OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1963 to June 30, 1964

Commonwealth of Virginia
Department of Purchases and Supplies
Richmond
1964
Letter of Transmittal

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

My dear Governor Harrison:

In accordance with § 2-93 of the Code of Virginia, I transmit to you the Annual Report of the Attorney General. This report covers the period beginning July 1, 1963 through June 30, 1964.

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.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General

October 1, 1964
<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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<tr>
<td>Kenneth C. Patty</td>
<td>Tazewell County</td>
<td>First Assistant</td>
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<tr>
<td>D. Gardiner Tyler</td>
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<td>Francis G. Lee</td>
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<td>Robert D. McIlwaine, III</td>
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<td>Reno S. Harp, III</td>
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<td>M. Ray Johnston</td>
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<td>Eleanor W. Tilley</td>
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<td>Margaret E. Bennett</td>
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<td>Helen B. Bowles</td>
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<td>R. Carter Scott</td>
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<td>Samuel W. Williams</td>
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<td>John Garland Pollard</td>
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<td>J. D. Hank, Jr.</td>
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<td>John R. Saunders</td>
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<td>Abram P. Staples</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>
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<td>Frederick T. Gray</td>
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<tr>
<td>Robert Y. Button</td>
<td>1962-1963</td>
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</table>

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

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

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

§Hon. J. Lindsay Almond, Jr., was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of Hon. Harvey B. Apperson. Resigned September 16, 1957.

**Hon. Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of Hon. J. Lindsay Almond, Jr., and served until January 13, 1958.

Hon. Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of Hon. A. S. Harrison, Jr., upon his resignation on April 30, 1961, and served until January 13, 1962.
CASES DECIDED IN THE SUPREME COURT OF APPEALS


Caldwell, Warren Howard v. Commonwealth of Virginia. Appeal from judgment of Circuit Court of Essex County convicting appellant of operating motor vehicle while under the influence of intoxicants. Judgment affirmed.


County School Board of Prince Edward County, Virginia, et al v. Leslie Francis Griffin, Sr., et al. Appeal from judgment of Circuit Court of City of Richmond construing Virginia school laws. Judgment of Circuit Court affirmed.


Kyhl, Elwood Coolidge v. Commonwealth of Virginia. Appeal from judgment of Circuit Court of Fauquier County convicting appellant of operating motor vehicle while under the influence of intoxicants. Judgment reversed.

Legum, Edward v. H. H. Harris, State Highway Commissioner. Appeal from Corporation Court of the City of Norfolk. Mandamus proceeding seeking to compel the Commissioner to institute condemnation proceeding for alleged damage to real property. Judgment affirmed.


Myers v. Moore, Mandamus to compel Judge to certify appeal. Writ denied.


CASES PENDING IN THE SUPREME COURT OF APPEALS

Bateman, Richard v. Commonwealth of Virginia. From the Corporation Court of the City of Norfolk, Part II. Upon a conviction of forgery.


Biddle, Shirley Mae v. Commonwealth of Virginia. From the Corporation Court of the City of Norfolk, Part II. Upon a conviction of murder.

Bullock, James R. v. Commonwealth of Virginia. (Two cases). From the Corporation Court of the City of Norfolk, Part II. Upon a conviction of forgery.

Cooper, Frank Timothy v. Commonwealth of Virginia. From Circuit Court of the City of Williamsburg and County of James City. Appeal from conviction of rape.

Crews, Earl David v. Commonwealth of Virginia. Appeal from judgment of Circuit Court of Pulaski County convicting appellant of operating motor vehicle while under the influence of intoxicants. Application of Virginia "implied consent" law.


Farmer, John M. v. Commonwealth of Virginia. From the Circuit Court of Hanover County. Conviction of speeding.

Fedele, Jacquelin v. Commonwealth of Virginia. From the Hustings Court of the City of Richmond. Upon a conviction of being a person not of good fame.

Hoffler, Hubert Earl v. Commonwealth of Virginia. From the Corporation Court of the City of Suffolk. Upon a conviction of armed robbery.

Kene Corporation v. H. H. Harris, State Highway Commissioner. Appeal from the Corporation Court of the City of Norfolk which denied a writ of mandamus.

Laing, Jim v. Commonwealth. Appeal from Circuit Court of Giles County from contempt conviction.

Lovelace, Floyd Ural v. Commonwealth of Virginia. From Circuit Court of Pittsylvania County. Appeal from conviction of larceny.

Lowery, Thomas, Jr. v. Commonwealth of Virginia. Appeal from judgment of Circuit Court of Halifax County convicting appellant of operating motor vehicle while under the influence of intoxicants. Application of Virginia "implied consent" law.

Maddy, John W. v. First District Committee of Virginia State Bar. Appeal from Circuit Court of Hampton in disciplinary action against lawyer.


Marymount College of Virginia v. H. H. Harris, State Highway Commissioner. Appeal from the Circuit Court of Arlington County. Proceeding involved an injunctive proceeding.
REPORT OF THE ATTORNEY GENERAL

Miles v. Commonwealth. From Hustings Court of the City of Richmond. Reckless Driving.

Pierce, Ruben v. Commonwealth of Virginia. From the Corporation Court of the City of Suffolk. Upon a conviction of armed robbery.


Wansley, Thomas Carlton v. Commonwealth of Virginia. From Corporation Court of the City of Lynchburg. Appeals from conviction of rape. (Two cases)


Wilkins, Jack N. v. Levin Nock Davis. Petition for writ of mandamus and invalidation of § 24-3 of Virginia Code establishing Congressional districts.


CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

Clinton, Catherine v. Commonwealth of Virginia. From the Corporation Court of the City of Norfolk. Pandering, knowingly receiving money from a prostitute. Reversed.


Griffin, Cocheyse J. et al v. County School Board of Prince Edward County. Judgment of Circuit Court of Appeals for Fourth Circuit vacating judgment of District Court. Reversed and cause remanded to District Court.

Retail Clerks International Association, Local 1625, AFL-CIO, and William Travis, President of Retail Clerks International Association, Local 1625, AFL-CIO v. Alberta Schermerhorn, Lois Devita, Joyce E. Thuro and Larry Stark. From the Supreme Court of Florida. The Attorney General of Virginia joined in on the amicus curiae brief filed by the Attorney General of Florida with the Attorneys General of sixteen other states.

CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

Virginia State Board of Elections v. E. Leslie Hamm. Appeal from a judgment of statutory three-judge District Court for Eastern District of Virginia invalidating statutes requiring maintenance of racially separate voter registration and tax lists.
REPORT OF THE ATTORNEY GENERAL

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


Griffin, Cocheyse J. et al v. Board of Supervisors of Prince Edward County. Appeal from judgment of United States District Court for the Eastern District of Virginia directing appropriation of funds for public schools by Board of Supervisors. Pending.


Pettaway, Avis M. v. County School Board of Surry County, Virginia. Appeal from judgment of United States District Court enjoining payment of tuition grants to residents of Surry County. Pending.

CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


Pettaway, Avis M. v. County School Board of Surry County, Virginia. Appeal from judgment of United States District Court for the Eastern District of Virginia enjoining payment of tuition grants on behalf of residents of Surry County. Pending.


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


Coleman v. Maher and May. Circuit Court of Henrico County. Motion for judgment for damages at MCV. Pending.


Commercial Laundry Company, Inc. v. City of Norfolk and Commonwealth of Virginia. Circuit Court of the City of Richmond. Motion for judgment. Claim for damage to real property resulting from construction of highway. Dismissed with prejudice.

Eggleston v. Commonwealth. Law and Equity Court of the City of Richmond. Petition for correction of erroneous assessment of taxes. Relief granted.


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


State Board of Pharmacy v. Harrell. Circuit Court of Virginia Beach. Appeal from license revocation. Pending.


Victoria Films, Inc. v. Division of Motion Picture Censorship. Circuit Court for the City of Richmond. Declaratory judgment suit attacking constitutionality of motion picture censorship statutes. Pending.


Waynesboro Community Hospital v. Commonwealth of Virginia and City of Waynesboro. Circuit Court of City of Waynesboro. Petition alleging erroneous assessments for retail merchants licenses. Petition denied.


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

Bates, Harold Edward v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the City of Richmond. Appeal from an action of the Commissioner suspending operator's license for a period of sixty days under Section 46.1-430. Action of the Commissioner modified to thirty days suspension of operator's license.

Branch, Earnest Lee v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Commonwealth of Virginia. Circuit Court of the City of Newport News. Appeal from an action of the Commissioner revoking and suspending operating and registration privileges for a period of one year under Section 46.1-363. Appeal dismissed.

Capps, Billy C. v. C. H. Lamb, Commissioner of Motor Vehicles. Circuit Court for the City of Newport News. Appeal from an action of the Commissioner suspending operator's license and registration certificates and plates under Section 46.1-167.4. Policy of insurance held valid—Commissioner's order vacated.


Cleaton, Marvin Francis v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the City of Richmond. Appeal from an action of the Commissioner suspending operator's license for a period of one year under Section 46.1-430. Action of the Commissioner affirmed.


Commonwealth of Virginia, ex rel, C. H. Lamb, Commissioner, Division of Motor Vehicles v. Northeastern Petroleum, Inc. Circuit Court of the City of Richmond. Motion for judgment in the amount of $1,946.53, tax, penalty and interest assessed, with interest at one per centum from April 1, 1963, filed under Section 58-726. Dismissed agreed upon receipt of full settlement of claim plus court costs.

Dixon, Johnnie Lee v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the City of Norfolk. Bill of Complaint to enjoin Commissioner from revoking operator's license and suspending registration certificates and plates under Sections 46.1-449 and 46.1-167.4. Pending.

Doyle, William Thomas v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court for the City of Newport News. Appeal from an action of the Commissioner suspending operator's license and registration certificates and plates under Section 46.1-167.3 because of conviction of permitting the operation of an uninsured motor vehicle. Vehicle held insured and action of the Commissioner set aside.

Elliott, Robert Heim v. The Commissioner of the Motor Vehicles of Virginia. Circuit Court of the City of Radford. Appeal from an action of the Commissioner suspending operator's license for a period of thirty days under Section 46.1-430. Rehearing granted by Commissioner and appeal dismissed.

Eoerette, Herman P. v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court for the City of Newport News. Appeal from an action of the Commissioner suspending operator's license and registration certificates and plates under Section 46.1-167.4. Commissioner's action affirmed.

Report of the Attorney General


Gills, George William and Clara Stone v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Fairfax County. Appeal from an action of the Commissioner revoking operator's licenses and suspending registration privileges under Section 46.1-167.2. Fee paid and revocation rescinded under Section 46.1-167.7. Dismissed.

Grande, Albert Vincent v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the City of Richmond. Appeal from an action of the Commissioner suspending operator's license for a period of sixty days and providing for additional suspension contingent upon observing the motor vehicle laws. Action of Commissioner affirmed as to sixty day suspension and modified and reversed as to contingent additional suspension.


Helmick, Eugene v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Commonwealth of Virginia. Circuit Court of the City of Richmond. Appeal from an action of the Commissioner revoking the chauffeur's license and suspending the registration certificates and plates under Section 46.1-442. Judgment of Civil Justice Court held void and of no effect and since action of the Commissioner based on said judgment same held likewise void and of no effect.


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 certificates and plates under Section 46.1-449. Pending.

Mundy, Joseph Patrick v. Commissioner, Division of Motor Vehicles. Circuit Court of Grayson County. Appeal from an action of the Commissioner revoking operator's license for a period of one year under Section 46.1-430. Operator's license surrendered. Pending.

Myers, Willie Harris v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Pittsylvania County. Petition for appeal from action of the Commissioner revoking operator's license for period of one year and suspending registration certificates and plates under Sections 46.1-417 and 46.1-418. Petition for appeal dismissed.

Phibbs, Dexter E. v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the City of Norfolk. Appeal from an action of the Commissioner suspending operator's license and registration certificates and plates under Section 46.1-167.4 Pending.

Poole, Raymond S., Jr. v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the City of Chesapeake. Appeal from an action of the Commissioner refusing to issue an operator's or chauffeur's license for a period of one year under Section 46.1-363. Action of the Commissioner affirmed.

Scott, Harvey David v. The Commissioner of Motor Vehicles. Circuit Court of the City of Radford. Appeal from an action of the Commissioner suspending operator's license under Section 46.1-430. Appeal withdrawn prior to docketing. Operator's license surrendered to the Division.

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 for Fairfax County. Appeal from an action of the Commissioner suspending the operator's licenses and privileges to operate motor vehicles and registration privileges in accordance with the provisions of Sections 46.1-442 and 46.1-446 of the Code. Pending.

Tennis, Joseph David v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Hustings Court of the City of Roanoke. Appeal from an action of the Commissioner suspending the operator's license for a period of one year under Section 46.1-430. Action of the Commissioner affirmed.

Tucker, Charles Knighton v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the County of Alleghany. Appeal from an action of the Commissioner suspending operator's license for a period of sixty days under Section 46.1-430. Suspension period expired—appeal dismissed from docket.


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 certificates and plates under Section 46.1-449. Pending.

Ward, Paul Vincent v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Hanover County. Appeal from an action of the Commissioner suspending the operator's license and registration certificates and plates under Section 46.1-449. Satisfactory releases obtained—suspension withdrawn. Appeal Dismissed.

Wrenn, William Page v. Commonwealth of Virginia, Division of Motor Vehicles, C. H. Lamb, Commissioner. Circuit Court of Fairfax County. Appeal from an action of the Commissioner revoking operator's license for period of one year and suspending registration certificates and plates under Sections 46.1-417 and 46.1-418. Motion to dismiss the appeal sustained.


Defendants include the Attorney General, the Commissioner, Department of Taxation, Commissioner, State Corporation Commission and Commissioner, Division of Motor Vehicles.

CASE DECIDED IN THE SUPREME COURT OF APPEALS

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

Fidelity National Bank v. Lloyd Major Jones, et al, Circuit Court of Amherst County Pending.
Funkhouser, Violet v. Unemployment Compensation Commission of Virginia and American Viscose Corporation, Circuit Court of Washington County. Pending.
In the Matter of Oceana Drugs Inc., and John S. McFall, individually and t/a Oceana Drug, Circuit Court of the City of Virginia Beach. Pending.
Virginia Employment Commission v. Hugh H. Bell and 101 other similar suits for the collection of unemployment compensation. Circuit Court of the City of Richmond.
### Extrtradition Hearings Conducted and Reports Submitted Pursuant to Request of the Governor

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<td>July 12, 1963</td>
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<td>July 29, 1963</td>
<td>Wiley Frank Cummings, Jr.</td>
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<td>August 21, 1963</td>
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<td>November 4, 1963</td>
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<td>June 5, 1964</td>
<td>John Franklin Jackson</td>
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OPINIONS

ACKNOWLEDGMENTS—Form Required—Commissioned officers in armed forces may take acknowledgments—When to be recorded.

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

This is in reply to your letter of August 9, which reads as follows:

"We have had an inquiry from the Department of Defense concerning recognition in the Commonwealth of Virginia of notarial acts performed by commissioned officers of the armed forces abroad.

"Section 55-115 of the Code of Virginia appears to limit the authority of officers to perform notarial acts to members of the armed forces and their consorts.

"We would appreciate your opinion as to whether commissioned officers of the armed forces may act in the role of notaries for civilian employees of the military departments working abroad and dependents of the latter."

Section 55-115 of the Code, to which you refer, directs a clerk to admit to record any writing mentioned in § 55-106 as to any person whose name is signed thereto who at the time of making an acknowledgment to such writing was in active service in the armed forces of the United States, or as to the consort of any such person, upon the certificate of any commissioned officer of any of the military groups mentioned therein that such writing has been acknowledged before him by such person—that is, a person who is in active service in the armed forces of the United States, or the consort of such a person. The last sentence of § 55-115 specifically states that the commissioned officer may take the acknowledgment of any person in any branch of the armed services of the United States or the consort of such person. This section does not contain any language which would require a clerk to admit to record any such writing signed by a person who is not in the active service of the United States or the consort of such a person, and which has been acknowledged by a commissioned officer.

The procedure for taking acknowledgments outside the United States where the person making the acknowledgment is not in the active service of the armed forces is set forth in § 55-114. Acknowledgements by this group of persons may be taken before ambassadors, etc., as mentioned in this section.

It is my opinion, therefore, that acknowledgments taken by commissioned officers of the armed forces for civilian employees of the military departments working abroad, and the consorts and dependents of such persons, would not be sufficient for the purpose of making the writing a recordable instrument.

August 9, 1963
ALCOHOLIC BEVERAGE CONTROL LAWS—County Ordinance Regulating Sale of Beer on Sunday—Must not be discriminatory.

SUNDAY—Sale of Beer—County ordinance must not be discriminatory.

June 30, 1964

HONORABLE WALTHER B. FIDLER
Member, Virginia House of Delegates

This will acknowledge receipt of your letter of June 12, 1964, in which you state in part:

“Recently Westmoreland County adopted an ordinance that begins by prohibiting all sale of beer on Sunday in Westmoreland County and then further in the ordinance it exempts therefrom and allows the sale of beer by restaurants whose volume of sale amounts to at least 75% in the prepared food field. This ordinance allows restaurants to sell beer both on and off premises.”

You then ask my advice as to whether or not the ordinance referred to is discriminatory, and therefore unconstitutional, as to other licensees who hold off-premises privileges in Westmoreland County. You indicate that you do not think the ordinance is arbitrarily discriminatory as to other holders of on-premises privileges because there does appear to be some reasonable relation between the serving of food and the sale of beer on-premises, thus providing a rationale for the legislative classification in the ordinance with regard to the on-premises privilege.

As you are aware, Section 4-96 of the Code denies the localities almost all power regarding the regulation of alcoholic beverages. That section, however, refers to Sections 4-38 and 4-97 of the Code, both of which are exceptions to this general denial of power. The ordinance about which you have inquired was enacted pursuant to the provisions of Section 4-97.

Two former Attorneys General have construed Section 4-97. In an opinion dated June 20, 1950, addressed to the Honorable W. O. Fife, J. Lindsay Almond, the then Attorney General, concluded that an Albemarle County ordinance, enacted pursuant to Section 4-97, which prohibited the on-premises sale of beer or wine while permitting the off-premises sale thereof during the same period, was valid. His theory was that the locality was simply exercising a selected portion of its power grant under Section 4-97.

In an opinion dated April 6, 1961 to the Honorable Virgil H. Goode, Albertis S. Harrison, Jr., Attorney General, referred to and adopted the opinion of June 20, 1950, and concluded that a Franklin County ordinance enacted under Section 4-97, which allowed fraternal clubs to sell beer between certain hours on Sunlay, but prohibited all other licensees from selling on Sunday was non-discriminatory and therefore valid. He concluded that the ordinance was founded “upon recognizable distinguishing characteristics,” in that “clubs” were “private” and non-commercial, whereas the other licensees, who were prohibited from selling, operated commercial or “public” establishments. He also concluded, however, that there was no reasonable basis for distinguishing “fraternal” clubs from other clubs and that to the extent that it did this, the ordinance appeared to be discriminatory and unconstitutional.


In answer to your specific inquiry, I can find no reasonable basis for permitting restaurants, “whose volume of sales amounts to at least 75% in the prepared food field,” to sell beer off-premises on Sunday while at the same time,
prohibiting other holders of off-premises privileges from doing so. While I can see some reasonable basis for the distinction established by the ordinance as to on-premises sales and tend to agree with your conclusion as to those, no set of facts occurs to me which would warrant the distinction as to off-premises sales. Therefore, it is my opinion that the ordinance is discriminatory and therefore unconstitutional to the extent that it grants off-premises sales privileges to the restaurants designated while at the same time denying off-premises sales privileges to other off-premises licensees.

ALCOHOLIC BEVERAGE CONTROL LAWS—Excise Tax on Malt Beverages
—When new rate of tax applicable.

TAXATION—Malt Beverages—When new rate applicable.

June 4, 1964

MR. C. H. MORRISSETT
State Tax Commissioner

This will acknowledge receipt of your letter of May 22, 1964, which reads in part as follows:

"By Chapter 397 of the Acts of the General Assembly of 1964, §§ 4-40 and 4-108 of the Code of Virginia, as amended, relating to the State excise tax on beer and 3.2 beverages, respectively, were again amended, and these sections, as so amended, will be in force on and after July 1, 1964.

"The amended sections accomplish two things: (1) They extend the 'temporary' tax increase on malt beverages (first enacted in 1960, and continued by Acts 1962, p. 272, for another two years), so that this increase will not expire until June 30, 1966; and (2) they further increase the State excise tax on malt beverages in barrels to $6 per barrel of 31 gallons. The same rate of tax applies to malt beverages in half barrels, quarter barrels, etc. The old 'permanent' rate was $3.10 per barrel; the former 'temporary' rate was $4 barrel; the 1964 amendments make the 'temporary' and the 'permanent' rate $6 per barrel, effective July 1, 1964. The 1964 amendments continue for another two years the 'temporary' rates on malt beverages in bottles and cans without change.

"On July 1, 1964, when the rate per barrel of 31 gallons will be raised from $4 to $6, various Virginia wholesalers will have on hand in their inventories for sale to retailers, malt beverages in half barrels and quarter barrels. (Barrels are not in general use). The tax on July 1, 1964 will be $6 per barrel, $3 per half barrel, and $1.50 per quarter barrel, as compared with $4 per barrel, $2 per half barrel, and $1 per quarter barrel on June 30, 1964.

"The specific question on which your opinion would be appreciated relates to the collection of the difference between the rate of $4 per barrel and the rate of $6 per barrel from Virginia wholesalers who may have in their possession malt beverages in barrels, half barrels or quarter barrels on or after July 1, 1964 which carry inadequate tax stamps."

Inasmuch as the new rate of $6.00 per barrel applies to all malt beverages in barrels, half barrels and quarter barrels sold by wholesalers in Virginia after July 1, 1964, you ask my opinion as to whether or not the Virginia wholesalers
can be held liable to the State for the difference between the lower tax rate previously paid by the manufacturers as evidenced by the stamps on the containers and the higher tax rate in effect with respect to malt beverages sold by the wholesalers on or after July 1, 1964.

It is my understanding that the stamps which are provided for in §§ 4-41 (a) and 4-109 (a) are purchased from the Department of Taxation by the manufacturers and affixed by them to the containers. As you know, §§ 4-41 (a) and 4-109 (a) provide that the payment of the taxes imposed by §§ 4-40 and 4-108, respectively, the malt beverages excise tax on malt beverages in barrels, half barrels and quarter barrels, shall be evidenced by the affixing of the stamps to the original containers. Of course, §§ 4-40 and 4-41 relate to beer and 4-108 and 4-109 relate to 3.2 beverages. All these sections must be read together.

It is my further understanding that your inquiry is prompted by the obvious fact that certain containers of malt beverages in the hands of Virginia wholesalers on July 1, 1964, or perhaps in transit to them from the manufacturers on that date, may have affixed to them the tax stamps at the $4.00 rate. Of course, the containers of all such malt beverages shipped on or after July 1, 1964 by the manufacturers to the Virginia wholesalers will carry stamps at the new $6.00 rate. Your inquiry, as I understand it, does not concern these. It only concerns those containers which are still in the hands of or on the way to the wholesalers on July 1, 1964 and which have affixed to them stamps at the $4.00 rate.

It is my opinion that the Virginia wholesalers will be liable to the State for the difference between the lower tax rate ($4.00) previously paid by the manufacturers (as will be evidenced by stamps at the $4.00 rate affixed to the containers) and the higher tax rate ($6.00) which becomes effective on July 1, 1964. As indicated, this will apply only to those malt beverage containers sold by Virginia wholesalers on or after July 1, 1964 and which bear stamps at the $4.00 rate. The affixing of the stamps provided for in §§ 4-41 (a) and 4-109 (a) evidence the payment of the tax in the amount designated by the stamp, and no more. A stamp at the $4.00 rate does not and cannot “evidence” payment of a tax at the $6.00 rate. Amended §§ 4-40 and 4-108, which become effective July 1, 1964, clearly assess a tax rate of $6.00 per barrel on all beer and 3.2 beverages sold on and after July 1, 1964. If the wholesalers sell malt beverages after July 1, 1964, the containers of which have affixed to them stamps at the old $4.00 rate, it is my opinion that the wholesalers are required to pay to the State the difference between this old tax rate and the new tax rate of $6.00.

ALCOHOLIC BEVERAGE CONTROL LAWS—Prosecution under § 4-75—
Excess of one gallon of whiskey necessary in prosecution for failure to pay Virginia tax.

ALCOHOLIC BEVERAGE CONTROL LAWS—Evidence—Possession of any amount of whiskey not bearing U.S. stamps is prima facie evidence of nonpayment of U.S. tax.

September 23, 1963

HONORABLE JAMES S. EASLEY
Attorney for the Commonwealth for Halifax County

This is in reply to your letter of September 13, 1963, in which you request my opinion as to whether or not “there must be at least one gallon of untaxed whiskey in the possession of a defendant to successfully prosecute under Section 4-75 of the Code.”
REPORT OF THE ATTORNEY GENERAL

I presume that you have referred to former opinions of this office, specifically that found in the Report of the Attorney General (1938-1939) p. 5, an opinion rendered by Attorney General Abram P. Staples dated December 16, 1938. The applicable principles, with which I concur, are there stated as follows:

"I acknowledge your letter of December 13, requesting my opinion upon a question which has arisen under section 50 (now Section 4-75, as amended. Acts of Assembly, 1954, c. 484) of the Alcoholic Beverage Control Act, i.e., whether a person convicted of possessing one pint of illegal whiskey is subject to a minimum fine of $50 as provided in said section.

"This section was designed to cover the possession and transportation of two different types of alcoholic beverages. The second paragraph of this section states that spirits in the possession of any person, and in containers not bearing the required government stamps or seals, shall be deemed for the purposes of this Act to have been illegally acquired. This you refer to as 'illegal whiskey'.

"This portion of section 50 was intended to cover what is commonly known as 'moonshine' whiskey, or any whiskey which did not bear evidence that the Internal Revenue tax had been paid, and the possession of any amount of this whiskey subjects a person possessing the same to the minimum penalty specified in the last paragraph of this section.

"The third paragraph of section 50 deals with tax paid alcoholic beverages in the possession of persons in amounts in excess of one gallon, etc. This section was intended to cover the possession of alcoholic beverages brought into the State from other states, where the same had been lawfully obtained.

"You will notice in section 58, subsection (d), (now Section 4-84 (d)) that a person is permitted to bring into the State lawfully acquired alcoholic beverages in amounts not to exceed one gallon. The practice had grown up among the bootleggers throughout the State of accumulating such liquors which bore the Internal Revenue stamps, and sometimes the stamps of adjoining states, and from this stock to engage in peddling the same. This practice was doubtless the cause of the enactment of the amendment making it unlawful to possess such beverages in quantities exceeding one gallon in the absence of evidence that same was lawfully acquired in Virginia from some person authorized to sell same. A person can lawfully transport only one gallon of such alcoholic beverages and the statute permits the lawful possession of only that amount.

"It is my opinion that, if the whiskey is possessed in any amount in a container which does not have thereon government revenue stamps or seals, the person so possessing same is punishable as provided by this section for the possession of said 'illegal whiskey', the minimum punishment being a fine of $50." (Italics added)

As you mention in your letter, the Supreme Court of Appeals of Virginia construed this same "Section 50" in two decisions in 1944, Powers v. Commonwealth, 182 Va. 669, 30 S.E. 2d 22, and Smith v. Commonwealth, 182 Va. 585, 30 S.E. 2d 26. At that time it was Section 4675 (50), Code of 1942. It had not been amended since the opinion of Attorney General Staples.

The section was last amended by the Acts of Assembly 1954, c. 484. These amendments served to confirm the construction of the section by Attorney General Staples in his opinion of 1938. You might refer to the Acts of 1954 in order to compare the language before and after these amendments. This will be helpful, I think, in proper construction at this time.

It is my opinion that proof that "spirits", as defined in Section 4-2 (24), are seized in any amount in the possession of any person in containers not bearing
United States government stamps or seals, gives rise to a rebuttable presumption that the tax imposed by the laws of Congress has not been paid. This is clear from the first and second paragraphs of Section 4-75. Under the third paragraph, proof of possession of alcoholic beverages, as defined by Section 4-2 (2), in amounts in excess of one gallon, in containers not bearing stamps or other evidence showing that they were purchased from the Virginia Alcoholic Beverage Control Board or from a person licensed to sell them under the provisions of Chapter I of Title 4 or not bearing other evidence that the tax due the State or the markup required by said Board has been paid, gives rise to a rebuttal presumption of illegal acquisition of said alcoholic beverages.

These presumptions are sufficient to establish guilt of illegal acquisition, unless the possessor proves that the beverages were lawfully acquired by him and lawfully transported into Virginia. See Powers v. Commonwealth, supra, and Smith v. Commonwealth, supra.

It is to be noted that both the Smith and the Powers cases were prosecutions under the third paragraph of the section. Therefore, it was necessary that the amount of beverage possessed by the accused exceed one gallon in order for the rebuttable presumption of illegal acquisition to arise. In the Powers case, the opinion states that U.S. Internal Revenue stamps were affixed to all the containers. There is no reference to U.S. stamps in the Smith case. It is merely stated that the containers bore stamps indicating purchase in either Washington or Maryland. The point is, however, that if in either case the beverages had been "spirits" and U.S. Internal Revenue stamps had been absent from any container, regardless of the amount of "spirits" therein or the size of the container, the prosecution could have been under the first and second paragraphs of the section and the rebuttable presumption provided for therein would have arisen. In other words, if "spirits" in any amount are possessed in containers on which there are no U.S. Internal Revenue stamps, regardless of what other stamps might be present, it is presumed that the U.S. tax on the "spirits" has not been paid and that there was illegal acquisition. See Sturgis v. Commonwealth, 197 Va. 264, 88 S.E. 2d 919, for a prosecution under the first and second paragraphs of Section 4-75.

Therefore, it is my opinion that there must be an amount in excess of one gallon only where the prosecution is under the third paragraph, that is for failure to pay the Virginia tax. If the prosecution is under the first and second paragraphs, for failure to pay the U.S. tax, the possession of any amount (not bearing U.S. stamps) is prima facie evidence of nonpayment of the U.S. tax.

ATTORNEYS—Fees—How computed in court appointed cases under § 19.1-241.5 of the Code.

CRIMINAL PROCEDURE—Court Appointed Counsel—How compensation established under § 19.1-241.5 of the Code.

HONORABLE LLEWELLYN S. RICHARDSON
Judge of Municipal Court of Norfolk

June 12, 1964

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

"This is with reference to 19.1-241.5 of the Code. This Section provides that an amount not exceeding $25.00 may be paid by this Court in appointed felony cases. We have a number of cases where an individual is charged with several felonies."
“My question is where a defendant is charged with several felonies am I limited to pay $25.00 or am I permitted to make a charge for each felony not to exceed $25.00.”

The attorney who is appointed in these cases is charged with the duty of representing his client at every stage of any proceeding against him. If the same attorney is appointed to represent a person in connection with two or more warrants, in my opinion, the attorney is entitled to be compensated for his services on behalf of the defendant with respect to each warrant.

It will be observed that § 19.1-241.5 provides that counsel appointed to represent the defendant upon a felony charge shall be compensated for his services to the extent of not more than $25.00. The court has the authority to fix the compensation, but not in excess of $25.00 in any case. Where an attorney is appointed to represent a person against whom there are two or more felony charges, all of which are heard at a single session of court, the court in fixing the compensation in each separate case may consider what is a reasonable compensation for the entire services rendered and adjust the fee in each case so as to arrive at a fair compensation.

BAIL—Persons Charged with Offenses Involving Alcohol—May be released on bond by justice of the peace.

JUSTICE OF PEACE—Bail—No time limitation on authority to grant in cases involving the consumption of alcohol.

HONORABLE MAURICE E. GRIFFIN, JR.
Justice of the Peace

December 3, 1963

This is in reply to your letter of November 20, in which you present two questions as follows:

“If a person is charged with ‘drunk in public,’ can someone bond him out of jail and be responsible for his safety or do you have to keep them in jail so many hours or a reasonable definite length of time before their release?” and,

“If a person is charged with ‘driving under the influence of intoxicating beverages,’ can another person bond him out of jail and be held responsible for his safety or do you have to hold them in jail so many hours or a definite length of time before they may be released?”

The authority of a justice of the peace to grant bail is found in § 19.1-110 of the Code. In those cases where the offense is a misdemeanor such as the offense you have cited, I think the justice of the peace has ample authority to grant bail to the accused and deliver him into the custody of a responsible person. I know of no statute which make it mandatory upon the justice of the peace to commit a person charged with being drunk in public to jail to remain there until such time as he has recovered.

Your second question is of the same nature as your first question, except the misdemeanor is a different type, and I think that the same authority is vested in the justice of the peace with respect to both cases.
REPORT OF THE ATTORNEY GENERAL

BANKS—Deposits and Depository—Upon merger of depository bank treasurer of county may use new bank as depository.

TREASURERS—County—Upon merger may use new bank as depository.

September 26, 1963

Honorable F. B. Huber
Treasurer of Campbell County

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

"Campbell County Bank, one of my depositories, and The Lynchburg National Bank and Trust Company of Lynchburg, Virginia, will merge, effective October 1, the merged bank to be known as The Fidelity National Bank.

"The Lynchburg National Bank and Trust Company is presently acting as escrow agent for the First National Bank of Altavista, another of my depositories.

"I would appreciate your opinion with respect to the following questions:

1. Will it be necessary for the Finance Board of Campbell County to approve The Fidelity National Bank as a depository?
2. Will a new escrow agreement have to be drawn and executed?
3. May The Fidelity National Bank continue to act as escrow agent for The First National Bank of Altavista and, if permissible, will Finance Board approval and execution of a new escrow agreement be necessary?"

In my opinion, if the Fidelity National Bank, under the terms of the merger agreement will assume all the liabilities and contracts of the Campbell County Bank and Lynchburg National Bank and Trust Company, there will be no necessity for the Finance Board of Campbell County or your office to take any action in connection with the matter presented in your letter.

I have conferred with the Auditor of Public Accounts and he advises me that he has given advice of this nature in similar transactions.

BOARDS OF SUPERVISORS—Authority—Building Permits—May adopt ordinances requiring.

ORDINANCES—Building Permits—Board of supervisors may require submission of.

May 21, 1964

Honorable A. Dunston Johnson
Commonwealth's Attorney for Isle of Wight County

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

"In February, 1950, the Board of Supervisors of Isle of Wight County passed an ordinance requiring a building permit to be obtained from the Commissioner of Revenue before the construction, repair or improvement of a building or structure is commenced if the cost thereof was to exceed $750.00, which ordinance was apparently passed pursuant to what was then thought to be the statutory authority therefor.
"Section 58-766, as amended in 1954, requires a building permit to be obtained, without the county passing an ordinance requiring the same, before such construction, repair or improvement if the cost thereof is to exceed $500.00 and, since that time, Isle of Wight County has issued such permits pursuant to this State law rather than pursuant to its ordinance of 1950.

"Section 58-766.1 of the Code, enacted in 1962, provides that a county having a population of not less than 17,000 and not more than 17,200 inhabitants may require by ordinance a building permit if the cost of construction is $250.00 or more and the posting of such permit at any place covered thereby.

"Isle of Wight County is presently proceeding under the State law contained in Section 58-766, supra, and not under its said ordinance. According to the 1960 census its population was 17,164 inhabitants. It desires (1) to repeal its ordinance passed in 1950, (2) to discontinue proceeding under Section 58-766 of the Code, and (3) to adopt an ordinance pursuant to Section 58-766.1 of the Code.

"I will appreciate your opinion as to whether or not the Board of Supervisors (1) may, by resolution or motion, but without an ordinance, require building permits to be posted at places covered by such permits under Section 58-766 of the Code and fix the amount for which a building permit is required at less or more than $500.00 as stated in said Code Section, and (2) may, if it adopts an ordinance under Section 58-766.1 of the Code, fix the minimum cost of construction for which a building permit is required at less or more than $250.00 as stated in said Code Section."

Section 58-766, as you point out, requires no ordinance in order to be effective. No authority is delegated by this section to the governing body of a county to diminish or extend, by ordinance, the scope of the statute. Therefore, your question with respect to this statute is answered in the negative.

Section 58-766.1 provides that any county within the population bracket of Isle of Wight may enact an ordinance applying to building permits within the limits prescribed by this section. In my opinion, it is necessary that the provisions of this section be followed strictly and, therefore, the answer to that part of your question relating to this section is likewise in the negative. In my opinion, the wording of the ordinance with respect to cost should be the same as it appears in the statute.

Should your county adopt an ordinance as permitted under this section, § 58-766 would no longer apply to that county.

BOARDS OF SUPERVISORS—Authority—Cannot deny landowner access to streets in State Secondary Highway System.

BOARDS OF SUPERVISORS—Zoning—No authority to enforce regulation denying landowner access to State Secondary Highway System.

HIGHWAYS—Secondary System—Control, supervision and management vested in Department of Highways.

HONORABLE W. ROY SMITH
Member, House of Delegates

February 27, 1964

This is in reply to your letter of February 20, which reads as follows:
An opinion from your office is requested on the following questions:

1. Can the County Board of Supervisors deny a land owner access to streets in the State Secondary Highway System which abutt his property?

2. If the property owner in question is a builder of apartments, and his land is zoned for that use, can the County Board of Supervisors deny such access on the ground that they do not want traffic from apartments to travel over such streets through a community of single family homes?

In each question cited above, the public streets have not been classified as 'limited access highways' by deed or by act of the State Highway Commission.

With respect to your first question, I am of the opinion that a board of supervisors may not enforce an ordinance or regulation of that nature. I am not aware of any statute under which such power may be exercised.

With respect to question 2, I am of the opinion that it should also be answered in the negative. Under § 33-46, the Department of Highways is vested with the control, supervision and management of the secondary system of State highways. In my opinion, the powers granted to counties with respect to zoning, as contained in Article 8, Chapter 28, Title 15 of the Code, are not sufficiently broad to authorize a board of supervisors to enforce a regulation such as is mentioned in your letter.

BOARDS OF SUPERVISORS—Authority—May adopt ordinances prohibiting drunk driving paralleling State law on the subject.

April 30, 1964

HONORABLE WILLIAM A. JONES
Commonwealth's Attorney for Richmond County

This will acknowledge receipt of your letter of April 29, which reads as follows:

"The Board of Supervisors of Richmond County desires to amend the Drunken Driving law, which was enacted in 1936, to conform with the state law then in effect, under the authority of an enabling section giving cities, towns and counties the authority to enact similar ordinances.

"The Legislature in 1962, amended the penalty invoked under the state law existing until 1962, by setting the minimum penalty at $200.00 fine instead of $100.00 fine which had been in effect up until that time.

"I cannot find any enabling act authorizing a county to raise the minimum penalty in the 1962 Acts of Assembly.

"Question: Can a county raise the minimum penalty without appropriate enabling act by the Legislature? If this may be done, under what authority can it be done?"

Section 15-553 of the Code authorizes the councils of cities and towns and the boards of supervisors of counties to enact ordinances of the nature mentioned in your letter. In order for the county to take advantage of this Code section it will be necessary for the board of supervisors to adopt an ordinance amending the present ordinance and in the amended ordinance fix the minimum penalty at
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$200.00. The ordinance must be adopted under the procedure set forth in § 15-8 of the Code.

BOARDS OF SUPERVISORS—Authority—May adopt ordinances regulating shooting matches.

BOARDS OF SUPERVISORS—Authority—May not impose licenses on those in charge of shooting matches.

SHOOTING MATCHES—Authority to Regulate—Boards of supervisors may adopt ordinances to regulate but may not impose licenses thereon.

April 17, 1964

HONORABLE WILLIAM M. MCCLENNY
Commonwealth’s Attorney for Amherst County

This is to acknowledge receipt of your letter of April 9, 1964, in which you state in part:

“I would appreciate very much your opinion as to whether or not a county has the right to enact an ordinance regulating shooting matches, that is as to the hours, place and proximity to other people or residences in the vicinity.

“I would also like to know if those conducting shooting matches where prizes are given away consisting of goods of one type or another should be required to have a merchant’s license or if a Board of Supervisors would have authority to put a license of any type on such activity.”

Under the provisions of § 15-8(5), Code of Virginia (1950) as amended, the Board of Supervisors may adopt such measures as it deems expedient to promote the safety and general welfare of the inhabitants of the county. Obviously, there is danger in the conducting of shooting matches unless safety precautions are followed.

I am therefore of the opinion that the Board of Supervisors may adopt an ordinance prohibiting shooting matches from being held within fixed distances from public roads and public buildings, or within a fixed distance from a private dwelling, except with the owner’s or occupant’s consent.

In answer to your second question concerning the authority of counties issuing licenses, you are, of course, aware that counties can only impose licenses when expressly authorized to do so by statute. Code sections granting such authority to counties to issue licenses are 58-283 (on carnivals), 58-361 (on slot machines), 58-367.1 (on vending machines) and 58-371.2 (on bondsmen). None of these would include authority to require a license on the operation of a shooting match.

I am therefore of the opinion that the Board of Supervisors cannot require the participants or the persons in charge of a shooting match (where prizes are given) to secure a merchant’s license.

The 1964 General Assembly enacted legislation enlarging the authority of counties to impose licenses. I have not examined this legislation. It is suggested that you consider the same after it is published and becomes effective to determine whether it would encompass the authority to impose a license on such an activity as a shooting match.
BOARDS OF SUPERVISORS—Authority—May appropriate money for support of psychiatric clinic to extent services received therefrom.

MENTALLY ILL—Psychiatric Clinics—Boards of supervisors may contribute funds to psychiatric clinics.

Honorable H. Ratcliffe Turner
Commonwealth's Attorney of Henrico County

May 29, 1964

This will acknowledge receipt of your letter of May 21, in which you make the following statement:

"The Board of Supervisors of Henrico County have been requested to contribute funds to the support of the Richmond Area Psychiatric Clinic, a body created of the provisions of Sections 37-38 through 37-41 of the Code of Virginia for the purpose, as I understand it, of providing out-patient and follow up services to persons discharged from State Mental hospitals, as well as to render psychiatric services on an out-patient basis to persons in the locality desiring such services and without financial means to obtain it from private sources.

"As I understand it, this organization is a part of the Department of Mental Hygiene and Hospitals of the State of Virginia and not a private charitable organization. It is my understanding that similar clinics in other areas of the State are presently being supported in part by contributions from local governing units . . . "

You request my advice as to whether or not the Board of Supervisors of the County of Henrico is authorized by law to appropriate money for the support of a Richmond Area Psychiatric Clinic.

In my opinion the county of Henrico may make an appropriation for the purpose of participating in the operation of such a clinic, especially to the extent that the citizens of Henrico County may receive service at such clinic. The clinic in question is established under the provisions of Title 37 of the Code (§ 37-38, et seq.) and it is an integral part of the hospital system established and operated by the State Hospital Board and the Department of Mental Hygiene and Hospitals. Under Chapter 8 of Title 32, the governing bodies of the counties may establish a hospital within the county and appropriate funds for its support. Furthermore, under the provisions of § 15-16.1, the board of supervisors of a county may make appropriations in support of hospital service operated by charitable institutions or non-profit or other organizations conducting a hospital. Under § 15-8(5) the board of supervisors of every county shall have the power:

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

The clinics established under § 37-38 are charitable organizations of a public character, and I am of the opinion that the governing body of a county has the power to make appropriations for the support of such an establishment to the same extent as the county would have to establish such a facility of its own.

The Supreme Court of Appeals of Virginia, in the case of Pirkey v. Grubb's Ex'tor, 122 Va. 91, 100 stated:
That the establishment and maintenance of hospitals by counties and towns is regarded in Virginia as a benevolent object of a public character, is manifest from sections 1719 and 1720 of the Code, authorizing such hospitals and their maintenance out of the public funds; and it seems hardly necessary to say that the maintenance of the indigent poor is also a benevolent or charitable object of a public character . . ."

If the county of Henrico should be reluctant to make a lump sum appropriation to the clinic it could arrange with the clinic to pay the established per-patient cost for the service rendered to each patient who receives treatment at this facility and who is a resident of Henrico County.

I understand the counties of Arlington, Fairfax, Dinwiddie and Washington are making appropriations for this type of service.

BOARDS OF SUPERVISORS—Authority—May install and maintain lighting for public streets and highways as opposed to private rights of way.

HIGHWAYS—Streets—Authority to install lights in.

December 9, 1963

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

This is in reply to your letter of December 2, 1963, in which you raise some inquiries relating to the authority of the Board of Supervisors to install and maintain lights in various parts of the county. Your letter reads, in part, as follows:

“I will appreciate your opinion interpreting this section with particular reference to what is meant by the words ‘on the streets and highways in the villages and built-up portions of such counties.’ Are the line poles required to be on the rights of way of such streets and highways or within a certain distance of such rights of way and what constitutes villages and built-up portions of such counties? May the Board of Supervisors provide such lights if the line poles and lines are placed on private property?”

I am unaware of any legal definition, either by statute or by court decision in Virginia, for the word “village.” Given its generally accepted meaning, I am of the opinion that any unincorporated community consisting of an aggregation of houses and places of business and social commerce, as contra-distinguished from agricultural or uninhabited territory, would be considered as a “village” within the contemplation of § 15-778 of the Code of Virginia. That section reads as follows:

“The boards of supervisors of counties may, in their discretion, install and maintain suitable lights on the streets and highways in the villages and built-up portions of such counties, respectively, and pay the costs of such installation and maintenance out of the county fund.”

The clear purport of the foregoing quoted section of the Code is to authorize the expenditure of public funds for the installation and maintenance of suitable street lights in the villages and built-up portions of a county. Needless to say,
such communities are normally laid out in some orderly design with public streets and alleys giving some form of congruity and continuity to the built-up areas, although this is not essential. I should think that lights for streets and highways, as contemplated in § 15-778 of the Code, would be installed only when suitable for lighting public streets or highways, as opposed to private rights of way.

I know of no requirement that such lights be installed within the public right of way, but obviously they should be suitably placed so as to supply light to the street or highway.

BOARDS OF SUPERVISORS—Authority—May not adopt conditional ordinances.

ORDINANCES—Conditional—Boards of supervisors may not adopt.

March 18, 1964

HONORABLE H. RATCLIFFE TURNER
Commonwealth’s Attorney for Henrico County

This is in reply to your letter of March 10, in which you request my opinion as to the authority of a board of supervisors to enact an ordinance under the zoning statutes—§§ 15-968 through 15-968.12 of the Code—in the following manner:

“Several members of our Board of Supervisors have previously inquired of this office as to whether or not the Board could adopt an amendment to the Henrico County Zoning Ordinance which would, in effect, provide that where a parcel of land was rezoned at the request of the property owner, that if the property owner did not use the parcel of land so rezoned for one of the purposes permitted in the new classification within a specific period of time, probably one to two years, that the property would automatically revert back to the zoning classification which it held prior to the rezoning without any action of the Board of Supervisors.”

You furnished me with an opinion dated January 29, 1964 by your office to the county manager to the effect that such an ordinance would not be valid. I feel that you are correct in your conclusion with respect to the matter.

A board of supervisors may exercise only those powers granted by the Legislature. The statutes under consideration provide the methods by which zoning ordinances may be adopted, amended or repealed. There is no authority in these statutes for the enactment of conditional ordinances—that is, ordinances which cease to be effective if the property affected is not utilized in the manner permitted by the ordinance within a specified period of time.

In my opinion, any ordinance affecting zoning of the nature under consideration would be invalid on the ground that the statutes in question do not provide for zoning in such manner.

Since the ordinance would be invalid for the reason stated, I will not deem it necessary to explore the question as to whether a statute authorizing such an ordinance would be valid.
BOARDS OF SUPERVISORS—Authority—May not adopt ordinances paralleling § 33-279.1 prohibiting the dumping of trash on highways.

HIGHWAYS—Dumping Trash—Boards of supervisors not authorized to adopt ordinances paralleling § 33-279.1.

Honorable William C. Carter
Commonwealth's Attorney of Cumberland County

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

"The Cumberland County Board of Supervisors has requested that I ask for an opinion as to whether or not the Board of Supervisors may adopt a county ordinance similar to Section 33-279.1 of the 1950 Code of Virginia, as amended, with regard to dumping trash, etc., on highways in this county."

I am unable to find any statute authorizing a board of supervisors to enact and enforce an ordinance paralleling § 33-279.1 of the Code. The general powers of a board of supervisors are set forth in § 15-8 of the Code, and, in my opinion, no such power is granted in this section.

Under the provisions of § 15-14 of the Code, a board of supervisors may adopt and enforce an ordinance containing the provisions set forth therein, but this section is not sufficiently broad to authorize the county to parallel and enforce the provisions of § 33-279.1.

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BOARDS OF SUPERVISORS—Authority—May prohibit sleigh riding on roads and streets.

HIGHWAYS—Use Of—Boards of supervisors may prohibit use of for sleigh riding.

Honorable Robert L. Rhea
Commonwealth's Attorney for Augusta County

This is to acknowledge receipt of your letter of February 20, 1964, in which you state in part:

"I have been directed by the Board of Supervisors of Augusta County to prepare an ordinance which would prohibit coasting or sleigh-riding on the streets or roads in the subdivisions of Augusta County, which said roads would not be comprised in the primary or secondary highway system of this Commonwealth, with an additional qualification as to supervision, etc.

* * *

"There is a question in my mind as to whether or not the County, by exercising authority of controlling sleigh-riding on these private roads which are subject to the public easement or use, would thereby put itself in the position of inadvertently assuming control over these roads and thereby ultimately being required to maintain them."
There are two questions presented in your inquiry, one whether or not the County Board of Supervisors has authority to enact an ordinance prohibiting coasting or sleigh riding in the streets and roads in subdivisions and, secondly, whether by enacting such an ordinance the county would be obligated to maintain such roads and streets.

If the sleigh used in sleigh riding is considered a vehicle within the meaning of § 46.1-1(34), then the Board of Supervisors may prohibit the operation thereof on any designated highway, as 46.1-180.2 of the Code as amended specifically grants the Board of Supervisors authority to prohibit the operation of any vehicle on any highway during snow, sleet, hail, etc. If the sleigh is not a vehicle within the meaning of the motor vehicle traffic laws, then the Board of Supervisors may regulate or prohibit the use thereof by local ordinance, as such ordinance would not be in conflict with the provisions of the traffic laws as set forth in Chapter 4, Title 46.1, Code of Virginia, as such traffic laws deal only with the operation of vehicles. Hence viewed in either of these categories, an ordinance prohibiting or regulating sleigh riding and coasting on roads and streets would be valid.

These roads and streets, as you point out, are not parts of the secondary system of State highways. However, they are subject to public easement and are open to vehicular traffic. Therefore, such roads and streets are highways within the meaning of the traffic laws. See, § 46.1-1(10) for the definition of the term "highway" in regard to traffic laws. Although the Board of Supervisors may establish new roads under certain circumstances in accordance with the provisions of § 33-141 of the Code, apparently the board has no authority to maintain the roads, and the authority to expend public (county) funds is limited to the cost of acquiring rights of ways for the new roads. The State Highway Department must agree before public funds are expended for their maintenance.

I am of the opinion that the Board of Supervisors in exercising the authority vested in it to regulate or prohibit sleigh riding and coasting on certain roads or streets in subdivisions in which the public has an easement to travel does not obligate the Board of Supervisors to maintain such streets or roads.

BOARDS OF SUPERVISORS—Authority—Not authorized to create a bi-racial commission.

December 6, 1963

Honorable Horace T. Morrison
Commonwealth's Attorney of King George County

This is in reply to your letter of December 5, in which you state as follows:

"A delegation from the Naval Weapons Laboratory, Dahlgren, appeared before the Board of Supervisors, in executive session, pointing out that certain negro leaders may soon demonstrate for integration of restaurants, etc., in this county. The gentlemen suggested that the Board appoint a bi-racial commission to work with a similar group on the military base, for the purpose of solving racial problems. The Board took the matter under advisement until their January meeting."

You wish to know whether or not the board of supervisors has authority to appoint such commission.

There is nothing contained in the statutes which would authorize the board
of supervisors to create such a commission. Any such commission, of course, would have no authority to make any commitments obligating the county.

BOARDS OF SUPERVISORS—Authority—Not authorized to determine the assessed value of real or personal property.

TAXATION—Boards of Supervisors—Not authorized to determine the assessed value of real or personal property.

ASSESSEMENTS—Boards of Supervisors—Not authorized to assess value of real or personal property.

February 19, 1964

HONORABLE ROBERT D. HUFFMAN
Clerk, Board of Supervisors of Page County

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

"The last general reassessment of real estate in Page County was during the year 1959, and next year, 1965, is the regular year for another, however, we shall appreciate your opinion as to whether the Board of Supervisors may increase the assessments on real estate this year simply by directing the Commissioner of the Revenue to increase the per centage of the 1959 appraisals.

"The reason for this thinking is that the maximum levy allowed by law for school operating purposes, $3.00 per $100.00 assessed valuation of property, will not suffice for the purpose unless the assessed valuations are increased."

Your inquiry is answered in the negative. The board of supervisors of a county does not have any authority in connection with determining the assessed values of real or personal property. The board has no power to direct the commissioner of the revenue in regard to the valuations to be placed on property subject to taxation. Any increase or decrease in assessments on a percentage basis would be contrary to a decision of the Supreme Court of Virginia in the case of City of Lynchburg v. Taylor, 156., Va., p. 53.

BOARDS OF SUPERVISORS—Authority—Not entitled to see returns filed by taxpayers.

COMMISSIONERS OF REVENUE—Prohibited by § 58-46 from divulging any information acquired from returns filed by taxpayers.

February 28, 1964

HONORABLE ROBERT L. BROWN
Treasurer of Rappahannock County

This will acknowledge receipt of your letter of February 25, in which you state that—
The Board of Supervisors want to take a look at the personal property returns and the Commissioner of Revenue refuses to let them see them . . ."

I am enclosing herewith copy of an opinion of this office dated October 26, 1954 to Honorable Harold H. Purcell, which opinion was published in Report of Attorney General (1954-1955), at p. 23, which relates to a question of similar nature. You will note that under this ruling it is the opinion of this office that the board of supervisors has no power in determining the assessed value of real or tangible personal property.

With respect to whether or not the board of supervisors is entitled to see the returns filed by taxpayers, I am unable to find any statute which directs the commissioner of the revenue to make such returns available to the board. Section 58-46 of the Code provides as follows:

"It shall be unlawful for any tax or revenue officer or employee to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties. Any violation of the provisions of this section shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both; provided, however, that the Governor may at any time, by written order, direct that any information herein referred to shall be made public or be laid before any court; and provided, further, that this inhibition does not extend to any matters required by law to be entered on any public assessment roll or book, nor to any act performed or words spoken, or published in the line of duty under the law." (Underscoring supplied.)

This section, it would seem, prevents the Commissioner of the Revenue from divulging the information to the board.

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BOARDS OF SUPERVISORS—Authority—Sale of water to private individual.

WATER AND SEWERAGE SYSTEMS—Sanitary Districts—Sale of water.

HONORABLE CATESBY GRAHAM JONES, JR.
Commonwealth's Attorney for Gloucester County

March 6, 1964

This is to acknowledge receipt of your letter of February 28, 1964, in which you state in part:

"The Gloucester County Board of Supervisors has requested me to ascertain from you the legality of selling water by Sanitary District No. 1 to a private individual residing outside of the district.

"In the case for consideration, the applicant lives about one quarter of a mile from the district on a primary highway. All costs of laying the line and connection costs will be paid by the applicant. The Board is in agreement that there is a surplus of water."

Your attention is invited to § 21-118.4, Code of Virginia (1950) as amended. The pertinent provisions thereof are as follows:
"Notwithstanding any other provision of law, when an order has been entered creating a sanitary district in such county, the board of supervisors or other governing body, hereinafter referred to as 'board of supervisors,' shall have the following powers and duties, in addition to such powers and duties created by any law, subject to the conditions and limitations hereinafter prescribed.

"(a) To construct, reconstruct, maintain, alter, improve, add to and operate motor vehicle parking lots, water supply, drainage, sewerage, garbage disposal, heat, light, power, gas, sidewalk, curbs, gutters, streets and street name signs and fire fighting systems, for the use and benefit of the public in such sanitary district and as to such motor vehicle parking lots systems to make such charges for the use of such facilities as may be prescribed by said board or body.

"(h) To contract for the extension of any such system into territory outside of the district, and for the use thereof, upon such terms and conditions as the board may from time to time determine upon."

The term "such system" in paragraph (h), supra, refers, of course, to any of the systems set forth in paragraph (a), supra, including a water system. Under paragraph (h), a water system may be extended into territory outside the sanitary district. I am therefore of the opinion that the Board of Supervisors has authority to sell water to the individual under the circumstances described in your letter.

BOARDS OF SUPERVISORS—Authority—To Prohibit Dogs Running at Large—Extent to which authority may be exercised in towns.

DOG LAWS—Running at Large—When boards of supervisors may prohibit in towns.

HONORABLE KERMIT L. RACEY
Commonwealth's Attorney of Shenandoah County

June 12, 1964

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

"As Commonwealth's Attorney of Shenandoah County, Virginia, and on behalf of the Board of Supervisors of that County, I hereby request an opinion from your office pertaining to the following question, namely, to-wit:

"Does a dog ordinance adopted by the Board of Supervisors of a county pursuant to Section 194, Title 29, of the Code of Virginia 1950, as amended, apply to towns and municipalities within the county which have not in themselves adopted such an ordinance or kindred ordinance of its own."

In this connection I enclose copy of an opinion dated March 17, 1954, to the Commonwealth's Attorney of King George County, reported in Opinions of the Attorney General (1953-54), at p. 58, which relates to the matter under consideration.

Since this opinion was rendered, § 29-194 has been amended to include cities and towns.
A town is a part of the county and, unlike a city, is subject to the ordinances of the county board of supervisors in matters of this nature, unless the board of supervisors has been deprived of jurisdiction with respect thereto in the town by law.

In my opinion, the amendment referred to above merely authorizes the governing body of the town to prohibit the running at large of dogs therein, only in the event the county has failed to pass a resolution or ordinance to that effect. The amendment does not diminish the authority of the governing body of a county. In my opinion, the town may not reduce the number of months designated in a county ordinance but it may adopt an ordinance that may include additional months. The board of supervisors does not have the power to adopt a resolution or ordinance which would activate this section of the Code in a part of the county only. The county ordinance, in my judgment, must be county-wide applying to the area included in towns.

In the event the county does not exercise its authority the town may do so and, in that event, the State law would be effective only within the jurisdiction of the town.

In addition to the opinion which I have mentioned above, I enclose two other opinions—one to the Commonwealth's Attorney of Nelson County, dated June 25, 1951, reported in Opinions of Attorney General (1950-51), at p. 23, and one to the Commonwealth's Attorney of Powhatan, dated March 14, 1951, published in the same volume of Opinions, at p. 212.

BOARDS OF SUPERVISORS—Chairman and Vice Chairman—Proper time for election.

HONORABLE M. WATKINS BOOTH
Commonwealth's Attorney of Dinwiddie County

February 11, 1964

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

"The Board of Supervisors have requested me to write you with reference to § 15-233 which can be found in the 1962 Cumulative Supplement. Our problem is that the Chairman and Vice-chairman were elected at a special meeting prior to the first meeting in January. The question has been raised as to whether or not this was a proper election. Some of the members of the Board feel that the election should have taken place at the regular January meeting. You will note that this section says 'The Board shall, at its first meeting after election, elect one of its number as chairman . . .'. While this section does not specify that the election should be held at the first regular meeting it might have been the intention of the legislature that such election should take place at the first regular meeting."

In my opinion, the election of the chairman and vice-chairman was had at the proper time. In this connection, I call attention to § 15-241 of the Code, as amended by Chapter 218 of the Acts of Assembly (1962), and, especially, to the second paragraph, which reads as follows:

"The first meeting held after the newly elected members of the gov-
erning body shall have qualified and the first meeting held in the cor-
responding month of each succeeding year shall be known as the annual
meeting, and the first meeting held in the sixth month thereafter shall
be known as the semiannual meeting.”

The first meeting that was held in January complied with this provision. It
was proper at this first meeting to organize the board by electing a chairman and
a vice-chairman. This meeting was, under the language of the statute, the
“annual meeting.”

BOARDS OF SUPERVISORS—Duty—Must provide office space for clerk of
court.

HONORABLE F. PAUL BLANOCK
Commonwealth’s Attorney for Mathews County

January 23, 1964

This is to acknowledge receipt of your letter of January 21, 1964, in which
you state in part:

“The Board of Supervisors of our County desires to have an office
for said Board in the County Office Building. The office would be used
by the Board as its official headquarters. The Board would then advise
the general public of its office in the County Office Building and of their
office hours, so that their constituents could present complaints to them,
call to their attention matters which need governmental attention and
to take care of the necessary correspondence.

“Based upon the facts, it would be appreciated if the following ques-
tions would be answered by your office:

“1. Does the Board of Supervisors have the legal right to have
an office for said Board in the County Office Building for the purposes
above mentioned?

“2. Is it legal for a Board of Supervisors to hold office hours for
the above mentioned purposes?

“3. Does the Board of Supervisors have the power to reassign as
office space for its own use an office in the County Office Building that
has been assigned to the Clerk of the Circuit Court and which office
is occupied by the Deputy Clerk?”

Perhaps it would be proper for the board to maintain a separate office in a
county office building for the purposes narrated by you. I find no specific au-
thority or prohibition of the same.

In answer to Question No. 3, your attention is invited to § 15-9, supra, which
provides that the Board of Supervisors has the care of all county property.
Under § 15-686 of the Code, the Board of Supervisors has the mandatory duty
to provide the county with a courthouse and a clerk’s office. The Board of
Supervisors would not, in my opinion, have authority to reduce the space as-
signed to the clerk for that office if it will hinder the efficient operation of that
office. The clerk’s office that has been designated for that purpose is, of course,
under the control of the clerk. There is nothing in this section that would infer
that the Board of Supervisors may oust a clerk from any part of the clerk’s
office for the purpose of providing a conference room for the members of the Board, if it would result in interfering with the duties of the clerk.

BOARDS OF SUPERVISORS—Fairfax County—Salary, under § 14.1-46 of the Code, may not exceed $7,500 per year for each member—Section does not prohibit employment of county employees.

June 30, 1964

HONORABLE RALPH G. LOUK
Commonwealth's Attorney for Fairfax County

I have your letter of June 16, 1964, with reference to Section 14.1-46 of the Code of Virginia, as amended by the 1964 session of the General Assembly.

From reading this amended section, it is clear that the annual compensation to be allowed each member of the Board of Supervisors of Fairfax County shall not exceed $7,500.00 per year. This section is not in conflict with general sections of the Code permitting the hiring by the County of such employees as are necessary to carry on the County business.

BOARDS OF SUPERVISORS—Land Acquisition and Conveyance—May lease land and buildings only for purposes provided by law.

COUNTIES—Land—Purposes for which may be leased.

October 16, 1963

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

This will acknowledge receipt of your letter of October 8, 1963, which reads, in part, as follows:

"(1) Does the Board of Supervisors have authority to lease land and buildings for a nominal sum, providing the lessee is a non-profit corporation?

"(2) The School Board of this County proposes to convey an elementary school building and grounds to Franklin County and of course, the Board of Supervisors will have control thereof. Would the Board of Supervisors have the right to convey the property to a non-profit corporation for the purpose of operating a Home For the Aged, with its primary purpose being care for elderly welfare patients who need living quarters, with the provision that should the corporation cease to exist and operate as a Home for the Aged, the land, with all improvements thereon, would revert back to Franklin County, free of all liens and encumbrances at the time of the reversion?

"I would appreciate your opinion as to whether or not Section 15-692, Section 15-8(5), or 15-506 of the 1950 Code of Virginia as amended to date would be applicable to this situation. If not, would you give me another citation?"

It seems fair to assume that your first question is intended to apply to the
situation outlined in your second question, and my consideration thereof is limited to the factual situation set forth by the second question.

Generally, counties may exercise only such powers as are expressly conferred or necessarily implied. In its application to Franklin County, the provisions of § 15-688 of the Code of Virginia (1950), as amended authorize the board of supervisors to acquire (in addition to the two acres it may acquire under § 15-686 for courthouse, clerk's office and jail) as much as twenty acres of land "to be used for county purposes." In my opinion the acquisition of the land for the purpose of leasing it to a non-profit corporation which would operate a so-called "Home for the Aged" would not be construed as a acquisition for county purposes.

When the Board of Supervisors, in providing land for the courthouse, clerk's office and jail purposes, find that a portion of the land is not needed for the purposes mentioned in § 15-689 of the Code, it may, by following the procedure outlined in § 15-691, lease the same for private or other purposes. This latter section, however, would not seem to be applicable to your situation.

Your attention is invited to the case of Franklin County v. Gills & Johnson, 96 Va. 330, decided in 1898, before the enactment of § 15-691, holding that property acquired for county purposes may not be leased for purposes other than those provided by law.

I am not aware of any statute conferring the requisite authority by which the Board of Supervisors of Franklin County might effectuate the plan set forth in your letter, and I am further of the opinion that the sections you mention, viz., §§ 15-692, 15-8 (5) and 15-506, are not applicable to the situation.

BOARD OF SUPERVISORS—Mileage—Members entitled to mileage from homes to Board meetings and return.

December 16, 1963

HONORABLE FRENCHMAN O'QUINN
Clerk of Circuit Court of Dickenson County

This is in reply to your letter of December 13, which reads, in part, as follows:

"A question has arisen in Dickenson County as to whether the Members of our Board of Supervisors are entitled to mileage from their homes to the Board meetings and return . . ." 

I am enclosures copy of two opinions of this office—one to Mr. R. H. Oldham, dated December 28, 1954, published in the Report of the Attorney General (1954-1955), at p. 59, and one to W. Cary Crismond, dated July 10, 1959, published in the Report of the Attorney General (1959-1960), at p. 79. Although these opinions do not specifically relate to travel from the place of residence to the place of the official meeting of the board by a member of the board of supervisors, I am of the opinion that for the reasons stated in these opinions a member of the board of supervisors would be entitled to travel allowance for the attendance in such meetings.

Upon inquiry at the office of the Auditor of Public Accounts, I find that such allowances are customary in a number of counties.
BOARDS OF SUPERVISORS—Tax Increase—Must publish notice in newspaper in general circulation in county fifteen days before increase in levy made.

TAXATION—Increase—Boards of Supervisors—Must publish notice in newspaper in general circulation in county fifteen days before increase in levy made.

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

April 10, 1964

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

"The Board of Supervisors of this County is in the process of planning their budget estimate for 1964-1965. It is probable that a tax increase will be necessary.

"Heretofore, under Title 15, Section 582, when a tax increase was contemplated, thirty days notice of a public hearing had to be given. This section of the Code was repealed by the Acts of 1959, and it would appear to me that Title 15, Section 575, 576, and 577 are the only sections with which compliance is now required.

"Specifically, I should like to know if the Board can on the 22nd day of June publish a notice of a hearing on the 30th day of June, and on that day have the hearing and lay the levy.

"Furthermore, I should like to know if in the publication any special notice of the proposed tax increase is required."

Sections 58-839 and 58-846.1 of the Code apply. Both of these sections appear in the supplement.

You will note that publication is required in a newspaper having general circulation in the county at least fifteen days before the increase in levy is made and the citizens of the county shall be given an opportunity to appear before the board of supervisors and be heard.

In view of this statute the publication on the 22nd day of June for a meeting to be held on June 30 would not be in compliance with the statute.

BOARDS OF SUPERVISORS—Tax Rate—Must not be increased beyond that published in notice.

TAXATION—Local Tax Levy—Must not be increased beyond amount published in notice.

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

May 21, 1964

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

"The Board of Supervisors of Isle of Wight County has given notice that it will at its regular meeting on June 4, 1964, consider an increase in the local tax rate and levy from the present rate of $3.15 to $3.30 per $100.00 of assessed valuation on all taxable real and personal property in the County."
"I will appreciate your opinion as to whether or not the Board of Supervisors at its regular meeting on June 4, 1964, may fix such rate and levy at either less or more than the proposed increased $3.30 rate previously published without giving further notice with respect thereto as required by section 58-846.1 of the Code for a proposed increase in the present rate."

In my opinion the rate of tax may be fixed at less than $3.30, but I feel that there is grave doubt as to whether the rate can be fixed at a greater amount than the published figure. The object of the publication requirement is to let the property owners know what amount of increase is being considered and give an opportunity to be heard against the proposed increase. It is possible that there are property owners who feel that the proposed rate as published is reasonable and necessary to meet the public needs, but who would wish to be heard in opposition to a greater increase. For that reason, I am of the opinion that before the rate may be increased to a figure greater than $3.30, a publication of that intention is required, and an opportunity to be heard be given to the taxpayers.

BOARDS OF SUPERVISORS—Tie-breaker—Member not voting at initial meeting may not vote at adjourned meeting.

BOARDS OF SUPERVISORS—Voting—Tie-breaker—Only tie-breaker may vote in adjourned meeting.

HONORABLE WM. WELLINGTON JONES
Commonwealth’s Attorney for Nansemond County

January 3, 1964

Your letter of January 2, 1964, asked two questions, the first of which reads as follows:

"When a Board of Supervisors is tied at its organizational meeting for the selection of a Chairman, with all members present but one member not voting, and the meeting is adjourned, pursuant to Section 15-245, in order that the tie-breaker appointed under Section 15-240 can be present, can the member who did not vote at the initial meeting cast a vote at the adjourned meeting and thereby, perhaps, break the tie, even though a tie-breaker is present, or does Section 15-245 contemplate that only the tie-breaker shall vote at the adjourned meeting?"

Section 15-245 provides that when all of the members of the Board are present and there being a tie vote on any question, the Clerk shall record the vote, etc. The rest of the section deals entirely with the duties of the tie-breaker and states, in part, that when he casts his vote the Clerk shall record his vote and the tie shall be broken, being decided as he casts his vote. It would appear, therefore, that a member of the Board has no right to change his vote or to vote if not previously voting after the vote has been recorded by the Clerk; and after this has been done the record is set and then it is up to the tie-breaker as provided in the rest of the section. Therefore, the answer to your first question would be that the member who did not vote at the initial meeting cannot vote at the adjourned meeting and that Section 15-245 contemplates that only the tie-breaker shall vote at the adjourned meeting and the question shall be decided as he casts his vote.

Your second question is as follows:
"When a tie-breaker has been appointed by the Judge of the Circuit Court, as provided in Section 15-240, does he have to be sworn into office or in any manner qualify prior to the performance of his duty in casting a vote as tie-breaker?"

Section 15-240 relative to the appointment of a tie-breaker is silent as to whether the tie-breaker has to qualify in any manner prior to performance of his duty. It would appear that the court order entered in the common law order book as provided in this section would be complete and absolute authority for the tie-breaker to perform his duties without the necessity of any other action on his part. However, as the law is completely silent on the matter, I see nothing to prevent the tie-breaker from qualifying by taking an oath of office if any one feels that this is desirable or necessary.

BONDS—Premiums on Bonds of Probation Officer and His Secretary—Not subject to reimbursement by Commonwealth.

JUVENILE AND DOMESTIC RELATIONS COURTS—Probation Officer and Secretary—Premiums on bonds not eligible for reimbursement by Commonwealth.

February 25, 1964

HONORABLE ROBERT L. RHEA
Commonwealth's Attorney for Augusta County

This is to acknowledge receipt of your letter of February 19, 1964, in which you state in part:

"The Juvenile and Domestic Relations Court for Augusta County has made several changes in its operations regarding collections of non-support payments.

"Instead of the clerk of the court collecting and disbursing these funds, the judge, in an effort to expedite matters, has the probation officer and his secretary performing these duties.

"The probation officer and his secretary have entered into bonds as required by § 16.1-16, Code of Virginia, 1950, as amended.

"All of the cases in said court are on a warrant or petition in the name of the Commonwealth of Virginia.

"I would like your opinion as to whether or not the payment of premiums on these bonds by the County is a proper item for reimbursement by the Commonwealth."

Section 16.1-208 authorizes the judge of a juvenile court to designate the probation officer to receive and disburse support payments. Section 16.1-206.1 of the Code as amended provides that where a county provides for a separate probation service (such as you cite), the county is reimbursed by the State to the extent of "one-half of any expenditures made . . . for secretarial and stenographic assistance to such probation officer." Inasmuch as the payment of premiums on bonds covering the probation officer and his secretary who handle these funds is not included in the expenses which may be reimbursed in part to the county, there is no authority to pay the same out of funds appropriated by the General Assembly. Only the cost of bonds covering the officers, clerks, deputy clerks and clerical assistance listed in § 14-50 of said Code as amended can be charged to the Commonwealth.
It is therefore the opinion of this office that the payment of premiums on these bonds covering the probation officer and his secretary are not proper items for reimbursement by the Commonwealth.

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BONDS—Recognizance—Governor alone authorized to grant relief from forfeiture.

Honorable Philip Lee Lotz
Commonwealth’s Attorney for Augusta County

April 24, 1964

This will acknowledge receipt of your letter of April 22, in which you state that one Thomas Jenning Hodge executed a recognizance, with two of his step-brothers as surety, in the penalty of $3,000 for his appearance at a preliminary hearing. Hodge failed to appear at the hearing and was later apprehended by the sureties, but escaped from their custody. Subsequently, Hodge was located in Chicago, waived extradition and the Chief of Police and City Sergeant of Staunton journeyed to Chicago and brought Hodge to Staunton where he was tried and convicted upon a plea of guilty.

It appears from your letter that the recognizance was never forfeited, although you notified the sureties that you would have to consider the recognizance forfeited and would take the necessary action to have the same forfeited.

You request my advice as to whether you can compromise the matter by permitting the sureties to pay $300.00 (which more than covers the expenses incurred by the two officers in bringing Hodge to Staunton) to the Commonwealth as a compromise settlement.

If the recognizance had been forfeited, the Governor alone would have had authority to grant relief from the forfeiture. See § 19.1-351, et seq., which apply to forfeitures as well as fines.

Since no forfeiture has been made, you and the court may allow the sureties to make reimbursement of the expense incurred by the officers and abandon any plan to forfeit the bond. The amount paid by the sureties cannot be treated as a compromise settlement of the recognizance, because I know of no authority for a compromise to be agreed upon, except that in those cases where there has been an actual forfeiture the Governor under the procedure set out in § 19.1-351, et seq., may grant relief from all or any part thereof.

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CITIES—Attorneys—Special Counsel—May employ to represent city.

Honorable Kenneth P. Asbury
Commonwealth’s Attorney for City of Norton

November 26, 1963

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

"... The City of Norton by resolution has directed an Area Power Committee to appoint an attorney to have full authority to represent the City of Norton before the State Corporation Commission and the Federal Power Commission in an effort to get an adjustment of the rates
charged to the Old Dominion Power Company by the Kentucky Utilities Company.

"The City of Norton is also appointing the attorney to represent them in other matters that may come before the Federal Power Commission and the State Corporation Commission.

"I am writing to ask whether the City of Norton or any municipal corporation can expend funds in furtherance of this type of legal action against a public utility."

Under the charter of the city of Norton, the council is required to appoint a city attorney to represent the city in civil matters. In my opinion this would not prevent the council from employing special counsel in matters in which they feel it is in the best interest of the city to do so.

Under Section 2.215 of the city charter, the council is authorized to expend the money of the city for all lawful purposes.

CITIES—City of Radford—May institute condemnation proceedings in accordance with Chapter 1.1 of Title 25 of Code of Virginia.

STATE LANDS—Radford College—Conveyance of lands subject to action by General Assembly.

HONORABLE G. GARLAND WILSON
City Attorney for City of Radford

February 10, 1964

This is in reply to your letter of January 29, 1964 in which you request my opinion as to whether the City of Radford has authority to conduct condemnation proceedings as provided in Chapter 1.1 of Title 25 of the Code of Virginia (1950), as amended. You further ask if the City may acquire a portion of the property of Radford College by condemnation or by a voluntary conveyance, and if so, whose approval would be required and under what authority.

Please be advised that I am of the opinion that the City of Radford may generally institute condemnation proceedings in accordance with the provisions of Chapter 1.1 of Title 25 of the present Code. Section 3. of Chapter 375 of the Acts of Assembly of 1946 gives to the City the power of eminent domain but does not prescribe the procedure to be followed nor does it give a specific reference to any of the titles of the Code. Section 25-46.2 provides that unless otherwise specifically provided by law, the proceedings for condemnation of property under the power of eminent domain shall be in accordance with the provisions of Title 25.

It is further my opinion that the City of Radford cannot exercise the power of eminent domain to acquire portions of the grounds of Radford College, a State owned institution, without the passage of additional legislation whereby the General Assembly would grant specific authority to the City of Radford to condemn the lands of Radford College necessary for the construction of the highway.

In the event the City of Radford and Radford College could agree to a voluntary conveyance, it would be necessary for the General Assembly to authorize such a conveyance by express legislation which would set forth the terms, conditions and mechanics of the transfer.
CITIES—Council—Under proper charter amendment may appoint employees of Federal Government to serve on boards, commissions and authorities of city.

PUBLIC OFFICERS—Compatibility—Federal employees as members of city boards.

December 16, 1963

HONORABLE E. RALPH JAMES
Member, Virginia House of Delegates

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

"The City Council of Hampton has requested me to introduce a bill amending the Charter of the City of Hampton in order to provide that Civil Service employees of the Federal Government could be appointed to and serve on Boards, Commissions and Authorities which are appointed by the City Council.

"However, in view of Sections 2-27 and 2-29 of the Code, and the case of Dean v. Paolicelli, 194 Va. 219, some question has arisen as to whether the City Council can be given such authority by Charter amendment.

"I would appreciate very much from you an opinion as to whether a bill providing for such Charter amendment would be constitutional and valid."

The provision in the case of Dean v. Paolicelli, 194 Va. 219, was held unconstitutional on the ground that the classification contained therein was unreasonable and arbitrary and, therefore, invalid as special legislation in violation of the provisions of Sections 63 and 64 of the Constitution. Special provisions relating to the government of cities may be incorporated in city charters without violating the provisions of Sections 63 and 64 of the Constitution, provided such provisions are enacted in conformity with Article IV and Section 117 of the Constitution. The Supreme Court of Virginia has considered this matter on several occasions, a few of the cases being: Miller v. Pulaski, 109 Va. 137; Town of Narrows v. Giles County, 128 Va. 572; Portsmouth v. Weiss, 145 Va. 94; Fallon Florist v. City of Roanoke, 190 Va. 564.

In my opinion, if the provision to which you have reference is incorporated in the city charter in the manner provided by Section 117 of the Constitution, it will be valid.

CIVIL PROCEDURE—Appeal Bond—Results of Failure to Furnish—Judicial Question.

March 9, 1964

HONORABLE SAMUEL W. SWANSON
Clerk of Court of Pittsylvania County

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

"I would like to have your opinion concerning the docketing of an appealed civil warrant from the County Court to the Circuit Court of this county.

"On February 20, 1964, the plaintiff recovered a judgment against defendants in the amount of $1,986.93 with interest and costs, and on
March 2, 1964, the plaintiff executed an appealed bond with surety thereon in the penalty of $50.00 to cover costs. On this 5th day of March, 1964, the plaintiff advised both counsel for the defendants and myself that he did not intend to perfect his appeal as provided for in § 16.1-107 by paying to me the writ tax and the clerk's fees provided in that section. The defendants, by their counsel, have tendered payment of the writ tax and clerk's fees for the purpose of having the case docketed at the next term of the Circuit Court. I have refused at this time to accept the defendants' check in payment of the writ tax and costs for the reason that § 16.1-112 in part reads as follows:

"If within thirty days from the date of the judgment the appellant shall pay to the clerk of the court to which the appeal is taken the amount of the writ tax as fixed by law and costs as required by subsection (50) of § 14-123, the case shall be docketed."

"I take the position that since the defendants have failed to execute the appealed bond as provided for by law that the defendants cannot pay the writ tax and clerk's fees on the plaintiff's appealed bond."

In my opinion, the question involved is judicial in nature and one for the court to decide. After the case has been docketed the court, if it finds that the defendants were not entitled to pay the writ tax and costs by reason of their failure to furnish an appeal bond, may strike the case from the docket.

CIVIL PROCEDURE—Appointment of Guardian ad Litem—When necessary.

WELFARE—Appointment of Guardian ad Litem—When necessary in welfare cases.

HONORABLE EMORY H. CROCKETT
Commonwealth's Attorney of Lee County

May 27, 1964

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

"Under Section 8-750.1 a question has arisen in cases involving Subsection "D". In certain cases involving the appointment of a personal representative upon petition by the Superintendent of Public Welfare, a Guardian ad Litem appears to be necessary when a minor or other incompetent is involved. The Circuit Court is advised that the Department of Public Welfare has no funds for the payment of Guardian ad Litem fees. I have been requested to inquire as to whether or not a Guardian ad Litem, in cases involving minors or other incompetents, is required under Section 8-750.1, Subsection "D". If such Guardian ad Litem is required, how is the Guardian ad Litem to be paid and by whom? It is to be noted that Subsection "D" of the aforementioned section states specifically that no costs of Court or Commissioners fees shall be assessed on proceedings under this section."

Section 8-750.1 of the Code, unlike § 37-140, relating to the appointment of guardians and committees of infants, insane persons, or persons impaired by age or physical disability, does not specifically require the appointment of a Guardian ad Litem to represent the interest of the person for whom a guardian or com-
mittee is sought to be appointed. Section 8-750.1 is an amendment to Title 8 of the Code which contains the statutes with respect to civil remedies and procedures and, in my opinion, § 8-88, found also in Title 8, would apply. A proceeding under § 8-750.1 is a suit to determine whether or not the recipient of benefits is able to manage his finances and, if the court finds that he is not able to manage the payments being received, to appoint a personal representative of the recipient for the purpose of receiving and expending the benefits on behalf of the recipient.

It is provided in § 8-88 that where an infant, or insane person is a party to the proceedings in a suit, the court is required to appoint a Guardian ad Litem to represent such person. Therefore, your inquiry as to whether or not a Guardian ad Litem is required in cases involving minors or other incompetents is answered in the affirmative. It may well be that persons who are incompetent to the extent they are not capable of managing the benefits to which they are entitled, may not, in a technical sense, be insane, but it would seem that a person who is unable because of some infirmity to properly care for his funds so received, would be presumed to be incapable to adequately represent his interest in a proceeding brought under § 8-750.1.

It is provided in § 8-88 that the court may allow the Guardian ad Litem, a reasonable compensation for his services, and his actual expense, if any, to be paid out of the estate of the defendant.

In my opinion this allowance would not be considered as “costs of court” as that term is used in the terminal sentence of § 8-750.1.

CIVIL PROCEDURE—Liens—Priority of lien for taxes over lien for welfare payments.

March 19, 1964

HONORABLE L. J. HAMMACK, JR.
Commonwealth’s Attorney of Brunswick County

This will acknowledge receipt of your letter of March 17, in which you state that the local board of welfare for Brunswick County has instituted proceedings to enforce a lien on real estate created under §63-127 of the Code of Virginia. It has been discovered that the county taxes on the real estate subject to such lien have not been paid for the years 1962 and 1963. These taxes, as well as the taxes for 1964, are a lien on the real estate under the provisions of § 58-762 of the Code.

You have requested my opinion as to which lien is first in order of priority. Section 63-127 of the Code provides that—

“... The filing of such notice shall create a lien against the estate, both real and personal, of such recipient, prior to all other claims except prior liens and except funeral expenses not in excess of two hundred dollars, and except hospital bills, doctors' bills and medical expenses not in excess of one hundred and fifty dollars . . .”

Section 58-762 of the Code provides that—

“There shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance thereon. The lien shall continue to be such prior lien until actual payment shall have been made to the proper officer of the taxing authority . . .”
The lien for taxes takes priority over the lien for welfare payments. We know of no instance in which the lien for real estate taxes may be defeated by a priority in favor of another lien. See Thomas v. Young, 196 Va. 1166, at p. 1173, where the Supreme Court stated:

"... Since the passage of this statute (§ 58-796) and since the passage of § 58-762, it has been the purpose of the Commonwealth to create an *indefeasible lien* on land for taxes due thereon, which lien 'shall be *** prior to any other lien or encumbrance thereon,' and 'shall continue to be such prior lien until actual payment shall have been made.' The sole purpose of the legislation is to protect the Commonwealth by making sure the collection of taxes . . ."

**CIVIL PROCEDURE—Service of Warrant—When and how may be served.**

**JAILS AND PRISONERS—Service of Warrant—May be served on person confined in jail.**

June 2, 1964

HONORABLE E. R. HUBBARD
Justice of the Peace, Wise

This is to acknowledge receipt of your letter of May 30, 1964, requesting my opinion on several questions dealing with the issuance and service of warrants. I shall answer the same seriatim.

"(1) Can an officer legally serve a warrant in debt on a person on Sunday when such person cannot be found except on Sunday?"

This question is answered in the negative. Section 8-4.2, Code of Virginia (1950) is as follows:

"No civil process shall be served on Sunday, except in cases of persons escaping out of custody, or where it may be especially provided by law."

"(2) Can I legally issue a warrant in debt on a person who made an account for grocery bill when he is not a resident of this county but works in Wise County, Virginia, 6 days a week but lives in another county in Virginia (Scott)?"

This question is answered in the negative. Warrants issued by justices of the peace must be made returnable to the county court of the county in which the justice of the peace exercises jurisdiction. Section 39-4, Code of Virginia (1950). Furthermore, a justice of the peace must direct the warrant to the sheriff, sergeant or constable of the county, city or town *wherein the defendant resides*. "If there be two or more defendants, and any defendant reside outside the county in which the warrant is issued, the summons for such defendant residing outside the county may be directed to the sheriff or sergeant of the county or city of his residence." Section 39-5 of the Code.

"(3) Would service be legal if the officer catches them in this county?"
This question is answered in the negative. See, answer to preceding question.

"(4) Can any civil warrant be served legally on a person serving time and waiting trial in county jail?"

This question is answered in the affirmative. As you point out, witnesses while attending court are immune from service of civil process. 72 C.J.S. 1112. However, I know of no statute or rule of law which would render the service of process invalid for the reason that it is served on a person while he is confined in jail.

CIVIL PROCEDURE—Will—Probate—Appeals not a chancery proceeding and $15.00 fee inappropriate.

CLERKS—Fees—Appeals from order probating will not a chancery cause, therefore fee of $15.00 inappropriate.

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

October 1, 1963

This will acknowledge receipt of your letter of September 30, which reads as follows:

"There was recently filed in this Court an appeal from order of the Clerk probating a will and appointment of executors under § 64-74, and the appeal was docketed and proceeded with as required by this section of the Code. The appellants moved the Court for a trial by a jury to determine the issue, to-wit: 'Whether the paper writing bearing date on the 8th day of November, 1954, or any part thereof, is the true last Will and Testament of Harry Lee Craddock, Sr., deceased.'

"The Court set a date for the trial upon the issue joined before a jury, all parties being represented by counsel. A jury was impaneled for the trial of the issue and found that the will in question was the true last will and testament of the decedent.

"I taxed the clerk's fees in this matter against the parties who filed the notice of appeal in the amount of $15.00 clerk's fees, which is the fee charged in a regular chancery cause of devisavit vel non where an issue is made up and tried by a jury. Question has been raised as to the amount of fees due me as clerk in this proceeding. I will appreciate it if you will advise me the proper amount of fees due me in this matter."

I have conferred with the clerks of both courts in Richmond in which wills are probated with respect to the question presented by you, and they state that the practice in their courts is to charge only the item fees provided for in § 14-123 of the Code in proceedings under § 64-74. Of course, the clerk has already at the time the will was probated charged the fee provided for in § 14-123(6).

In my opinion, this is not a chancery proceeding such as is provided for in § 64-84 of the Code, and, hence, the fee of $15.00 would not be appropriate.
REPORT OF THE ATTORNEY GENERAL


ESTATES—Appointment of Appraisers—Discretionary under § 64-126.

October 3, 1963

HONORABLE LUCY A. ALLEN
Clerk, Circuit Court for Clarke County

This is in reply to your letter of September 27, 1963, in which you ask my opinion on the following question:

"* * * whether Sec. 64-156 would determine that a clerk would not appoint appraisers on the qualification of an Admr., cta, dbn, or should the clerk proceed to appoint appraisers as required by Sec. 64-126 of the 1950 Code of Virginia treating the qualification of the Admr, cta, dbn, as the qualification of 'any person authorized to act as a personal representative' as set out in said Sec. 64-126."

You have referred specifically to an administrator d.b.n., c.t.a., who may be appointed by the court in a proceeding conducted under § 64-156, or who may have been previously granted administration by the court or clerk under the provisions of § 64-112, or by the court under § 64-129 of the Code.

It is to be noted that § 64-156 of the Code of Virginia (1950), as amended, envisions a transfer of the decedent's assets from a personal representative whose powers have ceased to the administrator de bonis non with the consent of the court. Presumably the court having jurisdiction will enter an order appropriate to the transaction, which may or may not direct an appraisement of the assets transferred. It is not my view that § 64-126 of the Code necessarily requires an appraisement to be made in such cases.

I might commend to you the following observations found in Lamb on Virginia Probate Practice, § 22:

"Since it is the first and primary duty of an administrator to reduce the estate to money—or, if practicable, to make prompt distribution of assets in kind—it will frequently be found that the unadministered estate consists wholly of money in bank, a balance on deposit in an earmarked bank account. In such case obviously no appraisers need be appointed. In fact the appointment of appraisers upon qualifications d. b. n. is frequently omitted; but the court will appoint appraisers of the unadministered estate if for any reason the new administrator so desires or if any occasion for doing so is perceived by the court.

