OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1965 to June 30, 1966

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1966
Letter of Transmittal

August 1, 1966

HONORABLE MILLS E. GODWIN, JR.
Governor of Virginia
State Capitol
Richmond, Virginia

My dear Governor Godwin:

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, 1965 through June 30, 1966.

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. BURTON
Attorney General
### PERSONNEL OF THE OFFICE

*(Post Office Address, Richmond)*

<table>
<thead>
<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
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<tbody>
<tr>
<td>Robert Y. Button</td>
<td>Culpeper County</td>
<td>Attorney General</td>
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<tr>
<td>Kenneth C. Patty</td>
<td>Tazewell County</td>
<td>First Assistant</td>
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<tr>
<td>D. Gardiner Tyler</td>
<td>Charles City County</td>
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<td>Robert D. McLlwaine, III</td>
<td>Petersburg City</td>
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<td>Reno S. Harp, III</td>
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<tr>
<td>M. Harris Parker</td>
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<td>William B. Bagwell, Jr.</td>
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<td>A. R. Woodroof</td>
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<td>Paul D. Scotts</td>
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<td>Curtis R. Mann</td>
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<tr>
<td>Eleanor W. Tilley</td>
<td>Smyth County</td>
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<td>Mabel G. Hurt</td>
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<td>N. Lynn Campbell</td>
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<td>Cheryl Ruffin</td>
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<td>Margaret E. Bennett</td>
<td>Colonial Heights</td>
<td>File Clerk</td>
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<tr>
<td>Frances T. Robertson</td>
<td>Richmond City</td>
<td>Receptionist</td>
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</table>
ATTORNEYS GENERAL OF VIRGINIA
From 1776 to 1963

Edmund Randolph ........................................... 1776-1786
James Innes .................................................. 1786-1796
Robert Brooke ............................................... 1796-1799
Philip Norborne Nicholas ................................... 1799-1819
James Robertson ............................................ 1819-1834
Sidney S. Baxter ............................................ 1834-1852
Willis P. Bocock ............................................ 1852-1857
John Randolph Tucker ...................................... 1857-1865
Thomas Russell Bowden .................................... 1865-1869
Charles Whittlesey (military appointee) .................. 1869-1870
James C. Taylor ............................................ 1870-1874
Raleigh T. Daniel .......................................... 1874-1877
James G. Field .............................................. 1877-1882
Frank S. Blair .............................................. 1882-1886
Rufus A. Ayers .............................................. 1886-1890
R. Taylor Scott ............................................ 1890-1897
R. Carter Scott ............................................. 1897-1898
A. J. Montague ................................................ 1898-1902
William A. Anderson ....................................... 1902-1910
Samuel W. Williams ......................................... 1910-1914
John Garland Pollard ...................................... 1914-1918
*J. D. Hank, Jr. ............................................ 1918-1918
John R. Saunders ........................................... 1918-1934
†Abram P. Staples ........................................... 1934-1947
‡Harvey B. Apperson ....................................... 1947-1948
§J. Lindsay Almond, Jr...................................... 1948-1957
**Kenneth C. Patty ......................................... 1957-1958
A. S. Harrison, Jr. ......................................... 1958-1961
Frederick T. Gray ........................................... 1961-1962
Robert Y. Button ........................................... 1962-

*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.
Carter, Frederick v. City of Norfolk. From Corporation Court, City of Norfolk, Part II. Involving assessment of costs in traffic cases. Judgment for the Commonwealth.

Coleman, James R. v. Maher and May. Appeal from order of Circuit Court of Henrico County dismissing defendants as being immune from liability. Writ denied.


Crider, Irene Cole v. Commonwealth of Virginia. From Circuit Court of Fairfax County. Upon a conviction of violation of § 18.1-110 (knowingly misuse or misappropriate public funds). Reversed and remanded.


Hammer, James C. v. Commonwealth of Virginia. (Four cases.) From Corporation Court, City of Newport News. Burglary and rape. Reversed.


Howard, Roger T. v. Commonwealth of Virginia. From Corporation Court, City of Norfolk. Upon a conviction of attempt to murder. Affirmed.


Westy, Sam v. Commonwealth of Virginia. From Circuit Court, City of Virginia Beach. Upon a conviction of murder. Affirmed.


CASES PENDING IN THE SUPREME COURT OF APPEALS

Allison, Howard H. v. Commonwealth of Virginia. From Hustings Court, City of Portsmouth. Upon a conviction of forgery and uttering of a check.

Clarke, Robert Bernard v. Commonwealth. From Circuit Court of Essex County. Grand larceny.


Commonwealth of Virginia v. Green Motor Lines, Incorporated. Appeal from order of the Hustings Court, City of Richmond granting licensee refund for erroneous assessment of registration fees in the amount of $5,086.00.

Court, John M. and Court, Mildred E. v. Commonwealth of Virginia. From Circuit Court, James City County and City of Williamsburg. Appeal from decision denying petition for erroneous assessment of taxes.
Elder, L. R. v. Holland, R. H. Appeal from order sustaining defendant's demurrer in action for defamation of character.

Fairfax County Airport Authority. Appeal from the State Corporation Commission for refusing to issue permit to establish airport.

Fox, Oscar William, Jr. v. Commonwealth of Virginia. Appeal from order of the State Corporation Commission granting Commonwealth's judgment in the amount of $5,494.00 for unpaid license fees.

Hubbard, Lillie Echols v. Commonwealth of Virginia. From the Corporation Court, City of Danville. Upon a conviction of several misdemeanors.

Jennings, Page Lewis, Estate of v. Commonwealth, etc. Appeal by Commonwealth from order granting refund of inheritance taxes paid under protest.


Markley, Mervin M. v. Joseph R. Blalock, M.D., etc. From Circuit Court of Smyth County. Appeal from order granting writ of habeas corpus.

Matthews, James J. v. Commonwealth. From Circuit Court of Fairfax County. Appeal from conviction of robbery.

Moore, Daniel E. v. Commonwealth. From Corporation Court, City of Norfolk. Appeal from conviction of forgery, passing bad checks, and larceny.

Noe, James H. v. Commonwealth. From Circuit Court of Bedford County. Appeal from conviction of burglary.

O'Brien, Marybelle Louise v. Socony Mobil Oil Company. Appeal from the State Corporation Commission not approving recapitalization plan of the corporation.

Ord, Edward C. et al v. Douglas B. Fugate, State Highway Commissioner of Virginia. From Circuit Court of Loudoun County. Suit for declaratory judgment as to right to have highway maintained. Appeal by landowners.

Rollins, Eugene Williams v. Commonwealth. From Circuit Court of Arlington County. Murder.

Shepheard, William L. Sr., etc. v. W. R. Moore, etc., et al. Appeal from order refusing to enjoin assessment and collection of State capitation taxes.

Shumate, Lewis Hampton, Jr. v. Commonwealth of Virginia. From Circuit Court of Washington County. Appeal from conviction for a misdemeanor.

Smith, Martin Thomas v. Commonwealth. From the Circuit Court of Prince William County. Voluntary manslaughter.

Stevens, George Calvin v. Commonwealth of Virginia. From Hustings Court, City of Portsmouth. Appeal from conviction for maiming.

Taylor, Johnny Paul v. Commonwealth of Virginia. From Corporation Court, City of Norfolk, Part II. Appeal from conviction of burglary.

The Board of County Supervisors of Fairfax County v. The Alexandria Water Company. From the State Corporation Commission. From an appeal granting enlargement of the area to the water company.

Washington Holding Corporation v. County Utilities Corporation. From the State Corporation Commission. Approving fee for sewer connection to nursing home.

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


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

REPORT OF THE ATTORNEY GENERAL

Butts, Evelyn v. Albertis Harrison, Governor, et al. Appeal from judgment of three-judge District Court for Eastern District of Virginia, holding requirement of payment of poll tax as a prerequisite to voting to be constitutional and valid. Reversed, requirement held invalid.


Riggan v. Virginia. Appeal from Supreme Court of Appeals of Virginia from conviction for operation of a lottery. Reversed.


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

Carter, Frederick v. City of Norfolk. From Corporation Court, City of Norfolk, Part II. Involving assessment of costs in traffic cases.


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


CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


City Hall Tavern, Inc. v. A.B.C. Board. Suit to enjoin enforcement of Board's order suspending license to sell alcoholic beverages and attacking validity of A.B.C. regulation. Pending.


Griffin, Cochezse J. et al v. State Board of Education. Suit seeking declaratory judgment invalidating Virginia tuition grant statutes. Statutes held not unconstitutional on their face. Pending.

Haskins, Portia A. v. Levin Nock Davis, et al. Suit seeking injunction and declaratory judgment invalidating Virginia statutes requiring persons who registered for Federal elections only to register again in order to vote in all elections. Statutes held unconstitutional.


Pettaway, Avis M. v. County School Board of Surry County, Virginia. On remand from Supreme Court of the United States. Order entered on remand.


City Hall Tavern, Inc. v. A.B.C. Board. Circuit Court, City of Richmond. Petition for review of Board's action in suspending plaintiff's license. Dismissed as moot.

City of Richmond, etc. v. Commonwealth, et al. Chancery Court, City of Richmond. Suit to sell and dispose of islands in James River. Dismissed.


Culbertson, W. W. v. County School Board of Loudoun County. Circuit Court of Loudoun County. Suit to remove cloud on title to real property. Pending.


Ferguson, Grady H., et al. v. Edgar E. Evans, Jr., et al. Circuit Court of Franklin County. Motion for judgment for damages alleged to have arisen out of highway construction project. Pending.


Kahn, Leon S. v. Commissioner of Mental Hygiene, etc., et al. Circuit Court, Arlington County. Suit to enjoin employment of plaintiff's wife by the State. Pending.


Lee, Henry, M.D. v. Maurice Rowe, Commissioner of Agriculture and Immigration. Circuit Court, City of Richmond. Temporary injunction issued against Department of Agriculture. Dismissed.


State Board of Pharmacy v. Textile Workers Union of America, etc. Circuit Court, City of Richmond. Suit to enjoin illegal practice of pharmacy. Pending.


Virginia Real Estate Commission v. Thomas M. Gibbs. Law and Equity Court, City of Richmond. Appeal from revocation of real estate salesman's license. Pending.


CASES TRIED BEFORE THE STATE CORPORATION COMMISSION OF VIRGINIA

Commonwealth of Virginia v. David E. Snell. Motion under § 56-304.12 for judgment in the sum of $1,700.00 for unpaid registration and license taxes (fees). Judgment in favor of the Commonwealth.

Commonwealth of Virginia v. George Alfred Justis. Motion under § 56-304.12 for unpaid registration and license fees in amount of $872.00. Pending.

Commonwealth of Virginia v. Jessie Eugene Lewis or Gene Lewis. Motion under § 56-304.12 for judgment in the sum of $1,085.75 for unpaid registration and license taxes (fees). Judgment in favor of the Commonwealth.

Commonwealth of Virginia v. Oscar William Fox, Jr. Motion under § 56-304.12 for judgment in the sum of $5,494.00 for unpaid registration and license taxes (fees). Judgment in favor of the Commonwealth.

Commonwealth of Virginia v. Quinn Freight Lines, Inc. Rule issued by the State Corporation Commission under § 56-304.12 for unpaid registration and license fees. Settled by payment of license taxes (fees) in amount of $694.00. Pending formal disposition.


Norfolk and Western Railroad Company v. Commonwealth of Virginia. Application for refund of taxes denied.

CASES TRIED OR PENDING IN THE COURTS OF RECORD OF THE STATE IN WHICH THE DIVISION OF MOTOR VEHICLES WAS INVOLVED

Alt, Albie v. C. H. Lamb, Commissioner, etc. Circuit Court of Fairfax County. Appeal from an action of the Commissioner suspending operator’s license under § 46.1-430. Reversed.

Billups, Lloyd Junius v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Law and Chancery Court, City of Hampton. Appeal from an action of the Commissioner suspending operator’s license and registration certificates and plates under § 46.1-449. Dismissed.

Blaker, Robert Monroe v. C. H. Lamb, Commissioner, etc. Circuit Court, City of Williamsburg and County of James City. Appeal from an action of the Commissioner suspending operator’s license under § 46.1-430. Pending.

