took no further action.

“It appears that § 24-360 of the primary election law requires a tie to be determined by lot and I would understand that § 24-277 requires the commissioners of election to make such determination.

“I have found no authority for the commissioners of election to reconvene and take further action after their canvass of returns has been made and it would appear that the Henrico County Democratic Committee should, when its members take office on January 1, 1962, determine that a vacancy exists for this precinct committeeman post and proceed, in accordance with the committee rules, to elect a committee-man. May I request your opinion as to the procedure to be followed in this situation.”

Subsequent to the receipt of that letter, you have furnished me with copies of the “Pledge of Honor” and “Declaration of Candidacy” required to be filed by candidates for a place on the Democratic County Committee. These forms are as follows:

“I, ........................................................................, do solemnly affirm that I voted for all the Democratic Party nominees in the last general election, and I pledge myself to support all the nominees of the Democratic Party in any election so long as I shall remain a member of this committee.

........................................................................................................................................


“STATE OF VIRGINIA

“I, ........................................................................, of the County of Henrico, a member of the Democratic Party, declare myself to be a candidate for nomination to the office of Democratic Committee, ........................................................................ Precinct, ........................................................................ District, to be
REPORT OF THE ATTORNEY GENERAL

made at the primary election to be held on the .......... day of .........., 19.......-

"If I am defeated in the primary I hereby direct and irrevocably authorize the election officials charged with the duty of preparing the ballots to be used in the succeeding general election not to print my name on said ballots.

"Given under my hand, this .......... day of .........., 19.......-

"Attested by:


Witnesses

"STATE OF VIRGINIA:

"I, ............................................., a Notary Public in and for the ............................................., whose name is signed to the foregoing writing bearing date the .......... day of .........., 196....... has acknowledged the same before me in my 

............................................. aforesaid.

"My commission expires the .......... day of .........., 19.......-

"Given under my hand this .......... day of .........., 19.......-

By reference to the Democratic Party Plans, Section 1, page 3, you will note that it provides that whenever members of the county committee are selected in a primary election, the election shall be conducted under the State primary laws. This office has previously ruled that a write-in vote in a primary election is not permitted. See, Report of the Attorney General, (1957-1958), p. 113. In my opinion, the ruling which was furnished to the Secretary of the Electoral Board of Charlottesville is applicable to the case presented by you. The requirements of § 24-371 of the Code had to be observed in order for a person to qualify as a candidate for membership on the County Committee and no person was eligible to be a candidate unless those requirements were met.

Therefore, in my opinion, the write-in votes for the Democratic County Committee which were cast in the July 11, 1961, primary may not be counted as valid votes. Consequently, a vacancy exists in each case of that nature. The vacancy may be filled by the present Democratic County Committee.

With respect to those candidates whose names were on the ballot and a tie resulted, it was, of course, the duty of the Commissioners of Election to break the tie in the manner provided by law. However, since the Commissioners failed to perform this duty, in my opinion, it is too late now. There is no authority for convening the Commissioners at this time for the purpose of breaking the tie vote. I know of no other solution in connection with the tie votes than for the County Committee to declare a vacancy to exist and to fill the vacancy.

ELECTIONS—Registration—Eligibility fixed by Constitution—Conflicting statute invalid.

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

This is in reply to your letter of May 25, 1962 in which you state, in part, as follows:
"The Registrar of the County has questioned me concerning the legality of registering a voter at a time when the payment of his assessed capitation tax has not been made at least six months prior to the next general election. * * *"

You state that you have received from Honorable Levin Nock Davis copy of our opinion of March 21, 1952, appearing in Report of Attorney General (1951-1952), p. 76, in which it was held that Section 20 of the Constitution fixes one's eligibility to offer to register. You state that this is in conflict with § 24-67 of the Code, and you have requested my opinion as to how § 24-67 should be construed.

In this connection, this office issued a subsequent opinion on September 2, 1955, to the Secretary of the Electoral Board of Prince Edward County, copy of which I am enclosing. This opinion is published in Report of the Attorney General (1955-1956), p. 72.

You will note in this opinion that the Attorney General at that time took the position that to the extent that § 24-67 is in conflict with Section 20 of the Constitution, it is invalid. In my opinion, the previous opinions of this office with respect to the matter are sound, and I concur in the conclusions reached therein.

ELECTIONS—Registration—Persons convicted of felony not to be registered.

January 10, 1962

Mr. L. Waverly Hudgins
General Registrar, City of Portsmouth

This is in reply to your letter of December 15, 1961, in which you request my opinion as to whether, under the following conditions, the persons described are eligible to be registered as voters. I quote from your letter as follows:

"One man—twenty-one years old, convicted of 'Breaking, Entering and Burglary,' was sentenced to Beaumont for confinement—released after eleven months and placed on probation, after which, he entered the Army. This conviction occurred in this city during his teen years.

"The second man—now twenty-three years of age, was convicted at the age of seventeen for 'Burglary' and sentenced to one year's probation. Both convictions occurred in the Juvenile Court of this city."

You have directed my attention to § 24-18 of the Code, which excludes from registration and voting "persons convicted after the adoption of the Constitution, either within or without this State, of treason, or any felony* * *." This identical language is found in Section 23 of the Constitution of Virginia. Section 18.1-6 of the Code of Virginia defines felonies in such manner as to make it clear that burglary is a felony in Virginia.

Inasmuch as the records before you indicate that both of the persons described in your letter have been convicted of burglary, and hence convicted of a felony, I do not believe it would be proper for you to permit their registration. Whether these persons may successfully establish that they were convicted under juvenile statutes, which would have the effect of exempting them from the provisions of § 24-18, and whether any such exemption would be constitutional, in view of the fact that the ineligibility involved is imposed not merely by statutory enactment but by constitutional provision, are questions which I do not feel it would be proper for you to attempt to determine collaterally.

It is, therefore, my opinion that you must act on the face of the records before you and decline to register such persons.
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ELECTIONS—Residence—Place of residence depends upon intention.

April 11, 1962

HONORABLE THOMAS C. PHILLIPS
Virginia State Senator

This is in reply to your letter of April 10, 1962, in which you request my opinion with respect to the following state of facts:

"I have a constituent who formerly lived in Abingdon but who now lives outside the corporate limits of Abingdon but whose business and substantial property interests are situated in the corporate limits of Abingdon.

"For the last 12 years he has been voting in the Town of Abingdon elections and he considers Abingdon his home town and may at any time return to reside in the Town.

"The Town has recently published a list of those former residents who have moved outside the Town and whose names the Town expects to strike from its voting list and this includes my constituent.

"I would appreciate an opinion from you as to whether or not this party is entitled to vote in the Town election, assuming that he is otherwise qualified."

This office has held many times that the voting residence of a person is a matter of intent. One of these opinions which relates to a situation similar to the one presented by you was written by the late Attorney General Staples on December 6, 1939, copy of which I enclose. This opinion is published in Report of Attorney General, (1939-1940), p. 95. I also enclose copy of an opinion furnished on April 27, 1956, to Honorable Volney H. Campbell, Report of Attorney General, (1955-1956), p. 178, which discusses the same point, except that the situation was reversed—the voter having moved from the county to the town of Abingdon. This opinion also discussed other questions that may arise in a special election.

It would appear that inasmuch as the person in question has continued to vote in the town since moving to an area in the county outside the town, that his right to vote in the town is free from doubt, especially if he states that he intends to ultimately move back to the town.

ELECTIONS—Town—Effect of annexation—Residents of annexed area may vote if otherwise qualified.

November 29, 1961

HONORABLE WILLARD R. FINNEY
Secretary of the Electoral Board of Franklin County

This is in reply to your letter of November 28, 1961, which reads as follows:

"The Town of Rocky Mount is in the process of annexing part of Rocky Mount Magisterial District.

"Inasmuch as the Town election will be held on June 12th of next year, I would like to know what steps will be necessary for the people to take, who now live in the county (and who anticipate will be living in the Town by January 1, 1962) to be eligible to vote in the Town election. It appears that they would probably have to pay their poll taxes by December 12, 1961, and would also have to transfer their place
of registration as provided for under Section 24-89 of the Code of Virginia. On the other hand, I noticed that Section 24-23 of the Code states that the electors of a Town are the residents and those qualified to vote for members of the General Assembly.

"I would appreciate your advice in this matter inasmuch as we feel that the people who now live in the district will certainly want to vote in the Town election and it could be that a Bond Issue Vote will come up."

The provisions of § 15-152.24 are applicable. Of course, the general provisions with respect to the payment of poll taxes apply to voters living in the annexed territory. Persons who have not registered at the time of the annexation would, of course, be required to register under the general election law provisions with the precinct registrar. After such persons have so registered they, if residents of the town, will be automatically entitled to be placed on the town registration books.

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ELECTIONS—Town Council—Candidates must be qualified voter—Time in residence may be fixed by charter.

TOWNS—Council—Members must be qualified voters—Residence may be fixed by charter.

October 12, 1961

HONORABLE J. PEYTON FARMER
Commonwealth's Attorney for Caroline County

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

"A vacancy occurred on the Town Council, and the Council appointed X to the Council. X has resided for several years just outside of the corporate limits of the town. He built a home in town and moved into it about two months ago and is an actual resident of the Town and qualified to vote for members of the General Assembly. A question has been raised as to his eligibility to be on the Council since he has resided in Town for such a short period of time.

"The Town Charter provides: 'Any vacancy occurring otherwise during the term for which such person was elected shall be filled by the council by the appointment of any one eligible to such office.' Please let me have your opinion as to whether or not Section 15-487 of the Code of Virginia of 1950, as amended, applies to X. X will not take the oath of office until I have your opinion."

By reference to Article 3 of the Charter of the Town of Bowling Green, I find that the qualification for election to the Town Council is that the person shall be an elector of the town. The term elector means that such person shall be a voter in the town. I think this provision is an exception to the last sentence of § 15-487 of the Code to which you refer.

The provision in the Town Charter with respect to filling vacancies provides that the Council may fill a vacancy in the Council by the appointment of anyone eligible to such office. Inasmuch as this person has not resided in the town for a period of six months, I am of the opinion that he is not eligible to be elected to the Town Council due to the fact that he is not an elector in the town.

I enclose copy of an opinion relating to this matter which is found in the Report of the Attorney General (1938-1939), p. 92, and which is dated June 19, 1939.
ELECTIONS—Town—Election under § 4-45 of Code—Eligibility to vote.

ALCOHOLIC BEVERAGE CONTROL LAWS—Town Election Under § 4-45 of Code—Who eligible to vote.

MRS. NILLA B. TREDWAY
Treasurer of Pittsylvania County

May 16, 1962

This is in reply to your letter of May 14, 1962 in which you state that an election will be held on June 12, 1962 in the Town of Gretna under the provisions of § 4-45 of the Code of Virginia for the purpose of taking the sense of the qualified voters of said town on the question as to whether beer, wine and other alcoholic beverages shall be sold in the town. You have requested my advice as to the qualification of voters in this election. You state that under the provisions of § 24-22 of the Code it would appear that all persons qualified to vote in the town of Gretna who have paid their state capitation tax for the required years prior to May 5, 1962, will be eligible to vote in this referendum election. Section 24-22 to which you refer pertains to the qualification of voters at special elections. This section defines special election as follows:

"... The term 'special election' as used in this section shall be deemed to include such elections as are held in pursuance of any special law, and also such as are held to fill a vacancy in any office, whether the same be filled by the qualified voters of the State, or of any county, city, magisterial district or ward." (Emphasis supplied.)

Section 24-136 of the Code is as follows:

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

Under this section, June 12, the second Tuesday in June, is a general election day, even though in the town of Gretna there is no election of town officers this year.

Section 24-137 of the Code reads as follows:

"Special elections shall be deemed to be such as are held in pursuance of a special law, and also such as are held to supply vacancies in any office, whether the same be filled by the qualified voters of the State or of any county, city, town magisterial district, or ward, and the same may be held at such time as may be designated by such special law or the proper officer duly authorized to order such elections.

The election to be held on June 12 is not being held under a special law but is being held under Title 4 of the Code of Virginia, which is a general law. I am of the opinion that the provisions of Title 4 providing for a referendum on the question of the sale of alcoholic beverages may not be classified as a special law. The election called by the Circuit Court of Pittsylvania County in this instance is, of course, a special election as that term is ordinarily used, but in determining the question presented by you we are bound by the statutory definition of a special election.

If this were the year for the election of town council and other town officers only those persons who have qualified to vote in the general election to be held on June 12 would be eligible to vote for such town officers. Those persons who are qualified to vote in a general election to be held on June 12 for town officers
are qualified to vote in any election to be held on that date. Section 4-45 of the Code provides that the election shall be held upon the petition of a certain number of the qualified voters of the town and that the question as to whether or not alcoholic beverages shall be sold in the town shall be decided by requiring the regular election officials of the town on the date fixed in the order to open the polls and take the sense of the qualified voters of the town on the question submitted.

The qualifications of voters in an election are determined by the Constitution, and pertinent to this opinion is Section 18 of the Constitution, which reads as follows:

"Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another in the same county, city or town, shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

"The right of citizens to vote shall not be denied or abridged on account of sex."

Under this section of the Constitution there can be no doubt that those voters living in the town who have paid their poll taxes six months prior to the election (as required by Section 21 of the Constitution) shall be deemed to be qualified electors of the town and, of course, may not be denied the right to vote on any question presented at an election on June 12, 1962.

It is my opinion, therefore, that only those citizens of the town who would be entitled to vote in an election on June 12, 1962, for members of the town council and other town officials are qualified to vote in the referendum to be held on that date under Title 4 of the Code.

In view of my answer to your first question, no reply to your second question, regarding the posting of the certified list, is necessary.

ELECTIONS—Town—Referendum under § 4-45 of Code—Any qualified voter entitled to vote.

ALCOHOLIC BEVERAGE CONTROL LAWS—Town Referendum Under § 4-45 of Code—Any qualified voter may vote.

April 9, 1962

HONORABLE SAMUEL W. SWANSON
Clerk, Circuit Court of Pittsylvania County

This is in reply to your letter of April 6, 1962, which reads as follows:

"Petitions of qualified voters of the town of Gretna have been filed with the Circuit Court of this county, asking that a referendum be held in said town under the provisions of Section 4-45 of the Code of Virginia, 1950, as amended. It is apparent that under this section the signers of the petitions will have to number at least one hundred qualified
voters. It will be very much appreciated if you will give me your opinion on the following question:

"Should all signers of the petitions asking for the referendum have actually cast their votes in said town in the last preceding presidential election, and counted for presidential electors, or is it only necessary that the signers of the petitions be qualified voters of the town of Gretna and eligible to vote in the coming referendum?"

"or"

"If a person who was legally qualified to cast his vote in the town of Gretna in the last preceding presidential election did not vote on account of illness, absence or for any other reason, is that person eligible to sign a petition calling for the referendum at this time if he has paid the required poll taxes, if registered to vote in the town and has met all legal requirements as a voter?"

Section 4-45 of the Code to which you refer provides that the petition asking for a referendum to be held under Chapter 1 of Title 4 of the Code of Virginia shall be signed by a number of qualified voters not less than 30% of the number of votes cast and counted in the county, city or town, at the case may be, in the last preceding presidential election.

It is not necessary that the signers shall have voted in the last presidential election or shall have been qualified to vote in such election.

Any person who is eligible to vote at the time the petition for signatures is circulated may sign the petition and be counted as one of the number necessary to constitute the 30%.

ELECTIONS—Town—Registration—How residents determined.

MRS. GLADYS K. WILLIAMS
Registrar of Amherst

May 24, 1962

This will acknowledge receipt of your letter of May 22, 1962 relating to the town of Amherst election to be held on June 12, 1962, which letter reads as follows:

"I am Registrar for the Court House Precinct of Amherst County, Virginia and also Registrar for the Town of Amherst located within the Court House District and I have two sets of registration books, one for the Court House District of Amherst County and the other for the Town of Amherst, Virginia, an incorporated town. I have been requested by mail to send ballots to one or more persons whose names are on the Court House registration book for the Court House District, but their names do not appear on the current Town of Amherst registration book, and as I understand the situation, I cannot properly mail ballots to an absentee voter whose name is not on the Town of Amherst registration book, although the capitation tax has been paid and they state that they formerly lived in the Town of Amherst and now consider the Town their legal residence.

"Will you please advise me whether or not I shall mail ballots to such persons when their name does not appear on the Town registration book.

"A Town election is to be held on June 12, 1962 and the registration book, as I understand it, closes thirty days prior to election.
day and their names could not now be entered on the Town registration book."


The question is whether or not the applicants for absentee ballots have ever been residents of the Town of Amherst, and, if so, whether they have an intention to maintain their voting residence in the town. Once a person has established his citizenship in a locality so as to be entitled to vote there, he does not automatically lose that status by moving to another place. This office has consistently held that if a person has moved from a locality his right to continue to vote in that locality is controlled by whether or not he has an intention ultimately to return. If such person does not establish his voting place at the place to which he has moved but continues to vote at the place from which he moved, the presumption is that he is retaining his voting citizenship at that place.

As you will note from the enclosed opinions, you may place the names of these persons on the town books and proceed to process their applications for absentee ballots according to the absentee ballot statutes.

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ELECTIONS—Town—Special election—Who eligible to vote.

April 25, 1962

Honorable J. B. Cheney
Mayor, Town of Gretna

I have your letter of April 24th, 1962, in which you ask various questions relative to the special election to be held in the Town of Gretna on June 12, 1962. These questions are as follows:

(1) If a non-resident moved to the Town of Gretna, Virginia, after January 1, 1962, and is presently a resident of the Town of Gretna, may this person register without paying a poll tax on or before May 11, 1962 or what is the latest day that he can register and vote in the Special Election to be held on June 12, 1962?

Section 24-17 of the Code of Virginia is as follows:

§ 24-17. Every citizen of the United States twenty-one years of age, who has been a resident of the State one year, of the county, city or town, six months, and of the precinct in which he offers to vote thirty days next preceding the election, in which he offers to vote, has been duly registered, and has paid his State poll taxes, as required by law, and is otherwise qualified, under the Constitution and laws of this State, shall be entitled to vote for members of the General Assembly and all officers elective by the people. Removal from one precinct to another in the same county, city or town, shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days from such removal.

It is evident that the answer to this question must be in the negative.

(2) If a resident of the Town of Gretna, Virginia, became 21 after January 1, 1961, is it permissible for this person to pay a poll tax for the year 1962 (in advance) and then register to vote on or before
May 11, 1962 and vote in the Special Election to be held on June 12, 1962?

A resident of the Town of Gretna becoming twenty-one years of age after January 1, 1961, is first assessable with poll taxes on January 1, 1962. He may pay this poll tax in advance and, if registered in due time as stated in the question, would be eligible to vote in the June 12, 1962 election. The answer to this question, therefore, is in the affirmative.

(3) If a person has become 21 at of January 2, 1962 or will become 21 by June 12, 1962, may this person register and vote in the above Special Election to be held on June 12, 1962? Are the books closed for 21-year-olds registering thirty days before the election?

If the person becomes twenty-one years of age by June 12, 1962, he would not be assessable with poll taxes for the year 1962, but he may pay the poll tax in advance for 1963 and register and vote, as provided by § 24-83.1 of the Code of Virginia, which provides as follows:

§ 24-83.1. For the purpose of registering and transferring voters all registration books shall be closed for a period of six days next preceding and including the day of any special election or of any election upon a referendum. This section shall not be construed to shorten the period during which under any provision of law such books are required to be closed, nor shall this section apply to cities having a population of more than one hundred thousand.

(4) A number of citizens have lived in the Town of Gretna several years ago and have voted for years in the County Elections at the Gretna Precinct located within the corporate limits of Gretna. While they lived in the Town of Gretna they voted in all Town and Special Elections. These citizens maintain their legal voting domicile is still in the Town of Gretna, Virginia, as they have never moved their voting domicile elsewhere. If these citizens maintain their legal voting domicile is still in the Town of Gretna, are they entitled to vote in the Special Election to be held on June 12, 1962, and should the registrar place their names on the registration list if requested in order that they may be entitled to vote provided they have paid all poll taxes?

Section 24-22 of the Code of Virginia is as follows:

§24-22. The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at general elections, but at any such special election, held before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held and at any such special election, held on or after the second Tuesday in June in any year, any person shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the first Monday in November of that year. The term “special election” as used in this section shall be deemed to include such elections as are held in pursuance of any special law, and also such as are held to fill a vacancy in any office, whether the same be filled by the qualified voters of the State, or of any county, city, magisterial district or ward.

The question of voting residence is largely a matter of intention, and if the
citizens referred to above have retained their legal domicile in the Town of Gretna, with the idea of maintaining that as their legal residence, and have been voting there in other elections, under the above-quoted section they would be entitled to vote in the special election. If they have voted in Gretna in the past, as stated in your question, I assume their names are on the registration list for the Town of Gretna, and it would not be necessary for their names to be added thereto.

(5) Does the County of Pittsylvania or the Town of Gretna pay the costs of the Special Election.

Section 24-177 of the Code of Virginia provides as follows:

§ 24-177. The cost of conducting elections under this chapter shall be paid by the counties and cities, respectively.

From this it appears plain that the County of Pittsylvania would pay the cost of this election, as is customary in any elections.

ELECTIONS—Voting Machines—City may use on trial basis if approved by State Board of Elections.

HONORABLE THEODORE C. PILCHER
Member, House of Delegates

November 2, 1961

This is in reply to your letter of October 31, 1961, in which you state that the election officials of the City of Norfolk have arranged to use voting machines on a trial basis at the election to be held on November 7. Under the provisions of Chapter 12 of Title 24 of the Code, the governing body of a city may use any kind or type of voting machine that fulfills the requirements of that chapter and has been approved by the State Board of Elections. Experimental use of such machines is permitted by § 24-295 of the Code.

With respect to these machines you state as follows:

"** These machines that will be used in Norfolk are of the most modern type, including a 'mistake-proof' automatic counting and printing device, which not only totals, but also prints the total votes cast for each candidate on a separate special report form at the conclusion of the election after the polls are closed. This is somewhat similar to the vote counting apparatus used in the House of Delegates and in the Senate of Virginia. **"

You further state that these machines have been approved by the State Board of Elections, but you suggest that there may be some question as to whether or not the use of machines of this type may affect the validity of the election due to the fact that literal compliance with § 24-312 of the Code may not be possible.

In addition to having the benefit of your statement regarding these machines, we have conferred with Honorable Levin Nock Davis, Secretary of the State Board of Elections, who has witnessed a demonstration of a machine of the type being considered by the City of Norfolk.

In our opinion the use of the machines will not be in violation of any of the provisions of the Virginia election laws. Section 24-312 of the Code is not intended to prevent the use of any voting machine that is approved by the State Board of Elections and which is designed to assure a fair and exact tabulation of the total
vote cast for each candidate. The results as taken from the machine may be shown
to the representatives of the political parties who are lawfully present, and may,
and probably should, be read aloud by one of the judges to the persons who are
present. The vote as shown on the tabulation made by the machine with respect
to the total vote cast for each candidate can be entered by the election officials
on the official statement forms used for that purpose, and checked for accuracy.

FIRE LAWS—Fire Wardens and Agents—May cross private land while in scope
of employment.

HONORABLE ROBERT I. ASBURY
Commonwealth’s Attorney for Smyth County

May 21, 1962

This is to acknowledge receipt of your letter of May 17, 1962, in which you
state, in part:

“My question is this: Does the State Forest Warden and his employees
and agents have the right to cross over private property to investigate
law violations to fight and contain forest fires as a matter of law?

The duty of a forest warden in connection with fires is set forth in § 10-57
of the Code of Virginia, which reads, in part:

“When any forest warden sees or there is reported to him a forest
fire, he shall repair immediately to the scene of the fire and employ
such persons and means as in his judgment are expedient and necessary
to extinguish the fire, within the limits of the expense he has been
authorized to incur in his instructions from the State Forester. . . .”

Section 10-60 is as follows:

“No action for trespass shall lie against any forest warden on account
of lawful acts done in the legal performance of his duties.”

It is my opinion that a State forest warden, who under § 10-55 is a State
officer, and his employees and agents, under the direction of the forest warden,
have the right to cross over private property in order to suppress fires and investigate
violations of the statutes pertaining thereto. This would, in my opinion,
be a lawful act within the meaning of that phrase as used in § 10-60 of the Code.

FISHERIES—License for Crabbing in Potomac—Virginia may require even
though Maryland imposes license.

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

July 18, 1961

This is in reply to your letter of July 1, 1961, in which you inquire as to the
legal authority pursuant to which the Commonwealth of Virginia imposes a crab
license tax upon residents of Virginia for the privilege of taking crabs in the
Potomac River beyond the low water mark on the Virginia side. You state that
commercial crabbers are presently being taxed by both the States of Maryland and Virginia.

The Virginia statutory authority for the imposition of a tax for the privilege of crabbing is codified as § 28-170 of the Code of Virginia of 1950. That section reads, in part, as follows:

"Any resident of this State desiring to take or catch crabs for market or profit from the waters of this Commonwealth, or waters under its jurisdiction, by any of the means hereinafter stated, or any person desiring to engage in the business of buying or marketing crabs for picking or canning the same in any way, shall pay to the oyster inspector of the district in which he resides the taxes and be subject to the provisions set forth in the other sections of this article and the following subsections:"

It is to be noted that the foregoing section applies only to waters of the Commonwealth or waters under its jurisdiction. It is generally accepted as a fact that Maryland is the owner of the Potomac River bed and waters to the low water mark on the Virginia shore. Equally well established is the fact that Virginia is vested with concurrent jurisdiction over these waters as to the enforcement of fishing laws. See Barnes v. Maryland, 47 A. 2d 50.

I am of the opinion that there is little doubt but that Virginia may impose a license tax upon residents of Virginia as provided in § 28-170 of the Code. The fact that Maryland has chosen to impose a license tax for the same privilege does not present any justiciable question of "double taxation," as suggested in your letter. The law appears to be well settled that such a tax by two or more taxing authorities is permissible. For a general discussion on this subject, see 51 Am. Jur., Taxation, §§ 60, 284, et seq.; 33 Am. Jur. 344, Licenses, § 24.

FISHERIES—No Tort Liability—Employees are limited to Workman's Compensation Act.

STATE EMPLOYEES—May not Sue State for Damages—Workmen's Compensation Act exclusive remedy.

MR. B. T. GUNTER, JR.
Counsel for the Commission of Fisheries

May 28, 1962

This is in reply to your letter of of May 8, 1962, in which you pose two questions relating to the sufficiency of coverage by liability insurance carried by the Commission of Fisheries. One relates to suits by employees of the Commission for injuries sustained in navigable waters; the other relates to suits by other parties against the Commission or its employees arising from collisions with other vessels.

The law is well established that the Commonwealth is immune from tort liability and this immunity extends to the officers and agents of the Commonwealth when acting within the scope of their employment. See, Sayers v. Bullar, 180 Va. 222. The General Assembly has authorized suits against the Commonwealth only in specified instances. Actions sounding in tort have not been authorized; hence, no such action can be maintained against the Commission of Fisheries, an agency of the Commonwealth. This conclusion is not altered by the administrative decision by the Commission of Fisheries to provide a policy of insurance to compensate persons damaged or injured by officers or agents of the Commission.
I am of the opinion that the Commission of Fisheries can be held liable to employees of the Commission only to the extent provided by the Workmen's Compensation Act, irrespective of the tribunal where suit may be brought.

Owners of other vessels and their employees may be able to recover for such damages as may be covered in the liability insurance policy by the Commission, but under no circumstances could the Commission be held liable beyond that coverage for the tortious acts of its officers and employees. This does not mean that the officers and employees may not be held personally liable for negligent conduct beyond the scope of their employment.

GAME AND INLAND FISHERIES—Bear and Deer Stamp—Counties authorized to adopt ordinance—Effect of failure—Disposition of funds accumulated under existing ordinance.

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney for Rockbridge County

June 1, 1962

This is in reply to your letter of May 31, 1962, which reads as follows:

"I refer to Chapter 420, Acts of Assembly (H 105), approved March 31, 1962, authorizing certain counties (including Rockbridge County) to require special stamps to hunt bear and deer; to provide for disposition of moneys received from the sale thereof, etc.

"As I understand this new law, it repealed Chapter 208 of the 1950 Acts of Assembly, approved March 14, 1950.

"Under Chapter 208 of the 1950 Acts of Assembly, the Treasurer of Rockbridge County, Virginia, had accumulated a sum of $15,073.67 as of April 30, 1962, on deposit in the Bear and Deer Damage Stamp Fund. This was a fluctuating fund depending upon claims paid therefrom and deposits made thereto. I am advised that it has been the practice of the County Treasurer to pay from this fund claims solely for damage to crops by bear and deer, except occasional payments therefrom for conservation of wildlife in the County under the direction of the Board of Supervisors.

"I will appreciate your opinion on the following question:

"If the Board of Supervisors of Rockbridge County, Virginia, decides, at this time, not to enact an appropriate ordinance pursuant to Chapter 420, is the County Treasurer authorized to continue to make payments from the Bear and Deer Damage Stamp Fund in payment of claims for damages above described, and can claims continue to be paid from this fund regardless of whether lands of the claimant are open to the public for hunting?"

Chapter 420 of the Acts of 1962 combines various similar special stamp acts applicable to several counties into one act and repeals the acts heretofore enacted.

Section 1 of Chapter 420 authorizes the governing body of your county to enact and adopt by appropriate ordinance the provisions of this chapter and provides that the act shall not be effective in any county unless and until such ordinance is passed. If the governing body should pass such an ordinance, then, in my opinion, the sum that has accumulated under Chapter 208, Acts of 1950, could be applied as provided in Section 2 of Chapter 420. You will note that this section contains the following provision:
"Moneys heretofore accumulated in such special fund prior to the effective date of this act may be transferred at any time for the purposes set forth herinabove."

If the ordinance is not passed so as to make Chapter 420 effective in Rockbridge County, the purchase of such special stamps may no longer be required in that county.

Under Chapter 208, Acts of 1950, payments out of the special fund were 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."

The amount remaining in the fund is earmarked by Chapter 208, Acts of 1950, for a special purpose and, of course, it may not be used for any other purpose except as authorized in Chapter 420 in the event the governing body should decide to adopt that chapter by appropriate ordinance.

In my opinion, assuming the county board fails to adopt Chapter 420, Acts of 1962, the balance remaining in the fund may be used to pay (1) damages out of the net amount accruing in the special fund from the sales of special stamps during the license year in which the damage occurred, and (2) for the conservation of wild life in the county.

The provision relating to the prohibition against payment of claims to a person who prohibits hunting on his land does not appear in Chapter 208, Acts of 1950. If, however, the board of supervisors adopts Chapter 420, the provision will be applicable. Our interpretation of that provision is set out in an opinion to Honorable William J. Phillips, Commonwealth's Attorney for Warren County, dated May 28, 1962, copy of which I am enclosing.

GAME AND INLAND FISHERIES—Bear and Deer Stamp Fund—Not to be paid to owners of land unless permission is uniformly given to all hunters to hunt.

May 28, 1962

HONORABLE WILLIAM J. PHILLIPS
Commonwealth's Attorney for Warren County

This is in reply to your letter of May 22, 1962 which reads as follows:

"The Game Warden of our County has asked me to write and request your opinion and interpretation of House Bill No. 105 passed at the last session of the Legislature.

"This bill as you know deals with the special damage stamp on hunting licenses for bear and deer in certain counties. The question posed deals with the last sentence in Section 2, Paragraph 1 of said bill which reads as follows: 'Provided, however, that no such claim for damages shall be paid to any person who shall prohibit hunting on his land by the general public.'

"The Game Warden would like a ruling as to whether or not this provision applies against land owners whose land is posted but who
generally grant written permission to persons requesting it. Also he would like an opinion as to whether or not land owners with unposted land would come within the prohibition where only oral permission is needed."

House Bill 105 is Chapter 420, Acts of Assembly of 1962.

The prohibition against payments in cases where the "general public" is forbidden to hunt, in my opinion, means that the benefits to landowners under this Chapter shall not be available to any person whose land is not open to common or general use of persons who may wish to enter his premises for the purpose of hunting game. Hunting upon a person's property without his consent is unlawful, whether the property is or is not posted; therefore, this feature is not material. See §§ 29-165 and 29-166 of the Code.

In my opinion the proviso which is contained in the Act under consideration prevents all property owners from being paid claims for damages unless permission is uniformly given to all hunters, including holders of special stamps issued under the Act.

GAME AND INLAND FISHERIES—Deer and Elk—Taking between sunset and sunrise by use of light—Presumption of attempt—Not applicable to bow and arrow.

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

November 16, 1961

This is in reply to your letter of November 14, 1961, in which you refer to § 29-144.1 of the Code, which provides as follows:

"Any person who takes or attempts to take any deer or elk between sunset and sunrise by use of a spotlight or flashlight shall be guilty of a misdemeanor and shall be punished by a fine of two hundred and fifty dollars or by confinement in jail for not less than thirty days nor more than sixty days, either or both. The display or flashing of a spotlight or flashlight from any vehicle between sunset and sunrise by any person or persons, then in possession of a firearm normally used in hunting deer or elk, without good cause, shall raise a presumption of an attempt to take deer or elk in violation of this section."

You request my opinion as to whether or not "if a man is caught displaying a spotlight or flashlight from a vehicle between sunset and sunrise who is in possession of a bow and arrow fully strung with metal arrows on the ends of the arrow could he be convicted under the presumption created by the above mentioned Code section."

"Firearm" is not defined in the Game and Inland Fisheries statute. However, generally the term is defined as a weapon from which a shot is discharged by force caused by a chemical explosion, such as gunpowder. The statute under consideration, being of a criminal nature, is subject to strict construction. Therefore, in my opinion, the terminal sentence of this Code section would not apply in cases where the weapon in the possession of a person flashing a spotlight is a bow and arrow.
February 27, 1962

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This is in reply to your letter of February 12, 1962, which reads as follows:

"As to the interpretation of Section 29-197 of the Code of Virginia, as amended, my question:

"Would anyone have the right to shoot a dog caught in the act of chasing or killing fowl under the above section, or would the person have to wait until the dog had chased or killed a man's poultry for the third time without bringing it into Court, as set out in said section?"

"I would appreciate a clarification of Section 29-197 with reference to dogs killing or injuring poultry."

Section 29-197 of the Code of Virginia, as amended, reads in part, as follows:

"The governing body of any county, or any trial justice or other court, shall have the power to order the game warden or other officer to kill any dog known to be a confirmed poultry killer, and any dog killing fowls for the third time shall be considered a confirmed poultry killer."

This portion of § 29-197 relates to the killing of dogs that kill poultry and clearly limits the killing of such dogs to those known to be confirmed poultry killers; namely, a dog killing poultry for the third time.

In view of the foregoing, I am of the opinion that a dog killing poultry could not be killed by a game warden or other officer unless and until ordered to do so by the governing body of any county, or the trial justice or other court, upon finding that the dog is a confirmed poultry killer, having killed poultry for the third time.

February 16, 1962

HONORABLE JULIUS GOODMAN,
Commonwealth's Attorney for Montgomery County

This is to acknowledge receipt of your letter of January 30, 1962, in which you quote from §§ 29-209 and 29-184.2 of the Code and present the following question:

"May the general funds of the County be used for the restocking of game and fish, even though there is no excess in the Dog Tax Fund, as shown in Section 29-209, taking into consideration the amendment to Section 29-184.2 Sub-Section C, as underscored."
The answer to this question is in the negative.

Section 29-184.2 is only applicable to those counties that through ordinances have elected to enforce the dog laws by employing dog wardens. The effect of this section is to do away with the necessity of remitting 15% of the gross amount of the tax to the State Treasurer and also to transfer to the general fund of such county, any sum remaining which has not been used for the purposes set forth in § 29-209. Apparently the governing body of the county must use these funds between December 31st and June 30th (end of fiscal year); otherwise, they must be transferred to the general fund.

The provision contained in § 29-209 with respect to “any funds in excess of $250.00” is not, in my opinion, applicable to a County that has adopted a dog law under § 29-184.2 of the Code. Out of the special fund the Board of Supervisors may pay the salaries and expenses of the dog warden and deputy dog wardens, as well as the items numbered in the first paragraph of § 29-209.

I am not aware of any statutory provision under which the Board of Supervisors is authorized to make an appropriation out of the general fund for the purposes stated in your letter.

In connection with this matter, I call attention to an opinion dated September 25, 1959 and published in Report of Attorney General (1959-1960), p. 137. The amendments to the terminal sentence of paragraph (c) of § 29-184.2 do not affect the conclusions stated in the opinion referred to, as it relates to items which may be paid out of the special fund, nor do the amendments affect our conclusions regarding the funds in excess of $250.00.

GAME AND INLAND FISHERIES—Fishing License—Landowners conveying land for private lake—Required, although fishing rights reserved in deed.

Honorable Leonard F. Jones
Commonwealth’s Attorney for Campbell County

July 11, 1961

This will acknowledge receipt of your letter of July 8, 1961, in which you request my advice as to whether or not a license is needed to fish in a lake, owned by a private corporation, by persons who own lots adjacent to the lake which were conveyed to them by the corporation or its predecessor in title, the deed of conveyance containing the following language:

"The said party of the second part shall have, as an appurtenance, running with said lot, the privilege of the use of the lake for the purpose of boating, bathing and fishing, in common with others to whom the same privilege may be granted; subject, however, to such general rules, regulations and restrictions as may, now or hereafter, be prescribed by the Board of Directors of Timber Lake Corporation or Board of Directors of said incorporated club after its organization."

I am enclosing copy of an opinion furnished by this office on September 19, 1957 to the Commonwealth’s Attorney of Frederick County, which, I believe, is applicable to the situation presented by you.


In my opinion, the owners of these lots and their guests are required to obtain a license in order to fish in this lake.
REPORT OF THE ATTORNEY GENERAL

GAME AND INLAND FISHERIES—Fishing License—Tenants in common must have license to fish in private pond.

HONORABLE HAROLD H. PURCELL
Member, Virginia State Senate

This is in reply to your letter of July 27, 1961, which reads as follows:

"A number of people here in Louisa County, Virginia, have purchased a Fish Pond together. They own the land surrounding the Pond and are tenants in common.

"I am familiar with the Attorney General's Ruling found in the Report from July 1, 1957, to June 30, 1958, on Page 141, Section 29-52 and Section 29-78 of the Code, as to the interpretation thereof. This ruling applied to Corporations.

"My question is whether or not tenants in common owning jointly a pond are required to having a Fishing License to fish therein."

Since the date of the opinion referred to in your letter, we have issued a later opinion under date of July 11, 1961, to the Commonwealth's Attorney of Campbell County, copy of which I enclose.

While the circumstances set out in the two opinions previously issued by this office vary to some extent from those presented by you, I am of the opinion that the provisions of § 29-78 of the Code, under the facts presented, prevent these tenants in common, owning jointly a fish pond, from fishing therein without obtaining a fishing license.

GAME AND INLAND FISHERIES—Fishing License—"Trip license" entitles holder to fish in private trout stream, but not when stocked by state.

HONORABLE CHESTER F. PHELPS
Executive Director
Commission of Game and Inland Fisheries

This is in reply to your letter of February 12, 1962, which reads as follows:

"Section 29-55.1 of the Code of Virginia, which is concerned with a trip fishing license, states in part ' . . . such license shall not entitle the owner thereof to fish for trout in any of the trout streams nor in any public waters in which trout have been planted.'

"This question has been raised as to whether or not this trip license would be valid for residents and nonresidents to fish for trout in streams and ponds which are owned or controlled by a private company or corporation and which are stocked only by such company or corporation."

I am of the opinion that the "trip license" provided in § 29-55.1 of the Code would entitle the holder thereof to fish for trout in privately owned streams and ponds or any other waters not stocked with trout by the Commonwealth. This conclusion is in accord with the view of former Attorney General Albertis S. Harrison, Jr., as expressed in a letter addressed to Honorable W. E. Spencer, under date of July 21, 1958, reported in the Report of the Attorney General, (1958-59), p. 142.
MR. CHESTER F. PHELPS  
Executive Director  
Commission of Game and Inland Fisheries

May 23, 1962

This is in reply to your letter of May 21, 1962, in which you request my opinion regarding the necessity of the taking of an oath of office by game wardens.

By virtue of § 49-1 of the Code of Virginia (1950), all officers of this State are required to take a prescribed oath before entering upon the functions of office. The penalty for failure to so do is prescribed in § 49-11 of the Code. While game wardens appointed by the Commission of Game and Inland Fisheries do not have a specified tenure of office, I am of the opinion that they are officers within the meaning of § 49-1 of the Code. The statutory provisions relating to the appointment and functions of game wardens very clearly contemplate that such persons are vested with the cloak of office, as the word “officer” is customarily used.

In view of the foregoing, I am of the opinion that all game wardens should take the oath of office before assuming the duties of that office.

GAME AND INLAND FISHERIES—Licenses—Residents of cities situate within county eligible for resident license without regard to six months requirement.

April 4, 1962

HONORABLE GEORGE W. KEMPER  
Clerk, Circuit Court of Rockingham County

This is in reply to your letter of April 2, 1962, in which you request my advice regarding the eligibility to purchase a county or State resident hunting license by a person who has been a resident of the City of Harrisonburg, or some other city wholly within a county named, for a period of less than six months.

By virtue of § 29-57(f) of the Code of Virginia (1950), as amended, residents of cities, the limits of which are wholly within the county wherein the license is applied for, are entitled to a county or State resident license without regard to the six months’ residence requirement imposed by other sections of the Code, such as § 29-58 and § 29-62.

GARNISHEMENT—Payment into Court by Garnishee—Payment may be made to officer serving summons before return date.

June 28, 1962

HONORABLE EVERETT M. GARBER, JR.  
Judge, Civil & Police Court of Waynesboro

This will acknowledge receipt of your letter of June 22, 1962, which reads as follows:

“This is written with the hope that you may help us resolve a ques-
tion of procedure under the garnishment statutes (Section 8-441 through 8-449).

"Our present procedure is that the garnishee pays the amount of his liability to the Clerk of the Court. We have recently been criticized by the Auditor of Public Accounts for this practice. Section 8-448 provides as to payment before the return day of the summons.

"A question has arisen as to what the officer should do with any funds he might collect under this procedure. He contends that he should make return of the papers and the money to the Court. I realize that as Judge of the Court I have the undisputed power to determine the workings thereof, but I have no desire whatever to be arbitrary, and would prefer to have some independent authority for the Court's procedures. I might also inquire as to the proper person to receive funds which would be paid by the garnishee after the return date, as to whether these should be paid to the officer, the Court, or directly to the judgment creditor."

Since receiving your letter we have discussed this matter with the office of the Auditor of Public Accounts, and Mr. James, of that department, examined the recent report of the field auditor and it appears that you may have misinterpreted the remarks of the representative of the auditor's office.

I am enclosing copies of three opinions, two of which are dated December 9, 1958, and September 12, 1958, and relate to the payment by the garnishee debtor to an officer in whose hands the execution and garnishee have been placed. These opinions are published in the Report of the Attorney General (1958-1959), pp. 25 and 76, respectively. The other enclosed opinion is dated May 25, 1960 and is published in the Report of the Attorney General (1959-1960), p. 190.

Under § 8-444 of the Code, the court can give judgment against a garnishee and the garnishee may be directed to pay the amount he owes to the judgment debtor, in excess of the exemptions, to the court. Furthermore, the garnishee, if an employer of the judgment debtor, may make a voluntary payment to the court under the procedure set forth in § 8-445.

Section 8-448 authorizes a garnishee to pay the amount he may be liable for to the officer who has served the summons at any time before the return date. I am unaware of any statute that permits the officer in whose hands the summons in garnishee has been placed to receive payment after the return day. Payment by a garnishee under these circumstances should be made to the court to which the summons is returnable.

GARNISHMENT—Writ Tax Not to be Charged.

COSTS—Writ Tax—Not to be charged in garnishment proceedings.

December 1, 1961

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

This is in reply to your letter of November 30, 1961 which reads as follows:

"I would like your opinion as to whether or not writ tax should be charged on garnishment proceedings instituted in the Circuit Court in accordance with the provisions of Section 58-71 of the Code of Virginia.

"An opinion of the Attorney General year 1956-57 at page 111, a por-
tion of which reads, 'This should be classified as an action at law and the proper clerk's fees, etc.,' is one of the reasons for my contention that garnishment proceedings should bear the proper writ tax.'"

Section 58-71 of the Code expressly exempts "a summons to answer a suggestion" from the writ tax, and that phrase, as used in this section, refers to a garnishment issued on a suggestion by the judgment creditor under the provisions of § 8-441. Accordingly, I am of the opinion that no writ tax may be charged in garnishment proceedings. The opinion to which you refer related to clerks' fees only.

GENERAL ASSEMBLY—Apportionment of Membership—Counties may be divided between districts—Effects of annexation.

ANNEXATION—County Territory Taken into City—Effects upon legislative representation.

HONORABLE EDWARD E. LANE
Member, House of Delegates

February 19, 1962

This is in reply to your letter of February 9, 1962, which I quote, in part, as follows:

"1. With reference to redistricting, can a county be divided geographically so that one part falls in one district and the other in another district? Are there any restrictions or limitations as to how such a geographical line can be drawn?"

The duty upon the General Assembly to reapportion Senatorial and House districts every ten years is imposed by Section 43 of the Constitution of Virginia, which reads as follows:

"The present apportionment of the Commonwealth into senatorial and house districts shall continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter."

You will note that the foregoing section of the Constitution is silent as to the manner of reapportionment. The framers of the Constitution have thus left this question entirely to the Legislature. I am of the opinion that the General Assembly is vested with complete discretion as to the geographical arrangement of the counties and municipalities into districts. A county may, therefore, be divided geographically so that one part thereof is placed in one district and the remaining portion placed in another district.

You have posed several questions pertaining to the effect of annexation upon legislative representation in the cities and counties. Again, quoting from your letter, you ask:

"2. In the event of an annexation by the city of a part of a county, will you state what area the existing representatives and senators from the city would represent and what area the senators and delegates from the county would represent? In other words, who represents the annexed area?"
"3. In the event a city annexes a portion of a county in which the representative or senator representing the county resides what happens to this representative or senator? In other words, do these seats become vacant and if so who would represent the remainder of the county?"

Annexation of county territory by municipalities is undertaken pursuant to general laws enacted in accordance with Section 126 of the Constitution of Virginia, which reads as follows:

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

You will note that this section of the Constitution is silent as to the voting rights and legislative representation of the citizens within the territory which may be annexed by a municipality when the corporate limits are extended, or excised, when the limits are contracted. Obviously, there is a possibility that any such expansion or contraction of corporate limits would involve territory situate in separate Senatorial or House districts. In such instances it is apparent that inhabitants within the territory annexed or excised become residents of a separate district than that in which they resided prior to the extension or contraction of the corporate limits.

As pointed out by the Supreme Court of Appeals of Virginia in the case of Alexandria v. Alexandria, 117 Va. 230, at p. 251:

"The Constitution, section 126, requires that the General Assembly shall provide by general laws for the extension and contraction from time to time of the corporate limits of cities and towns, and that no special act for that purpose shall be valid. Pursuant to this constitutional provision, the General Assembly enacted the statute, supra, conferring upon the circuit courts of the State the authority, within prescribed limitations, to extend or contract the corporate limits of cities and towns, and the enactors of our organic law must necessarily have understood and contemplated that the annexation of territory from a county to a city and vice versa would, in many if not every case, take into the city or county limits more or less inhabitants of the territory annexed and operate upon their municipal relations."

This does not mean that the Senatorial or House districts are reapportioned by such extension or contraction. Only the boundaries of the municipality within the district are changed, which, of necessity, removes inhabitants from one district and places them in another. Neither the county nor the municipality loses its identity by reason of such extension or contraction.

I am of the opinion that, upon annexation by a city of a part of a county, both political entities continue in the same Senatorial and House Districts as before such annexation; hence, the existing representatives would continue to represent their respective localities. This conclusion is subject to an exception which may be presented in the event the area in which the Senator or Delegate resided is either annexed or excised, having the effect of removing such officers from the district for which they were elected. This conclusion is based on the provision in Section 44 of the Constitution of Virginia, which reads, in part, as follows:

"Any person may be elected senator who, at the time of election, is actually a resident of the senatorial district and qualified to vote for members of the General Assembly; and any person may be elected a member of the House of Delegates who, at the time of election, is actually a resident of the house district and qualified to vote for mem-
You next ask to be advised as to the effect upon county representation in the General Assembly in event of the annexation of an entire county. This portion of your letter reads as follows:

"4. In the event a city annexes all of a county, the county having a senator, delegate and a floater, the floater representing this county and another county, what would happen in each of these cases? Would the city gain these seats? If the seats formerly held by the county would represent the whole city, would it be necessary to have another election? What would happen to the floater?"

Based upon the reasoning contained in the answers to your preceding questions, it would appear to follow that the former county Senatorial and House seats would be vacated and the floater Delegate would continue to represent the county which remained in the district for which he is elected. Such a conclusion, however, I am not willing to state. To so hold would be to sanction in the General Assembly a power to reduce, abolish or re-apporportion Senatorial or House districts in a manner which I do not believe is contemplated in the Constitution of Virginia.

Sections 41 and 42 of the Constitution provide a minimum and maximum number of Senators and Delegates in the General Assembly of Virginia. Section 43 of the Constitution provides the manner for re-apporportioning the legislative districts. That section, as adopted in 1902, reads as follows:

"The apportionment of the State into senatorial and house districts, made by the acts of the General Assembly, approved April the second, nineteen hundred and two, is hereby adopted; but a re-apporportionment may be made in the year nineteen hundred and six, and shall be made in the year nineteen hundred and twelve, and every tenth year thereafter.

In 1928 this section of the Constitution was amended to read in its present form as follows:

"The present apportionment of the Commonwealth into senatorial and house districts shall continue; but a re-apporportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter."

The framers of the Constitution having provided for a re-apporportionment of Senatorial and House districts each decennial, I do not believe the Legislature is free to re-apporportion such districts during the interim between the decennial periods through the vehicle of annexation. Of course, as pointed out above, the framers of the Constitution necessarily contemplated incidental changes in the district boundaries when adopting Section 126 of the Constitution. The Supreme Court of Appeals of Virginia recognized this result in the case of Alexandria v. Alexandria, already referred to herein. I do not believe, however, that Section 126 of the Constitution may be utilized as the basis for destroying a county as an entity, while at once making no provision for Senate or House representation in the territory which was formerly the county. In so stating I am not unmindful that, since 1930, there has existed a statutory provision which obviously contemplates the annexation of an entire county by a municipality. That statute in its present form is codified as § 15-152.26 of the Code of Virginia (1950), as amended, and reads as follows:

"Whenever, as the result of any annexation proceedings the area
remaining in a county would, after annexation of the territory sought, be reduced below sixty square miles, excluding property owned by the United States of America, or shall otherwise be insufficient in area, population, or sources of revenue, adequately to support the county government and schools, the annexation shall not be decreed unless the whole county be annexed."

I am aware that the Supreme Court of Appeals upheld the validity of § 2968 of the Code of 1930 (forerunner to present § 15-152.26) in the case of Newport News v. Elizabeth City County, 189 Va. 825. That case turned upon the questions of whether the statute was a special act and whether the Legislature has the power to require that no county be reduced below sixty square miles in area through annexation proceedings. The Court did not pass upon the provision of the statute relating to annexation of an entire county, and I am not advised of any other case in which the court has been presented with the various questions relating to apportionment of legislative representation which would arise in the event of an annexation of an entire county. The closest case in point, in so far as I am advised, is Wade, et al. v. City of Richmond, 18 Gratt. (59 Va.) 583. That case was decided many years prior to the adoption of Section 126 of the Constitution, and I do not know that the views expressed therein would be those of the Court of Appeals as presently constituted.

In view of the foregoing, I am not prepared to reply categorically to your inquiries relating to the disposition of the Senate and House seats apportioned to a county in the event of annexation of the entire county.

Your last inquiry reads as follows:

"5. Can the boundaries of a city be enlarged by legislative act or in any other manner other than by annexation? If so, how?"