"And, at the other extreme, the first administrator may not have been in office long enough to do anything at all; or nothing more than to take over bank balances and perhaps pay an undertaker's, doctor's or nurse's bill. If the court is satisfied that this is so the personal representative of the deceased administrator may be relieved of duty to file inventory and appraisement and to make settlement of his decedent's accounts.

"Some courts have found it expedient and convenient to have all things subsequent to the initial qualification done before the court and not before the Clerk. There are so many proceedings the court may have to take that are beyond the scope of the Clerk's jurisdiction that much time might be wasted in arguing and differentiating the separate jurisdiction of the court and of the Clerk. The Clerk, for instance, cannot accept a resignation of a fiduciary (Code § 26-46), much less revoke
Clerks—Circuit Court—When may issue abstract of judgment rendered in court not of record.

Honorable Carey C. Hall
Clerk of Circuit Court King and Queen County

March 12, 1964

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

"Recently, a request was made of me to issue an abstract of a judgment rendered in the County Court, which judgment was given in that court more than two years ago. Considering the fact that the judgment has not been docketed, can I, as Clerk of the Circuit Court, issue an abstract, although all papers have been filed in this office as required by § 16.1-115 of the code?

"It would appear that, according to § 16.1-116, I could not issue said abstract since the amendment of 1962 added: 'provided, that such judgment has been duly entered in the judgment lien docket book of such court.'

"Since the Clerk of the County Court cannot issue abstract for me to docket, is it possible for me to docket the judgment under the provisions of § 8-373 and then issue an abstract under § 16.1-116 above mentioned? I hesitate to do this because I am unable to construe the word 'book' in the phrase 'and also upon the request of any person interested therein, any such judgment rendered by a county or municipal court judge whose book has been filed in his office under the provisions of Title 16.1.'"

Section 8-373 of the Code requires the clerk of a court of record to docket any judgment for money rendered by a county judge whose book has been filed in his office under the provisions of Title 16.1 of the Code, or of which an abstract is delivered to him certified by the county judge who rendered it.

Section 16.1-94 requires a county court not of record when a judgment is rendered to enter the judgment on the warrant, motion for judgment or other pleading and to sign the same.

Section 16.1-91 provides that—

"Whenever any action or other proceeding is disposed of by the court (not of record), all papers in the case shall be placed in an envelope or jacket which shall bear the number of the case, or securely fastened together and numbered, and all such envelopes or jackets or bundles of papers shall be filed in consecutive order and preserved as provided by law."

Section 16.1-115 provides, in part, as follows:

"All papers connected with any civil action or proceeding in a court not of record, except those in actions or proceedings (1) in which no service of process is had, (2) which are removed or appealed, and (3)
in which the papers are required by law to be sooner returned to the clerk's office of a court of record, shall be disposed of as follows:

“(1) If in a county court, they shall be retained for six months after the action or proceeding is concluded, and at the end of such period they shall be delivered to the clerk of the circuit court where they shall be properly filed, indexed and preserved, for which filing and indexing such clerk shall receive a fee of twenty-five cents which shall be paid by the plaintiff as a part of the costs and transmitted to the clerk of the circuit court with the papers . . .”

Section 16.1-116 provides as follows:

“When a judgment has been rendered in a civil action in a court not of record and the papers in the action have been returned to the clerk of the circuit or corporation court for filing and preserving, executions upon and abstracts of the judgment may be issued by the clerk of such circuit or corporation court. However, for a period of two years from the date of any such judgment, the judge or clerk of the court not of record may also issue executions upon and abstracts of the judgment.”

In the case which is under consideration here, the county court judge no longer has the power to issue an abstract, due to the fact that the judgment was entered more than two years before.

Under § 16.1-116 the clerk of a court of record may issue an abstract upon the judgment if the same has been entered in the judgment lien docket.

I see no reason why a clerk of a court of record especially after the papers have been filed in the clerk’s office pursuant to §§ 16.1-91 and 16.1-115. Inasmuch as the record of the judgment, as shown by the certificate of the trial judge made pursuant to § 16.1-94, is a part of the records of the clerk’s office, the clerk may treat the file pertaining to the case as the “book” required to be filed by the county court under the provisions of Title 16.1. The reference to Title 16.1 as used in § 8-373 was formerly § 16-25, which was omitted when Title 16.1 was enacted. No doubt the General Assembly felt that the provisions of § 16-25 were no longer useful in light of the provisions of § 16.1-91, requiring all such papers to be transmitted to the clerk’s office.

In my opinion, you should docket the judgment as shown by the entry made pursuant to § 16.1-94 and then issue an abstract in accordance with § 8-373.

CLERKS—Fees—Adoption Proceedings—Fee due on each petition irrespective of number of persons being adopted.

CIVIL PROCEDURE—Adoption Proceedings—Fee due on each petition irrespective of number of persons being adopted.

HONORABLE WILLIAM A. MONCURE, JR.
Judge, Chancery Court of City of Richmond

September 27, 1963

This will acknowledge receipt of your letter of September 26, in which you call attention to § 14-124.1 of the Code, which reads as follows:
"Notwithstanding any other provision of law to the contrary, only one fee, which shall be in the amount of ten dollars, shall be required by the clerk to be paid by the petitioner or petitioners for all services rendered in an adoption proceeding."

You make the following statement:

"A recently married couple wish to have the wife adopt the five minor children of the husband and his deceased former wife under § 63-356.1 of the Code, without change of name of the five infants. No investigation or reference to the Commissioner is required. There will be only one order in the proceeding and the Clerk notifies the Bureau of Vital Statistics of the adoption of the five infants, receiving a fee of $0.25 from the State for each such notice.

"The Clerk advises me that he must charge a fee of $10.00 for the adoption of each infant although there is only one petition and each of the five children are sought to be adopted by their step-mother, their father consenting.

"Will you please advise us whether the statute will allow the petition to be considered as one proceeding and subject to only one fee?"

In my opinion, only one petition is necessary under the provisions of § 63-356.1 of the Code. If only one petition is filed, the clerk will only be required to render services in connection with a single adoption proceeding. Therefore, in my opinion, if the adoption proceeding is by one petition only, the clerk's fee is limited to $10.00 under § 14-124.1, even though the petition involves the adoption of more than one infant.

CLERKS—Fees—Allowed for taking acknowledgments.

PUBLIC OFFICERS—Compatibility—County clerk may be Notary Public.

HONORABLE E. M. JONES
Clerk of Rappahannock County

July 29, 1963

This will acknowledge receipt of your letter of July 25, in which you request my advice as to whether or not a clerk or deputy clerk of a county is allowed to charge a fee for taking acknowledgments on deeds and other documents.

I am enclosing copy of an opinion issued by former Attorney General Abram P. Staples on July 24, 1935, and published in the Report of the Attorney General (1935-1936), at p. 29, in which this question was answered in the affirmative. It does not appear that there have been any changes in the statutes which would justify a reconsideration of the opinion of Mr. Staples. The opinion of Mr. Staples would be equally applicable to a clerk or his deputy.

You further ask the following question:

"Would it be advantageous for one or the other to be commissioned as a Notary, and if so, could he then charge fees for acknowledgments in the Clerk's Office in the same manner as any other Notary Public?"
Under § 15-486 of the Code it is provided that a county clerk may, at the same time, hold the office of notary public. If the clerk should be commissioned as a notary, he would, of course, be entitled to charge the proper notarial fees for services as such.

CLERKS—Fees—Entitled to twenty-two dollars and fifty cents in each felony case.

CRIMINAL PROCEDURE—Costs—Clerk entitled to fee of twenty-two dollars and fifty cents in felony cases.

June 25, 1964

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

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

"Section 14.1-112 (15) of Chapter 386 of the Acts of Assembly of 1964 provides that 'Upon conviction in felony cases, in lieu of any other fees allowed in this section, the clerk shall charge the accused twenty dollars in each case.' Section 14.1-115 of the same Chapter provides that 'For each case of felony tried in his court, to be charged only once, the clerk of such court shall be entitled to the sum of two dollars and fifty cents. But this section shall not apply to the clerk of the Hustings Court of the City of Richmond.'

"There appears to be no question that Section 14.1-115 is not applicable to the Hustings Court of the City of Richmond, but I have had a number of inquiries from other clerks of courts of record as to whether the $20.00 fee as provided by Section 14.1-112 (15) as well as the $2.50 as provided by Section 14.1-115 must be assessed in criminal cases. Some clerks are of the opinion that the $2.50 fee is no longer assessable, whereas others contend that both fees are assessable. I have been asked to obtain your opinion as to which of these viewpoints is correct."

Section 14.1-112 (15) of the Code was, prior to the revision of Title 14, § 14-123 (57) and read as follows:

"Upon conviction in felony cases, in lieu of any fees otherwise allowed by this section the clerk shall charge the accused ten dollars."

The revised section increases the charge from ten dollars to twenty dollars and adds the words "in each case."

Section 14.1-115, prior to the revision, was § 14-125, and it read the same then as now.

Therefore, the law is the same under Title 14.1 as it was under Title 14, with the exception that the charge in a felony case is increased from ten dollars to twenty dollars under § 14.1-112 (15).

In my opinion, the $2.50 to which a clerk is entitled under § 14.1-115 is in no way diminished by the provisions of § 14.1-112 (15), and the clerk in each felony case should assess twenty-two dollars and fifty cents in all felony cases on and after July 1, 1964, the effective date of Chapter 386 of the Acts of Assembly (1964).
CLERKS—Fees—Not allowed for proceedings under § 8-750.1.

CIVIL PROCEDURE—Appointment of Personal Representative—No charge may be made by clerk for proceedings under § 8-750.1.

HONORABLE RHEA F. MOORE, JR.
Clerk of Circuit Court of Tazewell County

This will acknowledge receipt of your letter of September 12, which reads as follows:

"From time to time, the local Department of Public Welfare files petitions in this Court requesting permission to pay monthly allowances to a Committee for incompetents. In addition to the petition, a notice is filed, and then a final order is entered by the Court in the matter. All of this requires certain work in this office plus the fact that there is an oath of office given to the Committee plus the giving of a bond.

"We have found that in these cases the Welfare Department has been paying counsel and also giving an allowance to the Guardian ad Litem. Heretofore, this office has not charged the Welfare Department for this work, but it is our contention that if other fees are paid by the Welfare Department in these cases, then a Clerk's Office should likewise receive its fees. We are cognizant of the provision in the Code which provides that no fee shall be charged in qualifications of less than $100 value in an estate.

"We shall appreciate your consideration of this matter, and advising if we should not charge the Welfare Department in these cases when the amount to be paid over to a recipient shall exceed $100.00."

The petitions to which you refer are filed under § 8-750.1 of the Code. The last sentence of this section provides that—

". . . No costs of court or commissioner's fees shall be assessed in proceedings under this section."

Under this provision, I am of the opinion that no charge can be made by the clerk in connection with such proceedings.

CLERKS—Fees—Not entitled to fee for collections under § 42-19.4.

HONORABLE RHEA F. MOORE, JR.
Clerk of Circuit Court of Tazewell County

This will acknowledge receipt of your letter of May 11, which reads as follows:

"Section 42-19.4 of the Code of Virginia (Chapter 439 of the 1964 Acts) provides for the assessment of a fee when civil suits are instituted to pay for local law libraries. These fees are to be collected by the Clerks when the suits are instituted; no mention is made in this Chapter as to the Clerk retaining a commission for his services; are we to imply here that the regular 5% commission due Clerks of Courts of Record
would be applicable as in the collection of all other local revenue through his office?"

The statute in question does not provide that the clerk is entitled to a commission on the amount collected and available for the local law library purposes. Article 5, Chapter 20, Title 58 authorizes the payment of a commission to the clerk upon collections made by him and reported to the State Comptroller on a form prepared by the comptroller. Inasmuch as the commissions allowed under § 58-972 are paid out of the State treasury, and may not be deducted by the clerk, it seems clear that the provisions of Article 5 relate only to the collection of State revenues. The compensation of a clerk is controlled by the statutory provisions and unless there is a statute providing for a commission in connection with a service (See § 14-72, as an example), I am of the opinion the clerk may not collect the same.

I am of the opinion, therefore, that the clerk is not entitled to deduct a commission under § 42-19.4 of the Code.

CLERKS—Fees—Taxation of costs limited to one set even though warrant contains one or more counts covering different offenses.

CRIMINAL PROCEDURE—Costs—Taxation of costs limited to one set even though warrant contains one or more counts covering different offenses.

December 11, 1963

HONORABLE T. F. TUCKER
Clerk of the Corporation Court of Danville

This is to acknowledge receipt of your letter of December 4, 1963, in which you make inquiry as to the taxation of costs by the Municipal Court and also by the Corporation Court. The questions will be answered seriatim, and I quote from your letter:

"1. Under the new procedure, the Judge of the Municipal Court is requiring that offenses similar to those described in the above paragraph [misdemeanor offenses arising out of the same incident, or where an individual was arrested for a specific misdemeanor and subsequently committed another offense in the presence of the officer] be contained in one warrant. Upon trial of the charges contained in the one warrant, if a finding of guilty is had on each of the offenses charged in the warrant, separate fines are imposed for the offenses, but only one set of costs is charged against the defendant.

"The Judge of the Municipal Court has asked me to inquire of you as to whether or not there should be one set of costs imposed or a separate set of costs imposed for each offense although there be only one warrant in trials in his Court."

Where one warrant is issued containing one or more counts or charges although the same be different offenses, the same constitutes a case within the meaning of § 14-132, Code of Virginia (1950) as amended. Upon conviction of any one of the counts [charges] in the warrant, there should be taxed against the defendant only one "set of costs". It is therefore my opinion that the Judge of the Municipal Court is correct in adopting the new procedure. This is in ac-
cord with the reasoning expressed in an opinion of this office, dated March 11; 1958, to the Honorable J. Gordon Bennett (Report of the Attorney General (1957-1958) p. 133), in which this office ruled that upon filing of a single warrant, although it contained two offenses, the clerk was entitled to receive a single fee.

"2. Where there is one warrant charging two separate misdemeanor offenses and these two offenses are appealed to the Corporation Court of Danville, would I, as Clerk, tax one set of cost or two sets of costs? These offenses are listed separately on my Criminal Court docket. How would this apply when only one of the offenses charged in a warrant is appealed to the Corporation Court, especially if the costs on the warrant were paid in the Municipal Court for the offense not appealed?"

Such a combination of charges in the same warrant would constitute a case before the Corporation Court within the meaning of that term in § 14-130 of the Code. Hence, you as Clerk of the Corporation Court should follow the same procedure as outlined above; that is to say, treat the warrant charging two separate misdemeanor offenses as one case and tax "one set of costs" against the defendant upon conviction.

Where the accused is convicted in the Municipal Court on both charges contained in the warrant, pays the costs and appeals only one of the charges, then the same is treated as a case in the Corporation Court and only the costs accruing in that court [the Corporation Court] are taxed against the accused upon conviction.

CLERKS—Fiduciary Bonds—No authority to accept new or increased bond.
BONDS—Fiduciary—No authority in clerk to accept new or increased bond.

HONORABLE ROBERT D. HUFFMAN
Clerk of the Circuit Court of Page County
February 19, 1964

This is to acknowledge receipt of your letter of February 14, 1964, in which you state in part:

"We have always taken the position that the Clerk of the Circuit Court has no authority to accept a new or increased bond of a fiduciary subsequent to the original appointment and qualification of the fiduciary, even though it may be voluntary on the part of the fiduciary."

Section 64-73, Code of Virginia (1950) provides that clerks of circuit or corporation courts may appoint and qualify executors, administrators and curators and take from them the necessary bonds in the same manner and with like effect as the court could do. Section 64-116 provides that the penalty of the bond shall be equal to the full value of the personal estate to be administered.

Under § 64-74 of the Code, any person interested may appeal from the action of the clerk in entering an order concerning a qualification issued under § 64-73. Once a clerk acts and (in that particular matter) enters his order, he is no longer directly concerned with duties imposed upon him by § 64-73, including the taking of the necessary bond from the fiduciary. Section 26-3 of the Code
expressly provides that the court under whose order or under the order of whose clerk any fiduciary derives his authority may require the fiduciary to furnish a new bond. No such authority is given the clerk by this section or any other section.

I am of the opinion that the position taken by you is correct in that the clerk of a circuit court has no authority to accept or require a new bond or increase the penalty of the bond subsequent to the appointment and qualification of the fiduciary.

CLERKS—Monies—Must be held in custody until court orders disposition—Not subject to levy to satisfy judgment.

CIVIL PROCEDURE—Execution on Judgment—Money held by clerk of court not subject to levy.

HONORABLE T. F. TUCKER
Clerk of the Corporation Court of Danville

This is to acknowledge receipt of your letter of November 19, 1963, in which you state in part:

"The Danville Redevelopment and Housing Authority has paid into this office certain monies which are to be paid to individuals as compensation for property acquired by the Authority."

You request my opinion on the following questions which will be answered seriatim.

"An execution has been issued by this office against one of these persons. The amount of the judgment upon which this execution is based is for $246.08 plus $12.50 costs. The execution has been served on me by the Constable of this city. Is the Constable's commission added by him to the amount of the judgment and costs, or is the Constable required to deduct his commission from the judgment and costs to be paid to the plaintiff?"

The real question involved here is whether the constable is entitled to any commissions. The monies here are in the custody of the court and no execution can be levied against them. The principle is expressed in 8 M.J., Executions, § 23, as follows:

"Property is Custodia Legis.—While property is in the hands of a receiver, or under the control of the court, no execution can be levied upon it, for that would be to interfere with the possession of the court. Property once levied on remains in the custody of the law and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under another jurisdiction."

I am of the opinion that whereas the money is held by the court, it is not subject to execution, and the constable has no authority to receive such money.
under the provisions of § 8-429 of the Code of Virginia (1950) and charge the commissions provided for in § 14-120 of said section.

"What authority do I have to pay to the Constable any money in excess of the judgment of $246.08 and the costs of $12.50?"

Although the money so held by the court is not capable of being levied upon, there may be a lien created thereupon when the *fieri facias* was issued and placed in the hands of the officer by virtue of § 8-431 of said Code. The execution served on you as clerk is notice of the existence of the *fieri facias* under said section. However, it is doubtful whether the same is sufficient notice under § 8-432. Whether there was a lien so created and whether such a lien has priority over other liens is a question for the court to determine when final disposition is made of these funds now held by the court. The constable is entitled to a fee of fifty cents for serving the execution upon you as clerk in accordance with the provisions of § 14-116 of the Code. This fee should be added to the costs.

For the reason heretofore stated, I am of the opinion that you do not have authority to pay to the constable any sum under this execution but must hold the monies in your custody as clerk until the court orders disposition of the same.

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CLERKS—Recordation—Deed—When regular fee is chargeable.

TAXATION—Recordation—When regular fee for recording deed chargeable.

HONORABLE J. FULTON AYRES
Clerk of Accomack County

February 7, 1964

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

"A deed has been submitted to this office for recordation as follows: "The grantor was, heretofore, an unincorporated Woman's Club and the title to the property was held in the names of the Trustees of the Club. The Woman's Club has formed a non-stock, non-profit corporation with the same members as heretofore, and now the Trustees of the Club are transferring the title to the property to the corporation by this deed."

"My question is—Is there a state tax collectible by me on this deed upon recordation? The deed is being withheld by the Attorney until I obtain a ruling."

In my opinion, the recordation tax should be charged in this instance. Section 58-54 of the Code is the applicable section. It will be noted that under the last paragraph of this section, whenever the charter of a corporation is amended and the only effect of such an amendment is to change the corporate name of the corporation, the tax upon the recordation of the deed conveying the title to the corporation under the different name is only fifty cents.

However, since this is not the type of deed which comes within this exception, it is my opinion that the regular recording fee is chargeable.
CLERKS—Recordation—Deed from joint owners to partnership subject to recordation tax.

TAXATION—Recordation—Deed from joint owners to partnership subject to tax.

HONORABLE C. W. SMITH
Clerk of Circuit Court of Washington County

This will acknowledge receipt of your letter of April 24, in which you request my opinion with respect to the following facts:

"On April 25, 1963, a deed was admitted to record in my office which conveyed two lots to A and B, in equal portions. Thereafter, A and B erected a substantial building for an animal hospital upon said lots. Now, A and B, together with their wives, have executed a deed for said real estate to A and B, 'as partners, doing business as Abingdon Animal Hospital.' The deed recites that A and B, 'are the joint owners of the hereinafter described real estate and desire to convey the same to themselves as partners, doing business as Abingdon Animal Hospital.'

"The consideration recited in the deed is $1.00 cash.

"The attorney for A and B contends that no State Tax should be paid upon the recordation of the new deed and also that no revenue stamps should be placed thereon. After reading the provisions of Article 3, Chapter 3, of Title 58 of the Code of Virginia, I am unable to determine whether or not this transfer should be exempt from taxation."

In my opinion, the deed is subject to the recordation tax prescribed by § 58-54 of the code. Neither § 58-61 nor § 58-64 would, in my opinion, exempt this deed from the recordation tax.

Inasmuch as the consideration cited in the deed is $1.00, the tax will be based upon the actual value of the property.

For the purpose of recordation, it is not necessary that the deed contain revenue stamps. Whether or not the revenue stamps are required is a matter for the Federal Internal Revenue Department to pass upon.

CLERKS—Recordation—Duty to admit deed to record without United States revenue stamps attached.

DEEDS—Recordation—Clerk required to admit to record without United States revenue stamps attached.

HONORABLE C. W. SMITH
Clerk of the Circuit Court of Washington County

This is to acknowledge receipt of your letter of February 13, 1964, in which you state in part:

"A major oil company has by its attorney requested this office to record a deed without the Revenue Stamps being attached thereto.

"It is our understanding that the grantee has no objection to having the Revenue Stamps attached to the instrument after it has been admitted to record."
"It appears that the grantee objects to revealing the price paid for the real property. "Please advise if we can be required to admit this instrument to record without having the Revenue Stamps attached."

This office has held that it is the duty of a clerk to admit a deed to record regardless of whether the individual requesting recordation has or has not paid for the proper United States revenue stamps. This view was expressed by the Honorable J. Lindsay Almond, Jr., then Attorney General, in a letter to the Honorable Thomas P. Chapman, Clerk of the Circuit Court of Fairfax County, dated January 4, 1951 (Report of the Attorney General (1950-1951) p. 54), a copy of which is enclosed.

Indeed, it has been held in other jurisdictions that the absence of revenue stamps required by Title 26, Section 4361 (Internal Revenue Code) U.S.C.A. does not invalidate the deed. Gerlach v. Cooper, 232 S. W. (2d) 458, 217 Ark. 596. See also, Weaver v. Crommes, 167 N. E. (2d) 661, 109 Ohio App. 470.

I am therefore of the opinion that you as clerk can be required to admit a deed to record without it having United States revenue stamps attached, provided, of course, that all the other requisites of recordation are fulfilled.

CLERKS—Recordation—Wills—How to be indexed.

May 13, 1964

HONORABLE EVA W. MAUPIN
Clerk of Circuit Court of Albemarle County

This will acknowledge receipt of your letter of May 11, in which you refer to Chapter 169, Acts of Assembly (1964), in which § 64-90 of the Code of Virginia was amended so as to add to the second paragraph of that section the following language:

"On and after July 1, 1964, such will shall be indexed in the General Indices of Deeds in such clerk's office in the name of the testator as grantor."

I do not construe this amendment to have an effect upon the statutes now existing with respect to the indexing of wills other than it requires that the will also be indexed in the general indices of deeds. I do not feel that the clerk is authorized by this amendment to abandon the indexes heretofore kept with respect to wills.

CLERKS—Records—Are public and open to public inspection.

PUBLIC RECORDS—Clerks—Open to public inspection.

May 19, 1964

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

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

"I have been asked the question if I can refuse to disclose the purchase price on a deed. I am of the opinion that I can do so if the
official receipt books of the Clerk's Office are not public records within the meaning of Section 17-43 of the Code of Virginia of 1950.

"Please advise me whether in your opinion the official receipt books of the Clerk's Office are public records and open to public inspection as such."

I believe the answer to your question is found in § 14-148 of the Code, which reads as follows:

"Every officer mentioned in §§ 14-145 and 14-146 shall keep in a book a true and accurate record of all fees, allowances, commissions, salary or other compensation or emolument of office to which he is entitled under the law, the amount of the same actually collected by him and the date of collection and sources from which the collections were made. Such book shall at all times be open to public inspection."

(Emphasis supplied.)

A clerk of a court of record is one of the officers mentioned in § 14-145. This book should reveal the amount of commission to which the clerk is entitled under § 58-972, and the source from which the commission was earned.

Section 17-46.1 relating to the maintenance of an official receipt book does not state that such book is open to public inspection. However, I am constrained to be of the opinion that the official record maintained by a clerk, including the receipt book, is not confidential.

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CLERKS—Salary—How salary of Clerk of Circuit Court of the City of Hampton determined.

HONORABLE C. M. GIBSON
Clerk of Courts for City of Hampton

May 21, 1964

This will acknowledge receipt of your letter of May 20, in which you direct attention to § 17-221.26 of the Code, found in Chapter 211, Acts of Assembly (1964), and request my opinion as follows:

"There was some question in my mind as to when this salary should begin and to what amount the 15% would apply. I discussed this matter with one of the state auditors and we are agreed that some ambiguity exists as to exactly what amount should be used as a basis from which to calculate the 15% and, also, when the salary should begin. We, therefore, concluded that the most prudent course would be to obtain an opinion from your office.

"This Clerk is paid under the provisions of Section 14-155 of the Code, which sets the maximum amount which can be withheld from fees of the office (these maximums have been increased from time to time and are considerably more than indicated in this Chapter). In addition to this maximum, this Section also provides that the City Council may allow, in a City of this size, up to $2500 as a Clerk's supplemental salary, which is exclusive of the maximum allowed under this Section to be withheld from the fees of the office.

"Now, my question is as follows: Should the 15% be figured on the maximum allowed from fees exclusive of the $2500 which the City may pay as additional salary; or should this 15% be figured on the maximum salary allowed from fees of the office plus the actual
portion of the $2500 now being paid to the officer by the City; or should the 15% be figured on the maximum allowed under this Section from fees of the office plus the $2500 allowed to be paid by the City Council, even though the full amount allowed may not now be paid . . .”

Section 17-221.26 of the Code reads as follows:

“The Clerk of the Circuit Court of the City of Hampton shall also be the Clerk of the Court of Law and Chancery of the City of Hampton. Subject to the provisions of Article 3 of Chapter 2 of Title 14 of the Code of Virginia, he shall receive for his services as Clerk of the Court of Law and Chancery fifteen per cent of his maximum compensation as provided in such article for his compensation as Clerk of the Circuit Court which said sum shall be paid from fees collected. He shall qualify as now provided by law and give bond for the faithful discharge of his duties in both courts. His bond shall be certified to the Circuit Court and the Court of Law and Chancery, and recorded in both courts. As the Clerk of the Circuit Court, he shall forthwith docket, in the manner provided by law, all judgments, decrees or orders for the payment of money rendered in the Court of Law and Chancery, or the clerk's office thereof, or by the judge thereof in vacation.”

In my opinion, the extra compensation allowed under this section should begin to accrue on the date you assume (or did assume) the duties of the Clerk of the Court of Law and Chancery—that is, the date of your qualification as such clerk.

This section provides that the clerk of the Court of Law and Chancery shall receive for his services as such clerk fifteen (15%) per cent of his maximum compensation as provided in Article 3, Chapter 2 of Title 14 of the Code of Virginia for his compensation as clerk of the Circuit Court. This, in my opinion, relates to the maximum compensation exclusive of any amount that may be supplemented by the city council for his services as clerk of the Circuit Court. In determining the maximum compensation allowed to the clerk under § 14-155, the compensation allowed to such clerk by the city council (other than commissions allowed by State law for the discharge of any duties imposed upon the clerk by the city council) shall be disregarded, but not more than $2500 in a city in the population bracket of Hampton. “Maximum compensation” as used in § 17-221.26 means, in my opinion, the same as that term is used in § 14-155—that is, compensation exclusive of the amount supplemented by the city.

COMMISSIONERS OF REVENUE—License—Professional Engineer—May not issue to engineer not certified.

PROFESSIONS AND OCCUPATIONS—License to Professional Engineer—Commissioner of Revenue may not issue to engineer not certified.

March 2, 1964

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

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

“Mr. Jack P. Blankenship, Commissioner of the Revenue for Campbell County, has asked me to obtain your opinion as to whether he is
required or permitted to issue a State license to an Engineer (Industrial-Cons.) who has not been certified to practice as an engineer by the Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors."

Section 58-376 of the Code is the applicable statute. You will note that the second paragraph of this section is as follows:

"No license hereunder shall be issued to any person desiring to practice engineering in this State unless such person exhibit a certificate or other evidence showing that the applicant is certified to practice as an engineer by the State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors."

In view of this provision, it is my opinion that the commissioner of the revenue is not authorized to issue a license to practice as an engineer to a person who does not exhibit a certificate or other evidence showing that he is certified to practice as an engineer by the State Board mentioned therein.

You will note that § 58-376 applies only to persons not exempted from the provisions of Title 54. These exemptions are set forth in § 54-37 of the Code. If a person comes within the exemptions, he does not have to pay the revenue license tax. Under either circumstance, therefore, he would not be entitled to the State license provided for in § 58-376.

COMMONWEALTH ATTORNEYS—Duties.

TAXATION—Assessment—Correction—Duty of Commonwealth’s Attorney to defend.

February 4, 1964

HONORABLE WM. M. MCCLENNY
Commonwealth’s Attorney for Amherst County

This is to acknowledge receipt of your letter of January 24, in which you seek the opinion of this office in reference to the duties of the Commonwealth’s attorney. I shall answer the questions seriatim.

"Is the Commonwealth Attorney required to defend the county without additional fee for cases dealing with tax reassessments on lands wherein the case is carried through the Circuit Court and the Supreme Court of Appeals?"

Section 58-1135 places the duty upon the Commonwealth’s attorney to defend the application for a correction of an erroneous assessment dealing with State license taxes, capitation taxes and taxes on income unless the application is defended by the State Tax Commissioner. In regard to local levies, if the county is aggrieved by a correction made by the commissioner of the revenue, the application for relief may be made by the county’s Commonwealth’s attorney. See, § 58-1143. When the application is made for a correction of an alleged erroneous assessment under Article 2, Chapter 22, Title 58, the Commonwealth’s attorney shall defend the application. If an application is made by an assessing
officer to correct an assessment, if local levies be involved, the Commonwealth’s attorney, under § 58-1153, must defend the application before the circuit court. Under § 58-841, if any order or levy made by the board of supervisors is, in the opinion of the Commonwealth’s attorney, illegal or is contested by six freeholders, the Commonwealth’s attorney shall appeal therefrom to the circuit court.

Article 3, Chapter 15, Title 58 (§§ 58-776 to 58-779, inclusive), dealing with general reassessments of real estate, is silent as to specific duties of the Commonwealth’s attorney. However, in order to test the validity of the reassessment, a property owner would follow the procedure outlined in Article 2, Chapter 22, Title 58, and, as stated above, the Commonwealth’s attorney must defend the application in the circuit court.

I am of the opinion that it is the duty of the Commonwealth’s attorney to defend the county when applications are made in the aforementioned cases and the Commonwealth’s attorney is not, in my opinion, entitled to an additional fee when this representation is made before the circuit court. The statutes are silent as to the duty of the Commonwealth’s attorney on appeal in the Supreme Court of Appeals in such cases.

The Commonwealth’s attorney is the statutory attorney for the county in connection with the care of the county property and the management of the business and concerns of the county. See, § 15-9. Under this section the board of supervisors may employ counsel to assist the Commonwealth’s attorney. This office has ruled that the Commonwealth’s attorney is not entitled to additional compensation for his services under this section. It would seem that there is a duty in all cases where the Commonwealth’s attorney is required to represent the county to appear in the Supreme Court of Appeals in the event the case is considered by that court. This, of course, would not apply in criminal prosecutions where the person convicted appeals his case.

“Is the Commonwealth Attorney required to condemn land for a sanitary district of a county without fee?”

The law governing the creation and management of sanitary districts is contained in Chapter 2, Title 21, Code of Virginia (1950), as amended. Although the boards of supervisors are the governing bodies of sanitary districts after such districts are created (§§ 21-118 and 21-118.4 of the Code), and may exercise the power of eminent domain, there is nothing in that statute placing the duty on Commonwealth’s attorneys to conduct such proceedings. Notwithstanding the fact that the Commonwealth’s attorney is general counsel for the board of supervisors (§§ 15-9 and 15-257 of the Code) and would therefore be required to furnish advice to the board on all matters coming before it, it may be that his general duties would not include the duty to conduct eminent domain proceedings for a sanitary district. The question is not free of doubt. The board of supervisors, in carrying out its powers and duties under the aforesaid chapter would, in my opinion, have the authority to employ counsel to conduct such proceedings, or to assist the Commonwealth’s attorney.

“Is the Commonwealth Attorney required to draft deeds, easements and other papers of a civil nature for a sanitary district without additional fees?”

These duties fall in the same category as the matter discussed in answer to the second question. However, it should be borne in mind that the Commonwealth’s attorney could not be employed by the board at additional compensation to do the work described in the third question because there is no exception in
§ 15-504 of the Code, as amended, which would permit a Commonwealth's attorney to accept such employment.

COMMONWEALTH ATTORNEYS—Duty—To prosecute appeals from courts not of record on charges based on city ordinances.

CITIES—Ordinances—Prosecution of charges based upon city ordinances—Duty of Commonwealth's Attorney.

February 24, 1964

HONORABLE PETER M. AXSON, JR.
Commonwealth's Attorney for the City of Chesapeake

This is to acknowledge receipt of your letter of February 18, 1964, in which you state in part:

“This is to request your opinion as to whose responsibility it is to prosecute city appeal cases in the City of Chesapeake. In other words, is it the duty of the Commonwealth's Attorney for the City of Chesapeake or the duty of the City Attorney for the City of Chesapeake to prosecute appeals from the lower court on charges based upon city ordinances?”


You point out that Chapter 211, Acts of 1962, granting a charter to the City of Chesapeake provides in part as follows—quoting from Section 9:03, Chapter 9 thereof, relating to the duties of the City Attorney:

“The city attorney shall be the chief legal advisor of the council, the city manager and all departments, boards commissions and agencies of the city in all matters affecting the interests of the city. He shall represent the city in all civil proceedings, and he shall institute and defend all legal proceedings which he shall deem necessary and proper to protect the interests of the city. He shall have such other powers duties as may be assigned by the council.”

The pertinent part of § 19.1-156, Code of Virginia (1950), as amended, is as follows:

“Every commissioner of the revenue, sheriff, constable or other officer shall promptly give information of the violation of any penal law to the attorney for the Commonwealth, who shall forthwith institute and prosecute all necessary and proper proceedings in such case, whether in the name of the Commonwealth or of a county or corporation, and may in such case issue or cause to be issued a summons for any witnesses
he may deem material to give evidence before the court or grand jury."

As indicated in former rulings of this office construing this section, it is the duty of the Commonwealth’s Attorney to prosecute appeals involving the violation of city ordinances in courts of record.

Although § 9:03, Chapter 9, of the city charter, supra, may be susceptible of the interpretation you have indicated, I do not think that the language used is clear enough to place upon the City Attorney the duty to prosecute criminal cases, nor do I believe that the term “institute and defend all legal proceedings” encompasse, the prosecution of criminal cases but refers rather to civil cases and matters in which the city is interested. It seems to me that had the Legislature intended that the City Attorney prosecute criminal cases, it would have used unequivocal language which would have left no doubt as to what officer is to perform that duty.

It is my opinion that it is the duty of the Commonwealth’s Attorney for the City of Chesapeake to prosecute appeals from courts not of record on charges based upon city ordinances.

COMMONWEALTH ATTORNEYS—Duty to represent county in boundary dispute cases.

HONORABLE CHARLES J. ROSS
Clerk of Madison County

January 9, 1964

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

“The Board of Supervisors of Madison County has pending in the Circuit Court two boundary dispute cases in accordance with section 15-38 and subsequent related sections.

“Do you know of any provision of law which places a duty on the Commonwealth Attorney to maintain a suit in a boundary dispute for the Board of Supervisors?

“If it is the duty of the Commonwealth Attorney to maintain such a suit, is it done without compensation?”

Under § 15-42 of the Code, in any proceedings in the appropriate court with respect to the establishment of a boundary line between two counties, it is necessary that a copy of the petition be served upon the Commonwealth’s attorney. The reason for requiring that a copy of the petition be served upon the Commonwealth’s attorney is because he is the attorney for the county.

By reference to § 15-9 of the Code, you will find that the board of supervisors may, in its discretion, employ counsel to assist the attorney for the Commonwealth in any suit against the county or in any matter affecting county property whenever the board is of the opinion that such counsel is needed. I think this section clearly implies that the attorney for the Commonwealth shall represent the board and that the board of supervisors may employ counsel to assist him.

This office has heretofore ruled that whenever the Commonwealth’s attorney is required by statute to perform a duty for the county he is not entitled to additional compensation unless the statute clearly makes a provision to that effect.
COMMONWEALTH ATTORNEYS—Fees—Not taxed in proceeding to forfeit recognizance payment to a county or city.

CRIMINAL PROCEDURE—Forfeiture of Bond—No attorney's fee taxed in proceeding to forfeit recognizance payable to a county or city.

COSTS—Forfeiture Proceedings—Attorney's fees not taxed.

October 22, 1963

HONORABLE Wm. S. HOLLAND
Clerk Circuit Court for the City of Suffolk

This is in reply to your letter of October 17, 1963, in which you inquire as to the taxing of an attorney's fee in a proceeding upon a forfeited recognizance when the recognizance is payable to a city and the Commonwealth Attorney appears for the city by agreement.

You draw my attention to § 14-131 of the Code which prescribes a fee of $10.00 and five per cent of the amount of the judgment when the Commonwealth Attorney appears on behalf of the Commonwealth in such proceedings.

Section 14-131 of the Code applies only to those instances in which the recognizance is payable to the Commonwealth and the Commonwealth Attorney appears in the forfeiture proceedings as a part of his official duties. I am aware of no comparable statutory provision whereby such an attorney's fee is taxed as a part of the costs in a proceeding to forfeit a recognizance which is payable to a county or city.

COMMONWEALTH ATTORNEYS—Vacancy—How filled in City of Staunton.

December 20, 1963

HONORABLE GEORGE M. COCHRAN
Member, Virginia House of Delegates

This is in reply to your letter of December 19, in which you state that for reasons of health it is expected that the present Commonwealth's Attorney for the City of Staunton will tender his resignation effective December 31, 1963. You state that the next regular election for this office will be held in November, 1965. You further state:

". . . A number of persons to whom this matter is of special interest, including the Judge Designate of the Corporation Court for the City of Staunton who will have to make an appointment to fill the vacancy on a temporary basis, are of the opinion that it would be desirable to hold a special election to fill this vacancy as soon as possible, with a temporary appointment to be made in the meantime . . . ."

You have requested my opinion as to the procedure for filling the vacancy. As you point out, Section 13 of the Charter of the City of Staunton (Acts of 1934, page 352) provides that:

". . . in case of a vacancy in the office of Commonwealth's attorney, clerk of the corporation court, or sergeant, the judge of the corporation court shall appoint a qualified person to fill the office in which such vacancy occurs until the next general election which may be held in the city when the vacancy may be filled by election for the unexpired term."
This charter provision, in my opinion, controls and the general provisions of law with respect to filling vacancies do not apply.

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 town, general elections for all officers required to be chosen at such elections respectively."

It appears, therefore, that the next general election in the city of Staunton, will be in June 1964 and under the charter provision the Commonwealth’s attorney for the city should be elected at that time for the unexpired term. In my opinion, the order appointing the Commonwealth’s attorney on January 1, 1964, should state that the appointment is until such time as the Commonwealth’s attorney who is elected in the June, 1964, election shall qualify. The person who is elected at the general election in June would be in position to qualify as soon as his certificate of election has been delivered to him.

Section 122 of the Constitution provides that the Commonwealth’s attorney shall be elected at the November election. However, the charter provision in question, enacted pursuant to Section 117 of the Constitution, is, in my opinion, valid and not repugnent to subsection (d) of this section, inasmuch as it relates only to the method of filling a vacancy.

CONTRACTORS—Classification—Equipment Supplier—When classified as a general contractor.

HONORABLE THEODORE C. PILCHER
Member, House of Delegates

October 29, 1963

This is in reply to your letter of October 23, 1963, in which you request my opinion as to whether a kitchen equipment supplier performing the functions discussed therein falls within the classification of a "general contractor" or "subcontractor" as those terms are used in § 54-113 of the Code of Virginia.

In an opinion rendered by former Attorney General Almond, Report of the Attorney General, (1956-1957), p. 63, the view was expressed that the kitchen equipment companies under consideration at that time were not performing services as a general contractor, as defined in § 54-113 of the Code. That conclusion was founded upon a premise that the companies simply delivered the equipment to the job site. While the employees of the supplier uncrated the equipment, assembled it and set it in place for service connections to be made, such connections were not made by the supplying companies. They were not engaged in installing devices permanently connected to electric wiring, or engaged in altering or repairing plumbing, steam fittings or other piping.

Provided the operating procedures remain substantially the same as above discussed, I concur with the opinion of Attorney General Almond that such companies are in fact suppliers, rather than contractors.

The situation presented in your letter differs vastly from those described above. You state that the company in question contracts to perform the following obligations:

"required to submit shop drawings, roughing-in plans and brochures for the proper alignment and installation of the equipment to be supplied,
"responsible for the proper fitting and placing of the equipment, including the adjusting and changing of the equipment by the metal workers of the contractor or supplier,
"responsible for effecting the electrical, steam, gas, water, waste and venting connections of the equipment on a permanent basis, even though the equipment may have to be moved at the end of the tenancy,
"after installation, is responsible for the starting, adjusting and demonstration of the use and care of the equipment,
"responsible for the servicing, altering and repairing of such equipment,
"supervisor of the installation of such equipment and is responsible for the proper functioning of said equipment under the terms of the owner's or architect's award, or any combination of these services."

A general contractor is defined by § 54-113 of the Code, which reads, in part, as follows:

"(2) 'General contractor' or 'subcontractor' shall mean any person, firm association or corporation that for a fixed price, commission, fee or percentage, undertakes to bid upon, or accepts or offers to accept, orders, or contracts for performing or superintending: (a) any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, or other metal or any other building material; . . . (e) any work involving the erecting, installing, altering or repairing, electric wiring, devices or appliances permanently connected to such wiring; or the erecting, repairing or maintaining of lines for the transmission or distribution of electric light and power; (f) any work involving the installing, altering or repairing of any plumbing, steam fitting or other piping, when the amount of the bid or cost of the undertaking, order, contract or subcontract is twenty thousand dollars or more; . . ."

I am of the opinion that bidding on a contract or undertaking to perform a contract in which the supplier of kitchen equipment is obligated to perform the functions above described brings the supplier within the definition of a general contractor, as defined in § 54-113 of the Code.

In order that the State Registration Board for Contractors may be advised of the view expressed by this office, I am taking the liberty of forwarding a copy of this letter to Honorable E. L. Kusterer, Executive Secretary of the Board.

CONTRACTORS—Definition—§ 58-297 does not include a person who performs his work on per hour basis for owner.

TAXATION—Licenses—Contractors—§ 58-297 interpreted.

December 18, 1963

HONORABLE WALTHER B. FIDLER
Member, Virginia House of Delegates

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

"In the Town of Colonial Beach, Virginia, the Mayor advises me that they have been having considerable confusion and lack of uni-
formity in the enforcement of a Town Ordinance imposing a license on all types of construction work in the town. I enclose herewith a copy of the Town Ordinance.

"The question proposed by the Mayor on behalf of the Council is this type of situation.

"A person does construction work within the town limits of the Town of Colonial Beach, employing no employees and performs his work on a per hour basis for the owner of the property. Usually it is repair and maintenance work of one kind or another such that the worker considers himself not a contractor in his own mind and generally considers that the town has no authority to impose any license tax upon him for the performance of that type of work.

"The question that the town needs an answer to is whether their ordinance is valid and whether the town has authority to impose such a license tax in the situation outlined above."

Under § 58-302 of the Code, a town may impose a tax on contractors, as defined in § 58-297, subject to the limitations of § 58-299. I am constrained to conclude that the term contractor, as used in § 58-297, is not intended to include a person who performs his work on a per hour basis for the owner. Generally, the relationship in such cases is that of employer-employee. To the extent that the ordinance in question would impose a tax on a person performing services on the basis stated. I am of the opinion it is not authorized by § 58-302 of the Code.

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CONTRACTS—Sale—Clerk to record.

RECORDATION—Sales Contract—Clerk to record.

October 4, 1963

HONORABLE CARY CRISMOND
Clerk of Circuit Court of Spotsylvania County

This will acknowledge your letter of October 3, in which you enclose a document entitled "Notice of Sale Contract," which reads, in part, as follows:

"Take notice that on the date of September 9, 1963, the undersigned did enter into an executory contract for the sale of the hereinafter described real property at a future date to Warren Shear. "Said Sale Contract covers the property described as follows:

* * *

"Said sale contract calls for settlement thereof on or before January 15, 1964, or soon thereafter as title can be examined."

I have omitted the description contained in the document. The writing is signed and duly acknowledged.

In my opinion, under the provisions of § 55-106 of the Code this is a recordable instrument and you should record the same in your office.

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CONTRACTS—State—Exceptions to requirement for obtaining bids.

HONORABLE C. P. MILLER, JR.
Assistant Comptroller

This is in reply to your letter of December 2, 1963, in which you request my opinion as to the exceptions to the requirement for obtaining bids prior to letting contracts to which the State of Virginia is a party.

The statutory requirement for advertising for bids on contracts to which the State is a party is codified as § 11-17 of the Code of Virginia, which reads, in part, as follows:

"Every contract in excess of twenty-five hundred dollars, except in a case of emergency and except also contracts for the purchase of stone, soil, lumber, borrow pits, gravel, sand, hay, grain, repairs and supplies for standard equipment, and other materials bought locally from farmers and property holders, to which the State of Virginia, or any department, institution or agency thereof is a party, for the construction, improvement or repair of any building, highway, bridge, street, sidewalk, culvert, sewer, reservoir, dam, dock, wharf, draining, dredging, excavation, grading, or other such construction work, shall be let by the State, or such department, institution or agency thereof, only after advertising for bids for the work at least ten days prior to the letting of any contract therefor." (Emphasis added)

You will note by the emphasis I have added to the foregoing quoted provision that the only excepting to the requirement for advertising for bids are those cases of emergency and contracts for the purchase of certain enumerated supplies, repairs and supplies for standard equipment, and other materials bought locally from farmers and property holders. All other contracts for the construction, improvement or repair of any building, etc., in excess of $2500.00 must be advertised at least ten days prior to the letting of the contract.

An additional exception which I did not feel it necessary to mention is that provided for bids for work on the highways which are governed by §§ 33-99 through 33-107 of the Code.

CORPORATIONS—Doing Business—Advertising alone not sufficient to place corporation in position as being engaged in business.

HONORABLE C. HARRISON MANN, JR.
Member, Virginia House of Delegates

This will acknowledge receipt of your letter of May 12, 1964, which reads in part as follows:

"The question has been raised whether a 'foreign' savings and loan association (D.C.) may lawfully insert advertising in Virginia newspapers and advertise over Virginia radio stations. Specifically, the
question evolves around whether such actions constitute doing business in this state as prohibited under Sec. 6-201.48."

It is my opinion that a foreign, non-resident, savings and loan association which simply advertises in Virginia newspapers and over Virginia radio stations is not engaged in the savings and loan association business in this state, within the meaning of Section 6-201.48 of the Code. I find no cases in Virginia, elsewhere, which hold that mere advertising, with nothing more, is sufficient to constitute doing, transacting, or engaging in business in a state. In fact, generally, the cases hold that mere advertising, with nothing more, does not constitute doing, transacting, or engaging in business in the jurisdiction involved. See Rich v. Chicago B. & Q. R. Co., 34 Wash. 14,17 (1904); Society Milion Athena v. National Bank of Greece, 166 Misc. 190, 2 N.Y. S. 2nd 155, 164 (1937); People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 62 L.Ed. 587, 38 S.Ct. 233, 235 (1918); Ballard and Ballard Co. v. Munson S.S. Line, 25 F. 2d 252 (6th Cir. 1928); Irvin v. Daniels Company, Contractors, 199 F. Supp. 766, 768 (1961); Dowd v. Boro Drugs, Inc., et al, 70 N.J. Super. 488, 176 A. 2d 15, 19, 23 (1961); Flannagan v. Acme Scaffold Co., 277 App. Div. 988, 100 N.Y. S. 2d 15, reargument denied 100 N.Y. S 2d 493 (1950) among others. Each of these cases arose from an attempt to subject the foreign corporation to service of process. It is generally recognized that less activity is required to subject a foreign corporation or association to suit than is required to subject it to qualification. For this reason cases, such as these, in which service is set aside, are a good indication that the particular activity about which you have inquired does not necessitate qualification.

CORPORATIONS—Doing Business—Foreign corporation may invest in notes, bonds or other investments and deemed to be not doing business in the State.

BANKS—Investments—When foreign corporation may invest without being considered as doing business.

June 11, 1964

Honorable Fred W. Bateman
Member, Virginia State Senate

This is in reply to your letter of May 27, 1964, which reads as follows:

"I desire your opinion on Section 13.1-102.1 of the 1950 Code of Virginia, as amended, with reference to whether or not a foreign bank or other foreign holder of secured paper may procure and service loans within the Commonwealth without being deemed to transacting or doing business in this State.

"In the specific situation prompting this question, a New York bank, that does not maintain an office or other place of business in this State and which does not advertise for business in this State, is interested in purchasing notes secured by deeds of trust on Virginia real estate providing they can service the payments on such notes directly from their collection department in New York without being considered as doing business in Virginia."
"Considering the nature of the proposed transactions, indicated above, may Section 13.1-102.1 be read, with equal application, with or without the words 'through corporations authorized to do business in this State.'"

Section 13.1-102.1 of the 1950 Code of Virginia, as amended, reads as follows:

"Without excluding other activities which may not constitute transacting business in this State, the investment by a foreign corporation in notes, bonds or other instruments secured by deeds of trust on property located in this State, the employment by it of attorneys at law surveyors and appraisers in connection therewith, the servicing and collection thereof in this State through corporations authorized to do business in this State, the acquisition of such property at foreclosure sale, and the holding of title thereto for a reasonable time, while liquidating such investment, shall not be deemed transacting business in this State, provided the foreign corporation does not maintain an office or other place of business in this State, and provided, further, that the foreign corporation does not advertise for business in this State."

In the situation you have outlined, it is immaterial in my opinion whether the servicing is accomplished by the collection department of the New York bank or "through corporations authorized to do business in this State." The investment pursuant to the conditions set forth is declared by the statute not to constitute "doing business" and the servicing in either case would seem but incidental to the initial investment. See, Rock-Ola Manufacturing Corp. v. Wertz, 249 F. 2d 813, 817; Continental Assur. Co. v. Ihler, 53 Idaho 612, 26 P. 2d 792; Equitable Credit Co. v. Rogers, 175 Ark. 205, 299 S. W. 747; 17 Fletcher, Cyclopedia of Corporations, (1960 Rev. Vol.) § 8492.

For the purpose of this opinion it is assumed that the New York bank, or "other foreign holder," is a foreign corporation.

CORPORATIONS—Exemption from Taxation—Grayson Development Corporation does not qualify under Section 183 of Constitution of Virginia.

TAXATION—Exemptions—Grayson Development Corporation does not qualify.

Honorable Paul X. Bolt
Commonwealth's Attorney for Grayson County

June 22, 1964

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

"You will please find enclosed the Articles of Incorporation and By-Laws of the Grayson Development Corporation.

"Please advise whether or not real estate and personal property owned by this corporation would be subject to state and local taxation. If subject to taxation please advise whether or not the Grayson County Board of Supervisors has the authority to exempt said property from local taxes for a period of five years."
The charter of the corporation states that its purposes are:

"1. To promote the civic and social welfare of the citizens of Grayson County, by encouraging and attracting industrial and business organizations to locate in the said county, and to raise the necessary funds for such purposes by such means as the corporation may deem wise, and to promote the general welfare of said county by encouraging both individuals and corporations to locate in said county.

"2. To promote, encourage, and support public health, recreational, and other charitable projects in the county and surrounding area, to serve as coordinating agency and faculty with respect to civic problems, needs, and facilities in order to achieve greater economic and cultural progress.

"3. The general welfare of society and not individual profit being the object for which this corporation is created, the corporation shall pay no dividends or salaries to its incorporators or its board of directors, and the said incorporators or board of directors shall not share in any of the profits of the corporation in any way. All income or profits of the corporation, over and above those necessary to pay debts and interest of the corporation, and to carry on the conduct of its purpose, shall be applied to public health, recreational, or other charitable purpose or purposes, as determined by a committee of six persons, selected by the board of Directors, the members of which committee may or may not be members of the board of directors of the corporation."

In order for a corporation to be relieved of tax liability it must come within the provisions of Section 183 of the Constitution relating to property exempt from taxation. These provisions are set forth in paragraphs (a) through (g).

Although the corporation in question is nonprofit, in my opinion, it fails to meet the requirements of either classification so as to be exempt from taxation.

One of the purposes of the corporation is "to promote, encourage, and support public health, and other charitable projects in the county," but to the extent that it is organized for a charitable purpose, that purpose is not exclusive. It would appear from paragraphs 1 and 2 setting forth the purposes of the corporation that the dominant purpose is to promote the civic and social welfare of the county by encouraging and attracting industrial and business organizations to locate in the county. This, in my opinion, prevents the corporation from qualifying under the constitutional provision. The fact that the income of the corporation in excess of its operating costs and debt service is to be applied to public health, recreational, or other charitable purposes, does not operate to bring the corporation within any of the exemptions. Charities and charitable associations are mentioned in paragraphs (e) and (f) of Section 183, but it is clear that the corporation in question fails to come within any of the categories mentioned in these paragraphs.

There is no statute under which the board of supervisors may exempt the property from taxation for a period of five years. Under Section 189 of the Constitution, the General Assembly may, by general law, authorize a five year exemption to manufacturing establishments and works of internal improvement. However, the statute under which localities were authorized to grant such exemptions (Tax Code Section 345 b.) was repealed by Chapter 224, Acts of Assembly (1944).
COSTS—In Convictions Upon Crimes and Offenses Reportable to Division of Motor Vehicles—Collected and processed in same manner as other costs in a criminal proceeding.

MOTOR VEHICLES—Costs Upon Crimes and Offenses Reportable to Division of Motor Vehicles—Collected and processed in same manner as other costs in a criminal proceeding.

April 3, 1964

HONORABLE SIDNEY C. DAY, JR.
Comptroller

This is in reply to your letter of March 24, 1964, in which you request my opinion as to the manner in which the provisions of Senate Bill 169 (Chapter 289, Acts of 1964) of the recently adjourned session of the General Assembly are to be administered.

The title to that bill explains the purpose as being "an Act to impose and provide for the collection and disposition of certain costs in convictions upon crimes and offenses which are reportable to the Division of Motor Vehicles."

Your specific inquiries were whether these moneys should be paid into the Treasury through a court of record, and, if so, whether the usual commissions which are paid the clerks of courts of record should be charged against the fund to which they are credited. I am of the opinion that both these inquiries are to be answered in the affirmative.

The assessment of an additional $5.00 against a person convicted of a violation of a law which is required to be reported to the Division of Motor Vehicles should be collected and processed in the same manner as any other cost in a criminal proceeding.

COSTS—Jury—Cannot be taxed against litigant in civil case.

CIVIL PROCEDURE—Costs—Jury costs cannot be taxed against litigant in civil case.

JURIES—Costs—Not taxed against litigant in civil case.

February 26, 1964

HONORABLE J. FULTON AYRES
Clerk of the Circuit Court of Accomack County

This is to acknowledge receipt of your letter of February 24, 1964, in which you state in part:

"The county pays the costs of civil jurors when there is a trial, but in cases of this kind, [which have been continued or settled] is there any way, legally, that in a compromise settlement, or continuance, that one of the parties can be liable for the jury costs incurred? It seems that this puts the county to needless expense."

This office has held that there is no authority to tax the costs of a jury against the litigant in a civil case. (Opinions of the Attorney General (1939-1940) p. 139 and (1953-1954) p. 42). The only exception to this is where a special jury is formed pursuant to the provisions of § 8-197, Code of Virginia (1950). There the court may direct the costs of the jury to be paid by the plaintiff or the defendant. An examination of the statutes since the rendition of said opinions by
this office does not disclose any change in the statutes which would permit the taxation of the costs of a jury against a litigant in a civil case. Furthermore, the statutes make no distinction between the pay of jurors whether they serve as such or merely attend in obedience to a lawful summons. See, §§ 8-204 to 8-208, inclusive, Code of Virginia.

COUNTIES—Appropriations—No authority to make for painting portrait of judge.

BOARD OF SUPERVISORS—Appropriations—No authority to make for painting portrait of judge.

HONORABLE VALENTINE W. SOUTHLALL
County Judge of Amelia County

September 9, 1963

This is in reply to your letter of September 7, in which you request my opinion as to whether or not the Board of Supervisors of Amelia County may make an appropriation of approximately $500 for the purpose of having a portrait of Honorable J. G. Jefferson, Jr., painted, he having retired as Judge of the Circuit Court of that county after a distinguished service of twenty years. You state that the portrait will be the property of the county and will be placed on the walls of the circuit court room.

I am unable to find any statute which, in my opinion, could be construed to be broad enough to authorize an expenditure of this nature. While the expenditure would be for a laudable purpose, I feel that statutory authority would be necessary.

COUNTIES—Contracts—Library Service—May contract with adjacent city under § 42-12.

CONTRACTS—Library Service—County may enter into with adjacent city under § 42-12.

HONORABLE RANDOLPH W. CHURCH
State Librarian

December 20, 1963

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

"Under Section 42-12 of the Code it is provided that the governing board of a county may contract with an adjacent city to receive public library service, and as part of such a contract shall receive representation on the board of trustees of the library giving such service. Such arrangements are now in existence in the State.

"However, under Section 15-13.2 of the Code it is provided that powers, privileges or authority exercised or capable of being exercised by any political subdivision may be exercised and enjoyed jointly under an agreement, and that the agreement must specifically contain certain items.

"I would appreciate it if you would give me your opinion as to whether it is necessary for a contract for library service to include the
items mentioned in 15-13.2 and whether contracts in effect should be so modified."

The answer to your question is in the negative. Section 15-13.2 does not, in my opinion, have any effect upon the provisions of § 42-12 of the Code which relates specifically to the authority of a county which has no free library system to contract with an adjacent city for library service.

An arrangement for library service by such a county may be made with a city without regard to the provisions of § 15-13.2 of the Code.

COUNTIES—Debt—Power to borrow money restricted by Virginia Constitution.

BOARDS OF SUPERVISORS—Authority—Power to borrow money restricted.

September 16, 1963

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney of Augusta County

This is in reply to your letter of September 12, in which you state that plans are being considered whereby the soil conservation authorities will construct a dam in Augusta County for flood control purposes, the project being financed under the Watershed Protection and Flood Prevention Act enacted by Congress. You point out that the Soil Conservation Committee, under Section 8 of the above mentioned federal act, is planning to obtain loans or advancements of federal funds sufficient to enlarge the scope of the project so as to provide a larger dam sufficient to impound a larger supply of water so as to have water available for distribution to water users in Augusta County. Under this plan it would be necessary for the board of supervisors of the county to obligate the county to the extent that "beginning ten years from the date that the dam is constructed, Augusta County would repay the Soil Conservation Authorities the difference between the cost of the dam considered to be erected for flood control, and the increased cost of the dam by being erected for the impounding of water for consumption."

You have requested my opinion as to whether or not the board of supervisors of the county may undertake this obligation without first submitting the question to a referendum.

In my opinion, the board of supervisors is prohibited from incurring the obligation. Such an agreement would, in my opinion, be contrary to the provisions of Section 115(a) of the State Constitution which forbids the creation of a debt of this nature without the approval of the voters.

COUNTIES—Dumps—County may not prohibit city from establishing public dump in absence of zoning regulation.

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

August 14, 1963

This is in reply to your letter of August 12, in which you request my advice with respect to the following:
"Can the Board of Supervisors of Montgomery County or any County, for that matter, pass an ordinance prohibiting any public dump by an adjoining city to the County, if the adjoining city to the County owns the property?"

"The Board of Supervisors of Montgomery County are making provisions for dumps for the different districts in the County in accordance with the law, with reference to acreage, etc., but the important matter is whether or not the city adjoining the County can come into the County and purchase property or obtain property by lease or otherwise, and use the same for a public dump for that city, without the approval of the Board of Supervisors."

Under § 15-707 of the Code, the governing body of a county is authorized in its discretion to provide for the establishment of sites to be used as dumping places for waste material, including abandoned automobiles. The last paragraph of this section reads as follows:

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

It will be noted that under the paragraph just quoted it is not unlawful to dump waste material including automobiles on other land in the county, provided the written consent of the owner of the land has been obtained. Inasmuch as the city owns the land in this instance, it would appear that under § 15-707 the governing body of the county could not prevent the city from using its own land for such a purpose.

However, it is possible that a county could prevent use of the property for such a purpose under the zoning statutes. In this connection, you are referred to the case of City of Richmond v. County Board, 199 Va. 679, in which the Supreme Court upheld the right of the Board of Supervisors of Henrico County to prevent the city of Richmond from building a jail in an area that was zoned against such property use.

COUNTIES—Federal Corporation—No authority to appropriate public funds for purposes of such corporation.

BOARDS OF SUPERVISORS—Appropriations—No authority in Board to appropriate public funds for purposes of Federal corporation.

October 17, 1963

HONORABLE GLENN A. BURKLUND
Member, House of Delegates

This is in reply to your letter of September 19, 1963. You advise that it is your understanding that an association known as the Metropolitan Washington Council of Governments will attempt to obtain a corporate charter from the Congress of the United States, and you enclosed copy of a draft of the proposed bill to accomplish this end. The purposes of the proposed Federal corporation are stated in the bill as follows:
"Sec. 2. The purposes of the Council of Governments are to promote a spirit of cooperation among the governments of the National Capital region, to resolve problems affecting the region in a manner which is mutually satisfactory, to defend the autonomy of the local governments, and to advise and assist the governments of the area to:

"(1) Identify mutual area-wide problems affecting the sound growth and development and economical functioning of the region;
"(2) Develop regional comprehensive plans for the growth and development of the region as a whole for consideration by the local governments of the area and promote interjurisdictional cooperation;
"(3) Agree upon mutually desirable policies and consensuses and develop cooperative mechanisms among the member governments for improving the administration of public services;
"(4) Support and promote concerted action among local governments for their mutual benefit and for the welfare of the region as a whole; and
"(5) Serve as a body representative of local governments of the region in matters such as they may determine affect the region as a whole."

Under Section 4, those who will or may be members of the proposed corporation are defined as follows:

"Sec. 4 (a) The Governments of the District of Columbia; Charles, Prince George's, and Montgomery counties in the State of Maryland; Arlington, Fairfax, Loudoun, and Prince William counties and the cities of Alexandria, Fairfax and Falls Church in the Commonwealth of Virginia; and such other municipalities as now or may hereafter exist within the geographic area bounded by the outer boundaries of the combined area of such counties and cities are eligible for membership in the Council of Governments, subject to the bylaws adopted in accordance with this Act."

Under Section 5 of the proposed bill it is stated that "... membership and participation in the Council of Governments shall continue to be on a voluntary basis, and decisions of the Council of Governments shall not be binding on any member or other local governing body."

Among others, the corporate powers set up in Section 3 of the proposed bill include the power to sue and be sued, to contract, to purchase and transfer real and personal property, and

"Notwithstanding any other provision of law, to receive planning grants from the Housing and Home Finance Administrator pursuant to Section 701 of the Housing Act of 1954, as amended (40 U.S.C. 461), and funds available for planning surveys and investigations under other Federally-aided programs and to receive financial assistance from any State or local governmental authority, including the Government of the District of Columbia."

While you have asked several specific questions, I understand that basically you desire my opinion as to whether the governing bodies of Virginia counties and cities may lawfully become members and participate in the affairs of this Federal corporation, particularly by appropriating public funds to such corporation.

There is, of course, a distinction between the governing body of a county or city and the county or city itself as a political subdivision of the Commonwealth—the members of such such governing bodies are not the county or the city, and the individual actions of such members are not necessarily the actions of such county or city. For example, all of the members of the governing body of a city
may, through the exercise of individual choice, have elected to become members of the local Rotary Club. On the other hand, while the membership of the proposed Federal corporation is stated to be the “governments” of the enumerated entities, it is evident that a particular “government” becomes a member only as a result of an affirmative resolution of the governing body concerned, passed in the manner prescribed by law. The question then becomes whether or not such a resolution is within the scope of the authority of the particular body. And ultimately, since funds will inevitably be required for the functioning of the corporation, the governing bodies concerned will probably have to face the question of whether they may lawfully appropriate public funds to the support of the corporation. While there may be involved other questions of more or less importance, consideration will be limited to those set forth.

Counties and municipal corporations are creatures of the State, and the powers they may exercise are limited to those specifically conferred and those necessarily implied. Generally, the exercise of these powers is limited to the attainment of “county purposes,” or “municipal purposes.” However, the charters of municipal corporations must be examined to determine the full extent of their powers. Whatever the purposes of the proposed Federal corporation may be, it would seem that they are regional in scope, extending beyond the limits of the Commonwealth of Virginia. In my judgment there is doubt as to whether the appropriation of county or city funds to such a corporation would be considered as being for purposes authorized under existing statutes.

I am not unmindful of the provisions of Chapter 28 of Title 15 of the Code of Virginia (1950), as amended, (§§ 15-961 et seq.). This chapter replaced Chapter 25 of Title 15, which chapter dealing with the same subject, was enacted in 1950 and repealed in 1962. Section 15-961 of the Code authorizes the governing body of any city or town to create or participate in a regional planning commission. If it be assumed that the proposed Federal corporation is a regional planning commission, it is not one that is created under Virginia law as envisioned by § 15-961.3, nor does any authorization granted under the provisions of Chapter 28 of Title 15 extend beyond the jurisdictional limits of the Commonwealth of Virginia.

As I advised you in my letter of October 14, 1963, it has come to my attention that several amendments to the proposed bill have been suggested or are under consideration in several of the localities involved. I am not in a position at this time to form an opinion as to whether the questionable features herein indicated would be eliminated by the proposed amendments.

In regard to your questions as to the effect of Section 14 of the State Constitution, I do not feel that this section applies to the matter under consideration.

COUNTIES—Ordinance—May adopt ordinance dividing county into districts for zoning purposes.

COUNTIES—Zoning Regulations.

ZONING—Ordinances—Must apply uniformly, but regulations may vary in different districts.

HONORABLE M. G. ANDERSON
Member, House of Delegates

January 31, 1964

This is with reference to your oral request that this office furnish you an opinion on the following questions:
1. Does the governing body of a county have the authority to zone the territory within the county by districts?

2. If the governing body does have the authority to zone by districts, do the zoning regulations have to be the same for each district?

The statutory authority governing zoning within counties is found in Article 8, Chapter 28 of Title 15, Code of Virginia (1950), as amended, and § 15-968 specifically provides in part that:

“The governing body of any county or municipality may, by ordinance, divide the territory under its jurisdiction into districts of such number, shape and area as it may deem best suited to carry out the purposes of this article, . . .”

In view of the above quoted language, I am of the opinion that the governing body of a county does have the authority to adopt an ordinance whereby the county would be divided into districts for zoning purposes.

With regard to the question concerning the uniformity of the zoning regulations, § 15-968.2 of the Code states:

“All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts.” (Italics added)

Therefore, zoning regulations which are adopted by the governing body of a county must be uniform for each class or kind of building and uses within a district but do not have to be the same for each district in the county.

COUNTIES—Ordinances—To prohibit the sale and use of fireworks.

FIREWORKS—Regulation—Extent to which localities may control sale or use.

HONORABLE STANLEY A. OWENS
Member of the House of Delegates

January 27, 1964

This is in reply to your oral request relating to § 59-219 of the Code. You have requested my opinion as to whether that section permits counties, cities and towns to prohibit or regulate the sale and use of fireworks.

By virtue of § 59-214 of the Code, it is unlawful for any person, firm or corporation to sell or use, etc., firecrackers or other explosives commonly known as fireworks except as otherwise provided in Chapter 15 of Title 59.

Section 59-219 of the Code reads as follows: “Nothing contained in this chapter shall apply to any ordinance prohibiting the sale, storage, use, possession or manufacture of fireworks heretofore or hereafter adopted by any county, city or town.”

The purpose of the foregoing quoted provision is to give effect to local ordinances which prohibit the sale or use of fireworks whether such ordinances were adopted prior to the effective date of § 59-214 of the Code or subsequent thereto. The only provision in Chapter 15 of Title 59 which empowers the governing bodies of counties, cities and towns to regulate the use of fireworks is codified as § 59-215 of the Code.

In reply to your specific inquiry, I am of the opinion that the counties, cities and towns may adopt ordinances to prohibit the sale and use of fireworks but
they are without authority to adopt regulatory measures for the sale or use of fireworks beyond the use contemplated in § 59-215 of the Code.

COUNTIES—Planning Commission—Authority to employ consultants.

July 29, 1963

HONORABLE E. M. JONES
County Clerk for Rappahannock County

This is in reply to your letter of July 16, 1963, in which you pose the question of the legal authority for the County Planning Commission to expend funds appropriated by the Board of Supervisors for the purpose of employing a planning consultant and a legal consultant.

Section 15-963.5, Code of Virginia (1950), as amended, reads as follows:

"The local commission shall elect from the appointed members a chairman and vice-chairman, whose terms shall be for one year. If authorized by the governing body the commission may (1) create and fill such other offices as it deems necessary; (2) appoint such employees and staff as it deems necessary for its work; and (3) contract with consultants for such services as it requires. The expenditures of the commission, exclusive of gifts or grants, shall be within the amounts appropriated for such purpose by the governing body.

"The commission shall adopt rules for the transaction of business and shall keep a record of its transactions which shall be a public record. Upon request of the commission, the governing body or other public officials may, from time to time, for the purpose of special surveys under the direction of the commission, assign or detail to it any members of the staffs of county or municipal administrative departments, or such governing body or other public official may direct any such department employee to make for the commission special surveys or studies requested by the local commission."

In view of the provision authorizing the commission to contract with consultants for such services as it requires, I am of the opinion that the commission may employ both a planning consultant and a legal consultant if the commission deems such services necessary and the expenditures for such services remain within the amount appropriated by the Board of Supervisors.

COUNTIES—Watershed Improvement District—Referendums—Signatures on ballots necessary.

ELECTIONS—Ballots—Must contain signatures of voters in watershed improvement district referendum.

February 4, 1964

HONORABLE ROY V. WOLFE, JR.
Commonwealth's Attorney for Scott County

This is to acknowledge receipt of your letter of January 22, 1964, in which you seek the opinion of this office to the following questions which will be answered seriatim.
REPORT OF THE ATTORNEY GENERAL

1. If the referendum is conducted by secret ballot, how can it be ascertained that the two-thirds majority voting for, if such is the case, represent ownership of at least two-thirds of the land in the proposed district?

Answer: Section 21-112.4, Code of Virginia (1950) as amended provides as follows: "All owners shall be eligible to vote in such referendum", and the supervisors "may prescribe such rules and regulations governing the conduct of such referendum as they deem to be necessary." The names of the owners of the land lying within the boundaries of the proposed watershed improvement district and the amount of land owned by each owner should be ascertained before the referendum is taken and only such owners should be permitted to vote. In order to ascertain whether two-thirds of the vote cast for the project represents ownership of at least two-thirds of the land, the voters will, of course, have to sign their ballots.

2. If part of the land to be included in the watershed improvement district is in the National Forest, what bearing, if any, would this have upon the referendum required by Section 21-112.4 and ascertaining the results pursuant to Section 21-112.5?

Answer: Watershed improvement districts have the power to levy a tax against the real estate included in the district. Obviously, property owned and used by the United States Forest Service could not be taxed. I doubt very much whether there is any way by which the area owned by the United States can be brought into the proposed district.

COURTS—County Court Jurisdiction—Extends to misdemeanors committed on Appomattox Surrender Grounds.


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

January 8, 1964

This is to acknowledge receipt of your letter of December 31, 1963, in which you state in part:

"There has been some damage done to some of the buildings and property on the lands owned by the Federal Government which is known as The Appomattox Surrender Grounds Park. Judge Crawley has raised the question as to whether or not the State Court has jurisdiction to try this case and any similar cases of alleged crimes taking place on this property which is owned by the Federal Government."

The Honorable G. P. Hultman, Assistant Chief of Lands, Southeastern Regional Office, National Parks Service, 400 North 8th Street, Richmond, Virginia, advises me that the United States Department of Agriculture acquired said property on October 14, 1936, by deeds from the following grantors, all of which are recorded in the clerk's office of Appomattox County:

Joel W. Flood, Special Commissioner, D. B. 35, page 483;
Adelie C. Ferguson, Widow, D. B. 35, page 477;
In 1939, these properties were transferred to the Department of Interior (Park Service) by executive order.

As the area with which we are concerned was acquired after March 28, 1936, and is now a public park, the provisions of § 7-21, Code of Virginia (1950), are applicable in reference to jurisdiction. The pertinent portions of that section are as follows:

"Over the lands heretofore or hereafter acquired by the United States for the purposes mentioned in this section, the Commonwealth hereby cedes to the United States the power and jurisdiction to regulate traffic over all highways maintained by the United States thereon, to protect the lands and all property thereon belonging to the United States from damage, deprivation or destruction and to operate and administer the lands and property thereon for the purposes for which the same shall be acquired by the United States.

* * *

"The Commonwealth hereby further reserves unto herself over all such lands exclusive governmental, judicial, executive and legislative powers, and jurisdiction in all civil and criminal matters, except in so far as the same may be in conflict with the jurisdiction and powers here ceded to the United States."

In 1940, § 19e of the Code was added, which is now designated as § 7-24. This statute expressly ceded to the United States concurrent jurisdiction over crimes and offenses committed on the lands acquired since March 28, 1936. The statute also provided a means by which the federal government could acquire exclusive jurisdiction by having the head of the department or agency of the United States having custody or control over such lands, secure a deed executed by the Governor and the Attorney General conveying such jurisdiction. No such deed becomes effective or operative until the jurisdiction is accepted by the United States as provided in § 355 of the revised statutes, Title 40, § 255, USCA., and such deed has been placed on record in the office of the clerk of the appropriate court of record. That statute, after setting forth the procedure to be followed, states:

"Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

Section 7-21 of the Code of Virginia, supra, does not cede any jurisdiction over crimes and offenses to the United States, with the exception of jurisdiction to regulate traffic over highways thereon maintained by the United States, and that jurisdiction is dependent upon compliance with the federal statute (40 USCA., § 225) and with Virginia Code § 7-21, supra. I am not advised whether the United States has accepted jurisdiction over this area. This section (7-21) certainly does not cede exclusive jurisdiction over crimes to the United States. I have not examined the records of the clerk’s office of the Circuit Court of Appomattox County to determine whether the United States has accepted or acquired any jurisdiction over these lands pursuant to said statutes (Federal and State). From what you state in your letter, I assume there is no such deed indicating such an acceptance or acquisition.

Based upon this assumption, it is the opinion of this office that the County Court of Appomattox County has jurisdiction to try a misdemeanor involving damages done to a building on the Appomattox Surrender Grounds.

MOTOR VEHICLES—Violations of Local Ordinances—Court must collect costs imposed by Ch. 289, Acts of 1964.

COSTS—Criminal Procedure—Violations of Local Ordinances—Court must collect costs imposed by Ch. 289, Acts of 1964.

June 10, 1964

HONORABLE HARRY B. WRIGHT
Clerk of the Municipal Court of the County of Rockbridge

This is to acknowledge receipt of your letter of June 4, 1964, in which you request my opinion as to the status and certain duties of the Municipal Court of the Town of Lexington. I shall answer your questions seriatim.

"1. In the 1962 Acts of Assembly, at page 245 etc.; the Charter of the Town of Lexington was amended, thereby creating a Municipal Court: 'Does Section 19.1-335 and 19.1-337 of the Code of Virginia apply to the Municipal Court of said Town?'

Under Section 43 of the charter of the Town of Lexington granted by the General Assembly, Chapter 321, Acts of 1932, the trial justice of the town was given jurisdiction comparable to that granted trial justices generally. However, that section of the charter was amended by Chapter 165, Acts of 1962. The name of the Trial Justice Court was changed to Municipal Court and its jurisdiction was limited to the trial of criminal offenses committed against the ordinances of the town. The effect of this amendment was to make the Municipal Court of the Town of Lexington a court of limited jurisdiction and causes it to come within that classification as prescribed in Chapter 5, Title 16.1 (16.1-71 to 16.1-75, inclusive) of the Code. The question is then presented as to whether the provisions of § 19.1-335, dealing with the duty of municipal courts to return warrants in criminal cases to the clerk of the corporation court of the city or to the clerk of the circuit court thereof if there be no corporation court, apply to the courts of limited jurisdiction (Chapter 5, Title 16.1). It is my opinion that the municipal courts referred to in Article 3, Chapter 14, Title 19.1 (Sections 19.1-335 to 19.1-337, inclusive) of the Code are those municipal courts included in Chapter 5, Title 16.1, and not to courts of limited jurisdiction covered by Chapter 5, Title 16.1, although the latter courts may be termed municipal courts in the town charters such as was done in the amended charter of the Town of Lexington. This question is therefore answered in the negative.

"2. The General Assembly of the 1964 enacted Chapter 289 (Senate Bill 169) and the question is: 'Does this Chapter apply to the Municipal Court of said Town?'

Under the provisions of § 46.1-180 of the Code of Virginia (1950) as amended, local authorities, including the governing bodies of towns, are granted authority to adopt ordinances regulating the operation of vehicles on the highways of such towns not in conflict with the provisions of Title 46.1 of said Code. Chapter 289, Acts of 1964, requires that the sum of $5.00 be added as costs where there is a conviction of a State law or of a local ordinance which must be reported to the Division of Motor Vehicles. It is the duty of the court in which the conviction is rendered to tax this additional sum of $5.00 as costs. Upon collection, the same
must be transmitted to the Treasurer of Virginia to be used for highway purposes. Upon collection, I suggest that you send the money to the Clerk of the Circuit Court of your county, advising him that it has been collected pursuant to Chapter 289, Acts of 1964. If the Town of Lexington has adopted ordinances regulating the operation of vehicles within said town, I am of the opinion that the Municipal Court of the Town of Lexington has the aforesaid duty. This question is therefore answered in the affirmative.

COURTS NOT OF RECORD—Appeal—Payment of fine on conviction of misdemeanor does not prohibit right to appeal.

CRIMINAL PROCEDURE—Appeal from County Court—Payment of fine does not bar appeal.

HONORABLE W. A. ALEXANDER
Judge of Franklin County Court

January 20, 1964

This is to acknowledge receipt of your letter of January 16, 1964, in which you state in part:

"During the past month I have had three cases which were tried in the County Court, and after trial the individual appeared and paid his fine and cost; then within the ten day limit permitted under Section 16.1-132 of the Code of Virginia, came back and demanded the right of appeal and a refund of the amount paid. Under the existing law, I permitted them to appeal the case and refunded their money. I am not sure that I am right under the existing statute; but, apparently the Supreme Court holds that this right of appeal has not been waived under this condition. I would like for you to give me an opinion on this."

The pertinent portion of § 16.1-132, Code of Virginia (1950) as amended, is 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."

The wording of this statute is clear that a person convicted in a county court of a misdemeanor may appeal within ten days from such conviction. In the case of Gravel v. Deeds, 185 Va. 662, 40 S. E. (2) 175, the Court held that an accused was entitled to an appeal notwithstanding the fact that he had paid the fine within the ten day period after he had been convicted in the trial justice court. I am therefore of the opinion that the payment of the fine does not prohibit a person from exercising his right to appeal under this statute.
COURTS NOT OF RECORD—County court has no jurisdiction to try violations of town ordinances when town has mayor's court.

July 12, 1963

HONORABLE JOHN ALEXANDER
Member of the Virginia State Senate

This is in reply to your letter of July 11, in which you request my advice as to whether or not the town of Warrenton may pay additional compensation to the judge of the county court of Fauquier County for his services in trying town of Warrenton criminal cases. I assume you have reference to cases involving violations of town ordinances of the town of Warrenton rather than to cases arising in the town in violation of State laws. You call attention to Section 16 of the Charter of the town of Warrenton (Acts of Assembly, 1912, at p. 24), which establishes a mayor's court (a court of limited jurisdiction) and provides that the mayor shall have jurisdiction to try all violations of town ordinances. You state that under § 16.1-123(2) of the Code the county court of Fauquier is continuing to exercise jurisdiction over violations of ordinances in the town of Warrenton.

In my opinion, there is nothing contained in § 16.1-123 of the Code which confers upon the county court jurisdiction to try violations of ordinances promulgated by the town of Warrenton. In this connection I call attention to § 16.70 of the Code which expressly continues all courts of limited jurisdiction presided over by mayors and which have been created under the provisions of municipal charters. These courts of limited jurisdiction may be abolished by resolution of the town council only in those cases in which the court was created by resolution of the town council. In those cases where the court was created by resolution of the town council and has subsequently been abolished by resolution, the jurisdiction to try violations of town ordinances passes to the county court. Therefore, since this court was not created by resolution, it would appear that the county court of your county does not have jurisdiction to try violations of town ordinances but this jurisdiction continues to be in the mayor of the town of Warrenton by virtue of the provisions of § 16.1-70 of the Code.

With respect to the question of power of the town of Warrenton to supplement the compensation of the judge of the county court, I am of the opinion that the town does not have authority to make such a supplemental payment. The compensation is limited under § 16.1-50 to the amount fixed by the committee of judges appointed under § 14-50 of the Code within the limits prescribed in § 14-51 of the Code.

COURTS NOT OF RECORD—Executions and Abstracts—May issue after judgment docketed in court of record.

CLERKS—Recordation—Must docket abstracts of judgments from county courts.

September 10, 1963

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

This is in reply to your letter of September 9, in which you state as follows:

"Clerks of courts of record are so much divided on the proper interpretation of Sections 16.1-115 (Disposition of papers in civil matters), 16.1-116 Supplement (Execution and abstracts) and 16.1-118 Supplement (Destruction of papers) of the Code of Virginia that I am disposed to request you to give an opinion that will be a uniform guide to follow."
"My questions are as follows, viz:

“(1) In view of all three sections quoted above, should the Clerk of the Court of Record at any time docket a judgment from a court not of record without first obtaining all the papers pertaining to the case from the court below in its jurisdiction?

“(2) Under Section 16.1-116 as amended, does the clerk or judge of the lower court have dual jurisdiction with the clerk of the court of record to issue executions and abstracts after the judgment has been duly docketed in a court of record?

“(3) In view of all three sections quoted herein, and if you should rule that the clerk and judge of a court not of record can continue to issue abstracts for a two-year period on judgments of record, then what precaution, if any, should a clerk of record take to prevent a judgment from being recorded several times?

“(4) In view of all three sections quoted herein, should a clerk of court of record docket an abstract of a judgment from courts not of record of other jurisdictions?

"Will you also advise me when the authority of the lower court ceases and Circuit Court begins as to garnishment proceedings on judgments of the lower court which have been duly docketed in a court of record, or is it concurrent jurisdiction?"

I assume that you have available in your office the opinions of this office for the years 1956-1957 through 1958-1959, inclusive. If you do not have available these volumes, we will furnish you with copies of the following opinions, to which we invite your attention:

1956-1957, pp. 106 and 120
Both of these opinions are addressed to Hon. Austin Embrey, Clerk of Circuit Court of Nelson County

1957-1958, pp. 76 and 78
Both of these opinions are addressed to Hon. J. Gordon Bennett, Auditor of Public Accounts

1958-1959, p. 26
This opinion is addressed to Hon. S. L. Farrar, Jr., Clerk of Circuit Court of Amelia County

I believe these opinions will enable you to find answers to the questions which you have presented, with the exception perhaps of your question (3). You will note from these opinions that the answer to your question (2) is in the affirmative.

With respect to your question (3), I do not know of any way the clerk may prevent a judgment from being recorded several times except by examining the index to determine whether or not the judgment has already been recorded.

With respect to questions (1) and (4), your attention is directed to § 8-373 which requires the clerk to docket abstracts of judgments from county courts.

CRIMES—Cursing or Abusing over Telephone—Jurisdiction—In place where call originates or terminates.

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

December 4, 1963

This is to acknowledge receipt of your letter of December 3, 1963, in which you state:
"A makes a telephone call from County W to B in County P. A curses, abuses, and uses vulgar, profane and indecent language to B. Can A be prosecuted in County P where B takes the telephone call? Also, can A be prosecuted in County W at the point of the origination of the telephone call? I am of the opinion that A can be prosecuted properly in County W, but I have some doubt as to whether he can be prosecuted in County P."

The pertinent portion of § 18.1-238, Code of Virginia (1950) as amended, is as follows:

"If any person shall curse or abuse anyone, or use vulgar, profane or indecent language over any telephone in this State, he shall be guilty of a misdemeanor."

In your hypothetical case "A" has used the telephone as an agency for committing an offense. A person need not be physically present in order to commit a crime in another area. The rule is expressed in the case of Hackney v. Commonwealth, 186 Va. 888, 890, in which the Court stated:

"It is a fundamental principle of criminal law that when a person puts in force an agency for the commission of a crime, he, in contemplation of the law, accompanies the agency to the point where it becomes effectual. This principle is applied frequently to determine the venue of a prosecution."

In that case, the Court cited the case of Burton v. United States, 202 U.S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, as authority for that premise.

It is the opinion of this office that a person who curses, abuses and uses vulgar, profane and indecent language to another person over a telephone may be prosecuted in the jurisdiction wherein the call originates and also may be prosecuted in the jurisdiction wherein the call terminates. However, such person can only be prosecuted once.
Several local establishments are operating such coin operated pool tables in connection with restaurants otherwise licensed and also having an ABC license.

"The specific instance in mind involves a restaurant capable of serving seventy-five people and also has installed coin-operated amusement machines together with two coin-operated pool tables and a beer license. In such instance, does this constitute a violation of Section 18.1-349 as to either violation."

The pertinent part of § 18.1-349 of the Code of Virginia (1950), as amended, is as follows:

"No minor shall frequent, play in or loiter in any public poolroom or billiard room operated in conjunction with any establishment licensed under the Alcoholic Beverage Control Act; nor shall any minor under eighteen years of age frequent, play in or loiter in any other public poolroom or billiard room; nor shall the proprietor of any public poolroom or billiard room or his agent permit any minor to frequent, play in or loiter in any such place in violation of the foregoing provisions of this section.

"Any such minor or any such proprietor or agent violating the provisions of this section shall be guilty of a misdemeanor and punished by a fine of not less than five dollars or by imprisonment in jail not more than six months or by both such fine and imprisonment."

The statute does not define the term "public pool room." However, § 58-396 of the Code, which imposes a tax upon the operation of pool and billiard rooms, provides that "any person who shall keep a place wherein there is a table at which billiards or pool is played shall be deemed to keep a billiard room . . ." It would seem, therefore, that § 18.1-349, under a strict interpretation, would apply to an establishment subject to being licensed under the provisions of § 58-396. Miniature pool tables which are operated by inserting coins are licensed under § 58-355(7) of the Code and it is not clear whether pool tables of this type would be within the scope of § 18.1-349. This is a penal statute and in my opinion must be strictly construed as applying to all minors who frequent, play in or loiter in a pool or billiard establishment in which drinks are sold under a license issued under the Alcoholic Beverage Act and which is also subject to the license under § 58-396. It would also apply to minors under eighteen years of age who frequent, play in or loiter in a pool or billiard room that is subject to the license imposed by § 58-396, although such establishment may not be licensed under the ABC Act. If a restaurant is licensed and being operated on the premises, I think that it would not constitute a violation of the statute for minors to enter the place for the sole purpose of patronizing the restaurant. This would not, in my judgment, be deemed as frequenting, loitering or playing pool or billiards in a pool or billiard room.

I do not feel that under the facts presented in your letter I can give you a firm opinion as to my views. It would seem that each case would depend upon the facts with respect to an alleged violation. The fact that there may be one or more pool tables of the type subject to § 58-396 located in the restaurant premises does not constitute a violation. The violation is frequenting, playing in or loitering by minors.
CRIMES—Giving of Bad Check—Section 6-129.1 of the Code not discriminatory.

WAGES—Employee—Master-servant—Wages paid to contractor or subcontractor not included.