Boyter, Richard Dave v. C. H. Lamb, Commissioner, etc. Corporation Court, City of Danville. Appeal from an action of the Commissioner revoking operating privilege for a period of sixty days pursuant to § 46.1-419. Dismissed.

Capitol Auto Sales, Inc. v. C. H. Lamb, Commissioner, etc. Circuit Court, City of Norfolk. Bill of Complaint filed from Commissioner’s suspension of operating privilege, registration certificates and plates under §§ 46.1-167.4 and 46.1-167.5. Vehicle properly covered with liability insurance. Dismissed.


Diggs, George Thayer, Jr. v. C. H. Lamb, Commissioner, etc. Circuit Court, City of Williamsburg. Appeal from an action of the Commissioner suspending operating privilege and registration certificates and plates under § 46.1-442. Commissioner rescinded the order of suspension. Dismissed.

Dixon, Johnnie Lee v. National Union Fire Insurance Company, etc., et al. Circuit Court, City of Norfolk. Bill of Complaint to enjoin Commissioner from revoking operator’s license and registration certificates and plates under §§ 46.1-449 and 46.1-167.4. Supreme Court affirmed action of the Circuit Court of the City of Norfolk that vehicle properly covered with liability insurance. Ended.

Drake, Thomas. Circuit Court of Fairfax County. Petition filed requesting that he be found competent. Declared competent. Ended.

Fisher, Charles Elwood v. C. H. Lamb, Commissioner, etc. Corporation Court, City of Alexandria. Appeal from an action of the Commissioner suspending operator’s license and privilege to drive for a period of thirty days pursuant to § 46.1-430. Affirmed.


McLaughlin, John Forrest. Circuit Court of Pittsylvania County. Notice filed for Petition for order of Restoration to Sanity. Order entered declaring petitioner to be recovered and of sound and competent mind. Ended.


Moore, Ballard v. Commissioner of the Division of Motor Vehicles. Circuit Court of Bath County. Appeal under § 46.1-437 from an action of the Commissioner revoking operator's license due to mental or physical infirmities or disabilities rendering it unsafe to drive a motor vehicle upon the highways. Operator's license surrendered. Pending.

Moore, Clarence Earl v. C. H. Lamb, Commissioner, etc. Circuit Court, City of Virginia Beach. Appeal from an action of the Commissioner revoking the operating privilege and suspending the registration privileges pursuant to §§ 46.1-417 and 46.1-418. Petitioner found not the person who was convicted. Commissioner's action revoked.

Pearce, Kenneth Wayne v. C. H. Lamb, Commissioner, etc. Circuit Court, City of Newport News. Petition to Rescind Order of Suspension of operating and registration privileges pursuant to § 46.1-167.4. Information received that subject not the owner of vehicle involved in the accident. Dismissed.

Pippin, Allen Byrd v. C. H. Lamb, Commissioner, etc. Appeal from an action of the Commissioner revoking operator's license for a period of one year pursuant to § 46.1-430. Commissioner's order revoking operator's license vacated. Dismissed.


Robertson, Oscar Leonard v. C. H. Lamb, Commissioner, etc. Law and Equity Court, City of Richmond. Injunction order entered temporarily enjoining Commissioner from suspending operator's license, registration certificates and plates under § 46.1-442 pending determination of declaratory judgment action. Pending.

Selquist, Stephen John v. Commissioner of Division of Motor Vehicles, et al. Circuit Court of Fairfax County. Appeal from an order revoking operating privilege for a period of sixty days pursuant to § 46.1-419. Pending.

Sheets, Hugh Samuel v. C. H. Lamb, Commissioner, etc. Circuit Court of Tazewell County. Appeal from an action of the Commissioner revoking operator's license under § 46.1-167.2. Pending.


The Home Indemnity Company and Winifred S. Hawkes v. The Travelers Indemnity Company, et al. Law and Equity Court, City of Richmond. Petition for Declaratory Judgment under the provisions of §§ 8-578 through 8-585. Order of suspension entered by the Commissioner pursuant to § 46.1-449. Injunction entered pending the maturing of this cause.

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 § 46.1-449. Pending.

Wrenn, William Page v. Commonwealth of Virginia, Division of Motor Vehicles, etc.
Circuit Court of Fairfax County. Bill to enjoin Commissioner from enforcing his order of revocation under § 46.1-417 and to compel restoration of operator's license and registration certificates and plates. Period of revocation expired—financial responsibility furnished. Dismissed.

CASES TRIED OR PENDING IN THE COURTS OF RECORD OF THE STATE IN WHICH THE VIRGINIA EMPLOYMENT COMMISSION (UNEMPLOYMENT COMPENSATION COMMISSION) WAS INVOLVED

In the Matter of Oceana Drugs, Inc., and John S. McFall, individually and t/a Oceana Drug. Circuit Court, City of Virginia Beach. Pending.

HABEAS CORPUS CASES

Approximately 459 habeas corpus cases were tried in both State and Federal trial courts. In addition, there were 40 appellate cases handled in the Supreme Court of Appeals of Virginia and in the United States Court of Appeals for the Fourth Circuit.
### EXTRADITION HEARINGS CONDUCTED AND REPORTS SUBMITTED PURSUANT TO REQUEST OF THE GOVERNOR

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<th>Date</th>
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<td>July 7, 1965</td>
<td>Henry Frederick Clark</td>
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<tr>
<td>April 19, 1965</td>
<td>Allen Nabutovsky</td>
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<td>Steve Sofocleus</td>
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<td>Moses Lovell Stanley</td>
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<td>William R. Nix</td>
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<td>Ralph Orndorf</td>
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<td>Jessie Arrington</td>
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<td>Charles Bell Woodard</td>
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AIRPORTS—County Obligation—May not guarantee State pro rata share.
COUNTIES—Airports—No authority to guarantee State pro rata share.

Honorable A. Erwin Hackley
Commonwealth's Attorney for Page County

May 25, 1966

This will acknowledge receipt of your letter of May 24, 1966, which reads as follows:

"Mr. J. J. Meadows, who is sixty-seven (67) years of age, has a lease on certain lands for his lifetime, where he operates an airport known as the Shenandoah Airport. He is obtaining financial aid from the State for lengthening and surfacing the runway. In order to obtain this aid the airport authorities must guarantee that the airport will be operated for a period of at least ten years.

"Is there any authority which would permit the Board of Supervisors of Page County, Virginia, to guarantee or obligate Page County to the Commonwealth of Virginia to the effect that they would be responsible for the pro rata refund to the State of Virginia for any years that this leased airport should not operate for the next ten year period?"

In my opinion, the board of supervisors does not have the authority to create an obligation against the county, such as you state is contemplated. Such commitment would be in violation of the provisions of Section 115(a) of the Virginia Constitution.

On March 7, 1957, we rendered an opinion to the Honorable Felix E. Edmunds, Member of the House of Delegates, in which this constitutional prohibition is discussed at length. This opinion is found in the Report of the Attorney General (1956-1957), at p. 9. I enclose copy of this opinion.

ALCOHOLIC BEVERAGE CONTROL LAWS—County Ordinance—Regulating sale of wine and beer on Sunday—Craig County.

COUNTIES—Ordinances—Regulating sale of wine and beer on Sunday—Craig County.

Honorable Arthur B. Crush, Jr.
Commonwealth's Attorney for Craig County

December 13, 1965

This will acknowledge your letter of December 7, 1965, in which you advise that by referendum held in Craig County prior to World War II the sale of beer other than 3.2 was prohibited in the county, and that subsequently the Board of Supervisors "enacted an ordinance prohibiting the sale of 3.2 beer on Sundays." You ask my opinion on the following questions:

1. Under these circumstances, inasmuch as Craig County allows only the sale of 3.2 beer, does the Board of Supervisors have any power to allow or prohibit the sale of 3.2 beer in Craig County on Sundays?
2. What is the present status as to the validity of the ordinance now in existence in Craig County?

3. If the local Board of Supervisors has no jurisdiction and the ordinance enacted by them is no longer valid, would it now be legal to sell 3.2 beer in Craig County on Sundays assuming, of course, that the merchants have the necessary license?

As to your first question, the local option provisions of § 4-45 of the Code of Virginia (1950), as amended, do not pertain to beverages containing not more than 3.2 per centum of alcohol; therefore, the referendum would have had no prohibitory effect upon the sale of such beverages. On the other hand, § 4-100 of the Code specifically authorizes the sale, etc., of such beverages subject to certain provisions and conditions. Section 4-114.1 directs the Alcoholic Beverage Control Board to prescribe by regulations between what hours and on what days beverages shall not be sold, etc. There are other sections, of course, providing for licensing by the Board, and other matters. There is nothing in the 3.2 beverage laws (§ 4-99 et seq.) that specifically authorizes localities to prohibit the Sunday sale of beverages. I think it is clear that the Board of Supervisors of Craig County has no power to entirely prohibit the sale of such beverages in the county, though it may, as I shall hereinafter point out, prohibit the Sunday sale thereof under certain circumstances.

As to your second question, the power was expressly conferred upon the governing bodies of counties, cities and towns, by 1938 Acts of Assembly, Chapter 129, to make it unlawful to sell beer and wine, or either, between the hours of 12:00 P.M. of each Saturday and 6:00 A.M. of each Monday (or to fix hours within such period during which they may be sold). The original Act conferred no like power with respect to beverages, and I believe no such power then existed. However, by 1940 Acts of Assembly, Chapter 25, the 1938 Act was amended by adding the provision now appearing in the third paragraph of § 4-97 of the Code which declares in part that "[o]n and after the effective date of any ordinance adopted pursuant to the provisions of this section, the provisions of such ordinance shall have like effect upon the sale of beverages as defined in § 4-99, . . ." Thus, while it appears that counties are given no express power to legislate upon the Sunday sale of beverages, they may in effect prohibit the Sunday sale of beverages by exercising the power conferred with respect to beer and wine. The fact that a county had voted against the sale of beer and wine in a referendum pursuant to § 4-45 would not, in my opinion, vitiate the power to declare the Sunday sale of beer and wine to be a punishable offense under § 4-97. I am not unmindful that § 4-98 states that the provisions of Chapter 1 of Title 4 shall not apply to the selling, etc., of beverages except as otherwise provided by § 4-39; however, § 4-98 was passed in 1934 prior to the 1940 amendment of § 4-97. In my opinion, the 1940 amendment would have the effect of repealing by implication so much of § 4-98 as conflicts therewith.

You did not supply me with a copy of the Craig County ordinance in question, and I hesitate to express any opinion as to its validity. If, as your letter seems to indicate, the ordinance was silent as to the Sunday sale of beer and/or wine, and exclusively concerned itself with beverages, or was passed prior to the 1940 amendment, I would very much doubt its validity.

As to your third question, I have sufficiently indicated above that the Board of Supervisors of Craig County may, if it has not already done so, prohibit the Sunday sale of beverages by exercising the power conferred under § 4-97 with respect to beer and wine. In the absence of a valid ordinance, the Sunday sale of beverages by licensees of the Alcoholic Beverage Control Board would be permissible.
ALCOHOLIC BEVERAGE CONTROL LAWS—County Ordinance—Sale of 3.2 beer in Craig County.

COUNTIES—Ordinances—Sale of 3.2 beer in Craig County.

March 4, 1966

HONORABLE ARTHUR B. CRUSH, JR.
Commonwealth's Attorney for Craig County

This is in reply to your letter of February 15, 1966.

In my letter to you of December 13, 1965, I gave you my opinion as to several questions contained in your letter of December 7, 1965. You now advise that there was some error in the factual situation presented in your letter of December 7, 1965, and request my opinion as to the validity of a Craig County ordinance adopted August 1, 1938, "prohibiting the sale of beer and wine, etc. between the hours of 12:00 P.M. of each Saturday and 6:00 A.M. of each Monday."

You further advise that by a referendum held in May, 1946, "the sale of regular beer and wine was prohibited at any time in Craig County." As I understand it, you want my opinion as to whether the 1938 ordinance makes it unlawful to sell 3.2 beer in Craig County at the present time in view of the above facts.

In my opinion, the 1938 ordinance does not prohibit the sale of 3.2 beer in Craig County.