As already pointed out above, the General Assembly is empowered to extend the boundaries of cities and towns by virtue of Section 126 of the Constitution. Acting pursuant to this authority, the Legislature has provided by general law a procedure whereby the boundaries of cities and towns may be changed through appropriate judicial determination, based on the facts of each case. I am of the opinion that the Legislature is not thereby precluded from prescribing by general law other methods; for example, the maximum or minimum number of square miles it may deem proper to be embraced in cities. Stated differently, Section 126 of the Constitution empowers the General Assembly to provide by general law for the extension or contraction of the corporate limits of cities and towns. Providing a general annexation procedure is only one manner of exercising this legislative function.

GENERAL ASSEMBLY—Authority to prohibit annexation by cities unless approved by county.

ANNEXATION—Consent of County—General Assembly authorized to prohibit annexation unless approved by county.

HONORABLE WILLIAM F. PARKERSON, JR.
Member, House of Delegates

February 26, 1962

I am in receipt of your letter of February 22, 1962, in which you forwarded to me a copy of a Committee Amendment in the Nature of a Substitute for House Bill
No. 550, and requested to be advised whether or not the proposed amendment would be violative of Section 126 or any other provision of the Virginia Constitution. As set forth in the document you submitted, the amendment in question provides:

“Nowithstanding any other provision of the laws of this Commonwealth, no city shall institute any proceedings for the annexation of territory unless and until the governing body of the city seeking annexation and the governing body of the county from which the area is sought to be annexed, agree to the annexation of the territory in question, which agreement shall be evidenced by ordinances duly adopted by such respective governing bodies and filed with the court in which any such proceeding may be instituted, until the expiration of ninety days following the adjournment of the regular session of the General Assembly of nineteen hundred sixty-four, and no county, city or town which has not heretofore held a referendum on the question, shall consolidate or merge with any other county, city or town, until the expiration of ninety days following the adjournment of the regular session of the General Assembly of nineteen hundred sixty-four.”

Section 126 of the Virginia Constitution prescribed:

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

Implementing the above-quoted constitutional provisions are Chapters 8 and 9 of Title 15 of the Code of Virginia (1950), entitled respectively, “Boundary Changes of Towns and Cities” and “Consolidations of Governmental Units.”

The most recent comprehensive observations of the Supreme Court of Appeals of Virginia upon Section 126 of the Virginia Constitution and the power of the General Assembly with respect to the extension and contraction of the corporate limits of cities and towns are found in Newport News v. Elizabeth City Co., 189 Va. 825, 55 S. E. (2d) 56. Under consideration in this case was an enactment of the General Assembly of Virginia prohibiting a city from annexing any portion of a county unless, after such annexation, there remained in the county at least sixty square miles of unannexed territory. Sustaining the validity of the enactment there under attack, the Court declared (189 Va. at 832, 836, 837):

“Section 126, in broad and general terms, empowers the General Assembly to provide by general laws for the extension and contraction of the corporate limits of cities and towns. This is not a self-operating section. The mode of the proceedings, the agency therefor, the conditions and the limitations thereon, are required to be provided by legislative action within constitutional limits. Accordingly, the legislature has proceeded to provide such requirements under the provisions found in chapter 120 of the Code of Virginia, 1942 (Michie), sections 2956 to 2971 (1), in which section 2968, the Act of 1938, is included. The nature and extent of the proceedings authorized are dependent upon legislative action, within constitutional limitations, and, therefore, the courts have power only to determine whether the legislation is in conflict with constitutional provisions and not whether it is wise or proper.” (Italics supplied).

* * * * *

“It is the conceded duty of the General Assembly in making provision for the extension and contraction of cities and towns to have regard for the rights and interests of the counties, cities and towns alike. The legislature has full power to determine, within reasonable limits, what public convenience and public welfare require, and to effect that end
it has full power to enact legislation, except so far as restrained by the Constitutions of this State and of the United States." (Italics supplied).

"The conditions under which cities may annex territory of the counties and the procedure therefor are left entirely to the discretion of the legislature. The Constitution contains no provision which confers upon the judicial department the power or function of ascertaining or determining the necessity for or the expediency of extending the corporate limits of cities, towns or counties. The only power of the courts to allow the expansion or contraction of cities is conferred by legislative action."

(Italics supplied).

If enacted into law, the committee amendment concerning which you inquire would alter the existing annexation and consolidation statutes by imposing, for a specified period of time, additional limitations upon the power of cities to annex territory of counties and would forbid the consolidation or merger of all counties, cities or towns which have not held a referendum upon the question prior to the effective date of the committee amendment. As is manifest from the language of the Supreme Court of Appeals of Virginia in Newport News v. Elizabeth City Co., supra, the conditions under which cities may annex territory of counties, the procedure therefor and the conditions and limitations thereon are matters referable "entirely to the discretion of the legislature" to be prescribed by general law. I am of the opinion that the committee amendment under consideration, if enacted, would constitute a general law, both in form and application, and would not be antagonistic to Section 126 or any other provisions of the Virginia Constitution.

GENERAL ASSEMBLY—Members—Attorneys entitled to continuance for thirty days following adjournment—How measured.

CIVIL PROCEDURE—Time for Filing Pleadings—Attorneys in General Assembly have thirty days' continuance.

HONORABLE W. CARRINGTON THOMPSON
Member, House of Delegates

March 27, 1962

This is in reply to your letter of March 26, 1962, in which you refer to § 30-5 of the Code of Virginia which provides that any lawyer who is a member of the General Assembly and who was retained prior to or during a session of the General Assembly to represent a client shall be entitled to a continuance as a matter of right during the period beginning thirty days prior to the commencement of the session and ending thirty days after the adjournment, and that the period required by any statute or rule for the filing of any pleading shall be extended until thirty days after any such session.

You state that the 1962 session of the General Assembly will end on March 30 and that the thirty-day period for filing a pleading will end on Sunday, April 29.

You have requested my opinion as to whether or not the last day for filing a pleading under such circumstances will be April 30, 1962.

Section 1-13.27 of the Code provides, in part, that when a court is directed to be held, or any other proceeding directed by law to take place, on a particular day of a month, if that day happens to be Sunday, the court shall be held or the proceeding take place on the next day."

In my opinion, under this section, the pleading, the filing date of which was postponed under § 30-5, may be filed on Monday, April 30, 1962.
This is in reply to your letter of December 9, 1961, which reads as follows:

"Your official opinion is requested as to the proper interpretation of § 30-5 of the Code, as amended.

"Let us assume a hypothetical case:

"D, a defendant in a civil suit, is served with process on November 25th, and has twenty-one days or through December 16th, to file responsive pleadings. D employs me to defend him in this case.

"As I construe the statute I have until thirty days after the adjournment of the General Assembly to file responsive pleadings."

Section 30-5 of the Code, as amended by the General Assembly in 1960, reads as follows:

"Any party to an action or proceeding in any court, including the Supreme Court of Appeals of Virginia, commission or other tribunal having judicial or quasi judicial powers or jurisdiction, who is an officer, employee or member of the General Assembly, or employee of the Division of Statutory Research and Drafting, or who has, prior to or during the session of the General Assembly, employed or retained to represent him in such action or proceeding an attorney who is an officer, employee or member of the General Assembly, or employee of the Division of Statutory Research and Drafting, shall be entitled to a continuance as a matter of right during the period beginning thirty days prior to the commencement of the session and ending thirty days after the adjournment thereof; and the period required by any statute or rule for the filing of any pleading or the performance of any act relating thereto shall be extended until thirty days after any such session. The failure of any court, commission or other tribunal to allow such continuance when requested so to do or the requiring of such filing or act during the period hereinabove specified shall constitute reversible error; provided that this section shall not prevent the granting of temporary injunctive relief, or the dissolution or extension of a temporary injunction, but the right to such relief shall remain in the sound discretion of the court or other such tribunal." (Underscoring supplied).

In my opinion, the underscored language makes it clear that your construction of the statute is correct.

I call to your attention the case of Hartsook v. Powell, 199 Va. 320, in which the Supreme Court of Appeals held that the language which I have underscored is applicable even to such jurisdictional matters as the filing of a notice of appeal and assignments of error. In view of that decision, I think there can be no serious question regarding the filing of responsive pleadings generally. The thirty-day period referred to in the statute commences to run the day after the General Assembly adjourns sine die. See Report of Attorney General, (1959-1960) p. 191.
HONORABLE KATHRYN H. STONE
Member, House of Delegates

This will acknowledge receipt of your letter of December 11, 1961, in which you state that you have been appointed by the President to serve for a term of four years on the Board of Advisors of the Federal Reformatory for Women. This appointment is made pursuant to Section 4321, U. S. Code, Title 18. Members of the Board receive no compensation, but are entitled to be reimbursed for actual expenses in attending meetings. You have requested an opinion with respect to your eligibility to be a member of the General Assembly, in event you should accept the appointment.

I find ample authority to support the conclusion that the position under consideration is not a post of profit, since no compensation is paid. It is widely held that mere reimbursement of actual expenses is not an emolument.

More difficulty is presented by the question of whether the position is an office. In view of the fact that an opinion from this office would not be conclusive on that point, and since the acceptance of the position would jeopardize your membership in the General Assembly if it were determined that the position is, in fact, an office, it would appear to me that the safest procedure for you to follow would be to attempt to have the Director of the Bureau of Prisons obtain a ruling from the Office of the Attorney General of the United States on this point. If the Attorney General should hold that the position in question is not an office under the United States Government, then it would seem to me that you could accept the appointment without any substantial concern as to the point being raised that you were in violation of the provisions of Section 44 of the Virginia Constitution.

I regret that I am unable to give you a categorical answer to your question, but I believe you will appreciate my reluctance to do so when I might jeopardize your seat in the General Assembly.

I am returning the letter from Mr. James V. Bennett, addressed to you under date of November 13, 1961, as requested.

HONORABLE JAMES M. THOMSON
Member, House of Delegates

This is in reply to your letter of February 22, 1962, in which you ask to be advised if there is any constitutional prohibition against the enactment of a general bill which would allow candidates for the House of Delegates to run for separate seats, in a district having been apportioned two or more seats, to be designated numerically or alphabetically.

Section 43 of the Constitution of Virginia reads as follows:

"The present apportionment of the Commonwealth into senatorial and house districts shall continue; but a reapportionment shall be made..."
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in the year nineteen hundred and thirty-two and every ten years thereafter."

You will note that the foregoing section of the Constitution is silent as to the manner of reapportionment. The framers of the Constitution have thus left this question to the discretion of the Legislature. I am aware of no constitutional inhibition against apportioning several seats to a district and providing for the election of those members apportioned to such district by designating the seats by number, or any other method by which the separate seats may be identified.

HIGHWAYS—Abandonment of Highway—Railway grade crossing in towns—What statute applicable.

TOWNS—Street Vacation at Railroad Grade Crossing—What statute applicable.

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

March 29, 1962

This is in reply to your letter of March 23, 1962, in which you stated that the Town of Windsor and the Norfolk & Western Railway desired to eliminate and abolish an existing grade crossing in the Town on "B" Avenue. You further stated that "B" Avenue is a part of the secondary system of highways.

Your inquiry is whether the grade crossing of "B" Avenue and the Norfolk & Western Railway in the Town of Windsor should be abandoned pursuant to § 56-365 or § 33-76.8 of the Code of Virginia of 1950.

It is my understanding that the Town of Windsor is incorporated and has a population of under 3500 persons. I am of the opinion that the abandonment of the grade crossing should be in accordance with the provisions of § 33-76.8.

Section 56-365 of the 1950 Code of Virginia, as amended, would appear to contemplate the elimination of the grade crossing, but there would be substituted therefor another method for crossing the railroad such as an overpass or an underpass. It does not appear to deal with the abandonment of the right of travel of the public across the railroad track.

Inasmuch as you desire to terminate the right of the public to travel across the railroad, I feel the crossing should be abandoned in the manner provided by § 33-76.8. The provisions of this section would necessitate action by the Board of Supervisors if the crossing is to be abandoned.

HIGHWAYS—Cities and Towns—Participation with State Highway Commission—No authority for installment payments.

CITIES AND TOWNS—Streets—Participation in cost with State Highway Commission—No authority for installment payments.

November 20, 1961

Mr. F. A. DAVIS
Chief Engineer, Department of Highways

This is in reply to your recent letter in which you request our opinion on the following questions:
"1. If a statute requires a municipality to contribute to the cost of a project, does the Highway Commission have authority to allow payment of this cost in installments?

"2. If the contribution is based on a policy of the Highway Commission instead of a statute, would the Highway Commission have authority to permit installment payment?"

It is the opinion of this office that both of your inquiries must be answered in the negative. The powers of the Department of Highways are limited to those granted it by statutory enactment or those arising by necessary implication from such statutes. I know of no statutory authority for the Department of Highways to extend credit to a municipality by permitting it to make payment for its required portion of the cost of a project upon an installment basis. Although the Legislature has authorized the State Highway Commission to contribute to the cost of construction of highways in municipalities of 3500 or more persons, the authority to extend credit to a locality does not arise therefrom.

While your second question poses a somewhat more difficult question, it is my opinion that even in this situation the State Highway Commission is not permitted to extend credit to a municipality without express authorization from the Legislature.

An affirmative answer to either of your questions would permit a radical departure from what I understand the practices and policies of the Commission to have been in the past, and they are, therefore, matters which I feel should properly be dealt with only by the Legislature.

HIGHWAYS—City Streets—Eligibility for payment—Subdivision streets formerly in Secondary System.

SUBDIVISIONS—Streets eligible for payment under § 33-113.2 of Code subsequent to merger of county and city.

CITIES—Streets eligible for payment under § 33-113.2 of Code after merger.

June 11, 1962

HONORABLE H. H. HARRIS
Commissioner, Virginia Department of Highways

This is in reply to your letter of May 8, 1962, in regard to the eligibility of certain streets for maintenance payments under § 33-113.2, Code of Virginia (1950), as amended, and your request that I furnish an opinion on the following questions:

1. Will subdivision streets completed after January 1, 1963, under the county standards, in those subdivisions approved by the Boards of Supervisors of Princess Anne and Norfolk Counties prior to the approval by the General Assembly of the mergers or prior to the advice by the Highway Department of the new standards, be eligible for maintenance payments under the provisions of Section 33-113.2 of the Code?

2. If the answer to Question No. 1 is affirmative, will approval by the Boards between now and January 1, 1963, of subdivisions to be constructed under county standards render the streets in such subdivisions eligible for maintenance payments under Section 33-113.2 of the Code?

Section 33-113.2, Code of Virginia (1950), as amended, sets forth certain standards that must be met before streets established since July 1, 1950, are
eligible for payments under that section. However, there are excepted from such requirements the following streets:

"... streets or portions thereof located within territory annexed or incorporated since July one, nineteen hundred fifty, or hereafter, which streets a portion thereof (1) have been paved and have constituted parts of the secondary system of State highways prior to such annexation or incorporation, or (2) have constituted parts of the secondary system of State highways prior to such annexation or incorporation and are paved to a minimum width of sixteen feet subsequent to such annexation or incorporation, . . ."

The streets in question are located within areas which will be incorporated into cities on January 1, 1963. Therefore, the only other question to be resolved in order to apply the above-quoted exemption is whether such streets constitute parts of the Secondary System.

Under § 33-141 of the Code, the counties have the authority to establish new roads which "upon such establishment, become parts of the secondary system of State highways within such counties." The Virginia Land Subdivision Act and similar acts provide for approval by the appropriate local governing bodies of subdivision plats which upon approval and recordation operate to transfer fee simple title to the subdivision streets to the local governing body or the Commonwealth.

I am of the opinion that when the local governing body has taken all necessary action under its subdivision ordinance to approve the streets as located on a subdivision plat and such plat has been recorded, the eligibility of such streets for maintenance payments under § 33-113.2, Code of Virginia (1950), as amended, subsequent to their construction is determined as of the date of approval and recordation.

In view of the foregoing, I am of the opinion that your first inquiry may be answered in the affirmative since the streets in question could qualify under the above-mentioned exception.

In addition, I believe that your second inquiry falls within the scope of the opinion rendered in answer to your first inquiry, and, therefore, may also be answered in the affirmative.

HIGHWAYS—Condemnation—Deposit by State Highway Commissioner—How disbursed to claimants.

COURTS—Deposits by State Highway Commissioner—Constitutes payment into court. How disbursed to claimants.

HONORABLE H. BRUCE GREEN
Clerk, Circuit Court of Arlington County

January 5, 1962

This is in reply to your letter of December 20, 1961, in which you request my opinion regarding the propriety of your complying with a request made of you by the attorney for a landowner whose property is being taken by the State Highway Commissioner and for whose benefit a certificate of deposit has been issued pursuant to § 33-70.1, et seq. of the Code.

From the enclosed copy of a letter addressed to you by the attorney, it appears that the owner and a lessee cannot now agree upon their proportionate interest in the amount to be paid for the land by the State Highway Commissioner.
It is the desire of the owner and the tenant to have the sum represented by the certificate paid into court by the State Treasurer and then you, in turn, would deposit the sum in a bank under a certificate of deposit bearing interest until the condemnation award is disbursed.

The procedure for the withdrawal of funds represented by the certificate of deposit is statutory. Section 33-70.6 provides in part as follows:

"Any person or persons entitled thereto may, upon petition to the court, be paid his or their pro rata share of the amount deposited with the court pursuant to § 33-70.2. Proceedings for the distribution of the fund so deposited shall be conducted mutatis mutandis as provided for the distribution of an award paid into court in a condemnation proceeding as now provided by law. * * *"

Section 33-67.2 provides for the manner of distributing the awards paid into court and is applicable to § 33-70.6.

Section 33-67.2 provides in part as follows:

"* * * the court being satisfied that the persons having an interest therein are before the court, the court shall make such distribution of such money as to it may seem proper, having due regard to the interest of all persons therein, and in what proportions such money is properly payable.

* * * * * *

"If it shall appear to the court that there exists a controversy among claimants to the fund, * * * the court shall enter an order setting a time for hearing the case and determining the rights and claims of all persons entitled to the fund or to any interest or share therein. * * *"

"Upon a determination by the court of the rights and claims of the persons entitled to the fund, judgment shall be entered directing the disbursement among the persons entitled thereto. * * *"

By the foregoing it is readily apparent that the statutes contemplate the court first determining the proportionate interest of all claimants to the deposit prior to entering an order directing the payment thereof out of the State Treasury. This appears to be the preferable procedure; however, the Commonwealth has been deemed to have paid the money into court upon recordation of the certificate of deposit. Thereafter I believe it is the responsibility of the court to determine in its discretion the manner in which the funds are to be disbursed.

I know of no valid legal objection to the court's directing that the sum be paid to the clerk of the court and deposited by him in such manner as the court may determine. I think the obligation of the State would then terminate as to the amount being held for the landowner. However, in order that all parties be protected, I suggest that the court should order the payment only upon petition of all claimants to the fund and then upon condition that the State Highway Commissioner and the State Treasurer be relieved of any liability to the owners to the extent of such payment.
HIGHWAYS—Industrial Access—County may purchase right of way for establishing.

BOARDS OF SUPERVISORS—Appropriations—Highways—Industrial access—County may acquire right of way.

December 22, 1961

HONORABLE EDWARD H. RICHARDSON
Commonwealth’s Attorney for Roanoke County

This is in reply to your letter of December 18, 1961, in which you request my opinion as to whether the County of Roanoke may purchase land and donate the same to the Virginia Department of Highways for the purpose of a right of way for access to an industrial park located in Roanoke County.

While I am not certain as to the nature of the industrial park mentioned in your letter, for purposes of this opinion, I presume that the State Highway Commission is to construct an industrial access highway to industrial sites which will thereafter constitute a part of the secondary system of State highways pursuant to § 33-136.1 of the Code of Virginia of 1950.

I am of the opinion that the Board of Supervisors of Roanoke County has legal authority to purchase the necessary right of way to be donated for the proposed access road. This view is in accord with the previously expressed opinions of this office to the effect that the several counties are authorized to expend funds for establishment of rights of way for roads to be placed in the secondary system of State highways. This conclusion is based upon the provisions of § 33-141 of the Code of Virginia. See, Report of the Attorney General (1950-51), p. 25.

HIGHWAYS—Industrial Access—State Highway Commission not authorized to make funds available in cities.

CITIES—Streets—Industrial access funds—Not available for construction in cities.

February 12, 1962

HONORABLE JOHN H. RUST
City Attorney for the City of Fairfax

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

“It will be appreciated if your office could advise as to whether in your opinion Title 33, Section 136.1 of the 1950 Code of Virginia would provide funds that would be available to cities for use for access roads to industrial sites.”

I am of the opinion that the answer to your question is in the negative.

Section 33-136.1 provides in part:
"This fund shall be expended by the Commission for constructing, reconstructing, maintaining or improving access roads to industrial sites.

Any access road constructed or improved under this section shall constitute a part of the secondary system of State Highways and shall thereafter be constructed, reconstructed, maintained and improved as other roads in such secondary system."

The roads which constitute a portion of the secondary system are defined in §33-44, which provides in part:

"The secondary system of State highways shall consist of all of the public roads, causeways, bridges, landings and wharves in the several counties of the State not included in the State Highway System, including such roads and community roads leading to and from public school buildings, streets, causeways, bridges, landings and wharves in incorporated towns having thirty-five hundred inhabitants or less according to the census of nineteen hundred and twenty, and in all towns having such a population incorporated since nineteen hundred and twenty.

Inasmuch as roads within cities are not included in the secondary system of highways, I feel the language used in §33-136.1 limits the use of these funds to roads which come within the jurisdiction and control of the State Highway Commission located outside the corporate limits of cities.

HIGHWAYS—Regulation of Parking—State Primary System—State Highway Commission has authority over roads within grounds of State institutions if designated as part of system.

STATE INSTITUTIONS—Roads—VMI has no authority to regulate parking on State Primary System.

April 11, 1962

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

This is in reply to your letter of April 9, 1962.

As I understand the situation, the street which extends from Route 11 to the VMI limit gates is part of the State Highway system and we assume from your letter that it is maintained and controlled by the State Highway Commission. This street lies between Washington and Lee University grounds and the Virginia Military Institute grounds and is an extension of Letcher Avenue. It appears that some of the students attending Washington and Lee University are parking their cars on this street and this interferes with the parking deemed desirable by the persons who live adjacent to this street. You request my advice as to whether or not it is possible for the Virginia Military Institute to control and limit parking along Letcher Avenue for the occupants of the quarters which face thereon. If VMI does have this power, you wish to know whether or not the officials of VMI may have the sheriff of Rockbridge County enforce this regulation. You state that you have one campus police who is a deputy sheriff and who could be used for this purpose.

The State Highway Commission has authority under its general powers to
regulate parking on roads in the Highway system. This power may not be exercised by the Virginia Military Institute, since its authority to regulate traffic and parking would be limited to the area owned and controlled by the Institute. However, the governing body of the Town of Lexington may, if it desires, exercise the authority granted under § 46.1-252 of the Code.

Any regulations and rules with respect to parking that may be promulgated by the State Highway Commission would have to be uniform and applicable to all persons who use the highway. It could not discriminate between these persons on any ground. The parking privileges under regulations would be equally available to all persons. This statement is applicable to ordinances of the Town of Lexington.

I am enclosing an opinion dated May 22, 1946, which relates to this subject. The opinion was published in the Report of the Attorney General, (1945-1946), p. 141.

HIGHWAYS—Rights of Way—Towns may expend funds to acquire and clear proposed right of way within town—Bond issue not necessary.

TOWNS—Contracts—May agree to pay for cost of relocating public utilities from proposed highway.

HONORABLE JAMES B. FUGATE
Member, House of Delegates

January 2, 1962

This is in reply to your letter of December 22, 1961, in which you request my opinion on the following questions:

“(1) Can the Town of Weber City legally appropriate its funds to the Virginia Department of Highways for the purpose of reimbursing the Appalachian Electric Power Company and Inter-Mountain Telephone Company for the costs expended by said companies in removing and relocating their transmission lines and poles from private property to be acquired for the new highway location, these costs to include the cost of purchasing new easements by the said companies from property owners on which to relocate their poles and lines?

“(2) If the answer to question No. one is in the affirmative, can the Town of Weber City legally enter into a contract with the Virginia Department of Highways creating an obligation to pay the $37,500.00 without a bond issue authorized by a referendum, unless such an amount of revenue could be anticipated from taxable sources or otherwise for the current year?”

I am of the opinion that the Town of Weber City may appropriate funds for the purpose set forth in your letter. Section 33-31 of the Code of Virginia of 1950 provides, in part, as follows:

“...The roads embraced within 'The State Highway System' shall be established, constructed and maintained exclusively by the State under the direction and supervision of the Commissioner, with such State funds as may hereafter be appropriated and made available for such purposes, together with such appropriations as may be hereafter made by any county, district, city or town in this State and such funds as are now available or which may hereafter be derived from the federal government for road building and improvement in this State..."
As may be noted from the foregoing quoted provision, the General Assembly has recognized the possibility that funds in addition to those appropriated by the General Assembly would be made available for purposes of establishing, constructing and maintaining the State Highway System. While I am aware of no provision whereby the Town of Weber City may be legally compelled to appropriate funds for this purpose, I am of the opinion that the Town may contribute to the establishment, construction and maintenance of highways within the Town on a voluntary basis.

The answer to your second inquiry is also in the affirmative. Section 3 of Chapter 583 of the Acts of Assembly of 1954, by which the Town of Weber City was incorporated, provides the necessary authority for incurring the type of obligation here contemplated. While bonds may be issued for the purpose of financing such an undertaking, there is no legal obligation to issue such bonds as a condition precedent to entering into the contract with the State Highway Commissioner.

Your second inquiry indicates that you may be concerned with the provisions of Section 127 of the Constitution of Virginia relating to bonded indebtedness of cities and towns. Under this section of the Constitution the Town may contract debts totalling eighteen per cent of the assessed valuation without being subject to the provisions of paragraphs (a) and (b) of this section. Obligations issued under paragraphs (a) and (b) are not included in determining the limit of indebtedness set forth in the first paragraph of Section 127. A resolution of council authorizing a debt within the limits of the eighteen per cent valuation, upon such terms as may be concurred in by the lender, will satisfy the requirements of this section of the Constitution.

HIGHWAYS—Secondary System—Removal of obstructions from highway in system but unaccepted by State Highway Commission for maintenance—County may expend funds.

BOARDS OF SUPERVISORS—Appropriations—Highways—When county may bear cost of removing obstructions.

This is in reply to your letter of October 2, 1961, relative to the removal of utility lines from the right of way of a road which has been taken into the secondary system of State highways by the appropriate action of the Board of Supervisors of Nansemond County but which has not been accepted for maintenance by the Department of Highways as provided in § 33-141 because of the encumbrance of the right of way by the utility easements. The question which you raise is whether the Board of Supervisors can make an appropriation covering the cost of removal of the utility lines from the right of way.

In an opinion of the Attorney General which can be found in the Report of the Attorney General, (1945-1946), p. 139, it was stated, in effect, that the Department of Highways can require as a prerequisite to the acceptance for maintenance of a road in the secondary system that the board of supervisors undertake to remove encumbrances from the road.

Section 33-141 of the Code of Virginia of 1950, as amended, provides in part:

"** * * when any such board or commission appointed by the board of supervisors or other governing body of a county to view a proposed
road or to alter or change the location of an existing road shall award damages for the right of way for the same, in either case to be paid in money, it may be paid by the board of supervisors * * * out of the general county levy funds; * * *"

This language was construed in an opinion of the Attorney General, Report of Attorney General (1950-1951), p. 25, as authority for the board of supervisors to appropriate funds to acquire necessary rights of way to establish a public road to be placed in the secondary system of highways.

Section 33-141 further provides in part:

"* * * no expenditure by the State shall be required upon any new road so established * * * except as may be approved by the Commissioner. * * *"

In view of the provisions of § 33-141, and the previous opinions of this office, I am of the opinion that the Board of Supervisors can make an appropriation covering the cost of removing an encumbrance to perfect the title to the right of way of a road already in the secondary system which has not been accepted for maintenance by the Department of Highways.

HIGHWAYS—Toll Roads—Richmond-Petersburg Turnpike—No competing facility to be constructed within twenty-five miles.

RICHMOND-PETERSBURG TURNPIKE AUTHORITY—No competing facility to be constructed within twenty-five miles.

February 14, 1962

HONORABLE E. E. WILLIE
Member, Virginia State Senate

This is in reply to your letter of February 14, 1962, in which you request my opinion as to whether the City of Richmond can proceed to construct toll facilities as authorized in the City Charter, which was amended during the last session of the General Assembly, without first obtaining permission so to do from the Richmond-Petersburg Turnpike Authority.

The Richmond-Petersburg Turnpike Act, Chapter 704 of the Acts of Assembly of 1954, provides a safeguard against competing facilities within a distance of twenty-five miles of any part of the project. The applicable section of that Act reads as follows:

"§ 33-255.40. So long as any bonds issued under the provisions of this article are outstanding, no limited access express highway or superhighway, competing with the project, and located within a distance of twenty-five miles of any part of the project, shall be constructed by the Commonwealth, nor shall the Commonwealth consent to the construction of any such highway; provided, however, the Commonwealth may construct or consent to the construction of an express highway or superhighway within such distance, if (1) the State Highway Commission shall recommend the same and if independent consulting engineers, selected by the Commission with the approval of the Authority, having a nation-wide and favorable repute in estimating traffic using such projects, shall determine that the construction of such highway will not result in a substantial reduction in the volume of traffic over the project, or (2) funds shall have been provided for the payment in full of all
such outstanding bonds, the interest payable thereon and the premium, if any, payable on the redemption of any such bonds. The provisions of this section shall not be construed to apply to the construction of any new bridge."

By virtue of the foregoing, neither the Commonwealth, nor anyone acting pursuant to the consent of the Commonwealth, may lawfully construct a competing limited access highway within twenty-five miles of the Richmond-Petersburg Turnpike project unless the conditions expressed in § 33-255.40 of the Code are met. By enactment of Chapter 185, Acts of Assembly of 1958, the Commonwealth consented to the construction of toll projects by the City of Richmond. This power may not be exercised, however, to construct a competing project within twenty-five miles of the Richmond-Petersburg Turnpike project until there has been a compliance with the provisions of § 33-255.40 of the Code.

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INSURANCE—Judges' Retirement Annuity—To be computed in manner most favorable to beneficiary.

JUDGES—Retirement—Annuity to be computed on basis most favorable to beneficiary.

June 22, 1962

HONORABLE SIDNEY C. DAY, JR.
State Comptroller

This will acknowledge receipt of your letter of June 18, 1962, to which you attached a letter from Mr. John S. Jones Actuary, Bureau of Insurance, in which he points out that clause (c) of § 38.1-456 (1) of the Code, relating to the minimum standard for valuation of certain insurance policies was amended by Chapter 562, Acts of 1962. After the effective date of this amendment (June 29, 1962) clause (c) will read as follows:

"(c) For individual annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies—the 1937 Standard Annuity Mortality Table or, at the option of the company, the Annuity Mortality Table for 1949. Ultimate, or any modification of these tables approved by the Commission."

Prior to this amendment this clause (c) read as follows:

"(c) For annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies, the 1937 Standard Annuity Mortality Table.

The effect of this amendment is to authorize the fixing of an individual annuity pursuant to the 1937 Standard Annuity Mortality Table or, at the option of the company, pursuant to the Annuity Mortality Table for 1949, Ultimate, or any modification of these tables approved by the State Corporation Commission.

Section 51-28.1 of the Code sets forth the basis for computing the retirement compensation to judges of courts of record and it provides that the computations shall be made as follows:
REPORT OF THE ATTORNEY GENERAL

"... All computations under this section shall be upon the basis of such annuity mortality table as is prescribed by statute as a minimum basis for the valuation of annuity contracts issued by life insurance companies in this State with interest at two and one-half per centum per annum. * * *"

It is pointed out by Mr. Jones that the 1937 Standard Annuity Table produces lower reserves at all ages except higher ages, and that at a higher age the Annuity Mortality Table for 1949 produces a lower reserve.

You have requested by opinion as to the annuity table to be used for computation of annuities to judges and their widows, in light of the 1962 amendment to paragraph (c) of § 38.1-456 (1) of the Code.

The retirement provisions of Title 51 of the Code are of a beneficent nature and it is a well-established principle of law that statutes in this category should be interpreted and construed to that end. Accordingly, it is my opinion that computations for the purpose of determining the retirement allowances to retired judges and their widows should be computed on the statutory basis found to be most favorable to the beneficiary or beneficiaries, as the case may be.

JUVENILE AND DOMESTIC RELATIONS COURTS—Appeal to Circuit Court—Either party entitled to issue out of Chancery.

CIVIL PROCEDURE—Issue Out of Chancery—Appeal from Juvenile Court—Either party entitled to request.

June 29, 1962

HONORABLE W. CARRINGTON THOMPSON
Member, House of Delegates

This is in reply to your letter of June 28, 1962 which reads as follows:

"Your official opinion is requested on the following matter:

"§ 16.1-158 provides that the Juvenile Courts shall have exclusive original jurisdiction over the disposition of a child whose custody is a subject of controversy. § 16.1-214 provides for an appeal from the Juvenile Court to the Circuit or Corporation Courts and further provides: 'Proceedings in juvenile cases in such courts shall conform to the equity practice where evidence is taken ore tenus; provided, however, that an issue out of chancery may be had as a matter of right upon the request of either party.'

'In a typical custody controversy between husband and wife the losing party appeals to the Circuit Court. When the case is called in the Circuit Court is either party entitled to an issue out of chancery in this controversy? Your official opinion will be appreciated.'"

In my opinion, the proviso contained in § 16.1-214 of the Code is clear and free from ambiguity. The provision clearly makes no distinction as to the rights of either party with respect to entitlement to an issue out of chancery.
JUVENILES—Non-Support—Child over sixteen years not “incapacitated” simply by being in school.

DESERTION AND NON-SUPPORT—Child over Sixteen Years—Parent not required to support unless incapacitated.

January 8, 1962

MR. FREDERICK L. WRIGHT
Clerk, Juvenile and Domestic Relations Court of the City of Roanoke

This is to acknowledge receipt of your letter of December 20, 1961, in which you state, in part:

"Your attention is directed to the above stated statute of the Code of Virginia: (Chapter 5, Section 20-61):

"Any husband who without just cause deserts or wilfully neglects or refuses or fails to provide for the support and maintenance of his wife, and any parent who deserts or wilfully neglects or refuses or fails to provide for the support and maintenance of his or her child under the age of seventeen years, or child of whatever age who is crippled or otherwise incapacitated for earning a living, the wife, child or children being then and there in necessitous circumstances (shall be guilty of a misdemeanor), etc. . . . ."

"The question has arisen as to what is intended by 'otherwise incapacitated' insomuch as school attendance is concerned.

"To be more specific, is a child, over the age of sixteen years, who is attending school, considered to be incapacitated for earning a living and is the parent responsible for his or her support and maintenance?"

In my opinion your inquiry must be answered in the negative. Regardless of our personal feelings concerning the desirability of a high school or college education for a child, the provision under consideration is a criminal statute and as such must be strictly construed against the State. With that well-established principle in mind, I am convinced that the rule of ejusdem generis prevents a finding that the fact that a child is attending school renders him "otherwise incapacitated" within the meaning of this statute. Under the rule referred to, where particular words ("crippled") are followed by general terms ("otherwise incapacitated"), the general terms must be regarded as referring to things of like class with those particularly described. Thus, I would conclude that "otherwise incapacitated" refers to other physical or mental disability, but would not embrace one whose only incapacity was the fact of his or her attending school.

JUSTICE OF PEACE—Bonds—No authority to take bond in appeal from county court, unless acting as bail commissioner.

CRIMINAL PROCEDURE—Appeals—Justice of Peace has no authority to take bond, unless acting as bail commissioner.

JULY 21, 1961

HONORABLE D. W. MURPHEY
Judge, Juvenile and Domestic Relations Court for Chesterfield County

This is in reply to your letter of July 18, 1961 which reads as follows:

"Question has arisen in this County as to the authority of a Justice
REPORT OF THE ATTORNEY GENERAL

of the Peace to accept bond from a defendant for an appeal in a criminal case.

"I know that bond for an appeal from a conviction in the County Court may be given before the Court, or the Clerk. I believe, also, that such an appeal bond may be given before a Bail Commissioner of the Circuit Court, where the appeal is to the Circuit Court.

"I would like your opinion as to the authority of a Justice of the Peace to take a bond from the defendant for an appeal from the judgment of conviction in a criminal case in the County Court."

Section 19.1-110 of the Code authorizes a justice of the peace to admit to bail persons charged with a misdemeanor or a felony. The authority to admit such person to bail in case of a felony is limited. This section does not authorize a justice of the peace to grant bail to a person who has been convicted in a county court and has filed an appeal from the conviction.

Section 16.1-135 of the Code provides as follows:

"When an appeal is taken at the time judgment is rendered, the accused shall, unless let to bail, be committed to jail by the court, until the next term of the court to which the appeal is taken and the witnesses may be recognized to appear at the same time. When an appeal is taken subsequent to the entry of the judgment of conviction, the judge shall enter the allowance of the appeal on the warrant, and such judge, or the circuit court of the county or corporation or hustings court of the corporation, or the judge thereof, as the case may be, may admit the accused to bail. Whenever an appeal is taken and the ten day period prescribed by § 16.1-133 has expired the papers shall be promptly returned to and filed with the clerk of the appellate court."

This section, it will be noted, authorizes the county judge or the judge of the appellate court, as the case may be, to admit the accused to bail. This section does not authorize a justice of the peace to grant bail in such cases. Section 19.1-114 of the Code provides that the circuit court of each county, or the judge thereof in vacation, may appoint a justice of the peace to serve as a bail commissioner for such county. In my opinion, a justice of the peace who has been appointed a bail commissioner under the provisions of Section 19.1-114 may, in his capacity as bail commissioner, admit to bail any person who has filed an appeal under § 16.1-132, provided the circuit court of the county, or the judge thereof in vacation, in which the appeal is pending, has not acted upon the application for bail.

I am of the opinion, therefore, that a justice of the peace does not have authority to grant bail to a person who has filed an appeal under § 16.1-132 of the Code unless he acts in the capacity of a bail commissioner.

JUSTICE OF PEACE—Conservator of the Peace—May require recognizance of person to keep the peace.

CRIMINAL PROCEDURE—Recognizance—When justice of peace may require.

HONORABLE THOMAS E. ST. CLAIR
Justice of the Peace for Prince William County

August 16, 1961

This is in reply to your letter of August 14, 1961, in which you present the following question:
REPORT OF THE ATTORNEY GENERAL

"I would like to respectfully request your opinion as to whether a Justice of the Peace can properly and legally require a person to enter into a recognizance to keep the peace and be of good behavior."

Section 19.1-20 of the Code provides that every justice of the peace "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." Sections 19.1-21 and 19.1-22, in my opinion, authorize a conservator of the peace, in accordance with the procedure therein set forth, to require a recognizance if there is good cause to fear that such person intends to commit an offense against the person or property of another. Section 19.1-23 provides for an appeal to the circuit court of the county or the corporation court of the corporation from the judgment of the conservator.

These provisions, with certain exceptions, were formerly contained in Chapter 2 of Title 18 of the Code. In the revision of Title 19 of the Code, which was repealed and a new title 19.1 enacted, these statutes relating to the prevention of commission of crimes, with certain changes not material here, were incorporated in Title 19.1 as Chapter 2. Title 19.1 was enacted by Chapter 366 of the Acts of 1960 and is the most recent expression of the General Assembly with respect to the matter in question.

You state that it has been suggested to you that the authority of a justice of the peace is limited to that stated in § 39-4 of the Code. Inasmuch as Title 19.1 is the most recent legislation affecting the subject matter, it is my opinion that the authority delegated to a justice of the peace in this Title is not affected by any of the provisions of § 39-4.

JUSTICE OF PEACE—Duty to Issue Warrant—Not to refuse solely because complainant is juvenile.

JUVENILES—Warrants—May be complainant—Justice of peace not justified in refusal to issue process solely because complainant is juvenile.

HONORABLE BENJAMIN L. CAMPBELL
Judge, Juvenile and Domestic Relations Court

December 15, 1961

This is in reply to your letter of December 14, 1961, in which you request my opinion as to "whether or not a Justice of the Peace can refuse to issue a warrant upon the complaint of a juvenile against an adult solely on the basis of the fact that the complaining person is a juvenile."

Section 16.1-141(3) defines a juvenile as a person less than eighteen years of age. An adult means a person twenty-one years of age or older.

I assume that you have reference to criminal warrants. Section 19.1-90 provides for the issuance of such warrants by a justice of the peace, unless otherwise provided by law, and § 19.1-91 provides 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."

Under this latter section, a justice of the peace, after examining the complaining witness on oath, should issue the warrant in cases where the complainant is a juvenile if he sees good reason to believe the offense has been committed, and he should not refuse to issue the process solely because the complaining witness is a juvenile. If it appears that the juvenile would be a competent witness to testify in a criminal case, he is qualified to furnish information, under oath, as a basis for the issuance of a warrant.

Generally, the rule is that the complainant must be a person who is competent to testify to the facts in the complaint. C.J.S., Vol. 22, Criminal Law, Section 305.

A justice of the peace is a law enforcement officer charged with a responsibility which he should not shirk, and his refusal to issue a warrant solely for the reason that the complaining witness is a juvenile would not be justified.

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JUSTICE OF PEACE—Fees—One fee for warrant, regardless of number of charges—Not authorized to deduct from cash bail.

COSTS—Fee for Issuing Warrant—One fee for warrant, regardless of number of charges—Not to be deducted from cash bail.

HONORABLE K. H. WEAKLEY
Clerk of Courts of York County

September 20, 1961

This is in reply to your letter of September 18, 1961, which reads as follows:

"A few days ago Mr. Harry A. Lyons, a Justice of Peace, forwarded to the Office of the County Court of York County a receipt for a cash forfeit taken by him in the sum of $23.75 retaining $4.00 for his fees and remitting $19.75. On the J.P.'s receipt there was a pencil notation 'Two Charges.'

"A letter was written to Mr. Lyons by the Judge of our Court on September 11, 1961, in which the Judge stated that he did not know the authority for the J. P. retaining a $2.00 bail fee on each charge contained in a warrant and stating further that in his opinion only one bond could be required for appearance on the one warrant even though two misdemeanor charges were contained therein.

"On the date of September 14, 1961, Mr. Lyons wrote 'The Four Dollars collected by me covers my fee as Justice of the Peace—i.e. $2.00 for each charge—and since there were two charges against him, my fee in this instance is Four Dollars.

"'This is the procedure followed by all of the Justices of the Peace in Hampton and is correct so far as we all know. We have never been instructed otherwise, nor have we had any complaints from the Judges or the Auditors.'

"This letter is to ask whether you concur in the opinion of the Judge of the County Court or the Justice of the Peace?"

Section 14-136 of the Code of Virginia provides, in part, as follows:
"A justice of the peace shall charge for services rendered by him in criminal actions and proceedings the following fees only:

* * * *

(3) For admitting any person to bail, including the taking of the necessary bond, two dollars, which shall, notwithstanding other provisions to the contrary, be collected at the time of admitting the person to bail, but which shall in no case be paid out of the State treasury."

In this instance there was only one warrant and, as a result, the defendant was only required to post a bail bond for his appearance for trial on that warrant. The justice of the peace admitted the defendant to bail and took the necessary bond for the defendant’s appearance to answer the charges set forth in the warrant. Although there were two separate charges contained in the warrant, nevertheless, only one bail bond could be required. The statute allows a justice of the peace to collect a fee of $2.00 for admitting any person to bail and taking his bond upon each warrant that has been issued and served upon the defendant.

In my opinion, the statute may only be construed to permit a justice of the peace to collect a $2.00 fee for his services in admitting a person to bail and taking his bond upon a single warrant even though the warrant may contain more than one charge.

I concur, therefore, in the conclusion reached by the judge of the county court in this case.

The justice of the peace does not have authority to deduct his fee from the amount of cash deposited in lieu of surety under § 19.1-130 of the Code. The fee must be collected separately. Section 19.1-131 contains the provisions with respect to the proper disposition of the cash deposit.

JUSTICE OF PEACE—Recognizance to Keep the Peace—When to require.

CRIMINAL PROCEDURE—Recognizance—Justice of peace may require of person to keep the peace.

HONORABLE PHILIP N. BINFORD
Justice of the Peace for Richmond City

September 29, 1961

This is in reply to your letter of September 25, 1961, which reads as follows:

"We have a copy of your opinion, dated August 16, 1961 regarding the power of a justice of the peace to place a person under a peace bond. The opinion is clear to us in so far as it goes and, as we understand it, as a rule the justice must feel that the person might do harm to another person or to property.

"We have a different problem in Richmond and would like your opinion. Through habit down through the years, the Richmond Magistrates and Courts have automatically placed persons under a good behavior bond when they bail the person for his appearance in Court or when the Court continues a case, etc. You will note that our printed bail bond form includes the good behavior clause at the end.

"When a magistrate bails a person for his appearance in Court in such cases as Reckless Driving, Gambling, Dealing in illegal whiskey, etc., does he have the authority to place that person under a good behavior bond. You will note that in those cases the justice has no reason to fear that the person being bailed will do harm or damage to a person or property."
The procedure with respect to requiring from persons security for their good behavior is set forth in Chapter 2, Title 19 of the Code. This chapter does not, in my opinion, authorize a conservator of the peace to require a so-called peace bond of a person unless (1) complaint is made pursuant to § 19.1-21 of the Code and a hearing thereon is had in accordance with § 19.1-22 or (2) the person, in the presence of a conservator of the peace or court, acts in such manner as to come within the provisions of § 19.1-27 of the Code.

It is provided in § 19.1-128 of the Code that when a recognizance is taken for any other purpose than to appear and answer for an offense or give evidence, the recognizance shall be with condition that the person of whom it is taken shall keep the peace and be of good behavior for a time not in excess of one year. This section further provides that the court or officer may, when the recognizance is taken of a person charged with a criminal offense, include a condition for keeping the peace and being of good behavior in addition to the other conditions of his recognizance. This is not, in my opinion, authority to include such a condition unless justification therefor is established in the manner provided in Chapter 2 of Title 19.1 of the Code.

Because there may be occasions when it will be proper to include the condition with respect to keeping the peace, this office suggested in 1941 that language to that effect could properly be included in a printed form, and that such condition could be stricken from the form when not required in any case.

LABOR LAWS—Right-to-Work Law—Agency-shop agreement unlawful.

November 3, 1961

HONORABLE W. ROY SMITH
Member, House of Delegates

This is in reply to your letter of October 30, 1961, which I quote in its entirety:

"It has come to my attention that in several recent contract negotiations between employers and labor unions, the union representatives have demanded that the employer enter into what is known as an 'agency shop agreement.' As I understand it, under this agreement, employees are required to pay to the union, through the 'check-off,' a sum equivalent to union dues and fees, but not so labeled as dues. These moneys are designated as service fees for the union to cover the cost of representation, grievance handling, bargaining, etc., under the collective bargaining agreement.

I am enclosing a copy of the type of contract clause being demanded by the union and would appreciate your advising me whether such a contract clause would be legal in a collective bargaining agreement under the Virginia right-to-work law."

The contract clause which you enclosed with your letter reads in part as follows:

"All present employees who are not Union members and who do not in the future become and remain members shall, immediately following a 30 day period from the date hereof, as a condition of employment, pay to the Union each month, pursuant to authorization for payroll deduction therefore as hereinafter referred to, a service charge as a contribution toward the administration of this Agreement in an amount equal to the regular monthly dues of the Union."
I am of the opinion that the foregoing provision is a clear violation of § 40-72 of the Code of Virginia, (1950), which reads as follows:

“No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.”

LAND GRANTS—Civil Engineer not licensed land surveyor within meaning of § 41-84 of Code.

HONORABLE HANSEL FLEMING
Commonwealth’s Attorney for Dickenson County

January 17, 1962

This is in reply to your letter of January 5, 1962, in which you ask to be advised as to whether a professional civil engineer would be qualified to prepare the plat contemplated by § 41-84 of the Code of Virginia for the purpose of the proceedings instituted for obtaining title to waste and unappropriated lands.

Section 41-84 of the Code of Virginia, pursuant to which such proceedings are undertaken, reads in part as follows:

“He shall file with the motion a copy of a plat prepared by a licensed land surveyor giving the metes and bounds of the land alleged to be waste and unappropriated. A copy of the motion and plat shall be served upon each of the landowners adjoining the tract in question.”

While a licensed civil engineer is authorized to undertake land surveying without obtaining a license as a land surveyor, I am of the opinion that a survey prepared by such an engineer would not be adequate for compliance with the above-quoted provision of § 41-84 of the Code. Since the General Assembly has specified that the plat must be prepared by a licensed land surveyor, I am of the opinion that a plat prepared by anyone other than a licensed surveyor would not be a compliance with this statute.

LAND GRANTS—Waste and Unappropriated—State Librarian no longer authorized to grant.

HONORABLE RANDOLPH W. CHURCH
State Librarian

April 5, 1962

This is to acknowledge receipt of your letter of April 3, 1962, in which you enclosed a petition and plat, with affidavit attached, relating to a land grant sought by Catherine Pullman, et al. These papers were sent to you by Mr. Charles Pickett of the Fairfax Bar.

Prior to July 1, 1952, the State Librarian had authority to issue a warrant under the provisions of § 41-3 of the Code, and the Governor, under § 41-6 of the Code, had authority to sign a grant conveying wasteland to an applicant. However, Chapter 185, Acts of 1952, repealed §§ 41-3 through 41-7, inclusive, and the same Act incorporated Chapter 8.1 of Title 41, § 41-83.1 into the Code, the same being thereafter designated by the Code Commission as Chapter 9, §§ 41-84.
through 41-89, inclusive. This Chapter prescribes the procedure by which a citizen may proceed in the local circuit court to acquire wastelands.

It is my opinion, therefore, that you, as State Librarian, no longer have authority to issue warrants under Chapter 2, Title 41, Code of Virginia, nor is there any authority to issue grants for wastelands under said Chapter. Under the circumstances, I suggest that you return the papers to Mr. Pickett, calling his attention to said Chapter 9, Title 41, of the Code of Virginia, as amended.

LIBRARIES—Contracts with County—May provide for termination on year to year terms—Statutory method for termination not exclusive.

COUNTIES—Contracts—Obligation beyond current appropriation period—May terminate contract with library in manner which differs from statutory method.

No.ember 29, 1961

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

This is in reply to your letter of November 20, 1961, which reads as follows:

"I enclose herewith a copy of a contract proposed to be entered into by the Trustees of the Walter Cecil Rawls Library and Museum and the Counties of Southampton and Isle of Wight. The Library and Museum is located in Southampton County.

"Section 6 of the contract provides that the original term thereof shall be two years and that it shall thereafter continue from year to year until terminated as therein provided for. Section 42-7 of the Code provides how a County may withdraw from such a contract, but the manner of withdrawal provided in this contract is not in accordance with the provisions of the statute.

"I will appreciate your opinion as to whether or not the Board of Supervisors of Isle of Wight County may legally:

1. Enter into such a contract for more than one year at a time and which is to run from year to year, the effect of which would be an attempt to bind a future Board to a contract whose term exceeds one year and to pledge the County revenue beyond the current tax year.

2. Enter into such a contract if the original term does not exceed one year with provision thereafter to run from year to year until terminated under its terms or the statute.

3. Withdraw from such contract except as provided in Section 42-7, supra."

It has been the long standing view of this office that a governmental agency cannot validly contract for a period beyond the then current appropriation period. See, Report of Attorney General (1940-1941), p. 1. My predecessor in office, Honorable Albertis S. Harrison, Jr., rendered an opinion on December 20, 1960, to Honorable Leon Owens, Commonwealth's Attorney for Russell County, to the effect that a contract by the County which would extend an obligation to purchase land beyond the current fiscal year without a vote of the people would be violative of Section 115a of the Virginia Constitution.

I am of the opinion that the present Board of Supervisors of Isle of Wight County cannot validly bind future boards to appropriate funds for the purpose contemplated in the proposed contract. There is no objection to the Board enter-
ing into a contract which would renew itself from year to year if the Board of Supervisors sees fit to make an annual appropriation for the purpose.