Honorable Valentine W. Southall
County Judge for Amelia and Powhatan Counties

March 18, 1964

This will acknowledge receipt of your letter of March 7, 1964, in which you ask my opinion in regard to § 6-129.1 of the Code of Virginia (1950), as amended. The statute in question reads as follows:

"Any person who shall make, draw or utter, or deliver any check, draft, or order for the payment of money, upon any bank, banking institution, trust company or other depository on behalf of any business firm or corporation, for the purpose of paying wages to any employee of such firm or corporation, or for the purpose of paying for any labor performed by any person for such firm or corporation, knowing, at the time of such making, drawing, uttering or delivering, that the account upon which such check, draft or order is drawn has not sufficient funds in, or credit with, such bank, banking institution, trust company or other depository, for the payment of such check, draft or order, although no express representation is made in reference thereto, shall be guilty of a misdemeanor.

"The word credit, as used herein, shall be construed to mean any arrangement or understanding with the bank, banking institution, trust company, or other depository for the payment of such check, draft or order.

"In addition to the criminal penalty set forth herein, such person shall be personally liable in any civil action brought upon such check, draft or order."

I believe the following excerpt from your letter indicates the reasons why you question the validity of the statute:

"* * * first, it is discriminatory in the sense that it makes it a crime, albeit only a misdemeanor, for a person to give a check on company funds, although with no intent to defraud, with knowledge of insufficient funds, to an employee for his wages but that that same person, as I see it, would be guilty of no offense if he had drawn the check on his own account with all of the same elements present, and, because, second, I can visualize a situation where, under 6-129.1, an individual may be imprisoned for debt and this is entirely contrary to our present concept of law and justice."

Generally, the purpose of "bad check" statutes seems to be to discourage overdrafts and resultant bad banking; to stop the practice of "check kiting," and generally to avert the mischief to trade, commerce and banking which the circulation of worthless checks inflicts. Many of such statutes include intent to defraud as an indispensable element of the offense, as does § 6-129 of the Code of Virginia (1950), as amended. While § 6-129.1 does not require a fraudulent intent, and is somewhat limited in its scope, no reason is perceived as to why the Legislature, for the protection of the public, may not define a prohibited act of this
nature and punish it as a misdemeanor without regard to any fraudulent intent or moral turpitude on the part of the offender.

There would seem to be no merit to the argument that the statute is discriminatory; it operates equally upon the whole class of persons named therein. See People v. Russell, 156 Cal. 450, 105 Pac. 416; Anno. 76 A.L.R. 1229.

You also state that you are particularly interested in the application of the statute to a situation such as this:

"An official of a corporation (perhaps its president) pays a subcontractor or contractor for labor performed for the corporation; the official knew that there were insufficient funds to meet the checks; and we assume that there was no intent to defraud and that, in a real sense the checks were for a pre-existing obligation or indebtedness."

In my opinion, the payment in this situation would not constitute an offense under § 6-129.1 of the Code. Criminal statutes are strictly construed, as you know, and the payment to a contractor or subcontractor would seem to be for the performance of a particular act contracted for, as distinguished from the payment of wages contemplated in a master-servant relationship.

CRIMES—Jurisdiction—Langley Air Force Base—State jurisdiction depends upon conditions of acquisition by the United States.

OPTICIANS—Advertising—Langley Air Force Base—State jurisdiction over violation of State statute depends on conditions of acquisition by the United States.

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

April 6, 1964

This is to acknowledge receipt of your letter of March 24, 1964, in which you state in part:

"Will you please advise as to whether or not the State of Virginia has jurisdiction at Langley Air Force Base, Langley, Virginia."

You informed Mr. Patty of this office that an optician or an optometrist is violating the Virginia statute in regard to advertising on Langley Field.

The area upon which Langley Field is located was acquired by the United States during World War I. By Chapter 382, Acts of 1918, the United States was granted exclusive jurisdiction over such lands, the only right reserved by the State being the right to serve civil and criminal process thereon. If any additional land for this air force base was obtained by the United States after 1936, then concurrent jurisdiction is vested in the State according to the provisions of § 7-19 of the Code of 1930, which would include the authority to impose a license tax on businesses operated thereon. After 1936, in order to obtain the exclusive jurisdiction over lands acquired, a deed executed by the Governor and the Attorney General under the provisions of § 7-24 of the Code is necessary. I am not advised whether the activities which you seek to regulate or prohibit are on an area acquired subsequent to 1936 upon which Virginia has concurrent jurisdiction. Only an examination of the records of York County and Elizabeth
City County would disclose when the United States acquired this area and whether over the portion, if any, acquired after 1936 Virginia has ceded exclusive jurisdiction under the provisions of § 7-24 of the Code.

Assuming that the entire area comprising Langley Field was acquired by the United States prior to 1936, I am of the opinion that the State of Virginia has no authority to prosecute the violation of § 54-396 and § 54-398.26, Code of Virginia (1950) as amended.

GRIMES—Larceny—Owner of motor vehicle may be guilty.

MOTOR VEHICLES—Larceny—Owner may be guilty.

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

November 6, 1963

This is in reply to your letter of October 30, 1963, which reads, in part, as follows:

"An automobile mechanic repairs a motor vehicle and is holding same on his premises for delivery to the owner when the repair bill is paid. The repairman had carefully locked the doors to the vehicle while he was holding it. The owner of the vehicle, in the night time, goes to the lot, apparently using a duplicate set of keys, removes the vehicle and takes it out of the State without paying the repair bill or contacting the mechanic in any manner. When the owner of the vehicle was contacted by telephone at his Pennsylvania address he advised the repairman that he had no intention of paying the bill.

"Can the owner of the vehicle be prosecuted under Section 18.1-116 of the 1950 Code of Virginia? If that section does not apply, can you suggest any section under which he might be prosecuted?

"I think we could meet the venue requirements of Section 18.1-116 as it appears the owner of the vehicle last had a legal residence in Northampton County, Virginia."

Section 18.1-116 of the Code of Virginia reads, in part as follows:

"Whenever any person is in possession of any personal property, including motor vehicles, in any capacity, the title of ownership of which he has agreed in writing shall be or remain in another, or on which he has given a lien, and such person so in possession shall fraudulently sell, pledge, pawn or remove such property from the premises where it has been agreed that it shall remain, and refuse to disclose the location thereof, or otherwise dispose of the property or fraudulently remove the same from the State, without the written consent of the owner or lienor or the person in whom the title is, or, if such writing be a deed of trust, without the written consent of the trustee or beneficiary in such deed of trust, he shall be deemed guilty of the larceny thereof." (Italics added)
While arguable that the owner of a vehicle does not necessarily give a lien on that vehicle when left with a garageman for repairs, such a lien is nevertheless granted by virtue of § 43-33 of the Code, whether or not the owner so intends. Accordingly, I am of the opinion that § 18.1-116 of the Code is applicable to the case here presented.

Even in the absence of the foregoing statute, I believe a charge of simple larceny would be applicable to the case presented. Although universally recognized that an essential element of larceny is the taking of property owned by another, it is also settled that a general owner of property can be guilty of larceny if the property is taken from another having lawful possession by virtue of some special right or title, such as for purposes of a pledge, bailment, or making repairs. See, 32 Am. Jur., 955, Larceny, § 53; 58 A.L.R. 330-339.

CRIMES—Obtaining Property or Services by False or Fraudulent Use of Credit Cards—If name of owner forged act involves forgery, otherwise § 18.1-119.1 applicable

HONORABLE ROBERT L. SIMPSON
Commonwealth's Attorney for City of Virginia Beach

This is to acknowledge receipt of your letter of April 30, in which you state, in part, as follows:

"A party without authorization uses the credit card of another by signing the name of the credit card holder to obtain a service of purchase of the value of less than $50.00.

"Is the person guilty of a misdemeanor under § 18.1-119.1, or is he guilty of a felony under the forgery statute?"

The pertinent portion of § 18.1-96, Code of Virginia (1950), as amended, dealing with forgery, is as follows:

"If any person forge any writing, other than such as is mentioned in §§ 18.1-92 (public records) and 18.1-94 (coin or bank notes), to the prejudice of another's right, or utter, or attempt to employ as true, such forged writing, knowing it to be forged, he shall be confined in the penitentiary . . . ."

It would seem that signing the name of the person to whom the credit card is issued without such person's authorization constitutes forgery. Section 18.1-119.1 makes it unlawful for a person to use any credit card of another, without the consent of the person to whom the card was issued, and the penalty is either a misdemeanor or a felony depending on the value of the goods or service obtained by such unauthorized use. Whenever any such unauthorized user of a credit card signs on the sales slip the name of the person to whom the card was issued, thus falsely representing himself to be the rightful owner of the credit card, in my opinion, the act comes within the prohibitions of § 18.1-96, without regard to the amount of the purchase. If the person using the card does not sign the owner's name in the transaction, § 18.1-119.1 is applicable.
CRIMES—Reckless Driving—Racing on highway—Arrest controlled by §§ 46.1-178 and 46.1-179.

MOTOR VEHICLES—Racing on Highway—Identification of license not sufficient to charge operator in absence of other identification.

Honorable Glenn H. Simmers
Justice of the Peace for Roanoke County

This is in reply to your letter of June 25, 1963, which reads as follows:

"I am interested in obtaining from your office an opinion or a ruling on the law concerning drag racing in the state of Virginia. For example, if a law enforcement officer, while in performance of his duties, sees two automobiles sitting side by side, moving out together and spinning wheels in a drag race, would it be necessary for the officer to see the operator of each vehicle behind the wheel; or could he stop one of the cars and take the license number of the other car and issue a summons? Or, if he knows both operators, can he issue a summons to each driver without pursuing and stopping either vehicle? "It would please me very much if you would give me an opinion, ruling, statute law, or whatever statement you may give me on this matter. Thank you very much for your information."

In regard to the act of racing upon the highways, the pertinent portion of Section 46.1-191, Code of Virginia (1950), as amended, is as follows:

"Any person who shall engage in a race between two or more motor vehicles on the highways of this State shall be guilty of reckless driving."

The remainder of this section relates to the punishment for such violation and the suspension of operator's or chauffeur's license of any person convicted of reckless driving under this section. The term "race" is not defined and, hence, should be given its ordinary meaning, which, in the context appearing in the quoted portion of the statute, indicates a contest of speed involving two or more motor vehicles on the highway. If these aspects are manifest to the law enforcement officer, it would be sufficient basis for the charge of violating this section.

In connection with any arrests for misdemeanor under Title 46.1, your attention is invited to Section 46.1-178, Code of Virginia (1950), as amended which I quote, in part, as follows:

"(a) Whenever any person is arrested for a violation of any provision of this title punishable as a misdemeanor the arresting officer shall, except as otherwise provided in § 46.1-179, take the name and address of such person and the license number of his motor vehicle and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice, such time to be at least five days after such arrest unless the person arrested shall demand an earlier hearing, and such person shall, if he so desires, have a right to an immediate hearing or a hearing within twenty-four hours at a convenient hour, and before a court having jurisdiction under this title within the city, town or county wherein such offense was committed. Such officer shall thereupon and upon the giving by such
person of his written promise to appear at such time and place forthwith release him from custody.

"(b) Any person refusing to give such written promise to appear shall be taken immediately by the arresting or other police officer before the nearest or most accessible judicial officer or other person qualified to admit to bail having jurisdiction under this title." (Emphasis supplied).

The pertinent portion of Section 46.1-179, Code of Virginia (1950), as amended, is as follows:

"If any person is:

(4) charged with reckless driving; the arresting officer may take such person forthwith before the nearest or most accessible judicial officer or other person qualified to admit to bail in lieu of issuing the summons required by § 46.1-178." (Emphasis supplied).

There is nothing in either of the foregoing statutes to require that the arrest be made or the charge be brought at the time or place of the violation. As in the case of misdemeanors generally, however, it would be necessary to identify the person with the violation. Considering your first question, I do not believe that taking the license number of one of the cars involved would, in itself, be sufficient for charging the operator of that vehicle as, in the absence of evidence to show that the person so engaged in the race and the registered owner of the motor vehicle are one and the same person, such license number does not identify the person who committed the violation.

In reply to your second question, in my opinion, it is not necessary that the officer pursue and stop either vehicle, if he is able to identify both operators without doing so, as his failure to stop them would not preclude the officer at a later time from obtaining warrants and making the arrests thereunder, provided, that he follows the proper procedure as required by law.

CRIMINAL PROCEDURE—Arrest—Person inside of motor vehicle being driven on public highway may be arrested for being drunk in public.

MOTOR VEHICLES—Arrest—Person inside motor vehicle being driven on public highway may be arrested for being drunk in public.

CRIMES—Being Drunk in Public—Person in motor vehicle being driven on public highway may be prosecuted.

April 7, 1964

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

This is to acknowledge receipt of your letter of March 25, 1964, in which you state in part:

"A question has arisen with regard to the arrest of persons for being drunk in public while they are inside an automobile on a public highway. This question was brought about by some of the language of the
recent case of *Banner v. Commonwealth*, 204 Va. 640. As you know, in that case a police officer was shot and it was claimed that the officer may be resisted if his arrest was unlawful. I would like to know if this new language would require that such person not be arrested for public drunkenness and that I would ask the further question of what disposition should be made of such person."

This office has heretofore held that a drunk person in the rear seat of an automobile driven on a public highway is amenable to § 18.1-237, Code of Virginia (1950) as amended. The said statute makes it a misdemeanor for a person having arrived at the age of discretion to be drunk in public. See, the opinion expressed in a letter to the Honorable John R. Dudley, dated July 13, 1960, which is found in the *Opinions of the Attorney General* (1960-1961) p. 91. A copy thereof is enclosed.

I have reviewed the Case of *Banner v. Commonwealth*, 204 Va. 640, and do not believe that it is in conflict with the said opinion of my predecessor in office. Therefore, it is the opinion of this office that a person within the class set forth in § 18.1-237 of the Code may be prosecuted thereunder if he is drunk in an automobile being driven on the public highways.

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**CRIMINAL PROCEDURE—Bail—Forfeiture**—Commonwealth Attorney has no authority to agree to accept partial payment.

**COMMONWEALTH ATTORNEYS**—No authority to agree to accept partial payment on forfeited recognizance bond.

**HONORABLE PHILIP LEE LOTZ**
Commonwealth's Attorney for Augusta County

*July 9, 1963*

This is in reply to your letter of July 5, 1963, which reads as follows:

"Because of non-appearance, it became necessary for the Commonwealth of Virginia to proceed against the surety on the bond of one Albert Jennings Painter, and the attached order was entered by the County Court for Augusta County, where this man was bonded to appear to answer a manslaughter charge.

"I have now received a request from the surety, against whom a judgment was obtained, along with the principal, asking whether the bond could be paid in weekly payments. I know of no authority for the Commonwealth's Attorney to direct or authorize the payment in this type of matter in weekly installments, but I would like to have your opinion as to my authority to try to negotiate the best possible method of collecting the forfeited bond, as my information is that it is virtually impossible to collect the full principal at one time."

It is my opinion that partial payments upon this judgment may be accepted on behalf of the Commonwealth, but I do not feel that the Commonwealth's Attorney would have authority to enter into a firm commitment for the payment of this judgment on a weekly basis.
CRIMINAL PROCEDURE—Blood Analysis—Implied Consent—Accused entitled to have own physician withdraw blood where practicable.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Accused entitled to have own physician withdraw blood where practicable.

October 3, 1963

HONORABLE JULIUS GOODMAN
Commonwealth’s Attorney for Montgomery County

I am in receipt of your letter of September 25, 1963, in which you present certain inquiries involving § 18.1-55 of the Virginia Code, generally known as the Virginia “implied consent” law. These questions will be stated and considered seriatim.

"(1.) Defendant was arrested for driving under the influence and consented to taking a blood test. He was taken to the New Altamont Hospital and a registered nurse withdrew the blood. However, prior to this registered nurse withdrawing the blood, the defendant requested that his own private or personal physician, who lived in the Town of Christiansburg, withdraw his blood for the test. This was not granted and the blood was taken at the hospital by the registered nurse. The officers making the arrest did not call his personal physician.

"Please advise, as soon as you can conveniently do so, whether or not this fact that the personal physician did not withdraw the blood after the defendant’s request would be a valid defense to the charge of driving under the influence of intoxicants."

Answer: In this connection, § 18.1-55(c) provides that “where practicable,” the physician of an accused’s choice shall withdraw a blood sample for the purpose of determining its alcoholic content. Whether or not it is practicable, in a given instance, for the physician of an accused’s choice to withdraw the sample in question necessitates consideration of the totality of the facts and circumstances surrounding the particular case. It thus appears that no dispositive answer to your inquiry can be given and that resolution of such question would depend upon the practicality of securing the services of the physician of the accused’s choice as contrasted with the utilization of the services provided at the New Altamont Hospital.

"(2.) A defendant is arrested for driving under the influence of intoxicants, consents to the taking of the blood test, the blood is withdrawn according to the statute, and the defendant is lodged in jail and remains there for sixteen (16) days; upon his release, his blood sample is delivered to him. Nothing further was done by the defendant with reference to the blood sample delivered to him after his release.

"Please advise if this would be a valid defense to the charge of driving under the influence."

Answer: This office has frequently ruled that if the results of the analysis of a blood sample of an accused are not received in evidence upon trial—after the accused has consented to the withdrawal of a sample of his blood and has not failed to comply with any provision of the Virginia “implied consent” law—he must be found not guilty of the offense of operating a motor vehicle while under the influence of intoxicants. However, § 18.1-55(c) of the Virginia Code directs that an accused or his attorney shall deliver the accused’s blood sample to a laboratory supervised by a pathologist or approved by the State Health
Commissioner to be tested for alcoholic content. In the situation you present, it appears that the accused did not comply with the above-mentioned provision of the Virginia "implied consent" law and that his inability to have the benefit of the results of an analysis of his blood sample was occasioned by his own default. In such circumstances, an accused would not be entitled to a dismissal of the prosecution for operating a motor vehicle while under the influence of intoxicants under the terms of § 18.1-55(f) of the Virginia Code. In this connection, I am forwarding to you copies of two previous opinions of this office, dated November 14, 1962, and January 15, 1963, in which questions substantially similar to your second inquiry were considered and discussed.

CRIMINAL PROCEDURE—Charging a Person With a Second Offense Under § 18.1-58—If based upon prior conviction without this State, laws of state of such prior conviction must be substantially similar to §§ 18.1-54 through 18.1-57.

MOTOR VEHICLES—Second Offense Under § 18.1-58—May be based upon prior conviction in another state only when such other state has laws substantially similar to §§ 18.1-54 through 18.1-57.

March 3, 1964

HONORABLE M. WILLIAMSON WATTS
Commonwealth's Attorney of Madison County

This is in reply to your letter of February 26, 1964, from which I quote the following facts and questions:

"There is at the present time a person charged locally under section 18.1-58 of the Virginia Code with a subsequent offense of driving while under the influence of intoxicating liquor. The accused was first convicted of this offense in the State of New Jersey on November 16, 1960, and subsequently was convicted of the same offense in the State of Pennsylvania on the 25th day of September, 1961.

"Does the Commonwealth of Virginia have reciprocity agreements with the State of New Jersey and the State of Pennsylvania, and if so, do either or both of these two states have statutes substantially similar to Sections 18.1-54 through 18.1-57? If there is a reciprocity agreement between either or both of the States of New Jersey and Pennsylvania and if either or both of these two states have statutes similar to our Virginia statute, can a conviction under either the New Jersey and/or Pennsylvania statutes be proven by the introduction of a transcript from Commonwealth of Virginia Division of Motor Vehicles under Section 46.1-34.1 of the Code of Virginia?"

While the states of Pennsylvania and New Jersey, like other states, maintain reciprocal practices with the Commonwealth of Virginia in certain matters relating to the registration of motor vehicles and driving privileges, reciprocity is not the basis for determining whether a person should be charged with a first or second offense under Section 18.1-58, Code of Virginia (1950), as amended. In this connection, the guide lines are found in the terminal sentence of § 18.1-58, itself, which quotes as follows:
"For the purposes of this section a conviction or finding of not innocent in the case of a juvenile under the provisions of § 18.1-54, former § 18.75, the ordinance of any county, city or town in this State or the laws of any other state substantially similar to the provisions of §§ 18.1-54 through 18.1-57 of the Code shall be considered a prior conviction." (Emphasis supplied)

Unlike Section 46.1-421, Code of Virginia (1950), as amended, dealing with the revocation of licenses, which requires only that the law of any other state be similar to § 18.1-54, the charges of a second or subsequent offense under § 18.1-58, if based on a prior conviction for violating the laws of any other state, may be maintained only where the laws of the other state are substantially similar to §§ 18.1-54 through 18.1-57. The laws of the other state concerned must have a substantial counter-part not only to § 18.1-54 but, also, to 18.1-55, 18.1-56 and 18.1-57 of the Code. In examining the Code of Pennsylvania, I find Section 1037 of Title 75 similar to § 18.1-54, but no laws similar to §§ 18.1-55 through 18.1-57 of the Code of Virginia. The Code of New Jersey contains Section 39:4-50 of Title 39 similar to § 18.1-54 and Section 39:4-50.1 of Title 39 similar to § 18.1-57, but no laws similar to § 18.1-55 or §18.1-56, regarding the requirements for the use of chemical tests and reporting the results of any such analysis. Section 18.1-58 is a criminal statute and, by well established rules regarding the construction of criminal statutes, it must be strictly construed against the Commonwealth. It is, therefore, my opinion that the laws of Pennsylvania and New Jersey fall short of qualifying as "substantially similar to the provisions of §§ 18.1-54 through 18.1-57," as contemplated in § 18.1-58, and accordingly, the prior convictions in those states do not present a proper basis for a charge of a second or subsequent offense under § 18.1-58 of the Code.

In response to your second question, Section 46.1-34.1, Code of Virginia (1950), as amended, to which you refer, essentially, provides that whenever any record in the office of the Division of Motor Vehicles is admissible in evidence, a copy of such record attested by the Commissioner or his designee may be admitted as evidence in lieu of the original. This section does not establish standards for the original, except that it be admissible in evidence. The law governing the proper authentication of the records and judicial proceedings of any court of another state, for faith and credit in the courts of this State, is found in Section 8-271, Code of Virginia (1950), as amended, which is as follows:

"The records and judicial proceedings of any court of the United States, or of any state, or of any country subject to the jurisdiction of the United States, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, and certified by the judge, chief justice, or presiding magistrate of such court, to be attested in due form, shall have such faith and credit given to them in every court within this State, as they have in the courts of the state, territory, or district whence such records come."

Having previously decided that neither Pennsylvania nor New Jersey has statutes of substantial similarity to §§ 18.1-54 through 18.1-57 sufficient to render a conviction in either state a prior offense under § 18.1-58, however, your second question is rendered immaterial when applied to the circumstances of the case presented.
CRIMINAL PROCEDURE—Costs—Convicted accused liable only for costs accrued in case against him.

JURIES—Costs—When convicted liable for payment.

February 5, 1964

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

This is to acknowledge receipt of your letter of January 29, 1964, in which you state in part:

"Two or more criminal cases are quite often tried in the Circuit Court on the same day—some of the accused persons being represented by counsel and some not represented. Those who are not represented by counsel are not usually present when the Court calendar is made up for the term and the Court is therefore not advised as to whether they will demand trial by a jury.

"It has been our practice to have a sufficient number of jurors present on the given day to try all cases set and apportion the cost thereof among all who are convicted, whether by a jury or by the Court.

"Our Judge Haas has asked us to seek your opinion as to the correctness of this practice since he is not satisfied as to the propriety of the practice."

Section 19.1-320, Code of Virginia (1950), as amended, imposes upon the clerk the duty in "every criminal case to make up a statement of all expenses incident to the prosecution." Expenses incurred by the Commonwealth in paying the jurors under §§ 19.1-218 and 19.1-219 are expenses incident to the prosecution and are therefore properly taxed upon the accused upon his conviction. In the case of Kincaid v. Commonwealth, 200 Va. 341, the Court held that the practice followed under § 19-296 of the Code, (now designated as § 19.1-320), in taxing the costs against the convicted defendant did not violate Section 8, Article 1, of the Constitution of Virginia.

If an accused is convicted in a case where a jury is not used, then the term "all expenses incident to the prosecution" does not include the costs of the jury. Each case is separate and the costs must be taxed accordingly. An accused who has been convicted is only liable for the costs accrued in the case against him.

I am of the opinion that the practice heretofore followed by you in apportioning the costs of the jury among the defendants who are tried and convicted by a jury and those who are tried and convicted by the court is not in conformity with the statute.

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CRIMINAL PROCEDURE—Costs—Electronic Recording Equipment—Collection and disposition.

COSTS—Criminal Procedure—Electronic Recording Equipment—Collection and disposition.

June 19, 1964

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

This will acknowledge receipt of your letter of June 18. I enclose copy of an opinion relating to the subject matter of your letter which was furnished on yesterday to Hon. L. J. Hammack, Jr., Commonwealth's Attorney of Brunswick
REPORT OF THE ATTORNEY GENERAL

COUNTY. I believe that letter will answer most of the questions presented by you, but I shall comment separately with respect to those questions which perhaps are not definitely answered in the letter to Mr. Hammack.

With respect to your first question as to whether or not the costs taxable under § 14.1-116 of the Code are to be paid by the Commonwealth out of the appropriation for criminal charges in the event such costs are not collected from the defendant, in my opinion, the answer to this question must be in the negative.

With respect to your second question as to the disposition of costs collected under § 14.1-116, such costs, and only those costs collected under this section, go into the Special Fund under the clerk’s custody. See, last paragraph of opinion to Mr. Hammack.

With respect to whether the city, county or Commonwealth shall pay for the electronic device, you are advised that it is the obligation of the city or county to purchase the electronic equipment. The Commonwealth does not participate in any way in the purchase of this item.

Regarding § 17-30.1 of the Code, you make the following inquiry:

"Where the judge elects to order the evidence and incidents of trial recorded by electronic devices, who pays for the electronic equipment?"

This question, I believe, is answered by my reply to the immediate previous question. I might add here that as shown in the opinion to Mr. Hammack, the Commonwealth pays for the operation of the electronic equipment.

Your second question relates to § 17-30.1 and reads as follows:

"The portion of § 17-30.1 of the Code of Virginia cited above provides that the Commonwealth shall be entitled to receive from the defendant, if convicted, the reasonable charge attributable to the costs of operating such mechanical or electronic device. "Does that portion of § 17-30.1 mean, that in any event, the Commonwealth is entitled to the charge when paid by the defendant, or does it mean that where the Commonwealth has paid same to the person operating the electronic device and the defendant later pays the costs that it shall be repaid to the Commonwealth?"

I am of the opinion that under the provisions of this section the Commonwealth is required in all cases to pay the expenses of reporting or recording the trial of a felony case. If the defendant in such a case is convicted, the statute provides "the per diem charges of the reporter or reasonable charge attributable to the cost of operating such mechanical or electronic device shall be taxed as a part of the costs of the case." Any sum collected from the defendant for operating the electronic device, either voluntary or to satisfy a judgment for costs, goes to the Commonwealth.

Your third question with respect to § 17-30.1 reads as follows:

"Another portion of § 17-30.1 of the Code reads as follows: "Provided, however, in all felony cases, wherein it appears to the court from the affidavit of the defendant and other evidence that the defendant intends to seek an appeal and is financially unable to pay such costs or to bear the expense of a copy of the transcript of the evidence for an appeal, the trial court shall, upon the motion of counsel for the defendant, order the evidence transcribed for such appeal and all costs therefor paid by the Commonwealth out of the Appropriation for Criminal Charges . . . ."

"Under this item "Third," I would like your opinion, first: on the interpretation of the words 'and other evidence'; second: suppose defendants are serving time in the penitentiary and request copies of the
records in their cases, which they so frequently do (not for purpose of appeal), and in addition thereto request a transcript of the evidence and incidents of trial, after having filed a pauper's affidavit, does the evidence have to be transcribed for them, and if so, who bears the costs of such transcription?"

I do not know of any way to interpret the phrase "and other evidence" except that it would seem to mean that in addition to the affidavit the court may consider other evidence relating to the financial position of the defendant.

With respect to the second phase of your question, the only provision made in the language of § 17-30.1 for making a transcript of the record is in those cases where the court orders the evidence transcribed for the purpose of an appeal. It is the function of the court to determine whether the defendant is unable to pay for the transcript and further whether or not the defendant wishes to obtain a transcript for the purpose of perfecting an appeal. The clerk has no obligation nor right to prepare the transcript (except, of course, in cases where the defendant advances the money) except upon the order of the court. If the clerk furnishes the transcript under those conditions the costs in connection therewith shall be paid by the Commonwealth. This section, in my opinion, does not authorize the clerk upon a pauper's affidavit to furnish a transcript of the record for a purpose other than for taking an appeal unless satisfactory arrangements have been made with the clerk for the payment of his charges in connection therewith.

At the top of page 4 of your letter, you make the following observation:

"The above two sections of the law will be in force and effect on July 1, 1964, but they make no provision as to who shall operate the mechanical or electronic device, in instances in which devices are installed."

You will find the answer to this question in our opinion to Mr. Hammack.

With respect to your inquiry as to whether or not the Supreme Court will designate the operator of the device and if that court does not designate anyone to do this work, who, in my opinion, will have to be in charge of the operation, I have had no advice from the Supreme Court in connection with this matter.

I believe, however, that the State Auditor and the State Compensation Board as will appear in our opinion to Mr. Hammack, covers the question as to who shall have charge of the operation. The opinion to Mr. Hammack also answers your question with respect to how the person charged with the duty of operating the device shall be paid.

CRIMINAL PROCEDURE—Costs—How costs of operating recording machine and transcribing testimony to be handled.

COSTS—Criminal Procedure—How costs of operating recording machine and transcribing testimony to be handled.

HONORABLE L. J. HAMMACK, JR.
Commonwealth's Attorney of Brunswick County

June 18, 1964

This is in reply to your letter of June 16, relating to § 14.1-116 of the Code, the last two paragraphs of which reads as follows:
"I should like your opinion as to whether, after the effective date of § 14.1-116, the Clerk of the Circuit Court of Brunswick County, Virginia, may continue the same practice which has been followed in the past with reference to charges made for the use of the electronic recording equipment, and the disposition of the proceeds therefrom, or whether he will thereafter be bound by the provisions of § 14.1-116.

"In the event that it is your opinion that the practice heretofore followed in the Circuit Court of Brunswick County must be abandoned, I should appreciate you also furnishing me with your opinion as to who should hold and administer the special fund provided for in § 14.1-116 'to be used for the purpose of repairing, replacing or supplementing such electronic devices.'"

The third paragraph of your letter is a statement of the practice or method of operation by the clerk of the circuit court, presumably under § 14-125.1 of the Code, which, as amended, will be §14.1-116. This office has conferred with the Auditor of Public Accounts with respect to § 14.1-116 as well as § 17-30.1 (Chapter 533, Acts of Assembly (1964)) which must be read and considered along with § 14.1-116. As a result of this conference, the Honorable J. Gordon Bennett, Auditor of Public Accounts, has written a letter to the Honorable Langhorne Jones, Judge of the Circuit Court of Pittsylvania County, and with Mr. Bennett's permission, I quote from that letter as follows:

"The Attorney General has advised me that he sees no conflict in Section 14.1-116, found on page 623 of the advance sheets of the Acts of Assembly of 1964, and Chapter 533, which can be found on pages 815-816 of the 4th Section of the advance sheets of the Acts of Assembly of 1964. Section 14.1-116 will replace Section 14-125.1 when the Acts become effective this month. Chapter 386, which starts with page 593 of the 3rd Section of the advance sheets of the Acts of Assembly of 1964, includes Section 14.1-116. As you will recall, Title 14 was rewritten and the old sections were repealed.

"The fees provided by Section 14.1-116, when collected, will be paid into the Special Fund to be used for purposes of repairing, replacing, or supplementing electronic recording devices.

"In addition thereto, under the provisions of Chapter 533, and specifically Section 17-30.1 of the Acts of Assembly of 1964, there will be other charges in all felony cases which will have to be assessed as a part of the cost against the defendant if convicted. Among these will be '. . . reasonable charge attributable to the cost of operating such mechanical or electronic devices, . . .' in such cases.

"As I interpret the second paragraph of Section 17-30.1 dealing with felony cases, two charges are to be made in felony cases where recording machines are used. The first will be a reasonable charge attributable to the cost of operating the recording machine while the testimony is being recorded. The second will be the cost involved in transcribing the testimony when an appeal is taken. As the Comptroller and I interpret the second paragraph, all of the reasonable charges attributable to the cost of operating the recording machine are payable by the State Comptroller and must be taxed as a part of the cost against the defendant. If this sum is collected from the defendant it must be paid into the State treasury to reimburse the Commonwealth for the amount which has been paid by it for such services. It is our conclusion that where the evidence is to be transcribed from the record made by the recording machine that the cost of transcribing, if possible, shall be collected from the defendant, and the Commonwealth is
to be billed for such transcriptions only in those cases where the Court
determines that the cost of the transcription cannot be collected from
the defendant because he is financially unable to pay the costs. In
such instances, this additional cost would be taxed against the defendant
and if subsequently collected from him would be paid into the State
treasury to reimburse the Commonwealth for the cost ordered by the
Court to be paid for transcriptions in such cases.

"At your request I reviewed with the Compensation Board the ques-
tion of providing trained personnel to operate the recording machines
and to transcribe the recorded information. It was the unanimous opin-
ion of the Compensation Board that such a person preferably be a
member of the staff of the clerk of court of record; that this person
be paid from the fees of the clerk's office; and that the clerk would
treat as fees of his office all moneys collected from the Commonwealth
for recording and transcribing services as well as the amounts paid by
defendants for transcribing the record in those cases where the cost
was not paid by the Commonwealth and not taxed as a part of the cost.
It, of course, is understood that where the Commonwealth pay the cost
of transcribing the record any collections of costs taxed in such cases
would be paid into the State treasury.

"If it is necessary to add someone to the clerk's staff on a part-time
or full-time basis to do this particular work, the Compensation Board is
agreeable to making an adequate allowance to be paid by the clerk from
the fees of his office for the employment of such full-time or part-time
person under the conditions aforementioned. For such help as it may
be to you, I advise that the Compensation Board feels very definitely
that this person should be an employee of the clerk's office rather than
an employee of some other county or city constitutional officer . . . ."

I am adopting Mr. Bennett's views, as stated herein, as a part of this opinion,
and I believe it will serve to answer your inquiry and, in addition, be helpful
to you and the clerk in solving other problems which may arise.

With reference to the last paragraph of your letter, in my opinion, the special
fund provided for in § 14.1-116 should be in the custody of the clerk. We have
consulted with Mr. Bennett about this feature of the matter, and he is in
agreement with the view stated here.

CRIMINAL PROCEDURE—Costs—Juries—When may be charged to convicted
person.

JURIES—Costs—When may be charged to convicted person.

March 12, 1964

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

This is to acknowledge receipt of your letter of March 9, 1964, in which you
make inquiry as to the meaning of my opinion of February 5, 1964, in which I
expressed the view that in a case where a jury is not used, the convicted person
could not be charged with the costs of the jury under § 19.1-320, Code of Vir-
ginia (1950) as amended. You now pose the question whether the person (subsequently convicted) can be charged with the costs of the jury when the venire is in attendance at his request, he having subsequently waived trial by jury or changed his plea to guilty. The answer to this question is not free of doubt. The Supreme Court of Appeals has not passed on this precise question. However, it is my opinion that when the person convicted has requested trial by jury and the jury venire has been duly summoned and appears in obedience thereto, the expense incurred thereby is an expense incidental to the prosecution within the meaning of § 19.1-320, as amended, and such person is liable therefor.

In answer to the question posed in the second paragraph of your letter, I am of the opinion that the costs of the jury venire can be apportioned among the cases tried (by members of the same jury venire) so that each person convicted may pay his just share thereof.

CRIMINAL PROCEDURE—Costs—Supplying indigent prisoner copies of warrant, indictment, and court orders pertaining to his conviction.

JAIL AND PRISONERS—Costs—Indigent prisoner supplied copies of warrant, indictment, and court orders pertaining to his conviction.

HONORABLE JOHN WINGO KNOWLES
Judge, Circuit Court of the City of Richmond

May 25, 1964

This is in response to your recent letter in which you state that the Court has received many requests from indigent prisoners for certified copies of their court records. You asked my opinion as to whether or not the Court should furnish an indigent prisoner certified copies of the warrant, indictment, and court orders pertaining to his conviction.

Your attention is directed to § 14-180 of the Code of Virginia, which is set forth below:

"Any 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."

Your attention is also directed to the following language, which is found in Item 73, Chapter 640, Acts of Assembly, 1962:

"Out of this appropriation shall be paid the expenses incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner, including the payment of counsel fees as fixed by the Court. Said expenses shall be paid upon receipt of an appropriate order from a court."

(This language also appears in the 1964 Appropriation Act).

I believe that the provisions of § 14-180 of the Code and the quoted language from Item 73 of the Appropriation Act, as set forth above, must be read together.
Many courts require as a prerequisite to the filing of a petition for a writ of habeas corpus that the prisoner append to his petition certified copies of the warrant, indictment, and court orders pertaining to his conviction. Without the necessary records a prisoner is prevented from seeking relief from allegedly illegal detention.

If a prisoner files an affidavit of poverty, as prescribed by § 14-180 of the Code and an affidavit that he needs certified copies of certain court records in order that he may prosecute a petition for a writ of habeas corpus, I am of opinion that the Court may direct the Clerk to forward to the indigent prisoner certified copies of his court records. I am further of the opinion that the Court may direct that the Clerk’s customary charges for preparing the certified copies be paid out of the Criminal Fund, as provided for in Item 73 of Chapter 640, Acts of Assembly, 1962.

CRIMINAL PROCEDURE—Costs—Under § 17-30.1 defendant liable only for pro rata portion of per diem charges of reporter.

June 26, 1964

HONORABLE CECIL W. JOHNSON
Clerk of Hustings Court of Portsmouth

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

“In reference to Section 17-30.1 of the Code of Virginia, as amended at the last session of the General Assembly, it is requested that you furnish this office with an opinion as to the charges which can be assessed against the defendant for the use of a court reporter under the following circumstances.

“The court reporter has agreed to record all testimony in criminal cases heard by this Court at a cost of $35.00 for the first case heard each day and $10.00 for each additional case heard on the same day.

“In assessing the costs against the defendant will it be permissible if we charge each defendant $35.00 for the court reporter where the actual cost will be only $10.00 except the first case? It is my understanding that Chief Justice Eggleston has stated it is permissible to use a court reporter under this Section of the Code, and the Judge of this Court intends to use electronic recording devices only when the court reporter is not available.”

Section 17-30.1 of the Code provides that “... the Commonwealth shall be entitled to receive from the defendant if convicted, the per diem charges of the reporter which charges shall be taxed as a part of the costs of the case ...”

In my opinion, your question must be answered in the negative. If there is more than one case tried in a single day the costs attributable to the defendants, in my opinion, should be prorated. For example, if there should be three cases on a single day the per diem charges of the reporter would be $55.00, one-third of which would be taxed against each defendant who is convicted. I do not feel in a situation such as you have presented that it would be reasonable to construe the Act to mean that a defendant would be liable for more than his prorata portion of the per diem charges of the reporter.
CRIMINAL PROCEDURE—Costs—When fees for professional witnesses summoned by indigent may be paid out of the criminal fund.

WITNESSES—Fees—When summoned by indigent.

Honorable Joseph Motley Whitehead
Commonwealth’s Attorney for County of Pittsylvania

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

“One Douglas Eugene Feather, charged with the offenses of robbery by force and murder was tried in our Court on May 26, 1964, and sentenced to life in prison by a jury. Mr. Feather made his usual oath and the Court appointed him counsel. The counsel had their witnesses summoned in due form and among their witnesses was Dr. Amelia G. Wood, Psychiatrist, from Roanoke, Virginia, to testify on behalf of the defendant. She was summoned on May 19, 1964, and appeared on the day of trial for the defendant. No application for summoning witnesses was made to the Court, but the memorandum was duly made in the Clerk’s Office and summons duly issued. Dr. Wood is now asking for a fee to be paid by the Commonwealth as a professional witness.

“I would like to know whether or not any allowance can be made out of state funds for a professional witness summoned by an indigent defendant, who, of course, is not able to pay for the charges usually made by professional witnesses. I am asking this because we have several other cases which may involve the same question.”

Sections 14-186, 14-187 and 14-188 of the Code (§§ 14.1-189, 14.1-190 and 14.1-191 under Chapter 386, Acts of Assembly, 1964) contain no authority for the payment of the expert witness in this case since it appears that the witness was summoned on behalf of the defendant. Under § 14-188, the fees of the witnesses summoned on behalf of the defendant are required to be paid by the party for whom the summons was issued.

In this instance the defendant was an indigent and was represented by a court-appointed attorney. Under such circumstances the court may wish to consider whether the provisions of § 19.1-315 of the Code are applicable. Under this section it is provided “... When in a criminal case an officer or any person renders any other service in the State for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service ...”

In this case the psychiatrist rendered a professional service for which no specific compensation is provided. Therefore, in my opinion, if the court is of the opinion that the service of Mrs. Wood was necessary in the trial of the case, the court may allow reasonable compensation to the psychiatrist to be paid out of the criminal fund as provided for in § 19.1-315 of the Code.

I enclose an opinion by former Attorney General Abram P. Staples which relates to a similar matter. This opinion is published in the Report of the Attorney General (1938-39), at p. 51.
CRIMINAL PROCEDURE—Counsel—Juveniles entitled to be represented by counsel.

CRIMINAL PROCEDURE—Juveniles—Right to be represented by counsel may not be waived.

JUVENILES—Right to Counsel—May not be waived.

May 29, 1964

Honorable Leo P. Blair
Judge, Juvenile and Domestic Relations Court of Portsmouth

This will acknowledge receipt of your letter of May 27, in which you state:

"I have carefully read Sections 19.1-241.1—19.1-241.6 of the Code enacted by the 1964 session of the General Assembly and I would appreciate an opinion from your office as to whether or not these Sections apply to our Juvenile Courts.

"If you are of the opinion that the Act applies to juveniles over the age of fourteen (14) years, will you please give me your opinion as to the following:

"1. If the juvenile, in open Court, is advised that if he is without counsel, the Court will appoint one for him, can the juvenile and/or his parents or the person having legal custody of the juvenile, waive the right of counsel, and if so, who would be the proper party to execute the waiver?

"2. If the waiver cannot be made, who is the proper person to execute the statement required by Section 19.1-241.3 for and on behalf of the juvenile?"

This office has rendered two opinions relating to these sections (Chapter 657, Acts of Assembly, 1964)—one to Mr. J. Luther Glass, Department of Welfare and Institutions, dated May 14, 1964, and one to Honorable D. R. Taylor, Judge of the Municipal Court at Williamsburg, dated May 25, 1964. A copy of each of these opinions is enclosed herewith. You will note that we have stated that in our opinion the provisions of Chapter 657 apply to cases pending in a juvenile court.

The statute is silent with respect to the question of waiver as presented in your letter. The statute under consideration is supplementary to §19.1-241, which provides that:

"In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him."

Considering this section together with the new sections—19.1-241.1 through 19.1-241.6—I am of the opinion that it is mandatory in a felony case, in all courts in this State, that the accused shall be represented by counsel, and that this cannot be waived by the accused, nor in the case of a juvenile defendant by his parents or other person in loco parentis.

With respect to your last question (2), it would, in my judgment, be proper for the statement required by § 19.1-241.3 to be signed by either the accused or his parents, or both. The procedure in cases where there is a refusal to execute the statement is contained in our comments set forth in the opinion to Judge Taylor.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Counsel—Person charged with felony entitled to be represented by counsel in a court not of record.

ATTORNEYS—Defense—Person charged with felony entitled to be represented by attorney in a court not of record.

May 25, 1964

HONORABLE D. R. TAYLOR
Judge, Municipal Court of the City of Williamsburg

This will acknowledge receipt of your letter of May 15, 1964, in which you make reference to Chapter 657, Acts of Assembly, 1964, which adds to the Code of Virginia § 19.1-241.1 through § 19.1-241.6. These provisions of law provide for the appointment of counsel for persons accused of felonies in proceedings in courts not of record.

You ask what action the Court should take if the accused be found not to be indigent but after a reasonable time is unable to employ counsel.

The purpose of Chapter 657 of the Acts of Assembly, 1964, is to assure that every person charged with a felony is represented by counsel in a Court not of Record. No such provision of law has heretofore been contained in the Code. Each case, of course, must be considered on its particular facts.

If an accused is not indigent, in that he owns some property or is working while on bail, makes a bona fide attempt to secure counsel and after a reasonable time states to the Court that for various reasons he has been unable to employ counsel, I am of opinion that the Court should take testimony and make a determination of the facts. If in the Court's opinion the accused has made a bona fide attempt to secure counsel and has been unable to employ a lawyer, I am of opinion that the Court should declare him to be an indigent within the meaning of § 19.1-241.3 and, after the accused has signed the statement prescribed by that statute, appoint counsel to represent him.

You asked what action the Court should take if the accused refuses to cooperate with an attorney appointed pursuant to § 19.1-241.3.

Here you present a question which must again be answered on the basis of the facts in each case. Of course, if the attorney appointed by the Court asks to be relieved of his duties because of a conflict between him and the accused, the Court may promptly grant such a motion. If the accused refuses to cooperate with his court-appointed attorney, it would seem that it would be appropriate for the Court to permit the attorney to withdraw and to appoint another attorney. This is a question, however, to which no definitive answer can be given, and I believe that the manner in which it is handled should be dictated by the particularities of the specific case.

You asked what action the Court should take if the prisoner refuses to sign the printed statement prescribed by § 19.1-241.3.

I am of the opinion that if an indigent accused refuses to sign the statement as provided for in § 19.1-241.3 that the Court may hold him in contempt. If the accused persists in his refusal, I believe that it would be appropriate for the Court to appoint counsel to represent him (for an analysis of a similar situation, see, Coleman v. Smyth, 163 F. Supp. 934 (E.D., Va., 1958); affirmed, 260 F.2d 518 (4th Cir., 1958); cert. den., 359 US. 966).

In Virginia the preliminary hearing is procedural and not jurisdictional, and I am further of the opinion that the failure to comply with the provisions of the Act may not be raised in a habeas corpus proceeding. Snyder v. Commonwealth, 202 Va. 1009, 121 S.E. 2d 452 (1961).
CRIMINAL PROCEDURE—Defense Counsel—Child fourteen years of age or over charged with a felony is entitled to.

**May 14, 1964**

MR. J. LUTHER GLASS
Legal Consultant, Department of Welfare and Institutions


You request my opinion as to whether these new sections apply to cases in the juvenile courts and, if so, to what extent.

As shown by the title to this chapter, the purpose of the statute is "to provide for the appointment of defense counsel for persons accused of felonies in certain proceedings and to provide for the compensation of counsel in such cases."

There is no language in Chapter 657 to indicate that its provisions shall not apply in any court where a person is charged with a felony. If a child fourteen years of age or over is charged with a felony, in my opinion, this chapter makes it mandatory for the judge of the juvenile court to follow its provisions and afford the child the opportunity to have the benefit of counsel to the same extent as if the accused were an adult charged with a felony in any court.

Since a child who is under fourteen years of age at the time of the commission of an alleged crime cannot be charged with a violation of the criminal laws of this State, in my opinion, Chapter 657 does not apply to proceedings with respect to such child.

**February 10, 1964**

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

This is to acknowledge receipt of your letter of February 3, 1964, in which you state in part:

"A State Trooper arrests the driver of a motor vehicle after complaint of an accident involving a collision with another vehicle. The physical evidence clearly shows the defendant to be guilty of reckless driving when coupled with the statements made by the operator of the second vehicle in the presence of the accused at the scene of the offense. Can the State Trooper testify to the statements made by the second driver, which were given in the presence of the accused at the scene of the crime?

"It is my understanding that such statements form a part of the *res gestae* and, therefore, constitute one of the thirteen exceptions to the hearsay rule. Am I correct?"

*Res gestae* has been defined as "a declaration uttered simultaneously, or almost simultaneously, with the occurrence of the act." Black's Law Dictionary, 4th
Ed., p. 1470. "Test as to whether a declaration is a part of the res gestae depends upon whether the declaration was facts talking through party or party talking about facts." Batchelor v. Atlantic Coast Line R. R. Co., 196 N. C. 84, 144 S. E. 542, 544, 60 A.L.R. 1091, Ibid.

I doubt very much whether statements made after an accident can be considered res gestae.

Of course, the circumstances surrounding the making of the statement would ultimately determine whether the same is admissible in evidence. A definitive answer to your first question cannot be made as the full circumstances are not disclosed.

However, the statements made in presence of the accused by the operator of the second car could be admitted into evidence provided the statements were made under circumstances which would naturally call for a reply. The rule is well stated in the case of James v. Commonwealth, 192 Va. 713, 718, 60 S. E. 2d 895; 7 M.J., Evidence, Section 231, p. 611; 20 Am. Jur., Evidence, Section 567, p. 479; 31 C.J.S., Evidence, Section 294, p. 1057."

See also, the cases of Tillman v. Commonwealth, 185 Va. 46, 56; Dykeman v. Commonwealth, 201 Va. 807; State v. Robinson (West Virginia), 127 S. E. 46, and Smith v. Allen, 297 F. (2d) 236.

CRIMINAL PROCEDURE—Fines and Costs—Confinement for failure to pay—Credit to be allowed prisoners in State Farms.

JAILS AND PRISONERS—Confinement for failure to pay fine and costs—Credit to be allowed for confinement on State Farms.

August 14, 1963

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This is in reply to your letter of August 12, in which you refer to our opinion of April 19, 1963, addressed to Honorable C. M. Gibson, Clerk of Circuit Court, Hampton, Virginia, with reference to § 53-221 of the Code, relating to limitation of time a person may be held at the State Farm for the nonpayment of fine and costs. You have presented two questions, as follows:

"First: Would this opinion be applicable to any person confined in the Bland Correctional Farm, White Gate, Virginia? In other words, would the Bland Correctional Farm be classed as a State Farm with reference to the opinion you have rendered April 19, 1963?

"Second: If a person has been confined at the Bland Correctional Farm at White Gate, Virginia, and has served his sentence, but has not
paid his fine and costs, would not he be permitted to pay the Clerk of the Court of the County from which he was sent the balance of the fine and costs that he has not served, instead of having to pay all of the fine and costs?"

I have conferred with the Superintendent of the Department of Corrections and he advises me that the Bland Correctional Farm is considered by his department as a State Farm under the provisions of § 53-221 and has been so considered for years.

With respect to your second question, whenever a person is held to labor in a State Farm for the payment of a fine and costs and, at the rate of credit upon the fine and costs as provided in § 53-221, the same is not discharged by the time the prisoner has worked at the Farm for six months, such prisoner shall be discharged from custody. The prisoner's six months' service under this section operates as a complete discharge of the fine and costs, even though the credits earned do not total as much as the fine and costs. As I pointed out in my opinion to Mr. Gibson, the prisoner is entitled to a certificate of such service which, when presented to the Clerk where the judgment is docketed, entitles the holder of the certificate to have the judgment marked satisfied.

If a prisoner who is being held at a State Farm for the nonpayment of fine and costs arranges to pay the balance of the fine and costs during the six months period, he, of course, is entitled to be discharged from custody at the time he makes such payment. The payment under such a circumstance would have to be the total amount of the fine and costs, less the credits earned during the time he was held at the Farm and required to work such credits.

CRIMINAL PROCEDURE—Fines and Costs—No credit allowed jail prisoners confined for failure to pay fines and costs.

JAILS AND PRISONERS—Fines and Costs—No credit allowed jail prisoners confined for failure to pay fines and costs.

Honorable Kermit E. Allman
Sergeant for the City of Roanoke

This is in reply to your letter of September 25, 1963, in which you inquire as to the existence of a statutory provision governing the credit to be allowed jail prisoners confined for failure to pay fine and costs.

As you point out in your letter, § 53-221 of the Code of Virginia relates to confinement in the State Convict Road Force or State Farms. There is no comparable statutory provision relating to credit for confinement of prisoners in jail. To the contrary, it is quite clear that the confinement of prisoners in jail for failure to pay fine and costs, pursuant to Article 2, Chapter 14, Title 19.1 of the Code, does not satisfy the civil liability to pay such fine and costs. The maximum time for which a person may be confined in jail by order of the court for the failure to pay fine and costs, irrespective of the amount involved, for any one case, has been fixed at two months by virtue of § 19.1-334 of the Code.
CRIMINAL PROCEDURE—Fines and Costs—Sections 19.1-328 et seq. authorize the hiring out of prisoners under certain conditions to pay fines and costs.

JAILS AND PRISONERS—Fines and Costs—Prisoners may be hired out to pay fines and costs under conditions authorized in §§ 19.1-328 et seq.

HONORABLE L. H. SHRADER
Judge, Amherst County Court

This is in response to your letter of October 7, 1963, in which you ask my opinion on the following matter:

"I have before me sometimes men charged with misdemeanors and they are unable to pay their fines and costs and I commit them to jail. Do I have authority to permit them to work for the jailer and other people during the day so that they can earn some money to help pay their fines and costs?"

I am unaware of any statute conferring such authority upon county courts. However, I might invite your attention to the provisions of Title 19.1, Chapter 14, Article 2 (§§ 19.1-328 et seq.) of the Code of Virginia (1950), as amended. By following the procedures there outlined prisoners, who have consented thereto in writing, may sometimes be hired out by the sheriff of the county or the sergeant of the corporation in whose jail he is confined. I may also invite your attention to §§ 53-166 and 53-168 of the Code which may prevent employment of a prisoner by a jailer.

CRIMINAL PROCEDURE—Fines and Costs—Section 19.1-334 applicable where prisoner fails to pay.

JAILS AND PRISONERS—Confinement—Credit allowed for good conduct controlled by § 53-151.

HONORABLE KERMIT E. ALLMAN
City Sergeant of Roanoke

This is to acknowledge receipt of your letter of February 14, 1964, in which you state in part:

"We will greatly appreciate your opinion as to whether a person confined in the city jail, regardless of charge, should be given good conduct credit on time to be served for non-payment of fines and costs in excess of $50.00. For example; a prisoner who has been given a jail sentence of 60 days and $100.00 plus $10.00 cost would normally serve 40 days of the 60 days sentence and 60 days flat for the fine and costs. Another example is a prisoner who may be given 60 days suspended jail sentence, $100.00 plus $10.00 cost would serve 60 days flat without any allowable good conduct credit."

The only statute of which I am aware that grants prisoners serving time in jail a credit allowance for good conduct is § 53-151, Code of Virginia (1950) as amended. That section provides that for every twenty days the prisoner...
has faithfully observed the rules and requirements of the jail and not have been subject to discipline for a violation of the same “there shall be deducted from the term of confinement of such convict [prisoner] ten days.” The term “confinement” here means the time or period set forth in the order of the court sentencing the prisoner to jail or to the penitentiary. This office has held that this statute (53-151) applies to persons serving time in jail for the violation of a misdemeanor (Opinions of the Attorney General (1952-1953) p. 129).

Where the prisoner fails to pay the fine and costs and is incarcerated for that reason by the court, the provisions of § 19.1-334 of the Code as amended apply.

CRIMINAL PROCEDURE—Forfeitures—Money forfeited for violation of §18.1-340 paid into State treasury to be credited to the Literary Fund.

May 5, 1964

HONORABLE KERMIT E. ALLMAN
City Sergeant of Roanoke

This is in reply to your letter of May 1, 1964, in which you request my opinion as to the proper method for disposing of money which has been forfeited to the Commonwealth of Virginia after having been seized from a person who has been convicted of a violation of § 18.1-340 of the Code of Virginia (1950), as amended.

The copy of the order entered on the 29th day of April, 1964, by the Hustings Court of the City of Roanoke, which was enclosed with your letter, plainly orders the money forfeited to the Commonwealth of Virginia in accordance with § 18.1-341 of the Code. It is customary to enforce forfeitures by a proceeding instituted pursuant to § 19.1-358, et seq., of the Code. See, Tri-Pharmacy, Inc., et al v. United States of America, et al, 203 Va. 723. Since I do not know what proceedings, if any, were undertaken by the Attorney for the Commonwealth prior to the entry of the order on April 29, 1964, I shall refrain from expressing a view on the sufficiency of the proceedings for compliance with the forfeiture procedure. For purposes of your inquiry I, therefore, assume that the forfeiture was properly undertaken.

By virtue of § 19.1-17 of the Code, the money which was condemned as forfeited is to be disposed of as if it were the proceeds of forfeited property condemned and sold pursuant to the provisions of § 19.1-358 et seq. of the Code. Accordingly, I am of the opinion that you may dispose of the money in question by paying the same into the State Treasury to be credited to the Literary Fund as required by Section 134 of the Constitution of Virginia.

CRIMINAL PROCEDURE—Juries—List of prospective jurors selected by jury commissioners.

CLERKS—Juries Exemption—Clerk may not exempt jurors.

HONORABLE WM. S. HOLLAND
Clerk, Circuit Court for the City of Suffolk

October 22, 1963

This is in reply to your letter of October 17, 1963, in which you request my opinion as to whether a person known by the clerk to be exempt from
jury duty by reason of his age can be excluded from the list of jurors drawn by the clerk under § 19.1-198 of the Code, or whether the judge must excuse such person.

Section 19.1-196 of the Code provides for summoning twenty jurors. These jurors are selected pursuant to § 19.1-198 from a list furnished by the clerk containing the names of twenty-four persons which are drawn from the box of prospective jurors prepared in accord with §§ 8-182 and 8-184 of the Code. In short, the jury list selected under § 19.1-198 of the Code is prepared from the same names of prospective jurors as are provided for civil cases in Chapter 11 of Title 8 of the Code.

The names which are placed in the jury box are selected by jury commissioners, and it is their responsibility to prepare a list of the inhabitants of their respective counties or cities as are qualified to serve as jurors and are not excluded or exempt by §§ 8-174, 8-175 and 8-178 of the Code. The list so prepared is delivered to the clerk for safekeeping and, from time to time, the commissioners may add names to the list or strike therefrom the names of any who have become disqualified or exempt from jury duty.

While § 19.1-196 of the Code requires the clerk to direct the summoning of twenty persons who are qualified in all respects to serve as jurors, I am aware of no authority for the clerk to substitute his judgment for that of the jury commissioners in the preparation of the list of prospective jurors. If it develops that the person whose name is drawn from the box is ineligible or exempted from jury duty by reason of age, that person should be excused or exempted by the judge, rather than the clerk.

CRIMINAL PROCEDURE—Preliminary Hearing—Not an incident of trial but step preceding trial.

May 26, 1964

HONORABLE VERNON D. HITCHINGS, JR.
Judge, Municipal Court, Part II, for City of Norfolk

This is in reply to your letter of May 21, relating to § 17-30.1 of the Code, as amended by Chapter 533, Acts of General Assembly, in which you request my advice as to whether or not it is mandatory that the evidence and incidents at a preliminary hearing shall be recorded as required by that section.

The statute, in my opinion, relates to the trial of a case involving a charge of a felony, as distinguished from a preliminary hearing held under the provisions of Article 2, Chapter 6, Title 19.1 of the Code. It will be noted that under this article (§ 19.1-105) the judge or justice conducting the hearing may, if he deems it proper to do so, require that the testimony of the witnesses at such hearing be reduced to writing and signed by such witnesses.

It is clear from an examination of those sections of the Code relating to a preliminary hearing, the granting of bail and the giving of recognizances, that such proceedings are not incidents of the trial of the case but are steps preceding the trial—that is, proceedings to determine whether or not a person shall be held for trial in a court of record.

In my opinion, the term “incidents of trial” relates to a trial in a court of record.
CRIMINAL PROCEDURE—Preliminary Hearing—Not required when person not arrested for violation of an offense in this State until after the indictment had been made.

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney of Rockbridge County

This is in reply to your letter of May 5, in which you request my advice as to whether or not a preliminary examination under § 19.1-163.1 of the Code is necessary under the following facts:

"(1) The accused, Albert Jennings Painter, a fugitive and in custody in Terre Haute, Indiana, was charged on a warrant for issuing a check for less than $50.00 on December 26, 1962. The warrant was issued January 24, 1963, and alleged that the accused had previously been convicted of two similar offenses, which would make this charge a felony under the statutes.

"(2) Extradition papers were issued by this office on January 16, 1964, and forwarded to the Governor.

"(3) Painter was indicted on the felony charge on February 3, 1964.

"(4) Sheriff W. B. Chittum of Rockbridge County, Virginia, was advised on March 24, 1964, that Painter had been ordered to be returned to his custody by the Judge of the Superior Court # 2, Vigo County, Indiana.

"(5) Painter was taken into custody by Sheriff Chittum on April 2, 1964, and has been in his custody since that date awaiting trial."

In this connection you are referred to the following opinions which are published in the Reports of the Attorney General, and which, I presume, you have in your office:

- Report of Attorney General (1959-60), at p. 133 (Carlton)
- Report of Attorney General (1960-61), at p. 99 (Logan)
- Report of Attorney General (1962-63), at p. 60 (Morrison)

Under the facts stated by you, this person had not been arrested under any warrant issued in the State of Virginia prior to the indictment by the grand jury. He was not arrested for violation of an offense in this State until after the indictment had been made.

Therefore, in accordance with the previous opinions of this office and with our understanding of the holding in the recent case of Webb v. Commonwealth, 204 Va. 24, I am of the opinion that no preliminary hearing is required in this instance.

CRIMINAL PROCEDURE—Preliminary Hearing—Section 19.1-163.1 not applicable to fugitives.

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

This is in reply to your letter of August 9, which reads as follows:
"Section 19.1-163.1 of the Code provides that no person who is arrested on a charge of felony shall be denied a preliminary hearing and no indictment shall be returned in a Court of record prior to such hearing, unless such hearing is waived in writing.

"Do you believe this statute applies to a case where X is a fugitive and while such fugitive is indicted for a felony in Virginia, and some days thereafter it is learned that on the date the Virginia indictment was returned, X was in the custody of the authorities of another state for some offense therein committed?

"Manifestly, X could not have been given a preliminary hearing in Virginia prior to the returning of said indictment, even though at the time of its returning he was 'under arrest.'"

In my opinion, § 19.1-163.1 of the Code does not apply to a case such as you have presented. This office has previously expressed the opinion that the statute does not prohibit an indictment for an offense committed in this State without a preliminary hearing where the alleged felon is a fugitive and has not been apprehended and arrested for the alleged crime. The statute is effective only in those cases where an arrest has been made for the same offense for which the indictment is sought.

CRIMINAL PROCEDURE—Record—Commonwealth to provide for recording in felony cases.

June 12, 1964

HONORABLE ALFRED W. WHITEHURST
Commonwealth's Attorney of Norfolk

This will acknowledge receipt of your letter of June 10, which reads as follows:

"These questions have presented themselves in reference to Section 17-30.1 of the Code of Virginia, enacted by our last legislature (recording of felony cases). The law states that the Court shall by order provide for the recording of all felony cases. My questions are:

"1. Where the defendant is not indigent, and does not, himself, provide for the recording of the felony case, is the state required to see that the case is recorded.

"2. In the event that the State is not required to have such case recorded and the defendant, who is not indigent, does not provide to have the felony case recorded, can the Court, nonetheless, proceed with the trial?"

In this connection I enclose copy of two opinions relating to § 17-30.1 of the Code, one of which is dated May 21, 1964, to Hon. John H. Powell, Clerk of Nansemond County, and the other is dated May 26, 1964, addressed to Hon. Vernon D. Hitchings, Jr., Judge, Municipal Court, Part II, Norfolk.

With respect to your question No. 1, under the language of the statute there is no escape from the conclusion that the court or judge trying the case is required to enter an order providing for the recording verbatim of the evidence and incidents of the trial. This statute provides that the expense of reporting or recording the trial of criminal cases shall be paid by the Commonwealth out of the appropriation for criminal charges upon the approval of the trial judge. If the defendant is convicted the per diem charges of the reporter or reasonable charge attributable to the cost of operating a mechanical device shall be taxed as a part of the costs of the case. This question is answered in the affirmative.
In light of my answer to your question No. 1, I do not consider it necessary to comment upon question No. 2.

CRIMINAL PROCEDURE—Record in Felony Cases—What record to contain.

COURTS—Record in Felony Cases—What record is to contain.

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

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

"I would appreciate it very much if you would give me your interpretation of Section 17-30.1 as amended by the Legislature in 1964, providing for the recordation of evidence and incidents of trial.

"Are the words 'incidents of trial' intended to cover the appointment of an attorney in felony cases where the defendant does not have an attorney of his own choosing and the reading of the indictment which constitutes the arraignment of the prisoner?"

The pertinent language of § 17-30.1 of the Code is as follows:

"In all felony cases, the court or judge trying the case shall by order entered of record provide for the recording verbatim of the evidence and incidents of trial either by a court reporter or by mechanical or electronic devices approved by the court, . . ."

Under this language in all felony cases it is mandatory that, prior to the commencement of the trial, the court or judge trying the case shall enter an order providing for the recording verbatim of the evidence and the incidents of the trial. The phrase "incidents of the trial," in my opinion, means all proceedings, such as examination of the jury, the reading of the indictment, the plea of the accused motions of counsel, objections to the admittance of evidence, rulings of the court, and all other statements connected with the trial. If the accused does not have counsel, all questions directed to the accused with respect to counsel and his answers thereto must, in my judgment, be recorded, as well as the court's designation of counsel for the accused. If counsel employed by the accused appears, and no designation by the court is necessary, the record must show that the accused had counsel during the trial, giving the name of such attorney or attorneys representing the accused.

CRIMINAL PROCEDURE—Sentences—When prisoner entitled to credit for confinement in jail.

JAILS AND PRISONERS—Sentences—When convicted felon entitled to credit for time confined in jail.

HONORABLE EARL R. SULLIVAN
Clerk, Corporation Court, City of Alexandria

This is in response to your recent letter which reads in part as follows:
"On the 26th day of March, 1962 a prisoner, charged with a felony was tried and convicted in Fairfax County, Virginia and sentenced to a term in the State Penitentiary, but instead of being committed to the Penitentiary, was turned over to the Sergeant of the City of Alexandria, Virginia, to answer an indictment pending in this court. "Defendant was committed to jail in Alexandria, Virginia on the 26th day of March, 1962, and confined until the 23rd day of November, 1962, at which time he escaped and was finally returned to Alexandria, Virginia, on the 17th day of January, 1963, and tried on the subsequent charge on the 17th day of April, 1963."

You inquire as to whether or not this prisoner is entitled to credit for time spent in jail in Alexandria, Virginia, awaiting trial on this subsequent charge.

Your attention is directed to Section 53-208 of the Code of Virginia, which reads in part as follows:

"Any person who may be sentenced by any court to a term of confinement in the penitentiary, or by any court or trial justice to a term of confinement in jail, for the commission of a crime, or in jail for default in the payment of a fine, shall have deducted from any such term all time actually spent by such person in jail or the penitentiary awaiting trial, or pending an appeal, and it shall be the duty of the court or trial justice, when entering the final order in any such case, to provide that such person so convicted be given credit for the time so spent. In no case shall a prisoner be allowed credit for time not actually spent in confinement, and in no case is a prisoner on bail to be regarded as in confinement for the purposes of this statute. No such credit, however, shall be given to any person who shall break jail or make an escape. * * *"

In view of the foregoing statute, I am of the opinion that this prisoner is not entitled to receive credit for any time spent in the Alexandria City Jail.

CRIMINAL PROCEDURE—Warrants—Juveniles—Warrant charging juvenile should follow same form as other criminal warrants.

JUVENILES—Warrants—Form of warrant to be same as other criminal warrants.

Honorable W. A. Kelly
Chief Probation Officer, Juvenile and Domestic Relations Court of Roanoke

April 14, 1964

This is to acknowledge receipt of your letter of April 6, 1964, in which you state in part:

"When a juvenile fourteen years of age or older commits a felony and the judge feels the child should be placed in jail and issues a warrant in accordance with Section 16.1-197, Code of Virginia, does he state in the warrant that the child violates Section 16.1-158 (1) (appropriate subsection), Code of Virginia, by committing the felony; or can he issue the warrant by stating the charge as is done in the case of adults?"
The pertinent portion of § 16.1-197, Code of Virginia (1950) as amended, is as follows:

"However, in any case where the child fourteen years of age or over when taken into custody resists, or is in a drunken condition, or if the officer taking custody deems it to be to the best interest of the child, or in the best interest of the public, or it is otherwise impractical or inadvisable to follow the aforesaid steps, the said officer after obtaining the warrant from any person authorized to issue criminal warrants may take the said child to the special place of detention for juveniles or to a separate cell of the jail apart from criminals or vicious or dissolute persons."

Such a warrant issued by any person authorized to issue criminal warrants should follow the form of a criminal warrant. The said warrant should be made returnable to the Juvenile and Domestic Relations Court because that court has jurisdiction under § 16.1-158 of the Code. There is no need to recite in the warrant that the child has violated § 16.1-158 of said Code. The Juvenile and Domestic Relations Court, under the provisions of § 16.1-176 of the Code, after a hearing may retain jurisdiction or certify such child (over fourteen years of age charged with the violation of a felony) for proper criminal proceedings to the appropriate court of record having criminal jurisdiction.

DEEDS OF TRUST—Clerk to place in general index book.

RECORDATION—Deed of Trust Relating to Personal Property—To be indexed in general index book.

December 3, 1963

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

This is in reply to your letter of November 14, 1963, in which you request my opinion as to the necessity in indexing a deed of trust twice when the trust relates to personal property.

Prior to the enactment of § 43-4.1 of the Code, the clerk was under an obligation to index deeds of trust affecting both real and personal property in the general index book and the book of miscellaneous liens, for such a requirement was expressly provided in § 17-61 of the Code. While that section has not been expressly amended by the Legislature, it was effectively nullified by the enactment of § 43-4.1 of the Code in the 1960 session of the General Assembly. That section reads as follows:

"Notwithstanding the provisions of § 43-4, or any other section of this title, or any other provision of law requiring documents to be recorded in the miscellaneous lien book in the clerk's office of any court, on and after July one, nineteen hundred sixty all memoranda or notices of liens or other documents theretofore required to be recorded in such miscellaneous lien books shall be recorded in the deed books in such clerk's office, in lieu of the miscellaneous lien book and shall be indexed in the general index of deeds, and such general index shall show the type of such lien."
In view of the clear purport of the foregoing quoted provision, I am of the opinion that the clerk is no longer under an obligation to index deeds of trust affecting personal property at any place other than the general index book.

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**DOG LAWS—Licenses—How tax to be fixed.**

_Honorable William W. Jones_
Commonwealth’s Attorney for Nansemond County

June 17, 1964

This is in reply to your letter of June 16, relating to Chapters 156, 652 and 653 of the Acts of Assembly (1964), pertaining to dog licenses. As pointed out by you, § 29-184 of the Code was amended by Chapter 653 so as to include the following:

“Provided that the governing body of any city or county, which has assumed responsibility for enforcement of the dog laws under §§ 29-184.2 or 29-184.5, may prescribe by ordinance a single license tax for all dogs regardless of sex, the amount of which shall not exceed five dollars.”

Section 29-208.1, a new section, was added by Chapter 652, and reads as follows:

“The governing body of any county or city which has assumed responsibility for enforcement of the dog laws under §§ 29-184.2 or 29-184.5 within such county or city, may, by ordinance, provide a method of obtaining licenses and tags of a type which shall be described by the ordinance. Such tags may be of a uniform type, without regard for the sex of the dog and the tax may be the same on all dogs male, female, or unsexed. The ordinance shall also provide a method of keeping lists, keeping accounts, how reports are to be made and how unsold tags are to be disposed of. Insofar as such counties or cities are concerned, the Commission shall not be controlled by the provisions of § 29-189 and §§ 29-204 through 29-208.”

Chapter 167, Acts of 1938, which is applicable to the counties designated therein, and which was last amended by Chapter 35, Acts of Assembly (1944), as you point out, was amended by Chapter 156, Acts of Assembly (1964), but the only effect of this amendment was to remove Culpeper County from the Act. Under this Act the counties named therein (Nansemond being one named) are required to enforce its provisions with respect to the dogs of the breeds mentioned therein. In the counties subject to Chapter 156, the dogs described therein are not subject to the provisions of the new Code section number 29-208.1.

The last paragraph of your letter reads as follows:

“I would appreciate your opinion as to whether or not there is a conflict between these two sections, as they apply to Nansemond County, and, if so, which section should prevail. Is it possible, in view of both sections, that the County may impose a uniform tax not exceeding $5.00 on all dogs other than German or Belgian shepherds and a separate uniform tax of a higher amount on any dog having ¼ or more German or Belgian shepherd blood.”
While to some extent there is a conflict between Chapters 156, 652, and 653, actually Chapter 156, with respect to the dogs mentioned therein within the applicable counties, is an exception to the general provisions of Chapters 652 and 653.

In light of this conclusion, the license tax for dogs described in Chapter 156 is required to be fixed in accordance with the amounts shown in Section 2 of said Chapter. On all other dogs the license tax will be as provided in § 29-184 of the Code.

EDUCATIONAL TELEVISION—Construction—State Aid—Applicant may be foreign corporation, but facility must be constructed in Virginia.

August 7, 1963

HONORABLE D. V. CHAPMAN, JR.
Executive Assistant, Advisory Council on Educational Television

This is in reply to your letter of July 24, 1963, in which you request my opinion as to whether the Greater Washington Educational Television Association, Incorporated, is eligible to receive funds from the Commonwealth of Virginia pursuant to Chapter 428, Acts of Assembly of 1962.

Chapter 428 provides a grant-in-aid program for the construction of educational television facilities, the State participating in such construction program in an amount not to exceed one-third of the total cost.

While the Act does not so state in express terms, I believe it quite clear that such construction projects are to be carried out within the geographical confines of the State of Virginia. It is difficult to imagine how the Advisory Council on Educational Television could exercise authority necessary to supervise or inspect facilities to be constructed in some other State.

On the other hand, I know of no objection to a foreign applicant receiving State aid for construction of television facilities in this State. So long as the Council can justify a grant-in-aid for constructing an educational television facility, I think it immaterial that the facility is to be owned and operated by a foreign corporation.

In view of the foregoing, I know of no legal objection to the eligibility of the Greater Washington Educational Television Association, Incorporated, for receiving grant-in-aid funds pursuant to Chapter 428, Acts of Assembly of 1962, provided the Advisory Council should find justification for approval of an application for State funds in aid of a construction project within the State of Virginia.

EDUCATIONAL TELEVISION—State Aid—Applicant must be a nonprofit corporation.

August 20, 1963

HONORABLE LLOYD C. BIRD
HONORABLE EDWARD E. LANE
Co-Chairmen, Advisory Council on Educational Television

This is in reply to your letter of August 7, which was addressed to me over the signature of the Executive Assistant to the Advisory Council. You have requested my opinion on several questions which have arisen in the application of the Educational Television Station Facilities Construction Act.
Your first, second and fourth inquiries can be treated together. I quote from your letter as follows:

"1. Can proper payment of State funds be made to an Association or Partnership?
2. Can proper payment of State funds be made to Hampton Roads Educational Television Association?
4. Since the Act includes both corporation and association, will it be mandatory or desirable to also add ‘Association' or ‘Partnership’ to the July 29, 1963, Draft of the amended Virginia Plan for Educational Television, to make it conform to the Statutes. (A copy of the draft has been previously and informally sent to Mr. Lee of your office.) If the word Partnership is used, will it be necessary to investigate the powers of the corporation to determine their ability to go into a partnership?"

While the Act (Chapter 428, Acts of Assembly, 1962) does not expressly prohibit the granting of State aid to associations or partnerships, such a conclusion appears implicit in the Act.

The grant-in-aid program contemplated by the Act visualizes a construction program for educational television facilities, the State participating in an amount not to exceed one-third of the total cost. The applicants for such aid are not classified or defined in the Act, but it appears rather manifest that in order to qualify for a grant the educational television facility must be owned by a nonprofit corporation. I reach this conclusion by applying the definition of "television station" which is supplied in the Act. I refer to Section 2 of Chapter 428, which is now codified as § 22-332, Code of Virginia. The term is there defined as follows:

“(a) ‘Television station’ or ‘stations’ means studio, tower, and other facilities required for, or useful in, the production and broadcast of programs which may only be received through those devices known as television receivers and which station is owned by any nonprofit corporation whose sole purpose is the operation of a television station, the facilities of which are used exclusively for educational purposes;”

It is clear that any application for State aid, pursuant to §§ 22-340 and 22-341 of the Code, must be made for the purpose of constructing a television facility and that term, as defined is the above quoted portion of the Act, means facilities owned by nonprofit corporations.

Your reference to the use of the word “association” in the Act, relates to the definition of “nonprofit” as it appears in § 22-332, subsection (b). That definition reads as follows:

“(b) ‘Nonprofit' as applied to a television station means a station owned and operated by a corporation, a municipal corporation, or association, no part of the net earnings of which enures, or may lawfully enure, to the benefit of any private shareholder or individual;”

The foregoing definition does not extend nor diminish the definition of television stations, the purpose of the latter definition apparently being to further emphasize that the station must be owned and operated in such a manner as to insure that no part of the net earnings will enure to the benefit of any individual.

In addition to the requirements of the Act itself applicants for grants must comply with the provisions of the plan adopted by the Advisory Council. The plan which has been adopted expressly limits the grants to “local corporations.”

In view of the foregoing, I am of the opinion that State aid cannot be
granted for the construction of educational television facilities owned by an association or a partnership.

Your third inquiry pertains to the construction of facilities on leased land. There is no mention in the Act as to the required nature of ownership of the land upon which television facilities are to be constructed. Accordingly, I am of the opinion that there is no objection to the granting of State aid for construction of television facilities upon land leased by the applicant.

EDUCATIONAL TELEVISION—State Aid—Existing facilities may be used as matching funds.

September 25, 1963

HONORABLE LLOYD C. BIRD
HONORABLE EDWARD E. LANE
Co-Chairmen, Advisory Council on Educational Television

This is in reply to your letter of September 13, 1963, in which you pose several questions concerning the administration of the Educational Television Station Facilities Construction Act (Chapter 428, Acts of Assembly of 1962).

Your first line of inquiries deals with the basic question of utilizing the monetary value of existing educational television facilities to match State funds which may be available for the construction cost of facilities for which State aid is being requested.

In my letter to you, under date of August 20, 1963, I advised that the grant-in-aid program contemplated by the Act visualizes a construction program for educational television facilities, the State participating in an amount not to exceed one-third of the total cost. Section 14 of the Act (§ 22-344 of the Code) reads as follows:

"The contribution by the State to the construction of any facility for educational television shall not exceed one-third of the cost thereof. No part of the State appropriation for the construction of any educational television facility shall be made available by the Council unless and until the Council has satisfactory assurances that the necessary funds to finance two-thirds of the cost of any such project have been or will be made available from sources other than State funds."

In view of the foregoing mandate, I think it manifest that two-thirds of the cost of any project must be made available from sources other than State funds. Whether existing facilities owned by the applicant could be utilized as a portion of the applicant's two-thirds would appear to depend upon the nature of the existing facilities as related to the project being undertaken. For example, a partially completed building may very well be an essential part of the project, while other facilities already constructed and in operation would not be construed as constituting a part of the project. The determinative factor in each case would be whether the existing facility could reasonably be said to constitute a part of the construction project being contemplated as a grant-in-aid project. If so, I am of the opinion that the value of the existing property could be considered as a part of the necessary funds to finance two-thirds of the project.

The question as to how the value of existing facilities is to be determined again presents a matter of administration, to be decided in the sound discretion of the Council. The method chosen for evaluation would not be legally objectionable so long as it appears reasonable and is equally applied. The fair market value of the facilities would appear to be the most logical test to be applied.
REPORT OF THE ATTORNEY GENERAL

As to the time at which the value is to be determined, I should think that the probative question would be the fair market value at the time of making application for State aid.

Your second line of inquiries relates to the method for payment of the State’s share of the construction costs. You are particularly interested in knowing whether lump-sum payments may be made as opposed to installment payments.

By letter of August 5, 1963, Mr. Lee, of this office, advised the Auditor of Public Accounts that § 12 of Chapter 428 contemplates an installment payment plan, the State payments being made only upon certification by the Council to the State Comptroller that such installment is due after the work has been performed, or purchases have been made. When applying that conclusion to a construction project which is a completely new undertaking, I should not think that any great administrative problem would be presented, for it should be a relatively simple matter for the Council to make a determination that the installment is due. In the event the Council should determine to consider an existing facility toward payment of the applicant’s share of a project, the difficulties of accounting may be increased, but the principal of installment payments would remain the same. Whether the project involves new construction or partially completed facilities, the Council must certify that an installment is due for the State’s share in the construction costs.

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ELECTIONS—Assistant Registrars—Procedures applicable.

TOWNS—Elections—Assistant Registrars—Procedures applicable.

March 4, 1964

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of March 3, to which you attached a letter from Mr. Paul C. Kincheloe, Secretary of the Electoral Board of Fairfax County. Mr. Kincheloe states that:

". . . the town of Vienna is composed of six county voting precincts, namely, Vienna No. 1, Vienna No. 2, Vienna No. 3, Vienna No. 4, Vienna No. 5, Vienna No. 6, all within the corporate limits of the Town of Vienna. Each precinct has a County Assistant Registrar. There are approximately 3500 registered voters in these six county precincts."

It is stated that all of the voters registered in the six precincts actually reside in the corporate limits of Vienna.

Mr. Kincheloe presents the following questions:

"1. There are six Assistant Registrars in the Town of Vienna. Could one or more of these Assistant Registrars be designated by the Electoral Board to serve as Town Registrar?

2. Would it be necessary for such persons to be sworn in again, since they have already taken their oaths as Assistant Registrars?

3. Is it necessary for the Electoral Board to make specific appointments for definite periods of time, or, could the duties of town registrars be rotated among these six persons?

4. Do the Virginia Election Laws require that at least one registrar sit for registrations on the last day that persons may register prior to the town election (May 9, 1964)? (Section 24-74)
"5. There are six county voting precincts in the Town of Vienna. 
   "(a) Should the town elections be held in six different polling places?
   "(b) If so, would it be possible for the Town to use the County registration books?
   "(c) Is there anything in the Virginia Election Law that requires a voter's name to be checked on his registration card when he votes on the day of election?
   "6. How many election officials are required to serve at each polling place at a town election?"

As we pointed out in the opinion referred to in Mr. Kincheloe's letter and which was furnished to you and is published in the Report of the Attorney General (1960-1961) at p. 130, the function of a town registrar is confined to posting upon the town registration books the names of those persons who are registered upon the general registration books and who live within the corporate limits of the town. Furthermore, in this same opinion we stated:

"... Town registrars are appointed under the provisions of § 24-56 of the Code. This section has specific reference to registrars for elections to be held for the purpose of selecting town officials. It will be noted that that electoral board of the county is required to appoint the registrar for town elections not less than fifteen days prior to the date of election. This provision of the Code is in conflict with § 24-74 and § 24-75 of the Code to the extent that these latter sections refer to towns. We have considered the reference to registrars of towns in these latter sections to be applicable only where the town is a separate precinct of a county and all the voters of that precinct reside in the corporate limits of the town. In such a case the town registrar would be a registrar appointed for that electoral district pursuant to § 24-52 of the Code and be required to comply with §§ 24-74, 24-75 and all other sections of Chapter 6, Title 24 of the Code applicable to the duties of registrars generally."

Inasmuch as all of the voters who have been registered in the six precincts are actual residents of the town, it is not necessary, in my opinion, for separate town registration books to be established and maintained. This is because of the fact that each person who is registered on the general registration books and is a resident of the town is qualified to vote in the town election even though his name has not been posted upon the registration books referred to in § 24-52 of the Code.

Each of the registrars and assistant registrars who are now appointed can perform all of the functions now required in town elections without the necessity of being specifically appointed under § 24-52 and without taking any further oath of office. This disposes of questions 1, 2, and 3.

With respect to question 4, the usual procedure provided for in § 24-74 must be carried out. After that date no registrations may be had until after the election, due to the provisions of § 24-82. The answers to the three questions under question 5 are in the affirmative. The provisions with respect to checking the name of a voter in the registration book (or card) are found in § 24-248 of the Code.

The same number of election officials is required in a town election as is required in any election.
ELECTIONS—Ballots—Not invalidated because of failure of printer to subscribe to oath.

September 23, 1963

HONORABLE H. M. HARDING
Secretary, Electoral Board of Halifax County

This will acknowledge receipt of a letter from you and the other two members of the Electoral Board of Halifax, in which my opinion is requested with respect to the following situation:

Pursuant to the provisions of Article 4, Chapter 11, Title 24 of the Code, after the time had elapsed for candidates to file for public office in the general election to be held on November 5, 1963, the Electoral Board of Halifax County made arrangements with a printing firm in the county to print the official ballots and furnished the printer with a list of all candidates who had filed for the respective offices and whose applications complied with the statute. The printer prepared the ballots in the manner directed by the Board and delivered them to the custody of the Secretary of the Board. Subsequently, the Board revealed the information shown on the official ballots as it may do under §§ 24-221 and 24-240 of the Code so that informative or sample ballots could be printed and made available to the press for publication. These provisions of the statute are obviously for the purpose of providing a means whereby the voters may be adequately informed as to who is seeking their support for the respective offices.

It appears that through an oversight the Secretary of the Electoral Board failed to require the printer to subscribe to the oath provided for in § 24-218 of the Code, in which he pledges to faithfully follow the law in printing the ballots and will follow the instructions of the Electoral Board. Furthermore, no member of the Electoral Board was present during the printing of the ballots as required by § 24-219 of the Code.

After the ballots had been printed and the contents thereof made public, the printers (the father and son who supervised the printing of the ballots) executed separate affidavits stating that they had fully complied with the requirements of § 24-218 of the Code.

You have requested my advice as to whether or not the failure of the printer to subscribe to the oath prior to the printing of the ballots and the failure of a member of the Board to be present while the printing was done will affect the legality of the election and, if so, should the Board destroy the ballots, which have been printed and have another supply printed.

In my opinion, the ballots as printed are valid and may be used without in any way affecting the legality of the election. The purpose of the oath is to pledge the printer to secrecy and the faithful performance of his task in accordance with the instructions of the Board. The subsequent affidavit of the printer is, in the absence of any contrary evidence, satisfactory assurance that in fact the printing of the ballots conformed to the statutory requirements. The presence of a member while the printing is in process is for the purpose of seeing that the ballots are printed in accordance with the conditions of the oath taken by the printer. The affidavits show that the printer followed the statutory procedure while printing the ballots. The ballots, as printed, have been approved by the Board as being in conformity with their instructions.

A destruction of the present supply of ballots and the printing of a new supply would result in a distribution to the various precincts and to absentee voters of a ballot of the same type and arrangement of names as is now available.

The election laws of Virginia are designed to assure honesty in all elections. When statutory provisions such as are under consideration here are overlooked, this alone does not affect the legality of the election. It must be shown that the rights of candidates and the purity of the election have been disregarded. It does
not appear that these technical oversights will in any manner prejudice the rights of any of the candidates.

In my opinion, based upon the facts presented by you, the ballots now in possession of the Electoral Board of Halifax County are proper ballots for the use of the voters in the approaching election.

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**ELECTIONS—Ballots—Number to be provided—Judges and clerks—Who may serve, duties of judges.**

**PUBLIC OFFICERS—Compatibility—Clerk of county court or deputy commissioner of the revenue serving as clerk or judge of election.**

**Honorable Robert C. Goad**  
Commonwealth’s Attorney for Nelson County

July 18, 1963

This is in reply to your letter of July 16, in which you present the following questions:

"1. How many ballots should the Electoral Board provide at each precinct in the primary elections and in general elections?

"2. Does the law permit a Deputy Commissioner of Revenue to serve as a judge of elections at a precinct in a primary election in which the Commissioner of Revenue is running unopposed, and his name is on the ballot; and in a general election in which the Commissioner of Revenue is running unopposed?

"3. Does the law permit the Clerk of the County Court to serve as Clerk of election in a primary or general election?

"4. Does the law permit any person, except the judges and clerks of an election, to assist in counting the ballots, or in tabulating the results of the ballot count, after the polls are closed, at either a primary or general election?"

With respect to question (1), the answer may be found in § 24-213 of the Code. You will note that this section allows the electoral board to determine the number of ballots to be printed with certain limitations.

With respect to questions (2) and (3), you are referred to § 24-198 of the Code which would prohibit a deputy commissioner of the revenue from serving as judge of election, either in a primary or general election, in which the commissioner of the revenue is running. This would apply even though the commissioner of the revenue has no opposition. Inasmuch as the clerk of the county court is not an elective office, it does not appear that § 24-198 would prevent such person from serving as a clerk of election.

With respect to question (4), there is no statute which would authorize the judges of election to delegate to someone else the duty of counting the ballots. This duty is placed upon the judges in § 24-258 of the Code. Under §§ 24-260 and 24-261 representatives of the political parties may be present at the counting of the ballots but these sections do not authorize these representatives to participate in the canvass of the vote.

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ELECTIONS—Ballots—Voters may write in choice for justice of the peace.

JUSTICE OF PEACE—Election—May be elected by write-in method.

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

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

“In the election we had in Highland County on November 5, 1963, no person had qualified as a candidate for the office of Justice of the Peace.

“The electoral board, in preparing the ballot, did not provide a place on the ballot to vote for this office. Certain voters, at the bottom of the ballot, wrote ‘for Justice of the Peace,’ and under that heading they wrote in the name of a person, put a box opposite the name, and put an X in the box.

“My question is, since the electoral board did not provide a place on the ballot to vote for a Justice of the Peace, were the ballots cast for the Justice of the Peace properly counted and certified by the commissioners of the election? Finally, if those votes were counted improperly, would this invalidate the remainder of the offices they voted for on their ballot?”