As I advised you in my letter of December 13, 1965, 1938 Acts of Assembly, Chapter 129, conferred no power on the governing bodies of counties, cities and towns to prohibit the Sunday sale of beverages. The 1938 Act was amended by 1940 Acts of Assembly, Chapter 25, by adding the provision now appearing in the third paragraph of § 4-97 of the Code, which, in part, provides that "[o]n and after the effective date of any ordinance adopted pursuant to the provisions of this section, the provisions of such ordinance shall have like effect upon the sale of beverages as defined in § 4-99. . . ." I do not think the 1940 amendment could have the effect of reading into the 1938 Craig County ordinance something that was not contained in it at the time of its passage, and something the Craig County Board of Supervisors was without power to put into it at the time. In addition, § 4-98 of the Code, which was in effect at the time of passage of the Craig County ordinance, specifically stated that the provisions of Chapter 1 of Title 4 shall not apply to the selling, etc., of beverages except as otherwise provided in § 4-39.

As I advised you in my letter of December 13, 1965, if Craig County wishes to prohibit the Sunday sale of beverages it may do so by now passing an ordinance exercising the power conferred by § 4-97 with respect to beer and wine, and such an ordinance would, by virtue of the aforesaid 1940 amendment, "have like effect upon the sale of beverages as defined in § 4-99."

ALCOHOLIC BEVERAGE CONTROL LAWS—Rules and Regulations—Board may prohibit sale at less than established market price.

June 15, 1966

HONORABLE WARREN WRIGHT, Chairman
Virginia Alcoholic Beverage Control Board

This is in reply to your letter of May 20, 1966, which is as follows:

"Sections 4-79 and 4-115 of the Code were amended by Chapter 622 of the 1966 Acts of Assembly. Formerly the above mentioned sections
prohibited among other things, and with certain exceptions, a manufactur-er, bottler or wholesaler of alcoholic beverages or beverages from furnishing to a retail licensee '... money, equipment, furniture, fixtures or property with which the business of such retailer is or may be conducted...'

"The 1966 amendments to the sections, as you will note, broadened the above to prohibit the furnishing of the items mentioned for any other purpose, including a gift as an inducement or remuneration for purchases of alcoholic beverages or beverages. Further, certain language was added apparently for the purpose of bringing within the purview of these sections governmental instrumentalities, or employees thereof, selling alcoholic beverages or beverages at retail.

"Subsections (a) of Sections 53 and 54 of the Regulations adopted by the Virginia Alcoholic Beverage Control Board prohibit, with certain exceptions, a manufacturer, bottler or wholesaler of alcoholic beverages from giving 'either directly or indirectly, in connection with the operation of his business,' any alcoholic beverage or beverage to unlicensed persons or to person licensed to sell alcoholic beverages or beverages at retail.

"We should appreciate your opinion as to whether a sale of an alcoholic beverage, or of a beverage, by a manufacturer, bottler or wholesaler, at less than the established or prevailing market price of that type of merchandise in a particular locality, would constitute a violation of either of the foregoing statutes or regulations, and if not, whether the Board might properly adopt a regulation which would prohibit such sales."

As to your first question, a sale at less than the prevailing market price would not seem to be in violation of the statutes or regulations. The presence or absence of consideration is one of the factors considered in determining whether or not a particular transaction constitutes a "gift" or a "sale." The fact that a particular transaction is made at less than the prevailing market price does not of itself require a conclusion that the transaction is a gift, provided that the consideration is not so trifling as to be, in effect, no consideration.

Your second question seems to involve the power of the Board to regulate certain trade practices.

The statute conferring the general power upon the Board to make regulations pertaining to alcoholic beverages is § 4-11 of the Code, which, in part, reads as follows:

"The Board may from time to time make such reasonable regulations, not inconsistent with this chapter or the general laws of the State, as it shall deem necessary to carry out the purposes and provisions of this chapter and to prevent the illegal manufacture, bottling, sale, distribution and transportation of alcoholic beverages, or any one or more of such illegal acts..."

Substantially the same power to make regulations pertaining to beverages is found in § 4-103 of the Code.

The title to the A B C. Act in part reads:

"An Act to legalize, regulate, and control the manufacture, bottling, sale, distribution, transportation, handling, advertising, possession, dispensing, drinking and use of alcohol, brandy, rum, whiskey, gin, wine, beer, lager beer, ale, porter, stout, and all liquids, beverages and articles containing alcohol obtained by distillation, fermentation or other-wise."
In *Commonwealth v. Anheuser-Busch, Inc.*, 181 Va. 678, the power of the Board to regulate advertising of alcoholic beverages was sustained, the Court noting that the exercise of the regulatory power conferred by what is now Section 4-11 of the Code was reasonable and was consistent with the purposes of the A.B.C. Act as expressed in the quoted portion of the title to the Act. Among other things, the Court also said: "To unduly encourage, by display advertisements throughout the State, the use of alcoholic stimulants, or to stimulate that use, is highly undesirable."

The Report of the Liquor Control Committee to the 1934 General Assembly (Senate Document No. 5) contained this statement:

> "The private profit motive, with its incentive to stimulate the sale and consumption of liquor, should be reduced to a minimum. No manufacturer of alcoholic beverages should be allowed to have any interest, direct or indirect, in any place or business where these beverages are authorized to be sold at retail."

Statutes making it unlawful for manufacturers or wholesalers to have an interest in retail liquor stores, and statutes prohibiting the giving of a bonus, discount, premium, compensation, and the extension of credit, to the buyer to induce the buyer to purchase from the seller, have been sustained in other jurisdictions. *Beckanstin v. Liquor Control Commission*, (Conn.) 99 A. 2d 119 (1953); *Pickerill v. Schott*, (Fla.) 55 S. 2d (1951); *Weisberg v. Taylor*, (Ill.) 100 NE 2d 748 (1951); 48 C.J.S., Intoxicating Liquors, Section 197, Statutes of this nature are aimed at the evil known as the "tied house," the purpose being to prevent the integration of retail and wholesale outlets, and to remove the retailer from financial obligation to the wholesaler. It is observed that §§ 4-79 and 4-115 of the Code of Virginia specifically prohibit wholesalers from having any financial interest in the business of the retailer, and prohibit certain other inducements.

In my view a regulation reasonably designed to prohibit the giving of discounts by selling below the prevailing market price would be a valid exercise of the regulatory power of the Board, a logical extension of the provisions of §§ 4-79 and 4-115, and consonant with the purposes of the A.B.C. Act.

APPROPRIATIONS—Authority Under Which Commonwealth Operates on Fiscal Year Cash Basis.

Dr. Woodrow W. Wilkerson
Superintendent of Public Instruction

July 15, 1965

This will acknowledge receipt of your letter of July 12, 1965, in which you cite Item 6.3 of the State Plan adopted by the State Board of Education on April 21, 1965, with respect to Adult Basic Education under the provisions of Title IIIb of the Economic Opportunity Act of 1964.

You submitted this Plan to the Federal Department of Health, Education and Welfare, along with an explanatory statement, as follows:

> "The General Assembly of Virginia appropriates funds at each session for the ensuing two years beginning July 1 following the Legislative Session at which such appropriations are made. The General Assembly at its 1964 session, Chapter 654, approved public revenue for the two years ending respectively on the 30th day of June 1965 and the 30th day of June 1966."
The General Assembly in 1966 will appropriate funds for the two years ending respectively on the 30th day of June 1967 and the 30th day of June 1968.

The Appropriation Act of 1964 did not include a specific line for Basic Adult Education, because this program was not in existence at the time the General Assembly was in session. However, the State Educational Agency, officially known as the State Board of Education and/or the State Department of Education has the authority, Item 497 of the Appropriation Act, to make rules and regulations governing the distribution and expenditure of such additional Federal funds, etc., as may be made available. See Appendix C, Appropriation Act of State Plan as approved by the State Board of Education on April 23, 1965.

It appears that the explanatory statement does not satisfy the United States Office of Education in the Department of Health, Education and Welfare and a request has been made by that department for additional information as follows:

State Plan or Legal Appendix should include citation or quotation of State Law, regulation, or other official document supporting this statement. ('This statement' refers to Item 6.3 quoted above.)

In a telephone conversation with you and Mr. J. G. Blount, Director of Finance of your department, I understand that the real question involved is under what authority does the Commonwealth of Virginia operate on a fiscal year cash basis.

Under the provisions of the Appropriation Act, appropriations are made for two separate fiscal years commencing July 1 of the year in which the Appropriation Act is passed and ending June 30 each year—that is, the Appropriation Act of 1964 appropriated public funds to your department and other State agencies for the fiscal year commencing July 1, 1964 and ending June 30, 1965, and for the fiscal year commencing July 1, 1965 and ending June 30, 1966. These appropriations are made by the General Assembly pursuant to its legislative power set forth in Section 40 of the Constitution. The Appropriations Acts passed by the General Assembly are enacted at regular sessions which convene each two years under the provisions of Section 46 of the Constitution and the effective date of the Appropriation Acts is fixed as of July 1 of the year in which the Appropriation Act is passed under the authority of Section 53 of the State Constitution and § 1-12 of the Code of Virginia. The fiscal year is established by § 2-165 of the Code of Virginia, which reads as follows:

The fiscal year shall commence on the first day of July and end on the thirtieth day of June.

The biennial budgets are prepared pursuant to the requirements of Chapter 6 of Title 2 of the Code and under § 2-48 of this Chapter all the State agencies, including the Department of Education, are required to file with the Governor an estimate in itemized form showing the amount needed for each year of the ensuing biennium period beginning with the first day of July thereafter. Under §§ 2-54 and 2-55 the Governor is required to submit this budget to the General Assembly.

The Appropriation Act has contained for many years a standard provision as follows:

Section 43. Notwithstanding any contrary provision of law any unexpended balances on the books of the Comptroller as of the last day of the previous biennium shall be continued in force for such period, not exceeding ten (10) days from such date, as may be neces-
sary in order to permit payment of any claims, demands or liabilities incurred prior to such date and unpaid at the close of business on such date, and shown by audit in the Department of Accounts to be a just and legal charge, for values received as of the last day of the previous biennium, against such unexpended balances."

Under the provisions of the Appropriation Act, unless otherwise specifically limited, every item in the Appropriation Act, if unexpended at the end of the first fiscal year, may be carried over to and added to the appropriation made for the second fiscal year subject, of course, to the usual allotment requirements of the Budget Office. After the expiration of the first year of the biennium any expenditures for obligations created during that year are shown as expenditures for the succeeding year unless such expenditures were made within the ten-day period immediately following June 30. This is a policy established by the Office of the Comptroller and is within the scope of his authority as the head of the Department of Accounts of the State—See, § 2-160 of the Code. Sections 2-162, 2-163 and 2-164 relate to the powers of the Comptroller with respect to the general accounting policy of the State.

ATTORNEYS—Entitlement—Probationer upon a rule to show cause.

CRIMINAL PROCEDURE—Counsel—Probationer entitled to on rule to show cause.

HONORABLE GEO. A. PRUNER
Commonwealth’s Attorney for Russell County

November 8, 1965

This is in reply to your letter of November 4, 1965, in which you inquire whether or not counsel should be appointed to represent a probationer upon a Rule to Show Cause why the suspension of his penitentiary sentence and probation should not be revoked.

Your attention is directed to the provisions of § 19.1-241 of the Code which requires the appointment of counsel in all cases wherein the accused is charged with a felony and is not represented by counsel. The Supreme Court of the United States, in Gideon v. Wainwright, 372 U. S. 335, has held that an accused is entitled to counsel at every stage of the trial.

I am of the opinion that a hearing in connection with the Rule to Show Cause why the probation and the suspension of sentence should not be revoked is merely an extension of the trial proceedings and is an integral part thereof. Therefore, I am of the opinion that counsel should be appointed under such circumstances.

ATTORNEYS—Practice of Law—Judge of regional juvenile and domestic relations court prohibited.

JUVENILE AND DOMESTIC RELATIONS COURTS—Regional—Judge prohibited from practicing law.

HONORABLE FLETCHER B. WATSON, Judge
2nd Regional Juvenile and Domestic Relations Court

August 12, 1965

This is in reply to your letter of August 5, 1965, in which you state that you
have been appointed Judge of the Second Regional Juvenile and Domestic Relations Court, established pursuant to § 16.1-143.1 of the Code. You call attention to § 16.1-143.7, which reads as follows:

"No judge of a regional juvenile and domestic relations court who is appointed to serve on a full-time basis shall engage in the practice of law, but this shall not apply to a substitute judge nor to an associate judge unless appointed to serve on a full-time basis."