Section 6 of the proposed contract provides for discontinuance of the contract by "appropriate action of any contracting parties." There is a subsequent provision in the contract to the effect that it is to be executed in conformity with Chapters 1 and 2 of Title 42 of the Code of Virginia. Section 42-7 of the Code, a portion of Chapter 2 of Title 42, provides for withdrawal from such contracts by petition and vote in the manner prescribed in §42-4 of the Code. In a letter addressed to Honorable Randolph W. Church, State Librarian, under date of April 29, 1960, Attorney General Harrison reached the conclusion that the statutory method for withdrawal was not exclusive, and the contracting parties were free to limit the duration of the contract by the terms thereof. See Report of the Attorney General (1959-60), p. 212.

LIBRARIES—Regional Libraries—Grant to aid established library not permitted—Contract between town and county to use existing county library does not constitute new regional library.

September 21, 1961

HONORABLE RANDOLPH W. CHURCH
State Librarian

This is in reply to your letter of September 14, 1961, which reads as follows:

"Under section 42-25 of the Code as amended, the State Library may make an establishment grant of up to $50,000 to new county or regional libraries.

"Under section 42-5 of the Code, a regional library is designated as one which may be composed of a city and one contiguous county.

"The question has arisen as to whether, if the town of Franklin constitutes itself as city and contracts with its parent county of Southampton for library service, the regional library thus formed would be eligible to receive an establishment grant as a new library system, particularly since the county of Southampton has already received an establishment grant three years ago.

"I would appreciate your opinion."

In the event the proposed City of Franklin and the County of Southampton should enter into a contract pursuant to the provisions of § 42-5 of the Code, a regional library system will thus be established, consisting, however, of the same area now composing the county library system.

Section 42-25 of the Code provides as follows:

"Original grants shall be limited to not more than one dollar per capita of the county or region as shown by the last preceding United States census and in no case to exceed fifty thousand dollars. Such grants shall be made to areas approved by the State Library Board under standards fixed by it. Not more than one library in a county or regional free library system shall receive aid under this chapter, and such library shall serve as an administrative center for county or regional free library service to the whole county or region, provided that in the case of a contract with an adjacent library for county or regional free library service as provided in §§ 42-8 and 42-12, such aid shall be given to the library contracting to give such service, which library shall then be the administrative center for a county or regional free library system."
Original grants may be expended for a stated period under the direct authority of the State Library Board under standards and requirements established by the Board."

As I understand your letter, an original grant has been made for the area composing the region that will be established under the contract. This regional system, in my opinion, will not qualify as a new library system, but will be the same system under a different management. Original grants are made under § 42-24 of the Code for development of a public library service in areas approved by the State Library Board, subject to the limitations imposed by § 42-25 of the Code.

The State Library Board may explore the question of granting additional aid to the regional system under § 42-26 of the Code, if the Board should find that the region qualifies under this section.

LIBRARIES—Scholarship Loans—When repayable—Payment to be credited to locality, not State.

HONORABLE RANDOLPH W. CHURCH
State Librarian

October 3, 1961

This is in reply to your letter of September 29, 1961, which reads as follows:

"Under a scholarship program for the training of public librarians, the State Library permits allocations of State aid made by it to public libraries to be used for the training of librarians who agree to return to the locality for two years of service. The State Library acts as agent for the locality, holding the required promissory notes until the two years of service are completed.

"In the event the two years of service are not completed, the holder of the scholarship is required to repay with interest the pro rata share due for nonfulfillment of the contract. The Library, upon the verbal evidence of your office, has credited back to the locality these repayments and interest.

"The Auditor and Comptroller have questioned whether such refunds can be credited to the locality and feel that such refunds should revert to the General Fund, particularly at the ending of a biennium.

"I shall appreciate it if you would clarify the question as to whether the State or locality should receive the benefit of these refunds so that our records may be in order.

Grants for the purpose of providing scholarships are made to the localities by the State Library Board pursuant to the authority contained in Section 42-26 of the Code. This office has heretofore advised your Department that this Code section is broad enough to embrace such scholarship grants. Report of Attorney General, (1956-1957), p. 160.

Whenever a grant is made to a locality, the State Library, instead of disbursing the funds direct to the locality, makes the disbursement to the librarian who has been awarded a fellowship by the locality, and, in turn, the recipient of the fellowship executes a contract agreeing to serve for two years in a full time professional library position in the library operated by the locality, or, in the event of failure to render such service, repay the amount of the fellowship award, or such pro rata part thereof as has not been discharged by such service. The recipient of the award executes a note covering the amount of the scholarship.
Whenever a refund is made by a person who has failed to serve the time required in order to discharge the obligation under the agreement, and as evidenced by the note, such refund should be credited to the locality to which the grant was made. It is not a recovery of State funds. When the grant was made in the first instance and the money disbursed, it constituted an expenditure under the provisions of the Appropriation Act.

Under Section 41 of the Appropriation Act, only appropriations made out of the general fund which have not actually been disbursed by warrants drawn by the Comptroller on the State Treasurer revert to the general fund.

Since the scholarship loans to these librarians are made from grants made to the locality, it follows that payments received from the librarians pursuant to the agreement should be credited by the State library to the locality for use in making additional fellowship loans, or such other use as may be permitted under Title 42 of the Code.

LICENSES—Electrical Contractors—When localities may require examination before doing business.

COUNTIES, CITIES AND TOWNS—Licenses—When examination of electrical contractors may be required.

May 11, 1962

MR. EDWARD L. KUSTERER
Executive Secretary
State Registration Board for Contractors

This will acknowledge receipt of your letter of May 3, 1962, in which you cite § 54-143.2 of the Code of Virginia and request my opinion as follows:

"Your opinion is respectfully requested as to whether or not a political subdivision of the state may require an electrical contractor who holds a certificate from this board as an electrical contractor as provided in Section 54-129 of the Code to take and pass a local examination before being permitted to engage in the electrical contracting business or to perform electrical installations in the locality. It is realized that such contractors would be required to obtain the necessary local permits and pay proper license fees."

Section 54-145.2 reads as follows:

"The governing body of every county, city and town shall have the power and authority to adopt ordinances, not inconsistent with the provisions of this chapter, requiring every person who engages in, or offers to engage in, the business of electrical, plumbing or heating contracting in such county, city or town, to obtain a license from such county, city or town, except, however, such contractors examined and currently licensed under the provisions of § 54-129."

"The governing body of every county, city or town adopting ordinances pursuant to this section may require every applicant for such license to furnish evidence of his ability and proficiency; may require the examination of every such applicant to determine his qualifications; may designate or establish an agent or board for the county, and prescribe the procedures therefor, to examine and determine, according to the standards set forth in this chapter and such standards as may be established by the State Registration Board for Contractors pursuant to
the provisions of this chapter; may refuse to grant a license to any person found not to be qualified; and may provide for the punishment of violations of such ordinances, provided, that no such punishment shall exceed that provided for misdemeanors generally."

It will be observed by reference to § 54-113 that the State Registration Board for Contractors may require a license from those persons and firms coming within the definition of "general contractor" or "subcontractor." Under this definition the cost of the work to be done by the contractor or subcontractor determines the applicability of the chapter. It was held in Sellers v. Bles, 198 Va. 49, that neither a general contractor nor a subcontractor is required to take the examination required by the chapter unless the work he bids on or undertakes amounts to $20,000 or more. The provisions of § 54-129, therefore, refer to contractors and subcontractors who come within the definition contained in § 54-113 and contractors who do not come within this definition are not required to obtain a license from your Board.

Section 54-145.2 was enacted in 1958 and it contains an exception of "such contractors examined and currently licensed under the provisions of § 54-129."

In my opinion, the object of this statute was to authorize the governing bodies of counties, cities and towns to adopt ordinances thereunder requiring electrical, plumbing or heating contractors who are not subject to the examination given by the Board to take an examination not inconsistent with the provisions of Chapter 7 of Title 54 of the Code. In my opinion the phrase "examined and currently licensed under the provisions of § 54-129" refers to the time that the contractor is doing business in the county, city or town and is not subject to the interpretation that it is merely a grandfather clause applicable only to those contractors who had been examined and licensed at the time the statute was enacted. The language in question is not the usual language used for exempting from license requirements persons in business at the time an act is passed. The word "currently" must, in my judgment, be construed to refer to the time the contractor operates in the locality. If he has a State license at that time, he is not required to obtain a local license.

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LICENSES—Livestock Dealers—Poultry is not included in definition of livestock.

TAXATION—Licenses—Wholesale dealer in poultry cannot qualify for livestock dealer license.

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

May 10, 1962

This is in reply to your letter of April 30, 1962, in which you request my opinion as to whether a dealer in live poultry can obtain a license as a livestock dealer rather than a wholesale merchant's license to sell to retailers.

I am aware of no definition of "livestock" in the Code of Virginia. While poultry may be included in the classification of livestock for some purposes, the word "livestock," as most often interpreted, is not inclusive of "poultry." See, 25A Words and Phrases, 45.

Whenever reference has been made to poultry and livestock in the Code of Virginia, both words are employed, indicating that the General Assembly does not consider the two words as being synonymous or inclusive of each other. See Chapter 22, Title 3, as well as §§ 29-197, 29-202 and 29-209 of the Code.

In view of the foregoing, I am of the opinion that a dealer in poultry may not operate his business under the livestock dealer's license in lieu of obtaining a wholesale merchant's license.
LOTTERIES—Consideration—Attendance upon premises when chance drawn does not constitute consideration under § 18.1-340.1 of Code.

May 31, 1962

HONORABLE JOHN D. BUCK
Commonwealth's Attorney for the City of Radford

I am in receipt of your letter of May 28, 1962, in which you inquire whether or not a certain sales promotional program would constitute a lottery under Virginia law. See, § 18.1-340, Code of Virginia (1950), as amended. As outlined in your communication, the enterprise in question would be conducted in the following manner:

"A department store advertises that it will conduct a drawing and the holder of the winning ticket will receive a prize. This offer is extended to the general public and no purchase of merchandise is required. However, the public must register on a certain day between certain hours. Further, in order that the prize will be claimed, the management of the store requires the holder of the winning ticket to be present at the drawing. Otherwise, the drawing of the ticket stubs continues until the prize is awarded to someone who is present on the premises."

In conformity with the opinion of the Supreme Court of Appeals of Virginia in Maughs v. Porter, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. With respect to the element of consideration, § 18.1-340.1 of the Virginia Code 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 demonstration 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."

While it is clear that both prize and chance are present in the program concerning which you inquire, it also appears that no charge is imposed nor is any purchase required for registration by a participant, and I do not believe that the requirement that the winner of a prize be present at the time the winning ticket is drawn is sufficient to remove the venture from the protection of the above-quoted statute. I am, therefore, of the opinion that no consideration within the meaning of § 18.1-340.1 of the Virginia Code would be deemed to have passed or been given in the conduct of the program under consideration, and that such activity would not constitute a lottery under Virginia law.

LOTTERIES—Consideration—Exists in theatre promotional program when admission charge is made.

July 31, 1961

HONORABLE HAROLD H. PURCELL
Member, Virginia State Senate

I am in receipt of your letter of July 22, 1961, in which you present the following situation and inquiry:
"A motion picture theater will run Children's movies for nine Saturdays. As each person buys an admission ticket on those days and enters the theater, he will retain the numbered half, or stub, of his ticket. The management has previously and privately selected one of the numbers at random. At the end of the nine weeks, whoever holds the number previously selected by the management shall receive a prize. Is this project permitted by Section 18.1-340.1 of the Code of Virginia."

Section 18.1-340 of the Virginia Code prohibits the promotion, management or drawing of a lottery. In conformity with the opinion of the Supreme Court of Appeals of Virginia in *Maughs v. Porter*, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. With respect to the element of consideration, § 18.1-340.1 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 demonstration 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."

Since it appears from your communication that a charge is made in connection with the attendance of an individual at the motion picture theater in question, I am of the opinion that the enterprise concerning which you inquire would not fall within the provisions of the above-quoted statute and would embrace all the constituent elements of a lottery under Virginia law.

**LOTTERIES—Consideration—Necessary element—Attendance upon premises to obtain contest blanks does not constitute consideration.**

Honorable Ernest P. Gates  
Commonwealth's Attorney for Chesterfield County

This will reply to your letter of April 5, 1962, in further connection with your letter of March 21, 1962, in which you inquire whether or not a certain promotional program known as "Total," and designed to encourage attendance at automobile races to be conducted at a speedway, would constitute a lottery under Virginia law. Code of Virginia (1950), as amended, § 18.1-340 et seq. Essentially, the program in question contemplates the award of a cash prize to the participant who selects the first five automobiles in a particular race in the correct order of their finish.

In conformity with the opinion of the Supreme Court of Appeals of Virginia in *Maughs v. Porter*, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. With respect to the element of consideration, Section 18.1-340.1 of the Virginia Code 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 demonstration 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." (Italics supplied).

From the collateral material submitted with your communications, it is clear that both prize and chance are present in the enterprise concerning which you inquire. However, from your communication of April 5, 1962, it also appears that:

"... the entry blanks will be distributed free of charge at the box office at the Speedway to anyone requesting such blanks, regardless of whether or not they purchase a ticket of admission to the races. Boxes will be placed outside of the Speedway gates for depositing entry blanks for persons not purchasing admission tickets. In the event such person is a winner, the Speedway officials will notify the entrant at the address shown on the entry blank.

* * *

"... The purchase of a ticket to witness the racing events is not required to obtain an entry blank."

Since no charge is made to or paid by an individual in connection with the execution and return of the entry blank utilized in the "Total" contest and no purchase is required of a participant as a condition of his eligibility to receive a prize, I am of the opinion that no consideration within the meaning of § 18.1-340.1 of the Virginia Code would be deemed to have passed or been given in the conduct of the program under consideration, and that such activity would not constitute a lottery under the anti-lottery laws of Virginia.

LOTTERIES—Consideration—Necessary element—Attendance upon premises to register does not constitute consideration.

April 6, 1962

HONORABLE LACEY E. PUTNEY
Member, House of Delegates

This will reply to your letter of April 3, 1962, in which you inquire whether or not a certain sales promotional program would constitute a lottery under Virginia law. Code of Virginia (1950), as amended, §§ 18.1-340, et seq. Essentially, the program in question contemplates the award of cash prizes in various amounts to individuals who obtain an entry card from one of the stores of the promoter and thereafter make thirteen weekly visits to one of such stores.

In conformity with the opinion of the Supreme Court of Appeals of Virginia in Maughts v. Porter, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. With respect to the element of consideration, Section 18.1-340.1 of the Virginia Code 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 demonstration 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."

From the collateral material submitted with your communication, it is clear
that both prize and chance are present in the enterprise concerning which you inquire. See, Report of the Attorney General (1958-1959), p. 161. However, it also appears that no charge is imposed nor any purchase required to obtain an entry card; and although a participant is required to make thirteen weekly visits to one of the promoter's stores, no charge is imposed nor is any purchase required to have such visits recorded. I am, therefore, of the opinion that no consideration within the meaning of § 18.1-340.1 of the Virginia Code would be deemed to have passed or been given in the conduct of the program under consideration, and that such activity would not constitute a lottery under the anti-lottery laws of Virginia.

LOTTERIES—Consideration—Promotional program in which no charge made for participation does not constitute offense.

HONORABLE KOSSEN GREGORY
Member, House of Delegates

This will reply to your letter of September 2, 1961, in which you inquire whether or not a certain promotional program would be violative of the anti-lottery laws of Virginia. See, §§ 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 restaurant operator proposes to give to each individual coming into the restaurant premises a card upon which the individual writes his name, address and telephone number. The individual places the card in a container and at the end of a given number of days, a drawing is held and a previously designated gift will be given to the individual whose card is drawn from the container. The individual will be notified by way of his telephone number and address on the card and such individual is not required to be a patron of the restaurant nor is his presence required at the drawing in order to receive a gift."

In conformity with the opinion of the Supreme Court of Appeals of Virginia in Maughs v. Porter, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. With respect to the element of consideration, § 18.1-340.1 of the Virginia Code 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 demonstration 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."

Although the elements of prize and chance unquestionably exist in the enterprise under discussion, it would appear from your communication that no charge is made to or paid by—nor is any purchase required of—any person in connection with the executing or depositing of an entry card containing an individual's name, address and telephone number. In light of this circumstance and the provisions of § 18.1-340.1 of the Virginia Code, I am of the opinion that no consideration would be deemed to have passed or been given in the conduct of the activity concerning which you inquire, and that such activity would not constitute a lottery under the existing anti-lottery laws of Virginia.
MARRIAGE—Common-Law Marriage Not Recognized in Virginia Although Valid in Another State—Uniform reciprocal enforcement of Support Act not applicable.

May 31, 1962

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

This is to acknowledge receipt of your letter of May 23, 1962, in which you state in part:

"John Doe and Mary Doe for several years lived in the District of Columbia as common law man and wife, where such marriages are recognized. Some months ago John Doe deserted her and came to this jurisdiction. Thereupon, she instituted proceedings for support in the Municipal Court of the District under the Uniform Reciprocal Enforcement of Support Act (Virginia Code 20-88-12, et seq.) Copies of the proceedings in the District were then sent here to our Juvenile Court for the purpose of obtaining a support order against John Doe.

"Inasmuch as common law marriages are not valid in this State, the question is whether proceedings under said Act can be conducted and enforced here."

Section 20-88.18 of the Code of Virginia (1950), as amended, reads as follows:

"Duties of support enforceable under this law are those imposed or imposable under the laws of any state where the obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee."

As a common law marriage is valid in the District of Columbia, the duty to support is enforceable under the laws of the District of Columbia. The obligee, wife, is a resident of the District of Columbia. Although common law marriages are void in Virginia if celebrated in this State, such marriages will be recognized in Virginia if the same are consummated in a State where the marriage is valid. The general rule is set forth in 12 M. J., Marriages, Section 8, as follows:

"Common-law marriages are void both in Virginia and West Virginia, if celebrated there. However, a common-law marriage, consummated in a state where it is valid, between parties not forbidden to marry by the Virginia or West Virginia statutes as the case may be, will be recognized in either state."

However, it should be borne in mind that the rule that a marriage valid where performed is valid everywhere is subject to the exception that marriages forbidden by statute can be contrary to the public policy of the State and, hence, are not recognized as valid. 12 M. J., Marriages, Section 5.

It is, therefore, my opinion that proceedings under Chapter 5.2, Title 20, Code of Virginia (1950) can be conducted in the courts of Virginia for the purpose of enforcing the duty to support a wife of a common law marriage valid in a foreign jurisdiction, unless such marriage is one which is contrary to the public policy of this State under Chapter 4, Title 20, Code of Virginia (1950), as amended.
MARRIAGE—Prohibitions—Kinship—Woman may marry great-uncle.

December 29, 1961

HONORABLE FRANCIS B. GOULDMAN
Member, House of Delegates

This is in reply to your letter of December 21, 1961, in which you request my opinion as to whether the prohibition against certain marriages as set forth in § 20-38 of the Code of Virginia prohibits the marriage of a woman and her mother's uncle.

Section 20-38 of the Code reads as follows:

"No man shall marry his mother, grandmother, stepmother, sister, daughter, granddaughter, half-sister, aunt, son’s widow, wife’s daughter or her granddaughter, or stepdaughter, brother’s daughter, or sister’s daughter. If any man has prior to June fifteenth, nineteen hundred and ten, married his brother’s widow or the widow of his brother’s or sister’s son or his uncle’s widow, or his son’s widow or stepdaughter, such marriage is hereby declared to be legal and valid and exempt from the penalties prescribed by existing laws. No woman shall marry her father, grandfather, stepfather, brother, son, grandson, half brother, uncle, daughter’s husband, husband’s son or his grandson or stepson, brother’s son, sister’s son, or husband of her brother’s or sister’s daughter."

While the foregoing statute prohibits the marriage between a woman and her uncle, there is no prohibition which would extend to her great-uncle. I am, therefore, of the opinion that a woman may lawfully marry her mother’s uncle.

MAYORS—Jurisdiction—Not concurrent with county courts—Constitute courts of limited jurisdiction.

COURTS—Courts of Limited Jurisdiction—Mayors of towns have no jurisdiction except as specified in § 16.1-70 of Code.

September 20, 1961

HONORABLE L. JOHN DENNEY
Mayor, Town of Amherst

This is to acknowledge receipt of your letter of September 15, 1961, which reads as follows:

"Chapter 397 of the Acts of the General Assembly of Virginia for 1950 adopted a new charter for the Town of Amherst. This chapter is found on page 704 of the Acts of 1950. Under paragraph 18 on page 709 and 710, it is provided that the Council may appoint a trial justice for the Town, and further provides that the trial justice is vested of the power, authority and jurisdiction and charged with all the duties within and for the Town of Amherst, and in criminal matters for one mile beyond the corporate limits thereof which are or may hereafter be, conferred upon the trial justice by the laws of the State of Virginia, so far as the same may be applicable, and not in conflict with the provisions..."
of this chapter; and any amendment of the trial justice laws of this State shall be considered as amendments also of this section of this charter if the same is applicable hereto. The question arises as to whether or not the trial justice for the Town of Amherst has jurisdiction in civil matters and can issue civil warrants for debts and render judgment thereon, or whether he has jurisdiction only in criminal cases. Will you kindly construe this provision of the charter and advise me if the trial justice has jurisdiction in civil matters."

The statutes relative to trial justices (courts not of record) were revised and reenacted in 1956. Section 16.1-70 of the Code reads, 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."

It will be noted that the trial officer of a town now has limited jurisdiction to cases involving violations of the city or town ordinance or of cases instituted for the collection of city or town taxes or assessments or other debts due and owing to such city and town. Such town trial officers no longer have general jurisdiction in civil and criminal cases arising within corporate limits thereof, as § 16.1-70 of the Code supersedes the provisions of Chapter 397, Acts of 1950, relative to the jurisdiction of the trial justice appointed by the Town Council of Amherst. However, such a trial officer has the authority to issue attachments, warrants and subpoenas within the jurisdiction of the county court, but same must be made returnable before the county court. In this connection, your attention is invited to § 16.1-75, which reads 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."

It is, therefore, the opinion of this office that the trial justice for the Town of Amherst does not have general jurisdiction in civil matters or criminal cases as that now exercised by the county court. The jurisdiction of such trial officer is limited to those cases set forth in § 16.1-70 of the Code, to wit; cases involving the violation of town ordinances, cases instituted for the collection of town taxes or assessments or other debts due and owing to the town, and to the issuance of attachments, warrants and subpoenas returnable before the County Court.
MEDICINE—Dentists—May not conduct plan for prepaid dental service.

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

February 9, 1962

This will reply to your letter of January 29, 1962, in which you called my attention to § 32-195.2 of the Virginia Code and inquired whether or not dentists would be included in the term "physicians," as used in the above-mentioned statute, and thus authorized to conduct a plan or plans for furnishing prepaid dental services.

Section 32-195.2 of the Code of Virginia (1950), as amended, provides:

"A group of physicians may conduct directly or through an agent, who may be either an individual or a non-stock corporation, a plan or plans for furnishing prepaid medical or surgical and similar or related services or both."

I am constrained to believe that your inquiry should be answered in the negative. As a general rule, the terms "dentist" and "physician" are not interchangeable, the latter term ordinarily applying to one who engages in the practice of medicine.

Dentistry and medicine are separate and distinct professions under Virginia law, the former being defined and regulated by §§ 54-146, et seq. of the Virginia Code (Title 54, Chapter 8), and the latter by §§ 54-273, et seq., of the Virginia Code (Title 54, Chapter 12). Moreover, § 54-149 specifically prescribes that nothing in Title 54, Chapter 8, "shall apply to a legally qualified physician or surgeon unless he practices dentistry as a specialty", while §54-276.3 specifically prescribes that nothing in Title 54, Chapter 12, "shall be construed to apply to or interfere with dentists" within the scope of their usual professional activities.

In light of the foregoing, I am of the opinion that § 32-195.2 does not authorize a group of dentists to conduct a plan or plans for furnishing prepaid dental services.

MEDICINE—Nurses—Permitted to administer blood transfusions and intravenous injections as prescribed by physicians.

Honorable W. Roy Smith
Member, House of Delegates

April 23, 1962

I am in receipt of your letter of April 17, 1962, in which you present the following questions:

"(1) Is the administration of blood transfusions by registered nurses permitted under Virginia law?

"(2) Is the administration of intravenous injections by registered nurses permitted in Virginia?

"(3) Is either of the above-mentioned practices specifically forbidden by Virginia law?"
In this connection, I am forwarding to you a copy of an opinion of this office, dated December 10, 1951, to Mr. C. P. Cardwell, Jr., Director of the Medical College of Virginia Hospital Division, in which a question substantially identical to those which you present was considered and discussed. See, Report of the Attorney General (1951-1952), p. 113. In light of the enclosed ruling, I am of the opinion that registered professional nurses are permitted by Virginia law to administer blood transfusions and intravenous injections as prescribed by a licensed physician. It follows, of course, that your concluding inquiry must be answered in the negative.

MENTAL HYGIENE AND HOSPITALS—Collection of Claims—Counsel may be employed to institute proceedings.

COMMONWEALTH'S ATTORNEYS—Duty to Collect Claims Against Mental Patients—Statute imposing duty repealed.

HONORABLE ALFRED E. H. RUTH
Director of Mental Hospitals

This is in reply to your letter of May 29, 1962, in which you point out that the 1962 session of the Legislature amended several provisions of the Code of Virginia pertaining to reimbursement for care, treatment and maintenance of patients in mental hospitals. You have asked to be advised as to the procedure the Department of Mental Hygiene and Hospitals should follow to obtain legal representation to collect claims of this nature.

By enactment of Chapter 80, Acts of 1962, the General Assembly of Virginia amended §§ 37-125.6 and 37-125.15 of the Code and repealed § 37-125.7 of the Code, all of which relate to the collection of expenses for care, treatment and maintenance of patients in institutions under the control of the Department of Mental Hygiene and Hospitals. All provisions pertaining to the responsibility of the Commonwealth's Attorney have been repealed. Section 37-125.6 of the Code (1950), as amended, now reads, in part, as follows:

"* * * The Department shall collect such part or all of such expenses from the several sources as appears proper under the circumstances and may proceed against all of such sources. The proceedings for the collection of such expenses shall conform to the procedure for collection of debts due the Commonwealth."

Debts due the Commonwealth are recovered pursuant to Chapter 35, Title 8 of the Code of Virginia (1950). This chapter places the burden upon the State Comptroller to institute the necessary proceedings to enforce payment. This chapter must be read in conjunction with § 2-87 of the Code of Virginia (1950), which places the burden upon the Attorney General to provide all legal services in civil matters for the Commonwealth. Section 2-88 of the Code provides for the employment of special counsel. That section reads, in part, as follows:

"In cases of legal services in civil matters to be performed for the State Corporation Commission or any State department, institution, division, board, bureau or officer, where it is impracticable or uneconomical for the Attorney General's Office to render same, special counsel may be employed but only upon the written recommendation of the Attorney
General, who shall approve all requisitions drawn upon the Comptroller for warrants as compensation for such special counsel before the Comptroller shall have authority to issue such warrants."

Pursuant to the foregoing statutory provisions, it has become the practice for the Attorney General to appoint special counsel when so requested to enforce the payment of money owing any department of the government. This request may be made by the head of the department to which the money is owing. Any suit instituted by such counsel is conducted pursuant to Chapter 35, Title 8 of the Code of Virginia (1950).

MENTAL HYGIENE AND HOSPITALS—Training may be classified as educational for purposes of section 151(e) (4) of Internal Revenue Code.

February 20, 1962

DR. HIRAM W. DAVIS
Commissioner
Department of Mental Hygiene and Hospitals

This is in reply to your letter of February 16, 1962 relating to Sharon L. Cottrell, a patient at Lynchburg Training School and Hospital.

It appears that the father of the patient, a minor, has made a request to the Superintendent of the Lynchburg Training School and Hospital for a certificate pursuant to a ruling of the Internal Revenue Ruling 61-186 of 1961, which is quoted in a memorandum issued by the National Association for Retarded Children, Inc., dated February 1, 1962, as follows:

"where a state institution for the mentally retarded, or division thereof, which qualifies as an educational institution under Section 151 (e) (4) of the Internal Revenue Code of 1954 accepts a minor child for purposes of education and training and certifies that it is making an effort to educate or train him to use his faculties to the extent that he is physically or mentally able to do so, the child will qualify as a student under Section 151 (e) (4) of the Code, regardless of the education or training received or the extent of his disability."

The Superintendent, in a letter to the parent of the child, stated:

"As our institution is in the Department of Mental Hygiene and Hospitals and classified as a hospital and not classified as an educational institution within the Department of Education, I am forwarding your request to Dr. Hiram W. Davis, Commissioner, for a policy decision."

You have requested my opinion with respect to the question presented by the Superintendent to you.

In my opinion, the Superintendent may furnish the certificate to Mr. Cottrell. Although the Lynchburg Training School and Hospital is not within the Department of Education, it is obvious from the provisions of Article 1, Chapter 7 of Title 37 of the Code, that one of the responsibilities of the Lynchburg Training School and Hospital is to provide "such training, both educational and industrial" as is adapted to the capacities of the children who are in the care and custody of the institution. See, §§ 37-187 and 37-188 of the Code.
MENTALLY ILL—Commitment—Authority of Substitute Judge to commit for observation.

February 9, 1962

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

This is to acknowledge receipt of your letter of January 22, 1962. I shall answer your inquiries seriatim.

"(1) If the County Judge is not available, does the substitute or assistant County Judge have the authority to send a person to either of the State Institutions either by commitment or solely for the purpose of observation?"

By § 16.1-21 of the Code of Virginia (1950), as amended, substitute or associate County Judges are given the same power and authority as the County Judge. Inasmuch as Article 2, Chapter 3 of Title 37 of the Code authorizes a County Judge to commit a person to a State Institution for observation as to his mental condition, and thereafter to commit the person if he is found to be mentally ill, epileptic or mentally deficient, I am of the opinion that this authority may be exercised by the substitute or associate County Judge.

"(2) If the County Judge and the assistant are both not available, can a practicing physician send a person to either of the State Hospitals by way of commitment or for observation?"

Article 3, Chapter 3 of Title 37 (See § 37-103) authorizes the admission of a person for observation without commitment upon the certificate of two licensed physicians. This Section reads:

"The superintendent of any State Hospital or colony for the care and treatment of the mentally-ill may, without an order of a judge or justice, receive into his custody and detain temporarily in the hospital or colony for the care and treatment of the mentally-ill, a person whose case is certified by two licensed physicians, neither of whom is in any manner related to, connected by marriage with him, or has any interest in his estate, after careful personal examination and inquiry, whose mental condition is found to be such that it would be for his safety and benefit to receive proper hospital care and treatment, and upon a written petition to the superintendent of the hospital or institution made by some responsible person or persons."

A person admitted under this Article may be committed upon compliance with the provisions of §37-109. This section provides:

"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 (§§ 37-61 et seq.) 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."
MENTALLY ILL—Lunacy Commissions—Payment of fees and expenses—Source of payment—When state bears costs.

August 11, 1961

HONORABLE EDITH H. PAXTON
Clerk, Corporation Court for the City of Staunton

This is in reply to your letter of July 19, 1961, in which you ask for guidance in providing a procedure whereby the members of lunacy commissions may be able to collect the statutory fees which are payable from the State Treasury. You state that there is some difficulty experienced in obtaining certification by the Judge of the Corporation Court on the State Comptroller's Form 4 when the lunacy proceeding is held in Staunton for a subject who is a nonresident of that City. The Court's reluctance to certify the order is due to the lack of a copy of the record of the proceeding in your office, it having been transmitted to the court of jurisdiction where the subject resided before commitment.

Your letter indicates that there is some confusion in the application of the various statutes governing commitment proceedings. It appears necessary for you to alter the method of recording the commission's proceedings, and the State Comptroller to alter the form being utilized to certify the expenses of the Commission when such expenses are payable from the State Treasury.

The usual mode of commitment to a mental institution is codified as Article 1, Chapter 3 of Title 37 of the Code of Virginia. Pursuant to this article a lunacy commission is presided over by the judge specified in § 37-61 of the Code. Generally, this is the court in the locality where the subject resides, although not necessarily so. In many instances a subject may have already been institutionalized for observation at the time a commission is appointed. In other instances the subject may be a nonresident of the State. In all instances, pursuant to § 37-69 of the Code, a copy of the record of such proceedings is placed to record in the clerk's office where deeds are recorded. I think it rather manifest that this means the court in the locality where the proceeding is conducted, not in the locality where the subject resides.

The question of source of payment of the commission fees and expenses often arises when the commitment proceeding is conducted in some jurisdiction other than the subject's place of residence. Under normal circumstances, the expenses are paid by the county or city of which such person was a legal resident at the time of commitment, even though the commitment proceedings were conducted elsewhere. (See § 37-75 of the Code).

There are, of course, instances in which the State bears the cost of a lunacy commission; e.g., when the subject is committed for observation by order of a court where a criminal charge is pending, (§ 19.1-233) when the subject is a nonresident of this State, and when the subject is in the custody of and detained in a State-supported institution at the time of the commitment proceeding. (§ 37-75)

As to the certification order of commitment to the State Comptroller, it would be appropriate for the judge of a court of record to certify the order of commitment in those cases in which such court orders the examination when a criminal charge is pending against the subject or when such court presides over the lunacy commission. In all instances in which the expenses are to be paid out of the State Treasury, I am of the opinion that the jurist presiding over the commitment proceedings should certify the order of commitment, upon such form as the Comptroller may provide, whether or not such presiding official be the judge of a court of record, a trial justice or a special justice appointed pursuant to § 37-61.2 of the Virginia Code. Criminal Form 4, now being utilized, would appear to be appropriate only when the expenses are being certified pursuant to § 19.1-233 of the Code.
REPORT OF THE ATTORNEY GENERAL


CITIES—May not require milk products to show date of pasteurization.

AGRICULTURE—Milk—Containers not required to show date of pasteurization.

June 27, 1962

DR. MACK I. SHANHOLTZ
State Health Commissioner

This is in reply to your letter of June 20, 1962, which reads as follows:

"I would like an opinion as to whether the Richmond City Ordinance # 57-231-183, Section 21-12, Dating Milk or Milk Product Containers, is invalidated by the passage of Chapter 57, 1962 Acts of the General Assembly."

The title of Chapter 57 of the Acts of the General Assembly of 1962 and the language of the Chapter found in Section 3-400.103 thereof clearly indicate that it was the purpose of the General Assembly in adopting this Chapter to establish one State-wide uniform standard for the production, processing, and distribution of milk and milk products.

In establishing one State-wide uniform standard for the processing and distribution of milk and milk products, the General Assembly provided for the uniform labeling and marking of all bottles, cans, packages and other containers enclosing milk and milk products. See Section 3-400.45 of the Chapter. The provisions of this section do not require that milk containers be labeled or marked with the date on which pasteurization took place.

In establishing the one State-wide uniform standard the General Assembly also imposed restrictions and limitations upon the power of counties, cities and towns to enforce existing ordinances affecting the production, processing and distribution of milk and milk products. The restrictions and limitations are found in a portion of Section 3-400.103 of the Chapter, viz.:

"Provided, however, that any county, city or town, which has a local health department is hereby authorized to enforce existing ordinances insofar as, but no further than, they comply with this Article and to adopt and enforce ordinances and rules and regulations governing the handling of milk within such political subdivision, from the point of delivery, until sold and delivered to the public. Every such ordinance shall conform to the provisions of this Article, and rules and regulations adopted thereunder shall conform to rules and regulations adopted under this Article by the Board."

In view of the restrictions and limitations set forth in this section, I am of the opinion that Section 21-12 of the Richmond City Ordinance # 57-231-183, which requires that milk and milk products be labeled or marked with the date on which pasteurization took place, exceeds the requirements of Section 3-400.45 of the Chapter and is therefore invalid after the effective date of the proposed law.
MINES—Gas Well Pipes—Commissioner of Department of Labor may bring action to enjoin wrongful removal.

LABOR—Commissioner may bring action to enjoin wrongful removal of gas well pipes and markers.

HONORABLE EDMOND M. BOGGS
Commissioner, Department of Labor and Industry

This is in reply to your letter of April 3, 1962, which reads as follows:

"It would be greatly appreciated if you would give to me an opinion in reference to the following situation under Sections 45-129(b) and 45-130 of the Code of Virginia, which provides for certain markers and types of pipe to be used in ventilating gas wells. We would like to be advised:

'Can an individual remove from an abandoned oil or gas well the vent pipe and marker originally placed by the original driller of a well which has met the requirements, as provided in these sections even though the original driller of such well no longer has any lease or license to the well?'

"It appears, as an example, that one of our coal companies had complied with Sections 45-129(b) and 45-130. The well in question is an abandoned gas well which penetrates several workable seams of coal and was properly cemented to protect these seams; and since that time, an individual has removed the two-inch (2") vent pipe and has replaced it with a three-quarter-inch (¾") pipe and vent, as well as having removed the permanent marker.

"What jurisdiction does the Chief Mine Inspector have in requiring the person, who removed and permitted removal of this marker and pipe, to comply with the law?"

It would appear that § 45-141 of the Code is applicable. This section reads as follows:

"In addition to the penalties elsewhere provided, the Chief may, if any person is violating or threatening to violate any provision of this chapter, maintain suit in the circuit court of the county or corporation court of the city or the county wherein such violation has occurred or is threatened, or wherein such person may be found, to restrain such violation."

In my opinion the Chief of the Division of Mines of the Department of Labor and Industry may bring a suit in equity against the person who has changed the pipe and removed the marker. The suit would be in the nature of an application for a mandatory injunction to compel such person to restore the pipe and the marker to the condition previously existing. The suit should be brought in the circuit court of the county where the gas well is located.

This remedy, you will note, is in addition to the penalties provided in § 45-143. The expenses incurred in these injunctive proceedings could be paid out of the appropriations made for carrying out the provisions of Chapter 8 of Title 45 and also out of any funds collected by the Chief under said chapter. See, § 45-144 of the Code.
MOTORBOATS—License—Boats owned by volunteer rescue squad not exempt.

HONORABLE H. RATCLIFFE TURNER
Commonwealth's Attorney for Henrico County

This is in reply to your letter of May 18, 1962, in which you request my opinion as to whether motorboats owned and operated by volunteer rescue squads are subject to the requirements of Chapter 11.1, Title 62, Code of Virginia (1950), as amended, particularly for the payment of the fees provided in § 62-174.5 of the Code.

Section 62-174.4 of the Code requires that every motorboat, as defined in § 62-174.2 of the Code, on the waters of this State be numbered. Section 62-174.5 of the Code provides the procedure and regulations relative to obtaining such numbers, including the payment of a specified fee.

The only exemptions from the numbering requirements are set forth in § 62-174.7 of the Code. Those exemptions are as follows:

“(1) A motorboat which is required to be awarded a number pursuant to federal law or a federally approved numbering system of another state, and for which a number has been so awarded: Provided, that any such boat shall not have been within this State for a period in excess of ninety consecutive days.

“(2) A motorboat from a country other than the United States temporarily using the waters of this State.

“(3) A motorboat whose owner is the United States, a state or a subdivision thereof.

“(4) A ship's lifeboat.”

In the absence of an express statutory exemption, I am of the opinion that the boats owned by volunteer rescue squads must be numbered, in accordance with the foregoing mentioned sections of the Code, and the fee for such numbering must be paid.

MOTORBOATS—Life Preservers and Lights—Boats propelled by motors of less than 10 h.p. not required to be equipped.

CRIME—Failure to Equip Motorboat—Life preservers and lights not required on boats propelled by motor of less than 10 h.p.

HONORABLE JOHN G. SOWDER
Commonwealth's Attorney for New Kent County

This is in reply to your letter of September 19, 1961, in which you request my opinion as to whether an owner of a boat propelled by a motor of less than ten horsepower may be prosecuted in State courts for failure to equip such boat with life preservers and lights. You state that such equipment is not required by Virginia statutes for such vessels, but such equipment is required by the Federal Motorboat Act and the Coast Guard regulations, irrespective of horsepower, and that such Federal regulations have been adopted in toto by the Virginia Game and Inland Fisheries Commission.

The regulation of motorboats in Virginia waters by the Game and Inland...

While Chapter 11.1 of Title 62 is applicable in part to "vessels," irrespective of the source of propulsion, the requirements for lights and life preservers set forth in § 62-174.6 of the Code pertain to "motorboats" subject to the provisions of the chapter. As defined in this chapter "motorboat" means "any vessel propelled by machinery of ten or more horsepower, whether or not such machinery is the principal source of propulsion.* * *.”

By virtue of sub-section (k) of § 62-174.6 of the Code, the Commission is authorized to modify the requirements contained in Chapter 11.1 to the extent necessary to keep the requirements in conformity with the provisions of the Federal navigation laws or with the rules promulgated by the United States Coast Guard.

By virtue of sub-section (m) of the same section of the Code, the Commission may adopt such regulations as may be necessary to conform with the Federal Motorboat Act of 1958, in the event any of the regulations of the sub-sections of § 62-174.6 should conflict with the equipment requirements of the Federal Act.

The General Assembly has thus delegated to the Commission the necessary authority to modify the requirements contained in the chapter in order to conform with Federal regulations. I am of the opinion that this authority to modify requirements may not be extended to encompass classifications of vessels which differ from those defined by the General Assembly. To hold that the Commission may modify the regulations applicable to specific types of vessels is quite different from holding that the Commission may modify the definition of “motorboat” so as to bring within the requirements a different classification of vessels.

Inasmuch as the violation of the provisions of Chapter 11.1 of Title 62 of the Code is punishable as a misdemeanor, the language must be strictly construed in favor of the accused. I am, therefore, of the opinion that the owner of a boat propelled by machinery having less than ten horsepower cannot be prosecuted in a State court for failure to equip such boat with life preservers and lights as required in the regulations of the Commission of Game and Inland Fisheries, which are identical to the requirements of the Federal Motorboat Act and the regulations of the United States Coast Guard. While the Commission is free to modify the requirement for such equipment on “motorboats” to the extent necessary to conform with Federal requirements on the same classification of vessels, I am constrained to the view that such equipment requirements cannot be extended to vessels which the General Assembly of Virginia manifestly did not intend to be subjected to such equipment requirements.

MOTOR VEHICLES—Abandoned Vehicles—Purchaser may obtain new identification number when serial number removed.

May 23, 1962

Honorable Charles T. Turner
Assistant Commonwealth’s Attorney for Pittsylvania County

This is in reply to your letter of May 17, 1962, in which you request my opinion as to how a valid title may be secured for an abandoned vehicle sold pursuant to the provisions of § 46.1-2, Code of Virginia (1950), as amended, when such vehicle has no motor number, serial number, license plates or other ascertainable means of identification.

Section 46.1-4, Code of Virginia (1950), as amended, which makes provision for assignment of a new identifying number by the Division of Motor Vehicles
when the engine or serial number of a motor vehicle has been removed or obliterated, is as follows:

"The owner of a motor vehicle, trailer or semi-trailer upon which the engine or serial number or other identification number has become illegible or has been removed or obliterated shall immediately make application to the Division for a new engine or serial number or other identification number for such motor vehicle, trailer or semitrailer. The Division, when satisfied that the applicant is the lawful owner or possessor of the motor vehicle, trailer or semitrailer referred to in the application may assign a new engine or serial number or other identification number thereto and shall require that such number, together with the name of this State or a symbol indicating this State and the date of such assignment, be stamped upon the engine or, in the event such number is a serial number or other identification number, then upon such portion of the motor vehicle, trailer or semitrailer as shall be designated by the Division. Whenever a new engine or serial number or other identification number has been assigned to and stamped upon a motor vehicle, trailer or semitrailer as provided in this section, the Division shall insert such number upon the registration card and certificate of title issued for such motor vehicle, trailer or semitrailer."

This statute provides that the owner shall immediately apply to the Division for a new identifying number. In the present instance, the owner is unknown as the abandoned vehicle bears no identification by which the Division could trace its ownership. However, I find nothing in § 46.1-2, Code of Virginia (1950), as amended, which would invalidate the sale of an abandoned vehicle for want of knowledge of ownership. In fact, that section specifically provides for sale of an abandoned vehicle under certain conditions when "identity or whereabouts of such owner be unknown and unascertainable after a diligent search has been made." Accordingly, it is my opinion that the right of valid title inures to the purchaser under this section even though the former owner could not be ascertained.

After the sale has been made, the new owner should make immediate application to the Division for an identification number to replace the motor and serial numbers which have been removed. This application should be supported by appropriate documentation evidencing ownership. Such documentation would include properly authenticated copies of the bill of sale and the order which authorized such sale pursuant to § 46.1-2, Code of Virginia (1950), as amended. After the new identification number has been assigned and stamped upon the motor vehicle, registration and certificate of title may be readily obtained.

MOTOR VEHICLES—Exhaust System—Muffler cutout illegal while vehicle on highway.

CRIMES—Motor Vehicle Equipped with Muffler Cutout—Illegal when on highway.

December 15, 1961

HONORABLE HAROLD H. PURCELL
Member, Virginia State Senate

This is in reply to your letter of December 2, 1961, in which you request my interpretation of § 46.1-302 of the Code of Virginia with regard to the situation outlined in your letter, from which the following is quoted:
"There is a race track here in Louisa County, Virginia, where cars are raced. Some of these cars, which are standard cars, with standard mufflers and legal mufflers, have been worked on by their owners so that they may be converted to a straight exhaust system. They cut into the pipe before it reaches the muffler and have a pipe welded to it at this point, the said pipe coming to the outside of the car. A cap is placed on the pipe, and it is perfectly air tight and does not leak or exhaust fumes in any way. When they take this car to the race track, they take the cap off the pipe, and then the car has a straight exhaust system. This requires a person to get out the car, take the cap off the pipe and loosen a bolt. When the car leaves the race track, they put the cap back on, tighten the bolt, and the standard muffler is used.

"The real question which has to be answered is whether or not a muffler cutout is a contraption which must be operated from the inside of the car.

"I would appreciate an interpretation of the statute, with these thoughts in mind, and your advice as to what is a muffler cutout, as spoken of in the statute."

Section 46.1-302 of the Code of Virginia, reads as follows:

"It shall be unlawful to sell or offer for sale a muffler without interior baffle plates or other effective muffling device, commonly called 'gutted muffler,' 'muffler cutout' or 'straight exhaust' or for any motor vehicle to be equipped with or for any person to use such a 'gutted muffler,' 'muffler cutout' or 'straight exhaust' while such motor vehicle is being operated upon a highway." (Underscoring Supplied)

The statute refers to the term "muffler cutout" as it is commonly called, without defining it. A recent edition of Webster's Dictionary includes the following definition of "cutout": "a valve in the exhaust pipe of an internal-combustion engine through which the exhaust gases may pass directly into the air." This definition is in harmony with the common idea that a "cutout" consists of a valve or other channeling device through which the engine exhaust gases may be emitted directly without passing through an exhaust muffler. You state that the apparatus cannot be turned on or off from inside the car, but a person must get out of the car and "take the cap off the pipe and then the car has a straight exhaust system." In my opinion the fact that such "muffler cutout" or "straight exhaust" has no inside control but may be operated only from outside the car, is of no legal significance. Such a device is unlawful regardless of how it is operated.

Noting particularly the underscored portion of § 46.1-302, previously quoted herein, it seems clear that it is unlawful for any motor vehicle equipped with "muffler cutout" or "straight exhaust" to be operated upon a highway within this State. It will be noted that the statute makes it unlawful not only to use the "muffler cutout" or "straight exhaust," but also to have either device installed upon the motor vehicle exhaust system for possible use. In my interpretation, the fact that the car is operated upon the highway while so equipped with such "muffler cutout" or "straight exhaust" constitutes a unlawful act under this statute.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLE—License—For hire—When coal hauling trucks must have plates.

HONORABLE WILLIAM C. FUGATE
Commonwealth’s Attorney for Lee County

January 26, 1962

This is to acknowledge receipt of your letter of January 17, 1962, which reads, as follows:

“A defendant is charged on a summons issued by a State trooper for failure to have ‘for hire’ plates on his vehicle. The facts are as follows: The defendant and an associate operate what is commonly known as a small wagon mine in partnership, each partner contributing certain services. As a part of his contribution, the defendant hauled, in his privately owned truck, the coal produced from the mine to a point where the coal was being sold. The question is whether or not the defendant under the circumstances would need to purchase ‘for hire’ license for his vehicle.

“In another case on the same charge, a defendant leases certain coal lands, producing coal from these lands and hauls the same on his personally owned vehicle to a point where he sells the same. The question in this case also is whether or not this person should purchase ‘for hire’ licenses for his vehicle.

“In each of the above cases the sales price of the product is based upon the deposit of the product to the purchaser at a certain point and therefore necessitates the transporting of the product to that point.”

In regard to the first situation presented, the coal was owned by the partnership while the truck was owned individually by one of the partners. A case, similar in many respects, appears in Report of the Attorney General, (1956-1957), page 191, in which it was ruled that the truck should be licensed as a “for hire carrier.” A distinction was made between a truck registered in the name of the partnership owning the property transported and one owned individually by one of the partners and used for transporting partnership property for compensation. The facts in that case showed that the partner who owned the truck which transported coal for the partnership received direct compensation, inasmuch as he was paid on a tonnage basis by the partnership. In the instant case, it appears that the services of the truck represent a part of the truck owner’s contribution to the partnership and his compensation is included in his share of the income from the partnership. Hence, the truck owner receives compensation for the services of his truck, although such compensation is indirect. Section 46.1-1, paragraph (35) provides: “The terms operation or use for rent or for hire, * * *, wherever used in this title, mean any owner or operator of any motor vehicle, trailer or semitrailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly; * * *.” (Underscoring supplied). It will be noted that the fact that the compensation was received indirectly does not avoid the statute. In my interpretation, the truck must be licensed as a “for hire carrier.”

In the second situation which you describe, the person who leases the coal lands transports the coal to market on his personally owned vehicle. Here, it would appear that the person is engaged in the business of producing coal and in connection with that business he transports his own property upon his own vehicle. In such case, I conclude that he operates as a private carrier and is not required to purchase “for hire” licenses.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—License—For hire—When owner must license truck.

HONORABLE WILLIAM C. FUGATE
Commonwealth's Attorney for Lee County

August 25, 1961

This is to acknowledge receipt of your letter of August 21, 1961, in which you request an opinion of this office concerning whether owners must affix "for hire" tags to their motor vehicles under certain circumstances. I shall answer your questions seriatim.

(1) "A resident of Lee County, Virginia, has entered into contract with a lumber company in Knoxville, Tennessee, whereby he goes into Harlan County, Kentucky, cuts timber and transports a portion of the said timber to a rail-road site in Lee County, Virginia, and a portion through Lee County to Knoxville, Tennessee. The amount transported to the site in Lee County and the amount transported directly to Knoxville, Tennessee, varies with demand and need of the Company in Knoxville. This gentleman's contract with the company in Knoxville is based upon a set sum for the entire operation of cutting and transporting. It has been admitted to the State Police Officer that the compensation for the use of his vehicle is all inclusive in the contract price of the lumber delivered."

Your attention is invited to § 46.1-1, paragraph 35, which defines the term "operation or use for rent or for hire" as follows:

"The terms operation or use for rent or for hire, for the transportation of passengers, or as a property carrier for compensation, and the term business of transporting persons or property, wherever used in this title, mean any owner or operator of any motor vehicle, trailer or semi-trailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly; but such terms shall not be construed to mean a "truck lessor" as defined herein."

From what you state, it is obvious that the owner of these trucks which haul the lumber receives compensation for the service of hauling the lumber as well as cutting it. This is in accordance with an opinion issued by this office on November 6, 1958, in a letter to the Honorable Harry P. Rowlett, Commonwealth's Attorney for Lee County. See, Report of the Attorney General, (1958-1959), p. 182.

Therefore, it is my opinion that the trucks engaged in this operation must be licensed as "for rent or for hire carriers" under the provisions of § 46.1-154 of the Code of Virginia as amended.

(2) "The owner of a retail general merchandise establishment who also sells lime and other farm materials owns a group of trucks. These vehicles at the present time operate on 'private carrier' tags. Recently he has been coming from his business in Wise County, purchasing lime in his name in Lee County and delivering directly to customers in Lee, Wise, and Scott Counties before returning the product to his store in Wise County. We feel that the delivered price of the lime must reflect some compensation for the use of the vehicle and therefore would appreciate your opinion under these circumstances as to whether 'for hire' tags should be purchased for the specific vehicles transporting the lime under the facts and circumstances above stated."