While it would have been proper and desirable for the electoral board to have provided a place on the ballot for the purpose of permitting the voters to express their wishes with respect to who should be justice of the peace in the magisterial districts, I can find no objection to the procedure that you state was followed by the persons who cast their ballots for someone for that particular office. I assume from your letter that the commissioners of election certified the votes for the respective persons who were voted for for the office of justice of the peace by the write-in method. This was proper.

The answer to this question, therefore, makes it unnecessary to reply to your last question.

ELECTIONS—Candidates—Names may not be placed on ballot in place of a candidate who is deceased or withdraws unless that candidate was nominated for office.

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

This is in reply to your letter of September 27, in which you refer to the news item that recently appeared in the Richmond Times Dispatch, which purported to state that any person could qualify and have his name placed upon the ballot in the election to be held on November 5, in the Seventeenth Senatorial District. In that district, the Honorable Harry C. Stuart had been nominated by a convention as the Democratic candidate for the term commencing in January, 1964. Senator Stuart had no opposition. Due to his untimely death, after the regular filing time, the question arose as to who could qualify. The question was determined by § 24-234 of the Code which makes provision for placing an additional name or names on the ballot in place of the candidate who is deceased or withdraws. You will observe by reading this section that it only applies in those cases where a
candidate of a political party who has been nominated for a office dies or withdraws as a candidate at a time when it is too late under the general statutes for a candidate for the office involved to qualify and have his name printed on the official ballot for the general election.

You state that two candidates qualified to run for the board of supervisors for one of the magisterial districts in your county and that one of the candidates recently died. The person who was appointed to fill the unexpired term of the deceased supervisor has announced that he will run as a "write-in" candidate.

You have requested my advice as to whether or not the candidate who is running as a "Write-in" candidate would be entitled at this time to file and have his name placed upon the ballot.

In my opinion, § 24-234 is limited to those cases in which a candidate of a political party who has been nominated dies or withdraws. You state that no nominations were made for this office by the political party of either of the two candidates whose names are on the ballot—that is, the candidate who died and the other candidate who qualified.

Since the candidate who died was not a nominee for this office, I am of the opinion that § 24-234 does not apply and that there is no statutory way under which any person who desires to run for the office can now file and have his name placed upon the official ballot.

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ELECTIONS—Candidates—When notice of candidacy to be given.

HONORABLE J. FULTON AYRES
Clerk of Circuit Court of Accomack County

This is in reply to your letter of July 22, in which you state, in part, as follows:

"On Friday evening, July 19, at 11:15 P.M. a person presented to me at my home the necessary papers for filing a Notice of Candidacy for the November General Election and I was of the opinion that I could not accept the papers, acting under Section 17-41 of the Code of Virginia—in fine print 'Clerk must transact business during convenient hours, etc.' I marked the hour that the Notice and Petition of 50 qualified voters were left with me at my home. I did not refuse to accept the Notice but held it in abeyance, explaining to the person that it did not seem to me that it was equal opportunity for all if I took the Notice outside of office hours, the general public knowing them to be 9-5 on weekdays and 9-12 on Saturdays."

You request my advice as to whether or not this is in compliance with the provisions of § 24-131 of the Code which requires that notice of candidacy shall be given to the county clerk not later than ten days after the Tuesday after the second Monday in July, unless a second primary was held, at which time the notice may be given at a later date. It is my understanding that no second primary was held and, therefore, it was necessary for this notice to be given to the clerk on or before the end of July 19.

In my opinion, the notice of candidacy was given to the clerk within the
statutory time. The statute does not require that the notice be filed in the office
of the clerk during business hours, but merely that it be given to the clerk. There
is no doubt in this case that the clerk received the notice on July 19.
In a somewhat similar case, this office held the filing of certain notices of
candidacy with the State Board of Elections at 11:31 P.M. on the last day was
in sufficient time.
In my opinion, under the circumstances stated by you, you should certify this
person’s name to the Electoral Board as required by statute.

ELECTIONS—Capitation Taxes—Candidate for office must have paid taxes in
order to have name placed on ballot.

ELECTIONS—Candidates—Cannot have name placed on ballot unless capitation
tax paid.

HONORABLE ROGER C. SULLIVAN
City Treasurer of Alexandria

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

“The City of Alexandria will hold a Democratic Primary in April
and a General Election in June for members of City Council and Mayor.
The last day to pay the Capitation Tax in order to vote in these
elections was December 2, 1963, six months prior to the General
Election.
“On January 2, 1964 one of the City Councilmen called at this
office to pay his filing fee and have his petition checked. Mrs. Eliza-
beth Beall, a member of my staff who has charge of this type of work,
found that the 1963 state capitation tax had not been paid. After a
thorough check of our records an unpaid bill was found and the gentle-
man paid the same plus 8 cents penalty.
“I would appreciate your opinion as to whether there is any way
in which this man can be a candidate in the Elections.”

Section 24-369 of the Code provides that—

“The name of a candidate shall not be printed upon any official
ballot used at any primary unless such person is legally qualified to hold
the office for which he is a candidate, and unless he is eligible to vote
in the primary in which he seeks to be a candidate.”

Section 24-252 of the Code provides—

“At all elections except primary elections 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 Vir-
Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person." (Emphasis supplied.)

Due to the provisions of these statutes, the Electoral Board is not authorized to place the name of a person on the official primary ballot unless such person is eligible to vote in the primary, and the judges of election have no authority to certify the nomination of a person who receives votes as a write-in candidate for the nomination.

Under § 24-132 of the Code, the name of a person who is not qualified to vote in a general election is not entitled to have his name printed on the official ballot for such election. However, there is no statute that would prohibit voters from voting for such person by the write-in method as prescribed in § 24-252. A person elected by the write-in process may qualify for the office to which he has been elected if he is a qualified voter at the time he is sworn in.

ELECTIONS—Capitation Tax—Upon presentation of certificate or receipt for poll tax, treasurer may place name on poll tax list.

TREASURERS—Capitation Tax—Upon presentment of certificate or receipt for poll tax, treasurer may place name on poll tax list.

June 4, 1964

HONORABLE F. B. HUBER
Treasurer of Campbell County

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

"When persons present certificates or receipts evidencing poll tax payments in another locality, as provided by § 24-128 of the Code of Virginia, or when persons present certificates of residence filed in another locality, as provided in § 24-128.1 of the Code of Virginia, is there any obligation upon the treasurer to whom said certificates or receipts are presented to place the names of such persons on his lists described in § 24-120 of the Code of Virginia?"

A similar question relating to the poll tax list was considered by former Attorney General Abram P. Staples in an opinion dated May 5, 1939 (Report of Attorney General, 1938-1939, at p. 93), copy of which I am enclosing. The statute upon which Judge Staples based his opinion has not been amended so as to justify a different interpretation. Section 24-128.1 is the same as § 24-128, except that it relates to the residence certificates instead of poll tax payments. Sections 109 and 115 cited in Judge Staples' opinions are now §§ 24-120 and 24-128, respectively.

The certificates of poll tax payments and of residence to which you refer, no doubt in many instances, are issued and delivered to a voter subsequent to the six months deadline date and it is too late for the treasurer to put the names on the proper certified list. In that event, the voter can exhibit the certificate—either poll tax or residence—to the judges of election at the precinct to which he has transferred his registration. In those cases where either type of certificates is filed with the treasurer six months prior to the election, I concur in the opinion of Judge Staples as stated in the second paragraph thereof, which is to the effect
that a treasurer has the authority to place a name on the poll tax list (which, of course, would apply to the certificate of residence list), and that the statute contemplates that such action be taken by the treasurer.

ELECTIONS—Capitation Taxes—When to be paid.

July 19, 1963

HONORABLE PHILIP P. BURKS
Treasurer of Bedford County

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

"It is my understanding that, if a person became 21 years of age in 1962, but delays registering until 1963, such person is required to pay his state capitation tax for 1963 before registering in 1963. My information is that in the primary on July 9, 1963 a registrar did register a man in 1963 who was 21 years of age in 1962 when said person had not paid his 1963 capitation tax at the time he registered. On the day of the primary the person in question paid his 1963 capitation tax.

"Under the above facts please advise as follows:

"(1) Will above mentioned person be qualified to vote in the general election on November 5, 1963?

"(2) Was the person in question entitled to vote in the primary on July 9, 1963 by reason of the fact that his name appeared on the registrar's book, or was it the duty of the judges of the election to question the legality of the registration of said person due to the fact that the 1963 capitation tax had not been paid before the person was registered?"

With respect to question (1), the answer is in the affirmative. While it is true the registrar under Section 20 of the Constitution should have required this person to produce a receipt showing that he had paid his poll tax for 1963 in advance, nevertheless, the registrar did register this person and placed his name upon the registration books. He is not required under Section 21 of the Constitution to have paid the 1963 poll taxes six months prior to the election in order to vote in the November election of 1963. Section 21 of the Constitution requires a person to have paid the poll taxes assessed or assessable against him during the three years next preceding that in which he offers to vote. This person, of course, is not assessable for poll taxes for either 1960, 1961 or 1962 since he was not twenty-one years of age on January 1 of either of such years. Therefore, this person being duly registered is entitled to vote in the November election of 1963.

With respect to question (2), the judges of election were bound by the registration records. The registration books, of course, showed that this person was registered. Since this person was not assessable for poll tax for either of the three preceding years, he was entitled to vote in the primary.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—City Council—Write-in candidate receiving sufficient number of votes to place him first in contention may have his name printed on ballot for the run-off election.

ELECTIONS—Ballots—Run-off—May contain name of successful write-in-candidate.

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

June 11, 1964

This will acknowledge receipt of your letter of June 11, to which you attached a letter from Mr. Nicholas Daniels, Attorney at Law, Petersburg, Virginia, in which he submitted certain facts to present to this office and certain questions to be answered in connection with the recent councilmanic election in the city of Petersburg. It appears that at this election Mr. Lester I. Bowman received a write-in vote, which is permitted under § 24-252 of the Code of Virginia. By reason of this vote Mr. Bowman received a greater number of votes than the other candidates for council whose names had been printed upon the ballot. Under the charter of the city of Petersburg, it is provided that if no one candidate for the council shall receive a majority of all the votes cast then, in that event, the candidates receiving the highest number of votes, but not to exceed twice the number of vacancies to be filled in the election, shall have their names printed as candidates on a ballot at a run-off election, which election must be held on the second Tuesday following the first election. The questions presented are as follows:

"1. Under Section 2-2 of the City Charter, does a candidate who had his name written in on the first election, and who received a sufficient number of votes to place him first in contention to the positions sought, now have the right to have his name printed in on the ballot for the run-off elections? (See last paragraph of Section 2-2).

"2. If question number one is answered negatively, then can a candidate's name be written onto the run-off ballot and be elected for a position of office, provided this candidate receives a sufficient number of votes?"

The answer to question No. 1 is in the affirmative. There can be no question as to the meaning of the charter provision. The charter provision means simply that the persons who received the highest number of votes (but not a majority) in the initial election shall be the candidates in the run-off election with the proviso, of course, that the number of candidates shall not exceed twice the number of positions to be filled. Under the Virginia election laws a person who receives a write-in vote has the same standing as a person who has filed pursuant to the applicable Code provisions and, therefore, has been entitled to have his name printed on the ballot.

It is a fundamental principle that all election laws shall be liberally construed so as to permit the will of the people to prevail. There is nothing in the city charter that could in any way be construed to prevent the inclusion of Mr. Bowman's name on the official ballot along with the other candidates. Furthermore, the charter of the city of Petersburg provides that—

". . . The general laws of the Commonwealth relating to the conduct of elections, as far as pertinent, shall apply to the conduct of the general city elections . . ."
REPORT OF THE ATTORNEY GENERAL

In light of my answer to question No. 1, it is not necessary to comment upon question No. 2.

ELECTIONS—Commissioner of Revenue—How vacancy in Norton resulting from resignation filled.

COMMISSIONER OF REVENUE—City of Norton—Resignation—How vacancy filled.

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

March 16, 1964

This will acknowledge receipt of your letter of March 9, in which you state that—

"Mr. H. G. Dalton has resigned as Commissioner of Revenue of the City of Norton, effective March 1, 1964. We need to fill by appointment the vacancy in this office. We are first faced with this question: Should the appointment be made by the Council of the City of Norton or by the Judge of the Circuit Court of Wise County?"

You refer to Sections 3.4 and 3.5 of the City Charter (Chapter 565, Acts of 1954) relating to the filling of vacancies. These sections, in my opinion relate to the filling of a vacancy on the council. Certainly Section 3.4 of the Charter is clear on that point. Section 3.5 reads as follows:

"All other vacancies shall be filled within thirty days, for the unexpired term, by majority vote of the remaining members of the council."

The words "remaining members of the council" appearing in this section would seem to leave no doubt that those members remaining on the council shall fill a vacancy thereon, provided the remaining membership has not been reduced to "two or less members," in which case the Circuit Court of Wise County shall fill the three vacancies.

Since the provisions of the charter do not apply, the vacancy should be filled under the applicable general statutes.

Section 3.930 of the Charter provides for the election of a commissioner of the revenue. The next regular election under this provision will be in November, 1965.

Section 3.931 of the Charter provides as follows:

"The councilmen and all elective officers before entering upon the duties of their respective offices shall be sworn according to the laws of the Commonwealth of Virginia by any one authorized to administer oaths under the laws of this State. If any person elected or appointed to any office in said city shall neglect to take the oath of office required of him on or before the day on which he is to take office as provided by law or neglect to give bond as required of him, he shall be considered as having declined such office and the same may be declared vacant and the vacancy shall be filled as provided in this charter.”

(Emphasis supplied.)
I am not able to find any provision in the charter relating to the filling of a vacancy of this nature. As stated, Sections 3.4 and 3.5 do not apply.

In my opinion, the vacancy should be filled pursuant to the provisions of § 15-392 of the Code. The second sentence of this provision is applicable.

Section 24-136 provides that there shall be held throughout the State on 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. This section, as well as Section 3.4 of the Charter provides for a general election in June and, under the Charter, there will be a general election in June, 1964, to choose two members of the city council. Therefore, under §§ 15-392 and 24-137, the vacancy referred to should be filled in June, 1964. Candidates who desire to have their names on the ballot must file under § 24-131 sixty days before the election. I would suggest that the council pass a resolution directed to the Electoral Board notifying it of the vacancy and calling attention to the fact that in addition to holding an election on June 11th for council there will be an election to fill the unexpired term in the office of commissioner of the revenue.

In the meantime, the council may fill the vacancy and whoever is appointed by the council may hold office until the person elected on June 11th receives his certificate of election and qualifies. Such person may qualify and assume the duties of the office as soon as he receives his certificate of election.

Sections 15-91 and 15-92 are not applicable. These sections relate to the first election for city officers after the transition of a town to a city of the second class.

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ELECTIONS—Election Judge—Electoral board may select extra judges from lists furnished pursuant to § 24-195.

June 4, 1964

HONORABLE JAMES C. TURK
Member, Virginia State Senate

This is in reply to your letter of June 2, referring to my opinion to you on April 29, 1964, relating to the appointment of judges of election under § 24-195 of the Code.

You request my advice as follows:

"... Does the ruling of April 29, 1964 mean that the minority party is entitled to have the several judges of elections chosen from the single set of five nominees submitted under Section 24-195, or does the ruling intend to convey that for each set of judges of elections a separate set of five names would have to be submitted by the minority party?"

The statutes are silent with respect to this question. Sections 24-194.2 and 24-194.3 both provide that the qualifications of the extra set of judges shall be the same as those prescribed for judges required by law to be appointed for holding the election. It is clear from the language of § 24-195 that for each voting place the two major political parties are entitled to nominate five persons who are qualified voters and who are members of the political party making the nominations. I feel that an electoral board would be justified in selecting the extra judges from the lists furnished pursuant to § 24-195, but there is nothing to prevent an electoral board from requesting a second list in such cases, al-
though, in my opinion, this is not required under the language of the existing statutes.
I believe the answer to this question makes it unnecessary to comment in regard to your second question.

ELECTIONS—Election Judge—Must pay poll tax in time to vote for June election to qualify as judge of that election.

April 17, 1964

Honorable James C. Turk
Member, Virginia State Senate

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

"I would like to obtain an opinion from you concerning the qualifications for Judges of elections. The question I want answered is this: 'Would a person who did not pay his poll taxes in time to vote in the June councilmanic election, but has registered and paid his poll taxes and now qualifies to vote in the November election, qualify to be a judge of elections for the election coming up in June of this year?'"

Under § 24-193 of the Code, it is the duty of the electoral board to appoint "qualified voters" as judges of the election. This same requirement is contained in § 24-195 pertaining to persons nominated by the two major political parties. Also, whenever it is necessary to select one or more judges under § 24-196 or § 24-197, the same qualification for service as judge of election applies.
Any person who has failed to pay his poll taxes in time to vote for the June election, in my opinion, would not be a qualified voter within the meaning of this section, and would not be eligible for service as judge in the June election.

ELECTIONS—Electoral Boards—Duty under § 24-195 to appoint qualified voters to serve in a precinct.

April 29, 1964

Honorable James C. Turk
Member, Virginia State Senate

This will acknowledge receipt of your letter of April 24, in which you present the following questions:

"Question One: Where the duly authorized representatives of the minority political party have submitted the names of five qualified voters to serve in a precinct as prescribed in Section 24-195 of the Code of Virginia, and the Electoral Board designates two or more sets of Judges and Clerks for the precinct in order to handle a large vote, does the mandatory clause of Section 24-195 apply to the second and third sets of Judges as well as to the first set.
"Question Two: Where the authorities of the minority political party have submitted the names of five qualified voters for a precinct as
prescribed in Section 24-195 of the Code, are such persons disqualified for service in the designated precinct if they do not live in the precinct for which they have been nominated by the party authorities.

"Question Three: Where the authorities of the minority political party have submitted the names of five qualified voters for a precinct as prescribed in Section 24-195 of the Code, does the Electoral Board have the authority to go behind the minority party nominations and question or cross-examine the nominees concerning their party affiliation."

The answer to your Question One is in the affirmative. Section 24-195, in my opinion, is a mandatory provision with respect to an appointment of judges of election. Under this section the political parties must submit their nominations to the electoral board at least ten days prior to the time prescribed by law for the appointment of judges of election. Judges of election (§ 24-193) are to be appointed at the regular meeting in the month of May of each year.

The answer to your Question Two is in the negative. In this connection, I enclose herewith copy of an opinion rendered by the late Abram P. Staples while he was Attorney General, which relates to this point. This office has consistently adhered to the opinion of Mr. Staples. Of course, the persons appointed as judges of election must be qualified voters in the county or city in which they are appointed, but not necessarily in the precinct.

The answer to your Question Three has never before been considered by this office; however, I can find nothing in the statute which would authorize the electoral board to question the party affiliation of any person who is nominated by either political party under § 24-195.

I also enclose an opinion written by former Attorney General Staples with respect to two sets of election officials at one precinct. The two opinions which are enclosed are published in the Report of the Attorney General (1946-47), at pp. 70 and 71, respectively.

The power of electoral boards to appoint two sets of election officials in a precinct is limited by § 24-194.2. Unless a county or city comes within one of the population brackets set forth in § 24-194.2, the electoral board has no authority to appoint an extra set of officials in any precinct.

ELECTIONS—Electoral Boards—Not required to furnish to political parties names and addresses of election judges.

Honorable Joseph T. Fitzpatrick
Secretary, Electoral Board of Norfolk

May 26, 1964

In reply to your letter of May 22, in which you request my advice as to whether an electoral board is required to furnish the proper officials of the two major political parties with the names and addresses of judges of election appointed in accordance with §§ 24-30 and 24-195 of the Code, it is my opinion that there is no statutory duty upon an electoral board to furnish this information, subject, however, to the provisions of § 24-34 of the Code, wherein the secretary of the electoral board is required to keep a complete and accurate record of such appointments, which record "shall be open to the inspection of any one who desires to examine the same at anytime."
ELECTIONS—Federal—Certificate of Registration—When required.

March 17, 1964

HONORABLE R. CROCKETT GWYN, JR.
Member, House of Delegates

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

"There seems to be some confusion among the voters and the Electoral Board of Smyth County as to the filing of the certificate of residence in order to vote in the Congressional election to be held this Fall.

"Will you please advise me if the certificate is necessary to be filed by a voter when the voter is qualified to vote with the exception of paying his poll tax six months prior to the election, in other words, he is duly qualified to vote only he does not pay his poll tax; and

"A young voter becoming of age since January 1, 1963 and does not want to pay a poll tax, does this person have to file a certificate of residence in order to vote; also

"A person over 21 years of age who has never registered or paid any poll tax or voted, does this person have to file a certificate of residency six months prior to the election in order to vote in the Congressional election this Fall."

I assume your first question relates to a person who is registered under § 24-67 of the Code, but has decided to discontinue the payment of poll taxes. If this is correct, such person must file the certificate six months prior to the November election in order to be able to vote in elections for President, U. S. Senator and Member of Congress. Such person would not be entitled to vote in State and local elections.

Your question (2), I assume, relates to a person who became 21 in 1963 and was registered without the payment of the poll tax. If such a person desires to vote in federal elections only in 1964, he will have to file the certificate six months prior to the November election.

The answer to your third question is in the negative. The certificate is not required for elections held during the year in which a person registers. However, the certificate will be required for all succeeding years in which such person wishes to vote.

ELECTIONS—General Registrars—Boards of supervisors not required to biennially adopt a resolution to create general registrars as first resolution continues until action taken under § 24-118.9.

April 30, 1964

HONORABLE WILLIAM F. WATKINS, JR.
Commonwealth's Attorney of Prince Edward County

This will acknowledge receipt of your letter of April 29, which reads as follows:

"A question has been raised by the Secretary of the Electoral Board of Prince Edward County and the Clerk of the Circuit Court as to the appointment of general registrars under provisions of Section 24-118.1, which reads in part as follows:

"The governing body of any county may in the month of May of any year and biennially thereafter provide by resolution for the creation
of the office of general registrar of the county. Upon the receipt of a certified copy of the resolution of the governing body requesting the appointment of a general registrar by the county electoral board, the electoral board shall within 30 days thereafter appoint one general registrar.

"The question raised is whether, once the board of supervisors passes a resolution creating the office of general registrar and no abolition of said office is made as provided by Section 24-118.9, it is necessary for the board of supervisors to adopt a resolution every two years in May establishing the office of general registrar."

In my opinion, § 24-118.1 and § 24-118.9 must both be considered. Section 24-118.9 was not enacted until 1952, as shown by Chapter 228, Acts of Assembly (1952). Section 24-118.1 was enacted in 1950, as shown by Chapter 470, Acts of Assembly (1950). There was a conflict between Section 1 of Chapter 228, Acts of 1952, and Section 1 of Chapter 470, Acts of 1950, inasmuch as the latter act provided for the adoption of the resolution in the month of May and the appointment of a general registrar and the 1952 act provided for the adoption of such resolution in the month of March and the appointment of a general registrar thirty days after the board of supervisors has passed the resolution.

In 1962, by Chapter 475, Acts of Assembly (1962), the statutes with respect to general registrars were amended and reenacted and in that act some of the sections were repealed, but § 24-118.9 was preserved. There is still an inconsistency between §§ 24-118.1 and 24-118.9. These two sections, as I have stated, must be considered together and, in my opinion, inasmuch as § 24-118.9 was a subsequent expression by the General Assembly to the enactment of § 24-118.1, it must be concluded that the General Assembly has provided that the general registrar appointed under the provisions of § 24-118.1 will continue in that capacity until the resolution provided for in § 24-118.9 has been adopted.

Accordingly, in my opinion, it is not necessary for the governing body of a county to biennially adopt a resolution for the creation of the general registrar of a county but that the first resolution continues until action is taken by the board under § 24-118.9.

ELECTIONS—Recount—Not provided for in case of justice of the peace.

JUSTICE OF PEACE—Election Recount—Not provided for.

November 13, 1963

Honorable Kenneth I. Devore
Member, House of Delegates

This will acknowledge receipt of your letter of November 11, in which you request my advice as to whether or not there is any statute providing for a recount in an election for the office of justice of the peace.

Section 24-277.2, which provides that a recount may be had for certain offices under certain conditions, does not apply to district officers.

The procedure for an inquiry into election returns pertaining to district officers is contained in §§ 24-430 through 24-439 of the Code.
ELECTIONS—Registration—Certificate—Disposition by treasurer.

TREASURERS—Registration Certificates—How disposed of.

HONORABLE F. B. HUBER
Treasurer of Campbell County

March 17, 1964

This will acknowledge receipt of your letter of March 13, which reads as follows:

"Section 24-17.2, paragraph (b) provides that any person wishing to offer proof of continuing residence '... shall file with the treasurer of his county or city not earlier than the first of October of the year next preceding that in which he offers to vote and not later than six months prior to the election, a certificate ....'

"Does this mean that treasurers should refuse to accept these certificates between the expiration of the six months prior to the election and October 1?

"I also foresee that registrars may accumulate certificates left with them which were properly filled out within the prescribed time but may be sent by the registrar so as to reach the treasurer after the expiration of a date six months prior to the election. How should treasurers treat such certificates?"

There is nothing in the statute that prevents a treasurer from accepting these certificates during the period between the deadline date in May and the first of October. However, the treasurer cannot place such person's name on the certified list provided for in § 24-120. The treasurer must certify that the persons whose names are shown on such list have filed a certificate as required by § 24-17.2 "not earlier than October first of the preceding year and not later than the ....... day of May (that deadline date)."

Certificates that are filed between the dates in question—that is, between the deadline date in May and October first,—should, in my opinion, be marked so as to show the date of filing and preserved, at least, until the time has elapsed when certificates will no longer be a basis for qualification to vote.

ELECTIONS—Registration—Conditions under which registration remains permanent.

HONORABLE M. CALDWELL BUTLER
Member, House of Delegates

May 25, 1964

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

"Certain of my friends have neglected to file a certificate of residency as required by the recent legislation and have also failed to pay their poll taxes, although they were previously registered.

"I had written Mr. Davis and asked him if it were possible for these people to register to vote for the Federal election under the separate registration requirements with which I am sure you are familiar, and copy of his letter is enclosed to you herewith."
"I assume that he has consulted with your office in this, but I would appreciate hearing from you as to what specific legislation, if any, would prevent persons from registering under both sets of requirements."

The letter from Honorable Levin Nock Davis, copy of which you sent to me, is as follows:

"In reply to your letter of May 15, 1964, you are advised that once a person registers to vote IN ALL ELECTIONS in Virginia the REGISTRATION IS PERMANENT and such person remains registered in that category as long as he continues to be a voter in the State of Virginia. If he does not desire to pay the poll tax, he may file the certificate of residence within the required time and vote in FEDERAL ELECTIONS ONLY.

I concur in the statement made by Mr. Davis. Registration under Section 21 of the State Constitution and the implementing statutes is permanent. Unless a person who has been registered moves out of the State and qualifies to vote in another jurisdiction, thus losing his status as a registered voter in Virginia, he may not be required to register again in this State, unless his registration has been purged, in which event he may again apply for registration. If the person who has moved out of the State returns to this State and again establishes his residence for the time required by the Constitution, he is, of course, entitled to register as a new resident of the State.

Virginia has no statute which requires or permits the re-registration of voters. A proposed amendment to the Constitution to require annual registration was submitted to a referendum of the people at the November election in 1949 and was rejected. See, Acts of Assembly (1948), Chapter 525, p. 1062.

Under the provisions of Chapter 2, Acts of General Assembly, Extra Session (1963), any person who has previously registered under the provisions of Section 20 of the State Constitution and § 24-67 of the Code may qualify to vote for the officers mentioned in the 24th Amendment to the Federal Constitution either by making timely payment of his poll tax or timely filing of the certificate required by § 24-17.2 of that chapter. There is no statute under which a person who has previously registered pursuant to Section 20 of the Constitution and § 24-67 of the Code can be permitted to register again and thus qualify to vote in federal elections only.

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ELECTIONS—Registration—Naturalized alien may register if residence requirements met.

September 30, 1963

Honorable J. Phil Bennington
Clerk, Circuit Court of Grayson County

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

"Section 24-17 of the Code of Virginia, pertaining to QUALIFICATION OF VOTERS, states 'Every Citizen of the United States, twenty one years of age, who has been a resident of the State one year... Will you please advise whether or not a naturalized alien under the laws of the United States could be a resident of this State prior to his becoming a citizen for the purpose of this section, or would it be necessary for a naturalized alien after becoming a citizen to reside in the State one year prior to the election?"
There is no requirement in Section 18 of the State Constitution as to the length of time that a person must have been a citizen of the United States in order to be qualified to vote. An alien may be a resident of this State prior to the date he is naturalized. If he has been a resident of this State for one year, of the county or city six months and the precinct thirty days next preceding the election in which he offers to vote, the fact that he has not been a naturalized citizen for one year does not affect his eligibility for registration and voting.

ELECTIONS—Registration—Results where person registers under §§ 24-67.1 and 24-67 of the Code.

Miss Waneta M. Buckley
General Registrar for Fairfax County

This will acknowledge receipt of your letter of March 4, in which you make inquiry with respect to a situation where a person has been registered under § 24-67.1 of the Code—that is, without the payment of any poll tax—and subsequently qualifies for registration and actually registers under § 24-67 of the Code. You present a series of questions as follows:

"1. May a person who registers under § 24-67.1 for Federal elections only, re-register in a future year under § 24-67, provided his required poll taxes are paid, and thereby become eligible to vote in state and local elections? . . . YES

"A. If the answer to 1. is yes, what effect would this re-registration have on the previous registration? [See comments which follow]

"1. Should the registration for Federal elections only become void upon re-registration for all elections, could the records of the earlier registration be removed from the registration book and other files and filed in a specific file, set up for this purpose? . . . YES

"2. If the registration for Federal elections only would not become void upon re-registration for all elections, must we carry such persons on our records in both the registration book for Federal elections and the registration book for all elections? . . . NO

"a. Should such a ‘dually-registered’ person request a transfer to another county, would he be issued two transfers? If not, on which form should he be transferred? Also, please outline the disposition of his records after the transfer has been issued. [Answer to first question . . . NO

"b. If such a voter should move to another precinct in the county, would both of his registration records be transferred to a new precinct book? . . . NO

"(1) Would every change affecting such a voter—name—change, address—change, precinct change due to boundary line change, etc.—have to be made on both records? . . . NO

"c. If the name of a ‘dually-registered’ voter should be removed, for whatever reason, must the records of his two registrations be filed separately . . . NO

"d. Should such a voter, in a future Federal election year, file a certificate of residence in lieu of paying his poll taxes, in which registration book would the Judges of election check to see if he was registered? Also, which record would be marked to indicate that he had voted? [See comments which follow]
"II. We have been advised by the State Board of Elections that voters who have registered under § 24-67, prior to December 1, 1963, cannot re-register under § 24-67.1.

"A. Would this hold true even if the voter asked to have his previous registration cancelled and presented a written request for such cancellation? . . . YES

"1. If the answer to A. is yes would it be the responsibility of the General Registrar to deny such a request for cancellation? . . . YES

"B. If a person who registered under Section 24-67, some years ago, and who has not paid any poll taxes for a number of years, should re-register under Section 24-67.1, without advising the Registrar of his earlier registration, would the re-registration be void? (Such persons would not necessarily intend to deceive the Registrar. We find that many people simply forget that they have ever registered.) [See comments which follow]

"1. If the answer to B. is yes, would it be the responsibility of the General Registrar to notify such a person that his registration under Section 24-67.1 is void because of his previous registration?"

I have indicated with either a "yes" or "no" the answer to most of your questions.

With respect to question IA d., it is obvious that unless the registrar already knows that the person filing the certificate has registered under § 24-67.1 and subsequently has registered under § 24-67 you would have to check the books in order to determine whether such person has registered under both methods. If such person has been registered under both methods, then his entitlement to vote is based on § 24-67; if he has not been registered under both methods but only under § 24-67.1, then his entitlement to vote is under that section only.

Under the law and instructions which you have received, you are required to keep separate registration books showing who has been registered under both methods and as indicated in my answer to your previous questions, whenever a person has registered under § 24-67 his registration under § 24-67.1 becomes useless and of no benefit to the person.

The thing to bear in mind is that under the election laws, as amended, whenever any person has been registered under § 24-67 such person remains registered in that category as long as he continues to be a voter in the State of Virginia and his registration under § 24-67.1, if any, should be ignored.

Specifically with respect to the second question in paragraph d., the registration record made under § 24-67 is the one that should be marked to indicate that the person has voted.

Whenever a person who has registered under § 24-67.1—that is, without the payment of poll tax—subsequently pays his poll taxes and qualifies for registration under § 24-67 and has so registered, then a notation should be made on the registration book or card where the person formerly registered to the effect that this person has re-registered under § 24-67 and that thereafter his entitlement to vote, insofar as registration is concerned, will be based solely upon his most recent registration.

Commenting upon your questions under II—your questions A and A-1—if any person has registered prior to December 1, 1963, or subsequent to December 1, 1963, under § 24-67 that person is a registered voter so long as he continues to maintain his domicile in the State of Virginia and he is not eligible to be registered under § 24-67.1 due to the fact that he can already vote in any election held in the State provided he complies with other provisions of the law. If such a voter, either in writing or verbally, should request his previous registration under § 24-67 to be cancelled, such request should be denied.

With respect to II-B, if a person has been registered under § 24-67 at any time and his name has not been removed from the registration books under the
purging method or by transfer, such person, of course, is entitled to transfer at
this time if he has moved from the place where he originally registered. Under the
Constitution and § 24-68 of the Code, every person who applies to register under
either section is required to state therein whether he has ever voted and, if so,
the State, county and precinct in which he last voted. If the persons states that he
last voted in Virginia in another county or city you should still take his applica-
tion and determine whether or not he is still registered in the previous county
and, if so, get his transfer. His application may not be processed and his name
may not be placed on the registration book under § 24-67.1 if he is at that time
a registered voter anywhere in this State. Of course, if he was registered in
another State you have no problem.

In my opinion, a person’s registration under § 24-67.1 is a nullity if he has
overlooked the fact that he has previously registered. If you discover that such
person has intentionally or nonintentionally stated that he has never voted in this
State, you should not place his name on the registration book maintained for
persons registering under § 24-67.1, but he should be required to get a transfer
and, upon its delivery to you, his name would be placed on the registration book
for persons registered under § 24-67. Such person would not be entitled to vote
unless he filed the certificate in the time prescribed by § 24-17.2.

With respect to B-1, the last question in your letter, I assume that no answer
is required in view of my answer to the other questions.

ELECTIONS—Registration Books—Procedure followed in changing where boun-
dary lines of wards changed.

April 16, 1964

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of April 16, in which you enclosed a letter from
Mr. S. A. Wyatt, Secretary of the Electoral Board of Petersburg.

According to Mr. Wyatt’s letter, the council of the city of Petersburg, effective
January 1, 1964, changed the boundaries of the wards of the city. I have not
examined the city charter, but I assume this action of the city council was taken
pursuant to § 15-396 of the Code. Section 15-397 contains the procedure for re-
arrangement of the registration books whenever the boundary lines of the wards
have been changed. You will note under this section it is the duty of the judge of
the corporation or hustings courts of the city to appoint two commissioners whose
duty shall be to rearrange and revise the registration books of the city so as to
place the name of each registered voter on the proper precinct and ward registra-
tion books.

Section 24-44, to which Mr. Wyatt referred, is not applicable to this situation.
If the city of Petersburg has a general registrar rather than separate precinct
registrars, then under the last sentence of § 15-397 the general registrar shall be
appointed by the judge for the purpose of performing the duties that would have
been performed by the two commissioners. Of course, in a city which has a
general registrar the two commissioners would not be appointed.

It occurs to me that there is ample time between now and the June election to
revise and correct the registration books under § 15-397 of the Code.
ELECTIONS—Residence—For purpose of registering and voting, the residence of a married woman shall not be controlled by the residence of her husband.

April 2, 1964

Honorable Levin Nock Davis
Secretary, State Board of Elections

This is in reply to your letter of March 31, in which you enclosed a letter from Mrs. Robert Malcolm, wife of a member of the armed forces. It is stated that Mr. Malcolm is a resident of the State of Virginia and is entitled to vote in Highland County. Mrs. Malcolm has never resided in Virginia and is now living in the State of New Jersey. The question presented is whether or not, due to the fact that Mrs. Malcolm is married to a resident of Virginia, she can register and vote in this State by reason of this fact and not because of her personal residence in this State. You refer to two opinions of this office, one dated May 7, 1951 and published in Report of Attorney General (1950-1951), at p. 119, and another dated August 3, 1955, published in Report of Attorney General (1955-1956), at p. 73, and call attention to the fact that there is an apparent conflict between these two opinions. The opinion of May 7, 1951 is, in my judgment, a correct interpretation of the law. To the extent that the opinion of August 3, 1955 is in conflict therewith, I am in disagreement.

Section 24-21 of the Code provides as follows:

“For the purpose of registering and voting, the residence of a married woman shall not be controlled by the residence or domicile of her husband.”

Under this section a married woman may establish and maintain her residence for registering and voting at a different place from that at which the husband has his residence and votes. There is nothing in this section or any other section of the Code which would indicate that a person who is a nonresident of Virginia may by intention become a resident of Virginia for the purpose of voting without first actually and physically being in this State. This, of course, may be done by mere temporary physical presence in Virginia with the bona fide intention of establishing a residence in Virginia. After a period of one year has elapsed from the date a married woman has established her residence in Virginia, with a bona fide intention of making a permanent residence in this State, she will then be in position to register and vote, assuming she has complied with the other voting requirements.

ELECTIONS—Residence—How voter qualification to be determined.

July 19, 1963

Honorable H. P. Dunnington
Treasurer of Caroline County

This will acknowledge receipt of your letter of July 18, in which you present the following questions:

“1. If a person moved from the Town of Bowling Green and/or Town of Port Royal and requested that the Commissioner of the Revenue of Caroline County assess him with capitation taxes in the Town of Bowling Green and/or Town of Port Royal, is it incumbent upon the Treasurer to list this person’s name on the voting list of the Town of Bowling Green and/or Town of Port Royal?

“2. Will your answer to question number one be the same whether
or not this person owned any real or personal property in the Town of Bowling Green and/or Town of Port Royal?

"3. Has the Commissioner of the Revenue a right to assess a person not living in the Town of Bowling Green and/or the Town of Port Royal with capitation taxes in the Town of Bowling Green and/or Town of Port Royal even though this person requests that he do so?

"4. If the voting list has been prepared and certified by the Treasurer of Caroline County and this person's name appears on the voting list in the Town of Bowling Green and/or the Town of Port Royal, but he does not reside in the Town of Bowling Green and/or the town of Port Royal does he have a right to vote in the Town of Bowling Green and/or the Town of Port Royal?"

These questions will be answered in the order presented.

With respect to question one, it is not necessary for a person's name to appear upon a special list showing the names of the persons who reside in the town located in a magisterial district in order for such person to be qualified to vote in the town. Any person who is registered in the town of Bowling Green or the town of Port Royal is entitled to vote in the town election of such town if his name appears upon the poll tax list issued by the treasurer under § 24-120 of the Code. It is true that under § 24-127 the county treasurer is required to furnish incorporated towns with a list of resident in such towns who have paid the State poll tax provided by law six months prior to the second Tuesday in June, but this office has ruled on several occasions that if the name of a person residing in a town does not appear on the list prepared in accordance with § 24-127, he may not be deprived of voting, if otherwise qualified, if his name appears on the list required by § 24-120.

With respect to question two, the answer is yes. Whether or not this person owns any real or personal property in the town has no bearing upon his qualification to vote in the town.

With respect to question three, whether or not a person should be shown on the books of the commissioner of the revenue as a resident of a town is dependent upon whether or not this person maintains his voting residence in such town. This is a matter usually of the intent of the person. A person may have at one time physically resided in the town of Bowling Green and may have moved to the town of Port Royal with the intention of ultimately returning to Bowling Green. Persons in this class frequently desire to retain their voting residence in the place from which they moved and to which they plan to ultimately return. This they may do.

With respect to question four, I believe that my comments with respect to question three cover the point raised in this question. Specifically, if a person is registered and has established and maintained his voting residence in the town of Bowling Green and his poll taxes for the requisite years have been timely paid and his name appears upon the certified list issued by the county treasurer under §24-120, such person may not be denied the right to vote because the poll tax list may show that he is a resident of Port Royal.

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ELECTIONS—Residence—When boundaries of district are altered.

HONORABLE MONROE W. WOODRUFF
General Registrar for Greensville County

March 20, 1964

This is in reply to your letter of March 18, in which you present the following question:
"On January 1, 1964 part of Belfield District in this County was divided into a new district known as Nottoway. I have had a number of people that were formerly in Belfield District to advise me that it was not their desire to have their voting privileges changed to the new district. Do I have a right to make these changes regardless of their wishes. Your attention is directed to 24-85 of the Virginia State Election Laws which state that I only have a right to change a person from one voting district to another when he makes a written request for same. Also, 24-90 of the election laws pertaining to the duty of Registrars when one district is formed from another district."

Under the provisions of § 24-90 of the Code, when a precinct is divided into two precincts it is necessary that the voters be registered upon the books of the precinct in which they reside. As I construe this section, it is a mandatory duty upon the registrar to transfer the names of those voters living in the new precinct to the book established for that precinct. The provisions of § 24-85 are not applicable except in cases where the voter moves his place of residence. Under the circumstances stated in your letter, the voter does not move but continues to live at the same place. It will be your duty to strike from your present registration books the names of all those voters who live in the territory embraced in the new district, and place those names upon the appropriate book.

In this connection I enclose herewith copies of two prior opinions of this office. They are as follows:


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ELECTIONS—Residence—When voter moves from one precinct to another.

Mr. A. P. Coleman
Secretary, Electoral Board of Campbell County

July 12, 1963

This will acknowledge receipt of your letter of July 10, which reads as follows:

"I will appreciate it very much if you will give me your opinion on the following:
"A voter is registered in one precinct in the County, but subsequent to his registration he moved to another precinct and has lived there for a number of years. He has not transferred from his original precinct. He does not have any residence in the precinct in which he is now registered.
"It is my understanding that a voter must be an actual resident of the precinct at least thirty days prior to date of election, and that under Section 24-253 and Section 24-254, an election judge who knows this and challenges him should require him to swear that he has been an actual resident of the precinct for a least thirty days.
"Please let me know if the voter is eligible to vote in the first precinct in which he is registered but does not now reside and has not for several years."
Under § 24-85 of the Code any person who has changed his residence from one precinct to another in the same county may obtain a transfer certificate so as to have his name placed upon the registration books of the precinct in the election district to which he has moved and to have his name erased from the registration books in the election district where he formerly resided. This office has throughout the years liberally construed the provisions of the Code with respect to residence upon the theory that the right of suffrage should be protected and encouraged rather than discouraged. This office has held on many occasions that whether or not a person has changed his voting residence is a matter of intent. If a person has moved from one precinct to another with the *bona fide* intention of returning to the place from which he moved at some future time, he may, under the opinions of this office and the decisions of the Supreme Court of Virginia, retain his voting residence at the place at which he formerly resided.

With specific reference to §§ 24-253 and 24-254 of the Code, if a person is challenged under § 24-253, it is the duty of the judges of election to require the voter to take the oath set forth in § 24-254. If the person takes the oath the statute provides that his vote shall be received unless the judges be satisfied from record or other legal evidence adduced before them or from their own knowledge that he is not a qualified voter. In a case such as is under consideration here, if a voter subscribes to the oath I would think that his vote should be accepted because the question involved depends solely upon the intention of the party and he is, of course, in the best position to know what his intention may be.

**EMINENT DOMAIN—Condemnation Proceedings—Action at law when brought by a county or town.**

**CIVIL PROCEDURE—Eminent Domain—Condemnation proceedings instituted as action at law when brought by county or town.**

HONORABLE LEE N. WHITACRE
Clerk, Frederick County Circuit Court

August 28, 1963

This is in reply to your letter of August 16, 1963 in which you posed the following question:

"When a town or a county desires to institute condemnation proceedings for a public improvement, is the proceeding to be instituted on the law side or in Chancery?"

Section 15-667, Code of Virginia (1950), as amended, provides in part that:

"Proceedings for the acquisition of property by counties, cities and towns in all cases in which they now have or may hereafter be given the right of eminent domain may be instituted and conducted in the name of such county, city or town and the procedure shall be mutatis mutandis the same as is prescribed in §§ 33-59 to 33-67 for condemnation proceedings by the State Highway Commission in the construction, reconstruction, alteration, maintenance and repair of the public highways of the State."

Since the above quoted statute authorizes counties and towns to employ the same procedure in eminent domain proceedings as that employed by the State
Highway Commission pursuant to §§ 33-59 to 33-67, I am of the opinion that counties and towns should institute their condemnation proceedings on the same side of the court as the State Highway Commission.

In answer to a recent inquiry as to whether eminent domain proceedings by the State Highway Commission were proceedings in equity or proceedings at law, I advised the Honorable George F. Abbitt, Jr. by letter dated July 24, 1963 that I was of the opinion that such proceedings were now to be considered as proceedings at law. A copy of this opinion is enclosed herewith for your information.

In view of the foregoing, I am of the opinion that condemnation proceedings brought by a county or town should be instituted on the law side of the court.

EMINENT DOMAIN—Procedure—To be treated as action at law—Where orders recorded.

CIVIL PROCEDURE—Eminent Domain—Considered as action at law.

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

July 24, 1963

This is in reply to your letter of May 20, 1963 in which you raise the following questions:

"(1) Is a condemnation proceeding a proceeding in equity or a proceeding at law?

"(2) The case of Brown v. May, 202 Va. 300 at page 309 and 310 declares that such a proceeding is one at law. Virginia Code Section 17-28, pocket supplement to Volume Four, page 13 and 14 thereof declares that all proceedings including condemnation of property shall be recorded in the Chancery Order Book of the Court. In view of this limited language, does this section change the law and if so in what way?"

I am of the opinion that the answer to your first question is that condemnation proceedings are now to be considered as proceedings at law.

The Supreme Court of Appeals of Virginia had occasion to pass upon this question in the cases of Dove v. May, 201 Va. 761 and Brown v. May 202 Va. 300. The case of Dove v. May, supra, was handed down on April 25, 1960. The case of Brown v. May, supra, was handed down on November 28, 1960. The effective date of § 33-65, Code of Virginia (1950), as amended, was June 27, 1960 and the effective date of the amendment to § 17-28 of the Code was June 29, 1962. In the Brown case, supra, the Court's attention was directed to the provisions of § 33-65, as amended, which required that the costs of eminent domain proceedings should be taxed as any other suit in equity. In view of the ruling of the court in the Brown case, supra, it is my conclusion that proceedings in condemnation are on the law side of the court.

In regard to your second question, I am of the opinion that the amendment to § 17-28 which was enacted by the General Assembly in 1962 did reaffirm the direction of the General Assembly that final orders in condemnation proceedings be recorded in the Chancery Order Book. The amendment changed the saving time from June 19, 1936 to January 1, 1962 for those orders which had been recorded in either the Common Law Order Book or the Chancery Order Book. I do not feel that this amendment had the effect of changing the nature of con-
demnation proceedings or of overruling the case of Brown v. May, supra.

It therefore appears that the proceedings in condemnation are on the law side of the court. The costs to be paid are those fixed by statute and taxed as any other suit in equity. See the Report of the Attorney General, (1960-1961), p. 155. The final orders in such proceedings should be recorded in the Chancery Order Book.

FEES—Constable’s Commission—Should be deducted from amount collected under Chapter 19 of Title 8.

CIVIL PROCEDURE—Fees—Constable to deduct from amount collected under Chapter 19 of Title 8.

HONORABLE T. F. TUCKER
Clerk of Corporation Court of Danville

December 5, 1963

This is in reply to your letter of December 4, in which you present the following question:

"Is a Constable’s commission for receiving payment under an execution or other process in money, or selling goods, added to the amount of the judgment and costs, or is the Constable required to deduct his commission from the money collected by him? Section 14-120 is not clear in this regard."

Section 8-429 of the Code expressly provides that an officer who receives money under Chapter 19 of Title 8 of the Code shall deduct his commission from the amount collected. This section, you will note, provides for a straight commission of 5%, which is in conflict with § 14-120. In this connection, I enclose copy of an opinion dated July 5, 1962, to the Sheriff of Accomack County, which discusses in more detail the conflict between § 14-120 and § 8-429 with respect to the amount of commission, and held that the commission should be calculated under § 14-120.

Therefore, specifically answering your question, it is my opinion that the constable should make a deduction of his commissions from the amount collected in accordance with the provisions of § 8-429.

FIRE LAWS—Division of Forestry—Authority limited under § 10-88 to preparation of plans to protect forests.

HONORABLE GEORGE W. DEAN
State Forester

January 8, 1964

This is in reply to your letter of December 26, 1963, in which you enclosed a draft of a proposed agreement between the Division of Forestry and landowners of the State relating to certain services to be provided by the Division of Forestry in an effort to encourage growth of pine timber. In connection with this proposal you have requested my opinion on two questions which read as follows:
"1. May the Division of Forestry legally render to forest landowners the service of locating the fire lines and using Division tractor-fire plows to plow these lines on standard unit cost basis payable by the landowners?

"2. Is the Division legally liable for damage incurred to adjoining timber through a civil action or for fire suppression costs in case of an escaped fire in a case where the Division locates and plows the fire control lines preparatory to burning an area and has a representative present to advise the landowner at the time of burning, but the Division representative does not strike the match and set the initial fire?"

The authority of the State Forestry with respect to co-operation with landowners for the protection of forest lands is codified as § 10-88 of the Code of Virginia. That section reads as follows:

"The State Forester shall, whenever he may be directed so to do by the Director, co-operate with counties, municipalities, corporations and individuals in preparing plans for the protection, management and replacement of trees, wood lots and timber tracts under an agreement that the parties obtaining such assistance shall pay the field and traveling expenses of the person employed in preparing such plans."

You will note that the foregoing authority is limited to the preparation of plans for the protection, etc., of trees, wood lots and timber tracts. I am of the opinion that the work contemplated by the Division of Forestry under the proposed agreement goes beyond the planning contemplated in § 10-88 of the Code. Accordingly, your first inquiry is answered in the negative thereby making your second inquiry meet.

FIRE LAWS—Forest Closure Law—Does not apply to land owned by Federal Government.

September 13, 1963

HONORABLE GEORGE W. DEAN
State Forester

This will acknowledge your letter of September 12, 1963, in which you request my opinion as to "whether the so-called 'forest closure law,' § 27-54.1, is effective in Virginia on Federal-owned forest land, such as that owned in fee simple by the U.S. Forest Service and the U. S. Park Service."

Section 27-54.1 of the Code of Virginia (1950), as amended, reads, in part, as follows:

"It shall be unlawful, when the forest lands, brush lands and fields in this State or any part thereof have become so dry or parched as to create an extraordinary fire hazard endangering lives and property, for any person, except the owner, tenant or owner's authorized agent, persons regularly engaged in cutting, processing, or moving forest products, or person on official duty, to enter or travel in any state, county, municipal or private forest lands, brush lands, fields or idle or abandoned lands in the area so affected except on public highways or well defined private roads. * * * .” (Emphasis added)
Violations of the foregoing section are made misdemeanors under the provisions of § 27-54.4 of the Code.

Criminal statutes are strictly construed, and, in my opinion, land owned in fee simple by the Federal government would not be construed as "state, county, municipal or private forest lands" within the meaning of § 27-54.1 of the Code.

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FIRE LAWS—Forest Warden—Appointment to be made by Governor.

BOARD OF SUPERVISORS—Forest Warden—No authority in board to appoint Chief Forest Warden.

July 18, 1963

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

This is in reply to your letter of July 14, 1963, in which you request my opinion on questions raised by the Board of Supervisors of Pittsylvania County relative to the appointment of the Chief Forest Warden for the county. Your questions read as follows:

"(1) Does the Board of Supervisors have any authority in the appointment of the Chief Forest Warden under the laws of this state?

"(2) If a Chief Forest Warden is appointed by the State Forester, does the Board of Supervisors have a right to discontinue paying their share of his salary, etc.?

"(3) If the Board of Supervisors cuts off all funds of the office of Chief Forest Warden of Pittsylvania County, what effect, if any, will this have on other activities connected with other agencies of the state or federal government?"

I believe your questions can be answered by referring to §§ 10-46 and 10-55 of the Code of Virginia. Section 10-55 provides for the appointment of forest wardens by the Governor and directs that the compensation for such wardens is to be fixed in accordance with law. This is a responsibility which cannot be delegated to the localities.

The responsibility for the several counties to share in the expenses for forest protection, forest fire detection, prevention and suppression is a mandatory duty imposed by § 10-46 of the Code.

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GAME AND INLAND FISHERIES—Blinds—The right of riparian owners to erect.

November 4, 1963

HONORABLE CHESTER F. PHELPS
Executive Secretary, Commission of Game and Inland Fisheries

This is in reply to your letter of October 28, 1963, in which you raise several questions pertaining to the licensing of blinds for hunting migratory waterfowl in the public waters of the State.
Your letter reads, in part, as follows:

"Jamestown Island, located in James City County, is largely owned and operated by the United States Park Service. Prior to 1963 several citizens of the State had licensed duck blinds off the shore of Jamestown Island.

"During the year 1963 approximately 22 waterfowl blind licenses were purchased in the name of the U. S. Park Service to encompass the entire Island, thus exercising the right of a riparian owner. Stakes were placed above the water line and the waterfowl blind licenses affixed thereto. Recently a number of duck hunters, who previously licensed blinds in this area have also purchased waterfowl blind licenses and constructed blinds less than 500 yards from the stakes erected in the name of the Park Service and these hunters have attached their blind licenses."

The statutory provisions covering the hunting of migratory waterfowl in the public waters of the State are codified as Article 3, Chapter 5, Title 29 of the Code of Virginia. By virtue of § 29-81 of the Code it is unlawful to hunt migratory waterfowl in public waters and the shores thereof from unlicensed blinds, whether stationary or floating.

Under the provisions of § 29-85 of the Code, the owners of riparian rights, theirs licensees or permittees, have the prior right of licensing and erecting blinds in the public waters in front of the shore line. This option must be exercised between July 1st and August 31st of each year. When the option has been exercised and a stake or blind has been erected on the site, no other stationary or floating blind shall locate within 500 yards of that site without the consent of the owner.

If the license mentioned above has not been obtained and a stake, or a blind, erected and marked before September 1, the locations for blind sites belong to whoever first obtains a license and erects a stake or a blind.

The Legislature has provided a special penalty section for violations under Article 3, being codified as § 29-90 of the Code. That section reads as follows:

"Any person who hunts migratory waterfowl or shoots in the public waters of this State from a boat, float, raft or other buoyant craft or device nearer to any legally licensed erected stationary blind of another than five hundred yards without the consent of the licenses, except when in active pursuit of a visible crippled waterfowl which was legally shot by said persons, and any person who shall erect a stationary blind or anchor a floating blind in the public waters nearer to any other licensed blind than five hundred yards without the consent of such licensee, shall be deemed guilty of a trespass and the owner thereof may maintain action for damages. The violation of any of the provisions of law or regulation as to hunting migratory waterfowl from the blinds permitted in this article shall constitute a misdemeanor and subject the offender to a fine of not less than ten nor more than five hundred dollars, or confinement in jail not exceeding twelve months, or both in the discretion of the court or jury trying the case. Furthermore, the trial court shall immediately revoke the license of the blind owner where the offense was committed and he shall not have a similar license during that open season but may be eligible for license thereafter upon the same conditions that would apply to a new applicant. Any blind, license for which has been revoked, shall be destroyed by the former licensee, or game warden. An erected stationary blind within the meaning of this section shall be a constructed blind of such size and strength, when the blind is constructed over water, that it can be occupied by
one or more hunters, or large enough to accommodate a boat or a skiff, and intended for use therefor.

It is to be noted that the foregoing penalty section does not provide a penalty for every violation under Article 3, the penalties being limited to the acts specifically mentioned in that section. The section contains a two-fold penalty; the first being a civil action in trespass for damages, and the second being a misdemeanor. To constitute a trespass, a person must (1) hunt or shoot from a boat, or other floating device within 500 yards of a licensed erected stationary blind, or (2) erect a stationary blind or anchor a floating blind within 500 yards of any other licensed blind. To constitute a crime under this section one must violate a law or regulation as to hunting migratory waterfowl from the blinds permitted in Article 3.

The general penalty for violation of the hunting laws is codified as § 29-161 of the Code of Virginia, and reads as follows:

“Any person convicted of violating any of the provisions of the hunting, trapping or inland fish laws shall, unless otherwise specified, be deemed guilty of a misdemeanor and upon conviction, shall, unless specific penalty is otherwise provided, pay a fine of not less than ten nor more than two hundred fifty dollars and may be imprisoned in jail not exceeding thirty days, either or both. The attorney for the Commonwealth of each county and city shall prosecute all violations of any provisions of chapters 1 through 8 (§§ 29-1 to 29-182) of this title.”

The foregoing section of the Code governs all violations of Article 3, Chapter 5 of Title 29 of the Code except those specifically covered in § 29-90 of the Code.

Your first question reads as follows:

“(1) Has a violation been committed when another person locates a blind within 500 yards of the riparian owners licensed blind or stake before the former occupies it or shoots from it?”

While § 29-85 of the Code provides that no other blind shall locate within 500 yards of a blind site which has been licensed and a stake, or a blind, erected thereon, there appears to be no penalty provided in § 29-90 of the Code for such a violation, unless a person erects a stationary blind or anchors a floating blind within 500 yards of another legally licensed blind. I am of the opinion that an actionable trespass occurs when a person erects a stationary blind or anchors a floating blind within 500 yards of a licensed site, only if a blind has been erected. The penalty provision in § 29-161 of the Code would be applicable to this violation.

Your second question reads as follows:

“(2) If a violation has been committed, what course of action should the Commission of Game and Inland Fisheries take?”

Obviously, if the riparian owner licensed the blind site, as contemplated in §29-85 of the Code, no other license could have been legally issued for the same site. The burden was upon the applicant for the blind to determine whether the riparian owner had exercised his option within the time provided in § 29-85 of the Code. Having failed to so determine, I do not believe such persons can now be heard to complain that their licenses are invalid for the sites already licensed and staked by the riparian owner.

If the riparian owner desires to prosecute the other persons locating blinds within 500 yards of the legally licensed blinds, the Commission should follow the
same course of action as it has set for prosecution of other violations of the criminal provisions in the game laws.

Your third question reads as follows:

"(3) Where a riparian owner, the U.S. Park Service in this case, has stakes erected on their property with waterfowl blind licenses attached but has not constructed a blind, has a violation been committed when a person floats or anchors a licensed floating blind within 500 yards of the riparian owner's stake?"

As pointed out above, a trespass may occur by hunting or shooting from a boat or other floating device within 500 yards of a licensed erected blind, or by erecting a stationary blind or anchoring a floating blind within 500 yards of another licensed blind. If no blind has been erected on the licensed site by the riparian owner by November 1st, as required by § 29-82 of the Code, any other licensed blind could be floated within 500 yards of such site without violating the provisions of § 29-90 of the Code, or any other statute of which I am familiar.

GAME AND INLAND FISHERIES—Deer and Fox Hunters—Section 29-168 of the Code authorizing entry upon the land of another constitutional.

HONORABLE J. MADISON MACON, JR.
Commonwealth's Attorney for Charles City County

March 6, 1964

This is in reply to your letter of February 26, 1964, which reads as follows:

"I write to you concerning § 29-168 of the Code of Virginia with reference to 'deer hunters, when the chase begins on other lands, may go upon prohibited lands to retrieve their dogs' to ask your opinion as to whether this provision is constitutional in view of the following:

"(1) The Federal Constitution provides in the fifth amendment that no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation.

"(2) The Virginia Constitution in § 6 provides in part that all men cannot be deprived of, or damaged in, their property for public uses, without their own consent, etc.

"(3) The Virginia Constitution provides in § 11 that no person shall be deprived of his property without due process of law.

"(4) The Virginia Constitution provides in § 58 that 'It (the General Assembly) shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation.'"

Section 29-168 of the Code is one section of a broad Act of the General Assembly of Virginia which has been amended several times. (See, §§ 29-166 through 29-170.) The most recent amendment was in 1946 at which time it adopted Chapter 342. This chapter, which is found in the Acts of Assembly of 1946, at page 575, is a comprehensive coverage of the subject "trespass" and reads as follows:

"Section 49. Any person who goes on the lands, waters, ponds, boats or blinds of another to hunt, fish or trap without the consent of the
landowner or his agent shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not more than fifty dollars or by confinement in jail for not more than thirty days, or by both, in the discretion of the court or jury trying the case. Any person who goes on the lands, waters, ponds, boats or blinds of another upon which signs or posters prohibiting hunting, fishing or trapping, have been placed to hunt, fish or trap without the written consent of the owner or his agent shall be guilty of a misdemeanor and punished by fine of not more than fifty dollars or by confinement in jail for not more than thirty days or by both such fine and imprisonment in the discretion of the court or jury trying the case.

"Any person who shall mutilate, destroy or take down any 'posted' 'no hunting' or similar sign or poster on the lands or waters of another, or who shall post such sign or poster on the lands or waters of another, without the consent of the landowner or his agent, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than fifteen dollars.

"Fox hunters, when the chase begins on other lands, may follow their dogs on prohibited lands, and deer hunters, when the chase begins on other lands, may go upon prohibited lands to retrieve their dogs, but not to hunt any game while thereon. No person shall be deemed guilty of trespass hereunder upon uninclosed mountain lands not used for cultivation, except in the counties of Giles east of New River, Craig, Bath, Alleghany, Botetourt and Highland and in the mountains in the western part of Rockingham county, and in any county having a population of more than fourteen thousand and less than twenty thousand inhabitants, which adjoins a county within the geographical bounds of which is located a city having a population of not less than sixty thousand nor more than one hundred thousand inhabitants, all according to the last United States census; provided that the first three paragraphs of this section shall apply to any person who goes upon uninclosed mountain land of another, in that part of the County of Giles, which lies on the western side of New River, to trap, or to hunt for any game other than elk.

"Nothing in this act shall be construed to affect in any way the civil rights of a landowner as against trespassers against his property."

In this Act the General Assembly has made it a misdemeanor to go upon the lands, waters, ponds, boats or blinds of another to hunt, fish or trap without the consent of the landowner or his agent. In defining this crime it made an exception in those cases where "Fox hunters, when the chase begins on other lands, may follow their dogs on prohibited lands, and deer hunters, when the chase begins on other lands, may go upon prohibited lands to retrieve their dogs, but not to hunt any game while thereon." Thus, in construing all the statutes together it is obvious that the Legislature has proscribed certain acts of trespass, the violation of which constitutes a misdemeanor. Excepted from such criminal trespasses is the entry upon prohibited lands as contemplated in §§ 29-168 and 29-169 of the Code. While such trespassers would not be subject to criminal prosecution, they, nevertheless, would go upon the lands of another at the risk of being civilly prosecuted for trespass, inasmuch as § 29-170 of the Code expressly reserves this civil remedy to the landowner.

It is manifest that no landowner's property rights are being taken or damaged by § 29-168 of the Code, and I am, accordingly, of the opinion that there is no constitutional objection to this legislative enactment.
GAME AND INLAND FISHERIES—Fishing on Sunday—Prohibited in Douthat State Park.

SUNDAY—Fishing—Prohibited in Douthat State Park.

May 13, 1964

HONORABLE BEN H. BOLEN
Commissioner of Parks

This is in reply to your letter of May 12, 1964, in which you ask to be advised as to whether you may legally allow Sunday fishing in the State Park lake situate in Bath County at Douthat State Park, in view of the fact that Bath County has adopted a county ordinance prohibiting fishing on Sunday. You further advise that the Commission of Game and Inland Fisheries has promulgated a regulation pursuant to § 29-130.1 of the Code of Virginia to permit Sunday fishing in Bath County in waters owned or managed by the Commission.

I presume that the Board of Supervisors of Bath County adopted the county ordinance pursuant to Chapter 12, Acts of Assembly of 1930, which reads as follows:

"Be it enacted by the general assembly of Virginia, That the boards of supervisors of the counties of Highland, Craig, Rockbridge and Bath be, and are hereby, respectively, authorized and empowered to pass ordinances prohibiting fishing in said counties, or either of them, on Sunday."

In so far as I can ascertain, the foregoing quoted Act of Assembly has not been repealed. Accordingly, in the absence of a subsequent or superseding Act of Assembly, the Board of Supervisors of Bath County is vested with the authority to prohibit fishing on Sunday within that county. Section 29-130.1 of the Code of Virginia was enacted in the 1960 session of the General Assembly, and reads as follows:

"The Commission of Game and Inland Fisheries is hereby authorized, notwithstanding any other provision of law or local ordinance to the contrary, to prescribe and enforce the seasons, bag limits and methods of taking fish and game on lands and waters owned by such Commission and on lands owned by others but controlled by such Commission.

"The Commission shall exercise its powers under this section by the adoption of rules and regulations in the manner provided by law."

In view of the express authority conferred upon the Commission of Game and Inland Fisheries to prescribe seasons for taking fish, notwithstanding any other law or local ordinance to the contrary, I am of the opinion that the Commission may open the fish season on Sunday in any county of the State in waters owned or controlled by such Commission.

Inasmuch as the lake situate in Douthat State Park is owned and controlled by the Department of Conservation and Economic Development, I am of the opinion that the regulation of the Commission of Game and Inland Fisheries is inapplicable thereto, and that the ordinance adopted by the Board of Supervisors of Bath County prohibits anyone from fishing on Sunday in such waters.
REPORT OF THE ATTORNEY GENERAL

GAME AND INLAND FISHERIES—Foxes—Infectious Diseases—Local health board to examine head of fox for infectious diseases.

HEALTH—Infectious Diseases—Local health board to examine head of fox for infectious diseases.

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

This is to acknowledge receipt of your letter of April 2, 1964, in which you state in part:

"A member of the Board of Supervisors has asked me to find out from your office, if a fox is killed, whose duty is it to sever the head of the fox and forward it to the proper laboratory in Richmond for examination to determine whether or not the fox is sick or rabid."

A game warden has a duty to enforce the game, inland fish and dog laws. See § 29-34, Code of Virginia. Chapter 3 and Chapter 3.1 of Title 32 of the Code vests the local health boards and local health officers with plenary powers and imposes upon them duties in respect to the prevention and the control of communicable diseases. As to the authority to control rabies, see §§ 29-213.1 et seq.

I am of the opinion that it is the responsibility of the local health board acting through the local health officer to have the head of the dead fox examined for infectious diseases.

GAME AND INLAND FISHERIES—Guns Permitted in Hunting—Pistols not considered legal weapon.

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney for Augusta County

This is in reply to your letter of July 16, 1963, in which you request my opinion as to whether the use of pistols is prohibited in any type of hunting for wild animals or wild birds. Your letter reads, in part, as follows:

"A small summary published by the Game Commission, designated as 'Summary of Virginia Game Laws 1963-1964 Season,' has a statement as follows: 'Pistols are not classified as legal hunting weapons and therefore may not be used for killing wild birds or wild animals.'

"I do not believe there is any section in the Code dealing with Game, Inland Fisheries and Dogs which specifically prohibits the use of pistols to hunt non-game animals and birds, or predators.

"It will be seen that the question is whether a pistol may be used to hunt non-game wild birds and wild animals and for the killing of predators, or whether the use of a pistol is absolutely barred for any type of hunting.'"

I should point out that the summary of game laws published and distributed by the Commission of Game and Inlands Fisheries is designed for information only and does not purport to embody the exact phraseology of the statutes and reg-
ulations of the Commission pertaining to hunting. In large measure, this summary is an attempt on the part of the Commission to interpret the various laws in a manner best understood by the layman.

Section 29-140 of the Code of Virginia (1950), as amended, reads as follows:

“All wild birds and wild animals may be hunted with shotgun not larger than ten gauge, and with an automatic-loading or hand-operated repeating shotgun capable of holding not more than three shells, the magazine of which has been cut off or plugged with a one-piece metal or wooden filler incapable of removal through the loading end thereof, so as to reduce the capacity of the gun to not more than three shells at one time in the magazine chamber combined, or rifle or bow and arrow, unless shooting is expressly prohibited.”

Section 29-172 of the Code reads, in part, as follows:

“Any gun, trap, net, or other device of any kind or nature for taking wild birds, wild animals, or fish, except as specifically permitted in this title, or by a regulation of the Commission, shall be considered unlawful and, upon satisfactory evidence of the guilt of the owner or user and of the unlawful nature of the article seized, the trial court shall fine the owner or user not less than twenty-five nor more than two hundred fifty dollars and forfeit such device to the Commonwealth, whereupon it shall be destroyed by the game warden. * * *.”

Section 29-140 is the section in Title 29 of the Code which sets forth the permissible guns for use in taking wild birds and animals. Pistols are not mentioned in that section. Neither are pistols permitted by Commission regulations. It, therefore, follows that such guns are considered unlawful within the meaning of § 29-172 of the Code. Accordingly, I am of the opinion that the use of pistols is prohibited for hunting any form of wild birds or wild animals, whether or not such birds or animals be non-game animals or birds or predators.

GAME AND INLAND FISHERIES—Killing of Deer or Elk by Use of Flashlight—Conviction under § 29-144.2 not dependent on use of vehicle.

CRIMES—Killing Deer by Use of Lights—Owner of land may be guilty of killing deer by use of flashlight as prohibited by § 29-144.2.

December 11, 1963

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

This is in reply to your letter of December 4, 1963, in which you present two questions relating to alleged violations of § 29-144.2 of the Code. That section reads as follows:

“All person who kills or attempts to kill any deer or elk between a half hour after sunset or any day and a half hour before sunrise the following day by use of a light attached to any vehicle or a spotlight or flashlight shall be guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than two hundred and fifty dollars or by confinement in jail for not less than thirty days or more
than sixty days, either or both. The flashing of a light attached to any vehicle or a spotlight or flashlight from any vehicle between a half hour after sunset on any day and a half hour before sunrise the following day by any person or persons, then in possession of a rifle, shotgun, crossbow, or bow and arrow or speargun, without good cause, shall raise a presumption of an attempt to kill deer or elk in violation of this section. Every person in or on any such vehicle shall be deemed a principal in the second degree and subject to the same punishment as a principal in the first degree."

Your questions read as follows:

"1. Can there be a conviction under this section where no vehicle was involved, but the hunters are walking through open fields between the hours set in the statute with flash lights and guns loaded?

"2. Under the facts as I have given in No. 1 above, if one of those charged has an undivided interest in the real estate, assuming all the facts to be the same, can the owner of the land be convicted under this section?"

I am of the opinion that a conviction under the foregoing circumstances would be pivotal upon whether such persons are believed to have been using flashlights in an attempt to kill a deer or elk. Since the statutory presumption provided in the second sentence of the foregoing quoted section arises only when the light is flashing from a vehicle, you do not have such a presumption in the case presented. Inasmuch as the hunters were walking through the field with lights (you did not indicate that the lights were in use), it undoubtedly would be a difficult task to prove that they were being used in an attempt to kill a deer. This difficulty of proof, however, does not prohibit a conviction if there is sufficient evidence, without the statutory presumption, to establish that the lights were being used in an attempt to kill a deer between the hours specified in the statute.

The fact that one of the persons involved may also have an interest in the land where the offense occurred would be entirely immaterial to the criminal charge of attempting to kill a deer by use of a flashlight as prohibited in § 29-144.2 of the Code.

GARNISHMENT—Summons—Officer serving required to accept payment tendered to him.

November 22, 1963

HONORABLE A. SIDNEY FITCH, JR.
City Sergeant of Clifton Forge

This will acknowledge receipt of your letter of November 13, with which you enclosed a copy of a letter from you to the sergeant of the city of Martinsville.

It appears that a summons in garnishee was issued by the Civil and Police Court of Clifton Forge, in which a firm located in Martinsville was one of the co-defendants. The process was forwarded by the court to the sergeant of the city of Martinsville who served the summons on the co-defendant, who, it appears, paid the amount of the plaintiff’s judgment and the costs to the officer who served the summons. Under § 8-448 of the Code, the party on whom the summons in garnishment was served, if he owes money to the judgment debtor when the service is made, may, before the return day of the summons, pay the amount of the judgment, or so much as he is liable for, to the officer who served the process.
Section 8-448 of the Code reads as follows:

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

It would appear that under the provisions of this section the officer who makes the service is required to accept payment of the amount of the judgment that is tendered to him.

The section of the Code cited provides that whenever a garnishee makes payment to the officer making the service the officer "shall give a receipt for, and make return of, what is so paid and delivered." The officer's return, in my opinion, should be made to the court from which the summons was issued.

HAMPTON ROADS SANITATION DISTRICT—Authority—To use land owned by the Commonwealth.

WATER AND SEWERAGE SYSTEMS—Hampton Roads Sanitation District Commission—Upon approval of the Governor may use land owned by the Commonwealth.
HAMPTON ROADS SANITATION DISTRICT—Authority—To use under water land of Commonwealth as outfall installation for sewage treatment plant subject to approval by Governor.

WATER AND SEWERAGE SYSTEMS—Hampton Roads Sanitation District—May use bed of Elizabeth River as outfall installation for sewage treatment plant subject to approval by Governor.

March 26, 1964

HONORABLE FRANK H. MILLER
General Manager and Chief Engineer, Hampton Roads Sanitation District

This is in reply to your letter of March 23, 1964, in which you submitted a plan for the outfall installation for a sewage treatment plant on the western branch of the Elizabeth River in the City of Chesapeake. The plan has been approved by the State Water Control Board and the Virginia Department of Health and you now request approval of the Governor through this office.

The office of Attorney General has no authority to either approve or disapprove uses of State owned lands other than that limited authority set forth in Section 62-2.1 of the Code.

Generally speaking, permission for a use or encroachment upon the beds of State owned waters must be approved by the Commission of Fisheries subject to the approval of the Attorney General with the consent and approval of the Governor. Expressly excepted from the application of that section are uses which have been or may be authorized by the General Assembly (see Section 62-2.1(8)).

By virtue of Chapter 66, Section 11(d), Acts of Assembly (1960), the General Assembly has consented to the use of the under water lands of the Commonwealth by the Hampton Roads Sanitation District subject to the approval of the Governor. I am enclosing a copy of a letter addressed to the Commissioner of Water Resources, under date of March 10, 1964, in which I expressed this view.

I am of the opinion that the Hampton Roads Sanitation District may utilize the bed of the Elizabeth River as contemplated in the plan attached to your letter if the Governor approves. A copy of this letter goes to the Governor for his information in the event you should wish to direct your request to him.

HEALTH—Septic Tanks and Disposal of Sewage—State Health Department may enforce rules and regulations concerning.

SEWERAGE—Rules and Regulations Regulating—State Health Department may enforce.

June 3, 1964

HONORABLE E. E. BROOKS
Clerk of the Circuit Court of Wise County

This is to acknowledge receipt of your letter of June 1, 1964, in which you state in part:

“Approximately two years ago the Wise County Health Department requested the Board of Supervisors of Wise County to adopt ordinances
concerning septic tanks and disposal of sewage. A study committee was appointed and after receiving their recommendations the Board refused to adopt this ordinance.

"Thereafter the State Health Department acting under Section 32-9 of the Code of Virginia adopted Rules and Regulations (their Chapter No. XVIII) making it unlawful to construct a septic tank or sewage disposal system without a permit."

I shall answer the questions raised by you seriatim.

"(1) In view of the fact that the local Board of Supervisors refused to pass this ordinance would you give us your opinion as to whether these rules are valid in Wise County?"

The pertinent portion of § 32-9, Code of Virginia (1950) is as follows:

"The Board may regulate the method of disposition of garbage or sewage and any other refuse matter in or near any incorporated town, city, or unincorporated town or village of this State."

This section was amended by Chapter 436, Acts of 1964. The pertinent portion thereof as amended is as follows:

"The Board may regulate the method of disposition of garbage or sewage and any other refuse matter* or any combination thereof in this State."

The State Board of Health is authorized to adopt rules and regulations pursuant to said 32-9 of the Code. Chapter XVIII to which you refer in the second paragraph of your letter was a portion of the regulations adopted in 1962 and was effective until September 1, 1963. The regulations currently in force are contained in a pamphlet entitled "Regulations Of The Board of Health, Commonwealth of Virginia, Governing the Disposal of Sewage, Bureau of Environmental Health, Department Of Health, Richmond, Virginia 1964." A copy of this pamphlet is enclosed herewith. You will notice that the regulations concerning the design and construction of septic tanks are found in Part 3, pages 4, 5, 8 to 14. The portion thereof requiring a person to secure a permit to construct a sewage disposal system is found on page 4 and is as follows:

"It shall be unlawful for any person to construct, alter or extend or to allow construction, alteration or extension to a sewage disposal system in the Commonwealth of Virginia unless a valid permit has been issued for that system by the Health Commissioner in the name of a specific person for a specific location."

The fact that the Board of Supervisors of Wise County has refused to exercise its powers under § 15-8 of the Code to promote the health of the inhabitants of the county in this respect does not in my opinion render such rules adopted by the State Board of Health inoperative in Wise County.

"(2) Also would you advise if this is a valid delegation of legislative powers to the State Health Department to declare violations of its rules a misdemeanor?"

Section 32-15 of the Code of Virginia (1950) provides:

"Any person who shall violate, disobey, refuse, omit or neglect to comply with any rule of the Board made by it in pursuance of this chapter, shall be guilty of a misdemeanor."

I am of the opinion that the State Board of Health may adopt rules and regulations regulating the method of disposing of sewage and that a violation thereof would constitute a misdemeanor.

"(3) If the regulations are valid, would they apply in a rural county district?"

According to the provisions of § 32-9 in its present form, such a regulation is only applicable to areas in or near any incorporated town, city or unincorporated town or village. However, after the effective date of the amendment to § 32-9 (June 26, 1964), this rule will be applicable in all areas of the State as the restrictive portion of said § 32-9 was deleted by the 1964 amendment.

HEALTH—Veneral Diseases—Procedure to follow in making medical examination under § 32-94.

CRIMINAL PROCEDURE—Medical Examination—Veneral Diseases—Procedure to follow when person convicted under § 32-94.

February 26, 1964

Dr. Mack I. Shanholz
State Health Commissioner

This is to acknowledge receipt of your letter of February 24, 1964, in which you enclosed a letter from Dr. J. M. Huff, Director of Public Health of the City of Norfolk, Virginia. You request that I express an opinion on the questions raised by Dr. Huff. I shall answer the same seriatim.

"1. Under the State Code, Sections 32-93; 32-94, can the Director of Public Health request the City Sergeant to make available for medical examination persons convicted under the provisions covered in Section 32-94 of the Code of Virginia."

The court in which the person is found guilty of such offenses as described in § 32-94, Code of Virginia (1950) should order that the person be held until he (or she) is examined by the proper health officer. When this is done, then the officer having custody of the person convicted must make said person available for the examination.

"2. Can the local Director of Public Health request the local Judge to hold for medical examination persons convicted and fined by him and are not confined in jail."
The Director of Public Health can request the court to have the person convicted held for a medical examination and the court would have the authority to order such person held for this purpose. The local health officer should confer with the local court so that a plan may be adopted to make it possible that all persons reasonably suspected of having venereal diseases be examined by the medical officer. (§ 32-93 of the Code).

"3. Does the local Director of Public Health have authority to examine persons charged under Section 32-94 but are acquitted."

This question is answered in the negative.

HIGHWAYS—Allocation of Funds to Secondary System—Henrico Board of Supervisors may use to meet amortization payments on road bonds.

HIGHWAYS—Motor Vehicle Fuel and License Taxes—Allocation to Counties Withdrawn from Secondary System.—Revenue may be used by county to meet amortization payments on road bond.

HONORABLE T. DIX SUTTON
Member, House of Delegates

June 9, 1964

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

"Henrico County borrowed on a bond issue $3,500,000 in 1963 for the purpose of building certain roads. Very little, if any, of this money has been expended at this time.

"Will you please let me know if, in your opinion, funds received by the County from gasoline taxes and automobile license fees as imposed at the last session of the General Assembly can be used to meet the amortization payments on the above loan or will that loan have to be financed out of general tax revenues."

Under the provisions of §§ 33-49.1 and 33-49, as amended by Chapter 257, Acts of Assembly of 1964, the county of Henrico will receive from the State Highway Commission its proportionate share of funds collected by the State from the sale of automobile licenses and from the motor fuel tax. This sum is allocated to the county of Henrico due to the fact that it withdrew from the secondary system of State highways pursuant to the provisions of Section 11 of Chapter 415, Acts of Assembly of 1932. The funds so received are in the nature of grants to the county in lieu of the sum that would otherwise be expended therein by the State Highway Commission for the secondary road system.

The grants received by Henrico County under these Code sections are free from any statutory restrictions or conditions, subject to the power of the board of supervisors to appropriate and expend such funds for any purpose the board under the law may make expenditure of revenues coming under its control. The restrictions contained in § 58-730.1 of the Code apply to expenditures made by the State Highway Commission and are in no way binding upon the board of supervisors.
In my opinion, the revenue from the above sources, in the discretion of the board of supervisors, may be appropriated and expended for the purpose of meeting the amortization payments on the bond issue obligations mentioned by you.

HIGHWAYS—County Levy for Construction—Section 33-138 not applicable to county of Rockbridge.

BOARDS OF SUPERVISORS—Levying of Taxes for Road Construction—When permitted.

November 27, 1963

HONORABLE C. H. DAVIDSON, JR.
Commonwealth’s Attorney for Rockbridge County

This is in reply to your letter of November 26, in which you inquire whether or not under § 33-138 of the Code the Board of Supervisors of Rockbridge County may appropriate funds for the construction and maintenance of certain roads in the suburban area adjacent to the city of Buena Vista. Section 33-138 authorizes the boards of supervisors of counties adjacent to cities of the first class, for the purpose of supplementing funds available for expenditure by the State for the maintenance and improvement of roads in such counties when such supplementary funds are necessary on account of the existence of suburban conditions adjacent to such cities, to levy county or district road taxes, as the case may be, the proceeds thereof to be expended at the option of the board of supervisors under the supervision of the State Highway Commissioner in the maintenance and improvement, including construction and reconstruction, in roads in such suburban district.

As suggested in your letter, this authority depends upon whether or not the city of Buena Vista may be considered a city of the first class.

The population as shown for Buena Vista by the 1960 Census is 6300. Therefore, under the provisions of Chapter 7 of Title 15 of the Code the city of Buena Vista does not now qualify as a city of the first class. By reference to Section 5903 of the Code of 1919 it will be noted that the city of Buena Vista is classified as a city of the second class, although at that time it did have a corporation court. This section continues to classify Buena Vista as a city of the second class in Michie’s Code of 1936. I am unable to find any statute classifying the city of Buena Vista as a city of the first class. By Chapter 32, Acts of 1938, the city of Buena Vista was made a part of the Eighteenth Judicial Circuit. Under Section 2 of this Act all jurisdiction and authority therefore vested in the Corporation Court of Buena Vista was transferred to the Eighteenth Judicial Circuit. A companion Act was Chapter 31 of the Acts of 1938, which amended and reenacted Section 5888 of the Code so as to make the city of Buena Vista a part of the Eighteenth Judicial Circuit.

In my opinion, § 33-138 of the Code is not applicable to Rockbridge County and Buena Vista.

You are, of course, familiar with § 33-141 under which a county may pay the right of way cost for a newly established road or where the location of an existing road is altered or changed. Such right of way cost may be paid out of the general fund of the county.
HIGHWAYS—Industrial Access—Approval by Planning Commission not obligatory.

ZONING—Planning Commission—Approval of commission not necessary for industrial access highway.

April 14, 1964

HONORABLE ANDREW J. ELLIS, JR.
Commonwealth's Attorney for Hanover County

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

"The Planning Commission of Hanover County has adopted a comprehensive plan for the County pursuant to the provisions of Section 15-964 of the Code of Virginia and, in addition thereto, has adopted an official map of the County pursuant to the provisions of Section 15-965 of the Code of Virginia.

"The Board of Supervisors of Hanover County has instituted proceedings under Section 33-141 et seq. to acquire a right of way for the construction of an industrial access road and has appointed viewers to proceed with their duties as set forth in Section 33-144 of the Code of Virginia.

"I will appreciate your advising me if, in your opinion, the location, character and extent of such road must be submitted to the Planning Commission for approval as provided for in Sections 15-964.10 and 15-965.2 of the Code of Virginia.

"If, in your opinion, it is necessary to submit the location, character and extent of such road to the Planning Commission for its approval, at what stage of the proceedings under Section 33-141 et seq. should it be so submitted?"

The power conferred upon the board of supervisors by § 33-141 of the Code of Virginia to establish roads to be included in the secondary system of State highways must be construed in light of a subsequent legislative enactment, § 33-136.1 of the Code, which authorizes the State Highway Commission to construct industrial access highways. The latter section reads in part as follows:

"... (b) In deciding whether or not to construct or improve any such access road, and in determining the nature of the road to be constructed, the Commission shall base its considerations on the cost thereof in relation to the volume and nature of the traffic to be generated as a result of developing the industrial establishment. No such access road shall be constructed or improved on a privately owned plant site.

"(c) 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."

Generally speaking, the establishment of a highway to be included in the secondary system is the responsibility of the governing body of a county, although the State Highway Commission is not obligated to expend any funds on such roads unless it sees fit to do so. The practice has, therefore, developed as a cooperative effort between the State Highway Commission and the local governing body whereby the locality acquires the rights of way, and the State Highway Commission undertakes the construction and maintenance of the road.

Industrial access highways are generally constructed through the cooperative efforts of the two governmental agencies, but it is fairly manifest that the State
Highway Commission must have the final word as to whether such a highway is to be constructed.

It does not appear that the powers vested in the governing body to establish roads or the power vested in the State Highway Commission to construct industrial access highways are diminished by the provisions of §§ 15-964 through 15-964.11 (Article 2, Chapter 28, Title 15) of the Code. The purpose of § 15-964.10 is to provide an opportunity for the Planning Commission and the governing body of the county to determine if a proposed use of land conforms to the comprehensive plan for the county. The necessity for submission of plans to the Commission applies to almost any conceivable improvement, whether publicly or privately owned. (See, Report of Attorney General (1961-62, at pp. 40, 41.) The requirement, however, does not extend to improvements undertaken by the State and Federal governments, for to so hold would be to place in the hands of the political subdivisions of the State a veto power over State and Federal governmental operations. It is likewise highly doubtful that the requirement extends to improvements undertaken by the governing body of the county, since the governing body has the power to overrule the Planning Commission in the event of disapproval.

In the instant case there is a joint undertaking by the State and county to establish and construct a public road which will thereafter be included in the secondary system of State highways. I believe it would be a vain gesture on the part of the governing body to submit the proposal to the County Planning Commission after the determination to establish the highway has already been made.

I am, therefore, of the opinion that, while it may have represented good judgment to have submitted the new road proposal to the Planning Commission for its advice prior to making the determination to appoint viewers, there exists no legal obligation for the proposal to be so submitted.

HIGHWAYS—Jurisdiction of Local Authorities—Local planning commissions have no authority to locate State highways.

COUNTIES—Planning Commission—No authority to locate or alter State highways.

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

August 2, 1963

This is in reply to your letter of July 23, 1963, in which you request my opinion as to whether the Virginia Department of Highways is subject to the provisions of § 15-964.10 of the Code. You are particularly interested in knowing if that department must obtain approval of the Loudoun County Planning Commission on the general location, character and extent of any public structure or facility, including the widening, narrowing, extent, enlargement, vacation or change of use of streets or public areas.

While the various agencies of the State government are admonished to cooperate with the local planning commissions, the terminal sentence of § 15-964.11 of the Code expressly reserves all State jurisdiction in those agencies by the following language:

“Nothing herein shall be deemed, however, to abridge the authority of any such State agency regarding the facilities now or hereafter coming under its jurisdiction.”
The State Highway Commission has been delegated the authority over State highways. Part of these functions entail the location and maintenance of highways, as well as attendant facilities, such as shops and storage areas.

The provision in § 15-964.10 of the Code requiring approval of the planning commission for locating and altering public facilities must be construed to apply to facilities operated by governmental instrumentalities of lesser or co-equal authority, such as other political subdivisions or subordinate agencies of the cities and counties. For a discussion see, 61 A.L.R. 2d 970, and City of Richmond v. Board of Supervisors, 199 Va. 679.

Inasmuch as the functions of the State Highway Commission are governmental powers and duties conferred by the Legislature, I am of the opinion that such functions cannot be redelegated to political subdivisions, nor can they be diminished or abrogated by implication. Accordingly, I am of the opinion that § 15-964.10 of the Code does not apply to facilities operated under the control of the Virginia Department of Highways.

HIGHWAYS—Rights of Way—Authority of board of supervisors to purchase for State highway.

BOARDS OF SUPERVISORS—Appropriations—Authority to acquire rights of way for roads in secondary system of State highways.

HONORABLE BASIL C. BURKE, JR.
Commonwealth’s Attorney for Madison County

This is in reply to your letter of July 2, 1963, which I quote in full:

"Our Board of Supervisors has requested me to write you inquiring whether or not it would be a proper expenditure of County funds for them to purchase rights of ways to be used by the Department of Highways in the secondary road system. These rights of ways, I might add, are for alteration of an existing secondary state route."