You have requested my advice as to whether or not a judge appointed for a joint regional Juvenile and Domestic Relations Court "can practice law so long as he observes the limitations of § 16.1-10."

Section 16.1-10 of the Code reads as follows:

"No judge of a court not of record shall appear as counsel in any case, civil or criminal, pending in his 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."

Section 16.1-143.7 is an exception to § 16.1-10 and applies to Judges of Regional Juvenile and Domestic Relations Courts who are appointed to serve on a full-time basis. In my opinion, the judge of such court who is appointed to serve on a full-time basis is prohibited from practicing law and the provisions of § 16.1-10 of the Code do not apply to such a judge.

BANKING AND FINANCE—Agent for Borrower—May not receive brokerage fee.

Honorable John D. Gray
Member, House of Delegates

In your letter of May 10, 1966, you asked for an interpretation of § 6-352.1(b) of the Code of Virginia, enacted at the 1966 session of the General Assembly. Section 6-352.1 provides in part:

"(a) No person, copartnership, association, trust, corporation or other similar legal entity shall directly or indirectly charge, take or receive for a loan secured in whole or in part by a mortgage or deed of trust other than a first mortgage or deed of trust, on residential real estate improved by the construction thereon of housing consisting of four or less family dwelling units, an amount in excess of that permitted by § 6-253, whether payable directly to the lender or to a third party in connection with such loan...

"(b) In addition to the investigation fees and interest permitted by § 6-253, any such lender may also require the borrower to pay the actual cost of title examination, title insurance, recording fees, surveys, attorneys' fees, and appraisal fees. No other charges of any kind shall be made by the lender or any other party in connection with such loan."
You state:

"The question is whether brokerage fees charged a borrower by an agent for services rendered to the borrower in obtaining a loan for the borrower are permitted by the above section over and above the items charged by the lender or whether they are precluded by such section; bearing in mind that the agent represents the borrower—not the lender; does not handle any funds for the lender; has nothing to do with the details of making the loan or disbursing the proceeds and does not receive any remuneration of any kind from the lender."

Section 6-253, referred to in § 6-352.1, provides that industrial loan associations may charge in advance the legal rate of interest on a loan, and permits charging, in addition, an investigation fee of not more than two per cent. The prohibition in § 6-352.1(b) against any other charges "made by the lender or any other party in connection with such loan" seems clear and unambiguous. "Any other party" must be interpreted to include persons other than lenders or their agents, including a broker in a situation such as that described by you, and the services provided in such a situation clearly appear to be "in connection with such a loan."

Therefore, there is grave doubt that such a charge by a broker would be permissible under the statute.

BOARDS OF SUPERVISORS—Appropriations—Cannot make donation to private college for road.

COUNTIES—Appropriations—May be made to town for certain purposes.

HIGHWAYS—Board of Supervisors—Authority to establish public road.

June 24, 1966

HONORABLE ROBERT I. ASBURY
Commonwealth's Attorney for Smyth County

This will acknowledge receipt of your letter of June 20, 1966, which reads as follows:

"The Board of Supervisors for the County of Smyth has received a request, as has The Marion Town Council, from The Marion College Board of Trustees to provide construction and funds for the development of an access road and the water, for the said Marion College, which is outlined on page 2, paragraph B of 'Proposal For The Consideration of The Marion Town Council and The Smyth County Supervisors', which is forwarded herewith and asked to be read as a part hereof.

"The Smyth County Board of Supervisors has requested my opinion as to whether or not they have authority to appropriate out of the general levy a sum to meet this request, or any part of this request.

"I am also enclosing herewith certain information concerning Marion College, specifically pertaining to Board of Trustees and how constituted, Faculty and how composed, Power to make rules and regulations, President, Secretary and Treasurer, for the purpose of indicating the relationship of Marion College with the Lutheran Synod of Virginia.

"It appears to me that § 15.1-24 of the Code of Virginia of 1950, as amended, expressly forbids the Board of Supervisors of Smyth County
to make the requested appropriation of public funds. However, in view of the importance of Marion College and its contribution to the educational, social, industrial and general economic interest of the people of Smyth County, it is respectfully requested that your office render an opinion as to whether or not the Board of Supervisors for Smyth County may legally appropriate out of the general levy a sum to meet the request or any part of same as set forth in paragraph B of the subject proposal."

You are correct in your statement that the board of supervisors does not have authority to make a donation to the college. However, the board may make an appropriation for the purpose of establishing a public road to the college. It is my understanding from additional information furnished by you in a telephone conversation that the land over which the road would be established is located in the county. This expenditure may be made in accordance with the provisions of §§ 33-141, et seq., of the Code. See Article 2, Chapter 2, Title 33 of the Code of Virginia.

The town of Marion may extend its public water service to the college and may make expenditures for that purpose. Under § 15.1-300 and other provisions of Chapter 9, Title 15.1 of the Code, the county may participate in this project. Furthermore, § 15.1-544 of the Code, as amended by Chapter 495, Acts of Assembly (1966), reads as follows:

"The boards of supervisors may direct the raising, by levy, of such sums as may be necessary to defray the county charges and expenses and all necessary charges incident to or arising from the execution of their lawful authority; and may appropriate such sums as the board may desire to any incorporated town or towns within the boundaries of the county." (Emphasis supplied)

Under this section as amended, effective June 27, 1966, the county may make an appropriation to the town of Marion for the purpose of contributing to the cost of such additions to the water system of the town.

BOARDs OF SUPERVISORS—Appropriations—May make to nonprofit group under certain conditions.

ELECTIONS—Registrar—School board member may not serve.

ELECTIONS—Registrar—Stenographer to judge or Commonwealth's attorney may serve.

May 20, 1966

HONORABLE RUFUS V. McCOY, Sr.
Member, House of Delegates

This will acknowledge receipt of your letter of May 18, 1966, which reads as follows:

"I would appreciate it very much if you would send me your legal opinion on the following questions:

"(1) To what degree can the Board of Supervisors participate or appropriate money to a nonprofit county development corporation? Can the Board appropriate the money legally?"
"(2) Can a registrar who registers voters for elections serve as a member of the school board, or can a member of a school board serve as a registrar?

"(3) Can a stenographer for the court and secretary to the Commonwealth or to the county judge serve as registrar?"

The board of supervisors may, under § 15.1-10.1 of the Code, make appropriations, within the limits of this section, for the purpose of advertising and giving publicity to the advantages and resources of the county and in securing and promoting industrial development of the county. It will be noted that under this section such appropriations may be made to chambers of commerce or similar organizations within the county. If the nonprofit corporation to which you refer is an organization performing the usual functions of a chamber of commerce, it would seem that under this section the appropriation may be made within the limits of that section.

The answer to your question No. 2 is in the negative.

Section 24-53 of the Code provides as follows:

"The registrar shall hold office for two years from the first day of July following his appointment, and until his successor is duly appointed and qualified. The acceptance of any other office either elective or appointive by such registrar, except that of precinct judge of election, during his term of office shall, ipso facto, vacate the office of registrar. Any registrar or assistant registrar who registers or permits the registration of any person who has not made application to register as required by and in conformity with this chapter and section twenty of the Constitution may be removed from office by the electoral board of the county or city and if so removed shall be ineligible to serve as registrar anywhere in the Commonwealth of Virginia for a period of five years. The electoral board shall fill any vacancies that may occur in the office of registrar."

In answer to your question No. 3, I see no objection to a stenographer for the court or for the Commonwealth’s attorney serving as registrar.

BOARDS OF SUPERVISORS—Authority—May make donations to chambers of commerce or similar organizations.

November 4, 1965

HONORABLE W. D. REAMS, JR.
Commonwealth’s Attorney for Culpeper County

This is in reply to your letter of November 1, 1965, which reads as follows:

"I respectfully request your opinion concerning a donation to the Retail Merchants Association of $100.00.

A request for a donation was made under the following circumstances:

"The Retail Merchants Association (RMA) in order to promote down-town business conducted an animal show and children’s ride show in connection with certain sales promotions in the Town of Culpeper. The members of RMA stated to the Board of Supervisors that their action was designated for the promotion and protection of downtown business. The amount which they seek as an appropriation is identical to the amount paid by them for a carnival license."
"I would, therefore, inquire whether the provisions of §§ 15.1-10, 15.1-10.1 or 15.1-25 of the Code would permit the Board of Supervisors to make such a donation."

In my opinion, under § 15.1-10.1 of the Code the board of supervisors may make this appropriation to the Retail Merchants Association. This section authorizes the county to make an appropriation for the purpose of advertising and giving publicity to the resources and advantages of the county, and in securing and promoting industrial development of such county.

In my judgment, the purpose for which the appropriation is sought by the Retail Merchants Association comes within this category. It will be noted that this section authorizes the county governing body to make an appropriation for such purposes "to chambers of commerce or similar organizations." In my judgment, the Retail Merchants Association is an organization similar to a chamber of commerce.

BOARDS OF SUPERVISORS—Authority—May not loan out funds from big game damage fund.

GAME AND INLAND FISHERIES—Damage Stamp Fund—Boards of Supervisors may not loan funds.

October 15, 1965

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

This is in reply to your letter of October 13, 1965, in which you refer to the big game damage fund which is provided for in Chapter 420, Acts of Assembly (1962). You state as follows:

"The Board of Supervisors has asked this office for an opinion from you on the question of whether or not the county may make a temporary loan from said fund, which loan must be repaid on or before December 1 in any calendar year.

"The other question they have raised is whether or not the fund can be placed in a separate savings account, properly ear-marked, and then a temporary borrowing made from the savings account upon payment of the legal interest rate.

"At present the fund remains idle on a separate checking account in the name of the county because no appropriate conservation project has become available for which the money will be spent. It would appear to me that this money should be available for borrowing purposes on a temporary basis, and I would like to have your considered opinion on the two questions raised in this letter."

The purposes for which this fund may be used are set out in Section 2 of the above mentioned Act and have been the subject of discussion in opinions of this office, one being an opinion dated April 19, 1963 to the Honorable L. Harvey Neff, Jr., Commonwealth's Attorney of Grayson County, which opinion is found in Report of Attorney General (1962-63), at p. 91, in which the purposes for which the fund may be used are discussed.

I know of no statute that would authorize a board of supervisors to use a portion of this special fund and treat it as a temporary loan from the fund. The board of supervisors has authority under § 15.1-545 of the Code to borrow money for a short time, but it is contemplated that such loans would create a debt of
the county in anticipation of the collection of revenues during the year in which the loan is negotiated. A transaction such as you suggest would not create a debt in the ordinary and usual sense, but would be a mere transfer of money from this special fund to another county fund, and there is no provision authorizing such a transfer.

I have consulted with the office of the Auditor of Public Accounts with respect to this question, and that office is of the opinion that such a transaction would not be within the scope of any authority that is vested in the board of supervisors.

BOARDS OF SUPERVISORS—Authority—May provide water to private company.

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

November 15, 1965

This is in reply to your letter of November 9, 1965, in which you make the following statement:

"The Board of Supervisors of York County, Virginia, in order to supply public water to a new public school and a subdivision of approximately 300 homes, proposes to enter into an agreement with the City of Williamsburg and Sydnor Pump and Well Co. substantially as follows:

1. The School Board of York County, Virginia will lay and install water mains from the corporate limits of the City of Williamsburg to the proposed location of a new public elementary school. The cost of constructing and maintaining the water line would be paid by the York County School Board.

2. The Board of Supervisors of York County would then purchase a fixed amount of treated water from the City of Williamsburg at a price agreed upon between the City and the County.

3. The water so purchased would be used for the proposed public school, and the balance of the water purchased would then be sold to Sydnor Pump and Well Co., a Virginia Corporation. (Not a public service corporation).

4. Sydnor Pump and Well Co. would agree to extend water lines from the public school to and within the subdivision known as Queens Lake in York County and would purchase the water from the County of York at a price of five cents per 1,000 gallons over and above the rate which is charged for the water by the City of Williamsburg. The Sydnor Pump and Well Co. would also agree to supply all of the residences existing or to be constructed within this subdivision.

"I believe there is adequate authority under the Code of Virginia for the County of York to purchase the water from the City of Williamsburg, however, I question whether or not the County may then re-sell the water to a private company. It would appear to me that the County would then be subsidizing a private corporation."