Your attention is invited to § 56-275.1, which reads in part as follows:
"Any person who purchases articles, merchandise, commodities or things at one point or points and transports them in a motor vehicle, trailer or semi-trailer to another point or points for sale at the latter point or points, in the sale price of which is reflected a charge for the transportation of such articles, merchandise, commodities or things, or who permits any such vehicle to be so used by another, shall be deemed to be operating such vehicles for compensation; provided, that this provision shall not apply to merchants maintaining a bona fide and regular place of business and transporting to and delivering from such place of business by motor vehicle, trailer or semitrailer articles, merchandise, commodities and things sold by them, nor to peddlers, commission merchants or brokers holding the proper authority and having paid the State license tax required for the business in which they are engaged, nor to persons acting as authorized commission agents in the distribution of goods, wares or merchandise.

"The provisions of this section shall not apply to persons transporting forest products, farm produce and products, livestock or farm supplies in motor vehicles, trailers or semitrailers licensed for not more than 18,000 pounds gross weight."

Although this section is now part of the Motor Carrier's Act, Chapter 12, Title 56, it was formerly a part of the Motor Vehicle Code as § 46-152, and the terms thereof must be considered and read in connection with § 46.1-1(35), supra, in determining whether the operation of a motor vehicle is in the classification of "for rent" or "for hire." Although the delivered price of the lime may reflect some compensation for transporting it, I do not feel that this would place the vehicle so used in the category of a "for hire carrier." This is in accord with an opinion of this office issued on January 24, 1958, in a letter to the Honorable William Francis Binford, Judge of the Prince George County Court, found in the Report of the Attorney General, (1957-1958), p. 186.

As this man maintains a bona fide and regular place of business and transports and delivers to his customers, it is my opinion that he is not required to have his vehicles used in this operation licensed as "for hire carriers."

MOTOR VEHICLES—License—Interstate reciprocal agreement extends to Virginia corporation having trucks based in foreign states.

June 21, 1962

HONORABLE JUNIE L. BRADSHAW
Member, Virginia House of Delegates

This is in reply to your letter of June 4, 1962 which reads as follows:

"I have recently read in the newspapers that no reciprocity statute or agreement should be construed to grant reciprocity for registration and licensing to a citizen of Virginia who may own vehicles based in another state.

"It has been my understanding that the Fourteen-State Reciprocal Agreement governing the operation of interstate motor vehicles did permit a vehicle owned by a carrier incorporated in Virginia, but based in a state other than Virginia, to operate in interstate commerce in Virginia while carrying only the license plates of the state where based.

"In view of the apparent confusion concerning reciprocity, I would appreciate your opinion as to whether or not a Virginia corporation
would be authorized by the Fourteen-State Reciprocal Agreement to operate its North Carolina licensed tractors in Virginia under the following circumstances:

"1. The tractors are based in North Carolina, i.e., they are maintained, operated out of and returned to the corporation's North Carolina terminals and garages.

"2. The tractors do not operate in intrastate commerce in Virginia.

"3. The tractors operate in Virginia only in interstate commerce.

"4. The tractors do not carry Virginia license plates.

"For your information, I am enclosing a copy of the Fourteen-State Reciprocal Agreement, which was entered into pursuant to the provisions of § 46.1-20 of the Code, and wish to call your attention particularly to paragraphs 2 and 3 of Article I and the first clause of Article VI thereof.

"It appears to me that the provisions of the above mentioned agreement together with the provisions of § 46.1-1 (16) (a) of the Code dealing with the definition of a resident and which provides, in part, that 'in the case of corporations incorporated in this State but doing business without the State, only such principal place of business or branches located within this State shall be dealt with as residents of this State,' clearly recognizes the fundamental basis of the Fourteen-State Reciprocal Agreement that a corporation may have multiple 'places of business' and be a 'resident' of more than one state for purposes of motor vehicles registration."

Pertinent to the question presented by you are the following provisions of the Fourteen-State Reciprocal Agreement to which you referred:

"This agreement shall apply only to the following persons, firms and corporations:

"1. To privately owned and operated passenger cars duly licensed in the State of the owner's bona fide residence.

"2. With respect to all other motor vehicles, only to persons, firms and corporations, maintaining a principal place of business in either one or more of the reciprocating states.

"3. Maintenance of a principal place of business in one of the reciprocating States shall entitle the owner to operate a vehicle, properly licensed in the State in which such business is located, between said State and the other States parties hereto and likewise the maintenance of a principal place of business in more than one of said States shall entitle the owner to operate a vehicle, which has been properly licensed under the laws of the State in which the vehicle is based between such State and the other States parties hereto.

"The base of a vehicle shall be determined as follows:

"(a) The owner and/or operator of the vehicle shall designate the State in which he considers the vehicle based.

"(b) The motor vehicle administrators or reciprocating authorities of all States shall agree as to the base of the vehicle but must, in determining the vehicle's base give consideration, among other things, to the place from which the vehicle leaves and to which it returns in its normal operations.

"(c) The owner and/or operator of the vehicle shall have the right
to change the base of the vehicle from the State in which the vehicle is licensed to another State at any time, provided a new license be secured from the State where the new base is located, and the proper state authority can at any time question the base of any or all such vehicles.

“(d) If any vehicle is located in or operated from a base in the State other than that in which originally registered for a period of thirty days, it shall be conclusively presumed that the base has been changed, and the owner or operator of the vehicle shall be required to register such vehicle in the State in which the vehicle is last located.

“It is understood, however, that this agreement shall not apply to motor vehicles used by salesmen, solicitors, or peddlers in transporting merchandise for the purpose of selling or otherwise similarly disposing of same.

* * * *

“VI Motor Carriers of Property for Hire

“Motor vehicles licensed by any one of the reciprocating states, including trucks, tractors, trailers and semi-trailers, operated in the transportation of property for hire may be operated in the several states without limitation as to the number of trips and without the payment of any motor vehicle fees whatsoever to the reciprocating states when operated strictly in interstate commerce; provided, however, that motor carriers operating such vehicles shall register their operating rights and equipment with the Public Service Commission or Utility Commission of the reciprocating States (except in the States of Louisiana and North Carolina where the regulatory commissions have no statutory jurisdiction over purely interstate carriers) and file evidence of public liability and property damage insurance coverage with such reciprocating States, and pay the motor fuel tax as provided for in Section IV of this agreement, and with the following additional conditions and requirements: * * *

Paragraph 3 quoted above entitles an owner which maintains a principal place of business in one of the States participating in the Agreement to operate a vehicle—if that vehicle is licensed in the State in which such place of business is located—between that State and the other States parties to the Agreement, and also this provision provides that maintenance of a principal place of business in more than one State party to the Agreement shall entitle the owner to operate a motor vehicle which had been properly licensed under the laws of the State in which the vehicle is based between that State and other States party to the Agreement.

Your inquiry relates specifically to a situation where the owner of a motor vehicle is a Virginia corporation and maintains in addition to its Virginia place of business a place of business located in North Carolina which is one of the States party to the Agreement.

The Reciprocal Agreement was executed pursuant to the authority of § 46.1-20 of the Code. The terminal sentence of this section is as follows:

“* * * Except as hereinabove provided, it is the policy of this Commonwealth to grant reciprocity to the residents of another state when such state grants reciprocity to the residents of this Commonwealth.”

It is necessary, therefore, in order for reciprocity to be available in the case presented by you that, for the purpose of the Agreement, the corporation be a nonresident of Virginia with respect to the place of business located in North Carolina. In my opinion, this situation exists under the facts stated by you due to the following provisions found in § 46.1-1 of the Code:
“The following words and phrases when used in this title shall, for the purposes of this title have the meanings respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning:

"* * *(16) ‘Nonresident’.—Every person who is not domiciled in this State, except:

“(a) Any foreign corporation which is authorized to do business in this State by the State Corporation Commission shall be deemed a resident of this State for the purpose of this title; provided, however, that in the case of corporations incorporated in this State but doing business without the State, only such principal place of business or branches located within this State shall be dealt with as residents of this State. * * *.”

The proviso contained in paragraph (a) has the effect of stating that for the purposes of Title 46.1 a corporation incorporated under the laws of the State of Virginia and doing business within and without the State of Virginia shall be dealt with as a resident of Virginia only with respect to its principal place of business or branches located within this State and that as to such places of business or branches located without this State the corporation shall be deemed to be a resident of that State. In my opinion, the Reciprocal Agreement is clearly applicable to motor vehicles owned by a corporation operating in the manner set forth in your letter. Under the Agreement motor vehicles licensed and based in the State of North Carolina would be entitled to operate in Virginia under the circumstances set forth in your letter without being required to purchase Virginia license plates for such vehicles.

In connection with this matter, my attention has been brought to the decision of the Circuit Court of the County of Nansemond handed down on the 20th of November, 1957, in the case of Commonwealth of Virginia v. Samuel Smith Gray, who was the operator of a truck owned by a Virginia corporation that was travelling through Nansemond County in interstate commerce without having purchased Virginia license plates. The truck involved was licensed in the State of North Carolina and the facts in the case were parallel to those presented by you. Gray, the operator, was arrested and convicted in the county court of Nansemond County for operating a truck in the State of Virginia without first having obtained a license tag required of resident operators and owners. On appeal from this conviction the court sustained the position taken by the owner of the truck to the effect that under the Reciprocal Agreement involved in this opinion and under the provisions of § 46-1(14) of the Code—now §46.1-1(16) of the Code—the truck in question was owned by a nonresident of Virginia and, therefore, entitled to the provisions of the Reciprocal Agreement.

This office issued an opinion on August 1, 1958, (Report of Attorney General, 1958-1959, p. 181) relating to a similar situation. In that opinion we stated:

"* * * The reciprocal privileges in effect pursuant to Section 46.1-20 of the Code, in my opinion, are not intended to be available to a person in the State of his residence. It is designed to grant such privileges in proper cases to residents of another state that is party to the reciprocal arrangement.”

It appears that no consideration was given to the definition of “nonresident” contained in clause (16) of § 46.1-1. While the statement quoted from the former opinion is correct, to the extent that it holds the Agreement to be available in proper cases to residents of another state, it gives no consideration to the fact that the residence of a corporation organized in this state may be in more than one state for the purposes of Title 46.1-1 of the Code.
MOTOR VEHICLES—License—Localities may impose fee requirement on vehicles licensed by State and bearing TH tags—Exceptions in § 46.1-66.

COUNTIES, CITIES AND TOWNS—Motor Vehicles—License fees may be imposed on vehicles bearing TH tags—Exceptions in § 46.1-66.

HONORABLE SAM L. HARDY
Commonwealth's Attorney for Bland County

This is to acknowledge receipt of your letter of April 18, 1962, which reads as follows:

"Recently Bland County reenacted a County Ordinance pursuant to Section 46-64 as amended by the 1956 Legislature of Virginia. There seems to be some confusion with reference to T. H. Tags, and would appreciate your opinion as to whether or not Section 46-64 provides an exemption."

It is obvious that you have reference to § 46.1-65 of the Code of Virginia, as amended, which replaces and amends former § 46-64 which you have cited. This section authorizes counties, incorporated cities and towns to levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers as provided therein, subject, however, to the exceptions found in § 46.1-66 of the Code of Virginia.

There is an exception which applies to a motor vehicle, trailer or semitrailer operated by a common carrier of persons or property under the conditions stated in the following portion of § 46.1-66:

"(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

"(6) The motor vehicle, trailer or semitrailer is operated by a common carrier of persons or property operating between cities and towns in this State and not in intracity transportation or between cities and towns on the one hand and points and places without cities and towns on the other and not in intracity transportation; * * *

However, I find no exception which applies to all vehicles for which the State requires TH tags. These tags simply indicate "truck for hire" and are required to be displayed upon all trucks operated for compensation, whether as a common carrier or otherwise. Similarly, a tractor-truck operated for compensation must display TH tags. A former opinion of this office, found in Report of the Attorney General (1959-1960), p. 249, held that passenger buses not falling within this exception [§ 46.1-66 paragraph (6)] were subject to the county levy for license fees. It is, therefore, my opinion that the county may impose a license fee upon motor vehicles for which the State requires the TH or "for hire" license plates, whenever such vehicles do not fall within the quoted exception or any other exception found in §§ 46.1-65 or 46.1-66.

May 2, 1962
MOTOR VEHICLES—License—Revocation—Surrender of plates—Local police not authorized to remove from vehicle.

March 2, 1962

Mr. R. Ruff Cline
Chief of Police, City of Staunton

This is to acknowledge receipt of your letter of February 12, 1962, in which you pose the following questions, which I quote:

"(1) Does a local police officer, such as this city employs on a full time basis have the reserved authority to remove and to hold as evidence and/or turn over to the Division of Motor Vehicles, the registration plates of a vehicle, when said plates are displayed illegally, i.e., displayed on a vehicle other than that for which the plates have been properly issued.

"(2) Does a local police officer, such as this city employs on a full time basis, have the reserved authority to remove and to hold as evidence and/or turn over to the Division of Motor Vehicles, the registration plates of a vehicle, when said vehicle is being operated with improper or illegal equipment, i.e., improper brakes, lights, steering, etc."

Section 46.1-6 of the Code of Virginia requires that the provisions of Chapters 1 through 4 of Title 46.1, sometimes referred to as the "Motor Vehicle Code", shall be enforced by every county, city, town or other political subdivision of the State through the agency of any local peace or police officer. Section 46.1-8 authorizes any peace officer who shall be in uniform or who shall exhibit his badge or other sign of authority to stop any motor vehicle for the purpose of inspecting the motor vehicle as to its equipment and operations.

From these and related sections it is evident that city and county police officers not only have the right, but the duty to enforce the motor vehicle laws. However, the right to remove and hold registration plates issued by the State seems to be based upon the right to suspend or revoke, which is vested in the Commissioner of the Division of Motor Vehicles. In this regard, § 46.1-58 of the Code of Virginia, which provides for suspension of license plates for improper equipment, reads as follows:

"The Division shall suspend the registration of any motor vehicle, trailer or semitrailer which the Division or the Department of State Police shall determine is not equipped with proper brakes, proper lights, proper horn or warning device, or proper electrical or mechanical signalling device or safety glass when required by law, or proper mirror, proper muffler, proper windshield wiper, or proper steering gear adequate to insure safe movement of the vehicle as required by this title or when such vehicle is equipped with a smoke screen device or cutout or when such motor vehicle, trailer or semitrailer is otherwise unsafe to be operated."

Section 46.1-59 of the Code of Virginia provides for the revocation of license plates for unlawful use in the following language:
"The Division shall revoke the registration of a motor vehicle, trailer or semitrailer and shall revoke the registration card, registration or license plate or plates, whenever the person to whom the registration card or registration license plate or plates have been issued shall make or permit to be made an unlawful use of the same or permit the use thereof by a person not entitled thereto, or fail or refuse to pay, within the time prescribed by law, any taxes or fees required to be collected by the Division."

Under § 46.1-64 of the Code of Virginia, citing offenses relating to the registration, licensing and certificates of title, the following is found:

"No person shall:

* * *

"(d) Fail or refuse to surrender to the Division or the Department of State Police, upon demand, any certificate of title or registration card or registration license plate, which has been suspended, cancelled or revoked as in this title provided." (Underscoring supplied)

It will be observed that this statute makes it unlawful to refuse to surrender the license plates after they have been suspended, cancelled or revoked.

Section 46.1-102 of the Code of Virginia provides that:

"Every license plate issued by the Division shall remain the property of the Division and shall be subject to be revoked, cancelled and repossessed by the Division at any time as in this title provided."

In the Report of the Attorney General, (1953-1954), p. 134, it was pointed out that the Commissioner of the Division of Motor Vehicles had designated all of the officers of the Department of State Police to act as agents of and on behalf of the Division of Motor Vehicles to exercise all authority vested by § 46.1-58 quoted herein, supra, and the opinion was expressed that a State Police officer could suspend or revoke and repossess the registration plates by virtue of this delegated authority. I am advised that the authority so vested in the Commissioner has not been extended by general agency except to officers of the Division and Department of State Police.

It is highly doubtful that a police officer would possess the necessary authority to remove registration plates from motor vehicles under the stated circumstances merely by virtue of the inherent power of his office and I shall, therefore, answer both of your questions in the negative.

MOTOR VEHICLES—License—Trucks used for hauling animals for rodeo for charitable purposes not exempt.

HONORABLE STIRLING M. HARRISON
Commonwealth’s Attorney for Loudoun County

September 29, 1961

This is to acknowledge receipt of your letter of September 26, 1961, in which you request my opinion on the question of whether or not motor vehicles used in the manner hereinafter described are required to be licensed. I quote from your letter:

"Recently there was a rodeo held in Loudoun County, Virginia, and in conjunction with the show it was necessary to transport to and from the rodeo grounds animals, such as steers and other farm livestock, sad-
You further state that the proceeds of this rodeo went to the benefit of the Boy Scouts, Izaak Walton League and the 4-H Club. As you know, §46.1-45 of the Code does exempt from licensing certain motor vehicles so long as they are used in the particular manner set forth in that section. The use of the vehicles as described by you was not for an agricultural purpose, nor were these vehicles driven on the highways between tracts of land owned or leased by the farmers, etc. In order to be exempt under this statute, it must be clearly shown that the use of the motor vehicles comes within the four corners of the statute. Although the owners of these vehicles donated the use thereof to commendable purposes, I fail to see how they could be exempt from the registration and license requirements.

Therefore, it is the opinion of this office that the motor vehicles used to transport animals and equipment over public highways to a rodeo are not exempt from the registration and license requirements under the provisions of § 46.1-45 of the Code of Virginia.

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

This is in reply to your letter of July 18, 1961, which reads as follows:

"A question has arisen in this County as to whether one can drive his truck on the public highway of the State when he is getting out pulp wood on his own land and loading it on a trailer on other land within ten miles without a license under Section 46.1-45 of the Code of Virginia.

"Timber is now being considered by the Agriculture Department as a crop and this government is requesting farmers to so use and manage their timber.

"Based on the above a question has arisen and I will thank you to send me your opinion."

Section 46.1-45 of the Code of Virginia states, in part, as follows:

"(a) No person shall be required to obtain the annual registration certificate and license plates * * * for any motor vehicle, trailer or semitrailer, 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, * * * *." (Underscoring supplied)

As has been stated by this office previously, when interpreting this statute in relation to various other situations, exemptions from registration and licensing will avail only where the terms of this section are squarely met. A deviation in
any one particular is sufficient to prevent the application since exemptions from
the provisions of taxing statutes are strictly construed against the taxpayer.

It occurs to me that the transporting of pulp wood, whether it be all or a
part of the way to market, is an activity which would fall short of qualifying as
a use "for agricultural or horticultural purposes" as these terms are generally
defined and used. Furthermore, the statute permits such use of the truck only
from one part of the owner's land to another part thereof. As I understand the
facts stated in your letter, the truck would be used to transport the pulp wood
from land of the owner to other land located within ten miles thereof but owned
by someone other than the owner of the land on which the pulp wood grows.
For these reasons, it is my opinion that the truck could not be lawfully so op-
erated upon the highway without first being registered and licensed.

MOTOR VEHICLES—Local License—County ordinance valid when applied
in manner compatible with statutory authorization.

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

This is to acknowledge receipt of your letter of March 10, 1962, which reads
as follows:

"The Board of Supervisors of Wythe County passed a Motor Vehicle
License tax pursuant to Section 46.1-65 of the Code of Virginia.

"The Town of Wytheville has been designated agent with respect to
those vehicles in the Town of Wytheville, and some question has been
raised as to the validity of the portion of the Ordinance which applies to
trucks.

"The Board of Supervisors and the Town of Wytheville desire that
I secure your opinion as to the portion of the Ordinance applicable to
trucks, which is as follows:

"5. The license fee on each and every truck, trailer and semi-trailer, am-
bulance and similar vehicle shall be the amount of the license tax
imposed by the Commonwealth of Virginia on vehicles of like class,
but provided further, that in no event shall the license fee exceed the
'sum of $10.00 after the computation of credit on the fees or taxes paid,
if any, to the Town of Wytheville, or the Town of Rural Retreat.'"

"The Town of Wytheville has a license tax on such vehicles which is
$6.00 for weight under 10,000 and .08¢ per hundred in excess.

"Examples of the effect of this Ordinance are as follows:

"For a truck under 10,000 pounds weight the Town of Wytheville tax
is $6.00. Under the County Ordinance their tax would be computed
by the license fee of the Commonwealth which is $12.00, less the credit
of $6.00 on the Town tax with the result of a County tax of $6.00.

"For a truck with a weight of 12,100 pounds the Town of Wytheville
tax is $7.68. Under the County Ordinance their tax would be computed
by the license fee of the Commonwealth which is $18.00 less the credit
of $7.68 on the Town Tax, with the result of a County tax of $10.00,
that being the maximum tax after the computation of credit.

"In each of the above examples the owner of such a vehicle outside
of the Town would be paying only a County tax of $10.00.

"If the County tax provided for a straight $10.00 license fee on the
vehicles referred to in the examples the result would be that the owners in the Town and County would be paying the same total County and Town tax. For this reason some say that the tax is not uniform, and is invalid.

"It would be appreciated if you would give us your opinion on this matter.

"Because of the interest of the Town of Wytheville I am delivering a copy of this letter to their attorney Mr. R. William Arthur, Parsons & Arthur, Wytheville, Virginia, and also enclosing a letter from him to further explain the same."

Let us suppose for a moment that there were no town ordinances imposing license fees in Wythe County. Then, using your interpretation, the fee would in no case exceed $10.00. Mr. R. William Arthur, Attorney for the Town of Wytheville, expresses the same local interpretation in his letter, which you included with your own. Under existing ordinances, the Town of Wytheville does impose a license fee. This, however, should not act to increase the county fee.

Section 46.1-65, paragraph (d) contains the following:

"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."

This section requires a credit against the county license fee in the amount of license fee paid the town upon the same vehicle. While the wording of the Wythe County Ordinance leaves room for speculation in some respects, the presumption is that its intent is in accordance with existing laws and statutes and that it is valid. Where any ordinance may be interpreted in accordance with the law it should be so executed. The portion of the Ordinance which you quote does not state that the fee shall be $10.00 in some cases after the credit for town license fee is deducted. Rather, it provides that in no event shall the license fee exceed $10.00 after computation of credit on the town fee, if any. For those vehicles upon which the Commonwealth of Virginia imposes a license fee of $10.00 or less, the county ordinance imposes a like amount. But for those vehicles upon which the state imposes a larger license fee, the county imposes a license fee of only $10.00.

In your first example, you compute the county license fee at $12.00 against a vehicle owned by a resident of the Town of Wytheville and of the County of Wythe. It would be consistent to use the $10.00 rate here. In accordance with the quoted passage from § 46.1-65 (d) supra, the amount of license fee paid the town is to be credited upon the license fee imposed by the county. Thus, in your first example, the county license fee collected would be $10.00 (maximum county fee) less $6.00 (town fee paid), which would be $4.00. In your second example, the county license fee collected would be $10.00 (maximum county fee) less $7.68 (town fee paid) or $2.32. In any instance in which the town fee collected is as much as or more than $10.00 the county would credit an amount equal to the entire amount of its fee and collect nothing.

The law does not require that the same total license fee be paid by all vehicle owners within a county when some of these reside in a town within such county. It is permissible that a town within a county impose a license fee upon vehicles of owners residing therein while no license fee is imposed by the county and in such case the owners of vehicles residing outside the town would pay nothing. In fact, it cannot be otherwise under the situation described in the following provision of § 46.1-65, paragraph (a) of the Code of Virginia:
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."

Likewise, a town within a county may impose a license fee which is greater than that imposed by the county, as long as the amount does not exceed the fee imposed upon vehicles of like class by the State. However, if the county does impose a license fee and a town within the county also imposes a license fee, credit must be allowed up to the total county license fee, for the amount of license fee paid the town upon any vehicles so licensed by both the county and the town.

It is, therefore, my opinion that the quoted portion of the Wythe County Ordinance is valid when interpreted and applied in such manner that the license fees imposed upon the named vehicles parallel those imposed by the Commonwealth of Virginia upon vehicles of like class, provided that the county fee shall in no event exceed $10.00, from which any town license fee imposed and paid must be deducted in accordance with the statutory requirements.

MOTOR VEHICLES—Local License—Ordinance imposing tax may be enforced as other local law.

MR. T. BLAINE POOLE
Justice of the Peace for Grayson County

March 28, 1962

This is in reply to your letter of March 23, 1962, which reads as follows:

"There has been some controversy here in Grayson concerning the $5.00 County automobile license tags, some claiming it is not in reality a law that can be enforced and others claiming the opposite.

"Would you please render an opinion in order to clarify the situation?"

Section 46.1-65 of the Code of Virginia provides, in part, as follows:

"(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; * * *"

This section authorizes the county to impose a license fee upon motor vehicles, trailers and semitrailers, subject to the limitations contained therein and in § 46.1-66 of the Code of Virginia. By several rulings, this office and the Supreme Court of Appeals of Virginia have upheld the right of the named political subdivisions to enact such laws.

Since you do not indicate any deficiency in the Grayson County Ordinance requiring the license fee of $5.00, it will be assumed, for the purposes of this opinion, that the Ordinance is in accordance with the statutory requirements and proper in all essential respects and that a clause thereof or related ordinance prescribes the penalty for its infraction. A county is clothed with the power to enforce any ordinance which it enacts pursuant to the authority accorded such county by the Constitution and legislative enactment of this State. If it were otherwise, any local law would be reduced to a nullity.

I conclude that this county ordinance requiring the automobile license fee may be enforced by the local authorities just as any other authorized county law.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Obstructions on Windows—Stickers on glass prohibited except as authorized by law or Superintendent.

TOWNS—Motor Vehicle License—No authority to require sticker on glass.

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

This is to acknowledge receipt of your letter of October 11, 1961, in which you ask my opinion as to whether or not it is permissible for towns to issue paper automobile license tags similar to the State inspection stickers and to require them to be placed upon the front, rear or side glasses of automobiles so licensed.

While I find no statute specifying that automobile licenses issued by towns shall be any given size or shape or made of any particular material, the use of any non-transparent material upon the windshield, sideshields, or windows of a motor vehicle while it is being operated upon a highway is controlled by § 46.1-291 of the Code of Virginia, as amended, which is as follows:

“It shall be unlawful for any person to operate any motor vehicle upon a highway with any sign, poster or other non-transparent material upon the front windshield, sideshields or rear windows of such motor vehicle other than a certificate or other paper required to be placed by law or which may be permitted by the Superintendent.”

It will be noted that there may be no obstruction of the windshield or windows except by requirement of law or permission of the Superintendent. Since town licenses are not required by law to be placed upon the windshield or windows of the licensed vehicle, it is my opinion that it would not be lawful for a town to require that the licenses be so placed unless permission be first obtained by the town from the Superintendent of the Department of State Police of this State.

October 24, 1961

MOTOR VEHICLES—Operation When Not Authorized by Law—Owner must have knowledge to be convicted under § 46.1-386 of Code.

CRIMES—Permitting Unauthorized Person to Operate Motor Vehicle—Accused must have knowledge that operator is prohibited from driving.

HONORABLE RICHARD E. RAILEY
Judge, Southampton County Court

This is in reply to your letter of October 27, 1961, in which you request my interpretation of § 46.1-386 of the Code of Virginia (1950), as amended. You are particularly interested in having my opinion as to the necessity for the Commonwealth to prove that a person accused of violating this section knew that the person driving a motor vehicle owned by the accused, or under his control, had no legal right to operate a motor vehicle.

Section 46.1-386 of the Code reads as follows:

“No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this chapter.”

It can be argued with much force that this statute does not require proof that
the person accused had knowledge that the person authorized or knowingly permitted by him to drive a motor vehicle owned or controlled by him had no legal right to do so. It is clear that the Legislature possesses the power to enact such a statute and many would argue that the burden of diligent inquiry as to the right of a person to operate a vehicle should be put on the owner of a vehicle before he can lend it with impunity. The language of the section, however, does not compel that conclusion, and since the question is not entirely free from doubt, the fact that this is a criminal statute constrains me to conclude that any doubt must be resolved in favor of the accused. Accordingly, I am of the opinion that § 46.1-386 of the Code should be interpreted so as to require proof that the accused had knowledge that the person whom he has permitted or authorized to drive had no legal right to operate a motor vehicle. If this interpretation is not in accord with the intention of the Legislature, the statute can be readily clarified at the forthcoming session.

MOTOR VEHICLES—Operators’ License—Driver required to file proof of financial responsibility following termination of drunk driving revocation—Both resident and nonresident subject to conviction under § 46.1-351.

MOTOR VEHICLES—Financial Responsibility—Failure to file proof following termination of drunk driving conviction—Driver guilty of violation of § 46.1-351, regardless of residency.

May 18, 1962

HONORABLE REGINALD H. PETTUS
Commonwealth’s Attorney for Charlotte County

This is in reply to your letter of May 10, 1962, which reads as follows:

“Please write me whether or not, in your opinion, a person is guilty of driving while license is revoked under the Safety Responsibility Act, if his permit has been revoked for a period of three years for a second offense of drunk driving and he does not file proof of financial responsibility at the end of that period; but goes to another state and obtains an operator’s license from that state, and then comes back to Virginia and operates a motor vehicle in Virginia under the permit of another state, contending he is a resident of the other state and is just passing through Virginia—or here on vacation, a visit, etc.”

Section 46.1-421, Code of Virginia (1950), as amended, provides for a mandatory three-year revocation of operator’s license upon a conviction for second offense drunk driving. Section 46.1-438, Code of Virginia (1950), as amended, contains a requirement that before restoring a license to any person whose operator’s license or other privilege to operate motor vehicles has been revoked pursuant to § 46.1-421, the Commissioner of the Division of Motor Vehicles shall require proof of financial responsibility. Such proof of financial responsibility is required for a period of five years following termination of the revocation under § 46.1-421. See § 46.1-439, Code of Virginia (1950), as amended.

Section 46.1-351, Code of Virginia (1950), as amended, is 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 drive any motor vehicle in this State during any period wherein the restoration of license or privilege is contingent upon the furnishing of proof of financial responsibility, unless he has given proof of financial responsibility in the manner provided in article 6 (§ 46.1-467 et seq.) chapter 6 of this title.

"(b) Any person violating this section shall upon conviction therefor be punished by imprisonment for not less than ten days nor more than six months or be fined not less than fifty dollars nor more than five hundred dollars, or be punished by both such fine and imprisonment."

Under this section, it is apparent that a person's residency is of no consequence, as the law applies equally to resident or nonresident coming within the bounds of the statute. During a period in which restoration of his license is contingent upon furnishing proof of financial responsibility no person shall drive any motor vehicle in this State. The fact that such person may obtain an operator's license from another state would avail him nothing insofar as operating any vehicle in this State is concerned.

You do not state in your question what time has elapsed since the termination of the revocation under § 46.1-421. It is my opinion that a person would be guilty under the provisions of § 46.1-351, as quoted supra, whenever the offense occurred within the five-year period following such termination. After expiration of such five-year period he would be relieved of filing proof of financial responsibility, unless required to do so for some other reason, and, of course, would not be in violation of this law.

MOTOR VEHICLES—Operators' License—Effect of revocation of U. S. Mail Carrier by State.

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

February 13, 1962

This is in response to your letter of January 31, 1962 in which you request my opinion on the following question, which I quote:

"May a Federal employee, a rural mail carrier, operate a motor vehicle in and about the delivery of the mails after his right to operate a motor vehicle has been revoked on account of a conviction for operating a motor vehicle while under the influence of intoxicants?"

The U. S. Postal Manual, under Part 762, contains the following regulations which are required to be administered at all installations where motor vehicles are operated by postal personnel on official business:

Paragraph .21—"Postal personnel are not authorized to operate motor vehicles or powered industrial trucks on official business unless they have in their possession a Standard Form 46, U. S. Government Motor Vehicle Operator's Identification Card."

Paragraph .22—"An applicant must meet the following minimum requirements to qualify for a U. S. Government Motor Vehicle Operator's Identification Card:

"a. Possess a valid State driver's license issued by the State wherein the installation is located or the applicant is currently domiciled."
Paragraph .25—"Operator's Identification Cards must be revoked or suspended when:

"a. The employee is convicted by civil authority for operating or attempting to operate any motor vehicle while under the influence of liquor or drugs.

"c. The employee's State driver's license is revoked or suspended."

It is my opinion that a rural mail carrier is included within the purview of these regulations. Since the revocation of the federal permit to drive follows revocation by the State or conviction by civil authority for driving under the influence of liquor or drugs, any such conviction of a rural mail carrier should be brought to the attention of the Postal authorities. In view of the fact that the State law and the federal regulations are in agreement, each requiring the revocation of the respective permit to drive, I shall not consider the constitutional aspects of the question presented.

MOTOR VEHICLES—Operators' License—Original to be sent to judge of county or municipal court having jurisdiction over traffic cases if applicant under eighteen years.

May 10, 1962

HONORABLE HUGH REID
Judge of the Juvenile and Domestic Relations Court of Arlington County

This will reply to your letter of May 3, 1962, in which you call my attention to Chapter 261 of the Acts of Assembly of 1962 and inquire whether the County Court of Arlington County or the Juvenile and Domestic Relations Court of Arlington County constitutes the tribunal to which reference is made in such legislation.

Chapter 261 of the Acts of Assembly (1962) amends the Code of Virginia by adding thereto a new section, numbered 46.1-375.1, which prescribes:

"The Division (of Motor Vehicles) shall forward all original operators' licenses so issued to applicants who at the time of application for operator's license had not attained the age of eighteen years, to the judge of the municipal or county court having jurisdiction over traffic cases in the city, county or town in which the person to be licensed resides. Such judge shall issue to each person to be licensed the license so forwarded, and shall, at the time of issuance, conduct a formal, appropriate ceremony, in which he shall illustrate to the licensee the responsibility attendant upon the privilege of operating a motor vehicle. If the licensee has not attained the age of eighteen years at the time such application was made, he shall be accompanied at such ceremony by a parent, his guardian, spouse or other person in loco parentis." (Italics supplied).

As you indicate in your communication, the above-quoted enactment originated as House Bill No. 453 and, in its initial form, embraced all original operators' licenses issued to any person, without regard to the age of the recipient. I think it is manifest that the phrase "municipal or county court having jurisdiction over traffic cases"—as utilized in the original bill—referred to municipal and county courts only and did not include the juvenile and domestic relations courts of the various counties and cities of the Commonwealth. Although the original legislation was subsequently amended to limit its application to the issuance of original operators' licenses to recipients who at the time of application were under
the age of eighteen years, no change was made in the language designating the courts embraced by the statute.

Moreover, Title 16.1 of the Virginia Code, which governs courts not of record, establishes clear and definite distinctions between county courts, municipal courts and juvenile and domestic relations courts. See, Code of Virginia (1950), as amended, Title 16.1, Chapters 2, 3 and 8. Although, as you also point out, the county and municipal courts of the Commonwealth do not have jurisdiction over traffic cases involving persons under eighteen years of age, such courts do have jurisdiction over traffic cases generally. I am, therefore, impelled to conclude that original operators' licenses issued to persons residing in Arlington County in accordance with the provisions of § 46.1-375.1 of the Virginia Code should be issued by the Judge of the County Court of Arlington County rather than the Judge of the Juvenile and Domestic Relations Court of Arlington County.

MOTOR VEHICLES—Registration—Brakes—Exemption—Farm vehicles used to transport produce to market not exempt.

October 6, 1961

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

This is in reply to your letter of September 19, 1961, which I quote in full:

"The question has arisen in this County, and I am sure in other areas, concerning the use of farm trailers for hauling produce to the market.

"Title 46: Section 1-45 provides that such vehicles do not have to be licensed. This section is silent with regard to whether such vehicles have to be inspected, and specifically, the problem which has been presented to me is whether trailers of over 3,000 pounds capacity need to have brakes, as required by Title 46: Section 1-280.

"In this area, implement dealers are selling drying equipment which consist of several trailers into which the peanuts are placed from the harvester connected to a dryer, and after the drying process is completed, hauled to the market in the same vehicles.

"Will you please advise whether such vehicles are exempt not only from licensing requirements but also from other requirements normally applicable to motor vehicles?"

If we may assume that the trailers in question are exempt from annual registration by virtue of § 46.1-45 of the Code, or are being used exclusively for hauling raw agriculture produce from farm to farm or farm to packing shed or processing plant, they are also exempt from the brake requirement by virtue of the express language of § 46.1-280 of the Code. That section reads in part as follows:

"No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor, pursuant to the provisions of this chapter, for any truck upon which is securely attached a machine for spraying fruit trees and plants of the owner or lessee of the truck or for any motor vehicle, trailer or semi-trailer, which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway or along a highway from one point of the owner's land to another part thereof, irrespective
of whether or not the tracts adjoin, provided that the distance between
the points shall not exceed ten miles, or for the purpose of taking it
or other fixtures thereto attached, to and from a repair shop for repairs.
The foregoing exemption from registration and license requirements shall
also apply to any vehicle hereinbefore described or to any farm trailer
owned by the owner or lessee of the farm on which such trailer is used,
when such trailer is used by the owner thereof for the purpose of moving
farm produce and livestock from such farm along a public highway for
a distance not to exceed ten miles to a storage house or packing plant,
when such use is a seasonal operation.

The use being made of the trailers in question appears to be transporting
produce to market. In such case, the farm trailers are neither exempt from
annual registration, nor from the brake requirement in § 46.1-280.

Section 46.1-45 of the Code, which exempts from annual registration certain
trucks, trailers, etc., reads, in part, as follows:

Every semitrailer or trailer or separate vehicle attached by a drawbar,
chain or coupling to a towing vehicle other than a farm tractor or a
vehicle not required to obtain an annual registration certificate for
license plates under § 46.1-45 and having an actual gross weight of
three thousand pounds or more, shall be equipped with brakes con-
trolled or operated by the driver of the towing vehicle which shall
conform to the specifications set forth in § 46.1-279 and shall be of a
type approved by the Superintendent. Provided, however, that farm
trailers used exclusively for hauling raw agricultural produce from farm
to farm or farm to packing shed and/or processing plant within the
normal growing area of said packing shed or processing plant shall
be exempt from the requirements of this section.”

The foregoing exception to the general rule must be interpreted strictly against
the person seeking the exception. I am of the opinion that the exception does not
apply to the vehicles described in your letter when used to transport the produce
to market: hence, such trailers would be subject to annual registration as well as
the brake requirement in § 46.1-280 of the Code.

On the other hand, if the vehicles are being used to transport the produce along
a public highway for a distance not to exceed ten miles to a storage house or
packing plant, I am of the opinion that the trailers fall within the exception pro-
vided in § 46.1-45 of the Code, and thus would not require registration or brakes.

As to the necessity of inspection, the provisions of § 46.1-315 of the Code apply
to all motor vehicles, trailers and semi-trailers operated upon the highways of
this State, except those expressly exempted, such as well drilling machinery, log
trailers and certain towed vehicles.

MOTOR VEHICLES—Registration—Heavy equipment used by road contractors
—Temporary registration and permit required.

HONORABLE E. R. MARABLE, JR.
Judge of the Municipal Court of the City of Petersburg

January 16, 1962

This is in reply to your letter of January 2, 1962, which reads as follows:

“I shall appreciate an opinion from your office concerning the inter-
pretation of Section 46.1-43 of the Code of Virginia of 1950, as amended, when applied to a particular situation.

"This concerns motor vehicles such as motor cranes, rubber rollers, etc., owned by contractors with the Department of Highways and used in highway construction, which have been issued special mileage permits under the aforesaid section for the purpose of moving same from their base of operation to a construction project. After issuance of the original permit, is it necessary that another special permit be issued in order for such vehicles to be moved from the original project to another when such projects are all under one contract or schedule with the Highway Department.

"The question is essentially one of just what registration and permits, if any, are required of contractors with the Highway Department for the movement over highways of their heavy equipment, having in mind that these contractors may have one contract covering several projects within a district or residency and that movement of the equipment will be made from place to place over a period of time."

Section 46.1-43 of the Code of Virginia, contains the following:

"(a) The Commissioner may, if in his opinion it is equitable, grant a special temporary registration or permit for the operation of tractors, tractor-trucks, trucks and heavy-duty trailers for the transportation of heavy construction equipment, cranes, well-digging apparatus and other heavy equipment upon the highways of this State from one point to another within this State, or from this State to a point or points without this State, or from without this State to a point or points within this State. Such special registration or permit shall give the registration or permit number, the date of issue, the date of expiration and the route to be traveled and shall be displayed in a prominent place on the vehicle or other apparatus."

Since oversize or overweight equipment may not be lawfully operated or moved upon the highways except by permission of the State Highway Commission, the Commissioner of the Division of Motor Vehicles will grant a temporary registration or permit to operate or transport heavy equipment under § 46.1-43 only when a permit has been issued by the Highway Commission under § 46.1-343, which provides, in part, as follows:

"(a) The State Highway Commission and local authorities of cities and towns in their respective jurisdictions may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle upon the highway of a size or weight exceeding the maximum specified in this title. Every such permit may designate the route to be traversed and contain any other restrictions or conditions deemed necessary by the body granting such permit.

* * *

"(d) Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any officer and it shall be a misdemeanor for any person to violate any of the terms or conditions of such special permit."

In some instances the permits issued pursuant to these statutes allow only one trip. As a practical matter, however, when the circumstances warrant operating or moving a piece of heavy equipment several times, or from place to place for a period of time, the Commissioner issues one permit to cover this series of movements and requires the person to whom the permit was granted to file periodic accountings, usually on a monthly basis, for the mileage covered. In either case the permit issued by the Commissioner pursuant to § 46.1-43 incorporates by
reference the permit issued by the Highway Commission under § 46.1-343. It will be observed that § 46.1-43 requires that the permit issued thereunder be prominently displayed on the vehicle or other apparatus, while § 46.1-343 requires that the permit be carried in the vehicle to which it refers and shall be open to inspection by any officer. Therefore, it should be a matter for ready determination as to whether or not a violation of these statutes has occurred.

I find no statute which would abrogate the registration laws or the terms of the foregoing sections with regard to the movement of heavy equipment by those who have one or more contracts with the Highway Department. Accordingly, I conclude that the registration and permit requirements under § 46.1-43 are applicable to such contractors as to any other users of the highways.

MOTOR VEHICLES—Registration—§ 46.1-56(c) not bar to registering vehicle assigned to husband by wife suspended under § 46.1-167.4.

MOTOR VEHICLES—Registration—Assignee not liable for $75.00 fee required of assignor under § 46.1-167.4.

HONORABLE LIGON L. JONES
Commonwealth's Attorney for City of Hopewell

February 23, 1962

This is in reply to your letter of February 12, 1962, which reads as follows:

"I would appreciate if you would advise me whether Section 46.1-56 Subsection (c) has any application under the following set of facts:

"'W' owns a motor vehicle. She does not carry liability insurance. She obtains 1961 license plates and fails to pay the $20.00 fee required by the 1950 Code of Virginia as amended. She becomes involved in an automobile accident and the Division of Motor Vehicles directs the suspension of her driver's license and the license plates on the motor vehicle.

"She then transfers title to the motor vehicle over to her husband. Her husband obtains liability insurance and applies for a registration of the motor vehicle.

"Will you please advise me whether Section 46.1-56 Sub-section (c) requires the husband to pay only the costs incident to his registration of the motor vehicle or does the Section require the husband to pay the $75.00 on behalf of his wife as required by Section 46.1-167.4 of the 1950 Code of Virginia as amended."

The pertinent portion of § 46.1-56 is as follows:

"The Division may refuse to grant an application for the registration of a motor vehicle, trailer or semitrailer or certificate of title therefor in any of the following events:

"(c) When the fees required therefor by law have not been paid."

Section 46.1-167.4 of the Code of Virginia, states, in part, as follows:

"When it shall appear to the Commission (Commissioner) from the records of his office:

"(1) That an uninsured motor vehicle as herein defined, subject to
registration in this State, is involved in a reportable accident in this State resulting in death, injury or property damage with respect to which motor vehicle the owner thereof has not paid the uninsured motor vehicle fee of twenty dollars as prescribed in § 46.1-167.1, * * * * the Commissioner shall, in addition to enforcing the applicable provisions of article 4 (§ 46.1-442 et seq.) of chapter 6 of this title, suspend such owner's or operator's, operator's and/or chauffeur's license and all of his license plates and registration certificates until such person has complied with the provisions of article 4 of chapter 6 of this title and has paid to the Commissioner a fee of seventy-five dollars, to be disposed of as provided by § 46.1-167.6, with respect to the motor vehicle involved in the accident and furnishes proof of financial responsibility for the future in the manner prescribed in article 6 (§ 46.1-467 et seq.) of chapter 6 of this title.”

Certainly the person whose license and registration have been suspended under this section may not register a vehicle until there has been compliance with the terms of the section. The situation you describe, however, pertains to the assignee of such a person. There is apparently no question of liability such as would appear in the case of suspension for an unsatisfied judgment or after certain accidents. Under Article 4, Chapter 6 of Title 46.1, which is a part of the Safety Responsibility Act, § 46.1-459, paragraph (c) states:

“The motor vehicle involved in the accident upon which the suspension under § 46.1-449 or § 46.1-442 is based shall not be registered in the name of any other person when the Commissioner has reasonable grounds to believe that the registration of the vehicle will have the effect of defeating the purpose of this chapter and no other motor vehicle shall be registered, and no operator's or chauffeur's license or instruction permit shall be issued in the name of the person suspended except as prescribed in § 46.1-469 until the suspension is terminated.”

If the person whose licenses have been suspended under § 46.1-167.4 were found liable for damages and had his licenses suspended under the Safety Responsibility Act then the last quoted paragraph would be applicable. However, § 46.1-167.4 is not included in the Safety Responsibility Act and it would appear that § 46.1-459, paragraph (c), quoted supra, does not apply as it refers only to suspensions under § 46.1-449 or § 46.1-442. Article 10, Chapter 3 of Title 46.1 comprises the statutory provisions with regard to the registration of uninsured motor vehicles. I find nothing in this article which would prevent the assignment of title to a motor vehicle for which the registration has been revoked under § 46.1-167.4.

I conclude that, in the case you have stated, § 46.1-56, subsection (c), requires the husband to pay the costs incident to his registration of the motor vehicle assigned to him but does not require him to pay the seventy-five dollars on behalf of his wife. She, of course, may neither secure a license to operate nor register a motor vehicle in her name until she has complied with § 46.1-167.4.

MOTOR VEHICLES—Registration—Tractor with back hoe attachment must be registered.

Honorable Volney H. Campbell
Judge, Washington County Court

This is in reply to your letter of February 10, 1962, in which you request my
You describe a situation in which the tractor with back hoe attachment moves frequently from job to job and pose a question as follows: "Under the circumstances, I wonder if there is any possible way that such equipment can be moved under the presently existing law, without a permit."

As indicated in the former opinion, dated May 2, 1960, mentioned in your letter and found on Page 252 of Report of the Attorney General (1959-1960), the Commissioner may, if in his opinion it is equitable, issue a temporary registration and permit for this equipment under § 46.1-43 of the Code of Virginia. The discretionary power vested in the Commissioner does not extend to the person who intends to operate such equipment upon the highways. The tractor with back hoe attachment has been classified generally as heavy equipment which may travel upon the highway if granted special temporary permit by the Commissioner of the Division of Motor Vehicles under § 46.1-43 and special permit from the State Highway Commission under § 46.1-343 of the Code of Virginia. However, I am advised that these permits are sometimes issued on a blanket basis to cover a series of movements from one location to another. The special permits required for operating this class of equipment upon the highways take into account the possibility of safety hazards to the public and damage to the highways. Accordingly, I shall answer your first question in the negative.

You further inquire as follows: "Specifically, can the Washington County Sanitary District No. 1 operate a tractor with a back hoe attachment on the highways while moving from job to job, without securing the temporary permit and paying ten cents per mile, if it is registered as provided in Section 46.1-49?"

Having determined that the proper registration for such equipment is under § 46.1-43, it is my opinion that a special permit would be required thereunder as well as a permit from the Highway Commission pursuant to § 46.1-343. If, however, the vehicle be registered by the County and used purely for County purposes, no fees would be assessed for the necessary permits.

MOTOR VEHICLES—Taxation—Personal Property of Salvation Army—When exempt.

TAXATION—Exemption—Motor vehicles owned by Salvation Army.

HONORABLE JOSEPH A. MASSIE, JR.
Commonwealth's Attorney for Frederick County
February 26, 1962

This is to acknowledge receipt of your letter of February 13, 1962, which reads as follows:

"The Commissioner of Revenue for the City of Winchester, Virginia, is assessing the Salvation Army, Incorporated, for taxation purposes, a station wagon owned by and registered in the name of Salvation Army, Incorporated, and used by it for its purposes. We understand that the Salvation Army, Incorporated, is a charitable or eleemosynary institution.

"The question has arisen as to whether or not this station wagon of the Salvation Army, Incorporated, would be exempt from taxation along with the buildings and other personal property."

In its by-laws, the Salvation Army refers to itself as a "Branch of the Christian Church." The general purposes stated in its charter are: "* * * the engaging in religious, charitable, educational, philanthropic missionary and other eleemosynary
work." It is undoubtedly a religious body and the character of this organization seems unquestionably in accord with its stated purposes. It is my understanding that the Salvation Army, Incorporated, located in the City of Winchester, is a local branch of the Salvation Army.

Section 58-12 of the Code of Virginia states, in part, as follows:

"The following property shall be exempt from taxation, State and local, including inheritance taxes:

"(2) Buildings with land they actually occupy, and the furniture and furnishings therein, and endowment funds lawfully owned and held by churches or religious bodies and wholly and exclusively used for religious worship or for the residence of the minister of any church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

"(5) property whether real or personal, owned by any church, religious association or denomination or its trustees or duly designated bishop, minister or other ecclesiastical officer, and used or operated exclusively for religious, denominational, educational or charitable purposes and not for profit."

While paragraph (2) of § 58-12 specifies, in addition to certain real property, only furniture, furnishings and endowment funds, the quoted portion of paragraph (5) includes "property whether real or personal," with no further limitation of subject matter, provided it is used exclusively for the purposes stated in this section and not for profit. Accordingly, it is my opinion that § 58-12 is of sufficient breadth to include within its exemption from taxation the station wagon, along with the other personal property and buildings of the Salvation Army, Incorporated, provided it is used exclusively for the purposes stated in this statute and not for profit.

MOTOR VEHICLES—Uninsured Motorist Law—Administration discussed.

HONORABLE EDWARD E. LANE
Member, House of Delegates

This is in response to your letter of January 16, 1962, in which you request that I outline, by Code Sections, and give my opinion as to what the law requires of the Division of Motor Vehicles in connection with the "Uninsured Motorist Law."

The several sections numbered 46.1-167.1 to 46.1-167.7, inclusive, found in Article 10, Chapter 3 of Title 46.1, comprise the law with respect to registration of uninsured motor vehicles. Each of these sections will be considered in the order in which it appears in the Code.

Section 46.1-167.1 requires that "every person registering an uninsured motor vehicle shall pay at the time of registering the same a fee of twenty dollars." It is further required that every person registering a motor vehicle and declaring it to be insured shall furnish the Commissioner a certificate to that effect. The Commissioner, or his duly authorized agent, may require any registered owner of a motor vehicle declared to be insured to submit a certificate of insurance executed by an authorized agent or representative of an insurance company authorized to do business in this State. While the wording of this section, with regard to verifying the insurance status of the person registering a motor vehicle, gives the Commissioner discretionary power, the requirements of the person
registering a motor vehicle, as stated herein, are mandatory. Obviously, the Commissioner or his agents must require proper verification in numerous cases or the law would become a hollow mockery to many of those whom it seeks to affect. Since numerous changes may occur in the status of a motor vehicle with regard to insurance, because of expirations and cancellations, et cetera, from time to time, appropriate records must be maintained to reflect these changes. This responsibility rests with the Division of Motor Vehicles.

Section 46-1-167.2 defines the terms “insured motor vehicle” and “uninsured motor vehicle.” In order to carry out the mandates of the law, frequently the determination as to whether the motor vehicle is insured or not must be made by the Division.