On several occasions my predecessors in office have expressed the view that it is permissible for the board of supervisors of the several counties to expend county funds for the purpose of acquiring rights of way to be used by the Virginia Department of Highways in establishing roads for the secondary system of State highways. See, Report of the Attorney General (1950-1951), p. 25. The statutory authority for such expenditure is § 33-141, Code of Virginia (1950), which reads in part as follows:

"The local road authorities shall continue to have the powers vested in them on June twentieth, nineteen hundred and thirty-two, for the establishment of new roads in their respective counties, which shall, upon such establishment, become parts of the secondary system of State highways within such counties and they shall likewise have the power to alter or change the location of any road now in the secondary system of State highways within such counties or which may hereafter become a part of the secondary system of State highways within such counties; provided however, that the State Highway Commissioner shall be made a party to any proceeding before the local road authorities for the establishment of any such road or for the alteration or change of the loca-
tion of any such road; and provided further, that 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 or other governing body of the county out of the general county levy funds; * * * " (Emphasis added)

The view expressed with respect to the establishment of new roads is also applicable to the altering or changing the location of an existing road in the secondary system. So long as the expenditure is confined to the acquisition of rights of way to be used either in the establishment of a new road or alteration of an existing road in the secondary system, I am of the opinion that the board of supervisors may appropriate funds to be expended by the Department of Highways, or by the board itself.

HIGHWAYS—Shooting in Road—Target shooting within one hundred yards of a road prohibited.

CRIMES—Shooting in Road—Target shooting within one hundred yards of road prohibited.

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

November 20, 1963

This is to acknowledge receipt of your letter of November 15, 1963, in which you state in part:

"I am confronted in Bedford County with a situation in which an individual has a small house located 190 feet from a primary highway. The rear of this little house also is located 230 feet from another public road. This house is closed on the side next to the primary highway and on each end, and on the rear thereof it has two doors which swing down leaving the rear of the house open at these two places. Individuals then stand within the house and shoot at a target which is located 90 feet from the rear of the house toward this public road, which target also is located 140 feet from the public road (not the primary highway that runs in front of the house). In fact, they shoot into the bank along the top of which the public road runs, the charges going into the bank an estimated distance of 20 feet below the surface of this public road. It is quite clear that the little house where the men stand to shoot is easily within one hundred yards of the primary highway which runs in front of the house and clearly is within one hundred yards of the public road which runs back of the house.

"I shall appreciate your opinion as to whether Section 33-287 of the Code of Virginia is being violated by the shooting described above."

From what you state, there is no doubt that the persons engaged in this target shooting do it within one hundred yards of a road. Section 33-287 is as follows:

"If any person shoot in or along any road, or within one hundred yards thereof, or in a street of any city or town, whether the town be
incorporated or not, he shall, for each offense, be fined not less than five hundred dollars."

Enclosed herewith is a copy of an opinion, dated October 1, 1962, contained in a letter to the Honorable Dabney W. Watts, Commonwealth's Attorney for the City of Winchester, and also a copy of an opinion, dated December 6, 1951, contained in a letter to the Honorable A. Laurie Pitts, Jr., Commonwealth's Attorney for Buckingham County. (Opinions of the Attorney General (1951-1952) p. 50).

It is the opinion of this office that the above-quoted section is applicable to the facts related by you, and therefore the persons who engage in this shooting are violating the statute.

HOMESTEAD EXEMPTIONS—Wages Exempt—Householder, how computed.

GARNISHMENT—Wages Exempt—Amount of wages exempt from attachment under § 34-29.

HONORABLE FRANCIS M. HOGE
Judge, Smyth County Court

December 24, 1963

This is in reply to your letter of December 18, 1963, in which you request my opinion on two questions arising from the application of § 34-29 of the Code of Virginia.

In so far as applicable to your inquiries, § 34-29 of the Code reads as follows:

"... wages or salary owing or to be owing to a laboring man or woman who is a householder or head of a family, whether a resident or nonresident of this State, shall be exempt from distress, levy, garnishment or other process to the extent of the minimum exemption set out in the schedule of minimum and maximum exemptions hereinafter provided; in addition to the minimum exemption, seventy-five per centum of such wages or salary as exceeds the minimum exemption, but not in excess of the maximum exemption, shall also be exempt. All sums of wages over and above the maximum exemption, in addition to the twenty-five per centum of the sum between the minimum and maximum, shall be subject to attachment by garnishee summons; such wages so attached shall be withheld by the employer and applied on said summons and returned to the court as provided by law upon the return day of said summons."

Your inquiries read as follows:

"If an employee earns more than the maximum exemption, does the employer withhold only those wages in excess of the maximum exemption, or does the employer withhold such wages in excess of the maximum exemption and 25% of the difference between the minimum and maximum exemption?"

"If all deductions for taxes and other withholdings for the benefit of the employee exceed his exemption, from what source does the employer obtain and return to the Court the full amount of wages subject to the attachment?"
In determining the amount of wages subject to attachment under § 34-29 of the Code it may be helpful to first determine the amount to be paid the employee. This amount is (1) the amount specified in the minimum schedule and (2) if the total wages exceed that minimum amount, an additional sum to be determined by taking seventy-five per centum of the difference between the minimum exemption and the total wages earned. The sum of these two amounts must not exceed the maximum exemption specified in the schedule. The amount so determined shall then be paid the employee less any deductions for taxes, etc.

The amount subject to attachment by garnishee summons should then be the amount over and above the amount paid the employee. If the total wages do not exceed the minimum exemption there would be nothing to withhold on the attachment. If the wages exceed the maximum amount exempted, the employer must hold this amount for the Court, and the statute provides for withholding an additional amount determined by taking twenty-five per centum of the sum between the minimum and the maximum exemption.

The language of this statute does not lend itself to literal interpretation, for to do so would impose the impossible task upon an employer of paying to an employee a specified sum and then paying into the Court the amount of wages in excess of the amount specified in addition to another sum which would exceed the employee's total wages.

A simple example will serve to illustrate the foregoing. Assume the case of a householder with a weekly wage of $45.00. The minimum exemption is $23.00, and the maximum is $35.00. The amount exempt is $23.00 plus $16.50 (seventy-five per centum of $22.00, which is the difference between the minimum and the total wage) or a total of $39.50. As this sum is in excess of the $35.00 maximum, the employee can claim only the maximum amount. The amount of the total wages over the maximum exemption is $10.00, and this is the only amount left in the employer's hands which he can pay into court. Yet, a literal interpretation of the statute would require the employer to withhold the amount of $10.00 in addition to twenty-five per centum of $12.00, which is the difference between the minimum and maximum exemption.

The law does not demand the impossible. Accordingly, I have construed the language of this statute to carry out the manifested intent of the Legislature; namely, to obligate the employer to pay to the employee the calculated amount provided in the statute as being exempt from attachment, not to exceed the maximum exemption. All wages over that amount are withheld to honor the attachment.

In cases where the total wages exceed the maximum exemption, the employer would pay the employee the maximum amount, less taxes, of course, and pay the excess into court.

In cases where the total wages do not exceed the maximum exemption, the employer would pay the employee the minimum plus seventy-five per centum of the difference between the minimum and the total wages, and pay into court the remaining twenty-five per centum of that difference.

Using the example given hereinabove, the following result would thus ensue:

<table>
<thead>
<tr>
<th>Total weekly wage</th>
<th>$45.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum exemption</td>
<td>23.00</td>
</tr>
<tr>
<td>Difference</td>
<td>$22.00</td>
</tr>
<tr>
<td>75% of difference</td>
<td>16.50</td>
</tr>
<tr>
<td>Total exemption</td>
<td>39.50</td>
</tr>
<tr>
<td>Maximum exemption allowed</td>
<td>35.00</td>
</tr>
<tr>
<td>Difference between maximum and total wage</td>
<td>10.00</td>
</tr>
</tbody>
</table>

This is the amount to be applied to the summons.
On the other hand, assume a weekly wage of $35.00.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total weekly wage</td>
<td>$35.00</td>
</tr>
<tr>
<td>Minimum exemption</td>
<td>23.00</td>
</tr>
<tr>
<td>Difference</td>
<td>$12.00</td>
</tr>
<tr>
<td>75% of difference</td>
<td>9.00</td>
</tr>
<tr>
<td>Total amount exempted</td>
<td>32.00</td>
</tr>
<tr>
<td>Difference between exemption and total wage</td>
<td>3.00</td>
</tr>
</tbody>
</table>

This is the amount to be paid into court against the summons.

You will thus note that the pertinent portion of the statute, as I have construed it, will read as follows:

"All sums of wages over and above the maximum exemption, [or if the total wages do not exceed the maximum exemption] the twenty-five per centum of the sum between the minimum [exemption and the total wages], shall be subject to attachment by garnishee summons; . . . ." (Substituted language shown in brackets)

Applying the foregoing construction to your specific inquiries, the situation mentioned in your second inquiry would never arise, since the employer would pay the employee the amount of his wages which are exempt from attachment, after deducting the taxes or other withholdings. The employer would then withhold for the attachment the wages in excess of the maximum exemption or, if the wages do not exceed the maximum exemption, only the wages remaining in his hands.

JUDGES—Associate or Substitute—May appear as counsel before the court while another judge is sitting.

COURTS NOT OF RECORD—Associate or Substitute Judges—Prohibitions under § 16.1-10 as to practice applicable when acting as judge.

HONORABLE JERE M. H. WILLIS, JR.
Commonwealth's Attorney for the City of Fredericksburg

February 28, 1964

This is to acknowledge receipt of your letter of February 21, 1964, in which you state in part:

"We have a problem in Fredericksburg concerning the associate and substitute judges of our Municipal Court. We would very much appreciate your opinion.

"Section 16.1-10 of the Code provides 'no judge of a court not of record shall appear as counsel in any case, civil or criminal, pending in its court or on appeal or removal therefrom; nor shall he appear as counsel in any civil case which involves substantially the same evidence and circumstances as were involved in a criminal case tried before him or in which a preliminary hearing was held before him; nor shall he accept or receive any claim or evidence of debt for collection when the enforcement thereof is within the exclusive original jurisdiction of his court.'

"It would appear from the second clause of the Code Section that the prohibition against appearance in civil cases outside the court not
of record in which the judge sits applies only when the civil case concerned involves facts or circumstances which were presented in a trial or hearing to the specific individual judge. Our problem involves the other two clauses of the Section, and specifically our question is whether an associate or substitute judge may appear as counsel in the Court for which he is associate or substitute judge, even though some other judge may be sitting, and whether an associate or substitute judge may accept for collection evidences of debt within the exclusive original jurisdiction of the Court in which he sits, even though his actual service to that Court as associate or substitute judge may be infrequent."

The statute dealing with associate judges, to-wit, § 16.1-19, Code of Virginia (1950) as amended provides among other things as follows:

"Each associate judge shall serve at such time or times and perform such duties as may be designated by the judge or judges or other appointing authority, and while so serving shall be subject to the same obligations, perform the same duties, and have the same power and authority as the judge." (Italics supplied).

The statute dealing with substitute judges, to-wit, § 16.1-21, Code of Virginia, provides among other things as follows:

"While acting as judge a substitute judge shall perform the same duties, exercise the same power and authority, and be subject to the same obligations as prescribed herein for the judge." (Italics supplied).

It will be noted that the associate and substitute judge are subject to the same obligations as provided for judges of the court while acting as judge. One of the obligations required of the judge is not to practice law in his court or handle claims in civil cases under the circumstances set forth in § 16.1-10, supra. This obligation extends to the judge whether he is acting as judge or not, but these prohibitions only extend to the associate judge or the substitute judge "while he is acting as judge." Had the Legislature intended that the prohibitions extend to associate judges and substitutes judges, appropriate language would have been used in § 16.1-10 or in the other sections dealing with these judges.

It is my opinion that the associate judge or the substitute judge may appear as counsel before the court of which he is associate or substitute judge while another judge is sitting and that he may handle claims for collection within the exclusive jurisdiction of such courts, but of course it would be improper for him to act on such claims (that is, try cases involving such claims) as judge should they be litigated.

JUDGES—Courts not of Record—Substitute judge not to act when county judge is sitting.

COURTS NOT OF RECORD—Substitute Judge—When authorized to serve.

HONORABLE FRANK NAT WATKINS
Commonwealth's Attorney of Prince Edward County

August 5, 1963

This will acknowledge receipt of your letter of August 2, in which you state—
"Some question has arisen as to whether or not a substitute judge, under Section 16.1-20, can act as the judge of the county court at the same time that the county judge, appointed under Section 16.1-7, is acting under the conditions hereinafter set forth. * * * 

You present the following questions:

"First. Due to the circumstances existing in Prince Edward County at the present time, the judge of the county court, although not being prohibited from acting as the judge as provided under Section 16.1-27, is present in the county, but due to the amount of work to be performed, desires to have help in the disposing of cases, designates the substitute judge to try cases at the same time as the judge of the county court.

"Second. If the county judge is not prohibited for any of the causes set forth in Section 16.1-24, but only for the reason he cannot be located at the moment, although he is present in the county at the time, may the substitute judge perform the duties of the county judge?

"Third. Does the order of the county judge, directing a substitute judge to serve, have to be entered in the clerk's office of the Circuit Court or on the records of the county judge?"

I do not believe that it would be within the scope of the statutes for a substitute county judge to be designated to try cases at the same time as the judge of the county court. Substitute county judges, in my opinion, may only sit and try cases when the regular county judge is unable to hold court.

If it appears that the work load of the regular county judge exceeds his capacity, the proper procedure, in my judgment, would be under § 16.1-19 of the Code, which authorizes the judge of the circuit court, with the approval of the committee of judges referred to in § 14-50 of the Code, to appoint one or more associate judges. This conclusion disposes of your first and second questions.

With respect to your third question, § 16.1-21 does not supply the answer, but I believe that any directive by the county judge or the associate judge to a substitute judge to serve should be made a part of the record in the county court.

JUDGMENTS—Release—How judgment satisfied in one county to be marked by clerk of another county.

HONORABLE GEORGE W. KEMPER
Clerk of the Circuit Court of Rockingham County

July 8, 1963

This will acknowledge receipt of your letter of July 5, which reads as follows:

"Several years ago a judgment was rendered in this Court in favor of the Commonwealth of Virginia on a forfeited recognizance, in the amount of $1,000.00, plus $66.50 court costs thereon, among the items of cost being a fee for the attorney for the commonwealth (in accordance with Section 14-131 of the Code) of $10.00 plus 5% of the amount of the judgment, or $60.00, and the Clerk's fee of $5.00. Execu-
tion was issued thereon in due course, and subsequent thereto an ab-
stract of the judgment was sent to Shenandoah County for docketing
in that county, wherein defendants owned real property.

"Recently this judgment was collected by the Clerk of Shenandoah
County and he informs me that he has released the judgment on his
records.

"Was payment of said judgment and costs properly made to the
Clerk of Shenandoah County, and if so, can a good release of the
judgment on the records of this court of original jurisdiction be made
also?

"Of course, the clerk's fee and the commonwealth attorney's fee in
this Court of original jurisdiction remains unpaid to these respective
officers."

Under § 8-385 of the Code, it is my opinion that it was proper for the clerk
of the Circuit Court of Shenandoah County to mark the judgment satisfied.
The clerk of Shenandoah County, in my judgment, may remit to the clerk of the
Circuit Court of Rockingham County, the amount collected on the judgment so
that the clerk of Rockingham County can make distribution of the fund to the
proper parties. Thereupon, the clerk of Rockingham County may mark the
judgment in his office satisfied. The clerk of Rockingham County, of course,
would be required to furnish the clerk of Shenandoah County with a receipt for
such fund.

If the clerk of Shenandoah County prefers to make distribution of the fund
from his office, I see no reason why the matter could not be handled in that
manner. The clerk of Rockingham County would have authority to release the
judgment in his office upon the certificate of the clerk of Shenandoah County to
the effect that the judgment has been paid in full and has been marked satis-
fied on his records.

JUSTICE OF PEACE—Authority—Extends anywhere in county.

HONORABLE RALPH G. LOUK
Commonwealth's Attorney for Fairfax County

December 19, 1963

In reply to your letter of December 16, relating to the jurisdiction of justices
of the peace acting outside the geographical confines of their respective magis-
terial districts, I am enclosing copies of four opinions of this office which I
think will enable you to solve your question. These opinions are as follows:

Opinion to W. H. Overbey dated Jan. 11, 1949—published in Report
of Attorney General (1948-49), at p. 119

Opinion to J. T. Rodgers dated Aug. 21, 1952—published in Report
of the Attorney General (1952-53) at p. 133

of the Attorney General (1953-54) at p. 115

Opinion to E. R. Hubbard dated Feb. 21, 1961—published in Report
of the Attorney General (1960-1961) at p. 173

Your letter contains the following observation and question:
The particular problem in Fairfax County is this: Inasmuch as the county jail and the two sub-stations generate the bulk of the business for the justices of the peace, justices from other districts naturally want to sit at one of those three places. My particular question at this time is this: Do justices of the peace from one district have the right to go into another district and perform these functions, thereby reducing the amount of work that the elected justice of the peace would normally have? . . .

I can find no statute which would prevent a justice of the peace from issuing a warrant anywhere within the county in which his magisterial district is located. With respect to your question as to who has authority to arrange hours or places that a justice of the peace may or should be available, I can find no statute which would vest such authority in any person.

JUSTICE OF PEACE—Authority—When accused is brought before him on charge of crime committed outside his jurisdiction.

CRIMINAL PROCEDURE—Process—When justice of peace may issue for crime committed beyond territorial limits.

HONORABLE J. T. RODGERS
Justice of the Peace of Rockingham County

This is to acknowledge receipt of your letter of January 14, 1964, in which you ask my opinion as to whether a justice of the peace of a city has authority or jurisdiction to issue a warrant for an offense which was committed within the geographical limits of a county, adjoining or otherwise, when the accused is brought before such justice of the peace by an arresting officer.

It is well settled that a justice of the peace of a city only has jurisdiction within the corporate limits of said city and within one mile beyond the same. For instance, a justice of the peace of the city of Harrisonbug has no authority to act in the county of Rockbridge. This conclusion is consistent with opinions issued by this office, to-wit, in letters to the Honorable J. T. Rodgers, dated August 21, 1952 (Annual Report of the Attorney General (1951-1952) p. 133), to the Honorable W. Francis Binford, dated November 7, 1958, (Annual Report of the Attorney General (1958-1959) p. 158), and to Mr. B. R. Hubbard, Justice of the Peace, dated February 21, 1961 (Annual Report of the Attorney General (1960-1961) p. 173).

However, the question you now pose is different in that the city justice of the peace acts within the geographical limits of his city when an accused is brought before him in his city, the offense having been committed outside his [justice of the peace] territorial jurisdiction. This situation is governed by § 19.1-99 (formerly designated as § 19-78) of the Code of Virginia (1950) as amended, which reads as follows:

"When a warrant is issued in a county or corporation, other than
that in which the charge ought to be tried, the court before whom the accused is brought, shall, by warrant, commit him to an officer, and such officer shall carry him to the county or corporation in which the trial should be, and there shall take him before, and return such warrant to, a court of appropriate jurisdiction thereof, unless otherwise provided."

This statute has long been a part of the Virginia Code. The term "court", appearing in the second and eighth lines, was formerly referred to as "justice of the peace". The purpose of the statute [this section] is to provide means to lawfully hold an accused who has committed an offense in another city or county and has been arrested within the city or county without a warrant until he [the accused] can be taken to the court having trial jurisdiction. The warrant, if issued by a justice of the peace, must be returnable to the court within his [the justice of the peace] jurisdiction and that court issues a warrant directing that the accused be committed to an officer with directions that he be carried to the court having trial jurisdiction.

I am therefore of the opinion that a justice of the peace has authority to issue a warrant when the accused is brought before him, although the offense was committed outside the geographical jurisdiction of the city or county wherein the justice of the peace is elected or appointed.

You also raise the question of the propriety of the sheriff and the State Police not taking the accused before the justice of the peace in the city when the offense was actually committed in the adjoining county, a warrant not having been issued.

The duty of the State Police in this particular instance is set forth in § 52-21 of the Code of Virginia (1950) as amended. The pertinent portion is as follows:

"Except in the case of a violation of a provision of Title 46.1, in which case the officer making the arrest shall proceed as provided in § 46.1-178, the officer making the arrest shall forthwith bring the person so arrested before an officer authorized to issue criminal warrants in the county or city where the arrest is made." (Italics supplied).

I am of the opinion that where the arrest has been made without a warrant by a member of the State Police, the accused should be brought before a justice of the peace within the county wherein the arrest was made.

Where the arrest has been made by a sheriff without a warrant, it is his duty to take the accused before a justice of the peace or other officer authorized to admit bail with reasonable promptness. (Opinions of the Attorney General (1950-1951) p. 16.) Furthermore, the arresting officer should take the accused before a justice of the peace most readily available. I am not aware of any specific authority for a sheriff to go beyond the geographical limits of his county for the purpose of taking an accused before a justice of the peace when one is available in his county. Of course, where a county uses a jail in another jurisdiction (Code § 53-139), a sheriff may place the person arrested in such jail and this may be done without a warrant. (Opinions of the Attorney General (1948-1949) p. 116. Once a person is confined in jail, he may be admitted to bail by a justice of the peace or other officer of the jurisdiction in which the jail is located. (Code § 19-118). Then the procedure in § 19.1-99, supra, is followed.
JUSTICE OF PEACE—Bail—Committing justice may admit to bail.
CRIMINAL PROCEDURE—Bail—Committing justice may admit to bail.
BAIL—Accused—How obtained.

Honorable Frank E. Swain
Justice of the Peace for Pulaski County

November 21, 1963

This is to acknowledge receipt of your letter of November 17, 1963, in reference to the authority of a justice of the peace to admit persons to bail.

Your attention is invited to § 19.1-110 of the Code which pertains to the authority of a justice of the peace to grant bail. The following portion of that section is pertinent:

"If the offense be a felony, and there is good cause to believe such person guilty, he shall not be let to bail by any justice of the peace, nor shall any person in jail under an order of commitment be admitted to bail by any justice of the peace, except the one committing him, nor in a less sum than was required by such order." (Italics supplied).

You propound two questions which will be answered seriatim. I quote from your letter:

"If a law enforcement officer brings an arrested person before me for a warrant and the accused is placed in the county jail and he later becomes eligible for bond, do I have to be the Justice of The Peace to bond him?"

This question is answered in the affirmative. The italicized portion of § 19.1-110 quoted above applies to all commitments made by a justice of the peace whether in misdemeanor or felony cases. The purpose of this statute is to prevent one justice of the peace from interfering with the actions of another; and also precludes a justice of the peace who has determined the amount of bail from thereafter changing the amount thereof. It also prevents a justice of the peace from being harassed by the accused or his counsel or friends to alter his decision in fixing the amount of the bail or determining that the person be refused bail and thereafter committed.

"What happens if I issue a warrant for an accused person, he is placed in jail and later on, he becomes eligible for bond and I have gone out of town for a day or so or maybe at the time the accused becomes eligible for bond, I cannot be located. If another Justice of The Peace who did not originally issue the warrant cannot bond the accused, what then?"

If a justice of the peace who commits a person is absent or unavailable to serve at a future time upon request that bail be granted for the reason that the committed person has become eligible for bail, then the committing justice of the peace is the only justice of the peace who can admit the person to bail.

Any person committed to jail by a justice of the peace for any reason may be granted bail by the clerk of a court not of record (county or municipal court) or by the judge thereof. See, § 19.1-111, Code of Virginia (1950). Furthermore, if the clerk of the court not of record or the judge of a court not of record re-
fuses to grant bail to the individual, he may apply to the judge of the circuit or corporation court for bail, in accordance with the provisions of § 19.1-112. In the event that the circuit or corporation court refuses him bail, he may apply to the Supreme Court of Appeals for bail. (§ 19.1-112).

JUSTICE OF PEACE—Bail—Not authorized to admit to bail an accused released from custody under § 46.1-178 in another county.

JUSTICE OF PEACE—Authority—Not authorized to issue warrant on basis of summons issued under § 46.1-178.

April 7, 1964

HONORABLE W. H. OVERBEY
Judge, Campbell County Court

This is in response to your recent verbal request for an expression of my opinion relative to the lawful authority of justices of the peace in certain instances. I shall state your questions and consider them separately and in order.

FIRST QUESTION: Is a justice of the peace in one county authorized by law to accept cash bond from a person who has been released on a summons and promise to appear in another county pursuant to Section 46.1-178, Code of Virginia (1950), as amended?

Under Section 19.1-110, Code of Virginia (1950), as amended, the justice of the peace before whom a person is brought charged with a misdemeanor, may, upon committing such person for trial, admit him to bail. Section 19.1-130, Code of Virginia (1950), as amended, allows a cash deposit on the personal recognizance of the person accused when he is admitted to bail by a court or officer authorized so to do. Section 19.1-119, Code of Virginia (1950), as amended, provides that a person charged with a misdemeanor and arrested in a county other than the county in which the misdemeanor was committed, if he so requests, shall be brought before a court, judge or justice of the peace, and may be let to bail, without trial or examination, upon taking a recognizance for his appearance before the court or justice having cognizance of the case. Under the given facts, however, the accused has been released according to law and no warrant has been issued for his arrest. There is no bail, or occasion to let an accused to bail, when he is not being held and no warrant is outstanding for his arrest.

It is well settled in Virginia that a justice of the peace can exercise only such jurisdiction as is expressly conferred on him by statute. I find no statute that authorizes a justice of the peace to accept cash bond under the stated conditions, and I shall, therefore, answer your question in the negative.

SECOND QUESTION: Is a justice of the peace in one county authorized by law to issue a warrant on the basis of a summons tendered him by a person released on such summons in another county pursuant to Section 46.1-178, Code of Virginia (1950), as amended, and then accept his cash bond?

No. Section 39-4, Code of Virginia (1950), as amended, authorizes justices of the peace to issue warrants within their respective counties and to grant bail in any case in which they are authorized by general law to grant bail. This section
REPORT OF THE ATTORNEY GENERAL

contemplates that the warrants will be issued and bail granted in accordance with all applicable law. Under the circumstances described in your question, both, the arresting officer and the accused, have performed their statutory requirements, under Section 46.1-178, in the county in which the offense occurred and the accused has been released from custody. There is, therefore, no basis for issuing a warrant against the accused in another county. Furthermore, I find no law which would authorize a justice of the peace to issue a warrant under the stated conditions.

JUSTICE OF PEACE—Bail Bond—Committing justice of peace may admit to bail.

CRIMINAL PROCEDURE—Bail—Justice of peace committing person may admit to bail.

HONORABLE W. CARRINGTON THOMPSON
Commonwealth's Attorney for Pittsylvania County

May 22, 1964

This is to acknowledge receipt of your letter of May 20, 1964, in which you request my opinion on the following:

"Citizen X appears before a Justice of the Peace, A, swearing to a misdemeanor warrant against Y. The warrant is delivered to the Sheriff for execution and the Sheriff arrests Y in his bailiwick. Is it proper for any other Justice of the Peace in the same county other than A to admit Y to bail, or must it be done by the Justice of the Peace who issued the warrant?"

Section 19.1-110, Code of Virginia (1950) authorizes a justice of the peace to let to bail a person charged with a misdemeanor warrant against Y. The warrant is delivered to the Sheriff for execution and the Sheriff arrests Y in his bailiwick. Is it proper for any other Justice of the Peace in the same county other than A to admit Y to bail, or must it be done by the Justice of the Peace who issued the warrant?"

I am therefore of the opinion that any justice of the peace in the county can admit this person to bail unless he has been committed to jail by the justice of the peace who issued the warrant. In that eventuality, the justice of the peace who has committed him to jail is the only justice of the peace authorized to admit him to bail.

I am enclosing a copy of an opinion, dated November 21, 1963, to the Honorable Frank E. Swain, which relates to the subject of bail and which may be of interest to you.
JUSTICE OF PEACE—Bail Bond—Manner in which costs are collectible under bail bond.

CRIMINAL PROCEDURE—Costs—Manner in which costs collectible under bail bond.

HONORABLE THOMAS A. WILLIAMS
Acting Commonwealth's Attorney of Westmoreland County

May 8, 1964

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

"A felony or misdemeanor warrant is sent to Westmoreland County from another jurisdiction for the arrest of a subject. A request is sent with the warrant for the Sheriff to collect his costs at the time the subject is bailed, otherwise, hold and notify the jurisdiction requesting arrest. "The justice that bails the subject does not consider he has the authority to collect the costs of arrest, mileage, and commitment prior to the defendant standing trial and only collects the cost of the bail bond. "Question: Can a justice lawfully collect the costs of arrest, mileage, and commitment when he bails a subject from another jurisdiction prior to standing trial?"

Whenever a justice of the peace acts as a bail commissioner under the circumstances set forth in your letter, the only charge he may exact from the arrested person is the fee for his service which, under §§ 14-136 and 19.1-124 of the Code, is $2.00. I know of no statute under which a justice of the peace acting in a situation such as you have presented would have authority to demand or collect from the person arrested any money except the $2.00 statutory fee. If the person to whom bail is granted fails to appear in compliance with the recognizance, the cost and other charges mentioned in your inquiry may be collected from the surety, or if a cash deposit was given in lieu of a surety, these charges may be collected out of such cash deposit. Accordingly, your question is answered in the negative.

JUSTICE OF PEACE—Fees—Amount allowable in the City of Bristol, Virginia.

HONORABLE Jos. L. CANTWELL, JR.
Judge, Corporation Court of Bristol

March 18, 1964

This will acknowledge receipt of your letter of March 16, in which you request my opinion with respect to the fees allowable to the justice of the peace in the city of Bristol. You state that the justice of the peace of that city receives a salary of $103.00 per month, which is in lieu of fees for writing criminal warrants for public officers, such as police, juvenile probation officers, etc. The question presented by you is whether this salary is a bar to his receiving fees for writing State warrants under § 14-97 of the Code.

I am enclosing copy of an opinion construing § 3511 of the Code of 1919, which is now § 14-97. This opinion, which is published in the Report of the Attorney General (1939-1940), at p. 116, was addressed to Mr. A. W. Turner...
and dated February 19, 1940. Although this opinion relates to the sergeant, it would also be applicable to a justice of the peace.

I have discussed this matter with the Office of the Auditor of Public Accounts and that office concurs in our view that the justice of the peace may collect fees from the defendants and retain such fees so long as the total thereof, together with the $103.00 salary, does not exceed the maximum allowed under § 14-156 of the Code. The justice of the peace, of course, is required to comply with §§ 14-146 through 14-150.

Under the population bracket of Bristol, the amount of annual compensation a justice of the peace could retain in that city would be $3,600.00.

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JUSTICE OF PEACE—Issuance of Process—Accused to be taken before most accessible officer.

CRIMINAL PROCEDURE—Arrest—Accused to be taken before most accessible officer.

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

I have your letter of July 2nd, which is as follows:

"Sections 46.1-178 (b) and 46.1-179 of the Code requires the arresting officer under certain conditions to take the defendant 'forthwith before the nearest or most accessible judicial officer or other person qualified to admit to bail * * * '

"In the event there are two or more justices of the peace in the vicinity where the defendant was apprehended, may the arresting officer use his discretion to whom he may take the defendant before?"

The command of the statute is in the alternative directing the arresting officer to take the defendant forthwith before the nearest or most accessible judicial officer. Accessible is defined in Webster's New Collegiate Dictionary as easy of access. This implies that the arresting officer has discretion as to which of the judicial officers in his opinion is either the nearest or most accessible. Therefore, the answer to your question is in the affirmative.

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JUSTICE OF PEACE—Receiving Claims for Collection—Not prohibited by statute.

HONORABLE MAURICE E. GRIFFIN, JR.
Justice of the Peace for City of Chesapeake

This is in reply to your letter of November 15, 1963, in which you inquire as to whether you may represent a business firm in civil court proceedings for the collection of debts in the event you are employed as Business Manager for that firm.
Section 16-16 of the Code of Virginia (1950) contained a prohibition against a justice of the peace receiving claims for collection. When this section of the Code was recodified as a portion of Title 16.1 of the Code, this prohibition was deleted. Since the repeal of that section, I am aware of no prohibition against a justice of the peace receiving claims for collection.

The extent to which an employee or officer of a business firm who is a non-lawyer may appear in proceedings to represent the interest of an employer has been the subject of an opinion by the Virginia State Bar. I refer you to Mr. R. E. Booker, Secretary-Treasurer, at 203 North Governor Street, Richmond, Virginia for a copy of that opinion.

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**JUVENILE AND DOMESTIC RELATIONS COURTS—Appeals—Status of child fixed by court does not change during pendency of appellate proceedings.**

**October 29, 1963**

**Honorable W. J. Austin, Jr.**
Judge, Juvenile and Domestic Relations Court, City of Roanoke

This is in reply to your letter of October 21, 1963, in which you request my opinion as to the applicability of § 16.1-216 of the Code to appeals from a juvenile court to a court of record.

Section 16.1-216 of the Code of Virginia (1950), as amended, reads as follows:

"Petition for or the pendency of an appeal or writ of error shall not suspend any judgment, order or decree of the juvenile court in any case, nor operate to discharge any child concerned or involved in the case from the custody of the court or other person, institution, or agency to which the child has been committed, unless so ordered by the judge of a court of record or directed in a writ of supersedeas by the Supreme Court of Appeals or a judge thereof."

The section of the Code preceding the above-quoted section provides for an appeal from the juvenile and domestic relations court to a court of record as a matter of right. The judgment of the appellate court is filed with the juvenile court and thereupon becomes the judgment of the juvenile court.

The purpose of the above-quoted section is to retain the status of a child as fixed by the juvenile court during the pendency of the appellate proceedings. If the juvenile court has placed a child in the custody of some person or institution, the child is to remain in custody during the pendency of the appeal, whether to a court of record or the Supreme Court of Appeals unless otherwise ordered by the appellate court.

The manifest purpose of this section being to retain the status quo until disposed of by the highest court to which an appeal is taken, I am of the opinion that § 16.1-216 of the Code applies to all appeals from the juvenile court, whether to a court of record or the Supreme Court of Appeals.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS COURTS—Regional—City of Fredericksburg may not participate.

June 24, 1964

HONORABLE J. M. H. WILLIS, JR.
Commonwealth’s Attorney for City of Fredericksburg

This is in reply to your letter of June 22, relating to § 16.1-143.1 of the Code, as amended by Chapter 135 of the Acts of Assembly (1964), and to Chapter 6, Section 30 of the Charter of the city of Fredericksburg.

Section 16.1-143.1, as amended, reads as follows:

"The governing bodies of two or more cities or of two or more counties or of any combination of cities and counties may, with the approval of the judge or judges of the circuit court or courts of said cities and/or counties, establish and operate a regional juvenile and domestic relations court to serve the participating counties and cities."

Section 30 of Chapter 6 of the City Charter, to the extent it is material to your inquiry, reads as follows:

"There shall be elected by the qualified voters of the city of Fredericksburg, Virginia, on the Tuesday after the first Monday in November, 1945, and every four years thereafter, a special justice of the peace, to be known as the civil and police justice, who shall hold office for a term of four years, and until his successor is elected and qualified, and whose term of office shall begin on the first day of January succeeding his election.

"The city council shall elect a substitute civil and police justice and clerk of said court, and if the office of justice of the civil and police justice court of Fredericksburg, Virginia, becomes vacant by death or resignation, or for any other cause, the city council shall immediately elect a justice of the civil and police justice court to serve as such during the unexpired term.

"The civil and police justice of said city, the substitute justice and the clerk of said court shall ex officio be the justice, substitute justice and the clerk of the juvenile and domestic relations court for said city and their terms of office shall be concurrent and co-extensive with their terms as justice, substitute justice and clerk of the civil and police justice court."

You have presented the following question:

"1. May the City of Fredericksburg participate in a regional Juvenile and Domestic Relations Court as authorized by Section 16.1-143.1 of the Code of Virginia as amended in 1964?

"2. Does the Act of 1964 have the force and effect of depriving the Municipal Judge of the City of Fredericksburg of the position of judge of the Juvenile and Domestic Relations Court of the City as provided in the City Charter?

"3. The City Council having expressed its desire to do so, if questions (1) and (2) are answered in the neg-ative, would it be lawful for the city to participate and have the Council elect the Regional Judge as a substitute Municipal Judge and delegate the juvenile and domestic relations work entirely to the substitute so elected?"

Section 16.1-143.1 was first enacted by Chapter 478, Acts of Assembly (1960), and by reference to the wording of the section as first enacted it will be noted
that in the first sentence authority to establish regional juvenile courts was given to the governing bodies at that time.

Section 16.1-7 of the Code, to which you referred, is, in part, as follows:

"Every judge or justice and every associate, assistant and substitute judge or justice of a court not of record in office on July 1, 1956, shall continue in office as the judge, associate judge, assistant or substitute judge of such court under its designation as a county court a juvenile and domestic relation court, or a municipal court until the expiration of the term for which he was appointed or elected, and upon the expiration of his term and of each successive term thereafter a successor shall be appointed or elected for the term and in the manner following:

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

"(2) In cities and towns each such judge, associate judge, assistant or substitute judge shall be appointed or elected for such term and in such manner as is prescribed by the charter of the city or town in which he serves; but, in the event such charter does not prescribe the term and manner of appointment or election, then for such term and in such manner as was prescribed by general law immediately prior to the effective date of this title . . . ."

Chapter 478, Acts of Assembly (1960), and Chapter 135, Acts of Assembly (1964) fail to contain any language with respect to charter provisions of the various cities relating to the establishment of juvenile courts.

The critical question is whether or not the provision found in subsection (2) of § 16.1-7 is affected by § 16.1-143.1, a general statute enacted subsequent to the enactment of § 16.1-7. In the original enactment of Title 16.1 there can be no question that the provisions of the city charter quoted herein were not affected because § 16.1-7 expressly provides that the charter provisions with respect to the manner of selection of such judges is protected. Did the enactment of § 16.1-143.1 four years later repeal by implication paragraph (2) of § 16.1-7, is another way to present the question. Section 16.1-143.1 is an enabling act, leaving it to the discretion of the governing body whether or not it will join with one or more political subdivisions for the purpose of establishing a regional juvenile and domestic relations court appointed by a judge or judges of a court of record. This discretion, in my opinion, may be exercised only by counties and by those cities having no charter provisions that are in direct conflict with this Code section, such as the selection of such a judge by a vote of the people, as is the case in Fredericksburg. This section, in my opinion, does not repeal § 16.1-7 by implication. Repeal by implication is not favored by courts. The presumption is always against the intention of repeal where express terms are not used. See, Michie's Va.—W. Va. Digest, Vol. 9 (Statutes), p. 70, Sec. 115; and the numerous cases therein cited. Also, see Am. Jur., Vol. 50 (Statutes) Sec. 539. When the General Assembly first enacted § 16.1-143.1 it could have included language making it clear that the authority therein granted would extend to all cities notwithstanding any other provision of law or charter provision of any city. Furthermore, this could have been accomplished by the amendment at the 1964 session.

In light of the foregoing, your questions 1 and 2 are answered in the negative. In my opinion, question 3 must be answered in the negative. Such action would have the effect of depriving the civil and police justice of the jurisdiction he has under the city charter.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS COURTS—Traffic Offenses—Mandatory they try all cases involving person under eighteen years of age.

MOTOR VEHICLES—Traffic Offenses—Minors—Must be tried by Juvenile and Domestic Relations Court where person under eighteen years of age.

May 26, 1964

HONORABLE RICHARD W. DAVIS
Municipal Judge, Juvenile and Domestic Relations Court for Radford

This is to acknowledge receipt of your letter of May 21, 1964, in which you state in part:

"At the present time, the Municipal Court of Radford is trying all traffic offenders regardless of the age of the offender. This procedure has been followed primarily due to the fact that the Municipal Court of Radford has been conducting the ceremony of issuing operator's licenses to minors.

"Section 46.1-375.1 of the Code of Virginia, 1950, recently enacted by the legislature, requires the Juvenile and Domestic Relations Courts to issue operator's licenses to minors rather than the Municipal or County Courts. Is it also mandatory that said offenses be tried by the Juvenile and Domestic Relations Judge?"

Juvenile and Domestic Relations Courts are vested with exclusive original jurisdiction in all cases involving a minor under the age of eighteen who is charged with the violation of any State law, municipal or county ordinance. Section 16.1-158(4), Code of Virginia (1950) as amended. I am not advised of any statute which would divest juvenile and domestic relations courts of jurisdiction to try minors charged with traffic offenses. Proceedings against a child may be instituted on warrants as provided by law. Section 16.1-186. Furthermore, § 46.1-417 of the Code of Virginia as amended which authorizes mandatory revocation of driving licenses of a minor by the Commissioner of the Division of Motor Vehicles when the Commissioner receives a record of the juvenile having been found not innocent of certain crimes in violation of a State law or a town, city or county ordinance. This would certainly imply that the Legislature took cognizance of the fact that minors are tried by juvenile and domestic relations courts for traffic offenses. The only courts authorized to make a finding of not innocent are juvenile and domestic relations courts.

I am therefore of the opinion that it is mandatory that all traffic offenses allegedly committed by a minor (a person under eighteen years of age) be tried by juvenile and domestic relations courts.

JUVENILES—Detention—Cannot be detained in local jail.

JAILS AND PRISONERS—Juveniles—May not be detained in jail.

March 2, 1964

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney for Rockbridge County

This is to acknowledge receipt of your letter of February 27, 1964, in which you state in part:
"The Rockbridge County Board of Supervisors has requested me to seek your opinion as to its obligation, pursuant to Code Section 16.1-196, to furnish quarters entirely separate from adults for the detention of certain juveniles who might be held in custody for a period of time pending trial, when it becomes difficult to place such juveniles in an area juvenile detention home.

"Specifically, the Board of Supervisors seeks your opinion as to whether quarters entirely separate for juveniles in the local jail would legally serve the purpose of a juvenile detention home. To put it another way, is it mandatory to place such juveniles in a juvenile detention home where there are, or will be, separate quarters for such juveniles in the local jail?"

The statutes covering this situation are §§ 16.1-196 and 16.1-199, Code of Virginia (1950) as amended. The pertinent parts of said statutes are as follows:

"§ 16.1-196. No person known or alleged to be under the age of eighteen years shall be transported or conveyed in a police patrol wagon, or confined in any police station, prison, jail or lockup, or be transported or detained in association with criminals or vicious or dissolute persons; except that a child fourteen years of age or older may, with the consent of the judge, clerk or the juvenile probation officer, be placed in a jail or other place of detention for adults in a room or ward entirely separate from adults."

§ 16.1-199. (a) Provision shall be made for the temporary detention of children coming within the purview of this law (1) in a detention home conducted as an agency of the city or county or any combination thereof for that purpose, or (2) in a private home or homes selected by and under the supervision of the court or local department of public welfare, or (3) by an incorporated institution, society, or association licensed by the State Board as a children's agency, or (4) in a detention home conducted by another county or city or any combination thereof. The court or judge shall not send any child to a jail or station house while awaiting trial or disposition except in accordance with the provisions of this law.

"(b) The State Board is authorized and directed to prescribe the necessary positions required in the operation of detention homes, to fix salary ranges for such positions, provided, however, that nothing herein shall prevent the payment of salaries in excess of State approved ranges when such excess is paid from local funds, and also to prescribe minimum standards for construction and equipment in detention homes and for feeding, clothing, medical attention, attendance and care of children detained therein. It may prohibit by its order the detention of children in any place of detention which does not meet such minimum standards and designate some other place of detention for children who would otherwise be held therein.

Section 16.1-196 supra, provides that no child under eighteen shall be confined in a jail. The only exception to this is that a child fourteen years of age or older may be placed in a jail with the consent of the judge, clerk of the juvenile court or the juvenile probation officer.

Section 16.1-199 prescribes where children are to be detained. The State Board of Welfare is authorized to prescribe minimum standards for construction and equipment in detention homes and for feeding, clothing, etc. of the children. The object of the statute is to prohibit the child being detained from contact with
the adult offenders. Whether this can be accomplished when the juvenile detention home is in physical contact with the local jail is extremely doubtful.

I am of the opinion that the establishment of separate quarters for detention of juveniles in the local jail would not be in compliance with the statutes in so far as the establishment of a detention home is concerned.

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JUVENILES—Suspension of Commitment—Does not place minor in jeopardy.

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—Retained over juvenile after suspension of commitment.

March 12, 1964

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

This is to acknowledge receipt of your letter of March 9, 1964, in which you state in part:

"The facts are as follows: the accused was brought before the Juvenile Court in Appomattox County on a charge of unauthorized use of an automobile (a felony); The Juvenile Judge entered an order committing this juvenile (under 18 years of age) to the State Welfare Department; at the same time, the Judge suspended the execution of this order and committed the accused to probation under the State Probation Officer in Lynchburg. Mr. Ward Dean; the young man has failed to respond to the opportunity and has become involved in several additional crimes; the accused has now reached 18 years of age; the Welfare Department will not accept him at any of the detention homes or places. What we would like to know is whether or not this young man has been put in jeopardy to such an extent that the Juvenile Court cannot now further deal with him. If you feel that the Juvenile Court of Appomattox County has authority to deal with this man, to what extent can we deal with him? In other words, can we now enter a new sentence by way of punishment or can the Juvenile Court forward it on to the Grand Jury to be dealt with on the original charge? In other words, we want to know just what the principles of law are in relation to jeopardy and in relation to what we can do with this man who apparently is becoming a habitual criminal."

Apparently, the Juvenile and Domestic Relations Court found that this minor came within the purview of the statute (Chapter 8, Title 16.1, Code of Virginia (1950) as amended) and committed him under § 16.1-178 of the Code. This order of commitment was suspended and the minor placed under the supervision of a probation officer (Article 5 of said Chapter 8). This action on the part of the court does not constitute a conviction (§ 16.1-179), nor does it place the minor in jeopardy. Any commitment made by the court may continue until the child has attained the age of twenty-one (Section 16.1-180).

As this minor has not been placed in jeopardy, he can be tried on the original charge or the minor may be dealt with as the Juvenile and Domestic Relations Court sees fit. The charge being a felony, the case may be sent to the grand jury under the provisions of § 16.1-176 and disposed of by the Circuit Court.
REPORT OF THE ATTORNEY GENERAL

LABOR—Children—Child under sixteen years of age may not perform services in hospital with or without compensation.

June 9, 1964

HONORABLE EDMOND M. BOGGS
Commissioner of Labor

This is to acknowledge receipt of your letter of June 5, 1964, in which you state in part:

"The question has arisen from time to time in this Department as to whether girls fifteen years of age and over would be permitted to work as volunteers in a hospital as a laboratory helper, orderly or nurses' aide . . . The young people being considered do not receive any pay for such work performed.

"It would be greatly appreciated if you would advise me, at the earliest possible date, if these young people would be permitted to perform this type of work and would necessarily have to have an employment certificate, and if they would be permitted to do this type of work under sixteen years of age."

Section 40-109, Code of Virginia (1950) as amended has for its purpose the care and welfare of the child and must be construed with that purpose in mind. (Opinions of the Attorney General (1955-1956) p. 120). In the case of Humphreess v. Boxley Bros., Inc., 146 Va. 93, 94, the Court stated:

"The principal object of the child labor law is the protection of the infant."

The fact that the child may perform such service as you describe on a voluntary basis and without compensation does not alter this situation. The primary object of this provision is to protect the child from dangers which may arise in the course of attending patients in hospitals, clinics or other establishments. Its secondary object could be rightly said to be the protection of the patient from acts of immature children performed in such employment. The term "employ" is not defined in the statute. (Child Labor Laws). According to Black's Law Dictionary, 4th Edition, page 617, among the meanings of that term we find:

"To engage in one's service."

I think that employment within the meaning of the child labor law would encompass the situation where the services of the child are engaged both with or without compensation. Furthermore, this office has held that no certificates of any kind may be issued authorizing employment of children in occupations prohibited to children in § 40-109. (Opinions of the Attorney General (1956-1957) pp. 154, 155.

It is therefore my opinion that the questions raised by you should be answered in the negative.

LABOR—Hours—Women—Nurses aides not exempt from § 40-35.

October 24, 1963

HONORABLE EDMOND M. BOGGS
Commissioner, Department of Labor and Industry

This is in reply to your letter of October 17, 1963, in which you request
my opinion as to whether hours of work of nurses aids employed in nursing homes are regulated by § 40-34 of the Code of Virginia.

Section 40-34 of the Code reads, in part, as follows:

"No female shall be employed, suffered or permitted to work in any business establishment in this State, except as provided in § 40-35, for more than nine hours in any twenty-four consecutive hour period nor more than forty-eight hours in any period of seven consecutive days."

A nurses home falls within the classification of "business establishments" as defined in § 40-1.1(5) of the Code.

There is no exception in § 40-35 of the Code which would exclude unlicensed persons employed as nurses aids from the provisions of § 40-34 of the Code. Accordingly, your inquiry is to be answered in the affirmative.

LABOR—Wages—Contractor not required to pay salary to employee serving on National Guard duty.

CONTRACTORS—Wages—Not required to pay to employees while on National Guard duty.

HONORABLE TOM FROST
Member, House of Delegates

September 19, 1963

This will acknowledge receipt of your letter of September 17, 1963, in which you request my opinion on the following question:

"Can a contractor doing all government work deduct the salary from an employee while serving on National Guard duty?"

As I understand it, your question pertains to the right of such an employee to receive salary or wages from his employer during the time the employee is on active duty with the National Guard.

Section 44-93 of the Code of Virginia (1950), as amended, reads as follows:

"All officers and employees of the State who shall be members of the national guard or naval militia shall be entitled to leaves of absence from their respective duties, without loss of pay, time, accrued leave, or efficiency rating, on all days during which they shall be engaged in field or coast defense training, ordered or authorized under the provisions of this chapter."

I am of the opinion that an employee of a contractor doing all government work is not an officer or employee of the State within the meaning of the above statute. I am not aware of any law that would require a civilian employer to pay salary or wages to his employee during the time such employee might be on active duty with the National Guard.
REPORT OF THE ATTORNEY GENERAL

LICENSES—Local Tax—Practitioner of a Profession—City of Radford without authority to impose where office not in city.

TAXATION—Licenses—Practitioner of a Profession—City of Radford may not collect unless practitioner has office, place of business or abode in city.

November 18, 1963

HONORABLE G. GARLAND WILSON
City Attorney for Radford

This is to acknowledge receipt of your letter of November 6, 1963, in which you state in part:

"The City of Radford has recently enacted an Ordinance for license on certain professions based upon a percentage of gross receipts. The Ordinance provided that all physicians, lawyers, etc., who maintain an office or place of business in the City of Radford would be liable for the payment of a license measured upon their gross receipts.

"My question is if a surgeon removed his office outside of the City, and into the County, and yet regularly practiced his profession of surgery in the hospital in the City of Radford, whether or not an amendment could not be added to such an ordinance imposing a flat fee (assuming the same is reasonable) upon all persons practicing their professions in the City who do not maintain an office in said City."

Your attention is invited to Section 58-266.4, Code of Virginia (1950) as amended, which provides in part as follows:

"The situs for the local license taxation of every practitioner of a profession which the State regulates by law shall be the city, town or county in which such a practitioner maintains his office; provided, however, that if any such person maintains any branch office in any other city, town or county, the city, town or county in which such branch office is located may impose a local license tax on him, but if such local license tax be measured by volume, the volume on which the tax may be computed shall be the volume attributable to practice in the city, town or county in which such a branch office is maintained, and any volume so includable in the base for measuring such tax shall be deductible from the base in computing any local license tax measured by volume imposed on him by the city, town or county in which he maintains his principal office. If any practitioner of a profession which the State regulates by law does not maintain any office, the situs for the local license taxation of such a practitioner shall be the city, town or county in which such person maintains his place of abode, if he has a place of abode in this State, otherwise the situs shall be each city, town or county in which he practices his profession. The word "volume", as used in this paragraph means gross receipts or other base for measuring a license tax which is related to the amount of business done."

An examination of the charter of the city of Radford, Chapter 375, Acts of 1946, does not disclose any express authority to impose a license tax under the conditions you cite. Section 48 of said charter concerning the imposition of license taxes expressly excepts cases where the taxation is prohibited by the general laws of the State. The provisions of Section 58-266.4(a), supra, have the effect of a prohibition, as it states specifically what constitutes the situs for local license taxation.

It is therefore the opinion of this office that the city of Radford is without au-
thority to impose a license tax on all persons practicing their professions within the city but maintaining offices or places of business or places of abode in this State.

MENTAL HYGIENE AND HOSPITALS—Admissions—How residence of patient to be determined.

Dr. Hiram W. Davis
Commissioner, Department of Mental Hygiene and Hospitals

August 14, 1963

This will acknowledge receipt of your letter of August 13, in which you state that Wanda Leigh Piercey has been committed to Lynchburg Training School and Hospital and is now on the waiting list. The question of legal residence has come up due to the fact that her parents are not considered residents of Virginia. You state further:

"For your information, the father, Mr. Robert W. Piercey, entered this country as an alien for the purpose of joining the United States Army and becoming a citizen after the completion of three years. As a member of the Armed Forces, he was stationed in various parts of the United States and overseas from 1951 to 1962. He is now stationed in Fort Eustis, Virginia, and has been since September 1962.

"For your further information, this child was born November 15th, 1959, at Fort Devens, Massachusetts, while the father was stationed there in the Army."

It appears that Mr. Piercey has been a resident of Virginia since September, 1962, and it is assumed that the child in question has been a resident in Virginia for the same length of time. Under § 37-1.1(6) of the Code, residents, as used in Title 37 of the Code, means any person who has lived in this State for a period of one year without public support for himself or his spouse or minor children. I assume that in the month of September of this year this man and his family will become legal residents of this State within the meaning of this section. Therefore, based upon this assumption, in my opinion, as soon as the one year period has elapsed this person will be entitled to admittance to the Lynchburg Training School and Hospital.


MENTAL HYGIENE AND HOSPITALS—Admissions—Must admit only legal residents committed under state law.

ARMED FORCES—Dependents—State law determines status for purpose of acceptance in State hospitals.

Dr. Hiram W. Davis
Commissioner, Department of Mental Hygiene and Hospitals

September 11, 1963

This is in reply to your letter of September 4, which reads, in part, as follows:
"I am under the impression that a federal statute makes members of the armed forces residents of the state in which they resided at the time of entry into the armed forces, regardless of length of stay in another state as a member of the armed forces. Under the provisions of this law, Virginia is compelled to accept into its state hospitals dependents of servicemen stationed elsewhere in the country who claim residence in Virginia.

"If we are also compelled to accept dependents of servicemen stationed in Virginia who claim residence elsewhere, we will 'getting it from both ends,' and Virginia's mental institutions will soon be filled with dependents of servicemen stationed in Virginia but who claim residence in other states, who pay no taxes in Virginia, and drive their cars in Virginia with license plates of other states."

Section 37-186 of the Code provides that the superintendent of the Lynchburg Training School and Hospital shall receive and care for epileptics and feeble minded persons, when facilities are available, who are legal residents, when committed under State law. The term "legal residents" for the purpose of Title 37 of the Code is defined in § 37-1.1(6) as follows:

"'Legal resident' means any person who has lived in this State for a period of one year without public support for himself of his spouse or minor children;"

The State statute controls and it is not affected by any federal statute of the nature to which you refer. Therefore, in determining that a person is entitled to admittance under § 37-186 it must be established that such person is a resident within the meaning of that term under § 37-1.1(6). Although a person has lived in this State for one or more years, whenever he ceases to live in this State and establishes his home in another State he can no longer be considered a resident of this State as required by § 37-186.

MENTAL HYGIENE AND HOSPITALS—Construction of Facilities for Mentally Retarded under Public Law 88-164—State Board of Health has sole authority to supervise program.

June 25, 1964

DR. MACK I. SHANHOLTZ
State Health Commissioner

You have today conferred with this office with respect to Chapter 161, Acts of General Assembly (1964), by which §§ 32-197 and 32-200 of the Code of Virginia were amended so as to provide that the State Board of Health shall have authority to administer on behalf of the State of Virginia the provisions of Public Law 88-164 pertaining to the construction of facilities for the mentally retarded (Part C of Title 1 of Public Law 88-164) and community mental health centers (Title II of Public Law 88-164).

The amendment to § 32-197 enlarges the scope of Chapter 12, Title 32 of the Code of Virginia, cited as the "State Hospital Survey and Construction Law" so as to make said law (Chapter 12, Title 32 of the Code of Virginia) applicable to any other acts of Congress providing federal funds for hospital construction, in addition to the Hospital Survey and Construction Act (usually cited as the Hill-Burton Act). Section 32-200 was amended so as to increase the membership on the Advisory Hospital Council from twenty to twenty-two.

The Governor of Virginia, by letter dated May 28, 1964, to the Honorable Anthony J. Celebrezze, Secretary of Health, Education and Welfare, designated
the State Board of Health (Dr. Mack I. Shanholdt, Commissioner), as the sole and single State agency responsible for administering the provisions of Public Law 88-164. You have requested my advice as to whether the State Board of Health has the necessary legal basis to administer or supervise the administration of the provisions of Public Law 88-164 pertaining to the construction of facilities for the mentally retarded (Part C of Title I) and community mental health centers ('Title II').

You are advised that, in my opinion, the State Board of Health, having been designated for that purpose by the Governor, has complete and sole authority under the provisions of Chapter 12, Title 32 of the Code of Virginia, as amended, to administer and supervise the construction programs under Public Law 88-164 in the State of Virginia.


April 24, 1964

HONORABLE A. S. HARRISON, JR.
Governor of Virginia

This is in reply to your letter of April 23, 1964, in which you advise that you have informed the Secretary of Health, Education and Welfare that you plan to designate the State Department of Health to administer the provisions of Public Law 88-164, pertaining to the construction of mental retardation facilities and community mental health centers. You have requested my opinion as to the sufficiency of the legal authority reposed in the State Department of Health by Virginia law to administer the provisions of the Federal Act.

Chapter 12, Title 32 of the Code of Virginia of 1950, referred to as the "Hospital Survey and Construction Law," was originally enacted in 1947 to authorize the State Department of Health to administer the provisions of "The Federal Act," defined in § 32-197 (2) of the Code as Public Law 79-725, approved August 13, 1946.

By enactment of Chapter 161, Acts of Assembly of 1964, the General Assembly of Virginia amended § 32-197(2) of the Code so as to make the definition of "The Federal Act" applicable to any other acts of Congress providing Federal funds for hospital construction. By virtue of this amendment, the State Department of Health is now authorized to act as the sole agency of the State of Virginia for purposes of administering and complying with the terms of Public Law 88-164, known as the Mental Retardation Facilities Construction Act of 1963.

MENTAL HYGIENE AND HOSPITALS—Sale of handicrafts—No authority to contract on behalf of patients.

HONORABLE HIRAM W. DAVIS
Commissioner, Department of Mental Hygiene and Hospitals

July 29, 1963

I have your letter of July 18, 1963, with which you enclosed a copy of a
REPORT OF THE ATTORNEY GENERAL

letter addressed to the Superintendent of the Lynchburg Training School and Hospital wherein the Volunteer Services Council proposed a plan for selling the various products made by the patients of the Lynchburg Training School and Hospital in the school craft shop.

I am aware of no legal authority for a State institution to enter into a contract with a private organization of the nature here contemplated.

MENTALLY ILL—Commitment—Certificate of physician to be filed before court hearing.

HONORABLE JOHN G. CORBOY
Judge, Municipal Court of Vienna

July 22, 1963

This is in reply to your letter of July 15, in which you request my opinion as to whether or not under § 37-99 of the Code the certificate of a licensed physician should be filed along with the written request mentioned in said section. The material part of this section reads as follows:

"The judge of any circuit or corporation court, or any judge of a county or municipal court upon written request of any respectable citizen accompanied by the certification of a duly licensed physician, who shall if practicable be the person's family physician, upon forms prescribed by the State Hospital Board, may commit to any State hospital for observation as to his mental condition, any suitable person in his county or city who is not an inebriate or drug addict . . . ."

In my opinion, the court should not set the matter for hearing unless the certificate of the licensed physician is filed. The court is not authorized by this section to consider the written request by itself. The person involved is entitled to know in advance of the hearing the identity of the physician who is making the certificate. This statute, you will note, states that the written request and certificate of the physician shall be made upon forms prescribed by the State Hospital Board. I assume you have obtained a supply of these forms.

MINES—Jurisdiction of Chief Mine Inspector—Coal mining in vicinity of oil and gas wells—§ 45-127 applicable irrespective of whether wells producing or dry.

HONORABLE CREED P. KELLY
Chief Mine Inspector, Divisions of Mines and Quarries

August 30, 1963

This is in reply to your letter of August 12, 1963, in which you request my opinion regarding the legal responsibility of the Mine Division in situations in which coal mine operations extend into an area of gas or oil wells. You are particularly interested in knowing if there is a distinction drawn between a com-
pleted gas well and a dry and/or abandoned well when applying § 45-127 of the Code.

Section 45-109, Code of Virginia (1950), reads as follows:

"§ 45-109. Further powers and duties of Chief.—The Chief shall exercise supervision over the location, drilling, deepening, casing, completion, production, abandonment, plugging and filling of all wells and over all mining operations in close proximity to any well and any agent of the Division shall have such access to the plans, maps, logs, and such other records and to all such properties of the well operators and mine operators as may be necessary or proper for this purpose. The Chief may require the submission of reports on production of oil and gas at regular intervals and the placing of meters at places designated by him to prevent waste or obtain accurate records of production and transportation of oil or gas. (1950, p. 132; c. 699)."

By virtue of the foregoing quoted statute, it is readily apparent that the jurisdiction of the Chief Mine Inspector extends to all phases of mining oil and gas.

A "well" is defined in § 45-106 of the Code as follows:

"(x) 'Well' means a bore hole or excavation for the purpose of producing any liquid or gaseous substance from beneath the surface of the earth;"

It is noteworthy that there is no definition provided for "completed well," "producing well" or "dry well."

The essence of § 45-127 of the Code is the regulation of mining of coal and other minerals within a specified distance of gas or oil wells. That section reads, in so far here germane, as follows:

"Before removing any coal or other mineral, or extending any mine workings or mining operations within five hundred feet of any well, or under any tract of land in visible possession of a well operator for the purpose of drilling for oil or gas, the mine operator shall give notice by registered mail to the well operator and to the Chief and forward therewith an accurate map or maps on a scale, to be stated thereon, of one hundred to four hundred feet to the inch showing its mine workings and projected mine workings beneath such tract of land or within five hundred feet of such well. Following the giving of such notice and the furnishing of such map or maps, the mine operator may proceed with mining operations as projected on such map or maps, but shall not remove any coal or other mineral or conduct any mining operations nearer than two hundred feet to any completed well or well that is being drilled, or for the purpose of drilling which a derrick is being constructed, without the consent of the Chief." (Italics supplied)

As pointed out hereinbefore, there is no statutory definition of a "completed well," but it is generally accepted to be a well which has been sunk to a depth necessary to find oil or gas in paying quantities, or to such depth as is necessary for a reasonably experienced driller to determine that further drilling would not produce oil or gas in paying quantities.

There is nothing in Chapter 8, Title 45 of the Code which would evince an intention on the part of the Legislature to relinquish jurisdiction over gas or oil wells which have become dry or nonproducing. To the contrary, Article 4 of Chapter 8 is devoted to the abandonment of wells. The extent of care required
in the plugging of such wells, particularly in the vicinity of workable coal beds, would strongly indicate that a dry or nonproducing gas well is the concern of the Chief Mine Inspector.

Accordingly, I am of the opinion that § 45-127 of the Code is applicable to gas and oil wells, irrespective of whether such wells are producing or dry.

MOTOR VEHICLES—Accident Report—Not required unless driver of vehicle involved in accident.

MOTOR VEHICLES—Chauffeur’s License—Required of municipal employee employed principally to drive a motor vehicle.

October 15, 1963

HONORABLE D. C. WRAY, JR.
Judge of the Augusta County Court

This is in reply to your letter of October 3, 1963, requesting my opinion on each of two matters which I shall quote and consider separately and in the order presented:

"First, with respect to Section 46.1-176 Code of Virginia, 1950, as amended, concerning the duty of a driver to stop, etc., in case of accident. The section reads that ‘(a) The driver of any vehicle involved in an accident . . .’ (emphasis supplied) shall do certain things. My question is, need the vehicle of a driver be struck or damaged at all to be INVOLVED in an accident? Specifically, is the driver of a vehicle who is operating completely within the law, but who sees an accident take place when a vehicle overtaking him runs into another vehicle, under the duty imposed by statute? His vehicle was involved in the sense that had he not been there, the passing vehicle would not have been attempting to pass, but is this involved within the meaning of the statute?"

In considering the language of Section 46.1-176, which refers to “any vehicle involved in an accident,” it would appear that there must be some physical contact by the vehicle in order to bring it under the statute. In my interpretation, the statute does not apply to the driver of a vehicle who merely sees the accident take place, nor would the presence of his vehicle, under the circumstances which you describe, constitute involvement within the meaning of this section. By the terms of the statute itself, however, the driver of any vehicle which is involved is required to make the report irrespective of the amount of property damage.

"Second, with respect to persons employed principally to drive a motor vehicle, and the requirement that they have a chauffeur’s license; is this applicable to employees of a municipality, e.g., a garbage truck driver?"

Section 46.1-1 (2), Code of Virginia (1950), as amended, defines the word "chauffeur" as follows:

"Every person employed for the principal purpose of operating a motor
vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property."

This section contains no exception or reservation and I find none elsewhere which relates to municipal employees. In my opinion, the determining factor is whether or not the principal purpose of employment is for operating a motor vehicle. If such be the principal purpose of the employment, then a chauffeur's license, rather than an operator's license, is required. Accordingly, I shall answer this question in the affirmative.

MOTOR VEHICLES—Antique Motor Vehicle—Permissible use of vehicle so licensed.

October 18, 1963

HONORABLE MARK D. WOODWARD
Judge, Page County Court

This is in reply to your letter of October 10, 1963 in which you request my opinion as to whether or not it is permissible to operate a motor vehicle licensed as an "antique motor vehicle" under the following facts, which I quote:

"A vehicle properly bearing an antique vehicle license was observed by an officer leaving a Tastee Freeze on Main St., Luray, (Route 211). In the car were several very young children. The officer followed the car down Main St. to Broad St. (Route 340) and shortly thereafter stopped the vehicle."

Section 46.1-1 (15a), Code of Virginia (1950), as amended, defines "antique motor vehicle" in the following language:

"Every motor vehicle, as herein defined, which is over twenty-five years old and is owned solely as a collector's item, and is used for participation in club activities, exhibits, tours, parades, and similar uses, but in no event used for general transportation, may be classified by the Commissioner as an antique motor vehicle."

Under Section 46.1-104, Code of Virginia (1950), as amended, registration and license plates for an antique motor vehicle may be obtained for a fee of five dollars and such license plates are valid so long as title to such vehicle is vested in the applicant. This special rate for registration and license plates is, in itself, compatible with the intended limited use of such vehicles.

This legislative intent is crystallized in the words "but in no event used for general transportation," contained in Section 46.1-1 (15a). The phrase, "and similar uses," also found in this section, in my interpretation, refers to uses similar to the specifically stated uses of "participation in club activities, exhibits, tours" and "parades," such as purely for show or nonprofit display purposes. The antique license, however, would obviously permit such essentials as driving to and from these named activities, as well as driving to and from a repair shop, garage or service station for necessary repairs and supplies. It, apparently, would also permit the vehicle to be driven, within reasonable limits, for such purposes as recharging or maintaining the battery.

In considering the facts in your letter, I find nothing in the law which would make it illegal to transport children in such a vehicle nor to pause for refreshments along the way, so long as the vehicle is not used for general transportation.
It is, therefore, my opinion that the facts outlined, standing alone, do not reflect an improper use under Section 46.1-1 (15a), quoted supra, and I shall answer your question in the affirmative.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Effect of inability to procure qualified person to obtain sample.

CRIMINAL PROCEDURE—Blood Analysis—Failure to find person qualified to take sample—Requires dismissal.

January 20, 1964

HONORABLE WILLIAM A. JONES
Commonwealth's Attorney for Richmond County

This will reply to your letter of January 16, 1964, in which you call my attention to certain provisions of § 18.1-55 of the Virginia Code—generally known as the Virginia "implied consent" law—and present the following situation and inquiries:

"1. The arresting officer is unable to obtain any qualified person to take blood sample, because of the refusal of all qualified available persons within a reasonable distance after a reasonable effort upon the part of the arresting officer: Would the failure of the defendant in such circumstances, to receive in evidence a chemical analysis of a blood sample require the dismissal of the charge of drunken driving?"

"2. What would constitute a reasonable distance and a reasonable effort under the above circumstances?"

Pertinent to the resolution of your inquiries are the following provisions of § 18.1-55(f) of the Virginia Code which prescribe that:

"... when the person arrested within two hours of the time of his arrest requests or consents to the taking of a blood sample for chemical analysis, if the result of such chemical analysis of the blood sample taken is not received in evidence at the trial for any reason whatever, including but not limited to the failure on the part of any person, except the person arrested, to comply strictly with every provision of this section, then the rights of the person arrested shall be deemed to have been prejudiced, and he shall be found not guilty of any offense under § 18.1-54, or of any similar ordinance of any county, city or town, and his license shall not be revoked under any provision of this section."

I am of the opinion that your initial inquiry should be answered in the affirmative. This office has consistently ruled that if the results of the analysis of a blood sample of an accused are not received in evidence upon trial—after the accused has consented to a withdrawal of his blood and has not failed to comply with any provision of the Virginia "implied consent" law—he must be found not guilty of the offense of operating a motor vehicle while under the influence of intoxicants. In this connection, I am forwarding to you copies of two previous opinions of this office, dated October 8, 1962, and August 27, 1962, in which situations similar to that outlined in your communication were considered and discussed. In the specific situation you present, it appears that the accused consented to the withdrawal of a sample of his blood and did not fail or refuse to comply with any provision of the Virginia "implied consent" law; therefore,
his inability to have the benefit of the results of an analysis of a sample of his blood would not be occasioned by his own default and he would be entitled to a dismissal of the charge of operating a motor vehicle while under the influence of intoxicants.

The position taken with respect to your initial inquiry obviates consideration of the concluding question stated in your communication.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Interpretation of term “if any” in § 18.1-55.1(i).

May 19, 1964

HONORABLE WILLIAM GOODE
Commonwealth’s Attorney for the City of Clifton Forge

I am in receipt of your letter of May 6, 1964, in which you call my attention to Chapter 240 of the Acts of Assembly of 1964 and make inquiry concerning the existence of the phrase “if any” which appears in § 18.1-55.1(i) of the Virginia Code as amended by the legislation in question.

Chapter 240, Acts of Assembly (1964) repeals the existing Virginia “implied consent” law (§ 18.1-55) and reenacts that law as § 18.1-55.1 of the Virginia Code, effective July 1, 1964. As amended, § 18.1-55.1(i) provides:

“In any trial for a violation of § 18.1-54 of the Code or of a similar ordinance of any county, city or town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the blood test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence. The failure of an accused to permit a sample of his blood to be withdrawn for a chemical test to determine the alcoholic content thereof is not evidence and shall not be subject to comment at the trial of the case; nor shall the fact that a blood test had been offered the accused be evidence or the subject of comment.” (Italics supplied).

I am of the opinion that the phrase italicized above refers to the antecedent term “blood test or tests” and gives recognition to the possibility that a person arrested for operating a motor vehicle while under the influence of intoxicants may, in fact, decline to submit to a blood test. Inclusion of the phrase “if any” in § 18.1-55.1(i) is consistent with the direction contained in § 18.1-55.1(c) that if a person so arrested refuses to submit to a blood test and declares his refusal in writing (or the fact of refusal is certified by the committing justice) then “no blood sample shall be taken even though he may thereafter request same.”

Under § 18.1-55.1 of the Virginia Code, it is possible that no result of any blood test will be available at the time an accused is tried for operating a motor vehicle while under the influence of intoxicants because of the refusal of the person arrested to permit a sample of his blood to be withdrawn. It is also possible that the result of an analysis of only one blood sample will be available or that the results of separate chemical analyses of both blood samples will be available, i.e., the results of an analysis made by the Chief Medical Examiner and the result of an analysis made by an approved laboratory selected by the accused. Of course, if a person arrested for operating a motor vehicle while under the influence of intoxicants refuses to permit a sample of his blood to be withdrawn for chemical analysis, he does so upon pain of possible conviction
of the offense of unreasonably refusing to submit to a blood test in violation of § 18.1-55.1 of the Virginia Code.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Person refusing to submit to test may be tried thereafter although acquitted of drunk driving.

April 9, 1964

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

I am in receipt of your letter of April 7, 1964 in which you inquire whether or not a person who has been acquitted of an offense of operating a motor vehicle while under the influence of intoxicants may subsequently be tried for refusal to submit to a blood test at the time of his arrest as required by the Virginia “implied consent” law. Section 18.1-55, Code of Virginia (1950) as amended.

I am constrained to believe that your inquiry should be answered in the affirmative. This office has previously ruled that refusal to submit to a blood test in violation of § 18.1-55 of the Virginia Code constitutes an offense which is separate and distinct from that of operating a motor vehicle while under the influence of intoxicants, that the offense constitutes a misdemeanor, that separate costs are assessable as in other misdemeanor cases and that a separate bond may be required of persons charged with refusing to so submit. See, Report of the Attorney General (1962-1963) pp. 151, 154.

I am therefore of the opinion that a person who has been acquitted of operating a motor vehicle while under the influence of intoxicants may still be tried for refusal to submit to a blood test in violation of § 18.1-55 of the Virginia Code.

MOTOR VEHICLES—Blood Analysis—Not necessary for Commonwealth to summon person who took blood sample before introducing certificate of Chief Medical Examiner.

CRIMINAL PROCEDURE—Blood Analysis—Not necessary for Commonwealth to summon person who took blood sample before introducing certificate of Chief Medical Examiner.

June 22, 1964

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

This will reply to your letter of June 12, 1964, in which you call my attention to Chapter 240 of the Acts of Assembly of 1964, specifically § 18.1-55.1(s) of the Virginia Code included therein, and inquire whether it will be necessary after July 1, 1964, for the Commonwealth to summon the physician, nurse or laboratory technician, who withdraws a blood sample under the above-mentioned enactment, in order to establish exact compliance with the procedure enunciated in such enactment for the taking, handling, identification and disposition of a blood sample before the certificate of the Chief Medical Examiner indicating the results of an analysis of such sample be introduced in evidence.
Chapter 240, Acts of Assembly (1964) comprises what is generally known as the amended Virginia "implied consent" law and, inter alia, amends the Code of Virginia by adding thereto a new section numbered § 18.1-55.1, effective July 1, 1964. As you indicate, pertinent to the resolution of the question you present is § 18.1-55.1(s) of the Code of Virginia (1950) as amended which provides:

"The steps herein set forth relating to the taking, handling, identification, and disposition of blood samples are procedural in nature and not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce evidence on his own behalf to show non-compliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced. (Italics supplied).

I am of the opinion that your inquiry should be answered in the negative. In light of the language italicized above specifically that which states that the failure to comply with any one or more of the steps, or portions thereof, regulating the taking, handling, identification and disposition of blood samples shall not of itself be grounds for finding an accused not guilty, but shall go to the weight of the evidence, and that which states that substantial compliance with such procedure shall be deemed to be sufficient, I am constrained to believe that it would not be necessary, in the first instance, for the Commonwealth to summon the physician, nurse or laboratory technician who withdraws a blood sample in order to establish exact compliance with the prescribed procedure. Testimony by the arresting officer concerning the identity of the person who withdraws a blood sample, together with such officer's testimony that he personally observed the use of soap and water to cleanse the arm of the accused and the use of a disposable syringe or one taken from an accepted steam sterilizer would be sufficient compliance with the statute to authorize admission of the certificate of the Chief Medical Examiner showing the results of the analysis of an accused's blood sample. Should the accused undertake to introduce evidence on his own behalf in accordance with the provision contained in the terminal clause of the above-quoted statutory provision, it might then become necessary for the Commonwealth to summon the physician, nurse or laboratory technician in question to rebut such evidence on behalf of the accused and to establish exact compliance with the statutory procedure governing the taking, handling, identification and disposition of the accused's blood sample.

MOTOR VEHICLES—Blood Analysis—To whom second container of blood delivered in Chesterfield County.

CRIMINAL PROCEDURE—Blood Analysis—To whom second container of blood delivered in Chesterfield County.

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

June 19, 1964

This is in reply to your letter of June 18, which reads as follows:
"Chesterfield County has a police department authorized by Chapter 21, Acts of Assembly of 1944. Provision is made for the Chief of Police; and acting pursuant to such authority, the Judge of the Circuit Court of Chesterfield County has appointed a Chief of Police. Chesterfield County has a Sheriff, which is authorized under the Constitution of the State of Virginia.

"Section 18.1-55.1 as amended by Chapter 240 of the Acts of Assembly of 1964, provides that the officer arresting a person for 'driving under the influence' shall take possession of the second container and shall deliver said second container to the chief police officer of the county.

"I respectfully request your opinion as to whom the second container should be given in Chesterfield County."

The answer to your question is contained in the last sentence of paragraph (d-1) of § 18.1-55.1, which sentence reads as follows:

"... As used in this section, the term 'chief police officer' shall mean the sheriff of the county, the chief of police of the city or the sergeant or chief of police of the town in which the charge will be heard."

Therefore, the second container should be given to the sheriff of Chesterfield County, unless the charge will be heard in an incorporated town located in the county, in which event the second container shall be given to the sergeant or chief of police of the town.

MOTOR VEHICLES—Duty of Driver to Stop in Event of Accident.

CRIMES—Hit and Run—No felony if no other person is injured.

HONORABLE WILLIAM A. JONES
Commonwealth's Attorney for Richmond County

December 17, 1963

This is in reply to your letter of December 11, 1963, which quotes as follows:

"I would appreciate, as soon as possible, an opinion as to whether or not the driver of a vehicle which has been involved in an accident and leaves the scene of the accident without notifying anyone or leaving his name, address etc.; as required by Sec. C of Title 46.1-176 under the following circumstances, can be charged with a felony?

"A, while operating a motor vehicle, struck an unoccupied and unattended parked motor vehicle, parked on the shoulder of a public highway. A received a cut and laceration of his forehead in the accident. A leaves the scene of the accident and is subsequently arrested. Can A be charged with leaving the scene of an accident in which a person is injured, the injured person being the operator of the vehicle causing the accident, under the provisions of paragraph A Title 46.1-176, which is a felony?"

Paragraph (a) of Section 46.1-176, Code of Virginia (1950), as amended, is as follows:
"The driver of any vehicle involved in an accident in which a person is killed or injured or in which an attended vehicle or other attended property is damaged shall immediately stop as close to the scene of the accident as possible without obstructing traffic and report to a police officer, or to the person struck and injured if such person appears to be capable of understanding and retaining the information, or to the driver or some other occupant of the vehicle collided with or to the custodian of other damaged property, his name, address, operator's or chauffeur's license number and the registration number of his vehicle. The driver shall also render reasonable assistance to any person injured in such accident, including the carrying of such injured person to a physician, surgeon or hospital for medical treatment if it is apparent that such treatment is necessary or is requested by the injured person."

In considering charges under this paragraph, one of the stated obligations of the driver of any vehicle involved is to render reasonable assistance to any person injured in such accident, including the carrying of such injured person to a physician or hospital for medical treatment. In the words of the Supreme Court of Appeals, "The gravamen of the charge under consideration (of leaving the scene of an accident resulting in injury to or death of any person) is the flight from the scene and failure to give succor or aid to the injured party." See Blankenship v. Commonwealth, 184 Va. 495, 35 S.E. (2d) 760. The remainder of paragraph (a) deals with the requirement that the driver report his name, address, operator's license and registration numbers to a police officer, or to the person struck and injured, or to the driver or other occupant of the other vehicle involved. These are used in the alternative. In any such instance, the statute would be meaningless if no other person were involved since no purpose would be served by requiring an injured driver to give aid or report to himself. In the situation you present, the driver's vehicle struck an unoccupied and unattended parked vehicle. This situation is covered in paragraph (c) of Section 46.1-176 and a violation thereunder is chargeable as a misdemeanor under the provisions of Section 46.1-177.

In consideration of the foregoing, it is my opinion that injury to one's self, alone, would not present a basis for charges against such person of violating Section 46.1-176 and, therefore, I shall answer your question in the negative.

MOTOR VEHICLES—Licenses—Fee for registration of vehicles designed for the transportation of property may be based on empty weight where vehicle never operates in this State with more than its empty weight.

HONORABLE EMORY H. CROCKETT
Commonwealth's Attorney for Lee County

April 29, 1964

This is in reply to your letter of April 22, 1964 by which, at the suggestion of Judge William C. Fugate, you request my opinion in relation to the following facts and question, which I quote:

"Is it necessary for a tractor-trailer owner, who resides in Virginia, to license his tractor-trailer for more than the empty weight of the vehicle when all of the vehicle's operations are outside of the State of Virginia and that the only times that the vehicles are in the State of
Virginia is when the owner drives the vehicle into his place of residence for service. It being understood that the tractor-trailer combination involved is licensed for its gross weight capacity elsewhere?"

Section 46.1-154, Code of Virginia (1950), as amended, is applicable to the registration of such vehicles designed for the transportation of property, and the first sentence thereof quotes as follows:

"Except as hereinafter otherwise provided, the fee for certificates of registration and license plates to be paid by the owners of all motor vehicles, trailers and semitrailers not designed and used for the transportation of passengers shall be determined by the gross weight of the vehicle or combination of vehicles of which it is a part, when loaded to the maximum capacity for which it is registered and licensed, according to the schedule of fees herein set forth." (Emphasis supplied).

The license fee is determined by the gross weight of the combination of vehicles (tractor-trailer) when loaded to the maximum capacity for which it is registered and licensed. Thus, if the combination of vehicles is never to exceed a given weight when loaded to the maximum capacity for which it is registered and licensed, such given weight controls the license fee to be assessed. For example, if the gross weight of the combination when loaded is never to exceed forty thousand pounds, then it may be licensed at forty thousand pounds of gross weight. If it is never to be loaded at all, then it may be licensed accordingly.

Under the facts stated, the tractor-trailer combination involved is licensed for its gross weight capacity, elsewhere. In other words, this tractor-trailer is operating in another state or other states in full compliance with the license laws of the state or states in which it operates. You state that "the only times that the vehicles are in the State of Virginia is when the owner drives the vehicle into his place of residence for service."

If, by the last quoted words, it is meant that the vehicles only come into this State for service, this fact, alone, does not affect the registration and license fee required. Whether the vehicle is to be operated upon the highways once or many times, or for only one purpose or many, is of no significance in determining the proper license fee. On the other hand, if, by the stated facts, it is meant that the tractor-trailer involved will never operate in the State of Virginia with more than its empty weight, then it may be registered and licensed on the basis of its empty weight. In such event, however, if it ever, at any time, should operate in this State while loaded or partially loaded, so that the gross weight, including its load, be in excess of the gross weight for which it is registered and licensed, such operation would be in violation of the law.

MOTOR VEHICLES—Licenses—For Hire—Not required for truck delivering sand and rock purchased at quarry and sold at another place.

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney for Augusta County

September 19, 1963

This is in reply to your letter of September 12, 1963 in which you request "an interpretation of Section 56-275.1, Code of Virginia (1950)" and pose the
question of whether or not "TH" tags are required for a truck under the following set of facts, which I quote:

"A. A resident of a county adjoining Augusta County, operates a general grocery store. In addition, he owns several trucks, some of which are leased to the Virginia Department of Highways, and others on a straight for-hire basis. From the headquarters of his grocery business, although not from the same premise, A is engaged in the business of purchasing sand and rock from a quarry, or quarries, hauls same on a truck owned by him and delivers it to his customers. A buys directly from the quarries and his purchases are billed to him and paid for by him. He resells the sand and gravel to his customers, bills them, and they pay him. Naturally, there is a difference in the purchase price at the quarry site and that charged to his customers. Further, in determining the price to be charged the customers, A must take into consideration the expense to him of getting that sand or gravel from the quarries and delivering it to the customers, and, of course, to his own time if he operates the truck, or hires someone to operate it for him.

"It should be pointed out that the orders for the sand and gravel are taken at the grocery store, and the truck is dispatched from that location to the quarry, and from the quarry to the customer's residence."

In defining the terms "operation or use for rent or for hire," Section 46.1-1, paragraph (35), states 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 semitrailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly; but such terms shall not be construed to mean a 'truck lessor' or defined herein."

This section should be considered in conjunction with Section 56-275.1, Code of Virginia (1950), as amended, to which you refer, the pertinent portion of which reads as follows:

"Any person who purchases article, merchandise, commodities or things at one point or points and transports them in a motor vehicle, trailer or semitrailer to another point or points for sale at the latter point or points, in the sale price of which is reflected a charge for the transportation of such articles, merchandise, commodities or things, or who permits any such vehicle to be so used by another, shall be deemed to be operating such vehicles for compensation; 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.”

It does not appear, under the facts given, that the grocery store business operated by “A” has any real connection with the business of buying and selling sand and rock. This is not a matter of merchandise, commodities or things which are transported to and delivered from such place of business (grocery store) and hence the saving provision of Section 56-275.1 seems to have no application. Neither is this a situation which comes within the exception applicable to certain farm and forest products found in the last quoted Code Section. For all practical purposes the facts here are somewhat comparable to those shown in Reports of the Attorney General (1958-1959), Page 182 and (1961-1962), Page 165, paragraph (1), in both of which it was held that the vehicles should be licensed “as for rent or for hire carriers.”

You indicate that transportation charges are included in the sale price of the rock and sand and it is an obvious fact that the weight and consistency of such items make the transportation a significant factor. It is, therefore, my opinion that a truck used under the given conditions constitutes a motor vehicle operated “for rent or for hire” and the “TH” tags are required for its operation.

MOTOR VEHICLES—Local License—County ordinance may require receipt showing payment of personal property tax on vehicle before issuing license.

MOTOR VEHICLES—Criminal Procedure—Operation of a vehicle without displaying license tags involves a misdemeanor, not the failure to purchase the tags.

CRIMINAL PROCEDURE—Operation of Motor Vehicle—Failure to display tag is the offense, not failure to purchase.

HONORABLE WESCOTT B. NORTHAM
Commonwealth’s Attorney of Accomack County

April 22, 1964

This will acknowledge receipt of your letter of April 16, in which you refer to an ordinance adopted by the board of supervisors of your county under the provisions of § 46.1-65 of the Code, which ordinance you state reads as follows:

“No vehicle required to be licensed under the provisions of this ordinance shall be issued a County license unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the vehicle to be licensed, which personal property taxes have been assessed or are assessable against such applicant for the preceding year, have been paid.

“Any person who shall fail or refuse to purchase the county license tags as provided by this ordinance, or who shall fail or refuse to display same on the front of any vehicle required to display said County tag, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $5.00 for each offense.”
You present the following question:

"If an Accomack County resident fails to pay his personal property tax, but offers to buy his County license plate and the County Treasurer refuses to sell his the plate for failure to show a receipt for his personal property tax, can he be convicted for failure to purchase a County license plate?"

Subsection (c) of § 46.1-65 authorizes the local governing body to require as a condition precedent to purchasing a license tag that the applicant shall produce satisfactory evidence that all personal property taxes which have been properly assessed of assessable upon the motor vehicle for which the tag is being purchased, have been paid. Subsection (c) is as follows:

"Any county, city or town levying taxes and charging licenses fees under this section may by ordinance provide that it shall be unlawful for any owner of a motor vehicle, trailer or semitrailer to display upon such motor vehicle, trailer or semitrailer any license plate of such county, city or town after the expiration date of such license plate. Any such ordinance may provide that a violation of such ordinance shall constitute a misdemeanor and be punishable by a fine not exceeding twenty dollars."

This subsection authorizes the locality to enact an ordinance making it a misdemeanor for any person to display on his vehicle any license plate issued by the locality after the expiration date shown on the license tag has elapsed. Subsection (c) of § 15-8 also provides the extent to which a county board of supervisors may impose penalties for violations of ordinances adopted pursuant to said section.

An ordinance may provide a penalty within the limitations of the statute for operating a motor vehicle without complying with the license provisions. It cannot, in my opinion, provide for and enforce a penalty merely for failure to pay the property tax on a motor vehicle or for failure to buy a license plate.

You ask a further question as follows:

"Several towns are cooperating with the County by requiring a person purchasing a town license plate to produce a receipt for his personal property tax. If a person offers to purchase a town license plate, but the town clerk refuses to sell him one because he does not produce a receipt for his personal property tax, can he be convicted for failure to purchase a town license plate?"

In my opinion, the answer to this question is in the negative. A town, as is the case with a county, may pass and enforce an ordinance imposing a penalty for operating a motor vehicle without displaying any license tags that are required to be purchased by a valid town ordinance. The failure to purchase a town license plate would, by itself, be no crime; the crime is the operation of the motor vehicle without purchasing and displaying such plate. With respect to the statement that you understand that the treasurers of some towns are requiring a receipt for all personal property taxes before a license tag will be issued, you are advised that the treasurer has no authority to impose such a requirement. The only tax which may be required to be paid in order to obtain a license plate is the personal property tax upon the assessed value of the motor vehicle itself.
MOTOR VEHICLES—Local License—Exemptions—Vehicles exempt under § 46.1-66(6) not limited as to type.