We have considered the question raised by you, and we have concluded that there is no constitutional provision prohibiting an arrangement of this nature. We do not believe that any of the provisions of Section 185 of the Constitution would apply.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Authority to Borrow Money.

SCHOOLS—Board of Supervisors—Authority to borrow money.

March 29, 1966

HONORABLE E. M. JONES, Clerk
Circuit Court of Rappahannock County

This is in reply to your letter of March 28, 1966, which reads as follows:

"The Rappahannock County Board of Supervisors would like your opinion in regard to financing the erection of a new elementary school in Rappahannock County.

"We have applied for a loan of about $800,000.00 from the Literary Fund and have been informed that one-half of this amount will perhaps be available in May of 1967, and the remaining half available in November of 1967.

"It is imperative that this building be erected for use in September of 1967, the date when total integration is scheduled to begin in Rappahannock County.

"Does the Rappahannock County Board of Supervisors have authority to borrow as much as $400,000.00 from a National Bank or other similar lending organization for a period of twelve to eighteen months? If the above question is answered in the affirmative, what procedure of the Board is required to obtain a temporary loan until Literary Funds are available?"

Sections 15.1-545 and 15.1-546 of the Code apply. In this connection, I enclose copy of an opinion to Honorable J. Gordon Bennett, Auditor of Public Accounts, dated December 17, 1957, (Report of Attorney General (1957-1958), at pp. 29-30). Sections 15.1-545 and 15.1-546 were formerly §§ 15-250 and 15-251. I feel that the opinion to Mr. Bennett will be helpful.

The money borrowed by the board of supervisors under these sections could be appropriated to the school board of the county for the purpose of capital outlay. If such loan should be made during the current year it, of course, would have to be repaid out of the general revenues not later than December 15, 1966. If a loan is made after February 1, 1967, it, of course, would be in anticipation of the revenues for that year, but could be paid in May, 1967, out of the $400,000 borrowed from the Literary Fund.

If you desire any further advice in this connection, please let me know.

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

This will acknowledge your letter of July 19, 1965, in which you refer to Chapter 420, Acts of Assembly (1962), relating to the expenditure of surplus funds. You state in part as follows:

"... The Highland County Board of Supervisors has tentatively ap-
proved an appropriation from this fund of $600.00 to enable Highland County to meet its $5000.00 quota for the West Central District Educational Center in Franklin County, a 4-H project of the West Central District. The Commission of Game and Inland Fisheries has given its approval to such expenditure, but has indicated that it leaves the final decision with the local boards to approve or disapprove of the expenditures from this fund.

"The Board has inquired of me whether this is a proper expenditure from the fund, and your opinion will decide whether or not the expenditure for this purpose has any connection with conservation, restoration, protection of wild life, and preventing damage by wild life to property in said county.

"From the same fund the Supervisors have approved an appropriation of $20.00 to provide a scholarship for a county 4-H club member to attend Camp Farrier at Virginia Beach. I pose the same question to you in connection with an expenditure for this purpose as I have done in the preceding paragraph in connection with the $600.00."

The provision relating to the disposition of surplus funds reads as follows:

"... Any surplus remaining in the fund, which surplus has been in the fund more than three years, shall be earmarked for conservation, restoration, protection of wildlife and preventing damage by wildlife to property in said county under the direction of the board of supervisors and in cooperation with the Commission of Game and Inland Fisheries. ...

In my opinion, the board of supervisors has no authority to make an appropriation from this fund for either of the purposes set forth in your letter. Neither of these projects is in any way related to any of the purposes for which the fund may be expended.

With respect to the approval of the Commission of Game and Inland Fisheries, we have heretofore held in an opinion dated April 19, 1963, to Hon. L. H. Neff, Jr., Commonwealth's Attorney of Grayson County (Report of the Attorney General (1962-1963), p. 91) that the Commission has no authority or duties with respect to this fund. The board of supervisors is authorized to expend the surplus in this fund for the purposes stated in the statute in cooperation with the Commission of Game and Inland Fisheries, but there is no mandate that approval of the Commission be first obtained before paying damage claims or expending the surplus.

BOARDS OF SUPERVISORS—Official Meetings—May not be held in closed session.

July 12, 1965

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

This will acknowledge receipt of your letter of July 9, 1965, which reads as follows:

"I have received the following written request from Mr. L. L. Meredith who is a member of the Board of Supervisors for Dinwiddie County which reads as follows:

"In reference to our conversation pertaining to closed executive
sessions by the Dinwiddie County Board of Supervisors. I would like for you to obtain a ruling from the Attorney General of Virginia pertaining to the legality of closed executive sessions. Enclosed is a copy of the July 7, 1965 agenda and the items of discussion which were discussed in closed session on this date. Please determine if an executive session is an informal session or not.'

"The copy of the agenda referred to above is enclosed herewith.

"It will be appreciated if you will answer the inquiries contained in Mr. Meredith's memorandum above set out."

The matters considered in the executive meeting are listed in the agenda which you attached and are as follows:

"1. Accounts & Appropriations
2. Discussion of Agenda
3. Supt. of Schools 10:15
4. Robert Bowman 11:00
5. Supt. of Welfare 11:30"

In this connection, I call attention to an opinion dated August 22, 1962, to the Honorable Harold H. Purcell, which relates to this question. See, Report of the Attorney General (1962-1963), at p. 8. Section 15-244, referred to in that opinion is now § 15.1-539. In that opinion, this office held that an executive meeting of the board of supervisors comes within the provisions of this statute and may not be held in closed session.

Inasmuch as the board was in official meeting, it was not permitted under the statute to go into executive or closed session so as to exclude the public while considering the matters referred to above.

________________________________________

BOARDS OF SUPERVISORS—Ordinances—Procedure to be followed in advertising and publication.

ORDINANCES—Boards of Supervisors—Advertising and publication requirements.

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

July 2, 1965

This will acknowledge receipt of your letter of July 1, 1965, which reads as follows:

"At the regular monthly meeting of the Board of Supervisors for Mathews County held on June 30, 1965, said Board passed a resolution to advertise a public hearing to be held in regard to the Board's intent to propose for passage a County Recodation Tax Ordinance. The resolution directs that the ordinance be advertised by its title and an informative summary of the ordinance. A public hearing is scheduled for July 28, 1965, and the effective date of the ordinance is August 1, 1965.

I then advised the Board that, if the proposed ordinance was passed at the next meeting, the ordinance will have to be advertised two additional times before it would become effective in accordance with Section 15.1-504 of the Code of Virginia. My advice to the Board is based on that part of Section 15.1-504, which is as follows:
"'no such ordinance shall become effective until after it shall have been published in full, or by its title, or an informative summary of this ordinance, once a week for two successive weeks in a like newspaper.' 

"After I read that part of Section 15.1-504 set forth above to the Board, the Board then requested that I write to you and request an opinion from you in regard to the above.

"Kindly advise me if, in your opinion, said ordinance has to be advertised after same has been adopted and passed at the next regular meeting. If your answer to this inquiry is in the affirmative, kindly advise me if the effective date of the proposed ordinance would have to be changed to a later date."

In my opinion, you are correct in your interpretation of the advertising requirements of § 15.1-504 of the Code. The resolution to which you refer complies with the first publication requirement. Before the ordinance can become effective, it is necessary that it again be published, in full or by its title and an informative summary of the ordinance, once a week for two successive weeks in a like newspaper. Inasmuch as the statute has specifically prescribed that the ordinance shall not become effective until after the second publication, it will be necessary for the ordinance to be amended so as to make the effective date at a later date than August 1.

BOARDS OF SUPERVISORS—School Estimate of Expenses—Board has authority to change amount.

SCHOOLS—Estimate of Expenses—Board of supervisors has authority to change amount.

HONORABLE HUBERT W. MONGER, Superintendent
Louisa County Public Schools

May 11, 1966

This will acknowledge receipt of your letter of May 6, 1966, which reads as follows:

"For years our Estimate of Expenses has been prepared in the same order as the Annual School Report form S-2 provides and has been submitted to the Board of Supervisors in that manner. This year we followed the same procedure but had a change in category of

"MAINTENANCE OF SCHOOL PLANTS

"I write to inquire as to whether the Supervisors have legal authority to make such a change. The story is this:

"excerpt from 1965-66 estimate

"Maintenance of School Plants

"Repairs to Buildings & Grounds ...................... $15,400.00
"Furniture & Fixtures—repairs and replacements ...... 5,220.00

$20,620.00

"In the $15,400.00 was the salary of one person who took care of buildings and grounds @ $5,200. The Supervisors thought this figure too high and went on record as being opposed to this salary as set by the School Board. The School Board made no change. However, this
year the proposed Estimate for the same category was set as follows by the School Board.

"Maintenance of School Plants
   Repairs to Buildings & Grounds.................. $20,400.00
   Furniture & Fixtures—repairs and replacements...... 6,720.00

$27,120.00"

"Within the figure $20,400.00 the Board planned a salary for the person mentioned at $5,400.00 or a $200.00 increase for the year 1966-67. The Supervisors have changed this category to read as follows:

"Maintenance of School Plants
   Repairs to Buildings & Grounds.................. $15,000.00
   Furniture & Fixtures—repairs and replacements...... 6,720.00
   Salary of Foreman of Bldg. & Grounds............. 5,100.00

$26,820.00"

"This as you can see sets the figure for a person in this position at a maximum of $5,100.00 or $100.00 less than the current salary.

"I have read the Virginia School Laws 1964 Supplement from cover to cover and know that they can appropriate by categories and can require an itemized breakdown of each category when submitting the Estimate which I did at their request. However, I find nothing that permits nor prohibits the move noted above. May I have your reaction to the above situation."

It is noted that the school board in its estimate submitted to the board of supervisors requested an appropriation as follows:

"Maintenance of School Plants
   Repairs to Buildings & Grounds.................. $20,400.00
   Furniture & Fixtures—repairs and replacements...... 6,720.00

$27,120.00"

The board of supervisors revised the estimate and made the following appropriation which allows $5,100.00 for "Salary of Foreman of Building and Grounds."

"Maintenance of School Plants
   Repairs to Buildings & Grounds.................. $15,000.00
   Furniture & Fixtures—repairs and replacements...... 6,720.00
   Salary of Foreman of Bldg. & Grounds............. 5,100.00

$26,820.00"

The control of the board of supervisors with respect to appropriations is contained in § 58-839 of the Code of Virginia. Under this section the board of supervisors has the power to determine the purpose and the amount of any appropriation, subject to this provision:

"There shall be no mandatory duty upon the board of supervisors or other governing body of any county to appropriate any funds raised by general county levies or taxes except to pay the principal and interest on bonds and other legal obligations of the county or district and to pay obligations of the county or its agencies and departments arising under contracts executed or approved by the board of supervisors..."
or other governing body, unless otherwise specifically provided by statute."

In my opinion, the action of the board of supervisors in this matter is authorized under § 58-839 of the Code.

BOARDS OF SUPERVISORS—Zoning Ordinance—Commissioner in chancery cannot break tie vote.

ZONING—Ordinances—Tie vote of board of supervisors.

HONORABLE WILLIAM F. PARKERSON, JR.
Member, Senate of Virginia

February 21, 1966

In your letter of February 16, 1966, you ask my opinion "as to whether, in the case of a tie vote by the Board of Supervisors of a county involving a zoning amendment, the measure is defeated or whether the Commissioner of Chancery, designated by the Court to give the casting vote in case of a tie, is called upon to act."

Under § 15.1-540, Code of Virginia (1950), as amended: "All questions submitted to the board for decision shall be determined by viva voce vote of a majority of the supervisors voting on any such question;" but that "in any case in which there shall be a tie vote on any question when all members of the board are present," the commissioner in chancery appointed as a tie breaker shall be notified and, at that meeting or a later one, "the question shall be decided as he casts his vote."

Section 15.1-493 of the Code provides in part: "An affirmative vote of at least a majority of the members of the governing body shall be required to adopt, amend or re-enact a zoning ordinance."

Smiley v. Commonwealth, 116 Va. 979 (1914), involved application of a statute providing that the county superintendent of roads should be appointed "by the board of supervisors by the vote of a majority of all the supervisors of the county." At a meeting attended by all six members of the board, three votes were cast for each of two candidates. The country's tie breaker, acting under § 832 of the Code of 1887 (the predecessor of § 15.1-540) cast a vote in favor of Smiley. The court held his election invalid, because the appointment statute required the office of be filled "by the affirmative vote of a majority of all the supervisors—that is, by affirmative votes cast by at least four of the six supervisors of the county."