Section 46.1-167.3 makes it a misdemeanor and prescribes the penalties for operating an uninsured motor vehicle without payment of the required fee or for presenting to the Commissioner a false certificate or false evidence that a motor vehicle is insured. The Commissioner or his agents would at least have to furnish the information upon which these charges are based. This section provides that abstracts of convictions thereunder be forwarded to the Commissioner and that the Commissioner shall suspend the operator's license and registration certificates and license plates of any person so convicted. It further provides that following such suspension the Commissioner shall not thereafter reissue the operator's license or registration and plates in the name of the person so convicted for a period of one hundred eighty days in case of conviction for furnishing the Commissioner a false certificate and in any case until such person has paid the twenty dollar fee and furnished proof of financial responsibility for the future.

Section 46.1-167.4 provides that the Commissioner shall suspend the operator's license and registration and license plates of any owner under (1) (below) or operator under (2) (below), as the case may be, until he has complied with the provisions of Article 4 of Chapter 6, Title 46.1, and in addition has paid to the Commissioner a fee of seventy-five dollars, and furnished proof of financial responsibility as prescribed in Article 6 of Chapter 6 of this title, whenever it shall appear to the Commissioner from the records of his office:

“(1) That an uninsured motor vehicle as herein defined, subject to registration in this State, is involved in a reportable accident in this State resulting in death, injury or property damage with respect to which motor vehicle the owner thereof has not paid the uninsured motor vehicle fee of twenty dollars as prescribed in § 46.1-167.1, or,

“(2) That a resident operator of a motor vehicle not registered in this State is involved in a reportable accident in this State resulting in death, injury or property damage and there is not in effect as to such operator a standard provisions automobile liability insurance policy with limits as specified in § 46.1-504, as may be amended from time to time, * * *.”

The suspension required hereunder applies to all motor vehicles registered in the name of such owner or operator.

Section 46.167.5 contains the following provision with regard to the requirements for filing proof of financial responsibility:

“(a) Whenever any proof of financial responsibility filed by any person as required by this article no longer fulfills the purpose for which required, the Commissioner shall require other proof of financial responsibility as required by this article and shall suspend such person's operator's and/or chauffeur's license, registration certificates and license plates pending for furnishing of proof as required.”

It is mandatory that the Commissioner keep records regarding the filing of proof of financial responsibility by any person so required under this article in order to ascertain that adequate proof of financial responsibility is maintained.
in each case. Section 46.1-468 found in Article 6, Chapter 6 of Title 46.1, prescribes the methods of proving financial responsibility as follows:

"(a) A policy or policies of motor vehicle liability insurance have been obtained and are in full force and effect.
"(b) A bond has been duly executed.
"(c) A deposit has been made of money or securities, or
"(d) A self-insurance certificate has been filed, all as herein provided."

Subsection (b) of § 46.1-167.5 makes it a misdemeanor for any person whose operator's license or registration certificate or license plates stand suspended under this article to fail to comply with such suspension by immediately returning every such suspended item to the Commissioner.

Subsection (c) thereunder relating to certain police duties of the Commissioner, reads as follows:

"(c) The Commissioner is authorized to take possession of any license, registration certificate or set of license plates upon their suspension under the provisions of this article or to direct any police officer to take possession of and return them to the office of the Commissioner."

Section 46.1-167.6 is as follows:

"All funds collected by the Commissioner under the provisions of this article shall be paid into the State treasury and held in a special fund to be known as the Uninsured Motorists Fund to be disbursed as provided by law; provided, that the Commissioner may expend from such funds an amount to be fixed by the Governor for the administration of this article, for which purpose such funds are hereby appropriated."

This section needs no comment, except to note that, in directing the disposition of all funds collected under this article, the related accounting requirements are, of necessity, placed upon the Commissioner.

Section 46.1-167.7, which is the last section in this article, refers to rescission of certain revocations issued under the law as it existed on January 1, 1960, and as a practical matter no longer has any real significance as these requirements have been fulfilled.

Upon consideration of the statutes herein cited, it seems clear that the responsibility for the administration of this law rests with the Commissioner of the Division of Motor Vehicles. Except for the participation of public police officers in certain instances, all related duties are to be performed by employees of the Division or agents of the Commissioner.

HONORABLE H. RATCLIFFE TURNER
Commonwealth's Attorney for Henrico County

January 8, 1962

This is to acknowledge receipt of your letter of December 14, 1961, which reads, in part, as follows:
"On November 19, 1961, a state trooper had a warrant issued charging a violation of § 46.1-167.3 of the Code of Virginia on August 27, 1961, the precise wording of the warrant being:

"Unlawfully permit the operation of an uninsured motor vehicle on the highway without having paid the uninsured motorist fee, (a 1956 Oldsmobile sedan, identification No. 567W-15831, bearing temporary Va. license No. X99-814), in the aforesaid county.'

"The facts would appear to be that around the 25th or 26th of August, 1961, the defendant purchased an automobile from a dealer and was issued by the dealer a temporary license plate, in accordance with the provisions of § 46.1-123. At the time the officer found the vehicle operated in the county by a member of the owner's family, the vehicle was not insured and the owner had not paid the uninsured motorist fee required by § 46.1-167.1 of the Code of Virginia.

"Inasmuch as § 46.1-167.1 reads in part as follows:

"In addition to any other fees prescribed by law every person registering an uninsured vehicle as heretofore defined shall pay at the time of registering the sum of twenty dollars . . .,'"

"and paragraph (c) of § 46.1-121 reads:

"No application under subsection (a) of this section shall be construed to be a registration of a motor vehicle as provided in § 46.1-167.1.'"

"I would like to request your opinion as to whether or not a person arrested under these circumstances would be guilty of a violation of § 46.1-167.3."

Section 46.1-167.3 of the Code of Virginia, as amended, contains the following:

"If during the period for which it is licensed a motor vehicle is or becomes an uninsured motor vehicle and the fee of twenty dollars required by § 46.1-167.1 has not been paid, the owner thereof who operates or permits the operation thereof by another person shall be guilty of a misdemeanor, punishable as set forth in § 46.1-16."

An opinion in the Report of the Attorney General, (1957-1958), p. 209, in replying to Question 14 of an inquiry from the Commissioner of the Division of Motor Vehicles, stated that a motor vehicle bearing temporary license plates issued by a dealer, pursuant to § 46.1-121 of the Code, as it then appeared, was subject to the requirements of Chapter 407, Acts of 1958 (§§ 46.1-167.1 through 46.1-167.7 of the Code of Virginia). Subsequently, however, the General Assembly of 1960 amended § 46.1-121 by adding thereto paragraph (c) which, as you point out in your letter, states:

"No application under subsection (a) of this section shall be construed to be a registration of a motor vehicle as provided in § 46.1-167.1."

(Underlining supplied).

In answering your question, I have found it necessary to consider subsection (a) of § 46.1-121 and § 46.1-123 of the Code, which reads as follows:

"§ 46.1-121. * * * (a) The Division may, subject to the limitations and conditions hereinafter set forth, deliver temporary license plates designed by the Division to any dealer duly licensed under the provisions of this title who applies for not less than ten sets of such plates and who encloses with such application a fee of one dollar for each set for which application is made. Such application shall be made upon a form prescribed and furnished by the Division. Such dealers, subject to the limitations and conditions hereinafter set forth, may issue such
temporary license plates to owners of vehicles, *provided that such owners shall comply with the applicable provisions of this article.*" (Under-scoring supplied).

"§ 46.1-123. * * * No dealer shall issue a temporary license plate except upon the written application therefor by the person entitled to receive the same, which application shall be forwarded by the dealer to the Division on the day of such issuance. (Code 1950 (Supp.), § 46-109.3; 1956, c. 708; 1958, c. 541.)"

While the question is not entirely free from doubt as to whether the portion of paragraph (c) of § 46.1-121, which I have repeated with emphasis above, refers only to the application made by the dealer to the Division, or to both that application and the owner's application to the dealer referred to in § 46.1-123, I prefer the view that the exclusion in paragraph (c) refers to both.

I reach this conclusion because the authority for the issuance of temporary license plates to the owner by the dealer is found only in subsection (a) of § 46.1-121. It would, therefore, appear that the application referred to in § 46.1-123 is in reality an application "under subsection (a)," for it is only under subsection (a) that such application has any effect. In my opinion, the emphasized portion of subsection (a) incorporates by reference the application referred to in § 46.1-123.

In view of the general rule that criminal statutes should be construed against the sovereign, I am of the opinion that a person arrested under the stated circumstances would not be guilty of violation of § 46.1-167.3.

NEWSPAPERS—Legal Advertisements—Where to be published.

COUNTIES, CITIES AND TOWNS—Newspaper—Legal Advertisements—Where to be published.

HONORABLE JAMES M. THOMSON
Member, House of Delegates

June 22, 1962

This in in reply to your letter of June 19, 1962, which reads as follows:

"I am writing you in regard primarily to Section 8-80 and Section 8-81 of the Code of Virginia of 1950. I would like to determine whether a weekly newspaper physically published in Alexandria, Virginia, whose primary distribution is in Fairfax County but which has some distribution in the City of Alexandria qualifies as a newspaper to receive legal advertisements in such statutes as Section 8-72, 8-76, 8-77, 43-60, 55-59, Section 6, 4-30 and 15-577, as well as 8-81 itself.

"One of our weekly newspapers is the Fairfax Journal. It is printed in the City of Alexandria and serves its subscribers primarily in Fairfax County. There are, however, subscribers in Alexandria to this newspaper. The majority of subscribers are, of course, in Fairfax County.

"I would also like to know whether or not Section 8-81 applies only to ads published by county, city and town governments or the boards and agencies and whether this section serves as a restriction on any and all advertisements such as we have set out in the preceding section."

Section 8-80 of the Code provides:
"Any newspaper published in a city adjoining or wholly or partly within the geographical limits of any county shall be deemed to be published in such county or counties, as well as in such city, for the purpose of legal advertisements."

The language of § 8-80 is clear and free from ambiguity and, in my opinion, a newspaper located in the city of Alexandria, which, I understand, adjoins the county of Fairfax, would qualify as a newspaper to publish legal advertisements pertaining to matters pending in Fairfax County under the statutes cited by you.

With respect to your second question, in my opinion the requirements of § 8-81 are not limited to county, city and town governments, but apply to any notice or advertisement required by law to be published.

By reference to the act by which this section was enacted, I find that the title indicates that the act (Chapter 113, Acts of 1940) applies to "ordinances, resolutions, advertisements or notices, required by law to be published in a newspaper."

If the section was intended to be applicable to counties, cities and towns only the words "official board, or body, or officials, or by any person or corporation" would be surplusage. Obviously, the word "corporation" does not refer to a city, or town, since the phrase "municipality or municipal corporation" has been previously used.

NOTARIES PUBLIC—Eligibility—When members of National Guard may serve as notary public.

PUBLIC OFFICERS—Compatibility—When members of National Guard may serve as notary public.

December 13, 1961

Miss Martha Bell Conway
Secretary of the Commonwealth

This is in reply to your letter of December 12, 1961, which reads as follows:

"Sec. 2-27 of the Code of Virginia states that no person shall be capable of holding any office or post mentioned in Sec. 2-26 who holds a military post under the Government of the United States.

"Sec. 2-29 of the Code of Virginia, paragraph (3), states Sec. 2-27 shall not be construed 'to exclude from such office or post officers or soldiers on account of the recompense they may receive from the United States when called out in actual duty.'

"Will you be kind enough to let me have your opinion as to whether persons in the United States Armed Forces may be commissioned as notaries public, and whether there is any distinction between regular enlistees and members of the National Guard or reservists who have been called into active duty."

Section 2-29(3) of the Code was considered by the Supreme Court of Appeals of Virginia in the case of Lynchburg v. Suttonfield, 177 Va. page 212. In that case the Court held that the manifest purpose of exception (3) in this section is to disqualify as officeholders members of the regular army of the United States who are permanently in service and to except from disqualification officers and soldiers of the State Militia or National Guard who may be called to actual duty for a temporary period. In light of this case, I am of the opinion that there is a distinction between regular enlistees and members of the National Guard or reservists who have been called into active duty.
Your attention is directed to § 2-27.1 of the Code which provides, in part, as follows:

"No State, county or municipal officer or employee shall forfeit his title to office or position or vacate the same by reason of engaging in the war service of the United States; * *.*"

Under this provision no person who holds an office at the time he enters the war service of the United States, voluntarily or otherwise, forfeits such office or position for that reason. However, nothing contained in this section or § 2-29 (3) may be construed as removing the disability against accepting in the first instance any such office subsequent to becoming a member of the armed services of the United States.

NOTARIES PUBLIC—State at Large—Not necessary to show county when acknowledgement taken.

HONORABLE LUCY A. ALLEN
Clerk, Circuit Court of Clarke County

This is in reply to your letter of August 29, 1961, in which you request my opinion as to "whether or not it is essential that the county wherein the acknowledgment was taken, show in the acknowledgment when taken by a notary for the State at large."

Section 55-113 of the Code, to which you have referred, prescribes that a clerk shall admit to record any writing mentioned in § 55-106 as to any person whose name is signed thereto, upon the certificate of either of the officers mentioned therein “that such writing has been acknowledged before him by such person.” This is a material requirement of the section. If the acknowledgment shows that this material requirement has been met, the clerk may not properly refuse to record the instrument because the certificate of acknowledgment fails to be in the exact form set out in this Code section. In Banner v. Rosser, 96 Va. 238, our Supreme Court held that “a certificate of acknowledgment to a deed which identifies the subscriber, specifies the writing subscribed, states the capacity in which the subscriber executes it, and certifies his acknowledgment thereof, contains all that is necessary.” The statutory form for a certificate of acknowledgment at that time (§ 2501, Code of 1887) is now § 55-113 of the Code, and no material change has been made in the wording of the form. As stated in Hurst v. Leckie, 97 Va. 550, at page 563, “a strict or literal compliance is not required. * * If words equivalent to those in the statute are used, it is sufficient. This is the result of our own decisions, and also the general current of the authorities.”

The forms suggested by this section to be followed in making certificates were enacted prior to the enactment of § 42-2 relating to the appointment of notaries with power to take acknowledgments anywhere within the State. Acknowledgments could be taken only by notaries who had been commissioned for a single county or a single city and this no doubt accounts for the use of the words “for my county (or corporation) aforesaid,” and “in my county (or corporation) aforesaid.”

The General Assembly having subsequently provided for notaries for the State at large, such notaries would be acting in compliance with the form appearing in § 55-113 by making their certificates show that the acknowledgment was taken in the State of Virginia.

In Sullivan v. Gum, 106 Va. 245, the Supreme Court considered a certificate
of acknowledgment in which the notary failed to certify that it was taken in his city. This acknowledgment was approved, citing Banner v. Rosser, supra.

OPTICIANS—Advertising—Distinguishing professions does not constitute improper conduct.

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

This is in reply to your letter of July 17, 1961, with which you enclosed a copy of an advertisement appearing in a Danville newspaper on July 10, 1961, which raises a question as to improper professional conduct on the part of an optical company.

The advertisement in question ostensibly purports to advise the reader of the various factors which distinguish the professions of Ophthalmologists, Optometrists and a licensed Optician. The advertisement closes with the following language:

"Are you getting the best possible eye care? Let us make you an appointment when you have your eyes checked."

Section 54-398.23 of the Code of Virginia, (1950), pertaining to opticians, reads as follows:

"The Board shall revoke or suspend the certificate of registration of any person for any of the following causes:

"(5) If such person shall advertise or offer any gift or premium or discount in any form or manner in conjunction with the practice of an optician, or directly or indirectly advertise that any one class of duly licensed eye examiners is preferable to any other class qualified and authorized under the laws of Virginia to make visual or eye examinations and to prepare prescriptions for eyeglasses, or advertise in any manner that would tend to mislead or deceive the public, or engage in any form of house to house canvassing or soliciting for the sale of spectacles or other ophthalmic products or services."

While the advertisement in question may raise a strong inference that the advertiser intended to convey to the reader that one class of eye examiners is preferable to some other class, I do not believe that such an assertion is expressly made, nor do I believe that the statement is false or misleading. I am, therefore, of the opinion that the advertisement in question does not present a clear violation of the prohibition set forth in § 54-398.23 of the Code.

OPTICIANS—Advertising—U. S. pamphlet "Choosing a Specialist" does not constitute.

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

This is in reply to your letter of April 5, 1962, in which you state, in part, as follows:
"I am enclosing a copy of a pamphlet distributed by the United States Department of Health, Education, and Welfare, and wish to call your attention to that section entitled 'Choosing a Specialist.' This particular section of the pamphlet has been somewhat of a source of irritation to those persons who are licensed by the State to care for the eyes. "In order that this Department may be in a position to advise the licensees of the Virginia State Board of Opticians, the following opinion is requested: * * *"

You then quote § 54-398.23(5) of the Code, which provides that:

"The Board shall revoke or suspend the certificate of registration of any person for any of the following causes:

"(5) If such person shall advertise or offer any gift or premium or discount in any form or manner in conjunction with the practice of an optician, or directly or indirectly advertise that any one class of duly licensed eye examiners is preferable to any other class qualified and authorized under the laws of Virginia to make visual or eye examinations and to prepare prescriptions for eyeglasses, or advertise in any manner that would tend to mislead or deceive the public, or engage in any form of house to house canvassing or soliciting for the sale of spectacles or other ophthalmic products or services."

You have presented the following questions:

"Would it be improper under this Section of the Code if this pamphlet were purchased in quantity from the Federal government and made available to the public without charge,

"(a) by direct mailing from an individual optician to his customers?

"(b) by free distribution in the office or establishment of an individual optician, either upon request of the customer or in answer to a question, or upon the optician's own volition?

"(c) by offering, on an individually sponsored television or radio program, to mail it free upon request to any listener or viewer?

(d) by the Society, on the same basis as in (c) ?

"Would it be improper for all or any part of this pamphlet to be read aloud on television or radio, or reproduced in the newspaper, under the sponsorship of

"(a) an individual optician?

"(b) the Society?

"If some portions would be permissible, but others not, please designate the unacceptable portions.

"Would it be improper to reproduce only that section of the pamphlet entitled 'Choosing a Specialist' on a small card or other similar device and distribute it or make available as set out in the first question over the name of either the Society or an individual optician (with appropriate reference, of course, as to the source of the information) ?"

The pamphlet to which you refer was issued by the United States Department of Health, Education, and Welfare, and is designated as "Health Information Series, No. 64" under the title of "Care of the Eyes." The pamphlet is further identified as "Public Health Service Publication No. 113, Revised 1960." It may
be purchased from the Superintendent of Documents, United States Government Printing Office at the price of $3.00 per 100 copies.

I do not construe the pamphlet in question to be a "gift or premium or discount" within the meaning of those terms as used in the Statute, and I am unable to conclude that the distribution of this pamphlet would operate to violate any of the provisions of § 54-398.23 of the Code.

You have supplemented your letter by stating that you have received a complaint to the effect that circulation of the pamphlet by an optician would be a violation of the prohibition against advertising directly or indirectly that "any one class of duly licensed eye examiners is preferable to any other class qualified and authorized under the laws of Virginia to make visual or eye examinations and to prepare prescriptions for eyeglasses, * * *." We can see no merit in this contention.

The paragraph "Choosing a Specialist" reads as follows:

"In selecting an eye specialist, it is necessary that you understand the differences in these occupations:

"An OPHTHALMOLOGIST or OCULIST is a physician—an M.D. —who specializes in diagnosis and treatment of defects and diseases of the eye, performing surgery when necessary or prescribing other types of treatment, including glasses.

"An OPTOMETRIST, a licensed, nonmedical practitioner, measures refractive errors—that is, irregularities in the size or shape of the eyeball or surface of the cornea—and eye muscle disturbances. In his treatment the optometrist uses glasses, prisms, and exercises only.

"An OPTICIAN grinds lenses, fits them into frames, and adjusts the frames to the wearer."

This does not purport to indicate a preference of any one class over another class of eye examiners.

Accordingly, each question is answered in the negative.

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OPTICIANS—Licenses—Not required of supplier of glasses when supplied to person authorized to dispense prescription eyeglasses.

October 10, 1961

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

This is in reply to your letter of October 5, 1961, in which you request my opinion as to whether the practice on the part of an optical supplier is permissible under the provisions of Chapter 14.1 of Title 54 of the Code when conducted in the following manner.

The optical supplier fills a prescription for industrial safety eyeglasses, which prescription is issued by persons so authorized in accordance with the applicable statutes. The eyeglasses are sent to a person authorized under the applicable statutes to dispense prescription eyeglasses. The optical supplier then bills the industry (employer) direct for the cost of the eyeglasses. The employer may or may not collect from the employee the cost of such eyeglasses.

Under date of February 9, 1961, the Honorable A. S. Harrison, Jr., former Attorney General, in reply to a closely allied question, advised you that a manu-
facturer of glasses is not required to be a licensed optician so long as he supplies eyeglasses exclusively to licensed physicians, optometrists, opticians or to optical scientists. Under such circumstances, the supplier is exempt from the license requirement by virtue of § 54-398.1 of the Code. See, Report of Attorney General (1960-1961) p. 241.

As I view the practice of the optical supplier now in question, the eyeglasses are being supplied directly to a person who is authorized to dispense prescription eyeglasses; i.e., a licensed physician, optometrist or licensed optician. I do not believe that the source of payment for such eyeglasses would in any manner alter the conclusion reached by Attorney General Harrison in his previous letter to you.

PAWN BROKERS—License—Not necessary to reside in city where business located.

CITIES—Pawn Brokers—Residence in city not necessary.

Honorable Alfred W. Whitehurst
Commonwealth's Attorney for the City of Norfolk

April 9, 1962

This is in reply to your letter of April 6, 1962, which reads as follows:

"A question has been presented to us involving Section 54-841 of the Code of Virginia of 1950. This Section states that to . . . 'carry on the business of a pawnbroker in his city . . .' It further states ' . . . of the county in which he may desire to carry on such business, . . .'"

"Therefore, the question I wish to ask is can a court of our city grant a pawnbroker's license to a person, who is not a resident of this city under Section 54-841?"

Section 54-841 of the Code provides:

"The hustings or corporation court of any city, and the circuit court of any county, may from time to time, grant a license to any citizen of the United States who shall produce satisfactory evidence of his good character, to exercise or carry on the business of a pawnbroker in his city or county, which licensee shall designate the building in which such person shall carry on such business; * * *.

I do not construe the phrase "his city or county" to mean that the applicant for license must be an actual resident of the city or county in which he proposes to carry on his business. I think the phrase relates to the place where the applicant expects to carry on the business of a pawnbroker.

The last sentence of § 54-841 which provides that "no person shall exercise or carry on the business of a pawnbroker without being duly licensed by the hustings or corporation court of the city, or circuit court of the county in which he may desire to carry on such business, under penalty of fifty dollars for each day he shall exercise or carry on such business without such license" strongly supports the conclusion that the section means that any citizen of the United States meeting the qualifications as to character may exercise or carry on the business of a pawnbroker if duly licensed in any city or county in which he may desire to carry on such business.
PHYSICIANS AND SURGEONS—Professional Association—Permitted even though members not partners.

May 11, 1962

HONORABLE FITZGERALD BEMISS
Member, Virginia State Senate

This is in reply to your letter of May 9, 1962, in which you request my opinion as to whether the provisions of § 54-278 of the Code of Virginia will prevent physicians and surgeons from organizing and operating a Professional Association under the provisions of Chapter 277, Acts of the General Assembly of 1962. The definitions of “Profession” and “Professional Association” contained in Chapter 277 are pertinent and read as follows:

“‘Profession’ means and includes the following occupations, licenses for the practice of which are required by provisions of Title 54 of the Code of Virginia; architecture, professional engineering, land surveying, certified public accounting, dentistry, optometry, practice of the healing arts, and veterinary medicine, surgery and law.

“‘Professional Association’ means an unincorporated association, as distinguished from a partnership or a corporation, organized under the provisions of this act for the sole purpose of carrying on a profession as defined in (2) [‘Profession’] above.”

Section 3 of Chapter 277 is as follows:

“Any three or more individuals, each of whom holds a valid, unrevoked certificate or license to practice the same profession within this State, may organize a professional association for the purpose of rendering professional services of the kind its associates are authorized to render and dividing the gains therefrom; provided, however, that for the purpose of this act, architects, professional engineers and land surveyors shall be deemed to be practicing the same profession.”

Section 54-278 of the Code permits surgeons and physicians to form partnerships and to provide in the agreement for the division of profits as the parties to the agreement may determine, and we so construed this section in our opinion of October 18, 1960, published in the Report of the Attorney General (1960-1961), p. 246.

The language of paragraph (3), § 2 of Chapter 277, defining “Professional Association” to mean “an unincorporated association, as distinguished from a partnership or a corporation,” is not intended, in my judgment, to operate as a repeal or modification of § 54-278, but merely to authorize members of the healing arts and other professions set forth in paragraph (2) to form an association of a different legal character than a corporation or partnership as those terms are commonly defined.

In my opinion the provisions of § 54-278 are not affected by Chapter 277. The statutes are separate and independent of each other, and persons practicing the healing arts—as that term is defined in § 54-273(2) of the Code of Virginia—may form a “Professional Association” and operate the same, even though such association is not a partnership as contemplated by § 54-278 of the Code.
PINE TREE SEED LAW—Number of Trees to be Left at Time of Cutting—
Trees over six inches in diameter may be counted under § 10-81 of Code.

February 8, 1962

HONORABLE CHARLES T. TURNER
Assistant Commonwealth's Attorney for Pittsylvania County

This is to acknowledge receipt of your letter of January 30, 1962, in which you wrote, in part:

"My exact question is concerned with the definition of trees as given in Section 10-75 which defines a tree as certain types of more than six inches in diameter and the statement in Section 10-81 which refers to seedlings over four feet in height.

Can trees over six inches in diameter be counted as meeting the requirements of the number of trees to be left on an acre of land which is referred to in Section 10-81? In other words could a pine tree over four feet high and over six inches in diameter be counted to make up the 400 seedlings per acre referred to in Section 10-81?

Section 10-81, Code of Virginia 1950, as amended, is as follows:

"When article not applicable in general.—This article (6) shall not apply to any acre of land on which there are present at the time of final cutting of the timber as many as four hundred or more loblolly, short-leaf, pond or white pine or tulip poplar seedlings, singly or together, four feet or more in height." (Insertion supplied.)

The word "tree" is defined in § 10-75 as one having a diameter of six inches or more. The term seedling is not defined. The general purpose of Chapter 4, Title 10, Code of Virginia, is to preserve the forest and the conservation of forest resources. Of course, there is a difference between a seedling and a tree. However, insofar as § 10-81 is concerned, there is no difference.

Section 10-76 places a duty and obligation on the landowner to leave four trees fourteen inches in diameter on each acre of cut-over forest land. If the landowner is convicted of violating this Section (10-76), he must deposit $5.00 for every acre on which he fails to leave the uncut trees. After the expiration of a year and the landowner has failed to plant the seedlings as required, this deposit is used by the State Forester to restock the acreage in accordance with provisions of § 10-79.1 of the Code of Virginia. Obviously, it would be unnecessary to restock acreage upon which there are already a number of trees or seedlings which meet the requirement of the statute. Certainly, it is more beneficial to have trees six inches in diameter than seedlings on such acreage.

It is, therefore, my opinion that trees of six inches in diameter may be counted as meeting the requirements of the number of trees to be present at the time of final cutting of the timber, thus rendering such acreage exempt from the provisions of Article 6, Chapter 4, Title 10, Code of Virginia (1950).

PUBLIC FUNDS—Investments—Political subdivisions of State may invest in securities specified in Code.

July 10, 1961

HONORABLE LIGON L. JONES
Commonwealth's Attorney for the City of Hopewell

This is in reply to your letter of July 6, 1961, which I quote:
"The Hopewell Hospital Authority which was created pursuant to Chapter 13, Title 32 of the 1950 Code of Virginia, as amended, requested that I inquire of your office as to what investments they may lawfully make. Section 32-254 of the 1950 Code of Virginia, as amended, has been repealed without the re-enactment of some similar section."

While you are quite correct in stating that the General Assembly has repealed the statutory provision relating expressly to legal investments by hospital authorities created pursuant to Chapter 13 of Title 32 of the Code, I cannot concur in your conclusion that no similar statutory provision has been enacted.

By enactment of Chapter 184 of the Acts of Assembly of 1956, § 32-254 of the Code and several other statutes of similar purport were repealed, and Chapter 17 of Title 2 of the Code, consisting of §§ 2-297 and 2-298, was added. This chapter is designed to cover the field of investment of public funds. Section 2-297 of the Code reads, in part, as follows:

"The Commonwealth, all public officers, municipal corporations, political subdivisions and all public bodies of the Commonwealth may properly and legally invest any sinking funds belonging to them or within their control in the following securities:

* * *

Section 2-298 of the Code reads, in part, as follows:

"The Commonwealth, all public officers, municipal corporations, political subdivisions and all public bodies of the Commonwealth may properly and legally invest any and all moneys or other funds belonging to them or within their control other than sinking funds in securities that are legal investments for fiduciaries under the provisions of clauses (1), (2), (3), (4), (5), and (24) of § 26-40 of the Code of Virginia, as amended, but this section shall not apply to retirement funds to be invested pursuant to § 51-76."

By virtue of §§ 32-214 and 32-215 of the Code, the Hopewell Hospital Authority is a political subdivision of the Commonwealth. Accordingly, it is authorized to invest in the securities specified in Chapter 17 of Title 2 of the Code.

PUBLIC OFFICERS—Bonds—Blanket bond for city employees covers court employees.

BONDS—Blanket Bond for City Employees Covers Court Employees.

April 6, 1962

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

Attention is invited to the letter of the Honorable Leonard H. Davis, City Attorney for the City of Norfolk, Virginia, dated March 9, 1962, together with the enclosure of a blanket bond covering city employees. The question raised by the City Attorney and the Judges of the Municipal Courts is whether or not the bond covers the employees of the clerks of those courts.

The form initially used in this bond was that of the Public Employees' Honesty Blanket Bond; however, the printed rider attached has the effect of converting this bond into a Public Employees' Faithful Performance Blanket Bond. You will note that the aggregate penalty of the bond is $10,000, and this covers all employees of the City of Norfolk except those who are not required by law to
furnish an individual bond to qualify for office. This bond would cover the employees and deputies of the clerks of these Municipal Courts. The said clerks are required to give a bond under § 16.1-16 of the Code except this requirement may be dispensed with if the requirements of the terminal paragraph of this section have been met. The typewritten rider causes the bond to meet the requirement of § 16.1-16 as it protects the Commonwealth from losses of funds.

Attention is invited to the “additional indemnity rider.” The effect of this rider is to add additional coverage on the officers that hold specific positions. For instance the Judge of the Municipal Court is already covered by the $10,000 penalty of the bond but, in addition thereto, he is covered with an additional indemnity of $40,000, or a total of $50,000. Although § 16.1-15 of the Code requires not only the judge, but the associate judge or substitute judge to be covered by a Faithful Performance Bond, no mention is made of these officers in the said additional indemnity rider. Paragraph 3 of said rider only applies to that rider. However, they are covered by the so-called $10,000 aggregate indemnity clause.

We have examined Chapter 34 of the Acts of 1918, which provides for a charter of the City of Norfolk. As Mr. Davis states in his letter, the only mention of any requirement for bonds of public officers is found in Section 134 thereof and no specified officers or employees are mentioned in that section. Mr. Davis assures me that the amendments to the 1918 charter do not cover or mention anything concerning the requirement of bonds for public officers. As heretofore stated, the effect of this is that this blanket bond actually covers all the employees of the City of Norfolk.

The aforementioned bond meets the requirement of the statute and fulfills the general policy set forth in Section 85 of the Constitution of Virginia. This office has held that a blanket bond, as well as an individual bond, could meet the requirement of the Constitution. See, Report of the Attorney General (1950-1951), p. 90. Whether the blanket bond be a Public Employees' Faithful Performance Bond or a Public Employees' Faithful Performance Position Bond is for the city to determine.

PUBLIC OFFICERS—Compatibility—Chairman of County Board of Supervisors and Finance Board may be bank president.

BOARDS OF SUPERVISORS—Members—Chairman may be president of bank doing business with county.

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

December 1, 1961

This is in reply to your letter of November 29, 1961, which reads as follows:

"It is possible that next year, the Chairman of our County Board will be the member who is also President of a local bank. By virtue of the chairmanship under Section 58-940, the Chairman of the County Board also serves as Chairman of the Finance Board.

"Inquiry has been made as to whether or not there would be any conflict of interest if the Chairman of the Finance Board were also President of a local banking institution.

"I would appreciate it if you would advise me as to your opinion on this question."

It is my understanding that the county of Arlington has adopted the County Manager Plan of government under Article 3, Chapter 12, Title 15 of the Code.
This article does not contain special provisions relating to interest in contracts by the members of the Board. Therefore, the provisions of § 15-504 are applicable. This section prohibits members of the board of supervisors or any paid officer of a county from becoming interested in any contract made by a county. However, this section contains an exception, as follows:

"The term 'contract,' as herein used, shall not be held to include the depositing of county or town funds in, or the borrowing of funds from, local banks in which members of the board of supervisors, members of the school board, or other county officers herein named may be a director or officer or have a stock interest; nor shall it include the granting of franchises to or purchase of services from public service corporations."

The fact that the member of the board is also chairman of the Finance Board is not material.

I am of the opinion, therefore, that there is no statutory provision which prevents the member in question from serving on the board and as chairman of the Finance Committee.

PUBLIC OFFICERS—Compatibility—City attorney may not serve as Substitute Judge.

HONORABLE RICHARD L. JONES
Commonwealth's Attorney for the City of Colonial Heights

July 26, 1961

This is in reply to your letter of July 26, 1962, in which you request an opinion as to whether or not the City Attorney of the City of Colonial Heights would be eligible to hold the office of Substitute Judge of the Municipal Court and Juvenile and Domestic Relations Court of the City of Colonial Heights and the office of City Attorney at the same time.

You state that Section 21.7 of the charter of the City of Colonial Heights provides that the Commonwealth's Attorney shall prosecute violations of city ordinances and that there is no duty upon the City Attorney to prosecute violations of city ordinances.

You refer to § 16.1-18 of the Code, which enumerates certain incompatible offices, none of which is the office of city attorney.

Section 10.3 of the charter of the City of Colonial Heights relates to the powers and duties of the City Attorney. It will be noted that under this section the City Attorney is required, on request of the City Manager or any member of the Council, to “prepare ordinances for introduction and at the request of the Council or any member thereof shall examine any ordinance after introduction and at the request of the Council or any member thereof shall examine the ordinance after introduction and render his opinion as to the form and legality thereof, * * *.”

Under subsection (d) of this section of the charter the City Attorney is required to represent the city “in criminal cases in which the constitutionality or validity of any ordinance is brought in issue.”

I am enclosing copy of an opinion dated March 14, 1949 and published in Report of the Attorney General (1948-1949) at pages 272-273, in which the compatibility of the office of town attorney and trial justice is discussed. This opinion, in my judgment, is applicable to the question presented here.

While it might be true that there is little likelihood of the constitutionality or the validity of any ordinance drawn by the City Attorney being brought into
issue in a case before him if he should act in the capacity of substitute judge for
the municipal court, nevertheless, it is possible, and perhaps probable, that the
ordinance involved in the case being heard would be an ordinance that had been
drafted, or approved, by the City Attorney.

Although § 16.1-18 of the Code does not specifically provide that the holding
of these two offices would be incompatible, nevertheless under the principles of
law set forth in the enclosed opinion I feel that considerations of public policy
render it improper for a City Attorney to act in the capacity of Substitute Judge
for the Municipal Court while serving as City Attorney.

PUBLIC OFFICERS—Compatibility—County executive secretary may not serve
as deputy commissioner of revenue.

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

March 26, 1962

This is in reply to your letter of March 23, 1962, which reads as follows:

"I will appreciate your opinion as to whether or not the same person
may serve as executive secretary pursuant to appointment under Section
15-551.1 of the Code and at the same time serve at Deputy Com-
missoner of the Revenue pursuant to appointment under Section 15-485
of the Code and receive compensation for serving in both capacities.

"I will also appreciate your opinion as to whether or not the Board
of Supervisors may employ a person, without appointing such person an
executive secretary under Section 15-551.1, supra, for the purpose of
investigating and obtaining factual information and data with respect
to its general administrative duties, such as, for example, obtaining
factual data pertaining to claims and bills against the county and other
like matters which might require travel and inspection. While I do not
know by what title such an employee would be known, he would be
expected to perform general duties for the Board of Supervisors as
indicated above in order to assist the Board in the performance of its
duties and to avoid appointing an executive secretary at this time. If
you conclude that such an employee may be so employed by the Board
of Supervisors, I will appreciate your opinion as to whether or not such
person could also serve as a Deputy Commissioner of the Revenue at
the same time and receive compensation for serving in both capacities."

With respect to your first question, I am of the opinion that a Deputy Com-
missoner of the Revenue is not eligible to hold the office of Executive Secretary.
Section 15-486 of the Code of Virginia prohibits a Commissioner of the Revenue
from holding any other office, elective or appointive, at the same time, subject
to certain exceptions which are not applicable. This office has consistently held
that this section applies to the deputies of the officers therein mentioned. The
opinion which this office gave to you on November 23, 1959, Report of Attorney
General (1959-1960), p. 323, relating to a deputy sheriff is applicable.

Your second question, in my opinion, must be answered in the negative. The
employee would be required to perform the duties and exercise the powers of
an officer appointed under Article 8, Chapter 16 of Title 15 of the Code. He
would not have authority to serve in that capacity except as an officer of the
county. The governing body of a county may only appoint officers under statu-
tory authority.
PUBLIC OFFICERS—Compatibility—Deputy sheriff may not be deputy clerk.

SHERIFFS AND SERGEANTS—Deputy sheriff may not be deputy clerk.

HONORABLE BASCOM S. PRIBBLE, JR.
Judge, Stafford County Court

February 9, 1962

This is in reply to your letter of February 8, 1962, in which you present the question as to whether or not a deputy sheriff may simultaneously hold the office of deputy clerk of the county.

In my opinion this is forbidden by the provisions of § 15-486 of the Code. This section, you will note, expressly provides that no person holding the office of sheriff of a county shall hold any other office, elective or appointive, at the same time, subject to certain exceptions. This office has previously held that § 15-486 is applicable to deputies of the officers mentioned therein. Under the exceptions set out in § 15-486, a deputy sheriff may hold the office of town sergeant of a town within the county.

Had the Legislature intended to permit a deputy sheriff to hold any other office, I think there would be a positive expression in the statute to that effect.

PUBLIC OFFICERS—Compatibility—Federal employees may not serve on town council.

HONORABLE WALther B. FIDLER
Member, Virginia House of Delegates

June 26, 1962

This is in reply to your letter of June 25, 1962, in which you state that Mr. Vivian F. Gallahan was recently elected to the town council of the Town of Colonial Beach and you present the question as to whether or not he is eligible to qualify for this office under the provisions of §§ 2-27 and 2-29 of the Code of Virginia.

It appears that Mr. Gallahan is an employee of the United States Naval Weapons Laboratory at Dahlgren, Virginia. His duties are described by the Industrial Relations Director of the Laboratory as follows:

"Currently, Mr. Gallahan is employed as a Supervisor Photographer and is Head of the Field Section of the Photographic Branch, Development Division, Weapons Development and Evaluation Laboratory. The Photographic Branch is responsible for conventional and metric photographic work at the U. S. Naval Weapons Laboratory. As Head of the Branch, Mr. Gallahan is responsible for the administrative and technical leadership of the branch. He directs and supervises the field assignments and plans, coordinates and organizes the photographic projects to enable the Field Section to obtain the best possible photographic and metric photographic coverage of the varied ordnance tests conducted at the Naval Weapons Laboratory.

"The Field Section furnishes documentary and metric photographic coverage, both standard, high, and ultra-high speed motion pictures for the study of missile and projectile performance and functioning of ordnance devices. The Field Section operates powered photograph tracking equipment for recording displacements, velocities, accelerations and flight characteristics of missiles. The Section also installs, adjusts and
operates all types of cameras, standard and especially designed types, and associated electronic equipment for still pictures, spark shadowgraphs, microflash, Ballistic Synchro, and aerial photographs."

Mr. Gallahan is undoubtedly disqualified from holding the office under the provisions of § 2-27 of the Code, unless he can escape this disqualification under the provisions of § 2-29 of the Code. In my opinion, none of these exceptions would apply to a person holding the position described above.

In this connection, I am enclosing copy of an opinion dated July 19, 1960 to the Commonwealth's Attorney of Westmoreland County, which relates to a similar question. This opinion is published in the Report of the Attorney General (1960-1961), p. 254.

PUBLIC OFFICERS—Compatibility—Member of State Senate may not serve on advisory Board of National Capital Transportation Agency.

GENERAL ASSEMBLY— Compatibility—Member may not serve on advisory Board of National Capital Transportation Agency.

HONORABLE CHARLES R. FENWICK
Member, Virginia State Senate

This is in reply to your letter of August 1, 1961, which reads as follows:

"I have been appointed by the President to the Advisory Board of the National Capital Transportation Agency. I am concerned about such an appointment being in violation of Section 44 of the Virginia Constitution and Sections 2-27-28 of the Virginia Code. I am enclosing a copy of the Act; and I particularly call your attention to Section 202, page 2, entitled 'Advisory Board.'

"You will note my position would be only in an advisory capacity, but it does carry with it a per diem and travel expenses.

"My name has gone to the Senate for confirmation, but I do not intend to accept the appointment if it places my seat in the Senate in jeopardy."

Section 44 of the Constitution relates to the qualifications of Senators and Members of the House of Delegates of the General Assembly of Virginia. This section is, in part, as follows:

"* * (a) And no person holding any office or post of profit or emolument under the United States government or who is in the employment of such government, shall be eligible to either House."

This constitutional provision is implemented by § 2-27 of the Code of Virginia, which reads as follows:

"No person shall be capable of holding any office or post mentioned in the preceding section, who holds any office or post of profit, trust, 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."

Public law 86-669 creates the National Capital Transportation Agency, provides for its administration, and prescribes its powers and duties. This Agency is an instrumentality of the United States government. In addition to providing for an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, the Act creating this Agency establishes an Advisory Board composed of five members appointed by the President, by and with the advice and consent of the Senate. The duties of the Advisory Board are set out in the Act. It is provided that each of the members of the Advisory Board, when actually engaged in the performance of his duties, shall receive for his services compensation at a rate not in excess of the per diem therein referred to.

In considering the question presented by you it is necessary to determine (1) whether or not membership on the Advisory Board is an office, and (2) if not an office, whether or not any emoluments accrue to a member of the Advisory Board.

Under the provisions of the Act creating the Agency in question, appointments to the Board are subject to confirmation of the Senate. Inasmuch as this Act requires that persons appointed to the Board shall be confirmed by the Senate, it would appear that its members are officers of the United States within the meaning of Section 2 of Article II of the Constitution of the United States, which provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." It would appear that whenever a statute requires confirmation by the Senate of an appointment made by the President, the position involved is an office within the meaning of the federal Constitution.

Inasmuch as Section 44 of the Constitution of Virginia expressly provides that any person holding any office under the United States government shall not be eligible to membership in either House of the General Assembly of Virginia, I am of the opinion that your eligibility to continue as a State Senator would no longer exist should you accept the office to which the President has appointed you.

Under the provisions of § 2-27 of the Code, should you accept the appointment offered by the President you would, in my opinion, thereby vacate the office of State Senator which you now hold.

Although I have resolved this question by concluding that the position offered by the President is an office, I am further of the opinion if it is not an office that, inasmuch as the position carries with it certain emoluments, under those circumstances alone you could not continue to hold the office of State Senator while entitled to such emoluments.

I regret that I am unable to conclude that you can accept the appointment offered by the President and at the same time continue to hold the office of State Senator.
PUBLIC OFFICERS—Contracts—Commonwealth Attorney not to act as agent for insurance company bonding county officers.

COMMONWEALTH ATTORNEYS—Contracts—May not act as agent for bonding company on county officer’s bond.

HONORABLE JULIUS GOODMAN
Commonwealth’s Attorney for Montgomery County

January 2, 1962

This is in reply to your letter of December 21, 1961, in which you request my opinion as to whether or not a Commonwealth’s Attorney is prohibited by the provisions of § 15-504 from acting as agent for a surety company in connection with writing surety bonds covering deputy sheriffs of the county. It is my understanding that the deputy sheriffs advance the premium and that the agent receives a part of the premium as his compensation for representing the surety company. The deputy sheriff is reimbursed out of county funds.

In my opinion a Commonwealth’s Attorney is clearly forbidden from writing surety bonds covering any officer of the county whenever the premium, or any part thereof, is paid out of funds of the county which the Commonwealth’s Attorney represents in his official capacity.

Section 15-504 of the Code provides, in part, that “No * attorney for the Commonwealth * shall become interested, directly or indirectly, in any contract, or the profits of any contracts, made by * * any officer, * * or in any contract, fee, commission, or premium or profit therefrom, paid, in whole or in part, by the county *.”

This office has held on several occasions that a deputy sheriff is an officer.

PUBLIC OFFICERS—Contracts—Member of Board of Equalization not to sell motor vehicles to county—Contracts prior to accepting office valid.

HONORABLE C. FRED BAILEY
Member, Board of Supervisors of Isle of Wight County

June 12, 1962

This is in reply to your letter of June 9, 1962, in which you state that a member of a firm engaged in the sale of motor vehicles was appointed on May 7, 1962, as a member of the Board of Equalization for your County, and elected as its Chairman. You further state that the motor vehicle agency in which this person is interested (he being the principal owner in the corporation) was the low bidder on April 12, 1962, for the sale of school bus equipment to the School Board of your County; that the equipment has not yet been delivered nor has any payment been made to the motor sales agency under its contract made after the bids were opened and evaluated. The members of the Board of Equalization will be paid a per diem of $20.00 for each day of service.

You have presented for my consideration the following questions:
"Is a member of the Board of Equalization an officer or employee of the County within the meaning of Section 15-504 of the Code of Virginia? Also, if a member of the Board of Equalization is an officer or employee within the meaning of Section 15-504 of the Code of Virginia, can the member become interested or be interested in a contract with the Board of Supervisors or County School Board? And also, would the following described contract, if carried through to payment, be an enforceable contract by either the County School Board or Gwaltney Motor Company and if payment is made on this contract can it be recovered within the two years from time of payment?"

With respect to your first question, I am of the opinion that a member of a board of equalization of a county, appointed under § 58-898 of the Code is an officer of the county. The $20.00 per diem being paid for each day of service makes such a person a paid officer of the county, within the meaning of § 15-504 of the Code.

With respect to your second question, in my opinion the contract in this instance is not prohibited by § 15-504, due to the fact that it was consummated prior to the time the person who has an interest in the sales agency became a paid county officer. Section 15-504, it will be observed, provides that no paid officer of the county shall "become interested *** in any contract with the county." Since the contract was made prior to the time the person in question was appointed and qualified, in my opinion it does not come within the prohibitions of § 15-504. This opinion is not to be construed as being applicable to similar situations in counties that have adopted one of the forms of government provided for in Chapters 11 and 12 of Title 15 of the Code, which contains special statutes relating to contracts with county officials.

PUBLIC OFFICERS—Members of Electoral Board—May not contract with county.

COUNTIES—Contracts—Members of Electoral Board may not contract with county.

June 6, 1962

HONORABLE DONALD C. CROUNSE
Assistant Commonwealth's Attorney for Fairfax County

I have your letter of June 1, 1962, in which you ask the following questions:

"1. Is a member of the Fairfax County Electoral Board, receiving a per diem salary, classified as a County officer so as to come within the purview of Section 15-504 of the Code of Virginia, 1950, as amended, prohibiting a paid County officer from having any interest in contracts or profits from contracts with the County?

"2. The County is interested to know if it can continue to purchase supplies from a company owned by a member of the Fairfax County Electoral Board."
On October 9, 1958, an opinion on a similar question was rendered by this office to the Honorable O. B. Chilton, Clerk of the Circuit Court of Lancaster County. See, Report of the Attorney General (1958-1959) p. 236. We are in accord with the conclusion of this opinion and, therefore, the answer to Question No. 1 is "Yes," and the answer to Question No. 2 is "No."

I call your attention to the fact that under date of March 16, 1950, this office rendered an opinion on the same question to the Honorable Edwin Lynch, Member of the House of Delegates, in which a different conclusion was reached. See, Report of the Attorney General (1949-1950), p. 69. It is my opinion, however, that the opinion of October 9, 1958, is correct.

PUBLIC OFFICERS—School Board Members—Federal government employees may qualify—When precluded.

SCHOOLS—Members of School Board—When employees of federal government may not serve.

HONORABLE G. DUANE HOLLOWAY
Commonwealth's Attorney for York County

June 4, 1962

I have your letter of June 2, 1962, in which you pose the following question:

"May a resident of York County or the Town of Poquoson who is employed as a civilian, under the Federal Civil Service Act, by the National Aeronautics and Space Administration, the United States Army, the United States Navy, or other departments of the United States Government serve on the Board of School Trustees for the Town of Poquoson or on the York County School Board?"

Section 2-27 of the Code is a broad prohibition statute. Section 2-29(14) reads as follows:

"(14) To prevent clerks and employees of the Federal government engaged in the departmental service in Washington from acting as school trustees." (Italics supplied).

Unless the words "in Washington" have some special meaning there would be no need for their inclusion in the statute and we have always considered that this exception applied only to clerks and employees of the departmental service in the City of Washington being exempt from the operation of § 2-27.

Joy v. Green, 194 Va. 1003, upheld the constitutionality of subsection (14) but did not construe the words "in Washington." It is clear, however, from this decision that a person actually working in a Federal department in the City of Washington could live anywhere in Virginia and would be exempt.

Any exception to the general rule must be strictly construed and the ruling as set forth in this letter is in accordance with previous opinions of this office.
PUBLIC OFFICERS—Signature—Rubber stamp permissible.

COURTS—Not of Record—Abstract of Judgment—Rubber stamp may be used for signing.

SIGNATURES—Facsimile—Rubber stamp permissible.

May 21, 1962

HONORABLE CHAS. R. PURDY
Clerk of Hustings Court, Part II, of the City of Richmond

This is in reply to your letter of May 16, 1962, which reads as follows:

"We are receiving from some of the county courts abstracts of judgments for docketing and it is noted that these abstracts have the rubber stamp name of the county judge rather than his signed name or signature. There is a question in my mind as to whether the paper is properly certified by stamping the judge's signature to such paper, and it will be appreciated if you will advise as to the legality of this plan of certifying."

Section 16.1-95 of the Code reads as follows:

"At any time while the papers in any case in which a judgment has been rendered by a court not of record are retained by the court, the judge or clerk of the court shall certify and deliver an abstract of the judgment to any person interested therein. In the absence of any such judge or clerk, or in the event of a vacancy in the office of such judge or clerk, such abstract of judgment may be made and certified by the substitute judge or clerk, if there be one, or by any other judge of a court not of record in such county or city. If the papers in the case have been returned to a circuit or corporation court as provided in § 16.1-115, abstracts of the judgment may be certified and delivered pursuant to the provisions of § 16.1-116."

The object of this section is to provide a means whereby a judgment creditor may protect the lien of a judgment by filing an abstract thereof, duly certified by the judge or the clerk of the county court, in the office of a court of record where the judgment debtor may hold title to real estate. The filing of the abstract does not create a lien but merely operates to give constructive notice of the existence of the lien. When an abstract of judgment is filed with a clerk of a court of record, in my opinion it is the duty of the clerk to docket the abstract, even though it is signed with a rubber stamp or in some other method than the actual written signature of the person who has executed the certificate.

On the question as to whether or not the person may adopt the rubber stamp method for executing official documents, this office recently held that the Governor of Virginia may use a rubber stamp in executing commissions to notaries public and that such method would be in compliance with Section 75 of the State Constitution.

It seems that the opinions generally throughout the United States uphold this form of signature if it is the intention of the person to use that form.

In my opinion, if the rubber stamp method of signature is authorized by the officer, it is sufficient. In 80 C.J.S. under the title of signatures you will find that it is stated that "to sign" means to attach a name by any known method of "impressing the name on paper with the intention of signing it."

Since the abstract referred to in § 16.1-95 is not in itself an act of rendering
judgment, but merely gives notice of the existence of a judgment, I think that the type of signature you have referred to, if intended to be the signature of the officer, is sufficient.

PUBLIC RECORDS—Police records not open to public inspection.