August 7, 1963

HONORABLE W. CARRINGTON THOMPSON
Member of the House of Delegates

This is in reply to your letter of August 1, 1963, which reads, in part, as follows:

"Title 46.1-66 of the Code of Virginia is to this effect:

'(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;

* * * * * *

"Does this exemption cover a vehicle operated by a common carrier under YH tags?"

Section 46.1-65, Code of Virginia (1950), as amended, authorizing the imposition of local taxes and license fees upon motor vehicles, contains the following passage:

"Except as provided in § 46.1-66 counties, incorporated cities and towns may levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers;"

The exemption quoted in your letter constitutes one of the exceptions "provided in § 46.1-66." This exception includes motor vehicles, trailers and semitrailers. The YH tags are license plates issued by the State Division of Motor Vehicles for tractor trucks, which are classified by statute as motor vehicles designed and used primarily for drawing other vehicles.

Considering the foregoing, the exemption to which you refer, in my opinion, is not limited to any particular type of motor vehicle so long as such motor vehicle is operated by a common carrier of persons or property under the conditions stated in § 46.1-66, paragraph (6). As a matter of fact, tractor trucks are employed rather extensively in such common carrier operations. Accordingly, I shall answer your question in the affirmative.

HONORABLE G. W. MITCHELL
Treasurer of Culpeper County

March 25, 1964

This is in reply to your letter of March 20, 1964, which quotes as follows:
"We are having some difficulty with our county tags this year due to the fact that the Town of Culpeper is issuing tags on all vehicles within the incorporated area. The problem in issuing these tags is establishing the residence of the purchasers. The Town has an ordinance stating that if the vehicles are used in the Town of Culpeper for business purposes it is subject to their tax. In a number of cases these vehicles are used by residents of the County and the car or truck is parked or garaged at their place of residence in the County.

"For example we have a case namely; the Culpeper Appliance Store (Firestone) located in the Town of Culpeper. They have four trucks used in the business; one is used and garaged in the Town of Culpeper and the other three are used and garaged outside of the Town.

"I would appreciate it very much if you would advise us whether or not we should issue these tags on the residence of the owner of the vehicle or on the place of the business in the Town of Culpeper."

Section 46.1-65, Code of Virginia (1950), as amended, which empowers counties, cities and towns to charge license fees upon motor vehicles, opens with the following words:

"(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; * * * " (Emphasis supplied)

While the provisions of both §§ 46.1-65 and 46.1-66 indicate that the taxing authority is that where the owner resides, the prohibition against other jurisdictions thereafter imposing a similar license fee is crystalized in that segment of § 46.1-66 which quotes as follows:

"(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when: "(1) A similar tax or license fee is imposed by the county, city or town of which the owner is a resident;"

Applying this to the situation you describe, it is my opinion that the residence of the owner of the vehicle, rather than the place of business, determines the taxing authority for issuing these license tags. When such taxing authority has acted, it precludes other taxing authorities from imposing a similar license fee.

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April 28, 1964

HONORABLE LEROY MORAN
Commonwealth’s Attorney City of Roanoke

This is in reply to your letter of April 20, 1964, in which you request my opinion as to whether or not the evidence is sufficient to prosecute, for driving under the influence of alcohol, the person found intoxicated under the conditions set forth in the following quoted paragraph:

"Two witnesses spotted an automobile being operated in an erratic
manner on the streets of the City of Roanoke. Since it appeared to the witnesses that the operator must be under the influence they immediately pulled into a filling station and called the Police Department, and within moments the patrol car was on the scene. The patrolmen drove around the block and spotted an automobile which fitted the description given by the witnesses. The automobile had come to rest at the curb of a public street with the lights still on and the motor running. The accused was sitting under the wheel, but at no time did the officer see him move the car. Although the witnesses can testify that the car in which the accused was sitting fitted the description they are unable to state definitely that it is the same automobile, nor can they identify the accused as its operator."

The situation described is a serious one, since an intoxicated person behind the steering wheel of an automobile which has its motor running, obviously, presents a potential danger. On the other hand, before a person can be punished for the violation of a statute there must be evidence which brings his conduct within the comprehension of that statute. Here, two witnesses can testify that the automobile, in which the accused was found sitting, fitted the description of the one they saw being operated in an erratic manner. They are unable to state, however, that it is the same automobile, as they cannot link the former with the latter. It is common knowledge that many automobiles fit a similar description. More important, the witnesses cannot identify the accused as the operator or driver of the automobile. As a violation under Section 18.1-54, Code of Virginia (1950), as amended, necessarily involves driving or operating an automobile or other motor vehicle, car, truck, engine or train, the testimony of the two witnesses is insufficient, as they are unable to say they have seen the accused drive or operate any vehicle.

In an opinion found in Report of the Attorney General (1953-1954), p. 138, this office held that "if a person (behind the steering wheel of a motor vehicle) has the motor running and is attempting to put the car in motion, or if the car is in motion, whether the motor be running or not, then these facts would be sufficient to support a conviction of this person of driving or operating a motor vehicle while under the influence of intoxicants." (Emphasis supplied). The facts there given were virtually the same as those shown in a later opinion, found in Report of the Attorney General (1960-1961), p. 200, which, similarly, held the statute applicable. In each case, the accused had the vehicle in gear and the wheels spinning, although, he was unable to achieve the desired mobility. In an earlier case, found in Report of the Attorney General (1947-1948), p. 117, upon which the opinion quoted herein, supra, was partially based, the accused was under the wheel in the driver's position guiding the car along the highway, with a truck pushing the car from the rear, while the motor of the car was not running. The accused was held to be driving the car.

In the instant case, the patrolman saw the accused sitting behind the steering wheel of the parked automobile while its lights were on and its motor was running. Neither the two witnesses, who, previously, saw a similar car being operated in an erratic manner, nor the patrolman can testify, however, that the accused operated or drove or attempted to drive either the automobile seen in motion or the one in which he was later found sitting. In an opinion found in Report of the Attorney General (1955-1956), p. 134, this office decided that merely operating the engine of the motor vehicle which was parked on the highway, with no lights on, without any effort to place the vehicle in motion, would not "constitute operating the motor vehicle under the provisions of Section 18-75 of the Code of Virginia," now Section 18.1-54, Code of Virginia (1950), as amended.
While I am in agreement with the opinions herein reviewed, I believe the probative facts you have given very closely parallel and are materially the same as those found in the last one considered. In my interpretation, the evidence does not meet the statute, since it fails to show that the accused has *operated* or *driven* a motor vehicle. Accordingly, I shall answer your question in the negative.

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**MOTOR VEHICLES—Operator’s License—Extent of duty on Commissioner to make available names and addresses of persons whose licenses have been suspended or revoked.**

April 22, 1964

**HONORABLE C. H. LAMB**  
Commissioner, Division of Motor Vehicles

This is in response to your letter of April 1, 1964, which quotes, in pertinent part, as follows:

"§ 46.1-383.2. The Commissioner shall make available, semi-monthly, for release through all daily and weekly newspapers of general circulation, in this State, and upon request, through other news media in this State, the name and addresses, as shown on the records of the Division of Motor Vehicles, of any person whose operator’s or chauffeur’s license has been suspended or revoked, for any reason, during the period of revocation or suspension of such person’s license. Provided, however, the name and address of such person shall not be released more than once to any newspaper or other news media. The Commissioner shall request such newspapers or other news media to publish such information as a public service.

‘The Commissioner his agents and assistants, shall be absolved from any and all legal liability which may arise out of any such erroneous release of any information which he reasonably believes to be correct.’

‘Will you kindly advise me in relation to the language (1) ‘The Commissioner shall make available, semi-monthly, for release’ and the time factor ‘... during the period of revocation or suspension of such person’s license,’ whether there is a burden on myself as Commissioner or a burden on a newspaper or other news media to control the release. In other words, there are thousands of short term suspensions imposed by the courts and this Division. It is entirely possible that I may prior to the end of the period of revocation or suspension furnish a newspaper or other news media with the information related to in this statute. Assuming that such newspaper or other news media does not publish the names of such persons until after the revocation or suspension has terminated, where does the responsibility lie for such publication?

‘Further, (2) does the language ‘Provided, however, the name and address of such person shall not be released more than once to any newspaper or other news media’ mean that once having released the name and address of any person revoked or suspended that thereafter regardless of any subsequent statutorily required revocation or suspension that such person’s name and address shall not again be released?’"

Section 46.1-383.2, quoted above, requires that the names and addresses of persons whose operator’s or chauffeur’s licenses have been suspended or revoked,
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for any reason, be made available, semi-monthly, for release through all daily and weekly newspapers and, upon request, through other news media. It further requires that this information be made available "during the period of revocation or suspension of such person’s license."

Since the statute includes all types of suspensions and revocations, whereas, certain types of suspensions and revocations are subject to sudden termination, upon compliance with some condition, such as, the required filing of an insurance certificate, the status of a person’s license could not be stated with any degree of certainty except as of a definite date. Inasmuch as the required information is to be made available to the newspapers or other news media twice a month, no more and no less, all suspensions and revocations, exclusive of the statutory exception covered herein, infra, which are in force on the date such information is so made available should be included. For the same reasons, it would appear that any such information released by a newspaper or other news media should include appropriate reference to the date upon which such licenses stood revoked or suspended, as indicated by you.

Once you have properly made the information available to the newspapers or other news media in compliance with the statute, you have discharged your duties under the statute and are under no obligation to revise the list thus made available on a specific date, merely by virtue of the fact that on the following day, or other day subsequent thereto, some of the suspensions or revocations included in such list may have terminated.

Considering your second question, which relates to the provision that, "the name and address of such person shall not be released more than once to any newspaper or other news media," I believe the term such person is the key. The words such person seem to relate only to any person under suspension or revocation whose name and address have been released during such suspension or revocation. Thus, the intent seems to be that the same person’s name will be released only once during the same suspension or revocation period. If the suspension or revocation of such person terminates and, thereafter, his license is suspended or revoked, for any reason, for another period of time, during which you make such information available, his name should be included. Any other interpretation would seem directly opposed to the enhancement of public safety, which, must be the very motive for the statute, as the deterring factor would be eliminated for the second or habitual offender, who could rest assured that, after the first time, his name would never be published again.

MOTOR VEHICLES—Operator’s License Fee—Determined by law in effect on date license issued or renewed.

HONORABLE C. H. LAMB
Commissioner, Division of Motor Vehicles

April 16, 1964

This is in reply to your letter of April 1, 1964 in reference to Senate Bill No. 92, amending Section 46.1-380, Code of Virginia (1950), as amended. Specifically, you present the excerpts and questions shown in the following quoted paragraph:

“Will you kindly advise me in relation to the language ‘Thereafter all such licenses shall be renewed in the birthday month of the licensee and shall be valid for three years’ and ‘For each operator's license issued or renewed as herein provided the fee shall be * six dollars’?
If in the event a licensee seeking to renew his present operator’s license expiring on July 31, 1964, applies for a renewal of such license prior to June 26, 1964, the presumed effective date of the amending language, can the renewal operator’s license be issued for the present fee of $2.00 or can the new fee of $6.00 be assessed? In other words, is the month in which the present license expires after the effective date of the amendment or the date on which the applicant for renewal license applies for renewal the determining factor in the assessment of the prescribed fee?”

The language “Thereafter, all such licenses shall be renewed in the birthday month of the licensee and shall be valid for three years,” refers back to the preceding sentence in the statute which provides that “All original operator’s licenses issued after July first, nineteen hundred forty-six, shall be valid for three years from the birthday month of the applicant nearest to the month in which the license is issued.” (Emphasis supplied). The purpose and intent is to gear the expiration and renewal of any operator’s license to the birthday month of the licensee.

By law, the renewal shall take place in the birthday month of the licensee applying for renewal. The renewal of an operator’s license expiring July 31, 1964, upon proper application, should take place in the month of July, 1964, as this is shown, by the expiration date, to be the birthday month. The fee for renewal is determined by the law in effect on the renewal date rather than the application date. The renewal date is the determining factor. The amendment requires that “For each operator’s license issued or renewed as herein provided the fee shall be six dollars.” (Emphasis supplied). Since the amendment increasing the fee for renewal from two dollars to six dollars becomes effective June 26, 1964, it follows that the six dollar fee must be assessed upon renewal of the license in July, 1964.

MOTOR VEHICLES—Reciprocity Board—Duties not increased by Chapter 253, Acts of Assembly 1964.

June 17, 1964

HONORABLE C. H. LAMB
Chairman, Virginia Reciprocity Board

This will acknowledge receipt of your letter of June 15, which reads as follows:

“The Virginia Reciprocity Board, of which I have the honor of being Chairman, recently held a meeting to discuss Senate Bill 98, enacted into law as Chapter 253 of the Acts of Assembly, 1964. “This statute re-enacts 46.1-19 and 46.1-20 of the Code, and adds a new Section numbered 46.1-19.1. “I have been instructed by the Board to seek clarification of this enactment and to request your opinion as to the duties and responsibilities imposed on the Board and the various State Agencies by this new law. “Will you please be good enough to review this statute and advise me of your opinion as to its directives?”

The amendment to § 46.1-19 does not make any material change in that sec-
tion. It merely deletes after "State Highway Commission" the phrase—"who shall be designated by the State Corporation Commission."

Section 46.1-20 is amended so as to include a new paragraph as follows:

"(c) All agreements entered into by the Governor pursuant to this section shall be reduced to writing, and a copy shall be furnished the Secretary of the Commonwealth, each member of the Reciprocity Board and the Superintendent of State Police."

This amendment is self-explanatory.

A new section, numbered 46.1-19.1, was added. This section reads as follows:

"The State Corporation Commission shall annually prepare and publish a list showing, as of June thirty of each year, those states, including the District of Columbia, with which reciprocal agreements, unilateral, bilateral or otherwise, have been made, or are in force, under the provisions of § 46.1-20 of the Code. Copies of the list shall be mailed to the Superintendent of State Police, Attorneys for the Commonwealth, and judges of all courts which have criminal jurisdiction; each such list shall be accompanied by a statement of the law requiring the registration and licensing of motor vehicles of all kinds and the exemptions therefrom."

This section is free from ambiguity, except it is not clear as to what will constitute publication of the list which the State Corporation Commission is required to prepare and mail to the officials therein designated, which list must be accompanied by a statement to the State laws requiring registration and licensing motor vehicles of all kinds and the exemptions therefrom. The judges to whom such a list must be mailed includes, in my opinion, judges of courts not of record (except juvenile and domestic relations), as well as judges of all courts of record having criminal jurisdiction.

While the circulation of the list among the officials designated may be considered sufficient publication within the meaning of the statute, the statute could well be construed to include an additional supply of the lists for distribution, upon request, to those private organizations or associations operating in the State for the benefit of motorists.

With respect to the third and terminal paragraphs of your letter, it is the duty and responsibility of the State Corporation Commission to carry out the provisions of § 46.1-19.1. The duties and responsibilities of the Reciprocity Board have not been increased under the Act in question. Paragraph (c) of § 46.1-20 requires all agreements entered into under that section to be reduced to writing, and a copy thereof furnished to the Secretary of the Commonwealth, as well as to each member of the Reciprocity Board, and the Superintendent of State Police. It would seem that it would be the responsibility of the Governor to see to it that there is compliance with paragraph (c).

Whether or not these agreements are made is in the sound discretion of the Governor, with the advice of the Board.

I understand that there are in existence some reciprocal agreements heretofore made by the Governor. In my opinion, § 46.1-19.1 and paragraph (c) of § 46.1-20 apply to agreements already in existence as well as to any additional agreements which may be executed.
MOTOR VEHICLES—Reckless Driving—Applicable to speeding in excess of seventy-five miles per hour on Interstate Highway.

CRIMES—Reckless Driving—Constituted by speeding in excess of seventy-five miles per hour on Interstate Highways.

February 26, 1964

HONORABLE JAMES R. SIPE
Commonwealth's Attorney of Rockingham County

This is in reply to your letter of February 22, 1964 in which you ask my opinion as to whether or not a person who drives a motor vehicle in excess of seventy-five miles per hour on the Interstate System of Highways, where the speed limit is sixty-five miles per hour, should be convicted of reckless driving and have his operator's license suspended pursuant to Sections 46.1-190 and 46.1-423, Code of Virginia (1950), as amended.

The purpose of Section 46.1-190 is to set forth certain acts which, in themselves, shall constitute specific instances of reckless driving. The instance here under consideration is expressed in the following language, quoted from this section:

"A person shall be guilty of reckless driving who shall:

* * * * * *

"(i) Drive a motor vehicle upon the highways of this State at a speed in excess of 75 miles per hour; * * *"

This clause, like Section 46.1-423, had its origin in Chapter 401, Acts of Assembly of 1954, which not only provided that a person operating a motor vehicle at a speed in excess of seventy-five miles per hour should be guilty of reckless driving, but, also, provided that the driver's license of any person convicted of reckless driving under this section should be suspended by the court or judge for a period of not less than sixty days nor more than six months. When the motor vehicle laws were recodified under Chapter 541, Acts of Assembly of 1958, these provisions, formerly contained in Section 46-209.1, were placed in Sections 46.1-190, paragraph (i), and 46.1-423, respectively. The latter provides for a court suspension of the operator's license of any person convicted under the former.

It is not my intention to conjecture as to what consideration the framers of the statute may have given to certain laws of physics or to normal human skill in controlling a fast moving vehicle. It is worthy of note, however, that the legislature, by enactment of Section 46-209.1, in 1954, has placed a special significance on a conviction of reckless driving resulting from driving at a speed in excess of seventy-five miles per hour, by requiring that the driver's license of any person so convicted shall be suspended by the court or judge. The maximum speed limit for the highway on which the violation occurs has never been the determining factor. Neither is the margin of difference in excess of the lawful speed limit controlling. This is borne out by the fact that the law has been and remains equally applicable in a twenty-five mile per hour speed zone on a city street or in a fifty-five mile per hour speed zone on a highway in a rural area. This is true because each, by statutory definition, constitutes a highway of this State. Likewise, since the construction of the limited access highways, including the Interstate System of Highways, on which the maximum speed limit is sixty-five miles per hour, there has been no change in this law.

In consideration of the foregoing, it is my opinion that a person who drives a motor vehicle in excess of seventy-five miles per hour on an interstate highway
should be convicted of reckless driving and have his operator's license suspended in accordance with the applicable statutes herein considered, notwithstanding the fact that the violation occurred where the speed limit is sixty-five miles per hour. Since both the crime and the resulting suspension of driver's license are controlled by statute, any changes in this respect must come from the legislature rather than the courts.

MOTOR VEHICLES—Reckless Driving—Local ordinances adopted pursuant to § 46.1-180 may not require penalties greater than those required under Title 46.1.

May 8, 1964

HONORABLE JAMES R. Sipe
Commonwealth's Attorney of Rockingham County

This is in reply to your letter of May 4, 1964 in which you request my opinion as to whether or not certain town ordinances adopted pursuant to statutory authority granted in Section 46.1-180, Code of Virginia (1950), as amended, are invalid because they prescribe a greater minimum penalty than the State statute covering the same offense. You further inquire whether, if the said ordinances are invalid for the reasons stated, only a part or the entire ordinances should be declared invalid.

Specifically, your questions relate to the situation set forth in that portion of your letter which quotes as follows:

"Under the ordinance of the Town of Bridgewater the penalty imposed for reckless driving is, for the first violation, 'be punished by a fine of not less than Ten Dollars nor more than One Hundred Dollars, or by imprisonment in jail for not more than thirty days, or by both such fine and imprisonment.' The penalty for reckless driving as provided by the Town of Elkton is as follows: 'for a first conviction thereof, be punished by a fine of not less than $5.00 nor more than $100.00, or by imprisonment in jail for not less than one nor more than ten days, or by both fine and imprisonment.'"

The case of Shaw v. City of Norfolk, 167 Va. 346, 189 S.E. 335, cited in 13 M. J., Municipal Corporations, § 61 and often referred to as a leading case dealing with this subject, states the general rule as to validity of municipal ordinances as follows:

"The general rule is that where a municipality has the power to legislate on the same subject with which the State has dealt by general law, in the absence of specific restrictions, the ordinance of the municipality will not be declared invalid merely because different penalties are prescribed in the ordinance from those prescribed by a general statute." (Emphasis supplied).

The Norfolk case evolved from a prosecution under an ordinance making it an offense to drive an automobile on the streets while intoxicated. The ordinance was adopted under the authority granted the City of Norfolk by its charter. The only variance between the ordinance and the State statute was a difference in maximum penalty, the State law prescribing a greater maximum penalty than the maximum stated in the ordinance. The minimum punishment in both the statute and the ordinance were the same. The Court held that the ordinance
was not invalid simply because the maximum penalty prescribed thereby was not as severe as that prescribed by the statute.

The phrase "in the absence of specific restrictions," found in the quoted general rule, seems of special significance in considering ordinances for the regulation of traffic adopted pursuant to Section 46.1-180, Code of Virginia (1950), as amended, in view of the restriction found in paragraph (2) (c) thereof, which quotes as follows:

"No governing body of a county, city or town may provide penalties for violating a provision of an ordinance adopted pursuant to this section which is greater than the penalty imposed for a similar offense under the provisions of this title." (Emphasis supplied).

Section 46.1-192, Code of Virginia (1950), as amended, provides that a person "convicted of reckless driving under §§ 46.1-189, 46.1-190 or 46.1-191 shall for the first violation be punished as provided by § 18.1-9." Under the latter, the punishment shall be "by fine not exceeding five hundred dollars or confinement in jail not exceeding twelve months, or both." There is no minimum either as to fine or jail sentence. By comparison, the ordinance of the Town of Bridgewater provides for "a fine of not less than Ten Dollars," for the first violation, while, the ordinance of the Town of Elkton sets the minimum punishment at "a fine of not less than $5.00," or "imprisonment in jail for not less than one" day.

In my interpretation, both ordinances cited violate the restrictive clause found in Section 46.1-180, paragraph (2) (c), quoted herein, supra, in that each has a greater minimum penalty than that imposed for the first offense of reckless driving under Title 46.1, and, because of this fact, each ordinance, in my opinion, is invalid. While I find no prior opinion interpreting this section, several opinions emanating from this office, which upheld the validity of ordinances dealing with other matters, have differentiated between those with no statutory restriction as to punishment and those subject to the limitations found under Section 46.1-180 concerning traffic laws, as herein noted.

In reference to your question as to whether the entire ordinances dealing with reckless driving, or a part thereof, would be invalid, in my opinion, the ordinances are invalid in entirety because of their being in conflict with paragraph (2) (c) of Section 46.1-180, Code of Virginia (1950), as amended. The matter of penalty imposed is so related to the entire reckless driving ordinances, under the foregoing circumstances, as to render it not subject to being separated. Pending the adoption by the Town of Bridgewater and the Town of Elkton of ordinances in conformance with this section, the State statute could be applied in all reckless driving offenses occurring in these towns.

MOTOR VEHICLES—Reckless Driving—Passing school bus stopped on access road for taking on or discharging children.

CRIMES—Reckless Driving—Passing school bus stopped on access road.

HONORABLE LESLIE D. CAMPBELL, JR.
Member of the Senate

This is in reply to your letter of a January 3, 1964 in which you request my opinion relative to the following facts and question posed by Mr. Edward T. Jones, Principal of King William High School:

January 16, 1964
"The access roads to his school are maintained by the State Highway Department. He is not certain whether they have been assigned a state number and are in the state system. A school bus is stopped on this road, loading and unloading children, with the blinker light on. A car is driven by the bus while it is loading and unloading children. Is the driver of this vehicle guilty of violating Section 46.1-190 of the Code?"

The portion of Section 46.1-190, Code of Virginia (1950), as amended, which pertains to the violation of passing a school bus under certain conditions, is as follows:

"A person shall be guilty of reckless driving who shall:

(f) Fail to stop at a school bus whether publicly or privately owned and whether transporting children to, from, or in connection with, a public or private school stopped on the highway for the purpose of taking on or discharging school children, when approaching the same from any direction and to remain stopped until all school children are clear of the highway and the bus is put in motion, provided, however, that this shall apply only to school buses marked or identified as provided in the regulations of the State Board of Education; * * *

Assuming for the sake of this letter, that the school bus is marked or identified as provided in the regulations of the State Board of Education, the remaining key element to be resolved is whether or not the bus is "stopped on the highway" as contemplated by the quoted paragraph of the statute. Section 46.1-1, paragraph (10), Code of Virginia (1950), as amended, defines the word "Highway" as follows:

"The entire width between the boundary lines of every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets, alleys and publicly maintained parking lots in counties, cities and towns."

In the case of Prillaman v. Commonwealth, 199 Va. 401, the Court quoted from 25 Am. Jur., Highways, § 4, p. 340, as follows:

"'Highways are distinguished from private roads or ways in that the former are intended for the use of the public generally and are maintained at the public expense, as already noted, while the latter are intended for the exclusive use and benefit of particular persons."

Under conditions presently existing, one could hardly conceive of a public high school being so situated that the public did not have access through some manner of road or way. In this connection, Section 33-45, Code of Virginia (1950), as amended, is as follows:

"All roads leading from the State highways, either primary or secondary, to public schools in the counties of the Commonwealth to which school buses are operated and which have one or more buildings containing five or more separate classrooms shall continue to constitute portions of the secondary system of State highways in so far as these roads are on school property and as such shall be improved and maintained."
The access road in question is maintained at public expense and I am advised by the State Department of Highways that this is located on school property and has been taken into the secondary system of State highways. It follows that such access route is a way or place open to the public and, being so, falls within the statutory definition of highway. Your attention is invited, also, to paragraph (k) of Section 46.1-190, which provides that a person shall be guilty of reckless driving who shall drive "recklessly or at a speed or in a manner so as to endanger the life, limb or property of any person" on any driveway or premises of a school.

For the reasons stated, it is my opinion that passing a school bus under the given circumstances constitutes a violation under paragraph (f) of Section 46.1-190 and accordingly, I shall answer the question presented in the affirmative.

MOTOR VEHICLES—Reciprocity—When applicable.

HONORABLE HANSEL FLEMING
Commonwealth's Attorney of Dickenson County

August 16, 1963

This is in reply to your letter of August 8, 1963, which quotes as follows:

"I am confronted with the following situations: Warrants were issued for two persons for improper registration of their motor vehicles. One of these parties is a citizen of West Virginia, but is temporarily residing at Clincheo, Dickenson County, Virginia. The vehicle is registered in the wife's name. The husband is working for a contractor who is constructing a road for the State Highway Department of Virginia. They go to their home in West Virginia on practically every weekend.

"The other case is that the man is actually a resident of Pikeville, Kentucky, but owns an apartment house in the city of Bristol, Virginia. He visits Bristol, Virginia, occasionally and collects his rents. He has given a Virginia address on his Kentucky registration card. In view of Section 46.1-1 Paragraph (C) which says 'A person who has actually resided in this State for a period of six months, whether employed or not, or who has registered a motor vehicle, listing an address within this State in the application for registration, shall be deemed a resident for the purposes of this title', I would like to know in your opinion as to whether or not these persons have violated this statute.

"Also, a citizen of Dickenson County, Virginia, has his truck registered in Kentucky properly under the Kentucky registration laws. He has his coal dock and business in Kentucky. Occasionally he will come into Virginia and haul a load of coal from Virginia and unload in Kentucky. In view of Section 46.1-134 has this person in your opinion improperly registered his motor vehicle or has he violated Section 46.1-134 by coming into Virginia and loading his vehicle and hauling it back to Kentucky and unloading same in Kentucky?"

From the situation outlined in your first paragraph, it appears that the vehicle is registered in the name of the wife in the State of West Virginia, in which apparently, she and her husband are domiciled. Virginia and West Virginia are parties to a reciprocal agreement under which "privately owned and operated passenger vehicles properly licensed by one of the reciprocating jurisdictions shall
be permitted to operate freely between" the two States. I am enclosing a copy of this agreement, designated "Multistate Reciprocal Agreement Governing The Operation Of Interstate Vehicles" which was adopted by this State on March 21, 1963. Section 46.1-1 (16), Code of Virginia (1950), as amended, from which you quote, states in part, as follows:

"(b) A person who becomes engaged in a gainful occupation in this State for a period exceeding sixty days, shall be deemed a resident for the purposes of this title.

"(c) A person who has actually resided in this State for a period of six months, whether employed or not, or who has registered a motor vehicle, listing an address within this State in the application for registration, shall be deemed a resident for the purposes of this title."

It will be observed that the statute refers only to a person and not the spouse of such person. The related facts, especially in regard to the wife as owner of the vehicle, do not establish Virginia residency under any of the quoted statutory conditions. As long as she is domiciled in West Virginia and none of the quoted statutory conditions apply, it is my opinion that the vehicle properly registered in West Virginia may be operated freely between the two States without obtaining Virginia registration.

The resident of Kentucky, likewise under the same agreement, enjoys reciprocal privileges of operating his privately owned passenger vehicle between that State and Virginia. The mere fact that he owns property in Virginia is not sufficient to require that he license his privately owned passenger vehicle in this State. In my interpretation, the words, "who has registered a motor vehicle" found in Section 46.1-1, subsection 16, paragraph (c), quoted herein, refer to a person who has registered a motor vehicle in this State. The fact that a person gives a Virginia address in his application for registration in another state would not make him a resident of Virginia under this section. It is, therefore, my opinion that the related facts do not establish that the statute has been violated.

Regarding the situation of the citizens of Dickenson County, Virginia, registration for commercial vehicles, under the provisions of the reciprocal agreement, is not required to coincide with residency. In defining the term "properly registered or licensed" the reciprocal agreement under part C of the section designated "III. Definitions" states in part, as follows:

"2. In the case of a commercial vehicle, including a leased vehicle, the jurisdiction in which it is registered, if the commercial enterprise in which such vehicle is used, has a place of business therein, and, if the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled in or from such place of business, and, the owner and/or lessee, has assigned the vehicle to such place of business. . . ."

In my interpretation, the truck so registered and engaged in business in Kentucky and making such interstate trips in Virginia would be within the purview of the reciprocal agreement, provided that, if it be a truck with more than two axles, it must be registered with the State Corporation Commission in accordance with Article 8, Chapter 12, Title 56, Code of Virginia (1930), as amended, and, in addition, the required motor fuel tax, based on the use of Virginia highways, must be paid. Accordingly, I shall answer your last question in the negative.
MOTOR VEHICLES—Speed Limits—How speed limits reduced by Highway Commissioner and local authorities.

HIGHWAYS—Speed Limits—How limits may be reduced by Highway Commissioner and local authorities.

HONORABLE JOSEPH MOTLEY WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

June 9, 1964

This is in reply to your letter of June 1, 1964, which quotes as follows:

"Section 46.1-345 of the Code of Virginia reads Reduction of limits by Highway Commissioner and local authorities, states in the second paragraph thereof, 'If the reduction of limits as herein provided is to be effective for a period exceeding ninety days, the State Highway Commission shall effect such reduction by resolution to be recorded in the minutes of its meeting.'

"Assuming a situation whereby a portion of a highway which constitutes a part of the State Highway System undergoes an engineering and traffic investigation by the highway department and thereafter the speed limit is reduced from 55 m.p.h. to 45 m.p.h. with the required signs being posted, but without any resolution being effected of the reduction by the State Highway Commission; could a violator of the reduced speed limit as posted be convicted without said resolution being passed and recorded in the minutes of the meetings of the State Highway Commission?

"In this connection I refer you also to § 46.1-193 which seems to indicate that once a lower speed is prescribed by the State Highway Commission based upon an engineering and traffic investigation and is plainly indicated on the highway by signs, then said speed limit is valid."

The two Code sections which you cite are found in Chapter 4, Title 46.1, Code of Virginia (1950), as amended. Each of the two sections authorizes a reduction in the statutory speed limit under certain conditions although there are many ways in which they differ. For example Section 46.1-345 pertains to reducing the statutory limits on weight, width, height, length or speed, while Section 46.1-193 establishes the lawful speed limits on various types of highways and provides for increasing or decreasing the speed limits prescribed by the same section in certain instances. The penalty for a violation under the former is a fine of not less than ten dollars nor more than five hundred dollars or confinement in jail for not less than one day nor more than six months, or both, while the penalty for a violation of the latter is "as provided in § 46.1-16." This we find to be, for a first offense, "by a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment in jail for not less than one nor more than ten days, or by both such fine and imprisonment."

In reference to reducing the statutory speed limit, Section 46.1-345 provides that the limits "prescribed in this title" (Title 46.1) may be reduced by the "State Highway Commissioner, acting through district or resident engineers," for periods not to exceed ninety days but if such reduction in limits "is to be effective for a period exceeding ninety days, the State Highway Commission shall effect such reduction by resolution to be recorded in the minutes of its meeting." Section 46.1-193 provides, in part, that, "the State Highway Commission or other authority having jurisdiction over highways may decrease the speed limits set forth in subsections (1) (a) through (1) (c) of this section." The term "other authority," obviously, has reference to local authorities in instances
in which they have control over local highways and, therefore, would have no application in the instant situation.

Considering the foregoing, and giving effect to each of the two sections under which a reduction in the statutory speed could be effected, it would be necessary to know which of these statutes the accused was charged with violating, before giving a categorical answer to your question. Furthermore, the fact that the two sections prescribe different penalties would require a showing as to which section was violated.

If a person be charged with a violation of Section 46.1-345, it must be determined whether the posting of the reduced speed limit was temporary or "to be effective for a period exceeding ninety days," for only in the latter instance is action by the State Highway Commission required. If the charges were brought under this section and such reduction of the speed limit were to be effective for a period in excess of ninety days, it is obvious that there could be no conviction unless there be a resolution recorded in the minutes of the meeting of the State Highway Commission. If such reduction were prescribed by the Commissioner, acting through district or resident engineers, for a period not to exceed ninety days, however, there could be a conviction without any resolution of the Commission.

Section 33-12, paragraph (3), Code of Virginia (1950), as amended, gives the State Highway Commission the power "to make rules and regulations, from time to time, not in conflict with the laws of this State, for the protection of and covering traffic on and the use of the State Highway System and Secondary System and to add to, amend or repeal the same." In connection with any action taken by the Commission, Section 33-5, Code of Virginia (1950), as amended, states, in part, as follows:

"It shall be the duty of the Commission to keep accurate minutes of all meetings of the Commission, in which shall be set forth all acts and proceedings of the Commission in carrying out the provisions of this title."

Considering the section last quoted in conjunction with related statutes and Section 46.1-193, it is my opinion that if a person be charged with a violation of the latter, under the circumstances which you have given, it is necessary, for a conviction thereunder, that the resolution be recorded in the minutes of the State Highway Commission. I reach this conclusion because, under Section 46.1-193, only the State Highway Commission is authorized to change the statutory speed limits under the circumstances stated. Contrary to Section 46.1-345, previously considered, this section has no provision for temporary expediency, under which the Commissioner, through his agents, may effect such change without action by the Commission.

MOTOR VEHICLES—Traffic Violations—Added assessment of $5.00 required by Chapter 289, Acts of 1964, mandatory on any conviction required to be reported to Division of Motor Vehicles.

COSTS—Criminal Procedure—Added assessments required by Chapter 289, Acts of 1964, must be collected by court.

Honorable Kenneth P. Asbury
Commonwealth's Attorney of Wise County

This is in reply to your letter of June 8, 1964 in which you pose the follow-
ing question relative to the requirements of Chapter 289, enacted by the General Assembly of 1964:

"Is it mandatory that the $5.00 fee be collected in overweight cases, muffler cases, improper equipment cases, and non-moving violations?"

This statute, which applies to offenses occurring on and after July 1, 1964, quotes, in part, as follows:

"Whenever a person is convicted of a violation of any provision of a State law or local ordinance and such conviction is required to be reported to the Division of Motor Vehicles there shall be added to all other costs, penalties and fines assessed or assessable against the defendant, the sum of five dollars * * * " (Emphasis supplied).

In considering whether or not it is mandatory that the assessment required by this statute be made in any specific case it must first be determined if such conviction is required to be reported to the Division of Motor Vehicles. If the conviction is required to be so reported, then it is mandatory that the sum of five dollars required by this statute be assessed. In making this determination, consideration must be given to the requirements found in Sections 46.1-412 and 46.1-413, Code of Virginia (1950), as amended. Section 46.1-412, quotes, in pertinent part, as follows:

"Every county or municipal court or the clerk thereof or clerk of a court of record in this State shall keep a full record of every case in which:

"(a) A person is charged with (1) A violation of any law of this State pertaining to the operator or operation of a motor vehicle; (2) A violation of any ordinance of any county, city or town pertaining to the operator or operation of any motor vehicles except parking regulations: * * * " (Emphasis supplied)

The portion of Section 46.1-413, applicable to the question under consideration, is as follows:

"In the event a person is convicted of a charge described in subdivision (a) or (b) of § 46.1-412 or forfeits bail or collateral or other deposit to secure the defendant's appearance upon such charges unless the conviction has been set aside or the forfeiture vacated; * * * every county or municipal court or clerk of a court of record shall forward an abstract of the record to the Commissioner * * * "

In applying the quoted sections, the important factor to consider is whether or not the conviction resulted from a violation pertaining to the operator or operation of a motor vehicle. In regard to your question, in my interpretation, a conviction for operating a motor vehicle in violation of the weight laws, or with improper or illegal muffler or other improper equipment would fall within the reporting requirements of Section 46.1-413. Accordingly, it is my opinion that it is mandatory that the sum of five dollars prescribed by Chapter 289, Acts of Assembly 1964, quoted herein, in part, be assessed in case of any such conviction. In my judgment, it was not the intent of the legislature to limit the requirements for reporting violations of the motor vehicle laws to "moving" violations or to exclude from such reporting all "non-moving" violations as these terms may be applied. For instance, the violation of stopping on the highway as contemplated under Section 46.1-248, Code of Virginia (1950), as amended, may be considered a "non-moving" violations, although qualifying as a violation "pertaining
to the operator or operation of a motor vehicle," and, consequently, a conviction for such violation should be reported to the Commissioner of the Division of Motor Vehicles and the sum of five dollars should be assessed under Chapter 289. In this connection, Section 46.1-412, previously quoted, makes an exception only for violations of local "parking regulations."

MOTOR VEHICLES—Traffic Violations—Amount of $5.00 imposed for costs on violators applies to offenses committed on and after July 1, 1964.

HONORABLE RUSSELL M. CARNEAL
Member House of Delegates

This is to acknowledge receipt of your letter of April 27, 1964, in which you state:

"The 1964 Session of the General Assembly passed legislation which imposes $5.00 on each person convicted of certain traffic offenses. This $5.00 is in addition to the usual court costs and is to be used for highway purposes. "Please advise me whether or not this additional $5.00 is to be imposed on cases tried on and after June 26, 1964, regardless of the fact that the person was arrested and charged prior to June 26, 1964."

The legislation to which you refer was enacted into law as Chapter 289, Acts of the General Assembly of 1964.

The second section of that chapter is as follows:

"This act shall apply to offenses occurring on and after July one, 1964."

Under this provision it is clear that the $5.00 in question would not apply to an offense committed prior to July 1, 1964.


CRIMINAL PROCEDURE—Conviction for Violation of State Law or Local Ordinances Pertaining to the Operator or Operation of a Motor Vehicle—Requires assessment of additional fee of five dollars.

COSTS—Criminal Procedure—Must be assessed upon conviction for violation under Chapter 289, Acts of 1964.

HONORABLE E. BALLARD BAKER, Judge
County Court of Henrico County

This is in reply to your letter of June 18, 1964, in which you ask whether or not Chapter 289, Acts of Assembly, 1964, requires that the five dollar assess-
MENT "be charged against persons convicted of such offenses as failing to have State or county license tags, improper registration, or failure to have current operator's license."

As I interpret Chapter 289, it applies to any conviction for the violation of any provision of State law or local ordinance required to be reported to the Division of Motor Vehicles. In this regard, I am enclosing a copy of my letter of June 17, 1964 to the Honorable Kenneth P. Asbury, Commonwealth's Attorney of Wise County, Wise, Virginia, in which the application of Chapter 289 was treated generally, as well as in reference to certain specific convictions.

Since each of the violations named in your letter is either a violation of State law or county, city or town ordinance pertaining to the operator or the operation of a motor vehicle, Sections 46.1-412 and 46.1-413 require that a conviction upon any such violation be reported to the Division of Motor Vehicles. It follows that the five dollar fee prescribed in Chapter 289 should be assessed upon conviction in any such case, and accordingly, I shall answer your question in the affirmative.

MOTOR VEHICLES—Traffic Violations—Juvenile—Chapter 289, Acts of 1964, applies only when other costs or penalties imposed or juvenile is tried as an adult.

COURTS—Juvenile and Domestic Relations—Juvenile Violations of Motor Vehicle Laws—Fees assessed under Chapter 289, Acts of 1964 only when other costs or penalties imposed or juvenile is tried as an adult.

COSTS—Criminal Procedure—Costs for Juvenile Violations of Motor Vehicle Laws—Chapter 289, Acts of 1964, applies only when other costs or penalties imposed or juvenile is tried as an adult.

June 24, 1964

HONORABLE B. GARY BLAKE, JUDGE
Juvenile & Domestic Relations Court

This is in reply to your letter of June 11, 1964, which quotes as follows:

"We would like to have your interpretation of Chapter 289 (Senate Bill No. 169) of the Acts of the General Assembly of 1964 in so far as the same pertains to juveniles."

"As you will recall, juveniles are not 'convicted' but are 'adjudged to be within the purview' of the Juvenile and Domestic Relations Court law. See Code Section 16.1-178.

"Sections 16.1-177 and 16.1-177.1 empower Juvenile Courts, under certain conditions, to try a child over 14 years of age as an adult.

"Does Senate Bill No. 169 require that Juvenile Courts treat all children as adults in cases required to be reported to the Division of Motor Vehicles and then require the payment of the sum of $5.00 added to the costs?

"I call your attention to the fact that some of the cases required to be reported to the Division are heard on traffic summonses and some on juvenile petitions and on juvenile petitions costs are generally not assessed in this court."

As you state, Section 16.1-177.1 authorizes the court to try a child, fourteen
years of age or over, as an adult, under certain conditions, and impose the penalties which are authorized to be imposed on adults for such violations. Section 16.1-178, paragraph (8), Code of Virginia (1950), as amended, however, is as follows:

“In case of traffic violations the court may suspend an operator’s license or require restitution in accordance with provisions of this law, or it may impose the penalties which are authorized to be imposed on adults for such violations.”

This section, in my interpretation, gives the court the discretion to decide which alternative it will employ and whether or not it will impose upon juvenile violators the penalties authorized to be imposed on adults for traffic violations. Paragraph (9) of the same section authorizes the court to impose, as a disciplinary measure, a fine not exceeding fifty dollars upon a child of working age, to be paid in weekly or monthly installments, when such child has violated the traffic laws. I do not believe it was the intention of the legislature, in enacting Chapter 289, to disrupt the prescribed methods of disposing of such cases under the applicable existing laws, nor do I construe it as requiring the juvenile courts to treat all children as adults.

In consideration of the foregoing and the general rule of strict construction in the application of statutes assessing a cost or penalty, I am of the opinion that Chapter 289 applies in a juvenile case only when other costs or penalties are imposed or such juvenile is tried as an adult.

MOTOR VEHICLES—Traffic Violations—Juvenile to be tried in Juvenile and Domestic Relations Court.

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—To try juvenile for violation of motor vehicle law.

HONORABLE EMORY H. CROCKETT
Commonwealth’s Attorney of Lee County

January 23, 1964

This is in reply to your recent letter regarding the trial of a juvenile charged with operating a motor vehicle without an operator's license, in which you pose two questions, which I shall quote and consider separately and in the order presented:

Question 1. “Is it permissible for the County Court to try juvenile traffic offenders without transferring the matter to the Juvenile Court, (where such offenses are minor)?”

Section 16.1-158, Code of Virginia (1950), as amended, states in pertinent part, as follows:

“ * * * Except as hereinafter provided, each juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, and within one mile beyond
the corporate limits of said city, concurrent jurisdiction with the juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving:

“(1) The custody, support, control or disposition of a child:

* * * * * *

“(i) who violates any State or federal law, or any municipal or county ordinance; provided, however, that in violations of federal law jurisdiction in such cases shall be concurrent and shall be assumed only if waived by the federal court;”

Substantially similar language in a prior statute was held to preclude a Police Justice Court from jurisdiction to try persons under eighteen years of age for traffic violations. See, Report of the Attorney General (1953-1954), p. 147.

Section 16.1-175, Code of Virginia (1950), as amended, states, in part, as follows:

“If during the pendency of a criminal or quasicriminal proceeding against any person in any other court it shall be ascertained that the person was under the age of eighteen years at the time of committing the alleged offense, such court shall forthwith transfer the case, together with all papers, documents and evidence connected therewith, to the juvenile court of the city or county having jurisdiction,* * *

This statute contains a provision under which a court of record may retain jurisdiction of the case and continue with the trial thereof, although, there is no such provision for a county court, or other court not of record, to try such juvenile offenders. Accordingly, in my interpretation, the law requires that such juvenile traffic offenders be tried in the Juvenile and Domestic Relations Court, rather than in the County Court, and I shall answer your question in the negative.

Question 2. “Where juvenile traffic offenders are being tried in the Juvenile Court for minor traffic offenses, is it necessary to secure a social report from the Welfare Department on such minor before processing the matter?”

Section 16.1-164, Code of Virginia (1950), as amended, which requires an investigation of any child or minor within the purview of this law or subject to the jurisdiction of the court, contains an exception as to traffic violations, as will be observed from the following language:

“When the court receives reliable information that any child or minor is within the purview of this law or subject to the jurisdiction of the court hereunder, except for a traffic violation or violation of the game and fish law, the court shall require an investigation which may include the physical, mental and social conditions and personality of the child or minor and the facts and circumstances surrounding the violation of the law.” (Underscoring supplied)

The term “this law” as used in this section, by statutory definition under Section 16.1-141, “means the Juvenile and Domestic Relations Court Law embraced in this chapter; (Chapter 8, Title 16.1, Code of Virginia (1950), as amended).” Section 16.1-164 also states that: “In case of violation of the traffic laws or the game and fish laws the court may proceed on any summons issued without the filing of a petition.” It is further provided that in the case of violation of the
traffic laws, the investigating officer may issue the summons in the same manner as provided by law for adults.

In consideration of the foregoing, it is my opinion that it is not necessary for the Juvenile Court to secure a "social report" in the case of juveniles being tried for minor traffic offenses.

MOTOR VEHICLES—Traffic Violations—Nonresidents issued citations in lieu of posting bond in certain instances.

HONORABLE C. H. LAMB
Commissioner Division of Motor Vehicles

This is in reply to your letter of April 1, 1964 in which you pose several questions relative to Senate Bill No. 84, enacted by the 1964 Session of the General Assembly, providing for the issuance of a citation on making an arrest for a traffic violation in certain instances in lieu of requiring the posting of bond. I shall quote and consider your inquiries by paragraph and in the order presented:

"The term 'reciprocating state' used in this statute implies some type of agreement formal or informal in order that I comply with Section 3(d). Who is empowered to enter into such an agreement with a reciprocating state and under what statutory authority are such agreements consummated? If such an agreement is not considered necessary, what administrative yardstick should be employed by this office to ascertain and remain informed as to which states are 'reciprocating states.'"

The term “reciprocating state” is stated in § 1(b) of this Act to mean “any state which extends by its laws to residents of Virginia substantially the rights and privileges provided by this act.” In my interpretation, this language does not contemplate entry into a reciprocal agreement, but has reference to a state which extends, by its laws, to residents of Virginia substantially the rights and privileges provided by this Act. In other words, this Act, in itself, constitutes the authority for Virginia to proceed as herein authorized, provided, that such other “state,” as defined in this Act, extends by its laws to residents of Virginia substantially the rights and privileges provided by this Act. Your office should “ascertain and remain informed” as to which states are reciprocating states hereunder by obtaining and maintaining evidence as to whether or not such state extends by its laws substantially similar rights and privileges to residents of Virginia.

"What is your opinion as to the meaning of the language in 1(a) 'State' in relation to the remainder of the statute which utilizes the term 'reciprocating state' with one exception."

Under § 1(a), we find the following language: “As used in this act: (a) 'state' means the State of Maryland and the District of Columbia.” In my interpretation, this limits the application of the Act by this Commonwealth to the State of Maryland and the District of Columbia, and these, only if they extend by their laws to residents of Virginia substantially the rights and privileges provided by this Act. The original Senate bill defined the word “state,” as used in this Act, to mean “a state, territory or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.” The House of
Delegates substituted the present language, in lieu of that used in the original bill, by amendment, which was thereafter approved by the Senate.

"What criteria should be employed to determine if a state is a 'reciprocating state' and what, if any, means can be employed to withdraw such a relationship in the event a 'reciprocating state' does not continue to meet such terms and conditions of an agreement, if one is required?"

To determine whether or not a state is a "reciprocating state," it would be necessary that you obtain evidence of the laws of such state and its policy in respect to this subject. Whenever such state ceases to extend by its laws to residents of Virginia substantially the rights and privileges provided by this Act, this Act would no longer apply to such state. In this connection, a statement could be obtained from the Commissioner of the Motor Vehicle Department of such state.

MOTOR VEHICLES—Trailer—Must be designed for carrying property or passengers wholly on its own structure.

Honorable John R. Dudley
Judge, County Court for Loudoun County

This is in reply to your letter of May 22, 1964, in which you requested my opinion as to whether a portable machine constructed upon a platform which is capable of being drawn behind a motor vehicle, commonly called a Buck Hoistower, should be classified as a trailer within the meaning of § 46.1-1(33) of the Code of Virginia, thereby becoming subject to the various statutory requirements relating to equipment on trailers.

From the pictures in the brochure, the equipment involved appears to be designed as an elevator by which building materials can be hoisted to construction sites. The platform upon which this machine is constructed is mounted upon wheels and is equipped with a coupling for the purpose of being towed behind a motor vehicle.

A trailer is defined in § 46.1-1(33) of the Code of Virginia as follows:

"(33) 'Trailer'.—Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle."

By the foregoing definition it is readily apparent that the vehicle must be designed for carrying property or passengers wholly on its own structure in order to qualify as a trailer. Not only does the equipment in question appear to be lacking in this qualification, but I am advised by a representative of an equipment company which distributes Buck Hoistowers that the unit is without any provision for carrying property or passengers, and that the sole purpose for its portability is for moving from job site to job site.

In view of the foregoing, I am of the opinion that the equipment here in question does not qualify as a trailer within the definition provided in Title 46.1 of the Code of Virginia.
MOTOR VEHICLES—Weight—How computed—Axles must be equipped with brakes.

November 22, 1963

HONORABLE JOSEPH A. MASSIE, JR.
Commonwealth's Attorney of Frederick County

This is in reply to your letter of November 15, 1963, which I quote, in part, as follows:

"A question has arisen in Frederick County in regard to the proper interpretation of Section 46.1-399 of the Code of Virginia, as amended in 1962.

"A tractor and trailer is designed with the front axle of the tractor without brakes, a drive axle and a tandem axle on the tractor and tandem axles at the rear of the trailer. The length between the front axle without brakes of the tractor and the center of the tandem axles on the trailer is 42 feet. The distance between the center of the tandem axles on the tractor and the tandem axles on the trailer is 31 feet 7 inches. The weight upon the front axle without brakes on the tractor is 10,440 pounds, on the tandem axles of the tractor 26,500 pounds and on the tandem axles of the trailer 30,860 pounds.

"According to Sections 46.1-277 through 46.1-288 no axle meets the definition of axle or group of axles unless the wheels thereof are equipped with brakes. The gross weight of this vehicle was 67,800 pounds.

"Should the State Police in computing the allowable gross weight measure from the axle group at the rear of the tractor to the axle group at the rear of the trailer, ignoring the single axle without brakes at the front of the tractor?"

It is obvious that you have reference to Section 46.1-339, Code of Virginia (1950), as amended, which prescribes the maximum weight in pounds on any group of axles and is controlling as to the lawful weight of vehicles and loads. This section states, in part, as follows:

"(b) For the purposes of this section an axle weight shall be defined as the total weight transmitted to the road by all wheels whose centers may be included between two parallel transverse vertical planes forty inches apart, extending across the full width of the vehicle and all wheels thereof that are equipped with brakes in conformity with §§ 46.1-277 to 46.1-280."

In construing this paragraph, with special regard to the emphasized portion, consideration of the legislative intent seems appropriate, since the statute relates to the public safety and to this extent is remedial. Chapter 454, Acts of Assembly of 1952, amended Section 46-334 (now Section 46.1-339) by adding the following:

"For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with brakes in conformity with §§ 46-283 to 46-286."

Chapter 476, Acts of Assembly of 1956, rewrote Section 46-334 to include the following:

"(1) For the purposes of this section any axle load shall be defined as the total load transmitted to the road by all wheels whose centers
may be included between two parallel transverse vertical planes forty inches apart, extending across the full width of the vehicle and all wheels thereof that are equipped with brakes in conformity with §§ 46-283 to 46-286." This is substantially the same as § 46.1-339, paragraph (b), quoted herein, reads at present. The intention of the lawmakers constitutes the law, and the apparent intention of the framers of this section was to retain the requirement that no axle be considered unless it is "equipped with brakes in conformity with §§ 46-283 to 46-286, (now §§ 46.1-277 to 46.1-280)." There appears no other logical reason for the retention of the last quoted phrase in this definitive paragraph. It is further noted that the Department of Highways and the Department of State Police have consistently interpreted the statute in this manner. Where a statute, or a portion thereof, is obscure or its meaning doubtful, the construction given to it by the administrative officials over a period of years is entitled to great weight.

For the reasons stated, I shall answer your question in the affirmative.

MOTOR VEHICLES—Wrecking Cranes—When may operate under "T" license tags.

MOTOR VEHICLES—Licenses—Service or wrecking cranes.

January 24, 1964

HONORABLE M. WATKINS BOOTH
Commonwealth's Attorney of Dinwiddie County

This is in reply to your letter of January 21, 1964 in which you request my advice on the question of whether or not Section 46.1-163 of the Code of Virginia requires "a person operating a service station and a repair shop jointly" to obtain "TH" licenses for a wrecker used to haul disabled cars to his place of business or to any other garage requested by the owner of the disabled vehicle.

Section 46.1-163, Code of Virginia (1950), as amended, is as follows:

"For the purpose of determining the registration and license fees paid by the owners of motor vehicles used as service or wrecking cranes, such motor vehicles, when used in connection with the business of any person engaged in selling motor vehicles or repairing the same, shall be treated as other similar private motor vehicles and not as motor vehicles operated for compensation or for hire."

The fact that a person is operating a service station and a repair shop jointly would make no material difference as long as the wrecker is used only in connection with the business of repairing motor vehicles, in which event only "T" (private carrier) tags are required. The hauling of disabled motor vehicles to any other garage, however, creates a somewhat different situation. If the operator of the wrecker receives compensation from the owners of such disabled vehicles, this would not be in connection with his business of repairing motor vehicles, but, in my opinion, would be operating a motor vehicle "for hire" within the purview of Section 46.1-1, paragraph (35), Code of Virginia (1950), as amended, and such operation would require "TH" (for hire carrier) tags. As a practical matter, most wreckers do not exceed the 18,000 pounds gross weight class and, in such event, the cost of either "TH" or "T" license tags
would be identical under Section 46.1-154, Code of Virginia (1950), as amended.

NATIONAL GUARD—Member—No immunity granted by § 44-97 for violations of law.

MOTOR VEHICLES—Speeding—No immunity granted member of National Guard by § 44-97.

CRIMES—Speeding—Immunity—Not granted member of National Guard by § 44-97.

February 21, 1964

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney of Montgomery County

This is in reply to your letter of February 17, in which you request my opinion as to whether or not an officer in the National Guard is subject to prosecution under the following circumstances:

"An officer in the Virginia National Guard located in Montgomery County, was given proper military direction and order from the commanding officer to get into uniform and proceed for duty in a neighboring city. Following this order, the National Guard Officer proceeded to the point of destination as directed on the primary highway and was stopped by a State Trooper for speeding . . . ."

You refer specifically to § 44-100 of the Code, which reads as follows:

"No action or proceeding shall be prosecuted or maintained against a member of a military court, or officer or person acting under its authority or reviewing its proceedings, on account of the approval or imposition or execution of any sentence, or the imposition or collection of fine or penalty, or the execution of any warrant, writ, execution, process, or mandate of a military court, nor shall any officer or enlisted man be liable to civil action or suit or criminal prosecution for any act done while in the discharge of his military duty." (Emphasis supplied.)

You also refer to § 44-97 and make the observation that this section seems to be in conflict with § 44-100.

Section 44-97 reads as follows:

"No person belonging to the national guard or the naval militia shall be arrested on any process issued by or from any civil officer or court, except in cases of felony or breach of the peace, while going to, remaining at or returning from any place at which he may be required to attend for military duty; nor in any case whatsoever while actually engaged in the performance of his military duties, except with the consent of his commanding officer."

The immunity from civil and criminal prosecution contained in § 44-100, in my opinion, relates to acts done while actually serving on military duty. In my opinion, an officer or enlisted man is not engaged in actual active military duty while travelling over the public highway, at an illegal speed en route to
his post where he will discharge his military duty, unless he has been ordered
to report at a designated place within a time that requires him to travel at a
speed in excess of the legal maximum.

Section 44-97 does not purport to grant immunity to a person belonging to the
national guard or to the naval militia for violations of the law—the section
merely provides that a person may not be arrested, subject to the exception con-
tained therein while going to, remaining at, or returning from any place at which
he may be required to attend for military duty; nor in any case while actually
engaged in the performance of his military duties, except with the consent of his
commanding officer.

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NOTARY PUBLIC—Conservator of the Peace—May not carry concealed
weapon.

CRIMES—Concealed Weapon—Notary Public no longer authorized to carry.

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

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

"I am enclosing copy of a letter from the Interstate Mortgage Com-
pany requesting an opinion concerning notaries public, and whether
a notary public is considered a Conservator of the Peace. Although
his letter does not say so he may be also concerned with § 18.1-269
of the Code of Virginia relating to the carrying of concealed weapons."

Section 18-9 of the Code was as follows:

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

By Chapter 366, Acts of 1960, this section was transferred to Title 19.1 of the
Code as 19.1-20 and was amended to read as follows:

"Every judge throughout the State and every justice of the peace,
commissioner in chancery, and county surveyor while in the performance
of the duties of his office within his county or corporation shall be a
conservator of the peace, and may require from persons not of good
fame security for their good behavior for a term not exceeding one year.
Every conservator of the peace shall arrest without a warrant for felonies
committed in his presence, or upon reasonable suspicion of felony, and
for breaches of the peace and all misdemeanors of whatever character
committed in his presence."
By this amendment a notary public was removed from the category of "conservator of the peace." A similar amendment was not made to § 47-1(1) of the Code, which reads as follows:

"The Governor shall appoint in and for the several counties and cities of the State as many notaries as to him may seem proper, who shall hold office for the term of four years, and who shall exercise the powers and functions of conservators of the peace, and who shall be removable by the Governor at will for misconduct, incapacity or neglect of official duty; but in every case where the Governor shall remove a notary public from office, he shall report such action with his reasons therefor to the next session of the General Assembly."

Inasmuch as a notary is authorized to exercise the powers and functions of a conservator of the peace under Chapter 1 of Title 47, which relates to notaries public only, it was not necessary for § 18-9 (now § 19.1-20) to place a notary public in the category of a conservator of the peace under that section.

Therefore, I am constrained to adopt the view that it was not the intention of the General Assembly to affect the provisions of Chapter 1, Title 47 by amending § 19.1-20, formerly § 18-9, and that the powers conferred on a notary public in this chapter are not impaired.

With respect to the authority of a notary to carry a concealed weapon by virtue of his office, it will be noted that under the first paragraph of § 19.1-269, the carrying of the concealed weapons mentioned therein (one being a pistol) is prohibited. The second paragraph of this section provides that the prohibitions set out in the first paragraph shall not apply to conservators of the peace other than notaries public. Therefore, due to this exception, this section fails to authorize a notary public, by virtue of his commission, to carry a pistol.

ORDINANCES—Admission Tax—No authority in county to impose admission tax on State operated institution.

TAXATION—Admission Tax—No authority in county to impose on State operated institution.

April 7, 1964

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

This will acknowledge receipt of your letter of March 31, relating to Sections 5-66 and 5-69 of the Code of the county of Chesterfield, Virginia, under which taxes are imposed by the county upon certain exhibitions, including musical shows and concerts. You attached a letter from Dr. Daniel, President of Virginia State College, in which he states that the license inspector of Chesterfield County has demanded that the college pay a license tax of $20.00 to the county of Chesterfield for each program which it presents in its regular annual concert series. It is my understanding that the college is the operator of the symphony orchestra in question. The college charges a small admission fee to the general public. You have requested my advice as to whether or not the county of Chesterfield may enforce its ordinance against the college.

In my opinion the county has no such authority. I know of no statute under
which the General Assembly has authorized a county, city or town to impose a license tax, or an admission tax, against any State operated institution.

Therefore, in my opinion, the ordinance of the county referred to herein are not enforceable against the Virginia State College.

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ORDINANCES—Counties—Fixing Penalty for Failure to Pay Dog License Tax
—Must parallel State law.

DOG LAWS—Licenses—Penalty for failure to pay dog license tax imposed by county must parallel State law.

HONORABLE W. BYRON KEELING
Commonwealth's Attorney of Charlotte County

March 19, 1964

This is in reply to your letter of March 17, in which you state that the Board of Supervisors of Charlotte County has adopted a dog law ordinance under the provisions of § 29-184.2 of the Code. You call attention to the fact that the ordinance in question fixes the penalty for failure to pay the license tax at a minimum of $5.00 and a maximum of $10.00.

Section 29-184.4 of the Code reads as follows:

"The governing body of any county to which the provisions of §§ 29-184.2 and 29-184.3 are applicable may enact local ordinances corresponding in nature and scope, and not in conflict with, the provisions of this chapter, and may repeal, amend or modify such ordinances; provided, no governing body of a county may provide penalties for violating a provision of an ordinance adopted pursuant to this section which is greater than the penalty imposed for a similar offense under the provisions of this chapter."

As pointed out by you, § 29-213 provides that any person convicted of failure to pay the license tax within the time prescribed by law shall be fined not less than the amount of the license tax required by law to be paid on such dog, nor more than $10.00. You state that the license tax imposed by your county parallels § 29-184. The minimum prescribed in the ordinance is in excess of the minimum prescribed in § 29-213. You have requested my opinion as to whether or not the board of supervisors has the authority to establish by ordinance a minimum penalty that is greater than the minimum penalty provided by § 29-193. I assume that you meant § 29-213; § 29-193 does not relate to this particular matter.

The ordinance in question does not impose a greater penalty than the maximum imposed under § 29-213, wherein the maximum for such an offense is $10.00. Section 29-184.1 does not specifically relate to the maximum penalty but provides that no governing body may provide "penalties for violating a provision of an ordinance adopted pursuant to this section which is greater than the penalty imposed for a similar offense under the provisions of this chapter."

While the matter is not free from doubt, inasmuch as statutes of this nature must be strictly construed in favor of the defendant, I feel that, to the extent that it provides a greater minimum penalty than is prescribed under State law, it is not enforceable.
ORDINANCES—County—May not adopt ordinance requiring magazine salesman to post bond before soliciting orders for foreign companies.

BONDS—Magazine Salesman—County may not adopt ordinance requiring bond before salesman solicits orders for foreign companies.

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

This is in reply to your letter of April 6, 1964, in which you request my opinion as to the authority of a county to enact an ordinance requiring magazine salesman to post a bond before soliciting magazine subscriptions for foreign companies.

You advise that it is the present practice to require such solicitors to register with the Sheriff before soliciting business in the County. In my opinion, to require anything further of a salesman soliciting subscriptions for foreign magazine companies would be subject to constitutional objections.

ORDINANCES—County—Not applicable to State function.

COUNTIES—Ordinances—Not applicable to State function.

HONORABLE W. F. SMYTH, JR.
Director of the Division of Corrections
Department of Welfare and Institutions

This is to acknowledge receipt of your letter of March 11, 1964, in which you state that in order to maintain the State Convict Road Force Camps Nos. 6 and 26, located in Prince William County, house trailers are located on these sites and are used by State personnel connected with the operation of these camps. You further state that a representative of the county has insisted that these house trailers conform to the county ordinance regulating trailer courts and trailer parks. The copy of the county ordinance which you enclosed was adopted pursuant to Article 1.1, Chapter 6, Title 35, Code of Virginia (1950) as amended. This ordinance provides that persons, firms and corporations are required to obtain licenses from the county in order to operate a trailer park, et cetera.

The operation of these convict road camps is a State function and therefore cannot be controlled in any manner by a county. There is nothing in the statutes (§§ 35.1-64.1 to 35.1-64.6) which would suggest that the term "person" includes the State. Of course, the county has authority to adopt such ordinances. See, Opinions of the Attorney General (1962-1963) p. 289. However, I know of no authority which would permit a county to regulate a State activity of this nature.

I am therefore of the opinion that the County of Prince William has no authority to regulate these house trailers used by the personnel employed to operate these State Convict Road Force Camps.
REPORT OF THE ATTORNEY GENERAL

ORDINANCES—Dog Licenses—City ordinances on the subject must conform with § 29-184 of the Code.

LICENSES—Dog—City ordinance on the subject must conform with § 29-184 of the Code.

HONORABLE G. GARLAND WILSON
City Attorney of Radford

This is in response to your letter of March 3, 1964, which reads as follows:

"I should like your opinion as to whether or not the 1962 Amendment to Section 29-184 of the 1964 Replacement Volume of the Code of Virginia, which provides that it is unlawful for any person to own a dog six months old, or over, unless such dog is licensed, as required by Chapter 9, Title 29 of said Code supercedes Section 3-13 of the City Code of Radford providing that it is unlawful for the owner of any dog of the age of four months, or more, to keep or maintain such dog within the City unless such dog is licensed, as provided by Chapter 9, of Title 29. This ordinance was adopted prior to the 1962 Amendment to the State law.

Section 3-31 of the Radford City Code provides that it is unlawful for any person to own or keep a dog over the age of four months within the City unless such dog shall have been vaccinated by a licensed veterinarian, etc. Section 3-35 of the Radford City Code provides that any person making application for a dog license shall present to the official issuing the same, a certificate showing such dog to have been vaccinated, as required by Section 3-31 of the Radford City Code. Section 29-195 of the State Code provides, in the second sentence thereof, that the governing body of any City should have authority to pass ordinances restricting the running at large of dogs which have not been inoculated or vaccinated.

"I should like your opinion as to whether or not the said City ordinances have been repealed, and consequently, invalid by reason of the 1962 amendment to Section 29-184 of the Code of Virginia."

Under § 29-184 of the Code of Virginia (1950), as amended, it is made unlawful "for any person to own a dog six months old or over in this State unless such dog is licensed . . . ." Inasmuch as the effect of § 3-13 of the Radford City Code is to compel owners to obtain dog licenses two months earlier, I am of the opinion that it is in conflict with § 29-184 of the Code and, therefore, invalid. While I am not familiar with the full text of §§ 3-31 and 3-35 of the Radford City Code, from your description thereof, I assume that they pertain to vaccination for rabies and are within the purview of §§ 29-188.1 and 29-196 of the Code of Virginia.

ORDINANCES—Dumping Trash—Must conform to State law.

COUNTIES—Ordinances—Dumping Trash—Must conform to State law.

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

This is to acknowledge receipt of your letter of February 26, 1964, in which
you enclosed a copy of a proposed ordinance regulating the dumping of trash, rubbish, etc., which the Supervisor of Franklin County will consider adopting in the near future. You request my opinion on the validity of a clause which is desired to be added to the ordinance. Quoting from your letter, this clause would provide:

"prohibiting the landowner or anyone else from dumping trash, rubbish, etc., on any land within two hundred feet of any public highway, roadway, alley etc."

The enactment of such an ordinance flows from the police power, and its validity depends upon whether it is based on a substantial relation to the public health, safety or morals or some phase of general welfare.

The authority to adopt the proposed ordinance (which you enclosed) is prescribed in § 15-707, Code of Virginia (1950) as amended. In those counties where a public dump has been established pursuant to this section, it is unlawful for any person to dump any trash, etc., except on a public dump or with the written consent of the land owner. Section 33-279.1 of the Code makes it unlawful for any person to dump trash, garbage or other unsightly matter on a public highway or on private property without the written consent of the owner thereof. The above-quoted clause goes further than §§ 15-707 and 33-279.1, making it unlawful for a land owner as well as other persons to dump trash, etc. within two hundred feet of a public highway.

I am of the opinion that an ordinance prohibiting the land owner from placing trash, etc. on his own property within two hundred feet of a public highway would not be valid as it would be inconsistent with the State law. See, § 1-13.17 of the Code as amended.

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ORDINANCES—Land Subdivision and Development—Not invalid for failure to contain penalty provision.

TOWNS—Ordinances—When subdivision ordinance applicable.

SUBDIVISIONS—Ordinances—Not invalid because of failure to contain penalty provisions.

Honorable A. Dunston Johnson
Commonwealth's Attorney for Isle of Wight County

February 18, 1964

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

"The Town of Smithfield, Virginia, located in Isle of Wight County, adopted a land subdivision and development ordinance pursuant to Article Seven of the Code of Virginia of 1950 (section 15-967 et seq.), as amended, in April, 1963. The ordinance contains a provision making it effective in Isle of Wight County within two miles of the corporate limits of the Town, but the ordinance contains no provision prescribing a criminal penalty for violations thereof. The Town of Smithfield notified in writing the Board of Supervisors of Isle of Wight County of such ordinance prior to its adoption. I am aware of section 15-969 pertaining to civil procedures. There may be some question as to the validity of said ordinance because it contains no provision with respect
to a criminal penalty for violations thereof. If it is invalid for this reason, then it would seem that the ordinance would not be effective in territory of the County within two miles of the corporate limits of the Town.

"I will appreciate your opinion as to whether or not (1) the Town ordinance without such a criminal penalty provision is valid, (2) the Town ordinance is effective in the territory of the County within two miles of the corporate limits of the Town if the same is either valid or invalid, and (3) the County ordinance would be effective in the territory of the County within two miles of the corporate limits of the Town if such Town ordinance is either valid or invalid."

Your questions are answered in the order presented:

(1) Section 15-967.8(d) is applicable. The Land Subdivision and Development statutes do not contain any provision under which the ordinance may prescribe a penalty for violation.

(2) Section 15-967.2 provides that the subdivision regulations adopted by a municipality may apply two miles beyond the corporate limits of a town if the ordinance so provides.

(3) Sections 15-967.3 and 15-967.4 prescribe the procedure with respect to a county adopting regulations that apply in the area of a county subject to municipal jurisdiction. You will note that the county may not include the territory within two miles of a town in the scope of its regulations without the approval of the town.

Section 15-967.4 provides that in case of disagreement between a county and a town the question in dispute is determined by the circuit court.

I assume that your references to "valid or invalid" relate to whether the failure of the town ordinance to provide a penalty invalidated the entire proceeding, and do not relate to any other defects that might affect the validity of the ordinance.

ORDINANCES—Subdivisions—Ordinances pursuant to Chapter 269, Acts of 1930, adopted prior to June 30, 1962, valid and subsisting.

COUNTIES—Ordinances—Subdivision provisions pursuant to Chapter 269, Acts of 1930, adopted prior to June 30, 1962, valid and subsisting.

February 11, 1964

Honorable Julian Updike
Clerk of the Circuit Court of Warren County

This is to acknowledge receipt of your letter of February 6, 1964, in which you state in part:

"I note that Sections 15-807 to 15-818 were repealed by Acts 1962, C 407.

"Does the repealing of these sections also repeal the subdivision ordinance adopted by the Board of Supervisors pursuant to the Acts of Assembly 1930, Chapter 269?"

Chapter 28 of Title 15, Code of Virginia (1950) as amended was added to the Code in 1962 through the enactment of Chapter 407, Acts of 1962. As you
point out, that chapter did repeal §§ 15-807 to 15-818 of the Code, which said sections were first enacted as Chapter 269, Acts of 1930.

Section 15-969.1, Article 9, Chapter 28, which was also included in Chapter 407, Acts of 1962, is as follows:

"This chapter shall not affect any resolution or ordinance enacted under any other law heretofore [prior to June twenty-ninth, nineteen hundred and sixty-two] adopted except as specifically provided."

Under § 15-961.2 of the Code as amended existing planning commissions and boards of zoning appeals are continued and any master plan and any general development plan made under the authority of prior acts is validated.

I am therefore of the opinion that ordinances adopted by boards of supervisors pursuant to Chapter 269, Acts of 1930, (§§ 15-807-15-818) prior to June 30, 1962, are valid and subsisting.

PHYSICIANS AND SURGEONS—License to Operate Private Institutions for Care or Treatment of Epileptics—Issued by State Hospital Board only to legally qualified practitioners of medicine.

HONORABLE HIRAM W. DAVIS
Commissioner, Department of Mental Hygiene and Hospitals

June 4, 1964

I have your letter of June 1, 1964, with which you enclosed a copy of the Rules and Regulations for the Licensure of Private Institutions and a letter addressed to you by a person wishing to be licensed to operate a private institution for the care of epileptics. You have requested my opinion as to whether the licensee for such an institution must be a physician.

Section 37-254 of the Code of Virginia authorizes the State Hospital Board to annually license any suitable person to establish, maintain and operate, or to have charge of any private institution, hospital or home for the care or treatment of the mentally ill, epileptics, etc. Section 37-255 of the Code provides the qualifications for the licensee and, among other things, provides that no license shall be granted for the care or treatment of such persons unless the Board is satisfied that the person applying therefor is a legally qualified practitioner of medicine in the State of Virginia and has had practical experience in the care and treatment of such patients.

Section I. C. of the Rules and Regulations of the State Hospital Board appears to be a restatement of § 37-255 of the Code.

Section 37-258 of the Code makes it unlawful for any person to maintain or operate an institution as herein contemplated unless the institution, hospital or home is under the direct personal supervision of a person duly licensed by the Board.

In view of the foregoing, I think it is quite apparent that the State Hospital Board issues licenses for the operation of private institutions for the care or treatment of epileptics only to persons who are legally qualified practitioners of medicine in the State of Virginia.
PHYSICIANS AND SURGEONS—Licenses—Automatically suspended upon conviction of a felony in a Federal court.

May 19, 1964

Dr. R. M. Cox
Secretary-Treasurer, Board of Medical Examiners

I have your letter of May 18, 1964, requesting our opinion on the question:

"* * * whether the conviction of a doctor in the Federal Court, constituting a felony, causes automatic suspension of the doctor's license as outlined in Section 54-317.1(1) of the Code of Virginia."

The first sentence of Section 54-317.1(1) reads as follows:

"Has been convicted in the courts of this or any other state, territory or county of a felony or of a crime involving moral turpitude. * * *

(Emphasis supplied)

In the Code the word "country" is "county", but this is a typographical error as Chapter 461 of the Acts of Assembly of 1958 has the word correctly spelled as "country."

It is true that this language is subject to more than one interpretation, but it is our opinion that the word "country" above would refer to the United States as well as to other countries and that, therefore, convictions in the Federal Courts are convictions in a "country."

Consequently, the conviction of a doctor in a Federal Court of a crime constituting a felony would place him under Section 54-317.1(1).

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PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Accountants—Advertising—What constitutes illegal advertising.

August 8, 1963

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

This is in reply to your letter of August 5, in which you refer to our opinion of June 6, 1961, published in the Report of the Attorney General (1960-1961), at p. 1, and state that in view of this opinion the State Board of Accountancy requests "that [we] advise if this section prohibits a person who is not a holder of a CPA Certificate and who is not authorized to practice as a public accountant in accordance with the provisions of Chapter 5, Title 54 of the Code, from holding himself out a public accountant by the use of advertisements in the classified section of the telephone directory or by advertising in any newspaper or periodical as a public accountant, or by referring to himself as a public accountant by the use of calling cards and in letters of correspondence, or by holding himself out orally as a public accountant."

In my opinion, § 54-100 of the Code does not include the matters set forth in your question. As pointed out in our previous opinion, this is a penal statute and it must be strictly construed. This statute prohibits a person who is not registered as a public accountant from assuming to practice as a public accountant "either by the use of the words 'public accountant' on his door or stationery, or
by signing in the capacity of a public accountant a certificate in writing in re-
ference to any financial statement . . .”
Therefore, the answer to your question is in the negative.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Accountants—
Certified Public Accountant—Certificate may be issued to candidate quali-
fied to take but unsuccessful on exams prior to July 1, 1960, upon subsequent
successful completion of examination.

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

This is in reply to your letter of November 14, 1963, which reads as follows:

“Section 54-89 provides 'The certificate of ‘certified public account-
ant' shall be granted by the Board to any person who meets with the
requirements of paragraphs (1)-(6) of this section'

'Paragraphs (1) through (6) set forth the minimum requirements that
all candidates for such certificates shall meet prior to being issued cer-
tificates of certified public accountant. The last paragraph of the afore-
mentioned Section sets forth as follows:

'Notwithstanding the foregoing provisions of this section, any can-
didate who has taken the examination prior to July one, nineteen hun-
dred sixty, shall be eligible to take future examinations.'

'In your opinion, does the State Board of Accountancy have the
authority to issue a certificate of C.P.A. to a person who met the statu-
tory requirements to take such examination prior to July 1, 1960 and
was unsuccessful in passing such examination and who continues to
take subsequent examination and is successful in passing the examina-
tion after July 1, 1964, if such person does not meet the educational
requirements provided in Paragraph (4) of § 54-89 of the Code.'

Section 54-89 of the Code was rewritten in the 1960 session of the General
Assembly, one purpose apparently being to provide more stringent requirements in
subsection (4) relating to educational qualifications for certified public account-
ants. That subsection reads, in part, as follows:

“(4) He shall be a graduate of a high school with four years' course or, in the opinion of the Board, have had equivalent education through commercial experience, or otherwise; provided that on and after July one, nineteen hundred sixty-four, he shall be a high school graduate and shall have received sixty semester hours of credit from a college or university accredited by the State Board of Education, or in courses approved by the State Board of Accountancy at any other school, and after July one, nineteen hundred sixty-seven, he shall be a high school graduate and have received ninety semester hours of such credit and after July one, nineteen hundred seventy, he shall be a high school graduate and have received one hundred twenty semester hours of such credit.'

Among other qualifications and requirements for recipients of certificates from
the State Board of Accountancy is one for successful completion of an examina-
tion as provided in subsection (6) of § 54-89 of the Code.
Subsection (6) not only requires successful completion of the examination, but it also prohibits the examination of any applicant who has not first satisfied the requirements in subsections (1)-(4). The proviso which you quoted in your letter provides an exception to this prohibition if the applicant has taken the examination, without success, prior to July 1, 1960. It follows that the Board must allow an applicant to take future examinations without again first satisfying the requirements of subsections (1) through (4) if the applicant satisfied those requirements prior to July 1, 1960.

Although successful completion of an examination does not entitle an applicant to a certificate of C. P. A. unless all qualifications and requirements in § 54-89 are met, subsection (6) of this section recognizes that the examination cannot be given to any applicant who has not satisfied the other requirements.

I believe the intent and purpose of the proviso in the last paragraph of § 54-89 of the Code is to permit applicants to be certified upon passing the examination if they possess the qualifications as they existed as of July 1, 1960. Therefore, I am of the opinion that such applicants may be awarded the certificate of C. P. A. upon passing the examination after July 1, 1964, even though the educational requirements at the time will be more stringent than were provided prior to that date.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Barbers—Extent to which municipalities may regulate barbering.

May 26, 1964

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

This is to acknowledge receipt of your letter of May 20, 1964, in which you state in part:

"... will you please advise if in your opinion municipal or county governments can pass ordinances regulating barber shops. In addition, please advise if such ordinances will be applicable to barber shops wherein the practice of barbering is engaged in or carried on by just one barber."

You point out that the Council of the City of Winchester is considering the passage of an ordinance regulating all barber shops within the city limits. The city did not have such an ordinance on June 29, 1962.

Section 54-83.26, Code of Virginia (1950) as amended is a portion of Chapter 639, Acts of 1962, now designated as Chapter 4.1, Title 54, of the Code, which regulates the practice of the trading of barbering throughout the State. Said section is as follows:

"Nothing contained in this chapter shall be construed to prevent any municipal government in this State or county government in this State, regulating the trade of barbering on June twenty-ninth, nineteen hundred and sixty-two, from passing and enforcing reasonable laws and regulations not in conflict with this chapter governing the practice of barbering within its limits."

The Legislature may modify or withdraw at its pleasure any power here-tofore granted a municipality. The rule is expressed in 13 M.J., Municipal Corporations, Section 25, to-wit:
"As stated before, municipalities have no inherent power to exercise any function of government. Their power rests upon grants made by the legislature, and the legislature may modify or withdraw, at its pleasure, any power so granted."

Hence, the Legislature, in 1962, withdrew the power it had heretofore granted municipalities and counties to regulate the trade of barbering, but expressly permitted those municipalities and counties which were actually regulating such trade on June 29, 1962, to continue to do so.

I am of the opinion that § 54-83.26 permits only those municipalities and counties which were actually regulating the trade of barbering on June 29, 1962, to continue to do so, and that municipalities which were not regulating the trade of barbering at that time do not have such authority.

You also inquire whether municipalities may regulate the trade of barbering where barber shops are operated only by one barber. The term "barber shop" is defined in the aforesaid act as a place of business within which the practice of barbering is carried on by more than one barber. (Section 54-83.2(b)). No person shall practice barbering in a barber shop unless he is registered as a barber, and no person shall teach in a school of barbering unless he is registered as a barber teacher. (Section 54-83.3). Considering the whole of Chapter 4.1, supra, it is manifest that the Legislature only sought to regulate the trade of barbering where it is conducted in shops having more than one barber and also the teaching of that trade. Hence, the prohibition expressed in § 54.83.26 would not be applicable to ordinances of cities or counties regulating the operation of barber shops with only one barber working therein.

I am therefore of the opinion that municipalities (if authorized in their charters to regulate the trade of barbering) may enact such ordinances, but the same can only be applicable to regulating barbers working in shops where the practice of barbering is conducted by one barber.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Board of Registered Professional Hairdressers—Authority—May promulgate rules and regulations establishing minimum standards for schools.

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

June 15, 1964

This is in reply to your letter of June 9, which reads as follows:

"Chapter 6.1 of Title 54, Code of Virginia, provides for the examination and licensure of registered professional hairdressers. Section 54-112.12 sets forth the eligibility for examination. Subsection 5B of the aforementioned Section states 'Completed the required course in cosmetology, which course has been approved by the State Department of Education at a school approved by the Commission (Board).'

"In accordance with §§ 54-112.6 and 54-112.11, the Board of Registered Professional Hairdressers promulgated rules and regulations establishing minimum requirements for approved schools, a copy of which is enclosed.

"The Board of Registered Professional Hairdressers believes that if the public is to be adequately protected that it should adopt certain rules and regulations which would establish minimum standards for
instructors in approved schools of cosmetology. These standards would include age, educational qualifications and experience in the field of cosmetology.

"Will you please advise if, in your opinion, the Board has such authority."

Section 54-112.6, to which you refer, reads as follows:

"The Commission [Board] shall make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the performance of its duties, and to promote the ethical practice of 'professional hairdressing' and to discourage violations of this chapter."

Under this section the Board has the power to make reasonable rules and regulations as may be necessary for the performance of its duties and to promote ethical practice of professional hairdressing and to discourage violations of the Act. Section 54-112.12 sets forth the requirements that must be met in order for a person to take an examination which shall be given in accordance with the rules and regulations permitted under § 54-112.11. One of the requirements contained in § 54-112.12 is that the applicant has complied with the provisions of subsection (5) B., which reads as follows:

"(5) All persons desiring to be examined and who file applications on or after January one nineteen hundred sixty-three, shall, in addition to the foregoing, meet one of the following requirements:

* * * * *

"B. Completed the required course in cosmetology, which course has been approved by the State Department of Education at a school approved by the Commission [Board]."

Under the language just quoted it is the sole prerogative of the State Board of Education to approve the course of instruction furnished by a school; however, the school must be approved by the Board. In my opinion, the Board has the power to establish certain minimum standards that must be met by a school in order to be entitled to approval. One of these standards, in my judgment, could apply to the instructors. The standards, however, must necessarily be reasonable. If an instructor meets the minimum qualifications with respect to education and experience, there is some question as to whether or not exclusion on account of age alone would be a reasonable requirement.
"The Land Surveying Section of the Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors, recently issued two certificates as certified land surveyors to residents of another state, in accordance was § 54-35 of the Code.

"A resident of this State and a holder of a Land Surveyor Certificate issued by our Board, applied to that particular state for a land surveyor's certificate on the basis of reciprocity with the proper authorities of the aforementioned state. His application was denied on the basis that no reciprocal agreement was in existence between the two states.

"In view of the foregoing, does the Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors have the authority to revoke the two certificates previously issued to residents of the other state."

Subsequently we discussed this matter with your office and ascertained that neither of the certificates was obtained through fraud or misrepresentation (grounds for revocation under § 54-33), but that the certificates were received in good faith. It was stated that the State of North Carolina had previously reciprocated with this State and that the board had not been advised by the State of North Carolina that its policy in this respect had been changed.

The Board is bound by the provisions of § 54-32. This section does not authorize the board to revoke a certificate under the circumstances here. This section must be strictly construed in favor of a certificate holder.

Therefore, the question presented is answered in the negative.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Broker and Salesman—When actions repugnant to paragraph (12) of § 54-762.

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

January 17, 1964

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

"Enclosed is a copy of a lease for real property dated March 9, 1959.

"The question has been raised as to whether or not the provisions of the enclosed copy of lease violate the provisions of Section 762 (12), Title 54, Code of Virginia, 1950 as amended.

"Paragraph 22 of the enclosed lease apparently assures to the agent a commission on any rents that may accrue by reason of additional premises leased by the lessee from the lessor subsequent to the execution of the original lease. I especially wish your opinion as to whether or not the aforementioned paragraph 22 of the enclosed lease is repugnant to § 54-762 (12)."

Section 54-762 (12) of the Code reads as follows:

"The Commission may upon its own motion and shall upon the verified complaint in writing of any person, provided such complaint, or
such complaint together with evidence, documentary or otherwise, presented in connection therewith, makes out a prima facie case, investigate the actions of any real estate broker or real estate salesman, or any person who assumes to act in either capacity within this State, and shall have the power to suspend or to revoke any license issued under the provisions of this chapter, at any time when the licensee has by false or fraudulent representation obtained a license, or when the licensee in performing or attending to perform any of the acts mentioned herein, is deemed to be guilty of:

* * * * * *

(12) Making an exclusive listing contract which does not have a definite termination date:

* * * * * *

We have examined the copy of a lease which you enclosed and find that paragraph 22 reads as follows:

"Lessor in appointing .................................. its rental agent herein, does so for and in consideration of its services in securing the tenant herein and the negotiation of this agreement, and agrees to pay said Agent a commission of five percent (5%) of all rentals paid during the full term of this agreement and/or any renewal or extension thereof, or the continued occupancy of the herein premises by said Tenant, its heirs, administrators or assigns, and the Lessor does hereby appoint said .................................. its true agent to collect said rent during the full term of this agreement and/or any renewal or extension thereof, or the continued occupancy of the herein premises and any other premises leased from Lessor, by said Tenant, heirs, successors, administrators, or assigns, and to deduct herefrom the said five percent (5%) commission. This permission shall survive the transfer or assignment of this agreement and/or may sale or conveyance of the herein demised property to the said tenants."

The sole question to be determined is whether or not the lease in question makes an exclusive listing contract which does not have a definite termination date. The lease was originally made for a term of three years from May 1, 1959. On March 9, 1959 there was executed a supplemental agreement under which the lessee, by giving not less than three month's written notice, could exercise the option to extend the lease for two years. A similar supplemental agreement was executed giving the lessee the right to extend the lease for a period of two years from May 1, 1964, both options being subject to certain conditions not necessary for consideration by this office.

Under these provisions there can be no question that the listing contract contains a fixed or definite termination date. The fact that paragraph 22 contains a provision bringing additional premises—if contracted for by the lessee during the period of the lease or any extension thereof—within the scope of the agreement does not, in my opinion, affect the termination provisions of the lease.

In my opinion, the lease does not contain any provision that can be considered repugnant to paragraph (12) of § 54-762 of the Code.
PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Application of the word “apartment.”

May 14, 1964

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

I acknowledge receipt of your letter of May 11, relating to § 55-79.2 of the Code.

You have requested my advice as to whether under the definition of “Apartment” as contained in paragraph (a) of said section of the Code, “an individual family unit (apartment) consisting of two floors would come within the definition of an apartment as set forth in the above-quoted section of the Code, provided, of course, that all other provisions of Chapter 4.1 of Title 55 are complied with.”

A unit of this nature would not, in my opinion, come within the foregoing definition of “Apartment.” However, under § 1-13.15 of the Code, the phrase “enclosed room,” in my opinion, may be construed to be more than one room, but as used in paragraph (a) the rooms constituting an apartment would have to be located on one floor. This is further apparent from the language of §§ 55-79.3 and 55-79.4. A duplex arrangement, it seems, would constitute two apartments under Chapter 4.1 of Title 55.

PROFESSIONS AND OCCUPATIONS — Physical Therapists — When license may be issued without examination.