The court said § 832 of the Code "can have no application in a case such as this, where the statute upon its face negatives the idea of a tie vote by providing that the candidate for the office to be filled must be appointed by the vote of a majority of the entire body vested with the legislative power to make the appointment, hence in no reasonable construction that could be given the statute that authorizes the board of supervisors of Augusta county to appoint a superintendent of roads in the county 'by a vote of a majority of all the supervisors of the county,' could there be a tie vote within the purview of section 832 of the Code. Mr. Gordon, the 'tie-breaker' designated by the circuit court pursuant to that section of the Code, was not by his designation as such made a member of the board of supervisors, and his vote for a candidate for the office to be filled by appointment could not make the vote of the three members of the board, out of a total vote of six, 'a majority of all the supervisors of the county.'"

The Smiley case was followed in Hammer v. Commonwealth, 169 Va. 355 (1937), holding that the mayor of a town could not cast the deciding vote for
election of a justice of the peace, under a general charter provision authorizing him to break ties, in face of a charter section requiring election of the justice to be "by a majority of all the members" of the town council.

In view of these decisions, it is my opinion that § 15.1-493 controls in the case of zoning ordinance amendments, and that an amendment may be adopted only by the affirmative vote of at least a majority of the entire board of supervisors.

BOND ISSUES—Counties—How accrued interest applied.

COUNTIES—Bond Issues—How accrued interest applied.

SCHOOLS—Buses Not Considered Capital School Improvements.

February 8, 1966

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

This will acknowledge receipt of your letter of February 3, 1966, in which you state that the county of Chesterfield has sold bonds issued under the provisions of Chapter 5, Title 15.1 of the Code and that the board of supervisors wishes to invest the proceeds pending application of the funds to the purposes authorized by the bond issue election. You request my advice as to whether or not the interest accruing from such investment may be applied to the payment of the interest due on the bonds.

Under § 15.1-207 of the Code, it is provided as follows:

"... Any security so purchased as investment of the proceeds of such bonds shall be deemed at all times to be a part of such proceeds, and the interest accruing thereon and any profit realized from such investment shall be credited to such proceeds. . . ."

It is clear from this provision that the interest must be added to the bond issue fund.

I call attention to § 15.1-172(i), which provides as follows:

"The word 'cost' as applied to any project or to extensions or additions thereto shall include the purchase price of any project or property acquired by the unit or the cost of acquiring all of the capital stock of the corporation owning such project or property and the amount to be paid to discharge all of its obligations in order to vest title to the same or any part thereof in the unit, the costs of improvements, the cost of construction or reconstruction, the cost of all labor, materials, machinery and equipment, the cost of all lands, property, rights, easements and franchises acquired, financing charges, interest prior to and during construction and for one year after completion of construction, cost of plans and specifications, surveys and estimates of cost and of revenues, cost of engineering and legal services, and all other expenses necessary or incident to determining the feasibility or practicability of such acquisition, construction or reconstruction, administrative expense and such other expenses as may be necessary or incident to the financing of such project. Any obligation or expense incurred by the unit in connection with any of the foregoing items of cost may be regarded as a part of such cost and reimbursed to the unit out of the proceeds of bonds issued to finance such project."
Under this provision it will be noted that the interest on the bonds prior to and during the construction and for one year after completion of construction is considered a part of the cost of a project which may be paid out of the proceeds of the bonds. Since under § 15.1-207 the interest collected on the investment accrues to and shall be credited to the proceeds of the bond issue, I am of the opinion that the question should be answered in the affirmative.

You also request my advice as to whether or not school buses could be considered capital school improvements and purchased out of the proceeds of the bonds. The resolution states that the debt being contracted is "for capital school improvement purposes, acquisition of future school sites, and such other school construction as may be required by the actual educational needs . . . ."

In my opinion, school buses do not come within the category of capital school improvements. I think that capital school improvements as used in the resolution passed by the board of supervisors and the school board would be taken in its ordinary sense of permanent improvements as distinguished from articles of personal property, such as school buses, the usefulness of which is limited to a much shorter duration than is signified by the language of the resolution.

CHARTERS—Blacksburg—Whether city or town.

March 24, 1966

HONORABLE SOL GOODMAN
Commonwealth's Attorney for the City of Hopewell

This will acknowledge receipt of your letter of March 23, 1966, which reads as follows:

"This letter does not concern any criminal matter that I have in the City of Hopewell, but Judge Leadbetter asked me to see if I could find the answer to the following question: Is the Town of Blacksburg, Virginia considered a part of the county or a city in the interpretation of the above section of the Code? You will notice that the Code section does not include towns and that in 1964 the General Assembly gave the City of Blacksburg a new charter, having practically all of the powers of a city."

By reference to Chapter 127, Acts of Assembly (1964), it is clear that the new charter for the municipal corporation of Blacksburg continues the corporation as a town and not as a city.

The first paragraph of the charter specifically states as follows:

"The inhabitants of the territory comprised within the present limits of the town of Blacksburg, as such limitations are now or may be hereafter altered and established by law, shall constitute and continue a body, politic and corporate, to be known and designated as the town of Blacksburg, and as such shall have and may exercise all powers which are now or hereafter may be conferred upon or delegated to towns under the Constitution and laws of the Commonwealth of Virginia, as fully and completely as though such powers were specifically enumerated herein, and no enumeration of particular powers by this charter shall be held to be exclusive, and shall have, exercise and enjoy all the rights, immunities, powers and privileges, and be subject to all the duties and obligations now appertaining to and incumbent on the town as a municipal corporation; and the town of Blacksburg, as such shall have perpetual succession, may sue and be sued, implead and be
impleaded, contract and be contracted with, and may have a corporate
seal which it may alter, renew or amend at its pleasure by proper
ordinance."

You have requested my advice as to whether or not under § 55-93 of the
Code of Virginia Blacksburg would be considered a part of the county or a
city. Since the municipal corporation in question is a town, it follows that the
town is a part of the county and the reference in § 55-93 to "county" applies.
The town of Blacksburg would not be considered a city within the scope of this
section.

CHARTERS—Chesapeake—Civil service commission may be established.

February 15, 1966

HONORABLE ROBERT E. GIBSON
Member, House of Delegates

This will acknowledge receipt of your letter of February 15, 1966, in which
you request my advice as to whether or not under the charter of the city of
Chesapeake civil service regulations may be adopted governing the employment
of policemen and firemen. You refer to Sec. 18.02 of the charter as the same
appears in Chapter 211, Acts of Assembly (1962).

In my opinion, this provision is sufficient to enable the governing body of
the city to establish a Civil Service Commission with power to establish stand-
ards and regulations for the employment of such personnel.

CHARTERS—Elkton, Town of—Construing Section 3(b).

June 20, 1966

HONORABLE GEORGE W. KEMPER, Clerk
Circuit Court of Rockingham County

This will acknowledge receipt of your letter of June 17, 1966, which reads as
follows:

"Several citizens of the Town of Elkton, Rockingham County, have
asked me to seek an opinion from your office concerning the town
election held on June 14, 1966.

"As you know, from recent correspondence with your office, there
were two ballots. One ballot included nine candidates for Council with
instruction to vote for three, and also included on the same ballot
were two candidates for mayor with instruction to vote for one.

"In addition to this there was a second ballot to elect a member of
Council to fill the unexpired term of a deceased councilman who died
in the fall of 1965 and whose term did not expire until September 1,
1968. Since no person filed notice of candidacy for this office the
ballots were printed with no candidate's name but explained what it
was for, with the opportunity to vote for one person by writing in.
The person who received the highest number of votes on the second
ballot for the unexpired term was also elected (he ran third) on the
regular ballot. He was given an option by the Election Commissioners
before they completed their report; he declined the unexpired term in
favor of the four-year or regular term. As a consequence the Com-
missioners did not certify any person as being elected to fill the unexpired term.

"The questions that we seek an opinion on are as follows:

"Considering both the general law and the Town of Elkton charter (Chapter 580, page 724, Acts of Assembly of 1954) 1. Does the present Council—some of whose terms expire September 1, 1966, and which also includes the person appointed in the fall of 1965 to fill the unexpired term of the deceased member—proceed to appoint a Councilman, or does the new Council taking office September 1, 1966, do this?

"2. The Mayor who was elected in 1964 for a two-year term ending September 1, 1966, resigned some time last year and the Council appointed a successor. Does the newly-elected mayor take office immediately or does he take office September 1, 1966?"

By reference to Section 3(b) of the charter of the town of Elkton, it will be observed that the person who was appointed to the council in the fall of 1965 to fill the unexpired term of a deceased member was appointed to "fill such vacancy only for the period then remaining until such election, and a qualified person shall then be elected by the qualified voters and shall from and after the date of his election and qualification succeed such appointee and serve the unexpired term. . . ."

The person who received the highest number of votes for the unexpired term on the council, having elected to accept the office for the regular term for which he was also elected, it follows that there was no election for the short term. In my opinion, therefore, the person who was appointed to fill the unexpired term is no longer a member of the council. The other members of the present council may now fill this vacancy to expire at the regular election to be held in June 1968.

With respect to the mayor, in my opinion, the person who was elected by the council to fill the unexpired term ending September 1, 1966, remains in office until that time. The term of the person who was elected mayor on June 14 of this year will not begin until September 1, 1966.

CHARTERS—Falls Church—Construing Sec. 2.02(c).

June 10, 1966

HONORABLE JAMES E. DURANT
Treasurer of the City of Falls Church

This will acknowledge receipt of your letter of May 25, 1966, in which you refer to my opinion to you under date of April 26, 1966. In that opinion I expressed the view that the governing body of the city of Falls Church could fix the compensation of the members of the city school board and make appropriations for such purposes, and suggested that you should consult the city attorney and determine whether or not he concurs in that conclusion.

In your letter of May 25, you refer to § 22-67.2 of the Code which fixes the maximum that may be paid to members of the school board in the four cities mentioned therein. I do not construe this provision in § 22-67.2 as having the effect of prohibiting the governing bodies of other cities in the State from compensating the members of the school board.

My opinion expressed to you under date of April 26 was based upon the provisions of Sec. 2.02(c) of the city charter which you quoted in your letter of April 25. This provision of the charter authorizes the council of the city to make appropriations, subject to the limitations imposed by the charter, for the support of the city government. The school board, of course, is a part of the
city government and is so established under the provisions of Chapter 20 of the city charter.

As you will recall, you referred in your letter of April 25th to certain sections of the city charter which removed the restriction upon the payment of compensation to the boards mentioned in Sections 16.06, 17.01 and 17.15. I expressed the opinion that after these restrictions were removed the council would have the power to fix the compensation and make appropriations therefor for the members of the respective boards. This, of course, was based upon the authority contained in Sec. 2.02(c).

CHARTERS—Pennington Gap—Vacancy provisions construed.

March 8, 1966

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

This will acknowledge receipt of your letter of March 3, 1966, relating to the town of Pennington Gap. You state that since the year 1922, and possibly before that, the town council has been composed of six councilmen and the mayor.

I have examined the charter of the town as it appears in Chapter 327 of the Acts of 1901-02, and find it provides that the government of the town shall be vested in the mayor and five councilmen. Subsequent acts found in Chapter 167, Acts of 1922; Chapter 53, Acts of 1923; Chapter 199, Acts of 1930, and Chapter 411, Acts of 1940, contain no amendment changing the original requirements of the charter as adopted in Chapter 327, Acts of 1901-02. I was advised by Mr. Birg E. Sergent that these are all the acts relating to the charter provisions of the town of Pennington Gap. You state as follows:

"... On the 20th day of January, 1966, one of the six Councilmen submitted a letter of resignation addressed to the Mayor and Councilmen of the Town of Pennington Gap. This letter was mailed out to the Mayor and all Councilmen. At the next regular meeting of the Council, the Councilman who had submitted a letter of resignation did not appear, and motion was made by one Councilman to replace this councilman from the citizens of the Town as stated in the Charter. A discussion followed as to the Charter provision calling for only five councilmen, and no further action was taken. This Council Meeting was not finished at that time and was adjourned for another meeting two or three days subsequent. At this meeting, the councilman who had submitted his letter of resignation appeared at the Council Meeting and stated that he desired to withdraw his resignation and presented a letter withdrawing his resignation. The Mayor stated that he had already accepted the resignation of the councilman and did not believe that the councilman could be re-seated.