February 14, 1962

HONORABLE LIGON L. JONES
Commonwealth's Attorney for the City of Hopewell

This is to acknowledge receipt of your letter of February 12, 1962, in which you state:

"The Police Department of the City of Hopewell maintains a record on all persons tried in our Municipal Court of this city. The record reveals whether the party was convicted or acquitted and the ultimate disposition of the matter.

"I am writing to inquire whether this is a public record available to all citizens, or whether the record may be held only for the private use of the Department."

Generally, the right to inspect public records has its limitations based on public policy. Attention is invited to the following Sections of 45 Am. Jur., Records and Recording Laws:

Section 17. "In this country, the person asking inspection must have an interest in the record or paper of which inspection is sought and the inspection must be for a legitimate purpose, but interest as a citizen and taxpayer is sufficient in some instances."

Section 26. "The right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection, such as diplomatic correspondence and letters and dispatches in the detective police service, or otherwise relating to the apprehension, prosecution, and detention of criminals, and documents and records kept on file in public institutions concerning the conditions, care, and treatment of the inmates thereof."

Apparently, the Police Department maintains these records for the purpose of prosecution of criminal cases and, therefore, it would be against public policy to permit the general inspection for members of the public who do not have a bona fide interest therein. As a matter of fact, the same information could be secured by any person from the records of the Municipal Court. I believe it would be the best practice to deny any inspection and refer the interested party to the records of the said court. I am enclosing a copy of an opinion issued by this office on November 1, 1934, dealing with the subject of Inspection of Public Records found in Report of the Attorney General, (1934-1935), p. 25.

It is, therefore, my opinion that the records kept by the Police Department of a city showing persons convicted or acquitted of crime are not open to public inspection.
REAL ESTATE BROKERS—Bond—Not necessary to post in each locality if one bond has state-wide application.

BONDS—Real Estate Brokers—Not required in each locality if one bond has state-wide application.

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

September 12, 1961

This is in reply to your letter of September 6, 1961, in which you state that the Board of Supervisors of Fairfax County has enacted an ordinance pursuant to the provisions of § 54-767 of the Code of Virginia requiring a bond of real estate brokers and real estate salesmen doing business in that county. The Commonwealth’s Attorney for the county takes the position that the ordinance applies to all such brokers and salesmen who may act as agents in the sale of real estate located within Fairfax county, but that the Virginia Real Estate Commission has construed this Code section to apply only to such brokers and salesmen who maintain a place of business in the jurisdiction adopting the ordinance.

This section of the Code, as well as §§ 54-768 and 54-769, was enacted by Chapter 172, Acts of 1946, twelve years after the establishment of the Virginia Real Estate Commission by Chapter 461, Acts of 1924. The original act failed to provide for the posting of a bond by licensees thereunder. The 1946 amendment, codified as set forth above, in my judgment, is for the purpose of authorizing a locality to require licensees to post a bond for the protection of the citizens of such locality who engage the services of a real estate salesman or a real estate broker in connection with the sale or purchase of real estate located in the jurisdiction of the governing body. The statute authorizes the governing body of any county, city or town to require any person who acts as a real estate salesman or real estate broker to post the bond “before doing business in such county, city or town.” I am unable to conclude that the statute is limited in application to the locality in which the principal office of the licensee is established. The maximum protection to the citizens of any locality in their dealings with real estate salesmen and real estate brokers may be as much as $15,000 and $30,000, depending on the type of license. If the locality in which the principal place of business is located requires a bond below the maximum and such action prevents other localities in which the licensee transacts business from enforcing such an ordinance that provides for a larger bond, the purpose of the statute will be defeated to that extent.

In the event the governing body of a locality has required a bond and such bond when executed is not limited to the area of the locality but is statewide in the protection it provides, it would seem that proof of the existence of such bond would be all that is necessary to comply with the requirements of any other locality, provided such bond is in an amount sufficient to comply with its ordinance. For example, if Arlington county has adopted an ordinance requiring bonds in the amounts of $10,000 and $5,000, and Fairfax county has enacted an ordinance requiring bonds in the same amount, it would seem that the person whose office is in Arlington and who has filed the bond could comply with the ordinance in Fairfax without furnishing a separate bond, provided, of course, the bond issued in Arlington county provides protection throughout the State. However, if the Fairfax ordinance requires a bond of greater amount than the original bond, such licensee would not be in compliance unless the original bond should be enlarged or a separate bond for the difference should be written and filed.
RECORDATION—Acknowledgment—Facsimile signature permissible.

SIGNATURES—Facsimile on power of attorney permissible.

HONORABLE EDWARD M. HUDGINS
Member, House of Delegates

This is in reply to your letter of April 27, 1962, which reads as follows:

"Mr. Harold V. Thornhill, who represents one of the insurance companies and who resides in Chesterfield County, has made inquiry of the Clerk of the Circuit Court of Chesterfield County as to whether or not facsimile signatures on powers of attorneys which are filed with courts would be acceptable to the Circuit Court of Chesterfield County. Mr. Thornhill was advised that while the matter was not entirely free from doubt insofar as Chesterfield was concerned, such signatures in the past had been accepted. Mr. Thornhill has apparently encountered some difficulty in having these signatures accepted by some of the courts, and in view of the somewhat apparent uncertainty in Chesterfield and elsewhere, he has inquired of me as to whether or not the matter could be cleared up once and for all.

"I am further advised that the surety companies are Connecticut corporations and that the facsimile signatures appearing on the powers of attorney are duly authorized, adopted, and executed by said companies in the State of Connecticut. It would appear to me that facsimile signatures which have been used for a number of years by certain surety companies in the execution of powers of attorney have reduced considerable time-consuming effort and expense. However, in view of the doubt that has been cast upon their acceptance, I would appreciate an expression of your views on this subject."

We have received further information regarding this matter, including a specimen of the type of power of attorney being used by an indemnity company. The specimen is signed by a facsimile signature of an officer authorized to execute such instruments and the corporate seal is affixed by facsimile. The signature of the notary to the certificate of acknowledgment and the notarial seal are also facsimiles. It is my understanding, after discussing this matter with a local attorney interested in the matter, that a question has been raised by one or more clerks of courts of record (in whose offices such documents are filed for recordation) as to whether or not writings signed, sealed and acknowledged in the manner described come within the statutory category of recordable instruments.

As you have pointed out, the writings are executed outside the State of Virginia. It must be assumed, in the absence of evidence to the contrary, that the writings are executed in conformity with the laws of the State in which they were executed. Based upon this assumption, they are valid in this State. See, 11 Am. Jur., Conflicts of Law, Sec. 84. Certainly, if an attorney in fact, pursuant to valid authorization by an indemnity company, executes a surety bond on behalf of the company, the company is estopped to deny the efficacy of the bond. See, § 38.1-650 of the Code.

The Virginia recording statutes applicable here are contained in Chapter 6 of Title 55 of the Code of Virginia. Section 55-106, appearing in this chapter, reads as follows:
"Except when it is otherwise provided, the circuit court of any county, or the corporation court of any city, other than the city of Richmond, in which any writing is to be or may be recorded, and the Chancery Court of the city of Richmond, when any such writing is to be or may be recorded in such city, or the clerk of any such court, or his duly qualified deputy, in his office, shall admit to record any such writing as to any person whose name is signed thereto, when it shall have been acknowledged by him, or proved by two witnesses as to him in such court, or before such clerk, or his duly qualified deputy, in his office, or in the manner prescribed in §§ 55-113 to 55-115, 55-119 and 55-120, inclusive, and when such writing is signed by a person acting on behalf of another, or in any representative capacity, such acknowledgement before such court or clerk, or his deputy, may be in accordance with the provisions of such sections."

Under this section whenever a writing is submitted to a clerk for recordation in his office he is required to admit the writing to record, (assuming the recording fees are tendered) if it is (1) signed, and (2) acknowledged. The clerk, upon determining the writing to be signed and acknowledged (as shown by the certificate) before a notary or other officer mentioned in § 55-113, should admit the writing to record.

On the question as to whether or not a person may adopt the facsimile method for executing official documents, this office recently ruled that the Governor of Virginia may use, or authorize the use of, a rubber stamp in executing commissions to notaries public and that such method would be in compliance with Section 75 of the State Constitution, which requires commissions and grants to "be attested by the Governor." Your question is analogous.

Our research into this question leads us to the conclusion that this form of signature is upheld if it is the intention of the person to use that form. In 80 C.J.S. under the title Signatures, you will find that it is stated that "to sign" means to attach a name by any known method of "impressing the name on paper with the intention of signing it."

Accordingly, it is my opinion that when writings of the nature considered herein are signed, acknowledged and sealed by facsimiles (the officer certifying to the acknowledgment being one authorized to take acknowledgments under § 55-113 of the Code), it is the duty of the clerk to admit the writing to record.

**RECORDATIONS—Chattel Deed of Trust—Livestock and milk base—When to be recorded in deed book.**

**Honorable H. P. Scott**

Clerk, Circuit Court of Bedford County

September 20, 1961

This is in reply to your letter of September 19, 1961, in which you enclose two photostatic copies of deeds of trust and request my opinion as to whether they can be docketed in the Clerk's Office of the Circuit Court of Bedford County under the agricultural chattel deed of trust act. One of the deeds of trust which you have submitted is upon livestock only and the other deed of trust is upon livestock and 6,218 pounds of milk base on the Roanoke, Virginia market.

Section 43-44 of the Code provides that a person may give as security a chattel deed of trust upon livestock. Section 43-53 provides that chattel deeds of trust given under Chapter 6 of Title 43 of the Code may be filed for docketing and that the clerk shall maintain a separate book to be known as the agricultural
chattel deed of trust book, in which he shall docket each instrument filed pursuant to Chapter 6 of Title 43. This section further provides that the beneficiary, however, may require that the chattel deed of trust be recorded at length in the miscellaneous lien book.

It would seem, therefore, that these instruments may be docketed in the agricultural chattel deed of trust book. However, if the beneficiary elects to have the instrument recorded in the miscellaneous lien book, then it must be recorded in a deed book in lieu of the miscellaneous lien book due to the provisions of § 43-4.1 of the Code. Under this latter section the miscellaneous lien book has been abandoned for the purpose of recordation of instruments.

These instrumnts which you have submitted may, however, be treated as deeds of trust upon personal property. In that event they are recordable in the deed books pursuant to § 43-4.1.

RECORDATION—Chattel Deed of Trust—When to be recorded in deed book—Miscellaneous lien book abolished.

December 4, 1961

HONORABLE AUSTIN EMBREY
Clerk, Circuit Court of Nelson County

I have examined the chattel deed of trust which you submitted with your letter of November 30, 1961. You request my advice as to whether this document, which conveys an electric welder with tank complete, should be docketed as an agricultural chattel deed of trust instead of being recorded as a miscellaneous lien.

The question of whether any particular instrument comes within the scope of Chapter 6, Title 43 of the Code must, of course, be determined by the facts in each case. Section 43-44 of the Code provides that any person may give as security "* * * chattel deed of trust on live stock, poultry, farm machinery, farm equipment * * *")

Whether or not the chattel given as security in this instance can be classified as "farm machinery" or "farm equipment" is a matter that we are reluctant to determine. If it comes in either of these classifications, the instrument may be recorded accordingly. However, if the security given does not come within either classification, it must be recorded in a deed book, pursuant to § 43-4.1 of the Code, which was enacted at the 1960 session of the General Assembly by Chapter 81, Acts of 1960.


March 22, 1962

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

This will reply to your letter of March 19, 1962, in which you inquire whether or not a certain establishment in Culpeper County would come within the purview of §§ 35-25 and 35-26 of the Virginia Code, which provisions, respectively, pre-scribe:
REPORT OF THE ATTORNEY GENERAL

“§ 35-25.
(1) ‘Restaurant’ includes restaurant, coffee shop, cafeteria, short order cafe, luncheonette, hotel dining room, tavern, sandwich shop, soda fountain, and all other public eating and drinking establishments by whatever name called, including catering services, the dining accommodations of clubs, all State institutions, and schools and colleges both public and private; provided, however, this chapter shall not be construed to include facilities of public service corporations under the jurisdiction of the State Corporation Commission; ...” (Italics supplied).

“§ 35-26.
It shall be unlawful for any person to operate a restaurant in this State without an unrevoked permit from the Commissioner which permit shall be prominently displayed in the restaurant operated. State institutions, however, shall not be required to secure a permit or post such a permit. (1948, p. 1099; Michie Suppl. 1948, § 1584(2))."

You state that the operator of the establishment in question is engaged in selling packaged sandwiches purchased from a source which is apparently properly licensed and regulated. The sandwiches are heated and served in the packages to purchasers who consume them on the premises, and other packaged foods are sold and consumed on the premises. Moreover, it appears from the collateral document submitted with your communication that the establishment under consideration is one in which people congregate to eat and drink, and that the enterprise is one which has “disease spreading potentialities”.

In light of the language of the statute italicized above, I am constrained to believe that the establishment concerning which you inquire would constitute a “restaurant” within the definition enunciated in § 35-25 of the Virginia Code and that the permit specified in § 35-26 of the Code would be required for its lawful operation.

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SCHOOLS—Band Uniforms—Board may appropriate funds for purchase if school purpose.

BOARDS OF SUPERVISORS—Donations—Not authorized to purchase school band uniforms.

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

July 24, 1961

This will reply to your letter of recent date, in which you call my attention to § 15-16.1 of the Virginia Code and inquire whether or not this statute authorizes the Board of Supervisors of Highland County to “make a donation to a fund to be used for the purchase of uniforms for the local high school band.”

In this connection, I am of the opinion that the provisions of the statute in question are not sufficiently broad to authorize the appropriation concerning which you inquire, nor am I aware of any other provision of the Virginia Code which expressly authorizes the governing bodies of the various counties of Virginia “to make gifts and donations” for the specific purpose you mention. However, I believe that it is within the area of permissible discretion for the County School Board of Highland County to determine whether or not the procurement of uniforms for the local high school band is reasonably incident to the operation of the public school program of the county, and if such determination is affirmatively
made, I am constrained to believe that the Board of Supervisors of Highland
County could properly appropriate funds to the school board to be expended
for such purpose.

SCHOOLS—Board—Authority to participate in annuity plan for teachers.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Creditable Compensa-
tion—Includes amount withheld by employer for premium on annuity plan.

HONORABLE CHARLES H. SMITH
Director, Virginia Supplemental Retirement System

March 1, 1962

I am writing in further reference to your letter of January 31, 1962, and our
subsequent discussions concerning "Tax Sheltered Annuities" provided by Section
403 (b) of the Internal Revenue Code for employees of publicly supported schools.
In this connection, you present the following inquiries which will be considered
in the order stated:

"1. Does the State or a Local Public School Board have authority
to purchase the annuities provided for under Section 403 (b) of the In-
ternal Revenue Code?

"2. If the State and School Boards have authority, would the
premiums used to purchase the annuities for the employees be consid-
ered part of the employee's salary in determining creditable compen-
sation under the Virginia Supplemental Retirement Act and the amount
of life and accident insurance coverage under the Group Life Insurance
program?

If I have correctly assessed the information contained in your communication
and the collateral documents submitted therewith, the cost of all premiums on
such annuities would be borne—through reduction of salary or diversion of in-
crease in salary—by the employee purchasing an annuity; however, such pre-
miums would be withheld from the employee's salary and paid by the employer
to the company selling the annuity. If the procurement of tax sheltered annuities
imposes no legally pending obligation upon agencies of the State or the various
political subdivisions of the Commonwealth, and entails no expenditure of public
funds whatever, I am of the opinion that State agencies and local public school
boards would not be prohibited from arranging for the purchase of such annui-
ties.

With respect to your second inquiry, § 51-111.10 (15) of the Virginia Code
defines "creditable compensation" as:

"... the full compensation payable to an employee working the full
working time for his covered position which is in excess of twelve hun-
dred dollars per annum, except when computing a disability retirement
allowance in which event no exclusion shall apply; in cases where compen-
sation includes maintenance or other perquisites, the Board shall
fix the value of that part of the compensation not paid in money; ..."

As thus defined, the term in question is utilized to determine the contributions of
employers and employees under the Virginia Supplemental Retirement Act. See,
§§ 51-111.46 and 51-111.47, Code of Virginia (1950), as amended. Moreover, the
schedules governing the amount of group life insurance and group accidental
death and dismemberment insurance for which an employee is eligible is estab-
lished by § 51-111.67:4 on the basis of the "annual compensation" of such eligible
employee. I have found no provision of Title 51 of the Virginia Code which purports to authorize reduction of the creditable compensation or annual compensation of an employee by the amounts utilized by him to purchase annuities. I am, therefore, of the opinion that the amounts designated by an employee to be withheld by his employer for the purchase of annuities of the type under consideration would be considered as part of the employee's salary in determining creditable compensation under the Virginia Supplemental Retirement Act and the amount of group life insurance and group accidental death and dismemberment insurance for which an employee may be eligible under the provisions of Title 51, Chapter 3.2, Article 9, of the Virginia Code.

SCHOOLS—Bond Issue for Construction—Proceeds not to be used for construction of any school not specified if listed in question—submitted in referendum.

COUNTIES—Bond Issue—Proceeds not to be used for any purpose not specified in question submitted in referendum.

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

May 28, 1962

I am in receipt of your letter of May 15, 1962, in which you inquire whether or not the proceeds of a certain school bond issue may be "expended toward the development of the Junior High School program of Prince William County."

From your communication and the collateral documents submitted therewith, it appears that the proposal to establish a Junior High School program arose after approval of the bond issue by the people of Prince William County was secured by referendum upon the following question:

"Shall the Board of Supervisors of Prince William County contract a debt in the amount of $4,050,000, and issue general obligation bonds of said County of the aggregate maximum amount of $4,050,000, pursuant to the provisions of the Public Finance Act of 1958 of Virginia, to finance the erection and equipment of the following school buildings and, where necessary, the acquisition of land therefor: (1) a new high school building in the Manassas area; (2) a new high school building in the Occoquan area; (3) a new elementary school building in the Occoquan area; (4) an addition to the existing school building in the Gainesville area; (5) an addition to the existing school building in the Nokesville area; (6) seven new elementary school buildings at suitable locations within the County, and (7) Plans for two new high school buildings at suitable locations within the County?"

It also appears that the Junior High School program under consideration envisions the construction of Junior High School buildings at various locations in the county and the elimination or deferment of some of the specific schools spelled out in the referendum question.

In this connection, I am forwarding to you copies of three previous opinions of this office in which situations substantially similar to those which you present were considered and discussed. See, Report of Attorney General (1950-1951) p. 31; (1956-1957) p. 225; (1960-1961) p. 260 at 263. As you will note, in the most recent of these opinions dated October 10, 1960, it was ruled that the specific
question submitted to the voters on that occasion precluded utilization of the proceeds of the bond issue for any other purpose. In light of these opinions and the detailed nature of the question submitted to the voters of Prince William County in this instance, I am impelled to the conclusion that the proceeds of the bond issue in question may not be diverted to the development of the Junior High School program concerning which you inquire.

SCHOOLS—Bond Issues—Board of Supervisors may call for referendum although opposed to issue.

BOARDS OF SUPERVISORS—Bond Issues—Referendum may be called although board opposed to bond issue.

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

February 20, 1962

This is in reply to your letter of February 8, 1962, which reads as follows:

"The Sussex County School Board in Special session Thursday, February 1, 1962 requested the Sussex Board of Supervisors to call a referendum requesting the borrowing of $1,200,000 to complete the building program for school as set out in their report of October, 1961 showing school building needs.

"Section 15-666.29 states 'Whenever the governing body of any County shall determine that it is advisable to contract a debt and issue general obligation bonds of the County, etc.'

"The Board of Supervisors apparently do not think it advisable to contract a debt and issue general obligation bonds. Nevertheless, some members feel because of agitation in the County a referendum should be called.

"Please advise whether the Board of Supervisors can call for a referendum when they do not think a bond issue is advisable. In other words are the members of the Board committed to support a bond issue in a referendum after calling for same."

You will note that under the first paragraph of the Code section in question the Board of Supervisors must adopt a resolution setting forth the requirements contained in paragraphs (a) and (b). Nothing in these paragraphs requires the resolution to contain a statement regarding the feeling of the Board as to the advisability of the bond issue.

In my judgment, although one or more of the members of the Board of Supervisors may contemplate voting against a bond issue in the referendum, for this reason alone the Board is not prevented from submitting the question to the people for their consideration. Certainly this Code section does not contemplate that members of the Board of Supervisors would be required to vote in favor of the issuance of the bonds in a referendum.

You will note, of course, that under this section before the resolution may be adopted by the Board requesting the court to call an election upon the question of contracting a debt and issuing bonds for public school purposes, the local school board must first request the governing body to take such action.
SCHOOLS—Bus Drivers—Age—Determined at time of entering into contract, or renewal thereof under § 22-276.1.

May 18, 1962

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

This is in reply to your letter of May 16, 1962, which reads as follows:

"At the last session of the Legislature the statute, Chapter 544 approved March 31, 1962, provides: 'No school board or superintendent of schools of any county or city shall hire, employ, or enter into any agreement with any person for the purposes of operating a school bus transporting pupils after July 1, 1962, unless the person proposed to so operate such school bus shall:

"'(e) Be between the ages of 16 and 65 years, both inclusive, at the time of signing such contract.'

"The question has arisen as to whether or not a contract entered into before July 1, 1962 by the school board with a person over 65 would be valid for the school year 1962-1963. In other words, does the language: 'After July 1, 1962' modify the contract of hire or the operation?

"I should appreciate the advice of your office on this as soon as convenient."

In my opinion the amendment to Title 22 of the Code as enacted by Chapter 544 of the Acts of Assembly, (1962), and designated as Code § 22-276.1, would be applicable only to contracts made subsequent to the effective date of the amendment. This, of course, would be applicable to renewal contracts with persons who have previously been employed by the school board for the purpose of operating a public school bus.

SCHOOLS—Bus Drivers—Must be under sixty-five at time of entering into contract—Existing contract may not be renewed if driver over sixty-five years.

June 5, 1962

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

I have your letter of June 4, 1962, advising that your local school board is anxious to retain the services of one of its drivers who is already sixty-five years of age, and requesting that I advise you "specifically whether the local school board prior to July 1, 1962, may renew his contract."

Chapter 544 of the Acts of Assembly, 1962, was approved on March 31, 1962, as an emergency act and, therefore, was effective immediately. My letter to you of May 18, 1962, advised that contracts in force prior to the effective date of this act would be binding without reference to this act, but the terms of this act would be applicable to all contracts made after that date, or to any renewals which did not become effective until after the date of that act. In other words, a contract entered into prior to March 31, 1962, which had a specific time to run beyond that date would be binding, but no new contract or renewal of an existing contract that did not start until after March 31, 1962, would be effective in contravention of this act.

The specific answer to your question, therefore, is that such contract may not be renewed prior to July 1, 1962, if the new contract does not begin to operate until after March 31, 1962.
SCHOOLS—Bus Drivers—Special examination—Required of private and public school drivers.

MOTOR VEHICLES—School Buses—Special examination for drivers applicable to private and public schools.

December 29, 1961

HONORABLE TOM FROST
Member, House of Delegates

This is in reply to your letter of December 21, 1961, in which you request my opinion as to the applicability of the special licensing provisions of § 46.1-370 of the Code of Virginia to operators of private school buses.

Section 46.1-370 of the Code of Virginia reads as follows:

“No person shall drive any school bus upon a highway in this State unless such person has had a reasonable amount of experience in driving motor vehicles, and shall have satisfactorily passed a special examination pertaining to the ability of such person to operate a school bus with safety to the school children thereon and to other persons using the highways. The Division of Motor Vehicles shall adopt such rules and regulations as may be necessary to provide for the examination of persons desiring to qualify to drive such buses in this State and for the granting of permits to qualified applicants.” (Italics supplied)

I find no qualifying language in the above-quoted section of the Code which would in any manner confine the special examination therein required to operators of public school buses. By the portion which I have emphasized, you will note that this statute has the salutary purpose of protecting school children and other persons using the highways. Manifestly, the safety of children attending private schools is no less important than that of children attending public schools.

I must conclude that § 46.1-370 of the Code applies to operators of any school bus, without distinction between public and private schools.

SCHOOLS—Condemnation of Land—Authority of school board to dismiss proceedings.

CIVIL PROCEDURE—Condemnation of Land—Dismissal—When proceedings may be dismissed by condemnor.

December 11, 1961

HONORABLE W. CARRINGTON THOMPSON
Member, House of Delegates

This is in reply to your letter of December 8, 1961, which reads as follows:

“The County School Board of Pittsylvania County is in the process of a building program which requires acquisition of additional tracts of land. Land prices are very high and voluntary purchases are infrequent.

“Assuming that the Board instituted condemnation proceedings to obtain property and when the award is made by commissioners the amount is in excess of what the School Board is willing to pay as a fair and reasonable price, can the Board at that juncture terminate the condemnation proceedings and refuse to take the land? I am assuming here
that no Court Order is entered on the award which was merely returned to the Court and filed."

Section 25-22 of the Code applies and under this section, the School Board may have the proceedings dismissed at any time before any rights have vested. Your attention is directed to the cases cited in the annotations under this section.

SCHOOLS—Control of funds derived from damage suffered by highway construction—School board may spend without further appropriation.

BOARDS OF SUPERVISORS—Appropriations—Schools—Board may consider proceeds paid school board for damage to school property when making budget.

February 2, 1962

HONORABLE E. B. STANLEY
Division Superintendent of Washington County Schools

This has reference to your letter of January 30, 1962, relating to the disposition to be made of funds which have been paid to the Washington County School Board by the Department of Highways for damages to the North Bristol school property by reason of the construction of a highway project.

A similar question was considered by my predecessor in office in a letter addressed to Honorable Thomas A. Warriner, Jr., Commonwealth's Attorney for Brunswick County, under date of October 19, 1960. I am enclosing a copy of that letter in which you will note the Attorney General there expressed the view that proceeds from an award in a condemnation proceeding against school property would be subject to the appropriation power of the board of supervisors. That conclusion was based principally upon § 15-577 of the Code of Virginia, as amended, and the defeat of Senate Bill No. 294 which was introduced during the 1960 session of the General Assembly of Virginia.

Subsequent to the time of the opinion to Mr. Warriner, the Supreme Court of Appeals of Virginia had occasion to consider the extent of control in the school boards over public school property. See Howard v. County School Board of Alleghany County, 203 Va. 55. The Court there made it quite manifest that the school board is charged with the supervision of public schools by virtue of Section 133 of the Constitution of Virginia, and that such supervision extends to the control of property devoted to school purposes.

In view of the foregoing, I am of the opinion that the funds derived from the taking of school property by the Virginia Department of Highways became vested in the Washington County School Board to the same extent as the property which was damaged. This fund may be expended by the Board without further appropriation by the Board of Supervisors. Of course, the Board of Supervisors may take this fund into consideration in fixing the school budget and in determining any other appropriation it might make for school purposes.
SCHOOLS—Control of funds derived from sale of school property.

BOARDS OF SUPERVISORS—Appropriations—Schools—Board may consider proceeds paid school board in sale of property when making budget.

HONORABLE G. DUANE HOLLOWAY  
Commonwealth’s Attorney for York County

This is in reply to your letter of April 11, 1962, in which you request my opinion as to the proper disposition of the proceeds of a sale of school property by the School Board of York County to the First Corporate School District of the Town of Poquoson. You advise that a portion of the purchase price was paid in cash and the school trustees of the First Corporate School District of the Town of Poquoson assumed the balance of unpaid loans on the said school property.

You are particularly interested in knowing if the cash proceeds must be paid into the general fund of the County of York or whether this fund may be deposited in a school fund without an appropriation from the County Board of Supervisors.


You will note that the conclusion reached in the letter of October 19, 1960 to Honorable Thomas E. Warriner, Jr., was to the effect that the proceeds derived from a condemnation proceeding in which a portion of school property was taken by the Virginia Department of Highways must be placed in the general fund of the county, and subjected to the appropriation power of the board of supervisors. The last paragraph of § 15-577 of the Code of Virginia (1950), as amended, now reads as follows:

"The contemplated expenditure for all purposes as contained in the budget prepared under §§ 15-575 and 15-576 and published under this section shall be for informative and fiscal planning purposes only and shall not be deemed to be an appropriation. 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."

You will note that the letter addressed to Honorable J. O. Morehead is to the effect that proceeds derived from insurance on a school building destroyed by fire became vested in the School Board to the same extent as the property which was destroyed. That conclusion was based upon the provisions of § 22-147 of the Code of Virginia and the recent decision of the Supreme Court of Appeals of Virginia in the case of Howard v. County Board of Alleghany County, 203 Va. 55.

While neither the statute nor the Supreme Court decision, above-mentioned, expressly passes upon the disposition of funds derived from the disposal of
school property, I am inclined to believe that the powers of the school board over school property extend to supervision of moneys derived from the disposal of such properties. I thus conclude that the proceeds derived from the disposal of school properties are not moneys in the county treasury which are subject to the periodic appropriation powers of the board of supervisors within the contemplation of § 15-577 of the Code.

It should be pointed out, however, that the board of supervisors may take this fund into consideration in fixing the school budget and in determining any other appropriation it might make for school purposes.

SCHOOLS—Division Superintendent—Office abolished when county and city merges.

PUBLIC OFFICERS—Abolition of Office—Upon merger of county and city school divisions are abolished and Division Superintendents vacate office.

HONORABLE W. ROY BRITTON
Chairman, South Norfolk City School Board

January 24, 1962

This is in reply to your letter of January 17, 1962, in which you raise a question as to the effect of a proposed merger between the City of South Norfolk and Norfolk County upon the present Division Superintendent of Schools in the City and County. Your letter reads, in part, as follows:

"According to the proposed charter, either the Division Superintendent of Norfolk County or the Division Superintendent of South Norfolk will be appointed Superintendent of Schools of the consolidated city, if the merger goes through. The other Superintendent will become Assistant Superintendent. I am wondering where that will leave our School Board, which appointed the present Superintendent for a four-year term, under the law, if he is declared Assistant Superintendent, which apparently is likely.

"I am concerned, too, about a possible charter change that would, in effect, cancel his contract. Our Board appointed him in good faith, for the regular four-year term. What effect would the appointment of a new School Board for the new city have on this appointment and on his status?"

While true that the present Division Superintendents were appointed for a term of four years, they do not have a contract with the City and County which cannot be impaired by legislative action. It is a well established principle that public offices are not held by grant or contract. Such offices are created by lawmaking power, and no person has a vested right in them. See the recently decided Virginia case of Walker v. Massey, 202 Va. 886.

There can be little question as to the power of the General Assembly to provide for a consolidation of the two school divisions here in question. This authority is expressly conferred by Section 133 of the Constitution of Virginia which reads, in part, as follows:

"The General Assembly may provide for the consolidation, into one school division, of one or more counties or cities with one or more
counties or cities. The supervision of schools in any such school division may be vested in a single school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Upon the formation of any such school board for any such school division, the school boards of the counties or cities in the school division shall cease to exist."

I am of the opinion that upon merger of South Norfolk and Norfolk County the former political subdivisions will cease to exist and the school divisions therein will be abolished. The division superintendent for the newly consolidated city may be appointed by the school board of the new division pursuant to the final paragraph of Section 133 of the Constitution of Virginia, which reads as follows:

"There shall be appointed by the school board or boards of each school division, one division superintendent of schools, who shall be selected from a list of eligibles certified by the State Board of Education and shall hold office for four years. In the event that the local board or boards fail to elect a division superintendent within the time prescribed by law, the State Board of Education shall appoint such division superintendent."

SCHOOLS—Insurance-Disposition of proceeds from fire policy—School Board has control.

SCHOOLS—Control of funds derived from fire insurance policy.

HONORABLE J. O. MOREHEAD
Superintendent, Bland County Schools

January 30, 1962

This is in reply to your letter of January 24, 1962, in which you request my opinion regarding the disposition to be made of the proceeds derived from insurance on a school building which was destroyed by fire. You state that a group of citizens from the magisterial district in which the destroyed school was located has requested the Board to make the money available to them for the purpose of rebuilding a school within that magisterial district. The Board of Supervisors has gone on record as favoring such a proposal. You asked my opinion as to whether the Bland County School Board is acting within its authority in its refusal to relinquish control of this fund.

Section 133 of the Constitution of Virginia places the responsibility for the supervision of the public schools in the school boards of the several counties and cities. Such supervision extends to the control of property devoted to school purposes. See Howard v. County School Board of Alleghany County, 203 Va. 55. By virtue of § 22-147 of the Code of Virginia all property set apart for school purposes is vested in and managed by the county school boards. When the school in question was destroyed by fire, the proceeds from the insurance policy covering this building became vested in the School Board to the same extent as the property which was destroyed. These funds must be utilized by the School Board in the same manner as are other public funds appropriated for school purposes. I am aware of no authority whereby the Board could relinquish control of public funds to a group of citizens for the purpose of constructing a new school building.
SCHOOLS—Joint Committee for County and City—Fiscal officer must be treasurer of one political subdivision—Salary may be fixed by committee or judge of appropriate court.

TREASURERS—Duty to act as fiscal official for joint school committee—How compensated.

HONORABLE JAMES S. EASLEY
Commonwealth' Attorney for Halifax County

May 24, 1962

This is in reply to your letter of May 22, 1962 in which you refer to §§ 22-133.1 and 15-486 of the Code. I quote from your letter as follows:

"... Pursuant to the understanding which was drawn up between South Boston and Halifax County a joint committee for control was organized on July 1, 1961, pursuant to applicable regulations of the State Board of Education for the operation of joint schools between counties and cities and the consolidated high school has been governed by this committee ever since.

"The regulations of the State Board of Education provide that the committee for control shall elect a finance officer who shall have custody of the funds of the committee for control; fix his compensation; and provide for his bond. The finance officer may be the county or city treasurer of one of the participating school divisions or some other competent person not a member of the committee for control.

"The Treasurer of Halifax County was appointed finance officer for the committee for control and he has now submitted to the county a claim for compensation in the amount of $600.00 per year which would be in addition to the compensation he regularly receives as County Treasurer.

"... After consideration of the above facts I would like to submit the following questions to you for consideration:

"1. Can the county treasurer be legally employed as finance officer for the committee for control in light of § 15-486?

"2. If so, is it mandatory that the committee for control compensate the county treasurer for services rendered over and above the amount fixed by the Compensation Board?"

Your first question is answered in the affirmative. The regulations of the State Board of Education were promulgated under authority of § 22-7 of the Code and the finance officer was designated pursuant to § 22-133.1 to which you refer. Actually, the county treasurer is by this section the fiscal agent of any such joint school and his duties are described therein. Neither this section nor the resolution of the State Board creates an additional office, but merely prescribes additional duties to be performed by the treasurer. Since this is not an office, the prohibitions of § 15-486 of the Code do not apply.

I do not concur in your statement that the "finance officer may be the county or city treasurer of one of the participating school divisions or some other competent person not a member of the committee for control." Upon inquiry to the Director of Finance for the State Board I find that the regulation to that effect was adopted prior to the enactment of § 22-133.1. To the extent that the regulation is in conflict with this section of the Code, it is not operative.

With respect to question 2, § 22-133.1 provides that the treasurer shall be paid for his services as fiscal agent such salary as he and the committee for control may agree upon. If they cannot agree, the salary shall be fixed by the judge
of the appropriate court, which action of the judge shall be binding upon the treasurer and the committee for control.

SCHOOLS—Location of Schools—Board must observe county zoning ordinance.
ZONING—School Boards—Must observe zoning ordinance in locating schools.

HONORABLE G. DUANE HOLLOWAY
Commonwealth’s Attorney for York County

January 2, 1962

This is in reply to your letter of December 18, 1961, in which you cite certain provisions of the County Zoning Ordinance which prohibit the building of schoolhouses in certain areas.

You have presented three questions for my consideration, as follows:

"1. Realizing that the School Board of York County, Virginia is generally charged with the duty of providing adequate school buildings for the County of York according to the general law of the State of Virginia, is the School Board of York County, Virginia nevertheless required to comply with the York County Zoning Ordinance by obtaining a Use Permit from the Board of Supervisors of York County, Virginia prior to the construction of a school building within the County of York and within the zones listed above?

"2. If the School Board is required to obtain a Use Permit before constructing school buildings within the zones listed above and within the County of York, may the School Board of York County, Virginia expend public monies for the purchase of real property for the purpose of constructing school buildings thereon prior to obtaining said Use Permit?

"3. If the School Board of York County is required to obtain a Use Permit before constructing school buildings within the zones listed above and within the County of York, may the Board of Supervisors of York County, in its discretion, refuse to issue such Use Permits if the said Board of Supervisors reasonably believes that the construction of a school building within any proposed area might be detrimental to the general planning of the County?"

York County comes within the scope of Article 2, Chapter 24 of Title 15 of the Code, §§ 15-844 to 15-854, inclusive. Under the provisions of these sections, it is clear that the authority to enact and enforce zoning ordinances is vested in the governing body of the county, subject to such powers as may be delegated by the Board to a Board of Zoning Appeals.

In my opinion the school board of a county is subject to the regulations pertaining to zoning as adopted by the board of supervisors. The statutes fail to contain any exceptions of this nature. In accord with this conclusion, I am of the opinion that questions 1 and 3 presented by you must be answered in the affirmative.

With respect to question 2, I do not feel that it is within the power of the governing body to prevent the purchase of real estate, the power being limited to restricting the use of property.
SCHOOLS—Location of Schools—To be determined by school board, not board of supervisors.

BOARDS OF SUPERVISORS—No authority to determine location of schools.

November 1, 1961

HONORABLE LESLIE D. CAMPBELL, JR.
Commonwealth’s Attorney for Hanover County

This is in reply to your letter of October 30, 1961, which reads as follows:

"I have been requested by the County School Board to obtain an opinion from your office on the following question:

"'Can a Board of Supervisors negotiate for the purchase of a tract of land and appropriate a certain sum of money for its purchase for the purpose of establishing a school thereon without the concurrence of the School Board as to the wisdom of purchasing the land for a school site?"

"The facts applicable to the question are as follows: The members of the two boards consider the acquisition of tract A as a school site; the Supervisors, by resolution, authorized the School Board to purchase tract A; the School Board negotiates with the owners for tract A but do not consummate the purchase, indicating that tract B is more desirable for a school; the Supervisors, through further negotiations, determine that the owners of tract A will sell and advise the School Board that they are negotiating for the purchase of tract A, have appropriated money for its purchase and requests the School Board to reconsider tract A for the school instead of tract B; the purchase price for the property is not included in the school budget and is an additional appropriation for school purposes."

Under the provisions of Article 1, Chapter 9, Title 22 of the Code of Virginia, the acquisition and management of property for public school purposes is the prerogative of the county school board. Furthermore, it is provided in § 22-72(6) of the Code that:

"The school board shall have the following powers and duties:

* * * *

"(6) To provide for the erecting, furnishing and equipping of necessary school buildings and appurtenances and the maintenance thereof."

The only function of the board of supervisors in connection with the acquisition of a school site is the exercise of its power to control the amount of appropriations. (Sections 15-577 and 58-839 of the Code.)

To the extent that your question relates to the authority of the board of supervisors to require the school board to accept title to and utilize a tract of land for public school purposes, I am of the opinion the board of supervisors does not possess such authority.
SCHOOLS—Regulations of School Board—Limiting married students to class work of doubtful validity.

HONORABLE ALFRED H. GRIFFITH
Commonwealth's Attorney for the City of Buena Vista

January 9, 1962

I am in receipt of your letter of recent date, in which you inquire whether or not a certain regulation of the School Board of Buena Vista would be valid and enforceable under § 22-97 of the Virginia Code.

The substance of the regulation in question and the circumstances surrounding its adoption are set forth in an excerpt from the minutes of the school board meeting of February 23, 1959, which is quoted in your communication in the following language:

"The superintendent read a letter from the High School principal requesting a ruling on married pupils being limited to class work only, and not being permitted to participate in extra-class activities. Mr. Kling recommended that such a regulation be adopted, effective with the 1959-1960 session, but that it not be made retroactive for married pupils already enrolled with respect to organizations to which they already belong or office which they already hold. He asked the Board to give this matter serious consideration. The Board unanimously accepted Mr. Kling's recommendation upon the motion of Mr. Depriest, seconded by Mr. Bosserman."

The pertinent part of § 22-97 of the Code of Virginia, (1950) as amended, provides:

"The city school board shall have the following powers and duties:

(1) Rules and regulations.—To explain, enforce, and observe the school laws, and to make rules for the government of the schools, and for regulating the conduct of pupils going to and returning therefrom.

(4) Suspension or expulsion of pupils.—To suspend or expel pupils when the prosperity and efficiency of the school make it necessary.

It is clear that § 22-97 of the Virginia Code embodies a broad responsibility and confers commensurate authority upon the school boards of the various cities of the Commonwealth with respect to the government and operation of the local schools. In this connection, I do not doubt that city school boards may adopt regulations limiting the participation of students in extra-class activities whenever necessary for the efficient government of the schools, management of the student body and operation of the educational program.

Of course, all such regulations must be reasonable, and in order to meet that test the basis upon which a student is prohibited from participating in extra-class
activities must have a rational connection to some proper objective of the school board. For instance, it would seem that a demonstrably rational and practical connection would exist between a student's academic achievement and his extra-class activities, which connection would serve as a basis upon which students may properly be prohibited from participating in such activities on the basis of academic deficiencies. However, I am constrained to believe that a connection between the marital status of a student and his extra-class activities is much more tenuous and that the authority of a school board to prohibit a student from participating in such activities would be correspondingly limited when the sole basis of the exclusion is the fact that the pupil is married. It may well be that the general difference in maturity between married and unmarried students would be a proper ground for prohibiting participation in some extra-class activities but would not be sufficient as a valid ground for his exclusion from other activities. In each instance the question of whether or not a regulation of the type under consideration could be enforced would depend upon the nature of the activity from which the married student was excluded and the relationship of the exclusion to the welfare of the school, the particular pupil in question, the student body generally and the furtherance of the school's educational program.

In light of the foregoing, it would appear that no dispositive answer to the question you present can be given which would be applicable to all situations and that the enforceability of the regulation concerning which you inquire would depend upon the particular situation in which the regulation is invoked.

SCHOOLS—Scholarships—Not necessary to be a resident to obtain.

HONORABLE WILLIAM H. PHILLIPS
Commissioner of the Revenue, Virginia Beach

June 27, 1962

I have your letter of June 26, 1962, which I quote, in part, as follows:

"It is requested that an opinion be rendered as to whether a military officer, a non-resident of the State of Virginia, is entitled to the State Tuition Grant because of his child's attendance at a private school. The father is in the military service and claims Ohio as his legal residence."

Section 22-115.32 provides, in part, as follows:

"§ 22-115.32. Every child between the ages of six and twenty, residing in any county, city, or town which provides for the payment of local scholarships under the provisions of this article, who has not finished or graduated from high school, and who desires to attend a nonsectarian private school located in or outside, or a public school located outside, such county, city, or town, shall be eligible and entitled to receive such local scholarship."

If, therefore, the child is entitled to attend a public school, he is entitled to the tuition grant. The question of residence or non-residence of the father does not enter into the giving of the grant.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—School Boards—Contracts with members of School Trustee Electoral Board prohibited—Not applicable to conveyances of land.

PUBLIC OFFICERS—Contracts—Conveyances of land between school board and member of School Trustee Electoral Board not prohibited.

December 7, 1961

HONORABLE W. EARLE CRANK
Commonwealth's Attorney for Louisa County

This is in reply to your letter of December 5, 1961, in which you present the following questions:

"1. May a member of the School Trustee Electoral Board legally purchase land from the County School Board?
"2. If a member of the School Trustee Electoral Board cannot legally purchase real estate from the County School Board, is a deed from the County School Board to a member of the School Trustee Electoral Board made under order of the Court in pursuance of Section 22-161 of the Code of Virginia void or voidable?"

A similar letter has been received from the Vice Chairman of Louisa County Board of Supervisors, and I am sending him a copy of this opinion.

Members of the school trustee electoral boards are appointed under § 22-60 of the Code and are county officers. Under this section it is provided that the members of such board shall receive a per diem of $10.00 for each day actually employed, to be paid out of the funds made available to the school board. Such members are paid officers within the meaning of that term as used in § 15-504 of the Code.

Section 15-504 prohibits "any paid officer" of a county from becoming directly or indirectly interested in any contract made by or with the county school board. Section 15-504.2 provides that "the provisions of § 15-504 shall not be construed to apply to real estate purchased from or sold to the county in the manner prescribed by § 15-333."

Section 22-161 delegates power to a school board to sell school property by following the procedure set forth in § 15-692. Compliance with this procedure is required before there can be any valid sale. Furthermore, since the sale is being made to a person coming within the prohibitions of § 15-504, it will be necessary to obtain in advance the approval of the unanimous vote of the board of supervisors as well as the approval of the judge of the circuit court as required by the terminal paragraph of § 15-333. Under the procedure outlined herein, in my opinion, the transaction would be valid.

SCHOOLS—School Boards—Meetings for nomination of members—Electoral board may adopt own procedure.

June 12, 1962

HONORABLE LESLIE D. CAMPBELL, JR.
Commonwealth’s Attorney for Hanover County

This is in reply to your letter of June 8, 1962, relating to the procedure to be followed by a school trustee electoral board at its meetings. This board, appointed under § 22-60 of the Code, appoints members of the county school board as
provided by § 22-61 of the Code, after publishing the notice required by § 22-62. No procedure for the conduct of its meetings is prescribed in these statutes.

You state the following facts and present the following questions:

"On May 23, 1962, the Board met for the purpose of appointing a member to the School Board. At this meeting, a member of the School Trustee Electoral Board nominated a certain person as a member of the School Board. This nomination did not receive a second from the other members of the School Trustee Electoral Board. The chairman then vacated the chair and made a motion that the meeting adjourn until June 13, 1962.

"The chairman now desires to know what the proper procedure will be upon opening the meeting on June 13th. He advises me that the School Trustee Electoral Board member who made the nomination desires to withdraw this nomination and leave the floor open for discussion, prior to any further action by the School Trustee Electoral Board. These facts present the following questions, which the chairman would like to have answered:

"1. Should the request of the nominating member of the School Trustee Electoral Board be granted at the meeting, or

"2. Did the nomination at the meeting of May 23, 1962, die for the lack of a second?

"3. Should the meeting be continued in accordance with Roberts Rules of Order?"

I shall answer your questions in the order stated:

1. This question is answered in the affirmative, unless the Board has previously adopted a rule of procedure to the contrary. The nomination could have been withdrawn at any time before the question was put to a vote. Since the meeting is merely in recess, due to the adjournment until June 13, the nomination may be withdrawn when the recess period is ended.

2. The answer is no. In the absence of a statute requiring a nomination to be seconded, or of a previously adopted rule to that effect, I am of the opinion that the question on the appointment of a school board member can be put to a vote by the chairman without a second having been made. This is in accord with the opinions of this office to the effect that a motion made by a member of a board of supervisors should be put to a vote, although the motion is not seconded. Report of Attorney General (1956-1957), p. 35.

3. Not necessarily, unless the Board has previously adopted Roberts Rules of Order as the rules to govern its meetings.

SCHOOLS—School Boards—Member of county board may be member of town council.

PUBLIC OFFICERS—Member of town council may serve on county school board.

Dr. Woodrow W. Wilkerson
Superintendent of Public Instruction

June 5, 1962

I have your letter of June 4, 1962, in which you raise the question "concerning the eligibility of a person to serve as a member of the county school board at the same time he is serving as a member of a town council or mayor of a town. The council for the town is located within the geographical boundary of the county
for which the school board is responsible for the operation of public schools in both the county and the town."

Section 22-69 of the Code of Virginia provides, in part, as follows:

"No State or county officer, or any deputy of such officer, and no supervisor shall be chosen or allowed to act as a member of the county school board.

A mayor of a town or a member of a town council is not a State or county officer but is an officer only of the town; therefore, there appears to be no prohibition in the law against such person serving on a county school board. A former opinion of this office given to the Honorable Stanley A. Owens, Commonwealth's Attorney for Prince William County, under date of March 29, 1957, held that a district supervisor of a soil conservation district was neither a State nor county officer and, therefore, was eligible to serve as a member of the county school board.

SCHOOLS—Tax Levy—Revenues from special levy cannot be used for any other purpose.

TAXATION—Levy for School Bond Retirement—Revenues may not be used for other purposes.

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

March 5, 1962

This is in reply to your letter of March 3, 1962, which reads as follows:

"Page County completed a new high school and a new elementary school in 1961 on funds borrowed from the State 'funds.' A levy of $1.00 was set up for debt retirement. At present there is in the debt retirement fund approximately $22,000.00 over and above what will be needed for the next retirement of bonds and interest.

"The Board of Supervisors authorized the school board to borrow from the Literary Fund the sum of $140,000.00 for the purpose of building a new gymnasium at the Luray High School. This loan was approved and bids for construction were received. The lowest bid for the gymnasium was approximately $178,000.00, being more than the amount of the approved loan. My question is whether the Board of Supervisors of Page County can authorize the school board to transfer the present amount of $22,000.00 in the debt retirement fund toward the construction of the new gymnasium, and thus avoid borrowing the whole additional amount of $38,000.00. I might add that the present debt retirement levy of $1.00 is estimated to be sufficient to retire the present indebtedness and also the additional indebtedness for the gymnasium."

As I understand the question the one dollar levy made by the board of supervisors is solely for the purpose of debt retirement and is not made for debt retirement and capital outlay. If my assumption is correct, I am of the opinion that no part of the revenues collected on account of the one dollar levy may be applied to the cost of the gymnasium. The one dollar levy is for a specific purpose and it is well settled that where taxes are levied in such manner, the revenues collected from such levy may not be used for any other purpose.
The question of whether or not teachers engaged in field trips in the United States or foreign countries would be covered under the Workmen's Compensation Act is one to which no general answer applicable to all situations can be given. In each instance, this question must be resolved upon a consideration of the totality of facts and circumstances surrounding the individual case. With respect to the particular examples contained in the concluding paragraph of your inquiry, I am of the opinion that the teachers you mentioned would be covered by the Workmen's Compensation Act if they were authorized or directed by the Arlington County School Board to accompany and supervise the students involved, and if their compensation and expenses were paid by the Arlington County School Board. Of course, any accident resulting in injury to or death of an employee—teacher must arise "out of and in the course of the employment" to be compensable under the Workmen's Compensation Act. Section 65-7, Code of Virginia, (1950); City of Richmond v. Johnson, 202 Va. 33.

SCHOOLS—Trustee Electoral Board—Eligibility—Retired superintendent may serve.

November 14, 1961

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

This is in reply to your letter of November 13, 1961, which reads as follows:

"Will you please give me your opinion as to whether or not under Section 22-60 of the Code of Virginia a former Superintendent of Schools, who is now retired and drawing retirement pay, is eligible to serve on the School Trustee Electoral Board?"

Section 22-60 prohibits the appointment of a county or state officer to the
office under consideration and the terminal sentence of this section provides as follows:

"* * * No person employed by, or paid from, public school funds in whole or in part shall be eligible to serve on such trustee electoral board."

In my opinion, a person who has retired from the office of Division Superintendent of Schools pursuant to the Virginia Supplemental Retirement Act would not be disqualified for membership on a school trustee electoral board. Public school officials who have retired under Title 51 of the Code are no longer officers or employees of the State or any of its political subdivisions. The retirement allowance received by a person who was formerly employed in the public school system is not paid out of the public school funds but is paid out of the trust fund which is administered by the board of trustees of the Virginia Supplemental Retirement System established under § 51-111.17 of the Code. It is provided in subsection (d) of § 51-111.16 of the Code that any funds remaining in the assets of the retirement system after all the vested benefits provided for have been paid, shall revert to the general fund and not to the particular source from which contributions to the trust fund have been made.

SHERIFFS AND SERGEANTS—Concurrent jurisdiction between county and city upon transition into city of second class.

CITIES AND TOWNS—Transition to City of Second Class—Sheriff of county has concurrent jurisdiction with city sergeant.

HONORABLE JOHN H. RUST
Attorney for the City of Fairfax

July 18, 1961

This is in reply to your letter of July 13, 1961, in which you asked to be advised as to whether warrants in the courts not of record for the City of Fairfax may be served by the Sheriff of Fairfax County, or whether it be necessary that such warrants be served by the City Sergeant of Fairfax.