March 2, 1964

DR. R. M. COX
Secretary-Treasurer, Board of Medical Examiners

This is to acknowledge receipt of your letter of February 25, 1964, in which you request my interpretation of § 54-310.1, Code of Virginia (1950) as amended, dealing with the granting of licenses to practice physical therapy. You state in part:

"I am writing to ask for a clarification of Section 54-310.1 of the Code relative to licensure of physical therapists. The reason behind this request is really that the Advisory Committee of Physical Therapy of the State Board of Medical Examiners feels that any person who has been employed for several years as a physical therapist in the Armed Forces and is to be released therefrom should be able to be licensed in Virginia without examination.

Paragraph A of the section referred to would seem to indicate that any physical therapist who was serving in the Armed Forces on June 27th 1958, should be licensed without examination if they apply for licensure within six months after discharge, separation or release from the Armed Forces. If this paragraph is taken separately it would seem to apply whether the therapist had been stationed in an Armed Services' facility in Virginia or whether they had not. On the other hand, paragraph C would seem to indicate that any person to be licensed under this section would have to have been stationed in Virginia on June 27th, 1958, and at least a year prior thereto."
"There is a great shortage of trained physical therapists in the State of Virginia. We have at this moment applications from two such people who are getting out of the Armed Services. They have asked for licensure in Virginia by endorsement of their record in the Armed Services. They were not stationed in Virginia on June 27th, 1958, but were in the Armed Services on that date and for several years prior thereto."

Section 54-310.1 is as follows:

"The Board shall grant a certificate or license to practice physical therapy without examination to any person who:

"(a) Applies for such license or certificate by March one, nineteen hundred fifty-nine or, who, if serving in the armed forces of the United States of America on June 27, 1958, applies for registration within six months after discharge, separation or release from the Armed Forces;

"(b) On June 27, 1958, has met the requirements listed in paragraphs (a), (b), (c), and (d) of § 54-308.5;

"(c) Is practicing physical therapy, as defined and limited in this chapter, full time in the State of Virginia and was so practicing on and for at least one year prior to June 27, 1958, or the date of his application, or, if serving in the Armed Forces on June 27, 1958, was practicing full time in the State of Virginia for at least one year prior to June 27, 1958; and

"(d) At the time of making such application pays a fee of thirty dollars to the Board."

It will be noted that this statute is in the conjunctive. Hence, in order to secure a certificate to practice physical therapy, the applicant must meet all the requirements (in paragraphs, (a), (b), (c) and (d)) of § 58-310.1, Code of Virginia (1950) as amended. If the applicant is a member of the armed forces, he must show that he practiced in Virginia one year prior to June 27, 1958. Under paragraph (a), such a person is permitted to make an application within six months after discharge, separation or release from the armed forces.

PUBLIC FUNDS—Responsibility of officials in case of theft or other loss.

Mr. W. F. Smyth, Jr.
Director, Division of Corrections
Department of Welfare and Institutions

This is in reply to your letter of May 20, concerning Jacob Freeman, your #56996. I understand from your letter that the sheriff of Henrico County, or one of his deputies, was the custodian of $184.10 belonging to Freeman and that this money was stolen by some prisoners who escaped.

You request my opinion as to who is responsible—that is, whether or not there is a responsibility upon the sheriff or the custodian to replace this money.

I am enclosing copy of an opinion to the Hon. J. Gordon Bennett, dated September 12, 1956, published in Report of the Attorney General (1956-1957), at p. 203, in which the responsibility of an officer having in his custody public funds is discussed. You will note that at the bottom of page 204 this office expressed the opinion that the general rule relating to the duties of fiduciaries would be applicable in the case of loss of private funds in the custody of a public
Public Funds—Retirement System—Investment of funds by trustees subject to provisions of § 26-45.1.

HONORABLE DONALD C. CROUNSE
Assistant Commonwealth's Attorney, Fairfax County

This is in reply to your letter of September 6, 1963, in which my opinion is requested on the following question:

"Can the Board of Trustees of the Fairfax County Supplemental Retirement System invest retirement funds in common stocks or securities under the 'Prudent Man Rule' (Section 26-45.1, Code of Virginia) or is the investment of said funds governed by Section 2-298, Code of Virginia as public funds?"

You have advised that Fairfax County adopted a supplemental retirement system pursuant to Chapter 111 of the 1942 Acts of Assembly, and that § 9-37 of the Fairfax County Code (copy of which section you sent me) provides for the investment of retirement funds "upon the exercise of bona fide discretion, in securities, which, at the time of making investment are, by law, permitted for investment of funds by fiduciaries in the state."

In my opinion § 9-37 of the Fairfax County Code reflects a lawful exercise by the Board of Supervisors of the powers conferred by the provisions of Chapter 111 of the 1942 Acts of Assembly. If this be true, then the power of the Board of Trustees of the Fairfax County Supplemental Retirement System to invest is limited by the following language in § 9-37:

"The board . . . shall have full power to invest and reinvest such funds, subject to the limitation that no investment shall be made, except, upon the exercise of bona fide discretion, in securities, which, at the time of making the investment, are, by law, permitted for the investment of funds by fiduciaries in the state. . . ." (Emphasis added)

The answer to your question would seem to depend upon the proper construction of the foregoing ordinance.

Sections 26-40 and 6-184 of the Code of Virginia (1950), as amended, enumerate securities that shall be considered lawful for investment by fiduciaries generally. These sections furnish immunity to the fiduciary if he invests in the enumerated securities, but do not prohibit investment in other securities. Powers v. Powers, 174 Va. 164. Ordinarily, a fiduciary, as to investments not listed in these sections is amenable to the requirements of § 26-45.1 of the Code.

The question as to whether or not the language used in § 9-37 of the Fairfax County Code,—"permitted for the investment of funds by fiduciaries of the state,"—limits the authority of the Board of Trustees to those securities enumerated in §§ 26-40 and 6-184 of the Code of Virginia has been considered. If the authority of the trustees is so limited, they would have no immunity even
as to such securities unless the investment therein was made "upon the exercise of bona fide discretion."

In view of the decision in Goodridge v. National Bank, 200 Va. 511, I am of the opinion they are not so limited. It was there held that § 26-45.1 of the Code is applicable to a trust authorizing the trustee to invest in "... other securities that are eligible for the investment of fiduciary funds under the laws of the State of Virginia ..." I, therefore, feel that § 26-45.1 of the Code would also be applicable to the Board of Trustees of the Fairfax County Supplemental Retirement System.

In my opinion, § 2-298 of the Code of Virginia would not be construed to apply to any public funds already governed and controlled by the operation of a specific, validly enacted statute or ordinance.

PUBLIC OFFICERS—Bond—Blanket policy for constitutional officers not acceptable.

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

August 14, 1963

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

"I have been requested to ask your opinion as to whether or not the County of Arlington can accept a Public Official Schedule Bond (Specimen 'B' attached hereto) in lieu of an individual bond (Specimen 'A' attached hereto).

"With regard to the bond required of police officers, we have in the past taken only the individual bond (Specimen 'A'). There can be a savings in premium realized if we can accept the Public Official Schedule Bond in lieu of the individual bond."

Specimen "B" is an obligation executed solely by a surety company. Specimen "A" is an obligation executed by the person being bonded together with a surety. Specimen "B" is designated as a Public Officials Schedule Bond to which is attached a schedule giving the name of each person being bonded, his position, the amount of liability, etc. This type of bond, in my opinion, is acceptable with respect to employees of the county who are not required by law to execute a bond of this nature. This type of bond, however, may not be used by a county in connection with constitutional officers and their deputies. The constitutional officers are required by law to execute bonds of this nature and, therefore, it is necessary that the bond comply with the provisions of § 49-12 of the Code. As we construe that section, the officer, as well the surety, must execute the bond and it must contain those provisions which are required by § 49-12.

We have conferred with the State Compensation Board in connection with this matter and that Board has previously taken the position that a blanket bond of the nature of Specimen "B" is not acceptable with respect to such constitutional officers. Neither is it acceptable where the constitutional officer requires a bond of his deputies for his protection.
PUBLIC OFFICERS—Compatibility—A person who is a salaried employee of a food supplier furnishing food to school cafeterias may serve as member of the school board.

SCHOOLS—School Boards—A person who is a salaried employee of a food supplier furnishing food to school cafeterias may serve as member of the school board.

HONORABLE F. PAUL BLANOCK
Commonwealth's Attorney of Mathews County

May 11, 1964

This will acknowledge receipt of your letter of May 8, in which you request my advice as to whether or not a person who is a salaried employee of a food supplier that is furnishing food to the school cafeterias in your county is prohibited from serving as a member of the school board. You refer to §§ 15-504 and 22-213 of the Code and state that the latter section in your opinion does not prohibit this person from serving on the school board but that in your judgment he would be disqualified under § 15-504.

Assuming that this employee does not receive any commissions or other benefits from sales made by the firm to the county school board and that he does not act as salesman or take any action whatsoever in connection with the sale by this firm to the school board of supplies for the cafeterias, in my opinion, the provisions of § 15-504 would not be a bar to his serving as a member of the school board.

This office has previously held that the prohibitive provisions of § 15-504 must be strictly construed. Furthermore, the question presented by you seems to be similar to a question passed upon by former Attorney General Staples in an opinion dated January 25, 1939 to the Commonwealth’s Attorney of Chesterfield County. This opinion is published in the Report of Attorney General for 1938-39, at p. 210, and I am enclosing a photostatic copy for your information. I also enclose copy of a later opinion relating to a similar situation which opinion is dated September 5, 1957, and is published in the Report of Attorney General (1957-58), at p. 22.

I concur in your conclusion that the provisions of § 22-213 would not prevent this person from serving on the school board.

PUBLIC OFFICERS—Compatibility—Assistant Commonwealth’s Attorney may not hold any other office, elective or appointive, at the same time.

JUDGES—Compatibility—Assistant Commonwealth’s Attorney cannot serve as trial justice.

HONORABLE GEORGE L. FREEMAN, JR.
Assistant Commonwealth’s Attorney of Fairfax County

December 10, 1963

This is in reply to your letter of December 9, which reads as follows:

"The question has been raised as to whether or not an Assistant Commonwealth's Attorney may act as a trial justice in a court whose
cases are not prosecuted by the Commonwealth's Attorney's office in which the Assistant is employed."

Section 15-486 of the Code provides, with certain exceptions, that the officers therein named, including the commonwealth's attorney, are prohibited from holding any other office, elective or appointive, at the same time.

This office has held on other occasions that the prohibitions of this section are applicable to a deputy, which, of course, would include an assistant commonwealth's attorney. In this connection, I am enclosing copy of an opinion to the treasurer of Wise County, which is published in the Report of the Attorney General (1959-1960), at p. 272.

Without regard to § 15-486, it would seem that the two offices mentioned are incompatible.

PUBLIC OFFICERS—Compatibility—Deputy clerk cannot hold office of justice of the peace.

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

November 6, 1963

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

"Is it permissible for a Deputy Clerk of the Circuit Court to hold the elected office of Precinct Committeeman?

"Assuming the Deputy Clerk is eligible to hold the office of Precinct Committeeman, could the same Deputy be appointed as a Justice of the Peace which is ordinarily an elective office?

"If the Deputy resigned as Precinct Committeeman, could he then hold the office of Justice of the Peace?"

A precinct committeeman of a political party is not deemed to be an office holder within the meaning of the statutes prohibiting certain officers from holding two offices at the same time. Therefore, in my opinion, the fact that the deputy clerk would be a member of the local party committee would not alone make him ineligible to hold any of the offices mentioned in your letter. Of course, a deputy clerk cannot hold the office of justice of the peace. He would have to resign as deputy clerk before qualifying for justice of the peace.

PUBLIC OFFICERS— Compatibility—Deputy clerk of county court cannot serve as justice of peace.

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

January 14, 1964

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

"I will appreciate your opinion as to whether or not the same person may at the same time hold the office of Deputy Clerk of the County
Court of Isle of Wight County and the office of Justice of the Peace in said County. Section 16.1-18 of the Code seems to pertain to this matter in a general way, but the matter is not altogether clear to me and I will appreciate your advices at your earliest convenience."

The powers of a clerk of a county court are set forth in § 16.1-44 of the Code. These powers include the powers that may be exercised by a justice of the peace, as well as additional powers. A deputy Clerk, in the absence of any statute imposing limitations, may perform the functions of the clerk.

While there is no specific statutory prohibition against a justice of the peace and a clerk, or his deputy, from holding the two offices at the same time, nevertheless, due to the fact that a justice of the peace may collect a fee for his services and a county court clerk, or his deputy, is not entitled to collect a fee for the same services, I feel that the two offices are not compatible.

PUBLIC OFFICERS—Compatibility—Deputy sheriff of county may not serve as justice of the peace.

PUBLIC OFFICERS—Compatibility—Chief of police of a town may not serve as justice of the peace.

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

December 6, 1963

This is in reply to your letter of December 5, in which you present the following questions:

"1. May a Deputy Sheriff of a County also serve as a Justice of the Peace?
2. May the Chief of Police of a town serve as a Justice of the Peace?"

With respect to your first question, this office has frequently ruled that a deputy sheriff of a county is not eligible to serve as a justice of the peace. The most recent ruling on this subject is found in the Report of the Attorney General (1958-1959), at p. 156, copy of which I am enclosing.

With respect to your second question, § 15-486 of the Code does not specifically prevent a justice of the peace from serving as chief of police of a town. If the chief of police of the town should be appointed a justice of the peace, in my opinion, he should not issue any warrants or take part in any way in any matters involving an alleged violation of any State law or town ordinance which is alleged to have occurred within the corporate limits of the town. Therefore, in any opinion, the duties incident to the two offices would be incompatible.

It has been held in a leading case that two offices are incompatible where the holder of such offices cannot, in every instance, discharge the duties of each. This question is discussed at length in an opinion dated February 11, 1959, also published in the Report of the Attorney General (1958-1959), at pp. 156-157. For your information, I enclose copy of this opinion also.
PUBLIC OFFICERS—Compatibility—Employee of commissioner of revenue may serve as judge of an election where commissioner is not a candidate for any office.

ELECTIONS—Election Judge—Employee of Commissioner of Revenue may serve.

HONORABLE ROBERT L. RHEA
Commonwealth's Attorney of Augusta County

May 20, 1964

This will acknowledge receipt of your letter of May 19, which reads as follows:

"I have been requested to write and ask your opinion as to whether or not § 24-198, Code of Virginia, 1950, as amended, would disqualify an employee of the office of the Commissioner of Revenue from serving as a judge or a clerk of an election, when the Commissioner of the Revenue is not a candidate for any office at that time."

Although § 24-198 of the Code would prevent an employee of a person who is a candidate for office in an election to act as precinct judge in such election, this section does not, in my opinion, prevent an employee of a commissioner of the revenue from serving as precinct judge in an election in which the commissioner of the revenue is not a candidate for any office to be filled by such election.

PUBLIC OFFICERS—Compatibility—Judge of a county court may not serve as delinquent tax collector.

HONORABLE HANSEL FLEMING
Commonwealth's Attorney for Dickenson County

December 9, 1963

This is in reply to your letter of December 6, in which you request my advice as to whether or not the judge of a county court may also serve as delinquent tax collector for the same county. In my opinion the services rendered by the judge of a county court as an attorney representing the county in the collection of delinquent taxes and his services as judge would be incompatible. No doubt many of the claims for taxes would be in amounts coming within the category of suits where the county court has exclusive original jurisdiction. Section 16.1-10 of the Code expressly provides that no judge of a court of record shall "accept or receive any claim or evidence of debt for collection when the enforcement thereof is within the exclusive original jurisdiction of his court."

In my opinion, it would not be proper for the judge of a county court to undertake an assignment of this nature.
PUBLIC OFFICERS—Compatibility—Justice of the peace may be employed as city fireman.

JUSTICE OF PEACE—Compatibility—May be employed as city fireman.

Honorble Maurice E. Griffin, Jr.
Justice of the Peace of Chesapeake

This is in reply to your letter of December 24, 1963, in which you state that you have been elected to the office of Justice of the Peace for the City of Chesapeake for the term commencing January 1, 1964. You are employed by the City as a fireman at a fixed monthly salary. Your compensation for your service as a Justice of the Peace will be paid upon warrants written by the Clerk of the Municipal Court, based upon the usual fee allowed such officer for issuing criminal warrants.

You request advice as to whether or not you may hold the office to which you have been elected and at the same time continue in your employment as a fireman.

The employer-employee relationship, rather than that of a contractor, exists between you and the City. I am unable to find any provision in the City charter or § 15-508 of the Code which would prohibit a city from employing a justice of the peace as fireman. In my opinion your services as a fireman are not incompatible with your duties as a Justice of the Peace.

PUBLIC OFFICERS—Compatibility—Justice of peace may not serve as professional bondsman.

JUSTICE OF PEACE—Authority—Not authorized to carry concealed weapon without permit from proper court.

JUSTICE OF PEACE—Professional Bondsman—Offices are not compatible.

Honorble Maurice E. Griffin, Jr.
Justice of the Peace of Chesapeake

This is in reply to your letter of September 26, 1963, in which you request my opinion on the following two questions:

"May a Justice of the Peace, while serving in office, be allowed to qualify as a professional bondsman?"

"Does a Justice of the Peace have the authority or privilege to carry a revolver without a pistol/gun permit of any kind?"

My predecessors in office have previously given opinions on both questions. In an opinion given Honorble Carleton Penn, II, under date of July 18, 1956, it was the ruling of this office that a justice of the peace may not with

Opinions given to Mr. M. F. Steelman and Honorable E. N. Pritchett, dated August 8, 1949, and May 14, 1962, respectively, indicate that if you feel it necessary for you to carry a concealed weapon, it would be advisable for you to apply to the proper court for a permit to do so. Report of the Attorney General (1949-1950), p. 170; (1951-1952), p. 94.

Copies of these three opinions, with which I concur, are enclosed. Amendments made to the pertinent statutes since the foregoing opinions would not appear to affect the previous interpretations.

PUBLIC OFFICERS—Compatibility—Member of board of supervisors may not serve as member of Blue Ridge Airport Authority.

BOARDS OF SUPERVISORS—Member—May not serve as member of Blue Ridge Airport Authority.

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

March 10, 1964

This is in reply to your letter of March 9, in which you request my advice as to whether a member of a board of supervisors "may legally be appointed" as a member of the Blue Ridge Airport Authority, established under the provisions of Chapter 25, Acts of Assembly, 1964.

Section 3 of Chapter 25 provides that—

"There is hereby created and constituted a political subdivision of the Commonwealth, to be known as the 'Blue Ridge Airport Authority.' The exercise by the Authority of the powers conferred by this Act in the construction, operation and maintenance of the project authorized by this Act shall be deemed and held to be the performance of an essential governmental function.

"The Authority shall consist of five members, all of whom shall be appointed by the presiding judge or judges of the Seventh Judicial Circuit of the counties of Henry and Patrick and the city of Martinsville, at least three of whom shall be residents of said Judicial Circuit. Two of the members of the Authority first appointed shall continue in office for terms expiring on June 30, 1967, two for terms expiring on June 30, 1966, and one for a term expiring on June 30, 1965, the term of each such member to be designated by said judge or judges and to continue until his successor shall be duly appointed and qualified. The successor of each such member shall be appointed for a term of five years and until his successor shall be duly appointed and qualified, except that any person appointed to fill a vacancy shall serve only for the unexpired term. Any member of the Authority shall be eligible for reappointment. Members of the Authority shall be subject to removal from office in like manner as are State, county, town and district officers under the provisions of §§ 15.1-63 to 15.1-66, inclusive, of the Code of Virginia. The Authority shall annually elect one of its members as chairman and another as vice chairman and shall also
elect annually a secretary-treasurer, who may or may not be a member of the Authority . . ."

Under this provision the members, in my judgment, are public officers. The Act so designates them and makes provision for their removal from office in the manner applicable to other public officers.

Section 15-486, to which you referred in your letter, expressly provides that "no person holding the office of * * supervisor shall hold any other office, elective or appointive, at the same time * *," subject to certain exceptions which do not apply to the matter under consideration here.

It is clear, in my opinion, that a member of the board of supervisors may not hold the office of member of the Authority while continuing to serve on that board. Should a member be appointed and accept the appointment by qualifying he would, in my opinion, be deemed to have elected to relinquish his membership on the board of supervisors.

With specific reference to your question as presented, a member of the board of supervisors may legally be appointed to membership on the Authority, but he cannot continue to hold the office of supervisor if he accepts the appointment and assumes the functions of that office.

PUBLIC OFFICERS—Compatibility—Postmaster of third class post office may not serve as bail commissioner, but may serve as justice of the peace.

JUSTICE OF PEACE—Compatibility—May serve as postmaster of a third class post office.

December 5, 1963

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

This is in reply to your letter of December 2, in which you inquire whether or not a postmaster of a third class post office in your county may hold the office of justice of the peace and thereafter be appointed as a bail commissioner for the county.

Under § 2-27 of the Code this person is prevented from holding any office in the State government unless it comes within the exceptions to § 2-27, found in § 2-29 of the Code. Section 2-29 (4) provides that fourth or third class postmasters are not prevented from holding the office of justice of the peace. The exceptions contained in § 2-29 must be strictly construed. Subsection (4) of this section also states that § 2-27 shall not be construed so as to prevent a fourth class or a third class postmaster from holding any district office under the government of any county. The question arises as to whether a bail commissioner is a district officer. Section 19.1-114 of the Code expressly provides that a court or a judge may appoint a justice of the peace to serve as the bail commissioner for the county, and hence he must be considered to be a county officer, rather than a district officer.

I am of the opinion that the postmaster in question may not serve as a bail commissioner, since such officer does not come within any of the exceptions contained in § 2-29.
REPORT OF THE ATTORNEY GENERAL

PUBLIC OFFICERS—Compatibility—President of Virginia Association of Insurance Agents may be a member of Insurance Advisory Board.

INSURANCE ADVISORY BOARD—Conflict of Interest—Member may not participate in the consideration of coverage on property insured in agency in which he has an interest.

HONORABLE STEWART R. MOORE
Secretary, Insurance Advisory Board

This is in reply to your letter of August 27, 1963, in which the Insurance Advisory Board has requested my opinion as to whether Mr. Richard L. Beale, Jr., is eligible to serve as a member of the Board while at once serving as President of the Virginia Association of Insurance Agents. You advise that the Virginia Association of Insurance Agents has appointed a committee to study means by which insurance on State properties may be solicited and handled by stock insurance agencies.

The members of the Insurance Advisory Board are appointed pursuant to Chapter 178, Acts of Assembly, 1962, a portion of which reads as follows:

"No member of the Board shall participate, directly or indirectly, in the consideration of the insurance to be effected upon any property when such property is insured by or through an insurance agency in which such member has any interest of whatsoever nature."

The foregoing quoted provision does not bear on the eligibility or qualifications of a person appointed to the Insurance Advisory Board, but is designed to prevent a conflict of interest when a particular insurance coverage is being considered for State-owned property. The fact that a member of the Board is also a member of an insurance association, composed of agencies writing insurance coverage, would not in itself present a conflict of interest. In the event the Board should consider insuring State-owned property with the agency in which the Board member has an interest, the foregoing quoted provision would preclude that member from participating in the consideration of that particular coverage.

PUBLIC OFFICERS—Compatibility—Rural mail carrier may serve as member of county school board.

SCHOOLS—School Boards—Rural mail carrier may serve as member.

HONORABLE G. O. McGHEE
Superintendent of Charlotte County Schools

At the request of Mr. R. H. Pettus, Commonwealth's Attorney for Charlotte County, I am writing to advise you on the eligibility of a rural mail carrier to serve on the County School Board.

Prior to 1942, no Federal, State or county officer was eligible to serve on a school board unless expressly excepted in § 644(1) of the Code of Virginia (now § 22-69, Code of 1950). This view was expressed by the Attorney General in a letter appearing in the Report of the Attorney General, (1939-1940), p. 165, a portion of which reads as follows:
"Section 290 of the Code provides that United States officers and employees shall not be capable of holding any office of honor or profit under the Constitution of Virginia. Section 291 provides that section 290 shall *** not be construed *** to prevent any United States rural mail carrier *** from holding any county or district office ***.' Section 291, then, does not in itself permit any of the persons therein named to hold the specified offices, but merely provides that the general language of section 290 shall not prevent certain persons from holding certain offices.

"While a rural mail carrier is excepted from the provisions of section 290, he is not excepted from the provisions of section 644(1) which deals specifically with county school boards and which provides: "'No Federal, State or county officer, or any deputy of such officer, and no supervisor shall be chosen or allowed to act as member of the county school board, provided that the provisions herein obtained, shall not apply to fourth-class postmaster, county superintendent of the poor, commissioners in chancery, commissioners of accounts, registrars of vital statistics, notary public, clerk and employees of the Federal government in Washington; *** .'"

In the 1942 session of the General Assembly the word "Federal" was removed from the statute quoted in the foregoing opinion. Chapter 94, Acts of Assembly (1942). As a result, the eligibility of a Federal officer to serve as a county official is governed by §§ 2-27 and 2-29 of the Code (formerly §§ 290 and 291 of the Code of 1942).

By letter of March 17, 1959, addressed to Mr. J. S. Hardaway of Nottoway County, Attorney General A. S. Harrison, Jr., expressed the view that rural mail carriers are eligible for appointment to the county board of supervisors by virtue of one of the exceptions in § 2-29 of the Code to the effect that the prohibitions contained in §2-27 of the Code shall not be construed to prevent any United States rural mail carrier or star route mail carrier from being appointed and acting as Notary Public, or holding any county or district office. I concur in that view and am further of the opinion that the conclusion expressed therein is also applicable to the eligibility of rural mail carriers to serve as members of county school boards.

PUBLIC OFFICERS—Conflict of Interest—Member of Board of Real Estate Review who is a druggist may sell drugs to recipient of county welfare.

PUBLIC OFFICERS—Conflict of Interest—Member of board of supervisors who is a druggist may sell drugs to recipient of county welfare.

PUBLIC OFFICERS—Conflict of Interest—Member of school board who waives his salary may not sell lumber to county.

March 6, 1964

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

This is in reply to your letter of February 21, in which you request my advice as to whether the provisions of §§ 15-333, 15-504 and 22-213 of the Code prevent—

(1) A member of the Board of Real Estate Review who is compensated at the rate of $15.00 for each meeting attended, and who owns and operates a retail drug store, from selling medicines to persons receiving old age and other as-
sistance from the county Welfare Department, the bills for such drugs being paid to the druggist by the Welfare Department;

(2) A member of the Board of Supervisors (who is also a member of the Welfare Board) who owns and operates a drug store, from selling drugs under circumstances similar to those set forth in (1);

(3) A member of the School Board of the county who is also principal officer and stockholder in a lumber company, which company occasionally sells lumber to various departments of the county. This person, you state, has refrained from accepting any salary for his services on the School Board since his appointment because of the occasional sales made by his company to agencies of the county.

With respect to (1) and (2), the sales are made in the ordinary course of business to the general public rather than to the county. While it is true that the county under its welfare program (in which the State and Federal governments participate) underwrites, within limits, the payments to drug stores making such sales, yet, in my judgment, the transactions are not of the nature prohibited by the statutes under consideration here.

The situation in (3) is different. In that case the official deals with the county direct and such a transaction is undoubtedly forbidden by the statutes in question. This is, of course, subject to the language of § 22-213 relating to permission by the State Board of Education.

The fact that the member of the School Board in this instance waives his salary does not remove him from the prohibitions of any of the sections of the Code to which you referred. This conclusion is in accord with prior opinions of this office.

PUBLIC OFFICERS—Conflict of Interests—Member of Peninsula Airport Commission may not contract with the Commission.

PENINSULA AIRPORT COMMISSION—Members—May not contract with the Commission.

March 27, 1964

MR. WILLIAM E. ALLAUM, JR.
Chairman, Peninsula Airport Commission

This will acknowledge receipt of your letter of March 24, which reads as follows:

"Chapter 22 of the Acts of Assembly of 1946 enabled certain communities to form The Peninsula Airport Commission, which has operated under this act as amended since that time.

"Section 10 of the Act provides, 'No member, agent or employee of the commission shall contract with the commission or be interested, either directly or indirectly, in any contract with the commission, or in the sale of any property to the commission.'

"A member of the commission is President of a Virginia corporation owned entirely by members of his family, of which he owns a 1/6 interest.

"The corporation would like to make an offer to lease a portion of the property of the commission for use as a gasoline station, which offer would be in competition with other offers which the commission is obtaining from other companies.

"We would appreciate your opinion as to whether the offer from this family corporation can be considered by the commission, with the principal officer of the corporation who is a member of the commis-
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...tion abstaining from discussion, consideration, or approval of the offer? If further information be desired in respect to this question, I shall be glad to furnish the same."

In my opinion any contract between the Peninsula Airport Commission and the corporation in question for the lease to the corporation of property of the Commission would be contrary to the prohibitions of Section 10 of the Act under which the Commission was established and operates. I see no escape from this conclusion. Similar questions have arisen with respect to other statutes of a like nature, such as §§ 15-504 and 15-508 of the Code, applying to counties, cities and towns and the conclusion reached here is in accord with the opinions relating to those sections. The member of the Commission involved in this matter is the principal officer of the corporation and owns a substantial interest therein. The abstention of a stockholder from participation in the transaction does not have the effect of removing such transaction from the prohibitions of the statute. The Act in question does not contain any provision upon which to justify an exception in this case.

PUBLIC OFFICERS—Contracts—Board of Supervisors—Member who is insurance adjustor cannot participate in adjustment of claim involving his company.

BOARDS OF SUPERVISORS—Members—Insurance adjustor cannot participate in adjustment of claim involving his company.

Honorable H. Ratcliffe Turner
Commonwealth's Attorney of Henrico County

December 19, 1963

This is in reply to your letter of December 18, which reads, in part, as follows:

"A question has been raised concerning the application of Section 15-333 of the Code of Virginia 1950 as amended to certain insurance contracts purchased by Henrico County.

"In the instant case, one of the members of the Board of Supervisors elected to take office on January 1, 1964 for a four (4) year term is employed as a claims representative by the Royal Globe Insurance Companies. Henrico County carries a substantial quantity of liability and fire insurance, the premiums being on the order of $12,400.00. This insurance is placed through The Davenport Insurance Company in the City of Richmond, who in turn has placed the policies with companies with the Royal Globe Insurance Companies.

"This member of the Board, according to the information which I have, is employed as a claims representative by Royal Globe Insurance Companies. The question, of course, is will the County violate provisions of Section 15-333 of the Code of Virginia 1950, as amended, by continuing to carry substantial insurance policies with the Royal Globe Insurance Companies while a member of the Board of Supervisors is employed as a claims representative by this company."

In your letter you refer to the opinion of this office to Honorable William F. Parkerson, Jr., under date of September 5, 1957, and found in the Report of the Attorney General (1957-1958), at p. 22, and express the view that that opinion would be applicable.
The same principle controlling in the opinion to which you refer would apply in the present instance. However, in the event the county of Henrico should have a claim against the Royal Globe Insurance Companies, or any company represented in the capacity by the supervisor, during his tenure of office it would be improper, in my opinion, for this member of the board of supervisors to participate in the adjustment of the claim.

I enclose herewith the following opinions issued during the year 1962 which also relate to the subject matter: Opinion furnished Honorable James B. Fugate under date of October 19, 1962, and opinion furnished Honorable R. H. L. Chichester under date of December 14, 1962.

PUBLIC OFFICERS—Contracts—City may contract with corporation, even though member of council is member of board of directors.

HONORABLE MOSBY G. PERROW, JR.
Member, Virginia State Senate

This will acknowledge receipt of your letter of June 27, in which you state that Mr. Percy N. Burton is a member of the Board of the Lynchburg General Hospital a private nonprofit corporation. Mr. Burton has recently been elected to fill a vacancy on the Council of the City of Lynchburg and the question has been raised as to whether or not the city can continue to contract with Lynchburg General Hospital for services to the medically indigent if Mr. Burton should remain on the Hospital Board. You raise the question as to whether or not § 15-508 of the Code would prohibit the city from making such contract while Mr. Burton is a member of the Board.

The contract, of course, is made between the city and the corporate entity and, therefore, Mr. Burton is not a party to the contract. The question then is whether or not he is personally interested directly or indirectly in the contract or the profits or contract price. The corporation, being nonprofit, of course, pays no dividend and it is assumed that Mr. Burton receives no compensation for his service. Under these circumstances § 15-508, in my opinion, would not apply, and, should Mr. Burton continue to serve as a member of the Board of the Hospital, while serving as a member of the City Council, he would not, in my opinion, be in violation of said section.

PUBLIC OFFICERS—Contracts—County treasurer may not rent office space to county.

BOARDS OF SUPERVISORS—Contracts—May not rent office space from county treasurer.

HONORABLE FRANCIS C. NOLAND
Commissioner of the Revenue, Hanover County

This is in reply to your letter of August 10, which reads as follows:
Will you be kind enough to give me your opinion on the following question?

Would it be illegal by State Law, for a County Board of Supervisors to rent an office from the Treasurer of the County for the Commissioner of Revenue of the same County?

The Commissioner has an office located at the Court House, but due to the size and shape of the County the office in question would serve a large number of citizens in the area that would not be able to get to the office at Hanover Court House. This is strictly a move to better serve the people and not a personal matter at all, the office would be a branch office as the Commissioner has to go to his office at Hanover every day.

A contract of this nature is prohibited by § 15-504 of the Code. However, I wish to call attention to § 15-504.2 of the Code, which is an exception to § 15-504 and which must be strictly construed. Under this section, by following the procedure set forth in the terminal paragraph of § 15-333 of the Code, it would be possible for the county to purchase the property in question from the treasurer for use as a county office building.

PUBLIC OFFICERS—Contracts—Members of school board cannot contract for insurance coverage on property owned by county.

SCHOOLS—School Boards—Member cannot contract for insurance coverage on property owned by county.

HONORABLE F. L. WYCHE
Commonwealth's Attorney for the County of Prince George

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

"I have been requested by the Board of Supervisors of Prince George County to obtain your opinion on the following question:

"In the light of the provisions of Section 15-381 of the Code of Virginia, or any other applicable statutes, can a member of the School Board of Prince George County who receives compensation for his services as such from funds appropriated by the County, sell to the County as agent of an insurance company fire insurance and public liability insurance covering the Courthouse building, County office building, Police Headquarters, etc. This School Board member would receive the usual commission from his company upon the contracts of insurance issued to the County."

Section 15-381 of the Code, to which you refer is applicable to counties that have adopted the county board form under Art. 5, Chap. 12, Tit. 15 of the Code. The sections of the Code applicable to the question you have presented are §§ 15-504 and 22-213. Under these sections, a member of the school board would be prohibited from writing insurance covering any property owned by the county, except such school property as is specifically mentioned in § 22-213 of the Code and then only after first obtaining the permission of the State Board of Education.

In this connection, I call your attention to an opinion found in the Report of
the Attorney General (1958-1959), at p. 246, which opinion is dated July 11, 1958 and was furnished to the Commonwealth's Attorney of Stafford County. If you do not have access to this opinion, I will be glad to furnish you with a copy.

PUBLIC OFFICERS—Duties—Bound to act impartially in matters pertaining to the administration of their duties."

April 30, 1964

HONORABLE D. FRENCH SLAUGHTER, JR.
Member, House of Delegates

This is in reply to your letter of February 22, 1964, in which you requested my opinion and advice concerning alleged discrimination by public health officials and employees and certain school nurses against optometrists. Such alleged discrimination is described in your letter as follows:

"I have been advised that on occasion public health officials or school nurses have been directing patients and school children to physicians instead of permitting them the free choice of a practitioner in the matter of examination of eyes and prescribing of glasses. I am told that on one occasion a school nurse told a class of children that they could not be excused from class to have their eyes examined by an optometrist but could be excused to have their eyes examined by a physician.

"I am also advised that in some localities the printed health forms given to children by school nurses to take home state that the child had a visual problem and his eyes must be examined only by a physician."

Chapter 14 of Title 54 of the Code regulates the practice of optometry and § 54-368 thereof declares optometry to be a profession and defines optometrists as those persons who may "examine the human eye, to ascertain the presence of defects or abnormal conditions which can be corrected or relieved or the effects of which may be corrected or relieved by the use of lenses, prisms, or ocular exercises, or employ any subjective or objective mechanical means to determine the accommodative or refractive states of the human eye or range or power of vision of the human eye, or have in his possession testing appliances for the purpose of the measurement of the powers of vision, or diagnose any ocular refractive deficiency or deformity, visual or muscular anomaly of the human eye, or prescribe or adapt lenses, prisms, or ocular exercises for the correction or relief of the same."

Section 54-369 of the Code, in effect, declares that duly licensed physicians authorized to practice medicine under the laws of this State may also practice as optometrists.

An oculist or ophthalmologist is a duly licensed physician who specializes in the care of the eyes and whose practice of medicine and surgery particularly relates to the treatment of diseases of the eye. An optometrist is trained to recognize disease of the eye but may not treat them. His primary function is to examine eyes for refractive error and to employ means to determine the need of lenses for the correction of defects of eyesight and the increase of the power and range of vision. See § 54-368, Code of Virginia. See, Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 486, 99 L. Ed. 563, 571 and 22 ALR (2d) 939, 941.

It is fundamental that public servants are bound to act impartially in matters
pertaining to the administration of their duties. See, 43 Am. Jur., Public Officers, § 261, p. 78. Accordingly, public officials and their employees may not show a preference by suggesting or directing a patient to one class of practitioner when two classes are licensed by the State to perform the same service.

To sum up I agree with your conclusion that the patient, or his parent, should be free to choose an optometrist or a licensed physician for those defects for which an optometrist is licensed to correct or relieve.

PUBLIC OFFICERS—Oath—Clerk and deputy clerk of school board must take oath.

SCHOOLS—School Board—Clerk and deputy clerk must take oath of office.

HONORABLE H. S. ABERNATHY
Division Superintendent, Nansemond County Schools

July 18, 1963

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

"I would appreciate your opinion on the question as to whether the Clerk and the Deputy Clerk of a School Board have to take an oath of office.

"Section 22-71, Code of Virginia, requires that the Clerk and the Deputy Clerk be bonded in an amount not less than $10,000.00. However, that section is silent upon the oath of office."

The clerk and deputy clerk of school boards are public officers and, in my opinion, they are required to take the oath of office prescribed by § 49-1 of the Code. This requirement is found in Section 34 of the Constitution of Virginia, which requires that all officers, whether they are elected or appointed, take and subscribe to the oath of office set forth therein.

REAL ESTATE BROKERS—Definition—Engaged in an occupation rather than a profession.

ORDINANCES—Zoning—Real estate broker not engaged in profession but in occupation.

HONORABLE LOUIS B. STEPHENSON
Secretary, Fauquier County Board of Zoning Appeals

March 26, 1964

This will acknowledge receipt of your letter of March 23 in which you state that the question has arisen as to whether a real estate broker should be considered as engaged in a "profession" or "occupation." I have not seen the ordinance in question but assume it fails to contain definitions of the terms "profession" and "occupation" as used therein. The term "occupation" in generally and commonly used in reference to the work in which one is regularly or usually engaged, and could, of course, apply to a person engaged in the general category of professions—such as lawyer, physician, dentist, etc.
If under the language of the ordinance offices for the purpose of carrying on professional occupations are specifically permitted, but other occupations are forbidden, it is necessary to determine whether a person who is licensed as a real estate broker under Title 54 of the Code may be considered to be engaged in a profession as that term is ordinarily used.

An ordinance that prohibits the establishment of an office in a restricted zone for the purpose of engaging in one's occupation but expressly excludes from the effect of such prohibition an office established for the conduct of a profession in my opinion would be subject to the interpretation that the term "profession" as used therein was used in its narrow sense and applies to persons who have gained knowledge of an advanced type in a given field of learning gained through a prolonged course of specialized instruction and study.

I am unable to find any decisions of our State courts which relate to this question. However, I find that the decisions of the highest courts of other States support the view that a person who is engaged in the real estate business is not engaged in a profession as that term was used in zoning ordinances.

In the case of Jones v. Robertson, (Calif.) 180 Pac. (2) 929, the zoning ordinance authorized "professional offices" to be operated in the restricted area. The court said with respect to the operation of a real estate business that "such business is not one generally considered as professional." This conclusion was supported by citations from cases reported in 124 Adl. 743; 134 N.W. 79; 2 N.W. 176.

The case of Village of Riverside v. Kuhne (Ill.,) 82 N. E. (2) 500, also holds that the operation of a real estate business is not a "profession" within the meaning of that term as used in a zoning ordinance, citing the case reported in 2 N.W. 176.

REAL ESTATE BROKERS—Practice—Advertising by newspaper with commission contingent on sale by individual owner does not constitute practice.

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

We have examined the clipping from the Tidewater Trading Post, which you enclosed with your letter of December 13.

It appears that the Tidewater Trading Post has adopted a policy of publishing "for sale" notices of personal property and real estate, when the property is owned by individuals rather than by dealers, with the understanding that there will be no charge for running the advertisement unless the item involved is sold. The advertising costs are based upon a commission, ranging from 1% to 10%, depending upon the advertised price of the property.

You have requested my advice as to whether or not the service performed by the Tidewater Trading Post comes within the scope of § 54-732 of the Code.

It does not appear to me that the newspaper in question is holding itself out as a real estate agent or broker; it has merely adopted a plan of making its charges for the advertisements based upon the results obtained thereby. If the paper does nothing more than publish the notices in my opinion, the provisions of Chapter 18, Title 54 of the Code do not apply.
RECORDATION—Acknowledgments—What form required.

HONORABLE CHARLES J. ROSS
Clerk of the Circuit Court of Madison County

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

"In recent months I have had presented to me for recordation several instruments appearing to be properly signed by the makers and sworn and subscribed to thus. Viz:

"Subscribed and Sworn to before me this ....... day of ................., 19........... .................................................................

.................................................................

Notary Public"

"with the blank spaces properly supplied.

"Will you inform me if the statutory requirements have been substantially complied with and is valid for the purpose of recordation?"

Section 55-106 of the Code requires the clerk to record any writing as to any person whose name is signed thereto when it shall have been acknowledged by him or proved by two witnesses in the manner prescribed in §§ 55-113, 55-115, 55-119 and 55-120. The form which you have quoted does not appear to be an acknowledgment but instead a certificate by a notary public to the effect that the person who has signed the document did so in his presence and made affidavit as to the truth thereof. This form is not an acknowledgment within the meaning of the Code sections to which I have referred.

In my opinion, this form is not a substantial compliance of the statute for the purpose of recordation.

There are probably some special situations where an affidavit is recordable, but I have not searched through the statutes with respect to this.

You do not state in your letter the nature of the instruments which have been submitted to you with the certificate of the notary public as set out in your letter. This information may have bearing upon the recordability of the instruments in question.

RECORDATION—Deed of Trust—Assignment—How recorded.

DEEDS OF TRUST—How recorded where assignment written across the face thereof.

HONORABLE N. C. LOGAN
Clerk of Roanoke County

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

"I am forwarding to your office the enclosed copies for advise as to how the original deed of trust showing typed assignment written upside down in the middle of said deed of trust and presented to this office for recordation, should be spread on our deed books.

"State tax and recordation fees have been charged on both the deed of trust and assignment as separate instruments, and have been recorded as such and each given a different number .................."
It appears from the photostatic specimen which you enclosed that in preparing the deed of trust under consideration, sufficient space was reserved on the first page for the insertion and execution of an assignment of the deed of trust, which space was utilized for that purpose by typing the assignment upside down. The deed of trust provisions then continue on the next page, on which page it is executed by the grantors and acknowledged by them.

You have requested my advice as to how the original deed of trust executed in such manner should be recorded.

In my opinion, the deed of trust should be recorded, including the assignment, in the manner and in the form as it is prepared. Apparently, judging by the specimen submitted, you have rearranged the form of the instrument for recordation purpose. There would seem to be doubt as to whether a clerk is authorized to alter the position of sentences or paragraphs in connection with the recordation of a deed or other recordable instrument. Apparently, you have recorded the instrument twice. This, in my opinion, is not required.

It would be proper and, in my opinion, the duty of the clerk to index both the deed of trust and the assignment. The parties to the instrument are entitled to have it recorded as an exact copy of the original even though the form is irregular.

RECORDATION—Deed of Trust—To be recorded in deed book.

HONORABLE JULIAN UPDIKE
Clerk of Warren County Circuit Court

You have furnished me with a copy of a deed of trust from Marvin Lee McDonald to W. LeRoy Corron, Trustee, in which a piece of farm machinery, designated therein as "personal property" is conveyed in trust to secure the Bank of Warren in the payment of a note executed by McDonald, payable in monthly installments.

You request my advice as to what section of the Code applies for the purpose of recordation. Section 17-21 of the Code applies. Therefore, under § 43-4.1, the deed of trust should be recorded in the deed book.


RECORDATION—Tax—Not required when notice of lien is recorded under § 55-145.

HONORABLE MARGARET B. BROWN
Clerk of Circuit Court of Culpeper County

This will acknowledge receipt of your letter of May 22, in which you request my advice as to whether or not a notice of lien filed under Chapter 7 of Title 55 of the Code—§§ 55-143 through 55-150—is subject to a recordation tax. These
provisions provide for a Factor’s lien which may be created by the execution of a written agreement pursuant to § 55-144. The statute does not require that this agreement shall be recorded but under § 55-144 it is provided that the lien created by the agreement shall be valid from the time of recording a notice thereof, prepared in compliance with the provisions of (a), (b) and (c) of that section. The notice must be acknowledged by the Factor or his duly authorized representative and must be filed with the clerk for recording as required by § 55-145. This section provides that the clerk shall receive a fee for recording the notice as provided for in § 14-123. This chapter fails to contain any provision with respect to a recordation tax. Therefore, unless there is some provision in the recordation statutes—§§ 58-54 through 58-65 of the Code—broad enough to require the payment of a State tax on the recordation of the notice, above mentioned, then no such tax can be collected.

The notice is neither a deed of trust, nor a mortgage, nor is it a contract relating to real or personal property. While the agreement mentioned in § 55-144 is, of course, a contract relating to personal property and, if recorded, would be taxable under the provisions of § 58-58, nevertheless, since the agreement itself is not recorded, this section does not apply. The only thing that is recorded is the notice of lien created by the agreement.

It is my opinion, therefore, that there is no statutory provision under which a State recordation tax may be required when a notice of lien is recorded under § 55-145.

RECORDS—Local Health Departments—When confidential.

HONORABLE MACK I. SHANHOLTZ  
State Health Commissioner

This is in reply to your letter of March 31, 1964, in which you pose certain questions relating to the confidential nature of records compiled and maintained by the local health departments and the State Department of Health. Your inquiries read as follows:

"1. Information contained in medical records for individual patients should not be released to insurance companies lawyers, etc., without written permission from the patient and the physician. Are there any circumstances in which such consent is not required?

"2. What is the confidential status of information obtained by sanitarians, such as restaurant inspections, soil tests, water samples, etc., which may be on individually-owned or publicly-owned property or business? For example, could soil tests for sewage disposal systems be released to prospective buyers of the property? The confidentiality of this type of record is often questioned, and various opinions exist as to the propriety of releasing this information to citizens."

A distinction is drawn between public records and records compiled for the use of the public offices in the management of internal affairs. A distinction is also drawn between public records which are open for inspection and public re-
cords which are confidential in nature and must be kept inaccessible to public inspection. See, Gleaves v. Terry, 93 Va. 491.

The distinction is not always readily ascertainable. Whether the information obtained and compiled by a public officer or his agents constitutes "a public record," or is open to public inspection depends in large measure upon the statutory duty to keep such records and the nature of the record in question. Even if it is determined that a record is "public," it does not necessarily follow that the record is open for inspection, even by persons having a direct interest in such record. Some records are absolutely privileged and inaccessible, such as those compiled on cancer (§ 32-388), and physicians' records on the death of patients (§ 32-10.1), while others are qualifiedly available for inspection such as vital statistics (§ 32-353.26), and reports on venereal diseases (32-101).

Obviously, some public records of the local health department and the State Department of Health, such as public contracts and financial records, would be open to public inspection by anyone having a legitimate purpose for seeing those records.

Replying specifically to your first inquiry, I cannot answer more categorically than was done by Attorney General Staples in a letter directed to the President of the Medical College of Virginia on December 28, 1939, as follows:

"It is my opinion that the hospital record of a patient belongs to the hospital and not to the patient, and that, in most instances, there is no duty upon the hospital to permit anyone, other than the hospital authorities, to examine such record. However, since the record is one which concerns the patient, he should be permitted to see or use it whenever he has a valid reason for so doing unless it contains information, knowledge of which, in the opinion of the hospital authorities, would be detrimental to the health of the patient.

"The present practice of the Medical College of Virginia in refusing to allow any report to go out regarding any case or to allow anyone to see a patient's record without the consent of the patient is one which, in my opinion, the College should continue to follow. While, as stated above, it is my opinion that the record belongs to the hospital, the relationship between the patient and the hospital is a highly confidential one, from which, in my opinion, is inferred a promise on the part of the hospital to keep the patient's record confidential and to permit third parties to see it only in case the patient consents. Of course, an order of a court requiring the record to be produced for use as evidence in a lawsuit should be obeyed." (Report of the Attorney General (1939-1940, p. 220)

With respect to your second inquiry, the propriety of releasing such information to the public will depend in large measure upon the purpose for which the information is requested. Generally speaking, such investigations and reports are made for the use of the health officials in order for them to comply with duties imposed upon them by law. While such reports could not be classified as absolutely confidential, neither do I believe they should be open for inspection by the general public. Such records should be made available for inspection only to persons demonstrating a legitimate purpose in seeking the information, as opposed to those with idle curiosity, or those seeking information which could be otherwise obtained through independent research or investigation. In the example used by you relating to soil tests, I would advise against releasing the result to prospective buyers. In cases of doubt, I suggest you refer the question to this office.
SCHOOLS—Bonds—School boards authorized to invest proceeds from sale of school bonds.

BONDS—School—School boards authorized to invest proceeds from sale of school bonds.

BOARDS OF SUPERVISORS—Investments—No authority to invest proceeds from sale of school bonds.

HONORABLE L. J. HAMMACK, JR.
Commonwealth's Attorney of Brunswick County

August 29, 1963

This will acknowledge receipt of a letter dated July 31 from Honorable Thomas E. Warriner, Jr., who at that time was Commonwealth's Attorney of Brunswick County, in which he asked my opinion with respect to four questions. These questions are propounded in connection with school bonds of Brunswick County sold under the provisions of Chapter 19.2 of Title 15 of the Code of Virginia. For purposes of answering, your questions will be repeated and answers will be given immediately following:

"1. Does the Board of Supervisors have any control over the type of investment or is the responsibility of ordering investment and specifying the type or types thereof that of the School Board alone?"

The authority for investing the proceeds from the sale of school bonds issued under the aforementioned chapter of the Code of Virginia is vested only in the school board by § 15-666.73. This section provides that "Pending the application of the proceeds of any bonds issued under the provisions of this chapter . . . all or any part of such proceeds may be invested, upon resolution of the School Board, . . .""

"2. May the order directing investment provide for periodic withdrawals of portions of the fund?"

The answer to this question is in the affirmative. Section 15-666.73, in authorizing the school board to invest the funds received from the proceeds of the bonds issued under Chapter 19.2 of Title 15, provides that such investments may be " . . . in securities that are legal investments under the laws of this State for public sinking funds, which shall mature, or which shall be subject to redemption by the holder thereof at the option of such holder not later than 24 months after the date of such investment." It is my opinion that this provision empowers the school board to invest the funds in such manner that the withdrawal of portions of the funds may be made as and when needed.

"3. When interest is earned on the investment it is assumed that it is credited to the fund as the statute appears to provide; however, may the School Board (if it alone has control of the fund) direct that all interest earned be paid into the general fund of the County or into a special fund of the County so that the Board of Supervisors may use it to help meet the bond payments?"

In my opinion you are correct in assuming that the interest earned on the investment of the proceeds from the sale of bonds shall be added to such proceeds. This is expressly provided by § 15-666.73. This interest must, of course, remain in the fund realized from the sale of the bonds to be used for the purpose for which the bonds were issued. If after the project is completed and paid for there is any balance in this fund (made up of the proceeds of the sale and the interest on
the investment of such proceeds) the entire amount may be used only in the manner set forth in the answer to your question four.

"4. Suppose all of the amount realized from the sale of bonds is found not to be needed to complete the planned construction, how can the excess properly be used; for example, may the School Board pay it into the County to meet payments due on the bonds?"

The answer to this question is in the affirmative. This office has held on a number of occasions that any funds remaining from the proceeds from the sale of bonds not needed for the purpose for which the bonds were issued may be used only in retiring the bonds from which the proceeds were derived.

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SCHOOLS—Compulsory Attendance—Applicable to child for whom tuition may be charged but has not been paid.

SCHOOLS—Tuition—When child is non resident.

HONORABLE WILLIAM W. JONES
Commonwealth's Attorney for Nansemond County

December 13, 1963

This is in reply to your letter of December 12, in which you present the following questions:

"1. Is a child who is living with a relative or friend in Nansemond County and who has not been legally adopted by such relative or friend and whose natural parents reside and work outside of Nansemond County or outside of the Commonwealth of Virginia, entitled to attend public schools in Nansemond County without the payment of tuition?

"2. Does the Compulsory Attendance Law apply to a pupil for whom tuition may be charged but for whom tuition has not been paid?"

With respect to question (1), if the child is a non-resident but is living temporarily with relatives or others in your county, under § 22-220 the school board may charge tuition for attendance in the public schools.

We held in another opinion, published in the Report of the Attorney General (1954-1955), at p. 210, that a child’s residence is not necessarily the residence of its parents, but it may be where the person in loco parentis resides.

With respect to question (2), if the compulsory school statutes have been put into effect in Nansemond County in the manner permitted by § 22-275.24 of the Code, the question is presented as to whether or not the second paragraph of § 22-220 is applicable in light of the fact that the compulsory attendance law referred to therein and in effect when that section was enacted has been repealed, and a new compulsory attendance law has been enacted, which is in effect only in those jurisdictions that have adopted the same. If the provisions of § 22-220 apply, the failure to pay the tuition would have no effect.

Although the question is not free from doubt, I believe that § 22-220 would be applicable. Sections 22-251 to 22-255 referred to therein were reenacted as §§ 22-275.1, 22-275.2, 22-275.3, 22-275.5 and 22-275.6.
SCHOOLS—Compulsory Attendance—Applicable to deaf and blind students if locality adopts State law.

October 1, 1963

WILLIAM J. HOLLOWAY
Superintendent, Virginia State School

This will acknowledge receipt if your letter of September 26, which reads as follows:

"I would like clarification concerning the compulsory attendance laws and how they affect deaf and blind students enrolled in special institutions like Virginia State School:

"1. Are compulsory attendance laws still in force for these students?"

"2. If so, what law enforcement machinery is set up to enforce compliance?"

Article 4 of Chapter 12, Title 22 of the Code—§§ 22-275.1 through 22-275.25—is not effective in any county, city or town unless the same is adopted by the local governing body pursuant to § 22-275.24 of the Code. Deaf and blind children who are in the custody of State institutions are in the same category as all other children in the State. Therefore, except in localities that have adopted the compulsory school statutes, the answer to question one is in the negative.

In those cases where an institution similar to Virginia State School is located, if the governing body of the locality has by resolution made the compulsory school statutes effective for that jurisdiction, the provisions of §§ 22-275.1 through 22-275.23 will be applicable for the enforcement.

SCHOOLS—Contracts—Board may contract with spouse of teacher.

August 7, 1963

HONORABLE JAMES B. FUGATE
Member, House of Delegates

This is in reply to your letter of August 5, in which you request my opinion with respect to the following:

"Suppose that Mrs. A. is a teacher in the Public School System of C. county. Her husband purchased several school buses and executed notes and Conditional Sales Contract for these buses as security for the deferred purchase money. The titles to these buses are registered in the name of the husband. Mrs. A. is a co-maker on these notes executed along with her husband. Would it be a violation of Section 22-213 or Section 15-504 for the husband of Mrs. A. to have a contract with the County School Board of C. county for the furnishing of transportation for pupils in the school buses?"

The prohibitions of §§ 22-213 and 15-504 of the Code relate to contracts made with the county or some agency of the county by certain officials and employees of the county, such as school teachers.

As I understand your question, Mrs. A. is not a party to the contract between her husband and the county school board, nor does she have any pecuniary interest in the contract or the profits of such contract. The mere fact that she has obligated herself for the purpose of aiding her husband in the purchase of
the equipment does not make her a party to or interested in the contract between her husband and the school board.

This office has ruled on several occasions that these provisions, being highly penal, must be strictly construed.

SCHOOLS—Contracts—Husband of teacher may contract with board to furnish transportation.

HONORABLE JAMES B. FUGATE
Member, House of Delegates

July 31, 1963

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

"I would like to have an opinion on the following: Mrs. A is a teacher in the public school system in C. county. Would it be a violation of Section 22-213 or Section 15-504 for the husband of Mrs. A to have a contract with the county school Board of C. county for the furnishing of a school bus to transport pupils to school?"

Neither § 22-213 nor § 15-504 of the Code prohibits county school boards from making such a contract with the husband of a school teacher employed by the school board. However, if the teacher is a partner or otherwise holds an interest in the business of the husband, the board would be prohibited under § 22-213 from making such a contract. The mere fact alone that a member of the teaching staff is the wife of a person who is making a contract with the board to furnish a school bus or other supplies, is not sufficient to bring the matter within the inhibitions of the statute.

SCHOOLS—Contracts—School board may purchase gasoline from husband of teacher.

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

July 3, 1963

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

"Please advise me if Virginia Code Section 22-213 would be violated if a school teacher's husband, who is a merchant, supplied gasoline for school buses for the county in which the school teacher is employed."

This section of the Code would not prevent the school board from purchasing gasoline for school buses from the husband of a teacher, provided the teacher has no investment in the mercantile establishment. A similar question is discussed in an opinion of the Attorney General dated March 14, 1956 to the Superintendent of Public Instruction. This opinion is found in the Report of the Attorney General (1955-1956), at p. 182. I assume you have a copy of the Report of the Attorney General for 1955-1956.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—Sanitary District Sewage System—Construction—Cost cannot be paid out of general fund or school fund.

SCHOOLS—School Boards—Cannot pay construction cost of sanitary district sewage system.

BOARDS OF SUPERVISORS—Authority—Not authorized to pay construction costs of sanitary district sewage system.

Honorable Robert C. Goad
Commonwealth's Attorney for Nelson County

January 17, 1964

This is in reply to your letter of January 14, in which you refer to my letter of January 13, 1964, and present the following question:

"You state that the Board of Supervisors may determine the amount the County will pay into the Sanitary District fund for the use of its facilities, and that the Board of Supervisors may make the appropriation out of the general fund in an amount commensurate with the use of the facility by the County owned buildings.

"Assume that the Sanitary District issues bonds payable within a maximum period of thirty (30) years, and that the Board of Supervisors agrees to pay its fair share for the use of the Sanitary District sewage system in the amount of Sixteen Hundred ($1600.00) Dollars per year for thirty (30) years, a total of Forty-eight Thousand ($48,000.00) Dollars. Instead of paying the $48,000.00 at the rate of $1600.00 per year for 30 years, could the Board of Supervisors pay out of the general fund of Nelson County into the Sanitary District fund the sum of Twelve Thousand ($12,000.00) Dollars cash, when the sewage system is constructed, to be used to pay part of the original cost of construction of the sewage system, and pay the balance of the County's share in the amount of Thirty-six Thousand ($36,000.00) Dollars to the Sanitary District at the rate of $1200.00 per year for 30 years?

"In other words, does the County's share, paid out of its general fund, have to be paid to the Sanitary District in the form of a monthly or annual use fee, or can a portion of the share of the County be paid down in cash when the sewage system is constructed, to be used as a part of the original construction cost, which will reduce the amount of the bonds required to be issued and reduce the interest payable thereon, and proportionately reduce the monthly or annual use fee which the County will have to pay?

"Considering the facts set forth in my letter to you of January 9, 1964, will it be permissible for the Board of Supervisors, under the provisions of Section 15-737 and Section 15-739.1 of the Code, to pay out of the County general fund its proportionate share of the original cost of the construction of the proposed sewage system by the Lovingston Sanitary District?

"Will it be permissible for the Board of Supervisors and/or the County School Board, either jointly or separately, to pay to the Sanitary District out of the general fund or school fund of the County, a cash payment to be used as part of the original construction cost of the sewage system, which cash payment shall be the proportionate share for the use of said sewage system by the Lovingston Elementary School?"

The opinions which were enclosed with my letter to you dated January 13, regarding this matter, have been based upon the premise that it is proposed that
a sanitary district be established under the provisions of Chapter 2, Title 21 of
the Code. It has not been our understanding that the county contemplates the
establishment of a sewage disposal system under the provisions of Article 3.1 of
Chapter 22 of the Code.

The procedure for establishing such a system and financing the same is different
from that applicable to the establishment of a sanitary district. Therefore, since
you are dealing with a sanitary district, the provisions of §§ 15-737, et seq., and
§§ 15-739.1, et seq., (Articles 3 and 3.1 of Chapter 22, Title 15) are not ap-
plicable to the establishment, financing, etc., of a sanitary district.

With respect to the suggestion that the county pay to the sanitary district an
advance of $12,000.00 on is proper fees for connecting on to and using the
sanitary system, I do not feel that this is contemplated by any of the statutes
relating to the establishment and use of a sanitary district. In this connection,
you are referred to §§ 15-16.4 and 21-134.1 of the Code. Under the first section
cited the board may make an advance to the sanitary district for the purpose of
getting it established and under the second section cited the county shall be
reimbursed for the amount advanced out of the proceeds of the bonds authorized
for the establishment or from any other funds of the sanitary district. In this
connection, I am enclosing a copy of an opinion dated October 24, 1956,

With specific reference to the third paragraph which I have quoted from your
your letter, I am of the opinion the statutes contemplate that the county may pay
for services as the services are used.

In my opinion the last paragraph which I have quoted from your letter must be answered in the negative.

SCHOOLS—School Boards—Authority to purchase insurance on behalf of em-
ployees.

HONORABLE JOHN A. K. DONOVAN
Member, Virginia State Senate

This is in reply to your letter of July 3, in which you present the following
questions:

1.a. Does the State of Virginia or a local Public School Board
have authority to purchase a Group Permanent Life Contract providing
death benefits plus conversion to annuity privileges?

b. If so, can such purchase be in a plan which provides that all funds
are invested in mutual fund programs?

c. If so, can such purchase be in a plan which provides that it
may be invested partially in a group annuity and partially in a mutual
fund program as set forth in Section 401 of the Federal Tax Code?

2. In the event that such authority exists, would the funds used to
purchase such a qualified plan as set forth in Section 401 of the Federal
Tax Code be considered part of the employees salary in determining cre-
ditable compensation pursuant to the Virginia Supplemental Retire-
ment Act?”

In this connection, I enclose copy of any opinion dated March 1, 1962, ad-
dressed to the Director of the Virginia Supplemental Retirement System, which
I believe is applicable. This opinion is published in the Report of the Attorney
While the enclosed opinion is limited to tax sheltered annuities, provided by § 403(b) of the Internal Revenue Code, I feel that the State and the localities may purchase for the benefit of their employees the securities mentioned in your letter, provided the employees have authorized such purchase in writing and that these purchases will not entail any expenditure of public funds.

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SCHOOLS—School Boards—Competitive bidding not required for school cafeteria equipment.

CONTRACTS—Competitive Bidding—Not required for school cafeteria equipment.

HONORABLE TYLER FULCHER
Division Superintendent for Amherst County

October 21, 1963

This is in reply to your letter of October 15, 1963, in which you request my opinion as to whether a local school board has the legal authority to obtain estimates from several companies on cafeteria and kitchen equipment for a public school and choose one of the companies, in its discretion, to furnish such equipment.

You have advised that the County Board of Supervisors has appropriated $800,000 for the construction and furnishing of schools and improvements, the funds having been borrowed from the Virginia Supplemental Retirement System. By virtue of § 22-72 of the Code all local school boards have been given the authority, among other things, to provide for the erecting, furnishing and equipping of necessary school buildings and appurtenances and the maintenance thereof. There is no general statutory provision which require a school board to advertise for bids, nor to award a particular contract to the lowest bidder in the event bids are solicited. There is a special provision, which is codified as § 22-166.12 of the Code, which requires competitive bidding on contracts for the construction of any State-aid project. The term “State-aid project” is defined in § 22-166.8 of the Code to mean “the construction of any building for school purposes or substantial addition to such a building for which State funds, either by appropriation, grant-in-aid or loan, are used or to be used for all or part of the cost of construction.”

I am of the opinion that the furnishing of cafeteria and kitchen equipment for a public school does not come within the definition set forth above, since the project there contemplated is the construction of buildings. Accordingly, the School Board may award a contract for the furnishing of such equipment without the necessity of competitive bidding.

You also inquired if the board could utilize a portion of the money borrowed from the Supplemental Retirement System for the purpose of furnishing the kitchen and cafeteria.

The resolution of the Board of Supervisors appropriating the funds to the school board contemplated a complete construction of the schools and improvements. I am of the opinion that furnishing the kitchen and cafeteria would be included in the complete construction.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—School Boards—Land Acquisition—School board not prohibited from purchasing land encumbered by deed of trust where the board will not assume the mortgage.

HONORABLE THOMAS R. WATKINS
Chairman, School Board of Hampton

This is in response to your request that I express my view pertaining to the authority of the Hampton City School Board to purchase a parcel of land which is encumbered by deed of trust to secure an indebtedness. You suggest that the Board will not "assume" the mortgage, but the deed would provide that the conveyance is taken "subject to" the deed of trust without any liability upon the Board to assume liability for payment of the indebtedness.

While there may be merit in a suggestion that such a proposal constitutes a conditional or potential debt, I am aware of no statutory provision expressly prohibiting such a purchase or expressly permitting the same by a city school board. Sections 22-150 and 15-709.1 of the Code of Virginia are applicable. These statutes simply require the title to be examined and approved by a competent and discreet attorney prior to the purchase. Competent attorneys often disagree as to what constitutes "marketable" title to real estate. I think it quite manifest that such an encumbrance upon the title could, under many circumstances, prove to be objectionable in view of the possibility of a foreclosure to satisfy the indebtedness in the event it should not be paid. While the question is not free from doubt, I am of the opinion that the School Board would not violate any law in the event it should decide to accept the title to the land in question "subject to" the deed of trust after the title has been approved by a competent examining attorney.

SCHOOLS—School Boards—May not convey school property without consideration.

SCHOOLS—Construction—Donations—State or locality may receive donations toward costs of construction and operation of a school.

HONORABLE JOHN B. BOATWRIGHT, JR.
Secretary, Commission on Vocational Education

This is in reply to your letter of October 23, 1963, in which you ask my opinion on the following two questions:

"(1) May a local school board convey to the State, without consideration, school property acquired or constructed with local funds?  
"(2) May either the State or a locality receive donations toward the costs of construction or operation of a school, and would this be affected by conditions attached to the gift relating to the nature of education to be provided at such school?"

The words "school property" as used in your first question are broad enough to cover both real and personal property. Under the provisions of §§ 22-147
and 22-16 of the Code of Virginia (1950), as amended, title to such property is vested in the local school boards.

The general power of disposition of school property is predicated upon §22-161 which in turn brings §15-692 into play. These two statutes read as follows:

"The school board shall have the same power to sell or exchange and convey the real and personal school property of the county as the governing body of the county has with reference to the power of sale, exchange and conveyance of other county property under §15-692, provided that personal property not exceeding five hundred dollars in value may be sold or exchanged by the school board in such manner and upon such terms as it deems proper."

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

Once fee simple title to property is vested in a particular school board, the power of disposition is not thought to be affected by the fact that it may have been "acquired or constructed with local funds."

Property devoted to public use, such as school property, can only be disposed of pursuant to authority conferred by the Legislature. Generally, the disposition must be for the benefit of the school district concerned, and consistent with good business judgment and sound business principles. A conveyance without consideration would not seem to meet these requirements, nor would the power to sell or exchange seem to confer the power to give away school property. This is in conformity with a prior opinion of former Attorney General Staples. See, Report of the Attorney General (1946-1947), p. 131. Even where the donee is the Commonwealth of Virginia, such a conveyance would seem to be questionable.

I take it that your second question pertains only to public schools and not private schools, and will so treat it.

As to the first part of this latter question, i.e., whether the State or a locality may receive donations towards the costs of construction or operation of a school, it is my opinion that this is permissible. Without knowing the particular facts that may be involved, it is difficult to cite controlling statutes. However, your attention is invited to §§ 22-144 to 22-146, 22-148, 22-166 and 55-26 to 55-34 as being generally pertinent. Your attention is also invited to 1962 Acts of Assembly, Chapter 640, §15, with reference to Federal grants or donations.

As to the second part of your question, pertaining to the effect conditions relating to the nature of education to be provided on the capacity to receive the donation, I can only answer this in a general way without knowing what the particular condition is. That ordinarily the wishes of the donor are complied with is indicated in the provisions of the Code sections cited above; but there may be cases where such wishes could not be complied with. It is not thought, for example, that a donor could impose conditions that would have the effect of
REPORT OF THE ATTORNEY GENERAL

depriving the State Board of Education of its right under Section 132 of the Constitution of Virginia to select textbooks and educational appliances, or that would divest the school board of its power under Section 133 of the Constitution to supervise the school.

SCHOOLS—School Boards—May pay official expenses of division superintendent and legal counsel from appropriation made for that purpose.

BOARDS OF SUPERVISORS—Appropriations—May make for official expenses of division superintendent of schools and legal counsel.

September 10, 1963

HONORABLE CHARLES H. ORR
Division Superintendent for Scott County

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

"I hereby request your opinion regarding local school board paying expenses of myself and legal counsel and/or just my expenses in the recent hearing of which I was asked to attend by the State Board of Education.

"Section 22-37 of the Virginia School Laws states the local school board shall provide for the necessary traveling and office expenses of the superintendent.

"The above mentioned hearing was regarding Scott County's falsification of attendance records."

Section 22-37 of the Code, which relates to the salary and expenses of the Division Superintendent of Schools provides that—

"The local school board may, out of the local fund, supplement the salary above prescribed, and the local school board shall provide for the necessary traveling and office expenses of the superintendent. Detail records of all such expenses shall be kept in the office of the superintendent."

In applying this provision, consideration must be given to §§ 22-72(9), 15-575, 15-576, 15-577 and 58-839 of the Code. Section 22-72(9) provides that—

"The school board shall have the following powers and duties:

* * * *

"(9) In general, to incur costs and expenses, but only the costs and expenses of such items as are provided for in its estimates submitted to the tax levying body without the consent of the tax levying body."

This provision was amended at the 1959 Extra Session so as to substitute for the word "budget" (which appeared in this section prior to the amendment) the words "estimates submitted to the tax levying body." Furthermore, at the 1959 Extra Session §§ 15-575, 15-576, 15-577 and 58-839 were also amended. All of these amendments at the 1959 Extra Session had a basic purpose, namely, to extend to the governing bodies of the localities a more firm control over all expenditures of the revenues of the localities subject to appropriation.
Sections 22-120.3 to 22-120.5, inclusive, relate to the duties of the division superintendent of schools (with the advice of the local school board) and to the governing body, with respect to the preparation of an estimate of the amount of money deemed by the school board to be needed for public schools.

The answer to the question presented, in my opinion, depends upon (1) whether or not the expenses involved were included in the budget appropriation made by the board of supervisors to the school board for the period in which the expenses were incurred and (2) whether or not the expenses were incurred in connection with official business or are merely personal expenses of the superintendent. If the expenses are deemed by the school board to be official, rather than personal, then it would seem that your expenses for travel could be paid out of any appropriation made to the school board for necessary travel expenses incurred by local school officials.

If an appropriation was made for special counsel fees and expenses and the service rendered by your attorney is considered by the school board to be a necessary expense, it would seem that these expenses could be paid out of such an appropriation.

Under § 22-72(9) it will be observed that only those expenses for items provided for in the estimates submitted to the tax levying body may be paid without the consent of the board of supervisors.

After examining the estimates that were presented for the current fiscal year, the school board may be of the opinion that the consent of the board of supervisors must be obtained before the items in question may be paid.

SCHOOLS—School Boards—Members may be appointed by Board of Supervisors in counties operating under Chapter 12, Title 15 of the Code.

BOARDS OF SUPERVISORS—Authority—May appoint members of school boards if operating under Chapter 12, Title 15 of the Code.

HONORABLE BASIL C. BURKE, JR.
Commonwealth’s Attorney for Madison County

November 6, 1963

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

"Will you advise whether or not in your opinion Section 22-87.1 of the Code of Virginia which permits a referendum on change and new method of election of a County School Board applies solely to Boards in Counties having County Manager or County Executive form of government, or would it also apply to Counties having County Board of Supervisor form of government?"

Section 22-87.1 was repealed by Chapter 591, Acts of 1956.
Section 22-83.1 permits the governing bodies of counties operating under Chapter 12, Title 15 of the Code to appoint members of a county school board. This, however, would not apply to your county.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—School Boards—Must elect and use only one plan in applying for loan under § 22-120 of the Code.

March 10, 1964

MR. E. B. STANLEY
Superintendent of Public School for Washington County

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

"Washington County has a $4 levy for school operation and in addition to funds produced by this $4 levy, the School Board receives from the Board of Supervisors an appropriation from the General County Fund and ABC funds for school operation.

"The Washington County School Board finds it necessary to borrow money on a temporary basis in order to proceed with some school construction projects to meet obligations until funds become available for these projects.

"Section 22-120 of the VIRGINIA SCHOOL LAWS reads in part as follows: '... The school board of any county or the school board of any city, which may find it necessary to make a temporary loan, or loans, is hereby authorized to borrow a sum, or sums, of money not to exceed in the aggregate one-half of the amount produced by the county school levy laid in such county or city for the year in which such money is so borrowed, or one-half of the amount of the cash appropriation made for schools in such county or city for the preceding year...'. My question then is this: Under this provision, how much money can the School Board borrow? Is the amount limited to one-half the appropriation made last year or to one-half of the funds that the current levy would be expected to produce, or can the School Board borrow one-half of the sum of the total of the two?"

The word "or," as used in a statute, is a disjunctive conjunction and expresses an alternative. Some courts have construed "or" for "and" and vice versa, where such construction was necessary to carry out the manifest intention of the statute, but this has usually been done in order to reconcile an ambiguity or rectify an obvious mistake. I can find nothing in this section or any related sections which would indicate that the word "or" as used here should be construed to mean "and." Under this statute, in my opinion, it is necessary for the school board to elect whether or not it will base its borrowing on one-half of the amount produced by the county school levy for the year in which the money is borrowed or one-half of the amount of cash appropriations for schools for the preceding year.

I am unable to find where any court in Virginia has construed this section or a similar section of the Code. There is a case in California appearing in 205 Pac. (2d) 767, in which the court considered a statute authorizing the commissioners of a fire district to borrow "in anticipation of the revenue for the current year in which the indebtedness is incurred or of the ensuing year thereafter." The California Supreme Court in construing this section, said:

"The use of the conjunction 'or' assumes an alternative. It is often used 'either, or' and means that one of two courses must be adopted. Accordingly, a loan must be made under the provisions of Section 14150 either in anticipation of an indebtedness for the current year or the ensuing year, but not under both plans."
In my opinion, it will be necessary for the school board to elect which plan it will follow in applying for the loan. The board, in my opinion, may not borrow under both plans.

SCHOOLS—Teachers—Corporation may not contract to supply musical supplies or instruments to a public school where teacher in school is officer and stockholder of corporation.

SCHOOLS—School Boards—May not contract with corporation for musical supplies and instruments where teacher is officer and stockholder in corporation.

March 25, 1964

HONORABLE GUY O. FARLEY, JR.
Member, House of Delegates

This will acknowledge receipt of your letter of March 23, which reads as follows:

"I have received an inquiry from an attorney for a corporation which is considering selling supplies to the County School Board for use in County schools. The exact nature of their inquiry is as follows:"

"Is it illegal under Section 22-213 of the Code of Virginia, or other provisions of the Code, for a Virginia corporation engaged in the General business of selling musical supplies and instruments to the public to sell or enter into a contract to sell to the County School Board, schools, or music departments within the schools, musical supplies and equipment where one of the officers and stockholders of the corporation is employed as an instructor of Music in a school in the County?"

"The Corporation is interested in placing bids and selling supplies and equipment to schools with a full disclosure of the ownership interest of the instructor in the corporation."

Section 22-213 of the Code prohibits certain school officials, including a teacher, from supplying school furniture or apparatus to a public school, and this applies in cases where the teacher is interested in a corporation furnishing such articles.

One of the definitions of apparatus is "equipment." In my opinion, this Code section is applicable. This office has on several occasions issued opinions relating to this section, one of which I enclose herewith. This opinion was furnished Hon. W. H. Brown and was published in the Report of the Attorney General (1938-1939), at p. 221.

If the corporation in question enters into a contract to furnish the county school board the supplies and equipment, I think it will be necessary for the contract to be approved by the State Board of Education. The terminal sentence of § 22-213 applies to a situation where the merchant sells such supplies or equipment in the ordinary manner in which a retail sale is made. You will note that in the opinion which we enclose, Attorney General Staples was of the opinion that where a merchant enters into a contract for the furnishing of such supplies, the contract must be approved by the State Board of Education. I am in agreement with that opinion.
SCHOOLS—Teachers—Wife of superintendent of school may be employed as teacher where she was regularly employed by any school board prior to June 21, 1938.

May 20, 1964

HONORABLE J. VAUGHAN BEALE
Commonwealth's Attorney of Southampton County

This will acknowledge receipt of your letter of May 19, which reads, in part, as follows:

"The Southampton County School Board desires to employ the wife of the present Superintendent of this Division to teach the second grade in Capron, Virginia this Fall. Mrs. Louise P. Hagga began her teaching career in Orange County, Virginia in September 1936, and has taught school since that time with the exception of about eight years when she was with her children. She married the present Superintendent of Schools for Southampton County, Virginia on April 13, 1937.

"Mr. Stafford M. Hagga came to Southampton County, Virginia as Superintendent of Schools on July 1, 1963, and his wife is presently teaching school in Sussex County, Virginia where he has been employed since September 1963 . . ."

You state you have advised the local school board that, in your opinion, the provisions of § 22-206 of the Code will not prevent the employment of Mrs. Hagga by the county school board. You rely upon the opinions issued by this office on October 5, 1959 and May 22, 1958.

I am in accord with your opinion. In addition to the grounds upon which the opinions cited by you were based, it appears that Mrs. Hagga was employed by the Orange County School Board prior to June 21, 1938. The prohibitions of this section do not apply to persons who were employed by any school board prior to that date. In this connection, I enclose an opinion of Attorney General Staples, dated May 3, 1938, and published in the report of this office for 1937-1938, at p. 140.

SHERIFFS AND SERGEANTS—Leaving Office—Should turn over to the successor list of executions and search warrants in hand and take a receipt thereafter.

December 16, 1963

HONORABLE C. O. MULLINS
Sheriff of Mecklenburg County

This is in reply to your letter of December 14, in which you request my opinion with respect to the following:

"I have a number of executions in hand, some with levies on them which are still alive, some with nothing found to levy on and they are still live, others with levies on them which are not live, however the plaintiffs in the matter do not wish a sheriff's sale as in some cases they are making payments along. Please advise me as to what I should do in each of the cases, should I pass them to the next sheriff even though they are made out to me as C. O. Mullins, Sheriff, and if I do what return if any, should I put on these papers other than the credits which I have collected? I am afraid if I should return the live
ones to the Court in which they came, and should another execution come in and get priority over the defendant, I might be held responsible."

In my opinion you should make a list of the executions in hand and turn them over to your successor, taking his receipt. Your successor will then follow up on the executions to the same extent as he would had they come into his hands in the first instance.

I conferred with the State Auditor's office and was advised that such procedure is customary. The Auditor's office also stated that if you have official funds in your hands, or in bank, you should turn them over to the new sheriff and take his official receipt. In case partial payments have been made to you on any of the executions, you should enter the credits thereon.

With respect to your question as to the duration of a levy under an execution, you are referred to § 8-412 of the Code which is as follows:

"The lien of a writ of fieri facias, on what is capable of being levied on but is not levied on under the writ on or before the return day thereof, shall cease on that day. Property levied on, on or before the return day, may be advertised and sold within a reasonable time thereafter, and the lien given by this section may also be enforced after the return day of the writ by proceedings under § 8-435 and following of this chapter, if such proceedings be commenced before that day."

You further state in your letter:

"I understand a misdemeanor warrant after it has become 12 months old is not to be executed, and I am wondering if it would be legal to destroy such papers."

In my opinion, you should turn over to your successor all criminal warrants in your possession, and take his receipt therefor.

SHERIFFS AND SERGEANTS—Medical Expenses—County may appropriate funds for relief.

BOARDS OF SUPERVISORS—Appropriations—Authority to appropriate funds for relief of sheriff—No authority to pay for damage incurred in apprehension of felon.

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

July 29, 1963

This is in reply to your letter of July 19, 1963, in which you request my opinion as to whether the Board of Supervisors may appropriate funds for medical expenses, damages, and other incidental costs in connection with the capture of a person who shot the Sheriff of Isle of Wight County while understaking to place such person under arrest.

In previous opinions, the Attorney General has expressed the view that the counties are authorized to appropriate funds for the relief of sheriffs or deputy sheriffs who suffer injury or death as defined in the Workmen's Compensation Act. Report of the Attorney General, (1954-1955), p. 53; (1961-1962), p. 236.
The damages suffered to property during the search for and apprehension of a felon are not compensable by the county. Neither is the cost of food and supplies provided for the search compensable by the county. I am aware of no authority whereby the Board of Supervisors could appropriate public funds to pay for such damage and expense.


COMMONWEALTH ATTORNEYS—Payment for Services—Not to be made for services rendered Planning Commission.

HONORABLE E. M. JONES
Clerk of Rappahannock County

June 11, 1964

This is in reply to your letter of June 9, in which you present the following questions:

"1. According to Paragraph 14.1-58 and 14.1-73, the minimum salaries for the Commissioner of Revenue and the Sheriff in the several Counties of the Commonwealth were increased at the last session of the General Assembly. Will these minimum salaries become effective July 1, 1964, or will they become effective January 1, 1965, when salaries are set by the State Compensation Board for the 1965 calendar year?"

"2. Our County Planning Commission has requested me to write you in regard to whether or not they may recommend to the Board that the Clerk of the Court and the Attorney for the Commonwealth may be paid for services rendered the Planning Commission.

"3. I refer you to Paragraph 14.1-116 of the Code of Virginia as amended at the last session of the General Assembly. If the amounts named in this paragraph are not paid by the criminal for the upkeep of the electronic devices, will the Commonwealth pay them? Is the Special Fund named in the last sentence set up as a special fund by the Clerk of the Court or the Treasurer of the County?"

I shall answer these questions in the order stated:

(1) The minimum salaries in this case will become effective July 1, 1964. This was confirmed to me today by Miss Carrie Biesen, Executive Secretary of the Compensation Board, as well as by Hon. J. Gordon Bennett, Auditor of Public Accounts, who is an ex officio member of that Board.

(2) I do not feel that the Board of Supervisors can lawfully pay the Commonwealth's Attorney or the Clerk for any services rendered to the planning commission which come within the scope of their official duties. The provisions of § 15-504 of the Code would prohibit the Board from paying either of these officials for services rendered outside the range of their official duties. There are certain exceptions that apply to the Commonwealth's Attorney under this section, but none relates to service of this nature.

(3) Section 14.1-116 must be considered along with § 17-30.1 (as amended by Chapter 533, Acts of Assembly, 1964), in which it is provided that “the expense of reporting or recording the trial if criminal cases shall be paid by
the Commonwealth out of appropriation for criminal charges * * .” This language, in my opinion, includes the expense mentioned by you.

With respect to the second portion of your question relating to the special fund, I believe this is a matter that should be referred to the Auditor of Public Accounts for his advice. I believe the special fund would be maintained under the supervision of the clerk.

SHERIFFS AND SERGEANTS—Sheriff’s Mileage—Amounts allowed.

CRIMINAL PROCEDURE—Sheriff’s Mileage—Amounts allowed.

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

June 26, 1964

This will acknowledge receipt of your letter of June 24, which reads as follows:

“At a regular session of the 1964 General Assembly, a reenactment of Section 15.1-257 of the Code of Virginia provides certain facilities which are to be provided by governing bodies. One of these facilities appears to be a jail on lands owned by the County. This act is in force from date of enactment.

“Section 14.1-111 effective July 1, 1964, relates verbatim ac litteratim ‘for carrying a prisoner to jail under order of a justice, for each mile traveled of himself going and returning, eight cents’ . . . ‘for each mile traveled of the prisoner in carrying him to jail, when the distance is over ten miles, eight cents.’

“The County Judge and I request you to give us an interpretation of the word justice as used in the above quoted statute.

“Madison County uses the facilities of Albemarle County jail which is a distance of 30 miles (one way), from the Madison County Courthouse.

“The County judge is requesting what amount to tax a prisoner as cost who is arrested by the Sheriff of this county and lodged in the Albemarle County jail. And also the cost to be taxed if the same prisoner is returned by the Sheriff to court in Madison County and remanded to the Albemarle County jail on the same charge for which the arrest was made.

“I, as Clerk of the Circuit Court, request the amount to tax the same prisoner returned to the Circuit Court on two additional occasions and remanded to jail on both occasions.

“The County judge and I would be grateful for an example of the correct amount to tax as cost in the case as herein set forth.”

The language used in § 14.1-111 which you have quoted is the same, with the exception of the amount of allowance, that has been a part of the Code since prior to the Code of 1887, it having been enacted at the 1877 session of the General Assembly—Acts of Assembly (1877), p. 377.

The word “justice,” as used in this statute at the time of its enactment, no doubt, was used because by common usage it had become associated with a justice of the peace. However, the word “justice,” when used to denote a judicial of-
ficer, is generally used interchangeably with "judge," and in this particular instance it is used, in my opinion, in the sense that it includes any judicial officer who is authorized to commit a prisoner to jail and place him in the custody of an officer to be confined in jail.

With respect to what amount to tax a prisoner as costs in connection with travel allowance to the sheriff, I am of the opinion the taxable costs should be the amount to which the sheriff is entitled under § 14-122 (new § 14.1-111, as of July 1, 1964). The mileage allowance to the sheriff is as follows:

"... For carrying a prisoner to jail under the order of a justice, for each mile traveled of himself going and returning, eight cents.

"For each mile traveled of the prisoner in carrying him to jail, when the distance is over ten miles, eight cents . . ."

I enclose an opinion dated April 21, 1961, to Miss Virginia Woodroof, Clerk of the County Court of Brunswick County, which may be helpful. This opinion is published in the Attorney General Report (1960-61), at p. 49.

The sheriff is, of course, entitled to his mileage for each time he brings the prisoner to court, or returns him to jail under order of court, subject to the provisions of § 14-82 (new § 14.1-69) of the Code.

I also enclose copy of an opinion written by former Attorney General Abram P. Staples on January 22, 1943, to the State Auditor of Public Accounts, which relates to the subject matter. This opinion is published in Report of the Attorney General (1942-43), at p. 54.

SHERIFFS AND SERGEANTS—Workmen's Compensation—Benefits to be considered in payment of salaries.

PUBLIC OFFICERS—Salary—Sheriff’s—Workmen's Compensation benefits to be considered in paying.

BOARDS OF SUPERVISORS—Authority—May pay salary to sheriff less workmen's compensation paid during disability.

August 30, 1963

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

This is in reply to your letter of August 23, in which you request my advice as to whether the county may pay the sheriff (who was injured in line of duty) his full monthly salary while he is, at the same time, receiving compensation under the Workmen's Compensation Law—Title 65 of the Code—or whether the county may pay the sheriff an amount each month equal to his salary, less the amount he is being paid benefits under Title 65.

In my opinion, the county may pay the sheriff during his period of disability the difference between the salary being paid to him at the time of the injury and such amount as is being paid to him under the Workmen's Compensation Law. Section 15-555 expressly provides that "all sums paid to any such official * * *, as compensation under Title 65 * * shall be deducted from the allowance made under this section in such installments as the agency shall determine."
June 16, 1964

Mr. Kirk Lunsford, Jr.
Business Manager, Richard Bland College

This is in reply to your letter of June 15, concerning the status of Mrs. Kwang-Hsi Chow, under § 23-7 of the Code. Under this section the reduced tuition charges may be granted to any person who has been an actual bona fide resident of Virginia for a period of at least one year prior to the commencement of the term, semester or quarter for which such reduced tuition charge is sought. This office for many years has construed the word "resident," as used in § 58-49 of the Code, to apply to aliens. In my judgment, it should be construed the same way in connection with § 23-7.

In an opinion dated January 13, 1939, and published in Report of Attorney General (1938-39), at p. 255, the question was presented to the late Abram P. Staples, then Attorney General, with respect to whether or not the daughter of a person who was a citizen of Canada, but a resident of Virginia for fifteen years, would be entitled to the reduced tuition benefits. Mr. Staples stated as follows:

"The statute to which I have referred speaks of 'residents or citizens of Virginia.' Assuming that the gentleman's daughter is living with him in Virginia, I am of opinion that the reduced tuition charges are unquestionably in order. A person may well be a resident of Virginia without being a citizen of the United States, and the statute refers to both residents and citizens."

The case presented by you is similar and, therefore, in my judgment, this student is entitled to reduced tuition benefits provided for under § 23-7 of the Code.