"Based on the foregoing, the Mayor and Council would like your opinion as to the status of the councilman who submitted the resignation and whether or not the Mayor has the power to accept the resignation of a councilman. If your opinion is that the councilman submitting the resignation is still a member of the council, the council would like to be advised as to what action it should take regarding the extra councilman, if any, and whether steps must or should be taken prior to the coming election to reduce the number of councilmen to five. ...""

As to whether or not the resignation of the councilman was final is difficult to answer. You did not furnish us with a copy of the letter of resignation and,
therefore, we do not know whether or not it stated an effective date. The letter of resignation was mailed to the mayor and all the councilmen and at the next regular meeting of the council a motion was made by one of the councilmen to replace this councilman from the citizens of the town, as provided in the charter. This would indicate that the councilmen felt that the resignation was final. While the matter is not entirely free from doubt, in my opinion, the councilman who submitted his resignation is no longer a member of the council.

Inasmuch as the charter only provides for five councilmen, no vacancy now exists on the council and, therefore, no one should be elected by the council to replace the person who resigned.

Your question II is as follows:

"Based on the Town Charter as cited above, the Council would also like to know whether or not the Mayor is entitled to vote on each issue brought before the Council."

Section 8 of the charter of the town, page 343, Acts of 1901-02, reads as follows:

"The mayor and councilmen shall constitute the council of said town, a majority of whom shall constitute a quorum to transact business, and all the corporate powers of said town shall be exercised by said council under its authority, except when otherwise provided by law. . . ."

You will note that this provision states that the "mayor and councilmen shall constitute the council of said town." It would appear, therefore, that the mayor is a member of the town council and would be entitled to vote on questions coming before the council. There is no provision in the charter to the effect that the mayor can only vote in case of a tie. I can find no such provision in the general law.

Your question III relates to whether or not the council may have closed sessions. I can find nothing in the charter nor the general law which requires the council to have open sessions.

Your question IV is as follows:

"The Council would also like to know whether the Mayor would have the right to fire an officer or employee of the Town. If your opinion is that the Mayor would not have a right to fire an employee of the Town under the Town Charter, the Council would like your opinion as to whether the Council could delegate its authority to the Mayor to fire an employee or officer of the Town. In particular, the following ordinance was passed by a former Council of the Town of Pennington Gap, and the Council would like your opinion as to whether or not this ordinance would be in effect today, or would it die with the Council which passed the ordinance."

You make reference in this paragraph to "the following ordinance" which was passed by the council, and I assume you refer to Article 2, starting on page one of your letter apparently quoting Sections 19 and 20 of the ordinance. Section 10 of the charter provides that the council may remove the officers of the town. I do not feel that the council can delegate this authority to the mayor. However, I am of the opinion that the council could authorize the mayor to suspend an officer pending action by the council. In Section IV of your letter, quoted above, you wish to know whether an ordinance passed by a prior council would remain in effect, or would die with the council which passed the
ordinance. Unless there is some language in the ordinance stating that it shall not be effective beyond a certain date, or other words of limitation, it remains in effect until it is repealed. In addition to the charter provision with respect to the removal of town officers, you are referred to § 15.1-831 of the Code, which authorizes the council to remove town officers. This provision and the provision in the charter seem to be in harmony with each other.

CHARTERS—Warrenton—Tax on utility bills.

TAXATION—Warrenton Charter—Utility bills.

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

In your letter of February 14, 1966, you ask whether the Council of the Town of Warrenton has authority to adopt an ordinance imposing a tax on consumers' bills from utilities operating in the town.

The authority for such a tax is found in § 2-2 of the Warrenton charter (Acts of 1964, Chapter 47, p. 78) which gives the town power "to raise annually by taxes and assessments in said Town such sums of money as the Council thereof shall deem necessary for the purposes of the Town, and in such manner as the Council may deem expedient in accordance with the Constitution and general laws of the Commonwealth and of the United States . . . ."

I am aware of no provision of law prohibiting such a tax. Therefore, I am of the opinion that the town has power, under the section quoted above, to impose the tax in question.

CITIES—May Prohibit Certain Minors from Driving a Motor Vehicle on Its Streets.

MOTOR VEHICLES—City May Prohibit Certain Minors from Driving on Its Streets.

HONORABLE EARLE M. BROWN
Member, House of Delegates

This is in reply to your letter of December 3, 1965, in which you request my opinion as to whether any city in this State, irrespective of the population set forth in § 46.1-357, Code of Virginia (1950), as amended, is thereby authorized to prohibit any minor under the age of sixteen years from driving a motor vehicle on its streets, roads, highways and alleys.

The portion of § 46.1-357 quoted in your letter for my consideration, is paragraph (b), which I shall quote, as follows:

"(b) No minor under the age of sixteen years shall drive a motor vehicle on the streets, roads, highways and alleys of any city, or of any county having a population greater than eighty-nine thousand in this State if prohibited from so doing by a proper city or county ordinance, unless driving under the provisions of § 22-235.1."

The clause first extending this authority to counties was inserted by amendment found in Chapter 110, Acts of Assembly of 1960. It applied to counties
having a population greater than one hundred and thirty thousand. Prior to that, paragraph (b) of § 46.1-357 authorized any city in this State to prohibit minors under the age of eighteen years from driving a motor vehicle on the streets and alleys thereof but contained no limitation as to population. The 1964 amendment, found in Chapter 617 of the Acts of Assembly of that year, substituted "sixteen years" for "eighteen years" and "eighty-nine thousand" for "one hundred and thirty thousand."

The foregoing historical background and, especially, the phraseology and punctuation used in the quoted paragraph lead me to the conclusion that the limitation as to population applies only to a county. Accordingly, I am of the opinion that any city in this State, irrespective of the population specified in § 46.1-357, may, by proper ordinance, prohibit minors under the age of sixteen years from driving a motor vehicle on its streets, roads, highways and alleys.

CITIES—Water Pumping Station in Suffolk—Portsmouth permitted to operate.

ORDINANCES—Suffolk Zoning—Portsmouth permitted to operate water pumping station.

May 24, 1966

HONORABLE J. LEWIS RAWLS, JR.
Member, House of Delegates

HONORABLE WILLARD J. MOODY
Member, House of Delegates

In your letters of May 17 and May 23, 1966, you ask whether the City of Portsmouth is forbidden by the zoning ordinance of the City of Suffolk from operating a water pumping station on land in Suffolk owned by Portsmouth and located in an "AA residential" district.

Section 24-4(11) of the ordinance permits in such districts: "Water and sewerage pumping stations, only as controlled by the municipality."

The question is whether "the municipality" as used in the ordinance is a phrase which includes the City of Portsmouth. The ordinance contains no definition of this term.

41-A Words and Phrases, pages 26-80, states that the use of the word "the" before a noun usually is held to have a specifying and particularizing effect, as opposed to the generalizing effect of "a", "an", or "any", but that its meaning depends on the context in which it is used and the purpose of the law in which it is found, and that sometimes "the" can be construed to mean "a", "an" or "any".

I am advised that Suffolk has no water system of its own, and that Suffolk's inhabitants are served by the water system owned and operated by Portsmouth, pursuant to a contract between Suffolk and Portsmouth dated March 30, 1920, prior to the enactment of the Suffolk zoning ordinance. This fact undoubtedly was known to the draftsmen of the zoning ordinance. If "the municipality" is construed to refer only to the City of Suffolk, it would deprive the phrase of any meaning as applied to water pumping stations, since Suffolk does not own or control any such facilities.

The city attorney of Suffolk, in an opinion dated May 16, 1966, advised the Suffolk city manager that "the words 'only as controlled by the municipality' restrict the control to that of a municipality as opposed to private control . . . I am, therefore, of the opinion that the City of Portsmouth . . . has the right
to use its property in a "AA" Residence District for a water pumping station."

It is well settled that when the meaning of a phrase in a law is doubtful, great weight should be given to the practical construction given by officials charged with its enforcement. 17 M.J., Statutes, §§ 58, 59, pages 317-20.

Applying this rule, I am of the opinion that, while the matter is not free from doubt, the City of Portsmouth is permitted by the ordinance to operate a water pumping station on the premises in question.

CIVIL PROCEDURE—Appeals from Court Not of Record—Payment of writ tax and costs on legislative continuance.

HONORABLE W. CARRINGTON THOMPSON Member, House of Delegates

This is in reply to your letter of August 26, 1965, which reads as follows:

"§ 16.1-112 of the Code, dealing with civil appeals from courts not of record, provides in part 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 (59) of § 14-123, the case shall be docketed; but if the writ tax and costs be not so paid within thirty days from the date of the judgment, the appeal shall thereupon stand dismissed and the judgment shall become final, and the papers shall be returned to the clerk of the court which rendered the judgment and the judge of such court shall enter judgment against any surety on the appeal bond as a matter of course."

"§ 30-5 of the Code, dealing with legislative continuances, provides in part as follows:

"... and the period required by any statute or rule for the filing of any pleading or the performance of any act relating thereto shall be extended until thirty days after any such session."

"In a hypothetical situation assume that A recovers a judgment against B in a civil claim in the County Court, B being a member of the General Assembly. A Special Session of the General Assembly is called within thirty days after the judgment is recovered, B having effected an appeal to the Circuit Court.

"Does § 30-5 of the Code extend the time for paying the writ tax and costs as set forth in § 16.1-112? Your official opinion on this matter will be appreciated."

In my opinion, the phrase "the performance of any act relating thereto" includes the payment of the writ tax and costs required by § 16.1-112 of the Code. It would seem that your question is similar to the question decided in the case of Hartsock v. Powell, 199 Va. 320. In that case, notice of appeal was filed after the expiration of the sixty days period provided in Rule 5:1, Section 4 of the Rules of the Supreme Court of Appeals, but the filing was held to be timely.
due to the fact that counsel for the appellant was a member of the State Senate and the General Assembly was in session and the time for filing was extended by the provisions of § 30-5 of the Code.

CIVIL PROCEDURE—Summons in Garnishment—Justice of peace may not issue.

JUSTICE OF PEACE—Authority—Not authorized to issue summons in garnishment.

HONORABLE LEROY T. CHESHIRE, President Association of Justices of the Peace

August 13, 1965

This is in reply to your letter of August 12, 1965, which reads as follows:

"May we take this opportunity of calling to your attention a letter and opinion, dated June 21, 1965, to the Honorable Harold B. Singleton, Judge of the Amherst County Court, Amherst, Virginia. "This letter concerned the issuing of garnishments by Justices of the Peace in Amherst County, Virginia. "QUESTION: Would this opinion, recited in your letter of Judge Singleton and apparently interpreted under the Trial Justices' Act, apply to the issuing of garnishments by Justices of the Peace in the City of Norfolk, Virginia?"

The opinion to which you refer was based upon § 39-4 of the Code, which section relates to a justice of the peace within a county or an incorporated town within said county or in any city in which a trial justice is appointed under the provisions of Chapter 2 of Title 16 of the Code. Under the statutes in effect since the trial justice system was abolished, the trial justice courts are now designated as courts not of record.

Section 39-1 relates to the powers of justices of the peace in cities. This section reads as follows:

"In every city in which no provision is made for the election of justices of the peace by the terms of its charter there shall be elected by the qualified voters of each ward of such city one justice of the peace, who shall hold office for the term of four years and until his successor is elected and qualified, unless sooner removed from office. The justices of the peace shall be conservators of the peace within the corporate limits of the cities for which they are respectively elected and within one mile beyond the corporate limits thereof and within such limits shall possess the jurisdiction and exercise the powers conferred upon justices of the peace under the laws of this Commonwealth, except that nothing herein contained shall be construed as vesting in such justices any portion of the jurisdiction given by law to trial justices of the cities of this Commonwealth unless such a justice be himself a trial justice within the definition contained in § 1-13 and then only to the extent that the rights and authority of trial justices may have been conferred upon him."

I have not examined the charter of the city of Norfolk. I assume, however, that § 16.1-53 of the Code is the statute under which the municipal courts of Norfolk are established. These courts, in my opinion, are continuations of the former trial justice system. Therefore, in my opinion, under § 39-1 the justices
of the peace in the various cities, unless there is some provision in the charter to the contrary, do not have authority to issue a summons in garnishment.