By virtue of § 15-94 of the Code of Virginia, the Sheriff of the County of Fairfax is to continue to exercise the same duties and have the same jurisdiction as he did in the Town of Fairfax prior to the time such municipality was declared to be a city of the second class. That section reads as follows:

"The Commonwealth's attorney, the clerk of the circuit court and the sheriff of the county, of which the city is a part, whether heretofore or hereafter elected or appointed, shall continue to exercise and have the same rights and privileges, perform the same duties, have the same jurisdiction, and receive the same fees therefor in such city as they did in such town before such municipality became a city; and the qualified voters residing in such city shall be entitled to vote for such officers at the general election for county officers and the wards of the city shall be treated, for such election purpose, as precincts of the county, as if such city has not been declared to be a city of the second-class."

In view of the foregoing, I am of the opinion that the City Sergeant of the City of Fairfax and the Sheriff of Fairfax County have concurrent jurisdiction within the City of Fairfax and, accordingly, either may serve civil warrants which are returnable to the court not of record.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS AND SERGEANTS—Injuries—County authorized to appropriate funds for relief of deputy injured while on duty.

COUNTIES—Appropriations—Relief of deputy sheriff injured while on duty.

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

October 9, 1961

This is in reply to your letter of October 5, 1961, which reads as follows:

"The Deputy Sheriff of Montgomery County, in the discharge of his duties in endeavoring to arrest a person who had committed a felony, was shot and injured, causing the Deputy Sheriff to be hospitalized.

"The Board of Supervisors do not have, so far as I know, any special insurance protection by way of Workmen's Compensation or otherwise, unless said protection is automatically provided under the statute. Therefore, would the Board of Supervisors be responsible to pay the medical and hospital bills of the Deputy Sheriff or would the State properly participate in the paying of said bills along with the Board of Supervisors, since part of the salary received by the Deputy Sheriff is paid by the State.

"I will appreciate you letting me have an opinion on the above matter."

Prior to the amendment in 1954 of § 65-4 of the Code, the sheriff and his deputies were not covered by the Workmen's Compensation Act. Board v. Lucas, 142 Va. 84. By this amendment, (Acts of 1954, Chapter 246) "sheriffs and their deputies * * shall be deemed to be employees of the respective * * counties * * in which their services are employed and by whom their salaries are paid." By Chapter 187, Acts of 1958, this section was amended so as to add to the above sentence the words "or in which their compensation is earnable." Thus, by these amendments, sheriffs and their deputies are covered by the Workmen's Compensation Act, and have, for such purpose, been declared to be employees of the county in which they perform their services and earn their compensation.

Section 15-555 of the Code, as amended by Chapter 246, Acts of 1954, authorizes the board of supervisors of a county in its discretion, to make allowances by appropriation of funds, payable in monthly or semimonthly installments for the relief of sheriffs or deputy sheriffs who suffer injury or death as defined in the Workmen's Compensation Act.

Under these statutes I am of the opinion that the board of supervisors may appropriate funds for the purpose of paying an award made under Title 65 to a deputy sheriff.

I am not aware of any provision authorizing or requiring the State to participate in making such payments.
SHERIFFS AND SERGEANTS—Injuries—County not legally liable to pay—Personal insurance policy applies.

COUNTIES—Appropriations—Relief of injured employee—No legal liability—Personal insurance policy applies.

December 19, 1961

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This is in reply to your letter of December 15, 1961, which reads as follows:

"One of the Deputy Sheriffs of our County was operating his automobile one night last month on duty for the Sheriff's Department. Unfortunately, he had an accident, his car having slipped over into a ditch, I believe, it being a non-collision accident, causing his hospital and doctor expenses to come to something over $200.00.

"The Board of Supervisors does not pay in any money under the State Workmen's Compensation laws for their members. However, this Deputy Sheriff does have an insurance policy of his own which, in effect, states that if there is any other liability against anyone else for the payment of this bill, that the insurance company is not liable for the payment thereof. In other words, if the Board of Supervisors is legally liable to pay this bill, then the exception in the automobile policy states that the insurance company is not liable.

"I am herein enclosing you a copy of the exception shown in the insurance policy belonging to the Deputy Sheriff which speaks for itself.

"I trust that you will let me have an opinion as to whether or not the Board of Supervisors would have to pay this bill, since same was presented to it by the Deputy Sheriff and the insurance company refuses to pay the same."

Reference is made to my opinion to you of October 9, 1961, relating to this matter. In that opinion it was pointed out that a deputy sheriff is deemed to be an employee of the county under the provisions of the Workmen's Compensation statutes. However, it was further pointed out that the governing body of a county may, but is not required to, provide this protection. Your county board has not elected to appropriate funds for this purpose. Therefore, the workmen's compensation benefits are not payable to the deputy sheriff in question.

I am of the opinion, therefore, that the exception contained in the insurance policy to which you refer (copy of which exception you submitted with your letter) does not apply in this case.

SHERIFFS AND SERGEANTS—Jurisdiction—Enforcement of game laws—Limited to locality for which elected.

GAME AND INLAND FISHERIES—Game Wardens—Sheriff is ex officio warden for respective bailiwick.

December 21, 1961

HONORABLE JAMES H. YOUNG
Sheriff, City of Richmond

This is in reply to your letter of December 15, 1961, in which you request my opinion as to whether the Sheriff of the City of Richmond has Statewide juris-
diction for the enforcement of game laws and serving process relating to violations of such laws by virtue of §§ 29-29 and 29-30 of the Code of Virginia of 1950.

The sole jurisdiction, power or authority to enforce the game laws of this State is vested in the Commission of Game and Inland Fisheries by virtue of § 29-13 of the Code. This jurisdiction is exercised through game wardens appointed by the Commission. All sheriffs and other peace officers of the State are ex officio game wardens by virtue of § 29-29 of the Code. Section 29-30 of the Code grants Statewide jurisdiction to game wardens.

I do not believe that § 29-29 of the Code can be construed to extend the jurisdiction of local peace officers throughout the State. I think the effect of this section is to confer jurisdiction upon such peace officers to enforce game laws within their respective bailiwicks, which jurisdiction would otherwise be exclusively exercised by the game warden appointed by the Commission of Game and Inland Fisheries.

SIGNATURES—Governor may affix by rubber stamp.

NOTARIES PUBLIC—Appointment—Governor may use rubber stamp for signature.

Honorable Martha Bell Conway
Secretary of the Commonwealth

This is in response to your letter of February 28, 1962, relative to the appointment of notaries public by the Governor as provided for in § 47-1 of the Code of Virginia. Your letter reads, in part, as follows:

"Two signatures appear on the notary commission, the Governor's and that of the Secretary of the Commonwealth. In order to relieve the Governor of the burden of personally signing each commission our present practice is to use a rubber stamp for his signature on the commission and make up a daily authorization sheet for his personal signature. Is this practice legally permissible?"

Section 75 of the Constitution of Virginia provides that "Commissions *** shall *** be attested by the Governor ***." An examination of the Debates of the Constitutional Convention of 1901-02 gives no indication as to the meaning of this section of the Constitution.

In the case of Pilcher v. Pilcher, 117 Va. 356, 365, the Supreme Court of Appeals of Virginia considered the validity of a will which had been signed by the testator with his initials. The following language from the Court's opinion is pertinent herein:

"Nor does the Virginia statute define what shall constitute a 'signature,' but only prescribes that the will shall be signed 'in such manner as to make it manifest that the name is intended as a signature.'

"The Standard Dictionary defines it to be, 'The name of a person, or something representing his name, written, stamped, or inscribed by himself, or by deputy * * *.'

"No dictionary, so far as we are advised, restricts the meaning of 'signature' to a written name; therefore, according to these definitions, what constitutes a signature must largely depend upon the circumstances of each particular case, though in all cases the intent is a vital factor.
Whatever symbol is employed, it must appear that it 'is intended as a signature.'"

In view of the foregoing, it would seem that the intent of the signer is paramount. I am, therefore, of the opinion that if the Governor intends to sign his name to the commission of a notary public by directing the Secretary of the Commonwealth to affix his signature to a commission by means of a rubber stamp, such procedure is proper. I might suggest that the Governor issue an executive order authorizing this procedure. If such an order is issued, I am further of the opinion that it will not be necessary for the Governor to sign the daily sheets referred to in your letter.

STATE INSTITUTIONS—Cadets—Cadet waiters may be employees of catering corporation.

October 10, 1961

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

This is in reply to your letter of October 3, 1961, in which you request my opinion as to the status of cadet waiters who are being utilized by The Cleaves Food Service Corporation, of Silver Spring, Maryland, in accordance with the catering contract entered into with the Virginia Military Institute. You state that the question of status has arisen due to the reluctance of the caterer to classify the cadet waiters as "rented employees."

The proposal which preceded the contract for Food Service, and was later incorporated into the contract, bearing date of 8 June, 1961, specifically referred to cadet waiters on page 3. The pertinent provision reads as follows:

"Cadet waiters, from a list supplied by the V.M.I., shall continue to be employed, so long as the individual performs his reasonable duty to the Contractor satisfactorily, Board for these shall be charged at the rate established for Cadets, and the Contractor shall reimburse the V.M.I. directly for the service of the individual, full time for service of three meals per day or pro rata for partial service, in accord with the board cost announced in the V.M.I. Bulletin of that year (currently $450 per cadet per regular session).

"Many of the present food service employees have rendered long and faithful service to the V.M.I., accumulating retirement, insurance and other benefits. It is desired that the Contractor employ and continue in service any of these individuals, who apply for such employment, so long as his performance is satisfactory, and that the status of the individual concerned be that of a State Employee, subject to the classification, and pay scale, hours of work, and continuance of these benefits. (Negotiations are under way with the Division of Personnel for this.) Such an employee shall be subject to the reasonable direction of the Contractor under conditions similar to those of his regular employees, but salary payments shall be made directly to the V.M.I., which, in turn, shall pay the particular employee the amounts due and paid by the Contractor, less benefit deductions required by the Commonwealth of Virginia for its Supplementary Retirement and Insurance services."

You will note from the foregoing quoted provision that the parties intended that the status of the food service employees would continue to be that of State employee even though the contractor is to reimburse the Virginia Military Institute directly for the service of the individual.
It is noteworthy that no similar provision was made regarding the status of cadet waiters. I have been unable to find anything in the contract between the parties which would lead to any conclusion other than the parties did not contemplate any question arising regarding the employer-employee relationship. In the absence of some express provision to the contrary, we can only assume that the waiters became the employees of the caterer upon their employment. Even though the Virginia Military Institute receives payment directly from the caterer for the cadet services, the most essential criterion in determining the employer-employee relationship is that of control. In this instance, the caterer has control over the waiters and reserves the right to discharge any cadet waiter who fails to perform his duties to the caterer satisfactorily.

In view of the foregoing, I am of the opinion that the cadet waiters in question are the employees of Cleaves Food Service Corporation.

STATE INSTITUTIONS—Membership in Chamber of Commerce—No legal prohibition—No appropriation to pay fee.

MENTAL HYGIENE AND HOSPITALS—Authority of Eastern State Hospital to Join Chamber of Commerce—No legal prohibition—No appropriation for dues.

November 29, 1961

DR. HIRAM W. DAVIS
Commissioner, Department of Mental Hygiene and Hospitals

This will acknowledge receipt of your letter of November 27, 1961, which reads as follows:

"The State Hospital Board at its last meeting discussed a proposal that Eastern State Hospital become a sustaining member of the Williamsburg Chamber of Commerce, at the minimum fee of $100 per year. A sustaining member would be eligible for appointment to the Board of Directors.

"At the request of the State Hospital Board I am writing to ask your opinion as to the feasibility of Eastern State Hospital entering into such membership."

In my opinion, there is no legal objection to Eastern State Hospital becoming a member of the Williamsburg Chamber of Commerce. The critical question is whether or not the appropriation made to that hospital is broad enough to include an expenditure for such a purpose.

It would seem that the purposes for which appropriations are made in Items 335 and 336 of the Appropriation Act would not include membership fees in civic organizations. However, you might discuss the matter with Mr. Kuhn, the Director of the Budget, and ascertain if other State institutions have been making expenditures for such purpose, thus establishing a policy that has been approved.

In connection with this subject, I am enclosing copies of two opinions issued by this office, and published in the Report of the Attorney General, (1930-1931), p. 194; and (1940-1941), p. 163.
STATE INSTITUTIONS—Names—Legislature only may change name of Virginia Fisheries Laboratory.

HONORABLE L. M. KUHN
Director of the Budget

This will acknowledge receipt of your letter of September 20, 1961, which reads as follows:

"In response to inquiries to Dr. W. J. Hargis, Jr., Director, Virginia Fisheries Laboratory, concerning the use of a new title for the Laboratory, I received the attached letter.

"It has been my understanding that only the General Assembly has the authority to rename institutions or our various agencies.

"It will be appreciated if you will give me your opinion as to whether the parties involved have the authority to change the name of the Virginia Fisheries Laboratory to the Virginia Institute of Marine Science."

It appears from the minutes of the meeting of the Board of Administration of the Virginia Fisheries Laboratory on April 18, 1951, that the Board adopted a resolution approving the name "Virginia Institute of Marine Science" for the laboratory. By reference to Chapter 114, Acts of 1944, I find that Section 1 of this Act is as follows:

"The Marine laboratory, heretofore operating since the year nineteen hundred thirty-eight at the College of William and Mary and at Yorktown, is hereby established and continued under the control and supervision of the College of William and Mary and the Commission of Fisheries of Virginia and shall be known as the Virginia Fisheries Laboratory."

I am unable to find any amendment to this section and, therefore, the statutory name of the Marine laboratory is "Virginia Fisheries Laboratory."

In my opinion, the only way the name can be changed is by legislative action.

STATE INSTITUTIONS—Statute of Limitation—Applies to action to collect student accounts.

STATUTE OF LIMITATIONS—Applies to collection of student accounts by State supported colleges.

MR. R. M. HARPER
Treasurer, Virginia Military Institute

This is to acknowledge receipt of your letter of September 5, 1961, in which you request my opinion on the following question:
"We would appreciate your advising us if delinquent student accounts owed to a state supported institution of higher learning are covered by the Statute of Limitations, and if so, the time element involved."

The Virginia Military Institute is a corporation subject to the control of the General Assembly. It is incorporated for educational purposes. See § 23-92 of the Code of Virginia (1950). Your attention is invited to § 8-35 of the Code, which reads as follows:

"Except as hereinafter provided no statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same but agencies of the State incorporated for charitable or educational purposes shall be subject to statutes of limitations in the same manner as any person; provided, however, that statute of limitations concerning the enforcement of the lien of a judgment shall apply to the Commonwealth."

I am, therefore, of the opinion that the statute of limitations is applicable to delinquent student accounts at a State supported institution such as the Virginia Military Institute.

STATE INSTITUTIONS—V.M.I.—No tort liability—Extent of protection provided in automobile insurance policy.

May 1, 1962

Colonel J. C. Hanes
Business Executive Officer, Virginia Military Institute

This is in reply to your letter of April 9, 1962, in which you pose several questions relative to coverage of existing insurance on State motor vehicles when driven by VMI cadets.

An examination of the insurance policy issued to the Commonwealth of Virginia, Department of State Highway and Central Garage Pool, reveals it to be a policy of liability insurance, the coverage including (1) bodily injury liability with limits of $100,000 each person and $300,000 each accident, (2) property damage liability with the limit of $10,000 each accident and (3) coverage against uninsured motorists in the amounts prescribed by law, which for bodily injury or death is up to $15,000 each person, up to $30,000 in any one accident and for property damage up to $5,000 in any one accident. The protection given by this policy, by endorsement, "shall extend to, and cover action of judgment for damages against any driver using any vehicle covered by this policy with the permission of the department, institution or agency insured, arising out of the operation of any such vehicle, whether the Commonwealth of Virginia, or the department, agency, or institution insured hereby, is a party defendant to the action in which the judgment is rendered or not, or whether the suit is dismissed as to the Commonwealth of Virginia, or the department, agency or institution insured or not."

Thus, opinion as to your first two questions, namely, whether the cadet-driver is qualified to be considered legally as an employee of the State, or may so qualify if paid a nominal amount, will be reserved, inasmuch as coverage is not based upon the driver of the State vehicle being an employee, but upon such driver having "permission of the department, institution or agency insured" to drive the vehicle. Given this permission, the VMI cadet is covered just as an employee given similar permission would be covered. Employment, as such, is not a condition of coverage.

In your third question you inquire as to whether the other cadets who are
riding in the vehicle with the cadet driver on official business would be protected by this insurance. This refers back to the type of policy, which is only for liability insurance. Therefore, other cadets riding with the cadet-driver would be protected only insofar as the cadet-driver could be held legally liable upon action of judgment for damages against such driver. However, I am advised by the Highway Department that a “rider” is now being added to the policy effective April 18, 1962, granting medical payments coverage in the amount of $5,000 per vehicle, to apply to six “nine passenger station wagons” and one “four door sedan” owned by the Virginia Department of Highways and Central Garage Fund and currently assigned under the Central Garage Pool system to the Virginia Military Institute, Lexington, Virginia.

Finally, you inquire as to whether you are protected from liability to the general public in the sense that the injured person may not sue the State. The State cannot be sued without its consent and is immune from liability for the tortious acts of its servants, agents and employees. The immunity of the State from acts for tort extends to State agents and employees when they are acting legally and within the scope of their employment. However, the agents and employees of the State do not enjoy such immunity when they are sued by a party who has suffered injury by their negligence.

STATE LANDS—Conveyance—Proceeds to be used for purpose specified in deed by donor.

STATE INSTITUTIONS—Virginia State School—Gift of land—If sold proceeds must be used for purpose specified in deed by donor.

HONORABLE L. M. KUHN
Director, Division of the Budget

November 1, 1961

Re: Copeland Park—Virginia State School

This will acknowledge receipt of your letter of October 24, 1961, with respect to the above matter.

This property is a portion of the approximately 225-acre tract acquired by the Commonwealth of Virginia by deed dated March 14, 1950 from the United States of America. The consideration in the deed was $188,300.00, payable in equal installments over a period of ten years. The deed, however, contained a stipulation showing that it was conveyed for the benefit of Virginia State School at Hampton, which, under the provisions of § 23-14 of the Code, is a State educational institution under the control of the State Board of Education.

The deed contained a provision to the effect that if the property was used by the State during the ten-year period for the benefit of Virginia State School at Hampton (now Newport News) that for each year of such use ten percent of the consideration would be waived. The State complied with this provision for the entire ten-year period.

The State Board of Education, after the ten-year period expired, received an offer for approximately twenty-one acres of this tract of land and, as a result thereof, the property has been sold for $40,305.00.

The question presented is whether or not the proceeds of this sale should go into the general fund of the State or to the credit of the State Board of Education for the benefit of Virginia State School at Newport News.

Section 23-4.1 of the Code is as follows:

"The board of visitors or trustees of all State educational institutions, with the approval of the Governor first obtained, are hereby authorized
to sell and convey whatever interest they may have in real property that has been or may hereafter be acquired by will or deed of gift.

"The proceeds from such sales and conveyances shall be held, used and administered in the same manner as all other gifts and bequests are held, used or administered.

"Nothing in this section shall be construed as authorizing or empowering the sale and conveyance of such real property, contrary to the terms and conditions of the will or deed of gift."

There can be no question about the fact that the property was conveyed to the Commonwealth of Virginia by the United States government for the benefit of Virginia State School at Hampton (now Newport News) and that the property was acquired by gift, since no money whatsoever was paid by the State to the United States government for the property. Although there is nothing contained in the deed by which this property was acquired that restricts the use of the property after the ten-year period, nevertheless, it would seem that any proceeds of the sale of the property should be used for the same purpose as was provided in the deed.


HONORABLE CARTER R. ALLEN
Commonwealth's Attorney for City of Waynesboro

June 8, 1962

This is in reply to your letter of May 31, 1962, in which you request my opinion as to whether Chapter 451 of the Acts of Assembly of 1962 authorizes voluntary sterilization by a surgical procedure known as a hysterectomy, which you state is a more effective method of sterilizing a female than a salpingectomy, one of the operations expressly authorized in Chapter 451.

Chapter 451, Acts of Assembly of 1962, does not in terms refer to sexual sterilization. This act relates to the performance of the operations of vasectomy and salpingectomy. It is, of course, true that such operations generally result in sterilization, but a salpingectomy is more limited than is a hysterectomy. As I understand the operations, the uterus is excised in a hysterectomy, whereas in a salpingectomy the operation is limited to the Fallopian tubes.

Inasmuch as the authority conferred by Chapter 451, Acts of Assembly of 1962, is a departure from the generally accepted view that operations of this nature are to be performed only for sound therapeutic reasons, or pursuant to Chapter 9, Title 37 of the Code of Virginia (1950), as amended, I believe the language utilized by the Legislature must be strictly construed. Accordingly, I am of the opinion that the operations authorized by Chapter 451 are limited to vasectomy and salpingectomy.
REPORT OF THE ATTORNEY GENERAL

SUBDIVISION OF LAND—County Ordinance—Must apply throughout county except in areas of municipal jurisdiction.

COUNTIES—Subdivision Ordinance—Must apply throughout county except in areas of municipal jurisdiction.

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

August 31, 1961

This will acknowledge receipt of your letter of August 29, 1961, which reads as follows:

"I shall appreciate your opinion on the following facts:

"If the Board of Supervisors passed a subdivision Ordinance affecting only certain portions or sections of the County, would said ordinance be legal and enforceable, since there has been discrimination by not incorporating certain areas in the ordinance.

"Section 15-781 of the 1950 Code of Virginia, as amended to date, mentions 'territorial limits defined in this article' and I construe this to mean the entire county."

Section 15-781 of the Code, to which you have referred, should be read in connection with §§ 15-786 and 15-787. You will note that § 15-781 provides that before the powers granted under the Virginia Land Subdivision Act may be exercised by a county the governing body of such county shall adopt regulations covering subdivisions within the territorial limits defined in this article. The territorial limits of the county are defined in § 15-787 as the unincorporated area of the county. These limits are subject to the proviso that if the governing body desires to include within its regulations the county area of a municipal jurisdiction located within a county it may do so only after it has complied with the mandate with respect to the notice to be given to the municipality.

In my opinion, these sections of the Code contemplate that any regulations adopted by a governing body of a county under the Virginia Land Subdivision Act shall include as a minimum all of the unincorporated area of the county except that portion thereof which comes within the jurisdiction of a municipality.

It will be noted by subsection (3) of § 15-786 that an incorporated town may adopt such regulations for a distance of two miles from the corporate limits of the town. Under § 15-787, as I have pointed out, the county is not required to adopt regulations which include the territory within the two-mile limit of an incorporated town.

The governing body of a county may exercise only such authority as the General Assembly has granted. The statute under consideration does not, in my opinion, contain any language to support the conclusion that the territorial extent of a regulation may be less than the county as a whole, excluding the areas of municipalities as set forth in § 15-786.
TAXATION—Deduction by Treasurer from State Drawn Warrants—Not applicable to welfare payments.

WELFARE AND INSTITUTIONS—Payments by State—Taxes not to be deducted.

HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney for Floyd County

This is in reply to your letter of July 12, 1961, which reads as follows:

"Reference is made to Section 58-922, current Code of Virginia, which provides that county treasurers shall first deduct all taxes due by any party in whose favor a warrant has been drawn against the Commonwealth.

"Information is requested as to whether or not warrants drawn in favor of recipients of public welfare may be used by the treasurer to pay the delinquent taxes of subject recipient when the funds from which the warrants are being paid are made up of contributions of the county, the state and the Federal government."

Your attention is directed to § 63-102 of the Code, which reads as follows:

"No public assistance given under this law shall be transferable or assignable, at law or in equity, and none of the money paid or payable as public assistance under this law shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency laws."

This provision is applicable to payments made under Chapters 5 to 9 of Title 63. In my opinion, the prohibitions contained in § 63-102 prevent the deduction by the county treasurer of taxes due the localities by the recipients of benefits payable under these Chapters.

TAXATION—Delinquent Personal Property Taxes—Locality has lien good against bona fide purchaser if tax on specific property.

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

This is in reply to your letter of December 4, 1961, which reads as follows:

"Would you please give me your opinion as to whether a City Treasurer has a lien on tangible personal property against an innocent purchaser for value and without notice?

"Assume 'A' owned the property on January 1, 1960, and sold the same in August 1960, is there a lien against the specific personal property for this period?"

I am of the opinion that counties and cities have a lien upon specific items of personal property for the taxes assessed thereon. By reference to Drewry v. Baugh, 150 Va. 394, at page 401, our Supreme Court expressly held to that effect. This rule was reaffirmed in Chambers v. Higgins, 169 Va. 345, and United States v.
REPORT OF THE ATTORNEY GENERAL

Waddill, Holland and Flinn, 182 Va. 351, 363, in which the Court said, in commenting upon the personal property taxes assessed against specific chattels located on leased premises: "That the city has a lien therefor is settled in this state." See, § 55-233 of the Code of Virginia; also, Report of Attorney General, (1960-1961), p. 295.

TAXATION—Erroneous Assessments—Procedure for correcting.

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

December 29, 1961

This will acknowledge receipt of your letter of December 15, 1961, in which you make inquiry as to the proper procedure to correct erroneous assessments. The questions propounded by you will be answered seriatim. I quote from your letter:

"Bedford County had a general reassessment in the year 1959 effective for the year 1960 of all real estate in the County of Bedford. The Board of assessors erroneously assessed a dwelling on a lot and also on the correct lot and the land owner paid the taxes for the year 1960 on the erroneous assessment as well as on the correct assessment and the error was not discovered until recently. The owner of the land at the time is now deceased and the Administrator would like to recover the amount of the tax paid in error.

"I would like to be advised if the Administrator could be refunded the amount of the erroneous assessment under the provisions of Section 58-1142 of the Code of Virginia, as amended, and if not what would be the proper procedure for the refund of the erroneous assessment. The erroneous assessment is for local levies only."

Section 58-1142 applies only in those instances where the assessment was made by the Commissioner of Revenue or other officials performing duties imposed upon a Commissioner of Revenue. In the case you cite, the error of making the double assessment resulted in the action of the Board of Assessors when the general re-assessment was made in 1959. This being the situation, it will be necessary for the aggrieved party (taxpayer) to file his application for correction under the provisions of § 58-1145 of the Code, and the Court, under § 58-1147, can grant relief in the case of a double assessment by directing that the tax be refunded, if same has been paid, even though the application for relief was not made within the statutory period of two years from the 31st day of December of the year in which the assessment was made as set forth in § 58-1145 of the Code.

"I would also like to be advised what the procedure would be for the correction of an erroneous assessment that has not been paid and has now been returned to the Clerk's Office as delinquent."

Assuming that the assessment was made by the Commissioner of Revenue, then the procedure set forth in § 58-1142 is applicable. If the assessment was one made in the general re-assessment, then the procedure under §§ 58-1145, et seq., would be applicable. In either instance, the correction or application must be filed within two years from the 31st day of December of the year in which the assessment was made.
TAXATION—Exemptions—Portions of exempt land used for income may be separately assessed.

HONORABLE JOSEPH A. MASSIE, JR.
Commonwealth's Attorney for Frederick County

This is in reply to your letter of December 19, 1961, which reads as follows:

"The Stonewall Jackson Memorial Association owns the former Jackson Headquarters here in Winchester and recently purchased adjacent land in the rear upon which there is located a dwelling house, which house fronts on another street. This house is rented, but the tenants are denied access to the land lying in the rear of the house and adjoining the Stonewall Jackson Memorial Land which is now considered part of the lawn of the Stonewall Jackson Headquarters property of which this additional land was at one time a part.

"On the land books of the City of Winchester, Virginia, the land and buildings are assessed separately.

"The question is: Can the Commissioner of Revenue for the City of Winchester reduce the assessment of the land by the percentage of the part that is denied access to by the tenants and considered part of the lawn of the Stonewall Jackson Headquarters property, in accordance with Section 58-16 of the Code of Virginia, or, in the alternative, must all of the land or lot be totally assessed if the building is completely leased?"

Section 58-16, in my opinion, exempts from taxation that portion of the land that is not leased to the tenant and is not otherwise a source of profit or revenue.

Section 58-759 requires the Commissioner of the Revenue to extend the assessments each year on the basis of the last general reassessment, subject to such changes as may have been lawfully made. Under the facts here, there has been a lawful change which may be considered by the Commissioner of the Revenue. Therefore, the Commissioner may correct the assessment accordingly under the procedure set forth in §§ 58-808 and 58-809 of the Code.

TAXATION—Exemptions—Real estate used for home for indigent widows and maiden ladies not exempt.

HONORABLE PHILIP LEE LOTZ
Commonwealth’s Attorney for Augusta County

This is in reply to your letter of January 4, 1962, in which you request an opinion as to whether real estate to be used for the purpose of establishing a home for indigent widows and maiden ladies is exempt from real estate taxation by virtue of Section 183 of the Constitution of Virginia. You state that the home in question is to be established pursuant to a charitable trust which was the subject of the recently decided case of McClure v. Carter, Ex'r., 202 Va. 191.

The pertinent portion of Section 183 of the Constitution of Virginia reads 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:
“(e) Real estate belonging to, actually and 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, reformatories, 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.

* * *

“Whenver any building or land, or part hereof, 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.”

The will creating this charitable trust reads in part as follows:

“Said trustee and his successor or successors in title shall establish and maintain in perpetuity at the residence now occupied by me as a memorial to myself and my beloved late husband, G. Kemper Foster, a home to be known and designated as "Our Home," to be used and enjoyed by indigent widows and maiden ladies, who shall be maintained and supported from the proceeds of said trust fund, supplemented by the rents, issues and profits from the farm lying adjacent to and/or surrounding "Our Home," which farm I give devise and bequeath to said trustee upon the foregoing and following trust. * * * ” (202 Va. 193)

As to the land occupied by the home, I believe that the exemption provided for asylums is sufficiently broad to exclude this property from taxation. As a general rule, an “asylum” is a broad term which extends to a retreat, shelter or institution for the protection or relief of the unfortunate, destitute or afflicted. See Black's Law Dictionary and 4 Words and Phrases, Cum., Supp., page 166.

As to the farm lands which will not be occupied by the home, but from which rents and profits will be derived to support the home, I am of the opinion that such lands are not excluded from taxation by virtue of the express limitation in Section 183 of the Constitution which I have quoted hereinabove.

The foregoing views are consistent with the opinions expressed by my predecessor in office in relation to the property owned by the Virginia Baptist Home for the Aged, Incorporated, which may be found in Report of the Attorney General, (1960-1961), pp. 296, 297.

TAXATION—Intangible Personal Property—Includes stock inventory—Must be returned as of first of January.

March 14, 1962

HONORABLE J. LEWIS RAWLS, JR.
Member, House of Delegates

This is in reply to your letter of March 5, 1962, which reads as follows:

“I am concerned with the interpretation of Section 58-411 having to do with the definition of Capital.

“In our area we have a great many companies engaged in the storage of peanuts for out of state customers. These peanuts usually come in late
January or early February. They move out of storage in 7 or 8 months, but at any rate, prior to the end of the year.

"My question is: are inventories coming into the state after January 1st and leaving prior to December 31st, subject to tax in our state?"

I am of the opinion that such inventories as described by you are not taxable as capital.

By virtue of § 58-410 of the Code of Virginia, all capital of any trade or business is deemed to be intangible personal property. While not within the orthodox definition, § 58-411 clearly places inventory of stock on hand within the definition of "capital" and is, therefore deemed to be intangible personal property.

The status of the taxpayer liable to taxation on intangible personal property is fixed as of the first day of January of each year by virtue of § 58-423 of the Code and all such property shall be returned for taxation as of that date. This statute is clear and unequivocal. It is also consistent with the view previously expressed by my predecessor in office that property must have its situs in the State as of the return date fixed by statute in order to be subject to the tax. See, Report of the Attorney General, (1960-1961), p. 305.

TAXATION—License—Exemptions—Lunchroom operated in Blanton Building by private lessee not exempt from city license.

September 25, 1961
HONORABLE L. M. KUHN
Director of the Budget

This is in reply to your letter of September 13, 1961, inquiring whether or not the lunchroom operated in the Blanton Building is subject to city license taxes.

It is my understanding, which has been confirmed by telephone conversation with Mr. Chapman, that the land on which the Blanton Building was erected was acquired from sundry owners by the Virginia Public Buildings Commission, established under Article 2 of Chapter 8 of Title 2 of the Code. Under this article, the Commission and the Director of the Budget were empowered to prepare and when necessary, to amend, a long range site plan for the location of all State buildings and improvements related thereto in and adjacent to the city of Richmond to acquire land for that purpose and to direct and control the execution of such projects for the construction of State buildings and related improvements in and adjacent to the city of Richmond, The property on which the Blanton Building is constructed has never been a part of Capitol Square and I find nothing in Chapter 8 of Title 2 of the Code which would indicate that Capitol Square was intended to be enlarged or extended to include other real estate owned by the State for public building purposes. The land composing Capitol Square is the land acquired by the Commonwealth, pursuant to Chapter 21 of Volume 10 of Hening's Statutes at Large. The land set apart for Capitol Square is described in this Act as follows:

"That six whole squares of ground surrounded each of them by four streets, and containing all the ground within such streets, situate in the said town of Richmond, and on an open and airy part thereof, shall be appropriated to the use and purpose of public buildings: On one of the said squares shall be erected, one house for the use of the general assembly, to be called the capitol, which said capitol shall contain two apartments for the use of the senate and their clerk, two others for the use of the house of delegates and their clerk, and others for the purposes of conferences, committees and a lobby, of such forms and dimensions as
shall be adopted to their respective purposes: On one other of the said squares shall be erected, another building to be called the halls of justice, which shall contain two apartments for the use of the court of appeals and its clerk, two others for the use of the high court of chancery and its clerk, two others for the use of the general court and its clerk, two others for the use of the court of admiralty and its clerk and others for the uses of grand and petty juries, of such forms and dimensions as shall be adopted to their respective purposes; and on the same square last mentioned shall be built a publick jail: One other of the said squares shall be reserved for the purpose of building thereon hereafter, a house for the several executive boards and the offices to be held in: Two others with the intervening street, shall be reserved for the use of the governor of this commonwealth for the time being, and the remaining square shall be appropriated to the use of the publick market. * * *

In the case of Crenshaw v. City of Richmond, the Circuit Court of Richmond entered an order on May 26, 1939, allowing Crenshaw a refund of license tax charged against him by the city of Richmond for operating the lunch facilities in the State Capitol. The basis for the refund was that Capitol Square in which Crenshaw's business was located, is not a part of the city of Richmond and is not within the jurisdiction of said city, but subject to the sole jurisdiction of the Commonwealth of Virginia.

The Commonwealth of Virginia has acquired real estate in various sections of the city of Richmond outside of Capitol Square, but there is no statutory provision to my knowledge which removes these properties from the jurisdiction of the city of Richmond for the licensing of private businesses carried on by lessees in such buildings.

It is my understanding that the owner and operator of the lunchroom in the Blanton Building operates under a lease with the State and that the State itself is not involved in any way in the ownership, operation and management of the lunchroom. Under these circumstances, I know of no statute which would relieve the operator of the lunchroom from the payment of city license taxes.

TAXATION—License—Trailer Camps—Tax under Article 1.1, Chapter 6, Title 35 in addition to other taxes imposed by law.

MOTOR VEHICLES—Trailers—Trailer camps—Right of localities to tax.

HONORABLE WILLIAM R. BLANFORD
Commonwealth's Attorney for Powhatan County

December 8, 1961

This is to acknowledge receipt of your letter of November 29, 1961, which reads as follows:

"Enclosed is a Powhatan County Trailer Ordinance which was duly enacted by the Board of Supervisors of Powhatan County. As you will note in said ordinance, the County levied a $50.00 annual license tax. These trailers are also assessed for personal property taxes.

"(1) Does the County have the authority to impose a license tax and a personal property tax on a trailer? (2) Disregarding the personal property assessment, does the County have the authority to levy a license tax upon a trailer as such?

"(3) Would trailer on foundation be subject to this ordinance?"
Section 35-64.1 of the Code of Virginia provides as follows:

"The governing body of any political subdivision in this State is authorized to levy, and to provide for the assessment and collection of, license taxes upon the operation of trailer camps and trailer parks and the parking of trailers."

This office has previously ruled that a valid ordinance may be enacted pursuant to the authority granted under this and the ensuing sections. See, Report of the Attorney General, (1952-1953), p. 233.

Section 35-64.5 provides that "the governing body of any such political subdivision is hereby authorized to impose an annual license on the operator or owner of any such trailer park or trailer camp of not less than five dollars nor more than fifty dollars per trailer lot used or intended to be used as such." (Underscoring supplied).

Section 35-64.3 of the Code defines a "trailer park" or "trailer camp" as: "any site, lot, field or tract of land upon which is located one or more trailers, or is held out for the location of any trailer." The same section defines a "trailer" as: "any vehicle used or maintained for use as a conveyance upon highways, so designed and so constructed as to permit occupancy thereof as a temporary dwelling or sleeping place for one or more persons."

These and the related sections of Article 1.1 under Chapter 6 of Title 35 of the Code of Virginia give any county which has adopted an appropriate ordinance the authority to impose a license tax upon the operator or owner of the "trailer park" or "trailer camp," which by definition in § 35-64.3, supra, may be one or more trailer lots. In turn, the trailer lot is defined thereunder as, "a unit of land used or intended to be used by one trailer." Accordingly, if I may answer your second question first, it seems clear that the county is authorized to impose an annual license tax of not to exceed fifty dollars per trailer lot used or intended to be used as such.

This tax is separate and distinct from the license tax or fee which may be levied upon motor vehicles, trailers or semitrailers by counties, cities or towns under §§ 46.1-65 and 46.1-66 of the Code of Virginia. The latter tax relates to the use of the highways and may not be greater than the amount of the license tax imposed by the State on vehicles of like class, which in case of a trailer designed for use as living quarters for human beings is seven dollars and fifty cents per year.

In my opinion, none of the aforementioned license taxes affect the levying by a county of a personal property tax on a trailer and, in fact, § 46.1-65 provides that before issuing a license under that section the county, city or town may require that the personal property tax upon the vehicle be paid. Accordingly, my answer to your first question is in the affirmative.

With regard to your third question, as long as a trailer meets the definition of such as given in this article and set forth hereinabove under § 35-64.3 the parking of such trailer in a trailer camp or trailer park as herein defined would render it subject to this county ordinance. It is my understanding that many owners park their trailers upon various types of foundations to prevent deterioration of the wheels or tires or for other reasons in order to maintain the vehicles for future use as a conveyance upon the highways. In my opinion, the fact that the trailer rests upon a foundation rather than upon its own wheels would not, in itself, defeat the ordinance enacted by the county pursuant to this Article.
TAXATION—Motor Fuel—Refund under § 58-715—Not applicable to engine which furnishes power to motor vehicle although removable.

April 27, 1962

HONORABLE ARMISTEAD L. BOOTHE
Member, Virginia State Senate

This is in response to your letter of April 17, 1962, regarding motor fuel tax refunds under § 58-715 of the Code of Virginia.

Your summary of facts and comments upon the law have been considered along with the applicable statutes and I can appreciate your position in the matter. However, the term "stationary gas engine" used in § 58-715 is not defined by the Code and it is doubtful that the regular engine, which furnishes the automotive power for a motor vehicle could properly be so classified.

Any refund under this section must have as its basis an ultimate exemption from the tax under the specific conditions stated therein. In this connection, your attention is invited to the case of Huffman Co. v. Unemploy. Comm., 184 Va. 727, wherein the Supreme Court of Appeals of Virginia said:

"Where there is an exemption from a general tax, the statute should be strictly construed against the party asserting such exemption, and the rule requiring liberal construction in favor of a taxpayer is not applicable."

Therein, the Court, in turn, refers to the case of Hunton v. Commonwealth, 166 Va. 229, and also cites as authority, 51 American Jurisprudence, Taxation, Section 524, which contains the following:

"An exemption from taxation must be clearly defined and founded upon plain language, without doubt or ambiguity. Whenever doubt arises it is to be resolved against the exemption. These principles have been variously expressed. Thus, it is asserted that a claim to a tax exemption must be in terms too plain to be mistaken; that it must be founded upon language which cannot be otherwise reasonably construed, in clear and unmistakable words, or in regard to which there is no doubt as to meaning; that it must be granted in explicit terms; that it must be clear beyond a reasonable doubt; that it must be so plain as to leave no room for controversy, or so clear and unmistakable as to leave no doubt of the legislative purpose."

I believe this is the rule of this State with regard to exemptions from taxation, and that the statute falls short of asserting in language unmistakable or which cannot be otherwise reasonably construed an exemption from taxation or motor fuel used by the motor vehicles equipped with this "power take-off" device. Accordingly, it is my opinion that the present statute does not provide for refunds of the tax levied upon motor fuel so used.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Peddlers' License—Localities may require of wholesale dealer selling by traveling agents.

July 19, 1961

HONORABLE VICTOR J. SMITH
Commissioner of the Revenue for the City of Harrisonburg

This is in reply to your letter of July 18, 1961, which reads as follows:

"I should like to have your opinion on an interpretation of our State law regarding the licensing of wholesale merchants. The facts concerning the case in question are briefly as follows:

"A company whose office and plant is located in the City of Harrisonburg carries on a recapping business. This company each year obtains a Wholesale Merchant's License for the State and for the City of Harrisonburg based upon its total gross volume. In the conduct of its affairs, it sends salesmen throughout the State of Virginia with trucks loaded with recapped tires for sale to licensed dealers and retailers, but not to consumers. Recently this company has been stopped by officials in other cities and towns in the State of Virginia and required to purchase local licenses.

"In examining the Code of Virginia, (1950), as amended, I find that § 58-346(1) appears to expressly exclude this company from classification as a 'Peddler to Dealers and Retailers.' And, Section 58-318 of the aforesaid Code, seems to prohibit localities from requiring this company to pay any additional license tax other than that which he is presently paying.

"I should like to know whether any city, town or county in which this company sells and at the same time delivers its recapped tires, can require it to obtain a local license in order to do so. This opinion is solicited not only to determine the position of this company, but also, I should like to know how to treat wholesale merchants from other cities who sell and deliver their goods here in Harrisonburg."

In my opinion, the cities and towns may impose a license tax upon such a wholesale dealer. This tax may be imposed under the provisions of § 58-354 of the Code.

Section 58-318, to which you refer, relates only to the payment of an additional State tax and does not prohibit the cities and towns from imposing a license tax.

Section 58-346(1) likewise refers to the State license tax and does not apply to the tax which may be imposed by cities and towns.

TAXATION—Penalty for Failure to Pay—Charged only once—Interest calculated on tax plus penalty.

December 1, 1961

HONORABLE CHARLES T. TURNER
Assistant Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of November 29, 1961, which reads as follows:

"Your opinion is requested regarding the interpretation of Va. Code Ann. § 58-963 and § 58-964 (1959 rpl.)
"Can the penalty referred to in section 58-963 be charged for each year the taxes are not paid or does it apply only to the first year? For example: Can the penalty on taxes assessed in the year 1958 again be added in 1959 and 1960 on the 1958 taxes which are still unpaid?

"Section 58-964 refers to interest rate of 'six per centum per annum' for each succeeding year on unpaid taxes on which interest has accrued. Is this interest compounded annually or does it run at the rate of a straight six per cent per year?"

The answer to your first question must be in the negative. Section 58-963 does not authorize the addition of more than one penalty.

The interest provided for in § 58-964 is simple interest, calculated upon the principal of the tax, plus the penalty. There is nothing in this section that would authorize a treasurer to charge a taxpayer compound interest.

TAXATION—Personal Property—Motor vehicle owned by person residing in State part of year including January—Where taxable.

MOTOR VEHICLES—Taxes—Where taxable as personal property.

HONORABLE CARTER R. ALLEN
Commonwealth's Attorney for the City of Waynesboro

December 14, 1961

This is in reply to your letter of December 6, 1961, which I quote in full:

"Please advise whether a motor vehicle registered in the name of a non-resident who lives in Waynesboro roughly four months per year, including January 1st of each year, is assessable for personal property taxation.

"Under the provisions of 46.1-132 of the Code the owner of the vehicle would not appear to be required to have Virginia license tags and registration for his vehicle.

"However, would this same vehicle, under circumstances where it is situated in this State during the months of November, December, January, February and part of March of each year, be subject to personal property tax even though not required to be licensed in this State.

"The owner of the vehicle is a retired employee of New York State and not a member of the Armed Forces."

I concur in your conclusion as to the result under § 46.1-132 of the Code of Virginia on the facts presented. With respect to your question regarding the personal property tax, however, the pertinent statute is § 58-834 of the Code of Virginia, which reads as follows:

"The situs for the assessment and taxation of tangible personal property, merchants' capital and machinery and tools shall in all cases be the county, district or city in which such property may be physically located on the first day of the tax year."

In applying this statute, this office has consistently held that the liability for the personal property tax imposed upon motor vehicles or other "floating property" depends upon the situs of such property on January 1st. See, Reports of Attorney General, (1936-1937) p. 176; (1951-1952), p. 159. This rule applies equally to property of nonresidents of Virginia, as well as residents. Adams Exp.
The test of situs for taxation purposes is the place of its location and use. 51 Am. Jur., Taxation, §§ 449, 454, pp. 464, 468. Whether a motor vehicle owned by a nonresident has a taxable situs in Virginia on January 1st depends upon whether such vehicle is in Virginia on a transitory or temporary basis, as opposed to a permanent basis. Hogan v. County of Norfolk, 198 Va. 733. See also, 84 C.J.S., Taxation, § 115, pp. 225-226, which reads, in part, as follows:

"In determining taxable situs involving the physical location of the property, it has been held that 'actual situs' means a little more than simply the place where the property is, and excludes the idea of mobile personal property which happens to be in the course of transit through the taxing state, or the idea of property which for some definite purpose of its owner has come to rest within the boundaries of the taxing state for a brief and limited time, although it does not demand or necessarily involve the idea of permanency or permanent location in the taxing state, or permanency in the sense that it must be fixed like real property, but seems generally to be that it must have a more or less permanent location as distinguished from a transient or temporary one."

The fact that the owner of the motor vehicle in question lives in Virginia for four months of each year, including January, negatives any suggestion that he is merely a sojourner here, or that he has the vehicle in Virginia on a transitory basis.

I am, therefore, of the opinion that such motor vehicle is subject to the personal property tax imposed by the City of Waynesboro.

TAXATION—Real Estate—Chargeable against owner on first day of January—When § 58-822 applicable.

April 6, 1962

HONORABLE MARGARET COWAN
Treasurer, County of Montgomery

This is in reply to your letter of April 4, 1962, in which you pose several questions relating to the liability for payment of real estate taxes under the following circumstances:

"On December 31, 1960, the Draper's Meadow Development Corporation conveyed 16 acres of land to the Virginia Polytechnic Institute Educational Foundation, Inc. The deed was recorded January 4, 1961, and the property was assessed in the name of the Draper's Meadow Development Corporation for 1961 taxes.

"On May 15, 1961, the Foundation sold the property to Oakland Estates, Inc. The deed was recorded May 24, 1961.

"My questions are as follows:

"(1) Is the Draper's Meadow Development Corporation obligated to pay any part of the 1961 tax?

"(2) May acquisition by the Foundation be considered acquisition by the state within the meaning of Section 58-822 of the Code, which provides for credit on current year's taxes when land is acquired by state, county, municipality or church or religious body? (I am enclosing a copy of the Foundation's charter.)

"(3) If the provisions of Section 58-822 of the Code are applicable
in this case, would the resale of the property to Oakland Estates, Inc., affect the proration of taxes?"

By virtue of § 58-796 of the Code of Virginia (1950), as amended, real estate is assessed for taxation as of the 1st day of January of each year. The owner of such property on that day is chargeable for the tax thereby assessed. Since Draper's Meadow Development Corporation conveyed the property in question on December 31, 1960, that corporation would not be chargeable with the 1961 taxes assessed upon such property on January 1, 1961. Your first inquiry is, therefore, answered in the negative. The owner of the land in question on January 1, 1961, was Virginia Polytechnic Institute Educational Foundation, Inc. That corporation apparently was created to promote the interests of Virginia Polytechnic Institute, a State educational institution. Although the purposes of that corporation are indeed salutary, it cannot be classified as a State institution or agency and, in my opinion, it does not enjoy tax immunity. Similarly, I do not believe that the provisions of § 58-822 of the Code are applicable to this situation.

In view of the foregoing conclusion, it appears unnecessary to reply to your remaining inquiries.

TAXATION—Real Estate—Different tax rate in area added to city by merger—Legislature may specify changes in tax rate from year to year—Applies to land and improvements.

ANNEXATION—Merger of City and County—Different tax rate for territory formerly in county—Legislature may specify tax rate from year to year—Applies to land and improvements.

December 7, 1961

HONORABLE J. J. JEWETT
Member, House of Delegates

This is in reply to your letter of December 5, 1961, reading as follows:

"The Richmond-Henrico merger proposal rests on the assumption that real property in the present Henrico County will be taxed at a graduated rate for a period of fourteen years before reaching parity with the present city.

"This raises several questions, on which I would respectfully solicit your opinion:

"1. Since an apparent distinction is made in Section 169 of the State Constitution between real estate and land, does the General Assembly have power to allow a lower rate of taxation to be imposed by a city upon land, improvements, timber and minerals in areas added to its corporate limits than is imposed on similar property within its limits at the time such areas are added?

"2. Assuming an affirmative answer to the foregoing question, does the General Assembly have power to allow a rate change from year to year?

"3. Assuming an affirmative answer to the foregoing question, can the period of years for which a rate change is to be allowed be set by any governmental entity other than the General Assembly?

"Assuming that the above questions are answered in the affirmative, would the amendment of Section 15-222.3, by adding, 'That, in the consolidation of a city and one or more counties, a lower rate of tax-
ation will be imposed for a period of years, specified in the consolidation agreement, by the consolidated city upon land added to the limits of the city by consolidation than was imposed on similar property within the limits of the city at the time such land was added' permit the imposition of a yearly changing rate of tax upon real property, including land, improvements, timber and minerals in the area added to the limits of the city?"

Section 169 of the Constitution of Virginia reads as follows:

"Except as hereafter provided, all assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law. So long as the State shall levy upon any public service corporation, other than a railway or a canal corporation, a State franchise, license, or other tax, based upon or measured by its gross receipts, or gross earnings, or any part thereof, its real estate and tangible personal property shall be assessed by the State Corporation Commission, or other central State agency, in the manner prescribed by law. 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.

I am aware of no case in which our Supreme Court of Appeals has had before it the precise issue posed by your first question. Statutes have been passed pursuant to the concluding sentence of Section 169 of the Constitution, and insofar as I am advised the uniform practice under such statutes has been to treat the word "land" as though it embraced all "real estate." I refer you particularly to the case of Roanoke v. Hill, 193 Va. 643. In that case the Court said:

"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." (Emphasis supplied).

The Roanoke Case involved specifically the validity of the tax "on all the taxable real estate" in a part of the annexed areas. The tax rates apparently recognized no distinction between "land" and other classes of "real estate." The Court held that there was "no constitutional or legal defect" in the tax.

While this case is not squarely in point, in that the issue you present does not seem to have been raised before the Court, I am constrained to believe that considerable weight would be given by the courts to the fact that uniformly since the adoption of the Constitution of 1902 no distinction has been recognized between various kinds of real estate under the last sentence of Section 169. I would, therefore, answer your inquiry in the affirmative.

I am also of the opinion that your second question must be answered in the affirmative. The use of a specific example might best explain my view. If County
A, with a real estate tax rate of $1.50, merged with City B, with a real estate tax rate of $2.00, it is clear that the General Assembly could permit the rate in the area that was formerly the County to remain at $1.50 for ten years (or such other period of years as it might determine). The General Assembly would thus be permitting a lack of uniformity of 50¢ in the tax rate for a full ten years. Since it possesses that much power, it would seem to follow necessarily that it possesses the lesser power to permit the differential to be gradually reduced so that after two years the differential would be only 40¢, after four years only 30¢, etc. I reach this conclusion under the oft-quoted maxim, "the greater includes the lesser."