August 9, 1963

Honorable Jay A. Price
Judge of the County Court of Montgomery County

This is in reply to your letter of August 2, in which you ask whether or not the officers of Virginia Polytechnic Institute police force have jurisdiction to stop and arrest motorists on the highway off the campus of VPI, charging a violation of the motor vehicle code. You supplemented your letter by furnishing me under date of August 8 with a copy of the order entered by the Circuit Court of Montgomery County, appointing such policemen. It is noted that in this order, it is stated that "pursuant to the provisions of Sections 19.1-28 and 19.1-30, Code of Virginia, 1950, that the said Thomas Charles Trott be, and he hereby is appointed policeman, for the term beginning April 1, 1963, and ending December 20,
1963, whose jurisdictions shall extend over all the grounds attached to Virginia Polytechnic Institute that are situated in Montgomery County, Virginia, and used by said college in conducting its affairs and carrying out its purposes."

It seems clear to me that under this language the jurisdiction of these policemen as established by the court is limited to the campus—that is, the property occupied and owned by VPI and used by VPI in conducting its affairs and carrying out its purposes.

In view of the language of the order, I am of the opinion that the special police officers in this instance do not have the authority to make arrests outside the jurisdiction conferred upon them by the court.

STATE POLICE—Jurisdiction—May not regulate traffic in pursuance of Title 46.1 on highways maintained by United States located on lands ceded by Virginia under § 7-21 of the Code.

JURISDICTION—Regulation of Traffic—Highways Maintained by United States on Lands Acquired under § 7-21 of Virginia Code—Jurisdiction ceded to United States.

May 29, 1964

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

This is in reply to your letter of May 26, 1964, which quotes as follows:

"I would like your opinion on the phrase 'regulate traffic' as contained in Section 7-21 of the Code of Virginia. The question has arisen as to what authority State Police would have on traffic regulation or traffic control in the regulation of traffic during accidents and in enforcing Title 46 of the Code of Virginia."

Section 7-21, Code of Virginia (1950), as amended, sets forth the conditional consent of the Commonwealth of Virginia to the acquisition by the United States of lands in Virginia, for the purposes therein stated, including among others, the conservation of the forest or natural resources and the retirement from cultivation and utilization for other appropriate use of sub-marginal agricultural lands. This section cedes certain jurisdiction to the United States, while retaining certain other jurisdiction unto itself. The Commonwealth, thus, reserves "jurisdiction in all civil and criminal matters, except in so far as the same may be in conflict with the jurisdiction and powers herein ceded to the United States." One area in which such reservation is "in conflict with the jurisdiction and powers herein ceded" relates to the regulation of traffic, as expressed in the following clause, found in the same statute:

"Over all lands heretofore or hereafter acquired by the United States for the purposes mentioned in this section, the Commonwealth hereby cedes to the United States the power and jurisdiction to regulate traffic over all highways maintained by the United States thereon, * * * *"

This language cedes to the United States the jurisdiction to regulate traffic on all highways maintained by the United States within any lands acquired by the United States under the terms of this section. It is my opinion, therefore, that
the Virginia State Police are not authorized to regulate traffic, in pursuance of Title 46.1 (former Title 46), Code of Virginia (1950), as amended, on such highways.

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STATE SEAL—Use of—May be used by State Dental Laboratories Association where advertising not involved.

Honorable Martha Bell Conway
Secretary of the Commonwealth

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

"I am enclosing copy of a lay-out of a seal proposed to be used by the Virginia State Dental Laboratories Association, which includes the Virginia seal.

"Will you be good enough to let me know whether this is a proper use of the seal of Virginia."

The Virginia State Dental Laboratories Association proposes to use an emblem consisting of two circles and in the space between the outer and inner circle is written these words: "Virginia State Dental Laboratories Association." On the inside of the circle is a drawing in the shape of the State of Virginia and written across this is the word "Member." The State seal is inside the inner circle under the word "Member."

It is difficult to determine whether or not the use of the State seal in the manner set forth would be in violation of Article 2 of Chapter 8 of Title 18.1 of the Code. I can see very little difference between the use of the seal in this manner and that which has been approved by this office in connection with the issuance of stock certificates (opinion dated May 31, 1955, published in Report of the Attorney General (1954-1955), at p. 222) and that used on the mastheads of newspapers (opinion dated May 29, 1959, published in Report of the Attorney General (1958-1959), at p. 268.)

As stated in the latter opinion, the statute prohibiting the use of the State seal in certain instances is a penal statute and must be construed strictly. It may not be used in connection with an advertisement, but I do not believe that the emblem proposed to be used by the Virginia State Dental Laboratories Association can be considered to be advertising within the statute.

Therefore, in my opinion, there is no objection to the use of this emblem.

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STATE SEAL—Writing On—Prohibited by § 18.1-424.

Honorable Martha Bell Conway
Secretary of the Commonwealth

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

"I am enclosing corner from an envelope from the Clerk of the Corporation Court of the City of Chesapeake.
"Below the return address appears the seal of the Court, which is the seal of Virginia, with the words 'City of Chesapeake, Virginia, Corporation Court' written around it.

Will you be good enough to let me know whether this is a proper use of the seal of Virginia."

Under prior rulings of this office there would be no prohibition against the use of the State seal by the clerk of the court of the city of Chesapeake if it did not contain the wording placed thereon as follows: "City of Chesapeake, Virginia Corporation Court."

In my opinion, the use of this wording upon the seal is in violation of § 18.1-424. On account of this wording, the exception contained in § 18.1-426 does not apply.

STERILIZATION—Mentally Deficient—Application of the laws of heredity to patient.

MENTALLY ILL—Sterilization—Use of mental history of patient's family in applying laws of heredity.

December 2, 1963

HONORABLE M. WATKINS BOOTH
Commonwealth's Attorney for Dinwiddie County

This is in reply to your letter of November 13, 1963, in which you request my opinion as to whether the State Hospital Board must have evidence before it that the parent or grandparent of an inmate was mentally deficient in order to direct the sterilization of the inmate pursuant to § 37-241 of the Code of Virginia.

Section 37-241 of the Code reads as follows:

"The State Hospital Board may deny the prayer of the petition or if it shall find that the inmate is mentally-ill mentally-deficient, or epileptic, and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted, that the inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate and of society will be promoted by such sterilization, the Board may order such superintendent to perform or to have performed by some competent physician to be named in such order, upon the inmate, after not less than thirty days from the date of such order, the operation of vasectomy if a male or salpingectomy if a female."

The foregoing quoted section is silent as to the manner in which the Board is to arrive at its determination that, by the laws of heredity, the mentally-ill inmate is the probable potential parent of offspring likewise afflicted. This conclusion must be reached by the Board after considering the evidence presented at the hearing, as provided in §§ 37-236 and 37-237 of the Code. In short, the Board should determine from all the available evidence that, as a matter of fact, the inmate is the probable potential parent of a mentally-deficient offspring, by the laws of heredity.

I am aware of no decided case in which a court has ruled precisely on what constitutes "the law of heredity," but it seems generally accepted that the deter-
mination of whether a specific form of mental illness is one with hereditary traits is a matter of fact, and not one of law. See, the annotation in 6 A.L.R. 1486.

I am of the opinion that the State Hospital Board is free to determine that evidence of the mental history of the patient's family is essential in reaching a conclusion on the hereditary nature of the inmate's mental affliction in order to decide whether the operation of vasectomy or salpingectomy should be performed.

SUBDIVISIONS—Plats—To show correct description as determined by competent surveyor or professional engineer is conformity with standards of profession.

LAND—Descriptions—Subdivision plats must show description as determined by competent surveyor or professional engineer in conformity with standards of profession.

HONORABLE M. WATKINS BOOTH
Commonwealth's Attorney of Dinwiddie County

June 17, 1964

This is in reply to your letter of June 16, in which you refer to § 15-967.12 of the Code, relating to subdivision plats, or deeds of dedication to which such a plat is attached, which section, in part, provides as follows:

Every such plat, or deed of dedication to which the plat is attached, shall contain in addition to the professional engineer's or land surveyor's certificate a statement as follows: The platting or dedication of the following described land (here insert a correct description of the land subdivided) is with the free consent and in accordance with the desire of the undersigned owners, proprietors, and trustees, if any . . . ."

You request my advice as to whether the provision that is enclosed in parentheses means "a metes and bounds description of the land or a brief description of same?"

A correct description of real estate, in my judgment, means a description which adequately identifies the land intended to be designated in a plat. That would include the lots, as well as that portion of the plat set apart for streets, alleys, public easements or other public use, etc., as mentioned in § 15-967.13.

Section 15-967.11 requires that every such plat shall be prepared by a certified professional engineer or land surveyor, which carries the implication that the surveyor shall show a metes and bounds description of the property being platted. I feel that a reasonable interpretation of this statute justifies the conclusion that a correct description means a description as determined by a competent surveyor or professional engineer to be in conformity with the standards of the profession. The plat must be described to such an extent that the local commission or agent (§ 15-967.10) examining it may readily be able to obtain such information as may be necessary to make a judgment as to approval or disapproval of the plat.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Assessment—Commissioner of Revenue—No authority to adjust assessment on real estate as result of condemnation proceedings.

COMMISSIONERS OF REVENUE—Assessment—No authority to adjust on real estate as result of condemnation proceedings.

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney of Augusta County

This is in reply to your letter of August 30, in which you state that it was necessary for the Shenandoah Valley Airport (created by Chapter 628, Acts of Assembly, 1956 and amended by Chapter 396, Acts of Assembly, 1958) to obtain a flight easement over the land of an adjoining landowner. You state further:

"... It was necessary to condemn this and the damages were fixed by a commission and paid. The land owner now has applied for a reduction in his real estate assessment, on the theory that, being awarded damages for the land, it has, in effect, been decreased in value to the extent of the award.

* * * *

"I would like to be in position to advise the Commissioner of Revenue whether he has the authority to make the reduction in his office on the assessed value of the land, or whether it would be necessary for the land owner to petition the Court for a reduction, showing the special circumstances giving rise to the claim for a reduction. If the Commissioner of the Revenue has the authority, it would seem to me to be much more desirable to have the adjustment, if any is to be made done through his office, rather than require the land owners affected to go to the expense of court proceedings."

We have made a careful examination of the statutes relating to taxation and assessments and we are unable to find any statute which would authorize a commissioner of the revenue to make an adjustment of an assessment under the circumstances such as you have related. Nor can we find any statutes which would authorize a court to make such an adjustment upon the petition of the owner. There are statutes authorizing commissioners of the revenue to make adjustments where there has been a sale of the property or a building thereon has burned down or otherwise becomes valueless. The authority of the commissioner of the revenue, as well as the court, is, of course, dependent upon a statute.

Of course, when the next general reassessment of the real estate is made in the county, the assessors may take into consideration the value of the property at that time.

TAXATION—Delinquent—Lands purchased by the State to be taxed in name of former owner.

HONORABLE W. O. JONES
Treasurer of Nansemond County

This is in reply to your letter of June 28, which reads as follows:
"In 1907 the Nansemond Development Corporation was organized in this county. They sold a large number of lots in one area of the county to people all over the United States. A few years later they went out of business. We now have all these small lots on the land book and each year they go delinquent and have been delinquent for thirty to forty years. We have no address of the owners. The taxes run from twenty cents to ninety cents per lot and is costing the county more than they are worth by going delinquent.

"I should like to know if there is any possibility that we can take these lots off the land book in order to save the county all the expense year after year of typing, making tickets, mailing expense and then typing twice more as delinquents."

I assume that this property has been sold under the provisions of Article 2, Chapter 21 of Title 58 of the Code and that it was purchased in the name of the Commonwealth for the benefit of the county. If this assumption is correct, then it would seem that under § 58-1079 of the Code the Commissioner of the Revenue is required to continue the same upon his land book in the name of the former owner and taxes and levies shall be annually extended thereon the same as if such tax sale had not taken place. In my opinion, there is no statutory authority by which you could take these lots off the land books as suggested in your inquiry. This would be true even though no purchase has been made by the Commonwealth.

TAXATION—Delinquent—Procedure for levying.

May 14, 1964

HONORABLE E. P. GREEVER
Treasurer of Tazewell County

In reply to your letter of May 13, relating to the procedure to be followed in levying for delinquent taxes under § 59-1001 of the Code, I am enclosing copies of the following opinions, which I trust will be helpful:

- Opinions, 1938-39, at pp. 263, 264 (Weems)
- Opinions, 1950-51, at p. 269 (Avery)
- Opinions, 1950-51, at p. 300 (Sinclair)
- Opinions, 1950-51, at p. 301 (Reid)
- Opinions, 1953-54, at p. 204 (Goodman)

You will note that the treasurer, under this section, makes the levy upon the tax ticket, and no warrant is required.

TAXATION—Delinquent Tax Collector—Authority.

March 13, 1964

HONORABLE WILLIAM C. CARTER
Commonwealth’s Attorney for Cumberland County

This is in reply to your letter of March 11, which reads as follows:
"As Commonwealth's Attorney for Cumberland County I would like to know if the county delinquent tax collector, duly appointed by the Board of Supervisors, has the power to serve distress warrants and personally levy on property of persons whose taxes are delinquent, under Section 58-991 of the 1950 Code of Virginia, as amended."

Section 58-991, which you have cited, expressly authorizes a board of supervisors to employ a collector of delinquent taxes. This section further provides that such collector "shall have all the powers and authority to enforce collection by levy, distress or otherwise as the treasurers of the counties * * have under the law."

Sections 58-965 and 58-1001 are applicable.

I am enclosing two opinions published in the Reports of the Attorney General (1950-1951), at p. 301 and (1953-1954), at p. 204, which may be helpful.

In light of these statutes your question is answered in the affirmative.

TAXATION—Exemption—Cemeteries owned by private corporations.

August 8, 1963

HONORABLE WILLIE H. ROUNTREE
Commissioner of the Revenue for Nansemond County

This is in reply to your letter of July 19, 1963, in which you pose the following inquiry:

Where a private corporation has developed a cemetery and sells lots to individuals, should the Commissioner of the Revenue transfer that lot on the Land Book for purposes of taxation or is such a transaction exempt from taxation?"

By virtue of Section 183c of the Virginia Constitution burying grounds or cemeteries are exempt from taxation so long as the same are not operated for profit. The fact that the title to the land is vested in an individual does not affect the tax immunity of such lands. Accordingly, I am of the opinion that the cemetery lots which are sold to individuals by the private corporation developing the cemetery remain exempt from taxation.


June 9, 1964

HONORABLE EARLE M. BROWN
Member, House of Delegates

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

I have been requested to secure your opinion under the following circumstances: Section 58-12 of the Code of Virginia was amended at the 1964 Session of the General Assembly to exempt from state and
local taxation the Lynchburg Fine Arts Center, Incorporated. This corporation is in arrears for the payment of the real estate taxes due the City of Lynchburg for the calendar year 1963.

"The act amending Section 58-12, being Chapter 198 of the Acts of the 1964 General Assembly did not specify the effective date of the Act.

"I would appreciate your opinion on the following questions:

1. The effective date of this act.

2. If the effective date is ninety days subsequent to the adjournment sine die of 1964 Session, whether or not the corporation is entitled to a proration of taxes on such date or whether the tax liability would be for the entire year, since the assessment was effective on January 1, 1964.

3. Irrespective of the amount of real estate tax liability, whether the City can legally make a gift of the amount of such taxes due to the Lynchburg Fine Arts Center, Incorporated under applicable state law or city charter provisions."

I shall answer your questions in the order presented.

(1) The effective date of the Act is the first moment of June 26, 1964.

(2) The answer to this question is in the negative. There is no provision under the law by which the taxes on the property in question may be prorated for the year 1964. The taxable year 1965 will be the first year during which the amendment has any effect.

(3) I know of no way by which the city can abate the tax liability for the years 1963 and 1964. I do not know of any State statute under which the city council could make a gift to the Lynchburg Fine Arts Center for an amount equal to such taxes. As to whether or not this can be done under the city charter, this is a matter which I feel should be referred to the city attorney, inasmuch as this office is reluctant to construe city charter provisions unless a request of that nature is made by the city attorney.

I do not know the precise functions of the Lynchburg Fine Arts Center, but in arriving at the conclusion stated above, I have considered the provisions of Chapter 1 of Title 15 of the Code, especially §§ 15-16 through 15-17, none of which seem to authorize donations to an organization of this nature.

TAXATION—Licenses—Commission Merchant—City of Norfolk may impose where activities of person fall within definition of commission merchant.

COMMISSION MERCHANT—Defined for purpose of taxation by City of Norfolk.

Honorable W. R. Moore
Commissioner of the Revenue, City of Norfolk

March 23, 1964

Your letters of March 2, 1964, and March 5, 1964, appear to raise the same fundamental question. In your letter of the 5th the problem upon which you ask my advice is presented as follows:

"We are concerned about whether or not the City of Norfolk can validly impose a license tax upon certain individuals operating within the City limits."
"These individuals live either in Norfolk or in the surrounding Tide-water area. They rent office space within the City limits and, in most cases, sample products, sales literature, etc., are kept within the offices, and meetings are held within these offices from time to time. The individuals themselves pay the rent and all arrangements for the use of the offices are made in their own names. After making contact with potential customers, the customers are personally visited in their homes, a display is presented, and orders are taken which are occasionally accompanied by down payments. The orders and down payments, when taken, are then sent to an out of state corporation for acceptance or rejection. If the orders are accepted the merchandise is then sent directly to the customer. In no case do the individuals we are concerned with make delivery, and in no case does the actual merchandise come to rest in the offices rented by these individuals.

"By agreement with the out of state corporation, the individual soliciting these orders receives a commission on each order accepted which was procured by him. In addition, these individuals seek and train other individuals to do essentially the same thing, sometimes advertising, meeting in the local offices, and training in the field. The individual who does this training gets an override on each order accepted and procured by his trainees, over and above his normal commission. These solicitors consider themselves as being self employed, are not carried on the employment rolls of the corporation, and are not considered as employees by the out of state corporation. We seek to impose a privilege tax upon these local residents equal to thirty-five dollars and seven-tenths of one per centum of the gross commissions and gross proceeds in excess of $3,000.00 in such business during the preceding calendar year."

You have also furnished me with a copy of the Norfolk ordinance imposing license taxes, § 63 of which is as follows:

"Every person engaged in any of the following businesses shall pay a license tax equal to $35.00 and 7/10ths of 1 per centum of the gross commissions and gross profits in excess of $3,000.00 in such business during the preceding calendar year.

Broker, merchandise.
Broker dealing in options and futures.
Broker, stock.
Broker, wholesale merchandise.
Commission merchant.
Cotton buyer.
Cotton factor.
Investment securities.
Manufacturers agent.
Ticket sellers for compensation."

Section 89 of the Norfolk ordinance makes reference to the laws of the State of Virginia for definition of terms used in the Norfolk ordinance.

The operation described in your letter would seem to fall within the definition of a commission merchant as defined by § 58-293 of the Code of Virginia (1950), as amended. I am of the opinion that the Norfolk ordinance may be validly applied by requiring a license as a commission merchant of individuals who, in the situation described in your letter, have a definite place of business in the City of Norfolk, and are conducting business regularly and continuously in the city. These two factors, i.e., definite place of business and regular and continuous
conduct of business, are important features distinguishing this situation from that obtaining in *Nippert v. City of Richmond*, 327 U.S. 416. In addition, the practical operation of the statute does not seem to be such that it could be said to place interstate commerce at a disadvantage with intrastate commerce. See the comments of the Supreme Court of the United States on this aspect in *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U.S. 33, 55-58. Finally there are features in the situation you have outlined strikingly similar to those in *Christian Corp. v. Commonwealth*, writ of error denied, 178 Va. XXXIV, cert. denied, 315 U.S. 801; *Pelouze v. Richmond*, 183 Va. 805; *Dunston v. Norfolk*, 177 Va. 689. The license tax was upheld in all of these three cases.

TAXATION—Licenses—Real Estate Salesman—Tax may not be imposed by town of Colonial Beach.

TOWNS—Taxation—Tax on real estate salesman may not be imposed by town of Colonial Beach.

HONORABLE WALThER B. FIDLER
Member, House of Delegates

August 27, 1963

This is in reply to your letter of August 21, 1963, in which you request my opinion as to whether the Town of Colonial Beach has authority to impose a tax on a real estate salesman who is engaged in the selling of real estate within the Town under a licensed broker who lives in an adjoining county.

In Chapter 18 of Title 54, Code of Virginia (1950), a distinction has been drawn between real estate brokers and real estate salesmen. By virtue of § 54-748 of the Code both are required to obtain a license issued by the Virginia Real Estate Commission.

Article 4 of Chapter 18, Title 54 of the Code sets forth the authority for licensing and regulating real estate brokers and salesmen by cities and counties. Section 54-766 of the Code (a portion of Article 4) reads as follows:

"Nothing in this chapter shall affect the power of cities or counties to tax, license and regulate real estate brokers. The requirements of this chapter shall be in addition to the requirements of any existing or future ordinances of any city or county so taxing, licensing or regulating real estate brokers."

It is to be noted that no reference is made in the foregoing quoted statute to towns; nor is there a reference to real estate salesmen. I think it apparent that a town council must rely on some other statutory authority if a license tax is to be imposed upon real estate salesmen.

The general authority for the imposition of a license tax by cities and towns is codified as § 58-266.1 of the Code. That section reads, in part, as follows:

"In addition to the State tax on any license, as hereinbefore and hereafter provided for in this chapter, the council of a city or town may, when anything for which a license is so required is to be done within the city or town, impose a tax for the privilege of doing the same and require a license to be obtained therefor; and in any case in which they see fit they may require from the person licensed a bond, with sureties, in such penalty and with such condition as they may deem proper or make other regulations concerning the same."
Section 58-398 of the Code provides the authority for taxing real estate brokers. That section reads, in part, as follows:

"A real estate broker in a county or in an incorporated town or in a city of not more then fifteen thousand inhabitants shall pay the sum of twenty-five dollars; if in a city of more than fifteen thousand inhabitants, he shall pay fifty dollars.

* * * * *

"The revenue license tax provided for in this section shall be applicable to all persons who hold current real estate brokers' licenses issued by the Virginia Real Estate Commission; except that this paragraph shall not apply to any member or employee of a firm or to any officer or employee of a corporation in his capacity as such member, officer or employee if such firm or corporation has taken out a revenue license as a real estate broker."

Inasmuch as no State license tax would be imposed upon a real estate salesman who works under a real estate broker who has obtained a revenue license, it necessarily follows that no such license tax could be imposed by a city or town. In the absence of a charter provision expressly so authorizing, I am of the opinion that the Town of Colonial Beach may not impose a license tax upon a real estate salesman.

TAXATION—Motor Vehicles—Situs.

MOTOR VEHICLES—Licenses—Situs for purpose of taxation.

HONORABLE LEWIS JONES, JR.
Commonwealth's Attorney of Middlesex County

This is in reply to your letter of August 9, 1963, which reads as follows:

"The question has come up between the Commissioners of the Revenue in the County of Essex and the County of Middlesex concerning the proper situs for the taxation on a vehicle. I will attempt to set forth the facts as briefly as possible, which are as follows:

"Norton Food Company, Incorporated has its office and warehouse in the Incorporated Town of Urbanna, Middlesex County, Virginia. Its business is the wholesale distribution of food. Its fleet of trucks consists of twelve. All trucks including that located in Essex are stocked from the warehouse in Urbanna. They are serviced also in Urbanna. The truck in question is driven by a resident of the Town of Tappahannock. This particular employee has maintained a home in Tappahannock for the last thirteen years. His territory consists of the Town of Tappahannock, Richmond County, Northumberland County, King George County, Spotsylvania County, Caroline County, City of Fredericksburg, Surry County, and the Isle of Wight."
The driver is allowed the privilege by his employer of returning to the Town of Tappahannock on those nights when he is close enough to Tappahannock to make it practical. On all other occasions when it is not practical to return to Tappahannock for the night he stays at hotels or motels on his route. Mr. Norton informs me that he works five days a week and of these five days he is away from Tappahannock two nights. These two nights are Wednesday and Thursday night of every week.

"Town automobile tags are purchased in Tappahannock Essex County. Taxes on this particular vehicle have been paid in the Town of Urbanna and Middlesex County. On January 1, 1963 the truck in question was physically in Essex County.

"I would appreciate an opinion as to which is the proper situs for taxation."

Section 46.1-65 (f), Code of Virginia (1950), as amended, states:

"Except as provided by paragraph (d), no vehicle shall be subject to taxation under the provisions of this section in more than one jurisdiction."

Since the exception in "paragraph (d)" refers to the taxing of a motor vehicle by both a county and a town within such county, the situation here, dealing with two separate counties or towns located in separate counties would not come within such exception. It follows that the vehicle in question is not subject to a license tax in both counties nor in both towns nor both in one county and a town in the other county. Furthermore, Section 46.1-66, Code of Virginia (1950), as amended, contains the following:

"(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

"(1) A similar tax or license fee is imposed by the county, city or town of which the owner is a resident;"

Considering the quoted portions of Sections 46.1-65 and 46.1-66 together, it is my interpretation that the jurisdiction in which the owner resides is the taxing authority for imposing local motor vehicle license taxes and once that authority has acted it precludes other taxing authorities from imposing a similar tax. Since the owner is located in Urbanna, in Middlesex County, imposition of the license tax by such town or county, or both, would preclude any other county or town from imposing a similar tax.

In regard to the taxing of tangible personal property, Section 58-834, Code of Virginia (1950), as amended, states that the situs for assessment and taxation 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." Section 58-833 sets January 1 of each year as the day of return of taxation on such property. In interpreting these sections in the case of Hogan v. County of Norfolk, 198 Va. 733, the Supreme Court said:

"The situs for taxation as used in this statute means something more than simply the place where the property is. It does not mean property which is casually there or incidentally there in the course of transit, but it does necessarily involve the idea of permanent location like real property. It is sufficient if it is there and being used in such a way as to be fairly regarded as part of the property of the county."
Under the facts related, the truck in question is serviced in Urbanna and stocked from the company warehouse in Urbanna, in which town the business office is located and from which the truck travels into a number of counties and cities or towns including Tappahannock, in which its stays on those nights, falling within the five day work week, when it is "close enough to make it practical" as a convenience to the driver of the vehicle. It would appear that the truck was in Tappahannock on January 1, 1963 more or less by chance or incidentally, rather than being kept or maintained there in the ordinary course of business. Its presence there was transitory. It is one of several places the truck stays overnight while plying between its base at Urbanna and the various distribution points. Under these circumstances, it is my opinion that the truck has not acquired a situs for tangible personal property taxation different from that of the business office and accordingly the proper situs for such taxation remains in Urbanna, Middlesex County, Virginia.

TAXATION—Personal Property—Boats owned by Federal employees living within Federal reservation.

HONORABLE WARREN S. PURKS
Commissioner of the Revenue for King George County

February 5, 1964

This is to acknowledge receipt of your letter of January 28, 1964, in which you state in part:

"We have, in King George County, the Dahlgren Naval Weapons Laboratory which is a Government property. This property borders on the Machadoc creek, a navigable waterway located entirely in King George County.

"The Navy has built a wharf extending approximately two hundred feet into this creek for use by the civilian personnel living on the Base for the purpose of mooring boats owned by these civilians.

"Will you please advise us whether these boats are taxable as tangible personal property if moored at this wharf?"

It is understood that the Dahlgren Naval Proving Grounds was acquired by the Federal Government during World War I and exclusive jurisdiction was granted to said Government. Whether any additional area has been obtained since that time, I am not advised. However, if the area to which you refer was acquired after 1936, there is a strong possibility that the State reserved concurrent jurisdiction over the same. The extent of the jurisdiction of the United States and of Virginia upon this area can be ascertained by examining the records in the clerk's office, King George, Virginia.

Congress has granted to the States authority to impose certain taxes on activities carried on upon these federal areas over which the government has exclusive jurisdiction. 4 U.S.C.A., Sections 104 to 110, inclusive, commonly known as the "Buck Act". Generally, this statute includes sales or use taxes, income taxes and taxes on motor fuels. The Virginia tax imposed by § 15-829, Code of Virginia (1950) as amended on boats is a property tax and not included in the taxes enumerated in the Buck act, supra. This office has ruled that if the United States Government has exclusive jurisdiction over an area, then the persons living thereon are not subject to local taxation. (Opinions of the Attorney General (1950-1951), p. 285).
I am of the opinion that if the area in which these boats are moored and upon which civilian employees reside is under the exclusive jurisdiction of the United States, said boats are not taxable as tangible personal property under the laws of Virginia.

TAXATION—Personal Property—General Assembly may define capital for purpose of taxation.

CONSTITUTION—State—Not violated when General Assembly defines capital for purpose of taxation.

HONORABLE JOHN B. BOATWRIGHT, JR.
Secretary, Commission on State and Local Revenues and Expenditures and Related Matters

September 5, 1963

This will acknowledge receipt of your letter of September 4, in which you state that a proposal has been made to the Commission on State and Local Revenues and Expenditures and Related Matters that subsection (3) of § 58-411 of the Code of Virginia be eliminated from said Code section. If this proposal were put into effect, money on hand and on deposit would no longer be considered as capital as that term is defined in said Code section. You further state that it is proposed to recognize the taxation of income as a substitute for the present taxation of money as one of the items composing capital.

You have requested my advice as to whether or not the proposed amendment to § 58-411 would violate any provision of the State Constitution. You refer specifically to the provisions of Sec. 168 of the Constitution which provides that all property, subject to certain exceptions, shall be taxed, and to Sec. 171 of the Constitution which segregates to the localities real estate and tangible personal property (subject to an exception) for taxation. With respect to Sec. 171 you make the following comment:

"... and whether by the elimination of this clearly intangible item from the definition in § 58-411, an inference might arise that some other items of capital, such as inventories, which are in fact tangible property would fall within the prohibition on State property taxation of tangible personal property in § 171 of the Constitution . . .".

With respect to the inference suggested in your letter, I feel that the reasoning of the Supreme Court of Appeals of Virginia, in the case of City of Roanoke v. Michael’s Bakery Corporation, 180 Va. 132, would be applicable. In my opinion, the Supreme Court in this case has upheld the right of the General Assembly to define what shall be included as capital. You state that since it is proposed to recognize the taxation of income as a substitute for the present tax upon money as an item of capital, I see no reason why this cannot be done in the same manner as other moneys have been classified in this manner. I refer specifically to § 58-408 of the Code.

In my opinion, the proposal does not violate any provision of the State Constitution.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Real Estate—Buildings Moved or Demolished During Year—How assessed.

HONORABLE W. R. MOORE
Commissioner of the Revenue for City of Norfolk

April 24, 1964

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

"I am writing to ask your opinion of § 58-811.2.
"A city operating under § 58-811.1, of necessity has to be governed by § 58-811.2.
"Our Assessor has come to the writer on several occasions, raising the question whether or not we should assess the following:

"1—Buildings moved from city to out of the city by owner.
"2—Buildings moved from one lot to another lot by owner or by sale.
"3—Buildings demolished by owner and a new building constructed during same year.
"4—Only a portion of building demolished by owner during the year.
"5—Buildings demolished or moved by court order.

"If I have read correctly § 58-811.2, none of the above could be, save possibly example #5, under this Section because of the following: '. . . fortuitous happening beyond the control of the owner.' Limited to the acts of God, or beyond the control of the owner.'"

Section 58-811.2 does not, in my opinion, apply to examples 1, 2 and 4. This section would, in my opinion, apply to examples 3 and 5.

Under the circumstances relating to example 3, §§ 58-811.1 and 58-811.2 would be applicable. Under § 58-811.1 the new building would be subject to assessment and the tax thereon prorated as prescribed therein. Under § 58-811.2 the other building having been demolished, the tax thereon would be subject to proration as prescribed therein.

In example 5, the owner's loss has been caused by an order of court—that is, by a happening beyond his control. In my opinion, the tax thereon for that year would be subject to proration.

I am assuming that the governing body of the city has adopted the resolution required by § 58-811.1.

TAXATION—Recordation—Applicable to sales contract.

RECORDATION—Sales Contract—Subject to tax.

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

October 8, 1963

This will acknowledge receipt of your letter of October 5, in which you state that I failed to advise you in my letter of October 4 whether or not the writing referred to therein was subject to a recordation tax. This writing, in my opinion,
should be construed as a contract subject to taxation under the provisions of § 58-58 of the Code.
Any deed which is executed and submitted for recordation pursuant to this contract will also be subject to the recordation tax provided for in § 58-54 of the Code.

TAXATION—Recordation—Assignment Attached to Deed of Trust—Tax must be paid for both.

HONORABLE RHEA F. MOORE, JR.
Clerk of Circuit Court of Tazewell County

This will acknowledge receipt of your letter of April 24, in which you enclosed a photostatic copy of a deed of trust from Robert T. McGee to Dale Myers, Trustee, which deed of trust conveys certain real estate located in Tazewell County and secures the payment of a note in the amount of $3,125.71, with interest. This deed of trust also contains an assignment of the same to the North American Acceptance Corporation, which assignment is contained in the body of the deed of trust and reads as follows:

"For value received, the undersigned does hereby assign this deed of trust to North American Acceptance Corporation, without recourse, this 13th day of April, 1964.
Parce, Inc. of Virginia
By _______________________________
Notary Public
Commissioned as: ___________________
My commission Expires: ____________
"
Paragraph 2 of the contract is as follows:

"It is agreed that the purchase price for said estate shall be Sixteen Thousand ($16,000.00) Dollars cash, of which Five Thousand ($5,000.00) Dollars is cash in hand paid, the receipt of which is hereby acknowledged, and the balance of said purchase price shall be due and payable in cash upon the delivery of the deed by the Vendor to Purchaser, when this sale is closed, as hereinafter set forth."

I do not feel that the other provisions of the contract are material in arriving at the recordation tax. This tax should be measured by the value of the property placed thereon by the parties to the contract unless it is obvious that it is of greater value. No cash consideration (except the down payment on the purchase price) is stated in the contract. Section 58-58 of the Code, to the extent that it is applicable to the present situation, is as follows:

"On every contract relating to real * * property, except as hereinafter provided, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for * * *.

The exceptions in this section do not apply and since the value of the property contracted for exceeds the consideration, the value thereof ($16,000.00) must be the basis for determining the recordation tax.

TAXATION—Recordation—Deed for Cemetery Lot—Subject to tax.

Honorable John H. Powell
Clerk of Circuit Court of Nansemond County
March 27, 1964

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

"The Meadowbrook Memorial Gardens, Incorporated, is the owner of a 40.07 acres of land, situated in Nansemond County, operated for profit as a cemetery.

In 1963 a mausoleum containing 278 crypts was erected. The Corporation has sold all available burial spaces but no instruments to the purchasers have been recorded.

"Does the Commissioner of Revenue have the authority to remove this mausoleum from the tax rolls of Nansemond County without recorded instruments to support his action?

"If an instrument is necessary to remove the mausoleum from the tax rolls, what kind of instrument should be recorded, and would the Clerk charge a recording tax thereon?

"In addition to the above, the owners of the cemetery have laid off two subdivisions of burial spaces. In the event that the owners sell
merely the right of interment with no conveyance of title to the land itself, would recordation taxes be charged?"

Inasmuch as the corporation is operated for profit, its property is not exempt from taxation. Section 58-12 of the Code—Section 183(c) of the Constitution.

The crypts to which you refer are, I assume, located in a structure above the ground. I am not familiar with the terms of the contract the corporation has made with the purchasers of the spaces, but I understand that ownership of the land and structure thereon remains in the corporation which has covenanted to maintain and care for the crypts perpetually. Assuming this to be correct, the property will continue to be subject to taxation in the name of the land title owner.

Whenever the corporation sells a plot of land located in the cemetery and executes a deed therefor and the purchaser records the deed, it becomes the duty of the commissioner to adjust the land books accordingly as in the case of any transfer of real estate. The property acquired by the purchaser as a burial plot would, of course, be exempt from further assessment for real estate taxes.

Neither § 58-64 of the Code, nor any other section, exempts a deed for a cemetery lot from the recordation tax. Furthermore, § 58-65 expressly provides that—

"Except as provided in this article, no deed or other instrument shall be admitted to record without the payment of the tax imposed thereon by law."

I see no escape from the conclusion that the recordation tax in such cases should be charged.

With respect to the fifth paragraph of your letter, the answer is in the affirmative. This would seem to be a contract relating to real estate, subject to the recordation tax provided for in § 58-58 of the Code.

TAXATION—Recordation—How computed where option to purchase is involved.

May 12, 1964

HONORABLE H. C. DEJARNETTE
Clerk of Circuit Court of Orange County

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

"Enclosed is a verifax copy of a Lease Agreement that has been mailed to this office for recordation. You will see from this agreement that the lease term is one year, the forwarding letter stated the yearly rental to be $2,700.00. You will further notice, however, that the last paragraph of said agreement states that there is a separate agreement which provides for certain extension and purchase options, incorporated by reference, but not known to me.

"In light of your recent ruling that options should be taxed for recordation purposes on the basis of the full option price and in view of the long standing procedure that a lease agreement carries a recordation tax based upon the full amount payable as rent or the full value of the property, whichever is lesser, I would like to have a ruling from you as to the proper method of assessing the recordation tax against this instrument."
The last paragraph of the lease to which you refer, is as follows:

"The rental for the demised premises, certain extension and cancellation privileges, and a purchase option, or options, are more fully set forth in that certain Agreement between the parties hereto, of even date herewith, and this Lease is subject to all the covenants, conditions and terms set forth in said Agreement, which is hereby adopted herein and made a part hereof by reference to the same full extent as if all the covenants, conditions and terms thereof were copies in full herein."

The language of this paragraph would indicate that there is no extra consideration passing between the parties for the option. If this is true, the basis for the determination of the recording fee is $2700.00, or one year's rent. Where a lease is made for one year with the privilege of renewing or cancelling, the recording tax is based only upon the rental for the one year period. This is in accordance with two opinions of this office, copies of which I am enclosing and which are published in the Reports of this office for 1937-1938, at p. 165 and 1938-1938, at p. 275.

In the second paragraph of your letter, you refer to a recent ruling that "options should be taxed for recordation purposes on the basis of the full option price." I believe you have misinterpreted our ruling with respect to options, which was furnished to the clerk of Accomack County on February 4, 1963, and is published in Report of the Attorney General (1962-63), at p. 282. In that opinion we stated:

"... An option to purchase real estate is unquestionably a contract relating to real property, exercisable at the election of one of the parties, and, therefore, the contract is subject to the tax provided in this Code section.

"In my opinion, there is no escape from the conclusion that the statutory recordation tax must be collected."

We did not intend to state that the basis for the recordation tax would be the full option prices, although I can see that it might be so interpreted. The proper basis for the determination of the recording tax on an option is the consideration paid for the option. If the person should exercise his rights under the option and purchase the property, then the recording tax on the deed would be based on the consideration recited therein or the actual value of the property conveyed, whichever is greater.

TAXATION—Recordation—Not charged on deed of land to be used for church cemetery.

WILLS—Executor—Must appear personally before clerk of court to qualify.

September 13, 1963

HONORABLE MARGARET B. BROWN
Clerk of Circuit Court of Culpeper County

This is in reply to your letter of September 12, which reads as follows:
"I have several questions I will appreciate having you answer for me.

"Is a recordation tax charged on a deed to trustees of land to be used for a church cemetery? The Code Section says it is not chargeable for land used for religious purposes, and I do not know whether the cemetery comes under that heading.

"Mr. William Cannon has asked me if Mary Morris Hoffman may qualify as co-executor of her father's estate, and give bond without coming to this office. She is a patient at Blue Ridge. If she can, do I send the bond and other papers to her there to be signed before a Notary Public? I suggested to Mr. Cannon that the best way would be for her to decline to qualify, but he does not think she will do that."

With respect to your first question, I am of the opinion that the deed in question is exempt from the recordation tax imposed under § 58-54 of the Code. In my opinion, a cemetery owned and operated by a church may be considered as real estate held by a religious body wholly and exclusively for religious purposes as contemplated by § 58-64 of the Code. It is a proper religious function of a church to provide a burial ground for the membership of the church. The exemption is permitted under Section 183 of the Constitution, and our Supreme Court, in the case of Hanover County v. Trustees. 203 Va. 613, said the following:

"In construing § 183 of the Constitution we have said that as a general rule provisions exempting property of individuals or corporations from taxation must be strictly construed, taxation being the rule rather than the exception. But since it has always been the policy of this State to exempt property of the character mentioned in the several clauses of § 183 of the Constitution, it should not be construed with the same degree of strictness that applies to the provisions exempting property of individuals or private corporations, and as to such property exemption is the rule and taxation the exception."

With respect to your second question, it is my opinion that it is necessary that an executor personally appear before the clerk or the court, as the case may be, for the purpose of qualifying. In this connection, it will be noted that in § 64-127, relating to the list of heirs required to be filed by a personal representative of a decedent, it is provided that at the time of his qualification such personal representative shall—

"... furnish the court or clerk before which or before whom he qualifies . . . ."

Also, in § 64-128, it is provided as follows:

"No person appointed by a will executor thereof shall have the powers of executor until he qualifies as such by taking an oath and giving bond in the court in which or before the clerk by whom the will or an authenticated copy thereof is admitted to record, except that he may provide for the burial of the testator, pay reasonable funeral expenses and preserve the estate from waste."

I have inquired of the clerk of the Chancery Court of the City of Richmond as to the practice in that office, and I am advised by him that his court has
always considered it to be mandatory that the personal representative personally appear before the court or the clerk when qualifying as an executor or administrator.

TAXATION—Recordation—Tax for recording deed of trust should be computed in accordance with § 58-65.1.

HONORABLE W. E. SPENCER
Clerk of Circuit Court of Floyd County

April 29, 1964

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

"A situation has arisen in regard to the duties of a clerk in the imposition of Section 58-65.1 of the tax code which is as follows:

"A deed of trust, or a duplicate copy thereof was presented to me for recordation after it had been recorded in another county, the deed of trust constituting a lien on real property in Floyd and the other county. The amount secured was for $17,000.00 but no break-down was given between the two counties, and the clerk of the other county on this basis charged and collected the State tax, which is proper, and on grounds that he was not given a break-down charged and collected the full amount of ½ of the State tax. The beneficiary complains of double taxation if I should also collect the county tax. The Floyd County ordinance was passed about two years ago, and was modeled from the suggested ordinance from your office as contained in the 'opinions.'

"My question is, should I, or should I not charge a county tax in view of these circumstances, and if so, how should I determine a break-down between the two counties or Floyd County's part?"

In my opinion, the recordation should be prorated between Floyd County and the other county in which the deed of trust was first recorded. Code § 58-65.1 contains the following language:

"... where a deed or other instrument conveys, covers or relates to property located in the county or city of first recordation and also to property located in another county or city, or in other counties or cities, the tax imposed under the authority of this section by the county or city of first recordation shall be computed only with respect to the property located in such county or city; and when such deed or other instrument is recorded in the other county or city, or in other counties or cities, the tax imposed by each of them under the authority of this section shall be computed only with respect to the property located in each of them, respectively. ..."

This language, in my opinion, is clear and unambiguous. It contemplates, in my opinion, that the tax imposed by each county shall be based upon the value of the property in each county.

It might be well for the clerks of the two counties in question to agree upon the
relative value of the property conveyed with respect to each county and divide the tax in accordance therewith. The county which collected the entire tax should make a refund of the excess tax that it collected.

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TAXATION—Recordation—When tax is based on actual value of property conveyed.

RECORDATION—Tax—When based on actual value of property conveyed.

HONORABLE JULIAN UPDIKE
Clerk of Circuit Court of Warren County

June 10, 1964

This is in reply to your letter of June 5, in which you present the following question:

“. . . Under the following circumstances, on what value would the recording tax be assessed? A deed is presented to be admitted to record and I am advised that the price paid to the grantor-seller for the lot was $1,000.00; that the grantee-purchaser and the grantor-seller had, two years ago, entered into a binding installment sales agreement, whereby there would be no conveyance of the lot until the lot was paid for in full; that subsequent to the execution of the installment sales agreement, and after a portion of the purchase price had been paid on said agreement, the grantee-purchaser erected a dwelling house on the lot, at a cost of $15,000.00; that the grantor-seller was in no way connected with and had no interest in the erection of the dwelling; that the installment sale purchase price had been paid in full and now the grantor-seller has delivered a deed to the said lot . . .”

The first paragraph of § 58-54 of the Code provides:

“On every deed, except a deed exempt from taxation by law, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater.”

In the case presented here the actual value of the property conveyed by the deed is greater than the consideration passing to the grantor. Therefore, the recordation tax must be measured by the value of the property.

The improvements erected on the property have become attached to and a part of the real estate and, therefore, follow the conveyance of the legal title to the property.

The conclusion reached here is similar to that stated in an opinion of this office issued on February 17, 1949, to the Clerk of the Court at Norfolk. This opinion is published in the Report of Attorney General (1948-49), at p. 250.

Upon inquiry to the Department of Taxation, I find that the Honorable C. H. Morrissett is in accord with this ruling.

The tax for recordation purposes should be based on sixteen thousand dollars.
TAXATION—Sales and Use Tax—Whether a state may shift its responsibility for the collection of these taxes to another state will turn on the particular facts in each case.

May 11, 1964

HONORABLE OROY L. CANTRELL
Member, House of Delegates

This is in reply to your letter of April 30, 1964, in which you state:

"I am sure that you know that the Commonwealth of Kentucky has a State Sales and Use Tax and some of my constituents have gotten pretty much involved with the Kentucky Tax Department about the collection of a sales tax from Kentucky residents. I will give you one particular illustration.

"Pound Hardware and Furniture Company of Pound, as well as perhaps other businesses in this area, do a substantial business in Kentucky. Some of this merchandise is picked up by the purchaser and some is delivered. About two or three years ago when this tax first became effective, Pound Hardware agreed to pay the Commonwealth of Kentucky for purchases they delivered to the Kentucky customers, which they have done. Of course, the Kentucky residents were not charged one cent sales tax but the entire amount of the tax paid to Kentucky was paid by Pound Hardware. This doesn't seem to satisfy the Kentucky authorities and they have told the owners of this store that they must collect the tax directly from the customer. They also have asked that the tax authorities in Kentucky be permitted to audit the books of Pound Hardware and Furniture Company to see if they are paying for all sales delivered in Kentucky. In a few instances, they have stopped some of the Kentucky cars and searched them for merchandise they may have bought in Pound.

"With this explanation my questions are: are we compelled by law to collect the Kentucky Sales Tax on merchandise delivered to Kentucky by our own trucks? Can they force us to open up our books for an audit? And if the tax is to be paid to Kentucky can they compel us to collect it from the individual?"

A sales tax of three percent of the gross receipts derived from retail sales in Kentucky is imposed upon retailers by Kentucky Revised Statutes § 139.200. A use tax of three percent is imposed upon purchasers of tangible personal property bought for storage, use or other consumption in Kentucky by § 139.310. Property subject to the sales tax is exempt from the use tax by § 139.500. Monthly tax returns are required of retailers engaged in business in the State under § 139.550, and, under § 139.700, the Department of Revenue, under some circumstances, may authorize the collection of the tax by retailers not engaged in business within the State. A "retailer engaged in business in this State" is defined, and a duty imposed upon such retailers to collect the use tax, in § 139.340 which reads as follows:

"(1) Except as provided in KRS 139.470 and 139.480, every retailer engaged in business in this state and making sales of tangible personal property for storage, use or other consumption in this state, shall, at the time of making the sales, or, if the storage, use or other con-
sumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax levied under KRS 139.310 from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the department.

“(2) “‘Retailer engaged in business in this state’ as used in this chapter includes any of the following:

“(a) Any retailer maintaining, occupying, or using permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business;

“(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.”

The questions you have asked are not easy of solution and perhaps no hard and fast answer can be given. The correct answer in particular situations can likely be reached only after analysis of the complete facts pertaining thereto.

Your letter seems to indicate that your constituent is concerned with a sales tax, and not a use tax. The implication is that Kentucky deems Pound Hardware and Furniture Company to be a retailer engaged in business within the State of Kentucky, though I cannot say that such a conclusion seems justified under the facts you have given.

As to the sales tax, the crucial question in each case is whether the foreign seller is “doing business” within the taxing state within the legal interpretation of that term, or whether the business transactions are insulated from taxation by the Commerce Clause or the Due Process Clause of the United States Constitution. There are quite a few interesting cases in this field, and distinguishing features are not always readily apparent. I cannot, of course, in an opinion such as this, explore many of the cases, but will confine myself to a few that seem most closely related to the situation you have posed.

I assume, from the absence of facts to the contrary in your letter, that the hardware company has not qualified to do business in Kentucky, has no business offices or general agent in Kentucky, and does not actively solicit business through traveling salesmen or otherwise, except, perhaps, for advertising. If these assumptions be correct, I am of the opinion that there is no liability upon the hardware company for the Kentucky sales tax, regardless of the fact that delivery is occasionally made by the company to a purchaser in Kentucky. This conclusion is influenced by the case of McLeod v. J E Dilworth Co., 322 U.S. 327 (1944) wherein the Supreme Court of the United States, confining itself solely to the applicability of the Arkansas sales tax to a foreign seller, held that there was no liability upon such seller who had not qualified to do business in the state, maintained no place of business or general agent there, but did regularly solicit orders through traveling salesmen, the orders being subject to acceptance at the home office, and there filled by delivery to a common carrier.

On the other hand, unquestionably Kentucky purchasers are liable for the use tax on articles purchased from the hardware company. Not only is this true, but under some circumstances conceivably Kentucky might make foreign sellers her tax agents for collecting the use tax, even though she could not impose any sales tax liability. At the very same term at which the McLeod case was decided, and in a factual situation I cannot distinguish from that obtaining in the
McLeod case, the Supreme Court so held in General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944). It thus seems that what may be deemed interstate commerce, and on that ground exempt from imposition of a sales tax, may not always relieve the foreign seller from liability for the use tax. In the McLeod and General Trading Co. cases there was regular solicitation by traveling salesmen, and apparently this constitutes "doing business" to the extent that liability for the use tax can be imposed upon the foreign seller. But the lines delineating what is and what is not "doing business," as far as the use tax concerned, are not entirely clear. At the other end of the spectrum is the case of Miller Bros. v. Maryland, 347 U.S. 340 (1954). In that case the Delaware seller sold only to customers at its store in Wilmington, making deliveries sometimes by common carrier, sometimes by its own trucks. It did not take orders by mail or telephone and had no salesmen, general agent or office in Maryland. It did circulate its customers and advertise through Delaware papers and radio stations. Maryland attached one of seller's truck in an effort to collect its use tax on goods sold to Maryland purchasers. The Supreme Court held that the facts did not show any "invasion or exploitation of the consumer market in Maryland," and that Maryland could not shift the burden of collecting or paying her tax to a foreign merchant in such circumstances.

A closer case is that of Scripto v. Carson, 362 U.S. 207 (1960). There the Florida Comptroller levied a use tax liability against a Georgia corporation which maintained no office in Florida and had no regular employee or agent there, nor did it own any bank account or stock of merchandise there. Orders for the Georgia seller's products were solicited by ten advertising specialty brokers, each having a written contract and specific territory, and all of whom were Florida residents. The Supreme Court affirmed the decision of the Supreme Court of Florida holding that the Georgia seller had sufficient jurisdictional contacts in Florida, and, therefore, must register as a dealer under the statute and collect and remit to the State the use tax imposed on its sales.

From the foregoing, I believe you will readily recognize the importance of careful analysis of each factual situation as far as your constituents are concerned, and my difficulty in giving you a definite answer without more detailed information. The question of whether or not there is any obligation upon the hardware company to submit its books to examination by agents of the Kentucky Department of Revenue depends upon whether the company has submitted itself to the jurisdiction of Kentucky by the manner of its business operation in that State.

TAXATION—Sales Tax—Cities of Hampton and Newport News may impose tax.

August 9, 1963

HONORABLE FRED W. BATEMAN
Member, Virginia State Senate

This is in reply to your letter of August 2, 1963, in which you request my opinion as to the legality of a sales tax if imposed by the Cities of Hampton and Newport News under existing law.

The charters for both the City of Hampton (Chapter 9, Extra Session, 1952) and the City of Newport News (Chapter 141, Acts of 1958) confer the following powers upon the Cities:
§ 2.02. Financial Powers.—In addition to the powers granted by other sections of this charter the City shall have power:

"(a) To raise annually by taxes and assessments in the city such sums of money as the council shall deem necessary to pay the debts and defray the expenses of the city, in such manner as the council shall deem expedient, provided that such taxes and assessments are not prohibited by the laws of the Commonwealth. *** "

The foregoing provision is essentially the same as that contained in the charter of the City of Roanoke, and was the subject of consideration by the Supreme Court of Appeals in Fallon Florist v. City of Roanoke, 190 Va. 564. In a well reasoned opinion the Court there upheld the constitutionality of an ordinance of the City of Roanoke imposing taxes on the sale of floral designs, cigarettes and hotel room rentals. I am aware of no legislative enactment, nor subsequent pronouncement of the Court, which would alter or nullify the holding in the Fallon case.

Accordingly, I am of the opinion that the Cities of Hampton and Newport News are not precluded from enacting the necessary ordinance to impose a sales tax within the respective cities.

TORTS—Immunity—Government officials not liable for damages caused by exercise of official duties.

Honorable Mack I. Shan Holtz
State Health Commissioner

This is in reply to your letter of July 19, 1963, in which you request my opinion as to the liability of a landowner and the local health department in instances where the health department issues an installation permit for sewerage treatment facilities where there is to be a discharge of treated effluent into public waters.

Your first inquiry relates to the rights and obligations of one property owner to another. Such matters are not proper areas of concern for this office; hence, we must leave this question unanswered and allow the property owners to seek advice from private counsel in this regard.

Your second inquiry raises the question of legal liability upon an agency or political subdivision of the Commonwealth when discharging the functions of office. It is well settled that there is no liability upon government officials so long as their acts are confined to their governmental duties, and an exercise of powers legally conferred upon them.

Providing the minimum standards for sanitary treatment plants, and granting permits for the installation of sewage treatment facilities are proper functions of the State Water Control Board, the State Health Department and the local health authorities. See, Report of the Attorney General (1953-1954), p. 235.

I am of the opinion that the issuance of a permit by a local health department for the installation of a sewerage treatment facility would not result in placing any legal liability upon the local health department for damages which may be alleged to be incurred by other property owners by reason of a discharge of treated effluent into public waters.
TOWNS—Bonded Indebtedness—When Section 127 of Constitution of Virginia applies.

TAXATION—Towns—Bonded Indebtedness—When Section 127 of Constitution of Virginia applies.

ASSESSMENTS—Towns—Bonded Indebtedness—When Section 127 of Constitution of Virginia applies.

February 21, 1964

HONORABLE C. W. CLEATON
Member, House of Delegates

This will acknowledge receipt of your letter of February 20, which reads as follows:

"I have a request from Mayor Otto Sizemore of Clarksville, Mecklenburg County, to ask you to give a ruling on the following question:
"Clarksville has an airport outside the corporate limits of the town which is built on leased land for as long as the town operates said land as an airport. They have spent approximately $30,000.00 on this; grading and hardsurfacing with black top. The state has given them nearly that amount also. Mayor Sizemore wants to know if this airport can be included into property values and carried as an assessed valuation in the assets of the town of Clarksville. I will appreciate your giving me the ruling on this so that I may write him."

Since receiving your letter, we have conferred with you, and we find that what Mayor Sizemore had in mind was whether the property in question could be considered in determining the 18% debt limitation as prescribed in Section 127 of the Constitution.

This, of course, would not be property that could be included in the total assessed valuation of the real estate in the town. The property is located outside the corporate limits and, of course, the property is assessed in the owner's name for the purpose of county taxes.

In determining the total assessed valuation of property to be included in the 18% limitation under the section of the Constitution mentioned, none of the property owned by the town could be included since such property is not subject to taxation.

TOWNS—Mayor—If authorized by council as trial officer, may try cases where warrant issued by special justice of peace.

JUSTICE OF PEACE—Special—How compensated.

June 15, 1964

HONORABLE NATHAN B. HUTCHERSON, JR.
Member House of Delegates

This is to acknowledge receipt of your letter of June 4, 1964, requesting my interpretation of House Bill 560, enacted by the General Assembly of 1964 as Chapter 524. I shall answer your questions seriatim.

". . . in our town, [Rocky Mount] the Mayor tries the town cases
and we would like to know whether you would construe this bill [Act] as giving the authority to the Mayor of the town to try cases where a warrant is issued by a special justice of the peace to be known as a Warrant Justice.

The charter granted the Town of Rocky Mount by the General Assembly by Chapter 90, Acts of 1873, does not expressly provide that the Mayor be a trial officer. However, former § 16-129 grants the council of a town (within the jurisdiction of a trial justice) authority to designate the Mayor thereof a trial officer. From what you state, I assume that the Council of the Town of Rocky Mount has so acted and that the Mayor is a trial officer. Section 16.1-70 of the Code of Virginia (1950) as amended provides that the courts created under former § 16-129 shall, after July 1, 1956, be designated and known as police courts of such towns. Section 6 of said Chapter 524 [not a part of House Bill 560 as originally introduced] is as follows:

"For the purposes of this act 'municipal court judge' or 'municipal court' as the case may be, shall include police court judge or police court as requisite."

I am of the opinion that the Mayor of Rocky Mount, assuming he has been authorized by the Town Council to be a trial officer, has authority to try cases where the warrant is issued by a special justice of the peace elected pursuant to the provisions of Chapter 524, Acts of 1964.

"We would also like to know, as to paragraph 5 of the said bill, [§ 5 of the Act] what interpretation your Department would give to lines 2, 3, and 4, page 2, of this bill. In other words, we would like to know whether or not this warrant justice would have to be paid a salary or whether or not a fee, as now provided for justices of the peace could be added on to the court cost for the issuance of this warrant by these warrant justices."

Section 5 of said act provides in part that an issuing justice or justices shall receive such salary or other compensation as the Council may from time to time prescribe by ordinance.

I am of the opinion that the Town Council could by ordinance prescribe that such a special justice of the peace be compensated on a fee basis and same could be added to the court costs. In fixing fees, § 14-133 (14.1-125 of Chapter 386, Acts of 1964) should be examined.

TOWNS—Ordinances—May not adopt ordinances which pertain to motor vehicle violations by reference.

MOTOR VEHICLES—Traffic Violations—Town may not adopt ordinances by reference.

HONORABLE ROBERT I. ASBURY
Commonwealth's Attorney for Smyth County

April 1, 1964

This is in reply to your letter of March 23, which reads as follows:
"It is respectfully requested that your office render an opinion as to whether or not the Motor Vehicle Ordinance of the Town of Saltville is valid today.

"Prior to 1958 the Town of Saltville, Virginia adopted Title 46 of the Code of Virginia of 1950 by reference. Since that time no action has been taken by the Town except to amend the sections dealing with driving under the influence.

"It appears that adoption of Title 46 by reference was legal prior to the enactment of Title 46.1. Sections 46-1 to 46-553 were repealed by Acts 1958, c. 541.

"I am forwarding herewith an opinion rendered by Penn, Stuart & Stuart, counsel for the Town of Saltville. I prosecute all criminal cases appealed from the Mayor's Court to the Circuit Court of Smyth County."

I am unable to find any provision in Title 46 (repealed in 1958) of the Code of 1950 which specifically authorized local governing bodies to enact ordinances which pertain to motor vehicle violations by reference to the State statute. When Title 46 was amended by Chapter 541, Acts of Assembly (1958), it was specifically provided in § 46.1-188 as follows:

"Ordinances enacted on and after January 1, 1959, by local authorities pursuant to §§ 46.1-180 through 46.1-185 shall set forth in full any provision of this title which such local authority intends to incorporate into such ordinance. Nothing contained in this title shall be construed to require the re-enactment of ordinances heretofore validly adopted." (Emphasis supplied.)

In the absence of express statutory authority authorizing the local governing body to enact ordinances adopting statutory laws by reference, in my opinion the validity of such an ordinance is in doubt. The enactment of an ordinance is a legislative function and the members of the town council must have access to the text of the ordinance. This question is one that has not arisen frequently in this office, but in an opinion dated May 10, 1960 (Opinions of Attorney General, 1959-1960, at p. 367), to the Commonwealth's Attorney of Augusta County, this office held that ordinances adopted by a town by reference to county ordinances were not valid.

As to whether or not the terminal sentence of § 46.1-188 of the Code has an effect upon ordinances adopted by reference prior to January 1, 1959 depends upon whether such ordinances were validly adopted. As stated, ordinances adopted by reference to a statute are, in my opinion, of doubtful validity.

TREASURERS—Dog Licenses—Conditions under which license fees must be divided between city and State.

DOG LAWS—Licenses—When must be divided between city and State.

November 29, 1963

Honorable J. Gordon Bennett
Auditor of Public Accounts

This is in reply to your letter of November 8, 1963, in which you request my opinion as to whether a treasurer of a city is obligated to remit to the State Treasury 15% of the gross proceeds from the sale of 1963 dog tags under the following circumstances:
You advise that the council of the city entered into an agreement with the Commission of Game and Inland Fisheries, under date of February 6, 1963, pursuant to § 29-184.5 of the Code of Virginia, wherein the city assumed all responsibility for the enforcement of the dog laws within the municipality. You further bring to my attention the provisions of the Code of Virginia providing for the reports and remittances to be made by the city treasurer to the State Treasurer.

Inasmuch as the sale of 1963 dog license tags commenced in November of 1962 and the first report of the local treasurer to the State Treasurer was not due until April 10, 1963, you are interested in knowing if the proceeds from the sale of such tags between November, 1962 and February 6, 1963 must be divided between the State and locality as provided in § 29-206 of the Code.

I am of the opinion that your inquiry must be answered in the affirmative. This conclusion is founded upon the mandate in § 29-206 of the Code which reads, in part, as follows:

"County and city treasurers shall keep all money collected for dog license taxes in a separate account from all other funds collected by them and shall remit fifteen per centum of the gross receipts from the sale of dog licenses to the State Treasurer quarterly, as follows:

(a) For the months of January, February and March, not later than April tenth.

Collections for dog tags of the succeeding calendar year, made in November and December of the prior calendar year shall, for the purpose of remitting to the State Treasurer, be considered as having been made in the succeeding January and be included in the remittance for the first quarter of the succeeding year."

While the treasurer of the city is under no duty to remit 15% of the gross receipts from the sale of dog tags to the State Treasurer more often than quarterly, it, nevertheless, appears quite evident that the treasurer is obligated to keep a daily record book on such sales as provided in § 29-205 of the Code. I am of the opinion that the rights of the State and locality vested at the time of collection of the fees and the proceeds must be accounted for to the city as well as the State. When the city took over the responsibility for the enforcement of dog laws pursuant to § 29-184.5 of the Code, all money collected thereafter from the sale of dog tags vested in the city. Inasmuch as this responsibility did not shift from the State to the city until February 6, 1963, I am of the opinion that license fees collected prior to that date must be divided between the city and the State as provided in § 29-206 of the Code.

VIRGINIA BOARD OF VOCATIONAL REHABILITATION—Status—On July 1, 1964, succeeds to duties and responsibilities formerly had by the Division of Vocational Rehabilitation of the State Board of Education.

EDUCATION—Virginia Board of Vocational Rehabilitation—Successors to duties and responsibilities formerly had by State Board of Education.

HONORABLE WOODROW W. WILKERSON
Superintendent of Public Instruction

April 29, 1964

This will acknowledge receipt of your letter of April 27, in which you enclosed
two letters, dated respectively December 14, 1954 and December 28, 1954, in which Governor Thomas B. Stanley designated the State Board of Education as the Virginia agency to make disability determinations for purposes of the Old Age and Survivors’ Insurance law, with authority to enter into an agreement with the Department of Health, Education and Welfare relating to administration of the plan.

You direct attention to a statute enacted at the 1964 session of the General Assembly (Chapter 276), § 22-330.3 of which reads as follows:

“All powers, duties, functions, funds, records, and property of the State Board of Education and the State Department of Education relating to the Division of Vocational Rehabilitation, and the Woodrow Wilson Rehabilitation Center are hereby transferred to and vested in the Board.”

You state that you have received a request from Mr. M. D. Dewberry, Social Security Representative of the Department of Health, Education and Welfare, to secure from this office an opinion as to whether the designation made by Governor Stanley, as set forth above, will remain in effect and will vest in and be applicable to the Board of Vocational Rehabilitation on and after July 1, 1964.

You further state that Mr. Dewberry desires an opinion as to whether the Virginia Board of Vocational Rehabilitation, as of July 1, 1964, will have the duties and responsibilities formerly had by the Division of Vocational Rehabilitation of the State Board of Education.

The answer to both questions is in the affirmative. The Code section cited by you transfers the operation of the program in question in its entirety from the State Board of Education to the Virginia Board of Vocational Rehabilitation, effective July 1, 1964. It directs the State Board of Education to deliver all of its records and property pertaining to the program to the new Board established under § 22-330.1(a) of the Act. Furthermore, under the provisions of §§ 22-330.7 and 22-330.9, the General Assembly specifically accepts the provisions and benefits of the acts of Congress relating to this matter and designates the Virginia Board of Vocational Rehabilitation as the State agency to cooperate with the federal government in carrying out the provisions and purposes of the federal act providing for the rehabilitation program.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Coverage—Section 51-111.56(b) does not apply to tax examiner of the Department of Taxation.

April 17, 1964

HONORABLE CHARLES H. SMITH
Director, Virginia Supplemental Retirement System

This is in reply to your letter of April 16, in which you request my opinion as to whether a Tax Examiner and License Inspector of the Department of Taxation would qualify as a law enforcement officer, under Chapter 186, Acts of General Assembly (1964). This chapter amended § 51-111.56 of the Code of Virginia by adding paragraph (b) which reads as follows:

“(b) Any law enforcement officer member in service who has not attained age sixty-five may be retired on account of total and permanent
disability as a result of the felonious misconduct of another provided such act occurred subsequent to May one, nineteen hundred sixty-three while the member was in service and on active duty, upon written notification to the Board, made by the member or his appointing authority setting forth at what time the retirement is to become effective; provided that such effective date shall be after the last day of service but shall not be more than ninety days prior to the date of such notification."

I assume you have reference to persons who are employed by the Department of Taxation as auditors or agents and who, under orders of that department, may make examinations of the books and records of any taxpayer pursuant to the provisions of § 58-39 of the Code. This section reads as follows:

"The Department of Taxation may, in any case, in lieu of proceeding under § 58-36, cause the books and records of any taxpayer containing information concerning the tax liability of such taxpayer to be examined by one of its authorized auditors or agents in order that the tax and revenue laws of this State may be enforced; but, in any such case, if any taxpayer shall refuse to submit his books and records for examination, as aforesaid, the Department may proceed under § 58-36."

It will be noted that under this section, if the taxpayer shall refuse to submit his books and records for examination, the department may proceed to accomplish the examination of the taxpayer's books by the procedure provided in § 58-36 of the Code.

The auditor or agent does not appear to have the power to force the taxpayer to produce his books and records. That power is delegated to the State Tax Commissioner under § 58-36. The word "enforce" generally means to compel obedience. Our Supreme Court of Appeals, in the case of Anderson v. Biazzi, 166 Va. 309, at p. 311, quoted and adopted the dictionary definition that "enforce" means "to put into execution by force."

The amendment under consideration relates to retirement prior to attaining the age of sixty-five "on account of total and permanent disability as a result of the felonious misconduct of another" which ordinarily would result where a police officer, in the performance of his duty, attempts to take into custody a person charged with an offense and is disabled due to the person resisting by force the attempt of the officer to make the arrest.

In my opinion, the amendment to § 51-111.56 under consideration does not apply to a Tax Examiner of the Department of Taxation.

Upon inquiry to the Department of Taxation, I find that the Department does not have the classification of License Inspector. The classification is Tax Examiner and persons in this classification do make investigations and examinations pertaining to the license requirements under State law.


HONORABLE EDMOND M. BOOGS
Commissioner, Department of Labor and Industry

January 6, 1964

This will acknowledge receipt of your letter of December 18, 1963, which reads as follows:
"This is to request an official interpretation from your office relative to Title 40, Section 24 of the 1962 Code of Virginia as amended. Section 40-24 requires the establishment of regular payroll records and payment of wages. Does this section apply to professional people such as doctors, lawyers, architects, engineers, etc., who employ others to work in consideration of wages, salaries and commissions?

"It has been the interpretation and practice of this Department that all such professionals come within the meaning of the law as defined in Section 40-1.1 of the 1962 Code of Virginia designated as "Definitions."

"It would be greatly appreciated if you could give me your interpretation at an early date. A copy of a letter written to one of our Consultants relative to this matter is enclosed for your information."

Section 40-1.1 provides that as used in Title 40 of the Code, unless the context clearly requires otherwise, the following terms shall have the following meanings:

" § 40-1.1—"

"(3) 'Employer' means an individual, partnership, association, corporation, legal representative, receiver, trustee, or trustee in bankruptcy doing business in or operating within the State who employs another to work for wages, salaries, or on commission.

* * * * *

"(5) 'Business establishment' means any public institution owned or operated by the State or by a local government, or otherwise owned or operated, or any other proprietorship, firm or corporation where people are employed, permitted or suffered to work, but shall not include agricultural employment on a farm."

Section 40-24 provides, in part, as follows:

"(a) All employers engaged in the operation of any business establishment shall establish regular pay periods and shall pay salaried employees at least once each month and employees paid on an hourly rate at least once every two weeks or twice in each month. Upon termination of employment an employee shall be paid all wages or salaries due him for work performed prior thereto; such payment shall be made on or before the date on which he would have been paid for such work had his employment not been terminated."

In my opinion, the terms "employer" and "business establishment," as defined in § 40-1.1 of the Code, are sufficiently broad to apply to professional occupations of the nature suggested in your letter. Under § 40-24 persons practicing such professions are required to establish regular pay periods of one month or two weeks, or twice each month, dependent upon whether they are salaried employees or paid on an hourly basis.

In your letter you state that "Section 40-24 requires the establishment of regular payroll records." I am unable to find any language in Title 40 making such a requirement.
WAGES—Salaries—Municipal corporation may pay salaries to hourly employees on vacation.

December 27, 1963

HONORABLE ORBY L. CANTRELL
Member, House of Delegates

This is in reply to your letter of December 13, 1963, which reads as follows:

"Some of the incorporated towns in Wise County have, and are now giving paid vacations to its salary employees and demands are being made on some of these towns from time to time by employees who work on a hourly basis for a paid vacation. "Is it in order for the municipal corporation to give paid vacations to employees paid by the hour?"

The authorities generally appear in agreement that vacation pay constitutes a form of additional earnings and is not regarded as a gratuity or gift. If a municipality should determine it to be beneficial to provide a program of vacations with pay, and assuming there is no prohibition in the charter, I am aware of no legal objection to the program including employees paid by the hour as contradistinquished from those employed on a weekly or monthly basis.

WARRANTS—Arrest—Jailor must obtain warrant before formally committing a person to jail.

JAILS AND PRISONERS—Commitment—Warrant required.

March 11, 1964

HONORABLE WILLIAM H. HODGES
Member, House of Delegates

This is to acknowledge receipt of your letter of March 7, in which you state in part:

"I am writing you at the request of my father, J. A. Hodges, City Sergeant, Chesapeake, Virginia. The Municipal Court has recently instituted a docket system and he takes the position that it would still be necessary for him to have a warrant in order to commit a prisoner to jail when arrested by a police officer. All lock-up facilities are under his control and the police department has no provision for detaining prisoners pending trial in the Municipal Court."

When an arrest is made without a warrant, it is the duty of the arresting officer to take the person arrested forthwith before a justice of the peace or other officer having the authority to issue criminal warrants. See § 52-21, Code of Virginia, 1950 and the case of Winston v. Commonwealth, 188 Va. 386, 49 S.E. (2d) 611. Such officer may either release the person if he considers that there is not sufficient cause for charging him with the offense (§ 19.1-106), or commit the person to jail, or recognize the person to appear before the appropriate court (granting bail). One of the reasons for such procedure is to afford the accused opportunity to procure bail.
I am of the opinion that a jailor has no authority to formally commit a person to jail unless there is an appropriate process (warrant or mittimus) directing him so to do.

WEAPONS—Forfeiture to State—May not be disposed of by sale at public auction.

June 26, 1964

HONORABLE EMMORY H. CROCKETT
Commonwealth's Attorney of Lee County

This will acknowledge receipt of your letter of June 23, which reads as follows:

"The Honorable Joseph N. Crilin, Judge, Circuit Court of Lee County, has requested that I inquire of your office in reference to certain weapons forfeited to the State of Virginia in accordance with the provisions of Sections 18.1-269 and 18.1-270 of the Code of Virginia. "The question is, whether under the statutes, certain weapons forfeited under the aforementioned sections, which are not needed for use of the Peace Officers in and for this County, may be periodically sold at public auction to the highest bidder therefor, and, if such weapons may be sold at public auction, what disposition of the funds received therefrom may be made."


With specific reference to the second paragraph of your letter, in my opinion, there is no statutory authority under which any of the weapons forfeited may be sold at public auction. In my opinion, under §§ 18.1-269 and 18.1-270, all such weapons must be destroyed with the exception of those that are needed for the police officers. It is the duty of the court to determine whether or not any of the weapons are needed by the police officers.

WELFARE—Adoption Proceedings—Welfare Department may not recover expenses incurred in adoption proceedings.

CIVIL PROCEDURE—Adoption Proceedings—Welfare Department may not recover expenses incurred in adoption proceedings.

June 1, 1964

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

This is in reply to your letter of May 28, in which you request my advice as to whether or not the expenses incurred by the Welfare Department in making studies connected with child adoption cases may be taxed as costs.
I am not aware of any statute which would permit the Welfare Department to recover any part of such expenses in an adoption proceeding. The service rendered by the Welfare Department in connection with adoptions is mandatory under Chapter 14 of Title 63 of the Code, and there is nothing in this chapter which would indicate that the Department would be entitled to recover any sum as a part of the cost. The Welfare Department is expected to render this service, and to bear the expense out of the appropriations made to it, and this applies to the local organization.

Only those expenses that are authorized by statute may be taxed as a part of the cost. In this connection, you are no doubt familiar with § 14-124.1, which limits the clerk's fee in such cases to $10 and this applies even though there may be more than one child involved in an adoption petition. See Opinion of Attorney General to Clerk of Albemarle County, dated June 27, 1963, published in Report of Attorney General (1962-63), at p. 18.

WELFARE—Local Board—Number of members to be appointed.

July 22, 1963

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

This will acknowledge receipt of your letter of July 11, which reads as follows:

"Section 63-52 of the Code, as amended by the Acts of 1956, states that the local Board of Welfare in each County shall consist of five members; but also provides that the governing body may by resolution, either before or after the effective date of the 1956 amendment, limit such board membership to three members.

"On June 14, 1956 our Board of Supervisors adopted a resolution limiting the membership to three.

"We should now like to know whether our Board of Supervisors can now rescind said resolution and adopt another one increasing the membership to five, and requesting the Judge to make the two appointments."

Section 63-52 of the Code, to which you refer, reads as follows:

"The local board in each county shall consist of five members, residents of the county, appointed by the judge of the circuit court of such county, provided that the governing body of any county may by resolution, either before or after the effective date of this act, limit such board membership to three members."

We have given this matter careful consideration and have concluded that whenever the board of supervisors adopts a resolution in accordance with this section, limiting the board membership to three members, it cannot subsequently by resolution increase the membership. Once the resolution is adopted reducing the membership to three, the matter is ended, in my opinion.
WELFARE—Local Welfare Board—In Loudoun County must be appointed by Judge of Circuit Court.

PUBLIC OFFICERS—Compatibility—Deputy commissioner of revenue may not serve as member of local welfare board.

June 23, 1964

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

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

"Since July 1, 1963, Loudoun County has had an executive secretary to the Board of Supervisors under the provisions of Section 15-551.1 of the Code and at the same time, I was relieved of the duties of clerk to the board. The County does not have an executive or county manager form of government.

"Under these conditions and pursuant to the provisions of Section 63-60, would the judge of the circuit court or the governing body appoint members of the local welfare board?

"Is it permissible for a local welfare board member to also serve as a deputy Commissioner (field deputy) of Revenue and receive compensation for both positions?"

Section 63-60 of the Code, to which you refer in your letter, provides that the governing body of the county shall appoint the members of the local welfare board in those counties which have adopted the county executive form or the county manager form of organization and government. It further provides that "in any county in which the clerk of the board of supervisors is some person other than the county clerk and in which county such clerk of the board of supervisors acts as executive manager of the county under appointment by said board by virtue of the provisions of § 15-237," the local welfare board shall be appointed by the governing body of the county. The situation in your county does not apply to either of the three categories mentioned above. The reference in § 63-60 to the appointment of a clerk of the board of supervisors under the provisions of § 15-237 applies only to Augusta County and three other counties, but does not include Loudoun. This part of this section is repealed by Chapter 623, Acts of Assembly (1962), effective July 1, 1964. Therefore, it is necessary that the judge of the Circuit Court of Loudoun County appoint the members of the local welfare board in that county.

With respect to the last paragraph of your letter, this office has previously held that § 15-486 of the Code in applicable to deputies of the officers mentioned therein. One of these officers is the commissioner of the revenue. Therefore, I feel there is grave doubt as to the eligibility of a deputy commissioner of the revenue to serve upon the local welfare board.

WELFARE—Rules and Regulations—State board to establish minimum standards for personnel of local boards.

STATE INSTITUTIONS—State Board of Welfare and Institutions—Authority to promulgate rules and regulations.

July 26, 1963

HONORABLE W. L. PAINTER
Director, Department of Welfare and Institutions

I am in receipt of your letter of July 23, 1963, in which you present the following situation and inquiry:
"The Federal welfare authorities are now encouraging the states to tighten up their several welfare programs in order to provide better services to recipients, of course, with the ultimate goal of making as many of them as possible self-sufficient. One way of seeking to accomplish this purpose would be to limit the caseloads of local welfare employees in order that they might see clients more often and work more closely with them, as to their individual or family problems.

"Would you kindly give me your opinion as to whether the State Board, under its rule-making authority, is empowered to establish maximum caseloads for personnel of local welfare departments in order to approach a solution to the problem above set forth?"

Pertinent to the resolution of your inquiry are §§ 63-25 and 63-26 of the Virginia Code which in part provide:

"§ 63-25.—The Board shall make such rules and regulations, not in conflict with this title, as may be necessary or desirable to carry out the true purpose and intent of this title". (Italics supplied).

"§ 63-26.—The Board shall establish minimum standards of service and personnel based upon training, experience and general ability for the personnel employed by the Commissioner, local boards and local superintendents in the administration of the succeeding chapters of this title and make necessary rules and regulations to maintain such standards, including such rules and regulations as may be embraced in the development of a system of personnel administration meeting requirements of the Federal Social Security Board." (Italics supplied).

In light of the language italicized above, it is manifest that the State Board of Welfare and Institutions is authorized to promulgate rules and regulations which may be necessary or desirable to effectuate the various provisions of Title 63 of the Virginia Code. Moreover, the State Board is required to establish minimum standards of service for personnel employed by local boards and local superintendents in the administration of the provisions of Title 63 and is further empowered to make necessary rules and regulations to maintain such standards. I am therefore constrained to believe that, if a rational and practical connection exists between the maintenance of the minimum standards of service prescribed by the State Board and the case loads of personnel employed by local boards of public welfare and local superintendents in the administration of the provisions of Title 63, the State Board may properly adopt rules or regulations establishing maximum case loads for such personnel.

WELFARE AND INSTITUTIONS—Authority—To transfer prisoners to State Convict Road Force.

COURTS—Authority—No authority to transfer prisoners to State Convict Road Force for violations of county ordinances.

HONORABLE THEODORE W. FREDERICK
Sheriff for Arlington County

December 6, 1963

This is in reply to your letter of November 15, 1963, which was supplemented by your letter of December 4, 1963, in which you present several questions for
my consideration relating to the authority of the courts to include language in
the order when convicting violators of county ordinances providing for the
transfer of such prisoners to the State Convict Road Force or State Farm for
Misdemeanants.

Sections 53-100 and 20-61 of the Code provide for sentencing misdemeanants
to the State Convict Road Force, but there is no comparable provision relating
to sentencing such misdemeanants directly to the State Farm for Misdemeanants.

The authority for the transfer of prisoners to the State Convict Road Force
or the State Farms for Misdemeanants is vested in the Board of Welfare and
Institutions by virtue of §§ 53-83 and 53-84 of the Code. I am aware of no
 provision in the law which would authorize a court to order a person confined
on a State Farm for Misdemeanants to work out the term of imprisonment and
the fine and costs imposed for violations of county ordinances.

WITNESSES—Competency—When wife may testify against husband.

CRIMINAL PROCEDURE—Witnesses—When wife competent to testify against
husband.

HONORABLE DONALD H. SANDIE
Member, House of Delegates

July 11, 1963

This is to acknowledge receipt of your letter of July 8, 1963, in which you
state in part:

"Will you please advise as to whether Section 8-288 of the Code of
Virginia will prohibit the testimony of a wife (upon objection by her
husband) against her husband in a criminal case where the husband
is charged under 18.1-152 of the Code of Virginia of shooting into an
occupied dwelling. The wife, her two children and mother were oc-
cupants of the dwelling."

Section 8-288 of the Code of Virginia (1950) as amended states in part as
follows:

"In criminal cases husband and wife shall be allowed, and, sub-
ject to the rules of evidence governing other witnesses, may be com-
pelled to testify in behalf of each other, but neither shall be compelled,
nor, without the consent of the other, allowed to be called as a witness
against the other, except in the case of a prosecution for an offense
committed by one against the other or against a minor child of either."

(Italics supplied).

It would seem that where a person is charged with the offense of shooting into
a building whereby the lives of the occupants of the building are placed in peril,
the occupants being the wife and the children of the said person, the testimony of
the wife should be admissible under Section 8-288, as the offense is being com-
mittet by the husband against the wife and against the minor children. I am
assuming that the children are minors.
I am therefore of the opinion that under the above circumstances, the testimony of the wife may be introduced in the trial of the husband.

WORKMEN'S COMPENSATION ACT—Employee—When covered.

Honorable George W. Dean
State Forester

This is in reply to your letter of November 8, 1963, in which you request my opinion as to whether employees of the Division of Forestry, Department of Conservation and Economic Development, would be protected under the Workmen's Compensation Act in the event of injury while fighting fires on Federal lands, such as the National Forest or National Park.

The determinative fact in the application of coverage provided under the Workmen's Compensation Act is whether the employee is injured during the course of his duties and within the scope of his authority. Assuming that such employee are directed by persons in authority to enter upon Federal lands for the purpose of fighting fires in accordance with the terms of the co-operative agreement between the Division of Forestry and the Forest Service of the United States, Department of Agriculture, I am of the opinion that such employees would be protected under the terms of the Workmen's Compensation Act.

ZONING—Ordinances—Amendment—Compliance with provisions of § 15-968.7 mandatory.

Ordinances—Zoning—Amendments—Compliance with provisions of § 15-968.7 mandatory.

Honorable Andrew J. Ellis, Jr.
Commonwealth's Attorney of Hanover County

This will acknowledge receipt of your letter of February 27, in which you state that subsequent to the effective date of Chapter 407 of the Acts of General Assembly (1962), certain amendments were made to the zoning ordinances in Hanover County contrary to the procedure contained in said chapter. These amendments are codified as Article 8 of Chapter 28, Title 15 of the Code of Virginia.

It is my understanding that certain ordinances were amended without strictly complying with § 15-968.7. You have requested my advice as to whether or not such amendments adopted in such manner are invalid, null and void.

In my opinion, the procedure prescribed in this chapter is mandatory upon the board of supervisors and any amendments adopted in violation thereof, especially with respect to the holding of public hearings, are not enforceable.
ZONING—Ordinances—Must be adopted in compliance with provisions of § 15-968.7 of the Code.

COUNTIES—Ordinances—Zoning ordinances must be adopted in compliance with § 15-968.7 of the Code.

March 3, 1964

HONORABLE G. M. WEEMS
Treasurer of Hanover County

This is in reply to your letter of February 29, in which you refer to certain zoning ordinances adopted by Hanover County subsequent to the effective date of Chapter 407, Acts of Assembly (1962), relating to zoning, which is codified as Article 8 of Chapter 28 of Title 15 of the Code. This matter has previously been brought to the attention of this office by Hon. Andrew J. Ellis, Jr., Commonwealth's Attorney of Hanover County. We advised Mr. Ellis that in view of the failure of the ordinances to be adopted in compliance with the provisions of § 15-968.7 of the Code, such ordinances, in our opinion, are not enforceable. I enclose herewith copy of that opinion.

In your letter you refer to § 15-854.2 of the Code, which section reads as follows:

“All proceedings had in the preparation, certification and adoption of zoning ordinances after December thirty-first, nineteen hundred fifty-nine, and in counties prior to January one, nineteen hundred sixty-two, which shall have been in substantial compliance with the provisions of this article are validated and confirmed, and all such zoning ordinances adopted or attempted to be adopted pursuant to the provisions of this article are declared to be validly adopted and enacted, notwithstanding any defects or irregularities in the adoption thereof.”

You state that it appears that the legislature “intended to ratify, validate and confirm ordinances theretofore adopted by counties.” Unquestionably, it was the purpose of this section to cure any difficulties and irregularities in the adoption of zoning ordinances after December 31, 1959 and prior to January 1, 1962, if the procedure followed was in substantial compliance with the provisions of Article 2 of Chapter 24 of Title 15 of the Code. You point out that the zoning ordinance, which had been adopted prior to July 1, 1962, and which was amended subsequent to that time provided its own procedure for amendment and that such procedure was followed.

I do not construe § 15-854.2 as in any way having any effect upon the provisions of § 15-968.7. This latter section is specific in its requirements with respect to public hearings and notice prior thereto. Section 15-854.2 merely confirms and validates ordinances insofar as they affect zoning provisions.

ZONING—Ordinance—Published advertisements of hearings must conform to § 15-961.4 rather than the local zoning ordinance.

ORDINANCES—Zoning—Published advertisements of hearings must conform to § 15-961.4 rather than the local zoning ordinance.

May 19, 1964

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

This will acknowledge receipt of your letter of May 14, in which you en-
closed copy of a zoning ordinance of the county of Chesterfield and state that the provision contained in that ordinance with respect to publishing advertisements of hearings is different from that provided in § 15-961.4. You request my advice as to whether or not the provisions of § 15-961.4 prevail. In my opinion the provisions of this latter section must be complied with in preference to the local zoning ordinance. See, § 15-968.7.

You refer to § 15-968.9 in which it is stated "no such special exception may be granted except after notice for hearing as provided by § 15-961.4." Section 15-961.4 referred to in the above quotation provides that an advertisement must be published once a week for two successive weeks in a newspaper published or having general circulation in the county and that the publication shall specify the time and place of hearing which shall be not less than five days nor more than ten days after final publication. You refer to § 15-968.10 and suggest that there is an inconsistency between this section and § 15-961.4 in that § 15-968.10 requires the hearing to be held not less than ten days after the advertisement.

There does not seem to be any conflict between the provisions of subsection (c) of 15-968.9 and § 15-968.10 with respect to notice and time of a hearing. Subsection (c) relates to the power of the board of zoning appeals "to hear and decide appeals from the decision of the zoning administrator on applications for such special exceptions as may be authorized in an ordinance." The terminal paragraph of subsection (c), in my opinion, prevents the granting of any such special exception by the decision of the zoning administrator or by the appeals board on appeal from such decision, except after notice and hearing in either event as provided in § 15-961.4.

Section 15-968.10 does not relate to a decision made by the zoning administrator nor to an appeal to the board of zoning appeals from a decision of the zoning administrator. This section relates to applications for special exceptions filed with the zoning administrator, but concerning which the ordinance does not authorize the zoning administrator to pass initial judgment, and which must be transmitted by the administrator to the secretary of the board who shall place the matter on the docket of the board of zoning appeals, and shall advertise for a public hearing thereon. This particular hearing shall be held not less than ten days after such advertising, and after giving written notice of such hearing to the parties in interest. The five day limitation contained in § 15-968.9, by reference to § 15-961.4, does not apply when the proceeding is under § 15-968.10.

You present a further question as follows:

"Who would be considered parties in interest as specified in § 15-968.10?"

With respect to this question, parties in interest, in my opinion, include the person or persons who have filed the application and also such other persons who have filed objections to the exceptions sought by the application, or who have filed a notice in writing of their interest in the matter.

Your letter contains the following additional question:

"I further direct your attention to § 15-969.1 of the Code of Virginia which says, 'This chapter shall not affect any resolution or ordinance enacted under any other law heretofore (prior to June twenty-ninth, nineteen hundred and sixty-two) adopted except as specifically provided,' and ask your opinion as to exactly how this code section is to be interpreted concerning the presently existing Chesterfield County zoning ordinance."

Section 15-969.1 preserves the resolutions and zoning ordinances enacted prior to June 29, 1962. This section, as well as § 15-834.2, in my opinion, relate to resolutions and ordinances insofar as they affect zoning provisions. I do not
construe these sections as modifying in any way the provisions of § 15-968.7, so as to permit amendments to be made to zoning ordinances under a procedure that does not comply with the State statute. In this connection, see opinion to H. Selwyn Smith, published in the Report of the Attorney General (1962-63), at p. 315. I enclose herewith an opinion of March 3, 1964, to the treasurer of Hanover County relating to a similar matter.
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