Your third question does not permit of an absolute affirmative or negative reply. For reasons more fully set forth in a letter of even date herewith, addressed to Honorable David E. Satterfield, III, a copy of which I enclose, it is my opinion that in exercising its power to permit a lower rate of taxation in the area added to a city or town the General Assembly must prescribe the "period of years" within which such lower rate is permitted. I believe this requirement may be adequately met by the General Assembly if it fixes the maximum number of years and leaves to some other body or entity the decision as to the specific period within that maximum. This answer, I believe, also disposes of your final inquiry. The amendment of § 15-222.3, as set forth in your letter, would permit a yearly changing rate of tax upon real property, including land, improvements, timber and minerals in the area added to the City, provided the General Assembly inserts in the proposed amendment a definite maximum for the period of years that may be specified in the consolidation agreement. Without such insertion, I do not believe the amendment would comply with Section 169 of the Constitution.

TAXATION—Recordation—Amount based on value at time of lease.

RECORDATION—Leases—Tax based on value of land at time of lease.

HONORABLE RHEA F. MOORE, JR.
Clerk, Circuit Court of Tazewell County

March 13, 1962

This is in reply to your letter of March 12, 1962, in which you ask that I review a letter of the Attorney General addressed to the Deputy Clerk of Culpeper County under date of February 1, 1960, and advise you if the conclusion therein reached is to be adhered to when recording leases for land upon which improvements are to be constructed subsequent to the date of the lease.

The letter to which you refer was a restatement of a prior opinion of the Attorney General which was rendered to the Commonwealth's Attorney for Northampton County on November 30, 1950. That opinion may be found in the Report of the Attorney General, (1950-1951), p. 293. Briefly stated, the previous opinions of this office have concluded that the tax to be assessed under § 58-58 of the Code is limited to the value of the land at the time of entering into the deed of lease. This conclusion was based upon the decision of the Supreme Court of Appeals of Virginia in the case of Virginia Public Service Company v. Commonwealth of Virginia, 179 Va. 371.

Since there has been no legislative amendment to § 58-58 of the Code of Virginia which would alter the Virginia Public Service Company decision, I must adhere to the conclusion reached by my predecessors in office.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Assignment attached to deed of trust—Tax must be paid for both.

HONORABLE H. M. SIZEMORE
Clerk, Circuit Court of Halifax County

July 26, 1961

This is in reply to your letter of July 22, 1961, which reads as follows:

"I enclose herewith copy of a deed of trust and assignment of same received in this office for recordation. These were sent together as one instrument. Please advise me the correct recordation tax to charge on this instrument. Should a recordation tax be charged on the assignment in addition to the tax necessary for the deed of trust?"

Your attention is directed to an opinion of this office which was written on May 20, 1958 and published in Report of the Attorney General, (1957-1958), at page 278, in which a similar matter was presented. The only difference between the situation involved in that opinion and the present case is that the assignment is attached to the deed of trust.

In my opinion the assignment must be treated as a contract within the scope of § 58-58 of the Code. This assignment is a contract relating to tangible personal property and does not come within any of the exceptions referred to in this section.

Therefore, in my opinion it is necessary that separate recordation tax for recording this instrument of assignment be collected.

TAXATION—Recordation—Boy Scouts of America not exempt.

HONORABLE HARRY B. WRIGHT
Clerk, Circuit Court of Rockbridge County

April 27, 1962

I have your letter of April 25, 1962, in which you advise that the National Area Council of the Boy Scouts of America is in the process of purchasing a large tract of land in Rockbridge County to be used as a camping area for Boy Scouts. You ask my opinion as to whether, upon presentation of the deed to such property for recordation, it is to be exempt from the recordation tax.

On March 19, 1957, this office held that, "A recordation tax is not a tax on property and, as such, does not come within the provisions of Section 183 of the Constitution." See, Report of the Attorney General, (1956-1957), p. 262. It follows, therefore, that it does not come within the provisions of § 58-12 of the Code of Virginia. Section 58-64 of the Code of Virginia gives the exemptions from State recordation tax. This list of exemptions does not include the Council of Boy Scouts of America, or similar organizations.

I am of the opinion, therefore, that the above-mentioned deed is subject to the usual recordation tax.
TAXATION—Recordation—Deed conveying title to land held for benefit of grantee by prior conveyance—Subject to tax.

July 24, 1961

HONORABLE RHEA F. MOORE, JR.
Clerk, Tazewell County Circuit Court

This is in reply to your letter of July 20, 1961, which reads as follows:

"Acme Development Corporation has presented for recordation a deed to it from Virginia Acme Market, Incorporated, conveying real estate in Tazewell County, Virginia, and has requested that no tax be imposed on the transfer of this property pursuant to Section 58-60, stating that this deed is conveying legal title to the grantee for land paid for by it and held for its benefit by the grantor.

"The same real estate was conveyed to the grantor by Sidney Peery and wife, by deed recorded in this Clerk's Office on December 27, 1960, and taxes were assessed on a valuation of $58,400.

"The deed presented for recordation states that the land was purchased for the benefit of the party of the second part and that the consideration for the purchase of the real estate was paid by the party of the second part, and that the party of the second part has requested a deed conveying the title to said real estate.

"Please advise if under the above circumstances this transfer is exempt from tax pursuant to said Section or other statute."

In my opinion, this transaction does not come within the provisions of § 58-60 and is taxable under the provisions of § 58-54 upon the basis of actual value of the property conveyed.

The deed to the Acme Development Corporation, in my judgment, is not a supplemental document within the meaning of that term as used in § 58-60. It is a deed as contemplated by § 58-54.

TAXATION—Recordation—Exemptions—Conveyances to political subdivisions of foreign state not exempt.

January 15, 1962

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

This is in reply to your letter of January 8, 1962, in which you inquire as to whether a recordation tax should be charged for recording an assignment of a deed of trust between the New York Savings Bank and the State Board of Land Commissioners, State of Colorado.

It has been suggested to you that the State Board of Land Commissioners, State of Colorado, may be exempt from the payment of a recordation tax by virtue of §58-64 of the Code of Virginia.

The pertinent portion of § 58-64 of the Code of Virginia exempting certain deeds from the payment of recordation taxes applies to deeds conveying property to the State or political subdivision of this State. I do not believe that this exemption may be extended to other states or political subdivisions of those foreign states.
TAXATION—Recordation—Lease assignment—Deed of Trust—not taxible if merely additional security.

November 13, 1961

HONORABLE H. B. McLemore, Jr.
Clerk, Circuit Court of Southampton County

This is in reply to your letter of November 11, 1961, in which you enclose an assignment of moneys due under a lease. The instrument states that the assignment is given as additional security to the holder of a first deed of trust, dated November 10, 1961 and recorded prior thereto. I am assuming that the recordation tax was paid when the deed of trust was admitted to record.

Under these circumstances the assignment is not subject to recordation tax. This is pursuant to the provisions of § 58-60 of the Code, and is in accord with a previous ruling of this office, dated June 20, 1957, to the Clerk of the Circuit Court of Dinwiddie County, which opinion is published in the Report of the Attorney General, (1956-1957), p. 262.

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TAXATION—Recordation—Localities not to tax when State tax fixed at fifty cents.

September 25, 1961

HONORABLE JENNINGS L. LOONEY
Clerk, Circuit Court of Buchanan County

This is in reply to your letter of September 20, 1961, enclosing copy of a recordation tax ordinance passed by the board of supervisors of your county pursuant to § 58-65.1 of the Code.

I am enclosing copy of an opinion issued by this office on May 23, 1958 to the Executive Secretary of the Board of Supervisors for Prince William County, which relates to this question. You will note that we stated in that opinion that § 58-65.1 leaves some doubt as to whether any local tax may be charged upon the recordation of an instrument upon which the State tax is fixed at fifty cents.

By reference to Chapter 590 of the Acts of 1958, it will be noted that there is a comma after the word "specifically" in the first paragraph of the section but in printing the Code the comma was inadvertently omitted. This punctuation would seem to indicate that the sentence is intended to provide that no local tax could be charged in any case where the State recordation tax is fifty cents specifically and I think that is the only logical interpretation of the Act.

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TAXATION—Recordation—Partition of land—Decree allotting land is not partition deed—No tax to be assessed.

October 23, 1961

HONORABLE RHEA F. MOORE, JR.
Clerk, Circuit Court of Tazewell County

This is in reply to your letter of October 18, 1961, to which you attached a copy of a decree entered by the Circuit Court of Tazewell County on October 13, 1961, pursuant to §§ 8-692 and 8-698 of the Code of Virginia, in which a one-half interest in certain real estate was allotted to the complainants for a
consideration of $5,000, payable to the three defendants in equal amounts. You request my advice as to whether this payment of $5,000 by the plaintiff to the defendants constitutes a "consideration or sale" or if the decree can be treated as a partition deed and be taxed at the statutory fee for partition deeds.

The transaction is not considered a sale under the statute but is an allotment for which, in this case, a consideration of $5,000 passed. However, there are no recording statutes which cover a situation such as this and, therefore, it would not be proper for you to demand a recording fee on the basis of the consideration as is required in the case of deeds and other instruments covered by the provisions of § 58-54, et seq., of the Code. This decree, in my opinion, may not be treated as a deed of partition and taxed at the statutory fee of fifty cents. Therefore, in my opinion, there is no recording tax connected with this transaction.

This question does not frequently arise because ordinarily in such cases the courts appoint a Special Commissioner to convey the property that has been allotted and in such cases a recording tax would be chargeable in connection with any such deed.

TAXATION—Steamship Carriers—County may enforce tax judgment—No interference with interstate commerce.

May 24, 1962

MISS ELSA B. ROWE
Treasurer of Northumberland County

This is in reply to your letter of May 7, 1962, in which you request advice concerning any possible conflict between the Virginia law and Admiralty laws which would prohibit obtaining judgment and seizing a boat owned by a Maryland corporation and registered as an enrolled boat at the Customs House in Northumberland County.

In discussing the tax provisions against steamship carriers in the case of Commonwealth v Baltimore Steam Packet Company, 193 Va. 55, the Supreme Court of Appeals of Virginia held that such a tax does not interfere with Interstate Commerce and the enforcement is left to the ordinary device for the collection of taxes. I know of no provision in Admiralty laws which would in any manner prohibit the enforcement of a valid tax judgment. I, of course, am assuming that this ship is properly taxable by Northumberland County.

TAXATION—Writ Tax—Not taxed as costs against pauper bringing action.

COSTS—Writ Tax—Not to be taxed against pauper bringing action.

October 3, 1961

HONORABLE WALTER R. CARTER, JR.
Clerk of Courts of Roanoke City

This is in reply to your letter of October 2, 1961, which reads as follows:

"Suit has been brought by a person here who made affidavit upon which our Circuit Court entered an order under the provisions of Code Section 14-180 of the Code of Virginia permitting suit without paying fees or costs.
“Question has been raised whether such a suit may be maintained without payment of the writ tax provided by Section 58-71 of the Code of Virginia.”

Section 14-180 of the Code reads as follows:

“All person who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party.”

Section 14-195 of the Code provides:

“The clerk shall tax in the costs all taxes on process, * * *.”

The writ tax assessable under § 58-71 is thus specifically designated as a part of the costs to be taxed by a clerk. I am of the opinion, therefore, that the provisions of § 14-180 relate to the writ tax, as well as all other costs and fees, and that this section is an exception to the mandatory provisions of § 58-76 of the Code.

TIME—Daylight Saving—When effective—Extends from Memorial Day to Labor Day, inclusive.

April 12, 1962

HONORABLE HAROLD H. DERVISHIAN
Member, House of Delegates

This will reply to your letter of recent date in which you make inquiry concerning the dates upon which daylight saving time will become effective and cease to be effective in Virginia under applicable legislation enacted during the recent regular session of the General Assembly of Virginia.

The legislation to which you refer (House Bill No. 489) is contained in Chapter 617 of the Acts of Assembly (1962) and, in pertinent part, provides:

“On and after Memorial Day, nineteen hundred sixty-two, United States standard eastern time shall be in effect in all parts of the State of Virginia except between Memorial Day and Labor Day of each year when daylight saving time shall be in effect; provided, however, that nothing in this section shall be so construed as to be in contravention of Federal law, or duly authorized orders of the Interstate Commerce Commission with respect to the time zones of the United States and the application of standard time to interstate commerce and other matters within such zones; provided, further, that any county, city or town, located within the Tenth Congressional District, may by ordinance, duly adopted, establish daylight saving time to be effective between the last Sunday in April and the last Sunday in October of each year; provided further that in any city located partly within and partly without this Commonwealth where the remaining portion of said city is located in a state which by law prohibits daylight saving time, the council of the said city may direct that Eastern Standard Time shall be used in said city, until said adjoining state adopts daylight saving time.” (Italics supplied).
Manifestly, resolution of the question you present depends upon the interpretation to be accorded the word "between" as utilized in the above-quoted enactment. In this connection, the relevant rule of construction is comprehensively stated in 86 C. J. S. 857, Time: Section 13(6) in the following language:

"As a general rule the use of the word 'between,' in designating a period of time, bounded by two specified days or dates, excludes the days or dates named as boundaries or terminals, particularly where 'between' is preceded by intervene. This rule, however, is not an arbitrary one, and the context and subject matter may show that 'between,' as so used, was intended to have a different construction, such as that it was intended to include both terminal days * * *"

See, also, 52 Am. Jur. 352, Time: Section 28; 5 Words and Phrases 401 et seq.

Although I have been unable to discover any decision of the Supreme Court of Appeals of Virginia in which the question has been considered, a canvass of decisions of other jurisdictions discloses that the term under consideration has been construed both to exclude and to include the designated terminal days. Interpretations excluding the days specified as boundaries are contained in Henderson v. Henderson, 206 Ga. 23, 55 S. E. (2d) 578; Greenberg v. Neiman, 320 Ill. App. 99, 49 N. E. (2d) 817; Arcadia Citrus Growers Ass'n v. Hollingsworth, 135 Fla. 322, 185 So. 431; Hodges v. Filstrup, 94 Fla. 943, 114 So. 521; Weir v. Thomas, 44 Neb. 507, 62 N. W. 871; while interpretations including such days were approved in Anderson v. Eischen, 9 Cir., 16 F. (2d) 54; State v. Herr, 151 Wash. 623, 276 Pac. 870; State v. Liberman, 59 N. D. 252, 229 N. W. 363; McGinley v. Laycock, 94 Wis. 205, 68 N. W. 871.

Although application of the general rule and regard only for the intrinsic meaning of the word "between" would indicate an interpretation of the statute under consideration which would exclude both Memorial Day and Labor Day from the period during which daylight saving time would be effective in Virginia generally, and would also exclude both the last Sunday in April and the last Sunday in October from the period during which daylight saving time could be made effective by ordinance in the various counties, cities or towns in the Tenth Congressional District, the latter group of cases cited above combine in support of the proposition that the general rule is not an arbitrary one, that the word "between," when designating a period of time, does not exclude terminal days as a matter of law and that the context, subject matter and legislative history of a statute may indicate that the term in question was intended to include both terminal days. Furthermore, it is too well settled to justify extended citation of authority that the object of statutory construction is to ascertain and make effective the intent of the lawmakers, that a statute should be construed to carry out its intended purpose and that, in ascertaining the legislative purpose, consideration must be given to the subject matter of a statute and the circumstances existing at the time of its enactment. See, 2 Sutherland, Statutory Construction, Section 4501 et seq.; Crawford Statutory Construction, Section 157 et seq.

With respect to its legislative history, there can be no doubt that the instant statute was enacted principally to effectuate the recommendation made by the Governor of Virginia in his Address to the General Assembly on January 15, 1962, that daylight saving time should be in effect in Virginia during the period from Memorial Day to Labor Day, both inclusive. Senate Document 3-A, page 31. I think it most unlikely that the General Assembly intended to enact a statute which would utilize the identical days suggested by the Governor but exclude both such days in direct contravention of the gubernatorial recommendation. Moreover, daylight saving time is a system of time under which standard time is advanced for the purpose of taking advantage of the longer periods of daylight during the summer months. 86 C. J. S. 828, Time: Section 6. I think it equally unlikely that the General Assembly would prescribe that a system of time designed for this purpose should exclude Memorial Day and Labor Day, which are traditional holidays beginning and ending the summer months and both of which
are made legal holidays by law. Section 2-19, Code of Virginia (1950), as amended.

Furthermore, there can be no doubt that the provision authorizing counties, cities and towns in the Tenth Congressional District to establish daylight saving time to be effective "between the last Sunday in April and the last Sunday in October of each year" was intended to enable the governing bodies of those political subdivisions to conform their time systems to that which would prevail in the District of Columbia. On February 8, 1962, while the General Assembly of Virginia was in session, the Board of Commissioners of the District of Columbia—by Order No. 62-265 promulgated pursuant to the authority conferred by Section 28-2804 of the D. C. Code (1961 ed.)—proclaimed in effect that daylight saving time should begin on the last Sunday in April, 1962 (April 29, 1962) and end on the last Sunday in October, 1962 (October 28, 1962). In this situation, it would appear that the manifest intent of the Legislature may most nearly be effectuated by construing the term "between" as utilized in this portion of the statute to include both the last Sunday in April and the last Sunday in October. Under familiar principles, of course, a statute should be construed as a whole, and words used more than once in an enactment should receive the same construction in order to harmonize the various portions thereof.

For the foregoing reasons, although the question is by no means free from doubt, I am of the opinion that daylight saving time will be effective in Virginia from the first moment of Memorial Day (May 30, 1962) until the last moment of Labor Day (September 3, 1962) and that the various counties, cities and towns of the Tenth Congressional District may establish daylight saving time to be effective from the first moment of the last Sunday in April, 1962 (April 29, 1962) until the last moment of the last Sunday in October, 1962 (October 28, 1962).

TORTS—Immunity—State and political subdivision may not waive.

SCHOOLS—School Board—Tort immunity—Cannot be waived—No provision for paying claim against negligent bus driver.

HONORABLE ERNEST P. GATES
Commonwealth's Attorney for Chesterfield County

October 24, 1961

This is in reply to your letter of October 23, 1961, which reads as follows:

"During the past summer a prospective school bus driver was using a Chesterfield County School Bus to practice driving in order to get her driving permit, and while doing so had an accident with another vehicle causing property damage in the amount of $169.90. This accident was reported to our insurance carrier who informed us that our policy was not in effect at the time of this accident.

"The person driving the School Bus was doing so with the permission of the School Board, and an employee of the School Board was present and assisting the prospective driver.

"An examination of the facts surrounding this accident leads me to believe that the driver of the bus was negligent and would be liable for the damage sustained, there being no contributory negligence on the part of the other driver. The School Board believes that it is responsible for this damage, and I would like your opinion as to whether or not in view of Section 22-290 of the Code of Virginia, 1950, as amended,
the School Board can waive its governmental immunity and pay this claim."

Section 22-290 of the Code, to which you refer, expressly provides that "* * * in no event shall school funds be used to pay any claim or judgment or any person for any injury arising out of the operation of any such vehicle." This provision clearly forbids the use of school funds for the satisfaction of the claim.

Neither the school board nor the governing body may, in my opinion, waive the governmental immunity so as to pay the claim. See Mann v. County Board, 199 Va. 169, in which it was held that a county is not liable for tortious personal injuries resulting from negligence of its officers, servants and employees. Furthermore, this Court, in commenting upon the subject of immunity, stated:

"Arlington County being a political subdivision of the State, its freedom from liability for this tort may be likened to the immunity that is inherent in the State. It is fundamental and jurisdictional and could not be waived by the Board."

I am not aware of any legal method by which public funds of the county may be expended in satisfaction of a claim of the nature under consideration.


HONORABLE WADE S. COATES
Commonwealth's Attorney for Tazewell County

April 10, 1962

This is in reply to your letter of April 3, 1962, relating to the proposed consolidation of the Towns of Tazewell and North Tazewell under §§ 15-175 through 15-189 of the Code.

You call attention to House Bill No. 550 (Chapter 265 of the Acts of General Assembly of 1962), and present the following questions:

"1. Whether the bill, as enacted, bars a consolidation under Section 15-175, etc., when no referendum is required.

"2. If such a consolidation is barred, whether the consolidation must be completed as of June 29, 1962.

"3. If it is not necessary that consolidation must be completed by June 29, 1962, what steps toward consolidation must have been taken as of that date to put the consolidation outside the prohibition of the new act.

"4. In the event that a referendum should be called by a petition of the qualified voters or by the Council of either town, what effect such a referendum would have on the proposed consolidation under the new act."

The applicable provision of this Act to the situation presented by you is as follows:

"Notwithstanding any other provision of the laws of the Commonwealth, until the expiration of ninety days following the adjournment of the regular session of the General Assembly of Virginia of 1964; * (b) no county, city or town which has not heretofore held a consoli-
dation referendum shall consolidate with any other county, city or town;
* * *

Under this provision, since no consolidation referendum has been held, in
my opinion, the two towns are prevented from effecting a consolidation agreement
during the period from June 29, 1962 until ninety days following the adjourn-
ment of the regular session of the General Assembly of 1964. This answers your
Question 1.

With respect to Question 2, the consolidation must be completed not later
than June 28, 1962, since the Act in question becomes effective the first moment
of June 29, 1962.

The answer to Question 2 makes it unnecessary to answer Question 3.

With respect to Question 4, the only problem there is, if a referendum should
be required, whether the proceedings could be completed by June 28 of this year.
For your information I am enclosing copy of Chapter 265.

TOWNS—Land Acquired for Park—May be sold to county school board if per-

HONORABLE LEON OWENS
Commonwealth's Attorney for Russell County

This is in reply to your letter of May 4, 1962, in which you state that pur-
suant to Chapters 195 and 216 of the Acts of Assembly of 1934 the Town of
Lebanon acquired certain real estate from the Russell County Livestock and
Agricultural Association to be used as a public park. You further state that the
deed under which the town acquired title does not contain any restrictions re-
lating to the use of the property.

The Russell County School Board has indicated a desire to acquire the prop-
erty in question for public school purposes, either by purchase or gift. You
further state:

"* * * A question has arisen as to whether or not the Town of Leb-
anon has the power to convey unto the School Board a fee simple title to said property, in view of the fact that the above mentioned acts, under which title to the said land was acquired by the Town of Leb-
anon, specified that said land was to be 'for a public park and play-
ground.'"

I find that by Chapter 343, Acts of Assembly of 1958, a new charter was
granted to the Town of Lebanon, and in the same act all prior acts granting
a charter to the town, or amending the same, were expressly repealed.

Section 13 of the charter of Lebanon reads as follows:

"§ 13. Subject to the provisions of § 25-233 of the Code of Vir-
ginia, the town is empowered to acquire by condemnation or otherwise, property, real or personal, or any interest or estate therein, either within or without its corporate limits, for any of its proper purposes, including that of providing playgrounds, parks, golf courses and other recreational facilities, and to make reasonable charges for the use of such facilities, and to otherwise handle and deal with such properties in such manner as the council deems proper or expedient; and shall have power to acquire by condemnation or otherwise, rights of way from the town to any property acquired by it under any of the provisions of this
charter, which lies without its corporate limits, and to construct and maintain upon such rights of way, such roads or bridges as may be reasonably necessary for the full enjoyment thereof; and shall also have power to sell such properties or any of them, or any other property owned by the town, whenever the council deems it expedient to do so."

In my opinion the council of the town may by appropriate resolution authorize a conveyance of the property to the school board for a nominal or such other consideration as the council may deem expedient.

____________________________________

TOWNS—Ordinances—Violations to be tried by county court when no municipal court—How jail expense paid—Disposition of fines.

CRIMINAL PROCEDURES—Costs—How county to collect for expense of keeping prisoners for violations of town ordinances.

August 1, 1961

HONORABLE PHILIP LEE LOTZ
Commonwealth’s Attorney for Augusta County

This is in reply to your letter of July 31, 1961, in which you refer to the opinion of this office to Honorable Felix E. Edmunds on June 8, 1961, which relates to the issuance of warrants and trial of persons charged with violating ordinances of the town of Craigsville, which has not established a municipal court with jurisdiction of criminal matters.

In this opinion we stated “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.” See, Report of Attorney General, (1960-1961) p. 329.

You have requested my opinion with respect to the following questions:

1. The payment of the charge for prisoners held in jail while awaiting trial for violation of the ordinances of the town, as well as those prisoners who have been tried and sentenced.

2. The disposition of the fines collected from persons convicted of violating town ordinances.

In this connection you make the following observation:

“It occurs to me that if the laws are going to be enforced by the Sheriff of Augusta County and the County Court for Augusta County, the fines should be paid to the general fund of Augusta County, rather than to the Town of Craigsville. It would also appear that we should ask the Town of Craigsville to assume the per diem cost of prisoner keep in the Augusta County jail. I might add that we keep prisoners for other political subdivisions in the area, and have worked out a schedule of payments which are fixed by a contract entered into annually.”

With respect to question (1), I direct attention to Article 2, Chapter 6, Title 53, and especially, to § 53-182 of the Code. Under this section the sheriff of a county is required to collect from a town the reasonable costs to be determined in the manner therein set forth. I am enclosing copy of an opinion rendered by the late Abram P. Staples while he was Attorney General, which is applicable. The statutes cited by him in that opinion are now set out in Article 2, referred to above.
The arrangement contemplated by § 53-182 would apply to prisoners being held for trial as well as prisoners who have been tried and sentenced upon conviction.


With respect to your second question, it is provided in § 14-54 of the Code that all fines collected for violations of town ordinances shall be paid promptly into the treasury by the town whose ordinance has been violated.

TOWNS—Parking Meters—No exemptions from payment of fees.
HIGHWAYS—Parking Meters—Fees must be paid by everyone.

June 19, 1962
HONORABLE KENNETH P. ASBURY
Commonwealth’s Attorney for County of Wise and City of Norton

This will acknowledge your letter of June 6, 1962, in which you requested a copy of any opinion rendered by this office in regard to employees of the Department of Highways being required to deposit coins in parking meters on streets maintained by the Department within towns.

While this office has never rendered an opinion on the precise question involved here, it has been ruled previously that under § 46.1-252, Code of Virginia (1950), as amended, a town council has the authority to adopt a general ordinance providing for the installation of parking meters on all streets within the town, including streets maintained by the Highway Department. See, Reports of the Attorney General (1950-1951), pp. 297-298, (1951-1952), p. 167.

The section of the Code referred to above specifies that the council or other governing body of any city or town may, by general ordinance, require the deposit of a coin in a parking meter and the statute exempts no one from such requirement.

In view of the above, I am of the opinion that employees of the Department of Highways would be required to deposit coins in parking meters on streets maintained by them within towns, provided a valid ordinance has been adopted by the local governing body pursuant to § 46.1-252 of the Code.

I am sending Mr. H. H. Harris, State Highway Commissioner, a copy of this letter for his information.

TRAILER CAMPS—Ordinances—Procedure for adoption—Who to issue license.
COUNTIES—Ordinances—Trailer Camps—Procedure for adoption—Who to issue license.

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

December 14, 1961

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

"The board of supervisors of this county has asked me to prepare
an ordinance to be proposed for the taxation of the privilege of operating trailer parks in the county.

"The following questions have arisen in my preliminary study:

1. § 15-8 states the ways in which ordinances are adopted. Taxes on businesses are then classified with some few others in a separate category. Ordinances covering them must be published as proposed ordinances for four weeks prior to adoption and posted, and after a specified time lapse, they are passed. Must the county also publish the ordinance for two weeks after passage, or is the latter publication dispensed with?

2. May such ordinances be published in short form?

3. § 35-64.2 states that 'an officer' may be designated to issue licenses, etc. If a constitutional officer were designated, would he be filling another office as is contemplated under § 15-486 of the Code and thereby be an illegal appointee?"

An ordinance of this nature may be adopted by following the procedure set forth in § 15-8 (9) (a) (b) and (c). The statute does not require publication to be made subsequent to its passage. Under this procedure publication in short form is not authorized.

With respect to your third question, the ordinance may provide that an officer of the county, such as the Commissioner of the Revenue, shall have the responsibility of issuing these licenses. In this connection you are referred to an opinion furnished to the Commonwealth's Attorney of Appomattox County on December 30, 1959, and published in Report of the Attorney General, (1959-1960), p. 348. This would not be in conflict with § 15-486 of the Code, since the effect of the ordinance would be merely adding another duty to the office of the Commissioner of the Revenue.

VETERINARIANS—Malpractice—Revocation of license—Must be violation of rules and regulations fixing standards of conduct.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Rules and Regulations—Veterinarians—Standards of conduct may be prescribed—Power to revoke license.

October 13, 1961

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

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

"In the past six months, the Virginia State Board of Veterinary Examiners has received several complaints from the citizens of this Commonwealth, which complaints allege that holders of certificates to practice veterinary medicine and surgery are guilty of malpractice. Section 54-789.4 of the Code of Virginia, as amended, sets forth the acts that must be committed before the Board may refuse, suspend or revoke a certificate to practice veterinary medicine and surgery. You will note that this Section does not make reference to malpractice.

"Sections 54-784.1 and 54-785 of the Code convey upon the Board broad powers to regulate the practice of veterinary medicine and surgery in this State. Will you please advise, at your earliest convenience, in your opinion, the Board of Veterinary Examiners has the authority
to promulgate Rules and Regulations establishing standards of conduct and ethics for the practice of veterinary medicine, surgery and dentistry, and also, whether or not the Board has the authority to suspend or revoke a certificate issued by it when the holder thereof has been judged guilty of malpractice by the Board as a result of a hearing conducted in accordance with applicable statutes."

Section 54-784(8) of the Code authorizes the Board of Veterinary Examiners to:

"Prescribe according to law reasonable standards of conduct and ethics for the practice of veterinary medicine, surgery and dentistry."

This authority, in my opinion, may be exercised after the Board has adopted valid rules or regulations in the manner provided in § 54-785 prescribing reasonable standards of conduct and ethics for the practice of veterinary medicine, surgery and dentistry. Malpractice would, in my opinion, occur whenever a licensed veterinarian is guilty of professional misconduct by violating any of such reasonable standards of conduct and ethics as may be included in the regulation or rule which specifically relate to the treatment of animals in the performance of his professional duties.

Section 54-789.4 does not, in my opinion, authorize the Board to revoke a license because of malpractice, unless the offense is embodied in a valid rule or regulation previously adopted by the Board. Subsection (6) of this section of the Code empowers the Board to revoke the license of one who has willfully violated any valid rule or regulation, adopted by the Board pursuant to Chapter 19 of Title 54 of the Code.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Investments—Effect of new legislation.

HONORABLE CHARLES H. SMITH
Director, Virginia Supplemental Retirement System

February 8, 1962

This is in reply to your letter of February 5, 1962, which I quote:

"Your opinion is respectfully requested as to whether or not The Board of Trustees of the Virginia Supplemental Retirement System would, if House Bill No. 94 is enacted, have authority to invest in mutual investment funds registered under the Federal Investment Company Act of 1940."

House Bill No. 94 has as its purpose an amendment to § 51-111.24 of the Code of Virginia which relates to the investments of funds by the Board of Trustees of the Virginia Supplemental Retirement System. The amendatory language authorizes the Board to invest in "common and preferred stocks, limited to twenty per centum of total trust fund investment based on cost, such as fiduciaries may invest in under the statutory and common law of the State."

In addition to the specified types of legal securities in which fiduciaries may invest as provided in § 26-40 of the Code of Virginia, the General Assembly authorized certain unspecified securities for investments under certain circumstances. Section 26-45.1 of the Code of Virginia reads, in part, as follows:

"(a) Except with respect to the securities described in §§ 6-184 and
In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, an executor, administrator, trustee or other fiduciary, both individual and corporate, shall exercise the judgment of care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, an executor, administrator, trustee or other fiduciary, both individual and corporate, is authorized to acquire and retain every kind of property, real, personal or mixed, and every kind of investment, specifically including but not by way of limitation, debentures and other corporate obligations and stocks, preferred or common, and securities of any open-end or closed-end management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended, which men of prudence, discretion and intelligence acquire or retain in their own account; and within the limitations of the foregoing standard, an executor, administrator, trustee or other fiduciary, both individual and corporate, may retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase.

In view of the foregoing, I am of the opinion that, if House Bill No. 94 is enacted, the Board of Trustees for the Supplemental Retirement System would have authority to invest in mutual investment funds registered under the Federal Investment Company Act of 1940, limited to twenty per centum of the total trust fund investments.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Regional Planning and Economic Development Commissions—Constitute "political subdivisions" within meaning of § 31-111(2)(i) of Code.

January 9, 1962

HONORABLE CHARLES H. SMITH
Director, Virginia Supplemental Retirement System

Several weeks ago you requested my opinion as to whether a Regional Planning and Economic Development Commission constitutes a "political subdivision" within the meaning of § 51-111.2(i) of the Code of Virginia.

The definition as set forth in the statute reads as follows:

"For the purposes of this chapter:

"(i) The term 'political subdivision' includes an instrumentality of the State, or one or more of its political subdivisions, or of the State and one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the State or a political subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the State or a political subdivision."

By the foregoing definition the General Assembly apparently intended to include within the meaning of "political subdivision" certain governmental boards and commissions not generally considered to be political subdivisions of the State. You will note that the definition includes an instrumentality of one or
more political subdivisions of the State, provided such instrumentality is a "juristic entity," which is legally separate and distinct from such political subdivision.

I am unfamiliar with the expression "juristic entity," and I am not advised as to what denotation the General Assembly intended by inserting such a limitation on the instrumentalities of the political subdivisions of the State. For purposes of this letter, I assume that the General Assembly has reference to some independent commission or board created by the State or political subdivisions thereof to assist in carrying out a portion of the governmental functions.

Reference to Article 1, Chapter 25 of Title 15 of the Code of Virginia pertaining to regional planning and economic development commissions leads me to the conclusion that such commissions are instrumentalities of the political subdivisions in which they function, and to a limited degree, are separate and distinct governmental units apart from the political subdivisions in which they function. These commissions are composed of members who serve for a term of years. Their powers and duties are separate and distinct from the governing bodies of the localities creating such commission. The commissions have rule-making powers, power to accept funds from sources other than the creating localities, and the power to expend such funds without further appropriation. They have the power to employ their own employees and staffs.

I am of the opinion that the foregoing attributes of governmental authority constitute sufficient indicia of a separate entity so as to qualify such commissions as "political subdivisions" within the definition contained in § 51-111.2(1) of the Code of Virginia.

WATER AND SEWERAGE SYSTEMS—Sanitary Districts—Authority of county to participate in cost.

COUNTIES—Sanitary Districts—Authority of county to participate in cost.

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

June 26, 1962

This is in reply to your letter of June 21, 1962, which reads as follows:

"We are in the process of forming a sanitary district under Chapter 2 of Title 21 of the Code, for the purpose of constructing a lagoon-type sewer system. The district will include the general area of the unincorporated village of Lovingston, within which are several buildings owned by Nelson County, such as a large elementary school, the Court House, jail, Health Center and office building, which, of course, are not assessed for taxation.

"The estimated cost of the sewer system is about $75,000, which we plan to raise as follows:

"Bond issue, limited to 18% of assessed value of property within the district, maximum.............................................$45,000.00
"Grant from Federal Government.............................................. 15,000.00
"To be paid by Nelson County, because of sewer services to its buildings............................................... 15,000.00

$75,000.00"
"The above figures are purely estimates, but give the general picture of the situation.

"My questions, upon which I will appreciate your opinion, are as follows:

1. Will it be lawful for Nelson County to pay out of its general funds its proportionate share of the original cost of the sewer system, plus an agreed hook-on fee, plus monthly or yearly use fees?

2. If it is lawful for Nelson County to pay out of its general funds its proportionate share of the original cost of the sewer system, and such funds are not available, can the County borrow its share by any lawful means, and if so, under what procedure?

3. Under what conditions can the sanitary district issue bonds exceeding 18% of the assessed value of the property within the district? In other words, I will appreciate an explanation of the meaning and effect of the last portion of Section 21-122 of the Code, beginning with the words 'such limitation of 18% shall not apply if * * *.' We do intend to derive revenue from those using the sewer system."

Sanitary districts organized under Chapter 2, Title 21, are special taxing districts for the purposes for which they are created. The services enjoyed by the people in the district resulting from its creation are financed out of special revenues and charges applicable only to the property located in the district and users of such services. There is no statute under which the governing body of a county may make expenditures from the general fund for the establishment and/or maintenance of a sanitary district. This, no doubt, is upon the theory that the property in the county outside the district should not be taxed for the special benefits accruing to the property and people in the district. The governing body of a county may, however, make advances to a sanitary district pursuant to the authority contained in § 15-16.4 of the Code. In this connection, I am enclosing a copy of each of two opinions published in Report of the Attorney General, (1956-1957), p. 37.

In the event the sanitary district is established, I am of the opinion the board of supervisors would have the power to make appropriations to pay for the connecting charges and service fees applicable to the county property.

The county would have the power under § 15-250 of the Code to borrow money for the purpose of making an advance to the sanitary district provided the borrowing is within the limitations of that section. Under Section 115a of the Constitution a county may not incur debts unless the debt is approved by a vote of the people as prescribed in that section, or comes within the exceptions therein set forth.

Section 21-122 of the Code places the same limitation upon sanitary districts with respect to the issuance of bonds as is applicable to cities and towns under Section 127 of the Constitution and Article 2 of Chapter 19.1 of Title 15 of the Code, being §§ 15-666.18 through 15-666.27, inclusive. Under § 21-122 unless the bonds being issued are revenue bonds; that is, being bonds issued for a specific undertaking from which the sanitary district may derive revenue from charges made for services, the 18% debt limitation applies. You state in your letter that you intend to derive revenue from those using the facilities to be installed in the sanitary system. Therefore, under such conditions the bonded indebtedness can exceed 18% of the assessed valuation of all of the real estate in the district subject to local taxation. The petition required under § 21-123 must state the maximum amount of bonds to be issued for the specific undertaking as well as the other information required in § 21-122. I am of the opinion that strict compliance of this section is necessary in order to exceed the 18% limitation.
WATER AND SEWERAGE SYSTEMS—Town may not prohibit sale of water by private companies.

TOWNS—May not prohibit sale of water by private companies competing with municipally owned system.

HONORABLE SHIRLEY T. HOLLAND
Member, House of Delegates

This is in reply to your letter of April 30, 1962, which reads, in part as follows:

"The Town of Windsor has not granted a franchise for the purpose of selling water to any person or company in the Town of Windsor. The Town of Windsor is contemplating installing a municipally owned water supply system.

"The Windsor Water Company, Incorporated, has a Certificate of Public Convenience and Necessity under the Utility Facilities Act issued by the State Corporation Commission, a copy of which is enclosed, and sells water to a number of citizens of the Town of Windsor. The Windsor Improvement Corporation also sells water to some of the citizens in said town and several water systems are owned by individuals who sell water to citizens in the town."

You have requested my opinion as to whether the Town of Windsor is empowered to prohibit the sale of water by the above-mentioned companies and individuals if the Town installs a municipal water system.

Municipalities are vested with broad powers over the use of public streets, and may grant or refuse a franchise for the use thereof by public utilities by virtue of Sections 124 and 125 of the Constitution of Virginia, as well as §§ 15-727, 15-736 and 15-774 of the Code of Virginia (1950), as amended. I note, however, that you did not state that the privately owned water systems here in question utilize any portion of the Town streets or alleys, although you did state that no franchise has been granted by the Town.

I do not believe the powers of a town extend to prohibition of a lawful business of supplying water to residents of the municipality unless there is a question involved relating to the use of public streets or alleys for the purpose of installing the water system.


April 6, 1962

HONORABLE CHARLES W. CRUSH
Judge, Juvenile and Domestic Relations Court for Montgomery County

I am in receipt of your letter of March 24, 1962, in which you state that one
Wilbur Vance Perdue was convicted in your court of failing to provide for the support of his wife and family and was sentenced to the State convict road force for a period of twelve months. You advise that payments out of the State treasury for the support of Perdue's wife and family were made through your court, but that you recently received a letter from the Superintendent of the State convict road force requesting that the last such payment be returned, since the Superintendent had been notified that Perdue's wife and family were receiving public assistance through the Montgomery County Welfare Department. You have also been informed that public assistance payments to Perdue's wife and family have been made by the Montgomery County Welfare Department without reference to your court's order committing Perdue to the State convict road force.

In this connection, it would appear that the action of the Montgomery County Welfare Department and that of the Superintendent of the State convict road force are in conformity with the provisions of § 20-63 of the Virginia Code. Of course, you are empowered in your discretion by §§ 20-72 and 20-77 of the Virginia Code to suspend the sentence imposed and release the defendant from custody on probation upon his entering into a recognizance in such sum as the court may order and approve, and the fact that the Montgomery County Welfare Department has granted public assistance to the defendant's wife and family would neither enlarge nor diminish your authority in this regard.

With respect to your second inquiry, I am of the opinion that the State would not be relieved from making the payments specified in § 20-63 if a charitable group were to contribute to the support of the defendant's wife and family. In this connection, I call your attention to § 20-74 of the Virginia Code which prescribes:

"Any order of support or amendment thereof entered under the provisions of this chapter shall remain in full force and effect until annulled by the court of original jurisdiction, or the court to which an appeal may be taken; provided, however, that such order of support or terms of probation shall be subject to change or modification by the court from time to time, as circumstances may require, but no such change or modification shall affect or relieve the surety of his obligation under such recognizance, provided notice thereof be forthwith given to such surety."

WELFARE AND INSTITUTIONS—Old Age Assistance Benefits—Constitute lien upon land owned by recipient—Payments subsequent to conveyance constitute lien when purchaser has notice of lien.

HONORABLE W. EARLE CRANK
Commonwealth's Attorney for Louisa County

February 27, 1962

This will reply to your letter of February 20, 1962, in which you state that a resident of Louisa County was recently approved for grants of old age assistance and that notice of such grants was filed and docketed in the Circuit Court of Louisa County. You further advise that, without the consent of the local board of public welfare, the recipient subsequently conveyed certain real property to a neighbor who "was given actual notice of the grant and lien prior to the recording of the deed, as well as having constructive notice by reason of the recordation." You inquire whether or not future monthly payments of old age assistance to the recipient will constitute a lien upon the property in question.

I am constrained to believe that your inquiry should be answered in the affirmative. I assume that the notice to which you refer was prepared, acknowledged,
filed and docketed in accordance with the provisions of § 63-127 of the Virginia Code. The lien of this statute is created by a filing of the prescribed notice, but such lien may not be enforced so long as such recipient is eligible for assistance or "while such real estate is occupied by the surviving spouse of the recipient so long as such spouse remains unmarried or when such real estate is occupied by any dependent child or children of the recipient." See, § 63-128, Code of Virginia (1950).

In light of the above, I am of the opinion that further payments of old age assistance made in accordance with the statutory notice would constitute a lien upon the property under consideration.

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WELFARE AND INSTITUTIONS—Superintendent of Local Department—Vacancy—Who to act.

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

August 7, 1961

This is in reply to your letter of August 4, 1961, which reads as follows:

"The following situation has arisen in this county concerning which I respectfully request your opinion:

"A short time ago the local superintendent of welfare tendered her resignation. Subsequently an office assistant in charge was named by the local board and confirmed by the State Board of Welfare and Institutions to administer the welfare program in this county.

"Sections 63-96 and 16.1-205 set up the superintendent as probation officer of the juvenile and domestic relations court. Section 16.1-173 of the code allows the superintendent to be appointed guardian ad litem in certain cases before said court. Section 63-25 allows the State Board of Welfare and Institutions to promulgate rules and regulations for the administration of welfare services.

"My questions are as follows: (1) May the office assistant as designated above carry out all of the duties and does such person have the powers of the superintendent in the absence of the superintendent under regulations provided by the State Board of Welfare and Institutions? (2) Do the rules and regulations aforesaid affect any change in the provisions of title 16.1 calling for the superintendent, only, to administer the duties of probation officer and guardian ad litem?"

We have discussed this matter with Mr. J. Luther Glass, Consultant on Juvenile Law, Department of Welfare and Institutions, and he states that it is an established procedure of that Department, in cases where the Local Superintendent of Public Welfare has been serving as probation officer pursuant to subsection (4) of § 16.1-205, to appoint a member of the local welfare staff as acting Superintendent in case of a vacancy in that office. Such person, so appointed, according to Mr. Glass, is authorized to exercise during the interim appointment, all of the powers and duties that are customarily performed by the Local Superintendent of Public Welfare. In my opinion, this administrative procedure is not in conflict with any provisions of law. The State Board of Welfare and Institutions has adopted regulations providing for certain educational standards to be met by persons who are appointed Local Superintendents. These standards, however, do not prohibit the Board from appointing acting Superintendents who do not in all respects meet such standards, but who may serve in the capacity of a Local Superintendent.
With respect to your question (2), the acting Local Superintendent of Public Welfare becomes the local probation officer when so appointed. Section 16.1-173 does not require that the court shall appoint a Local Superintendent of Public Welfare as guardian ad litem but the section merely requires the court to appoint a probation officer or a discreet and competent attorney at law as guardian ad litem. The acting Local Superintendent of Public Welfare, being the probation officer during his period of appointment, may be appointed guardian ad litem.

WITNESSES—Allowance—Source of payment when summoned for defendant.

COSTS—Witness Allowance—Criminal case—No provision for paying defendant's witnesses.

MISS MARGARET B. BROWN
Clerk, Circuit Court of Culpeper County

October 25, 1961

This is in reply to your letter of October 24, 1961, which reads as follows:

"I will appreciate it if you will advise me whether the Commonwealth pays witnesses of the defendant in a case which the Commonwealth loses, and the defendant's witnesses claim their attendance."

Allowances for witnesses summoned on behalf of the Commonwealth, and allowances for witnesses otherwise summoned, are set forth in §§ 14-186 and 14-187 of the Code. In those instances in which the witness attends pursuant to a summons by the Commonwealth, such allowances are paid out of the State treasury, or by the treasurer of the county or corporation in which the trial is held, with subsequent reimbursement from the State treasurer. In all other cases, such as allowances to witnesses who have been summoned on behalf of the defendant, such allowances are paid by the party for whom the summons was issued and not by the State.

Section 14-188, you will note, provides that the sum to which a witness is entitled shall be paid out of the State treasury in any case of attendance before either House or a Committee of the General Assembly and in any other case in which the attendance is for the Commonwealth, except when it is otherwise specifically provided. This section further provides that "in all other cases it (allowance) shall be paid by the party for whom the summons issued." Therefore, I am of the opinion that there is no authority for the payment of witnesses summoned on behalf of the defendant, even though the defendant is acquitted.

WITNESSES—Arrest—Officers may not arrest material witness without process.

CRIMINAL PROCEDURE—Arrest—Material witness to crime not to be arrested without process.

HONORABLE WILLIAM C. FUGATE
Commonwealth's Attorney for Lee County

September 7, 1961

This is in reply to your letter of September 1, 1961, in which you ask to be advised as to whether an arresting officer at the place of a criminal offense may
place a material witness under arrest as he would with respect to the accused, without any other process. I am of the opinion that your inquiry must be answered in the negative.

Section 19.1-91 of the Code of 1950, as amended, 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.' (Emphasis supplied.)"

The final paragraph of § 19.1-106 of the Code reads as follows:

"The justice shall require recognizance with or without sureties as he deems proper from all material witnesses against the accused and also for the accused if he desires it."

Section 19.1-127 of the Code reads as follows:

"Recognizances in criminal cases, where the offense is charged to have been committed against the Commonwealth, shall be payable to the Commonwealth of Virginia. Recognizances in criminal cases where the offense charged is a violation of a county, city or town ordinance, shall be payable to such county, city or town. Every recognizance under this title shall be in such sum as the court or officer requiring it may direct. If it be to answer for a misdemeanor or if required of a witness it shall be with or without security as the court or officer may direct; but in all other cases shall be with security deemed sufficient by the court or officer taking it."

Section 19.1-135 of the Code reads as follows:

"A person not giving, and for whom no other person gives, a recognizance required shall be committed to jail. He shall be discharged therefrom when such recognizance is given before the court or a conservator of the peace; or, if it be to appear and give evidence, when such evidence is given; or, if it be to keep the peace and be of good behavior, when the period for which it was required has elapsed; or, in any case, when the discharge of such person is directed by the court in whose jail he is."

While it is clear that a material witness in a criminal prosecution may be compelled to attend a judicial proceeding, I am aware of no provision for placing such a witness under arrest without judicial process. Section 19.1-91 of the Code contemplates the issuance of a summons for witnesses. If recognizance be required, and the witness fails to give such recognizance, such person may be incarcerated, pursuant to § 19.1-135 of the Code.
REPORT OF THE ATTORNEY GENERAL

WITNESSES—Service of Process in Civil and Criminal Proceedings—§ 8-51 applicable—§ 8-65 applies to individuals and corporations.

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

This will acknowledge receipt of your recent letter in regard to the matter of the service of summons upon witnesses in civil and criminal cases. I shall answer your inquiry seriatim.

“(1) May a summons for a witness in a civil case be executed under the mode prescribed in 8-51?”

The answer is in the affirmative. Section 8-56 of the Code of Virginia provides that any process may be served in the same manner as is prescribed for the service of a notice under § 8-51. Before the 1954 amendment to this section (§ 8-51) the terms “summons or scire facias” appeared in lieu of “any process.” Of course, the term “any process” includes a summons for a witness and, therefore, such a summons could be executed in the mode prescribed by § 8-51.

“(2) May summons for a witness in a criminal case be served in accordance with 8-51?”

The answer to this question is also in the affirmative. Section 19.1-262 of the Code states that §§ 8-294 to 8-296, inclusive, are applicable to criminal, as well as civil cases. Section 8-296 provides that a summons may issue as provided in § 8-44. This section (§ 8-294) is silent as to the mode of service of such summons. Section 8-51, implemented by § 8-56, spells out how a summons is to be executed.

This office held in an opinion addressed to Honorable Ferdinand F. Chandler, Commonwealth’s Attorney of Westmoreland County, under date of September 13, 1960, Report of Attorney General, (1960-1961), p. 348, that § 8-51 is applicable in summoning witnesses in a criminal case. A copy of the said opinion is enclosed. Even without the benefit of § 19.1-262, these sections (§§ 8-51 and 8-56) would be applicable in criminal proceedings although they appear in Title 8 which generally deals with civil remedies and proceedings. In this connection, see the case of McCue v. Commonwealth, 103 Va. 870.

“(3) In the event that there is substituted service may the court hold the witness in contempt if he does not appear and does not have actual notice of his summons in civil or criminal cases?”

No definitive answer can be made to this question. Whether a person should be punished for contempt is a matter for the judge depending upon all circumstances surrounding the alleged conduct. In all such cases, the court could and should cause such person to be brought before it to determine the reasons for his absence. Whether the person must be held in contempt is in the sound discretion of the court.

“(4) Does 8-65, No. 2, now apply to individuals rather than just corporations since the deletion of the word 'six' from the original section?”

The answer to this question is in the affirmative. Chapter 432, Acts of 1956, which amended § 8-65, superseded the same. This section applies to individuals as well as corporations. The 1956 re-enactment did not change this feature of the statute, as it always applied to individuals and to domestic corporations.
ZONING—Cost of Publication of Notice—May be charged against applicant.

COUNTIES—Ordinances—Costs of publication in zoning proceeding—May be charged against applicant.

HONORABLE E. C. WESTERMAN, JR.
Commonwealth's Attorney for the County of Botetourt

This is in reply to your letter of November 21, 1961, which reads as follows:

"Botetourt County has enacted a zoning ordinance pursuant to Title 15, Chapter 24, Article 2 of the Code of Virginia of 1950.

"I would appreciate it if you would let me know whether or not the ordinance may be amended to provide for a set fee to cover the costs of publication in newspapers of hearings for rezoning, and for hearings before the Board of Zoning Appeals. This fee would be used strictly to defray the expense of the above publications and would in no way be considered a Clerk's fee."

I am of the opinion that the board of supervisors may amend the county's zoning ordinance so as to provide for the payment of a fee or deposit by the petitioner. Any such amendment would have to be adopted in accordance with the provisions of § 15-847 of the Code. In my opinion, the ordinance could provide for a reasonable fixed fee with no refund to the petitioner.

We have conferred with the officials of Henrico County who handle zoning matters and they advise us that in that county, pursuant to an ordinance, a reasonable fee is charged each petitioner; that if the expense incident to the publication of a notice is greater than the fee, no extra charge is made against the petitioner, and if this expense is less than the fee prescribed by the ordinance, no refund is made to the petitioner.
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