In this connection, I call attention to the recent report made by the committee of the Judicial Conference appointed to study the problems of the justices of the peace in Virginia. This report was filed by the Honorable Raymond V. Snead, Judge of the Twenty-sixth Circuit. In this report the powers of the various justices of the peace are set forth and it does not show that this committee was of the opinion that a justice of the peace could issue a summons in garnishment.

CIVIL PROCEDURE—Warrants—Lay employee may have issued for employer.

VIRGINIA STATE BAR—Unauthorized Practice—What constitutes.

WARRANTS—Lay Employee May Have Issued for Employer.

June 13, 1966

HONORABLE HALE COLLINS
Member, Senate of Virginia

In your letter of May 28, 1966, you ask:

1. Whether the manager or other person in charge of a corporation may institute a suit for a debt due to the corporation, and

2. Whether the manager or other person in charge of an unincorporated business may institute a suit for a debt due to the business.

The question is whether filing of suit involves the practice of law. A natural person may institute and prosecute a suit in his own behalf, acting as his own lawyer. I assume that the second part of your inquiry does not refer to such a situation, and concerns a suit on behalf of a sole proprietorship or a partnership instituted by an employee of the owner or owners.

Section 54-48 of the Code of Virginia empowers the Supreme Court of Appeals to define the practice of law. The Court, in Part I of the Rules for Integration of the Virginia State Bar, has adopted the following definition:

"Generally, the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

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

"(1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

"(2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

"(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal,—judicial, administrative, or executive,—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when
such presentation by such employee or expert does not involve the examination of witnesses or preparation of pleadings." 174 Va. at xix; 201 Va. at lxxxvi.

The Committee on Unauthorized Practice of Law of the Virginia State Bar, in Opinion No. 28, approved by the Council of the State Bar on May 9, 1957, ruled that it is not the unauthorized practice of law for a regular and bona fide employee of either an individual or corporation, private or municipal, to have civil warrants issued by a court not of record and to testify as to the facts. The last paragraph of the opinion states that the employee’s function “must, of course, be limited solely to the presentation of facts and cannot extend to the examination of witnesses.” A similar ruling was made by the Committee in Opinion No. 18, dated February 3, 1943, in which the actions of an assistant manager of a small loan corporation, in obtaining a civil warrant and in introducing a note in evidence, were ruled not to constitute the practice of law. However, in Opinion No. 10, dated February 21, 1940, the Committee ruled that the president or other employee of a corporation, not an attorney, is engaged in the unauthorized practice of law if he prepares and files a bill of particulars, since a bill of particulars is a pleading.

Since the filing of a pleading, as opposed to requesting a civil warrant, constitutes the practice of law, then it would follow that a lay employee of a corporation or of an unincorporated business may not institute suits in a court of record, where written pleadings are required. In courts not of record, as well as in courts of record, a lay employee may not prepare or file a bill of particulars or other pleading, nor may he take any part in the trial of an action other than presentation of facts.

In my opinion, a regular bona fide lay employee would not be engaged in the unauthorized practice of law when he institutes a suit in a court not of record, on behalf of his regular employer, by applying to the clerk for issuance of a civil warrant. This ruling is based largely on State Bar Opinion No. 28, mentioned above. I am advised that the Committee on Unauthorized Practice of Law is considering a change in that opinion.

Of course, a lay employee may not institute a suit in any court on behalf of a creditor who is not his regular employer, as stated in my opinion dated February 10, 1966, and addressed to the Honorable Beverly T. Fitzpatrick, Judge of the Municipal Court of the City of Roanoke. It is the representation of another person, not the regular employer of the acting employee, which distinguishes the latter situation from those presented in your inquiry.

CIVIL PROCEDURE—Writ of Arrest—City sergeant may break inner door in serving.

CIVIL PROCEDURE—Writ of Arrest—City sergeant may require assistance of others.

CIVIL PROCEDURE—Execution of Process—Dependent on who issues.

Honorable Charles H. Leavitt
City Sergeant, City of Norfolk

May 2, 1966
Justice Court of the City of Norfolk. You state that the writ was served on the defendant, and on being asked to accompany the deputy sergeant who served it to the jail, "The defendant became hostile and belligerent and ran to a bedroom, barricaded the door and refused to come out of the room or open the door. The sergeant requested police assistance to apprehend the defendant, which assistance was denied."

You ask three questions:

1. To what extent can the sergeant legally go to the effect the writ of arrest?
2. Who is required to assist the sergeant at his request?
3. Who is to execute writs or other process emanating from and returnable to the Civil Justice Court, the city sergeant or high constable?

1. Section 8-435 of the Code of Virginia (1950), as amended, empowers the clerk of the court from which a *fieri facias* issues to issue a summons requiring the judgment debtor to appear before a commissioner in chancery to answer interrogatories propounded by the commissioner or counsel for the execution creditor. If a person so summoned fails to appear and answer, § 8-438 provides that the commissioner "shall issue a writ directed to any sheriff, sergeant or high constable requiring such sheriff, sergeant or high constable to take the person so in default and keep him safely until he shall make proper answers . . . ."

This statute empowers the officer to make a civil arrest, a rather drastic remedy. I know of no Virginia case which states how much force an officer may use in making such an arrest. The broad principles applicable to arrest generally would appear to be applicable. "When an officer has a right to make an arrest, he may use whatever force is necessary to apprehend the offender or effect the arrest, and no more; he must *avoid* using unnecessary violence . . . . What amounts to reasonable force on the part of the officer making an arrest usually depends on the facts of the particular case, and hence the question is for the jury." 5 Am. Jur. 2d *Arrest* § 80, p. 766; § 81, p. 768.

"In the absence of statutory authorization, no person or officer acting under any civil process, whether at the suit of a private person or of the state, has authority to break open the *outer* doors or windows of a man's dwelling to arrest the occupant or a member of his household . . . . an officer who has gained entrance to the premises peaceably may, after demand for admission and refusal, break in an *inner* door without a warrant for the purpose of search for and apprehending the occupant." 5 Am. Jur. 2d *Arrest* § 91, p. 777; Annotation, 5 A.L.R. 263, 271 (1920). (Emphasis added)

Section 8-422 of the Code permits an officer who has in his hand an execution to be levied "to break open the outer doors of a dwelling house in the daytime, after having first demanded admittance of the occupant," in order to make a levy. Similarly, § 8-402 permits an officer to "employ reasonable and necessary force to break and enter the door" of the premises in question and "to put the plaintiff in possession" when executing a *writ of possession* for recovery of specific real or personal property.

The fact that power to break in outer doors is expressly given in these latter sections and is not expressly given in § 8-438, leads me to doubt that authority to break outer doors is given in a case like that described by you. However, it would appear that, if necessary in order to execute a writ of arrest, an officer would be justified in breaking down an inner door of the premises in such a case.

2. Section 15.1-79 of the Code provides: "Every officer to whom any order, warrant or process may be lawfully directed . . . . may, in case of resistance made or apprehended, summon so many of the people of his county, or corporation . . . . to aid him, as may be sufficient." Any person failing to obey such summons may be punished for contempt by the court issuing the order,
warrant or process. This statute plainly requires any person, including policemen, to assist the sergeant at his request in the execution of process. However, the basic responsibility for effecting the arrest remains with the officer to whom the process is directed.

3. Which officer is required to execute process depends on the type of process issued, and the court or officer issuing it. Generally speaking, the high constable is the ministerial officer for the Civil Justice Court, and the city sergeant is the ministerial officer for the Circuit Court, the Corporation Courts and the Court of Law and Chancery. Code, §§ 17-192 and 17-203. In the case of failure to answer interrogatories issued to a judgment debtor under § 8-435 of the Code, it is plainly stated in § 8-438 that the commissioner in chancery may issue a writ of arrest directed "to any sheriff, sergeant or high constable." Thus, the commissioner may cause such a writ to be directed to either the city sergeant or the high constable, and the officer receiving it is bound to execute it.

CLERKS—Bond—Certain clerical duties covered.

BOND—Clerks of Courts—Certain clerical duties covered.  

HONORABLE ROBERT L. GILLIAM, III  
Commonwealth's Attorney for Westmoreland County  

April 25, 1966

In your letter of April 19, 1966, you enclosed a copy of a bond for the clerk of the circuit court, the condition of which is that the principal "shall faithfully discharge the duties of his office or trust as clerk of the circuit court." You ask:

"Could you please advise whether, in your opinion, this bond, by the wording above referred to, would encompass and cover such acts as indexing of fiduciary bonds and accounts, indexing of deeds and wills, proper entry of court orders in order books and other acts of a like nature which are required to be performed by clerks of court."

Section 15.1-41 of the Code of Virginia requires every clerk of a city court or a circuit court, at the time he qualifies, to "give such bond as is required by § 49-12." Section 49-12 says each bond "shall be with condition for the faithful discharge by him of the duties of his office, post or trust." Section 15.1-42 requires the amount of the bond of such a clerk to be not less than $3,000.00, and requires that the bond bind the clerk and his sureties "not only for the faithful discharge of his duties as clerk of the court, but also for the faithful discharge of other duties as may be imposed upon him by law in like manner and with the same effect as if it were so expressed in the conditions of his bond."

A clerk's official bond does not cover misdeeds by him in his private capacity. Stuart v. Madison, 1 Call (5 Va.) 481 (1798). In another early case, Auditor v. Dryden, 3 Leigh (30 Va.) 762 (1832), it was held that a bond that the clerk should "duly and faithfully execute his said office" of clerk of court was not broad enough to recover shortages in the collection of taxes, where collection of taxes was a duty separately imposed upon the clerk by law. The court reasoned that in statutes dealing with collection of taxes by sheriffs, and later by clerks, separate bonds had been required covering performance of the obligations of the officer as tax collector, as distinguished with performance of the duties peculiar to the office of sheriff or clerk. In view of the language of § 15.1-42 quoted above, I doubt that the Dryden case would be followed today.
I can find no case specifically covering liability on a bond arising from the clerk’s negligence or shortcomings in indexing records, entering orders or performing other clerical functions. However, it appears clear from the broad language of the bond, and the even broader language of § 15.1-42, that the bond covers more than the mere defalcation in funds, and requires the proper and careful performance of the routine acts of the particular office in question. This view is supported by Chase v. Miller, 88 Va. 791, 803, 14 S.E. 545 (1892), where the court said that if the act of the clerk of a circuit court in taking an insufficient appeal bond was a breach of the condition of his official bond, given “for the faithful discharge by him of the duties of his office, post or trust,” then the injured party’s remedy was by action on the clerk’s bond. The clear implication of the court’s language was that failure to properly execute his clerical duties would constitute a breach of the condition of such a bond.

Therefore, I am of the opinion that the bond in question covers improper performance of the clerical acts listed by you, and performance of similar duties.

CLERKS—Courts of Record—Use of U. S. Census correct in determining compensation.

COMPENSATION BOARD—Proper to Use U. S. Census in Determining Compensation.

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

January 5, 1966

This will acknowledge receipt of your letter of January 4, 1966, in which you refer to § 14.1-143 of the Code which provides for the maximum compensation of the officers mentioned in § 14.1-136. This section fixes the compensation upon the basis of the population of the political subdivision.

You state as follows:

“It has been the practice of the Compensation Board to apply annually the population brackets contained in Code § 14.1-143, on the basis of the United States Census in effect at the close of each fee year in determining the maximum compensation to which clerks are entitled.

“I can find no authority in said Section, or any other section of the Code, authorizing the Compensation Board to use the U. S. Census as a factor in measuring population to determine maximum compensation for Clerks of Court. The U. S. Census is taken at ten year intervals. It is not realistic and its use contravenes the purpose of the law to determine compensation annually.

“I would thank you for your opinion as to the legality of the Compensation Board in using the U. S. Census as aforesaid.”

In my opinion, the policy adopted by the Compensation Board is correct. This is on account of the provisions of § 1-13.22 of the Code, which reads as follows:

“The word ‘population’ used in any act of the General Assembly with reference to any county, city of town, unless the context clearly indicates some other meaning, shall be construed to mean the population of such county, city or town as shown by the United States census latest preceding the time at which any provision dependent upon population is being applied, or the time as of which it is being con-
strued, to the end that there will be such flexibility as will constitute the word of general and variable, instead of special and invariable, significance; provided, however, that where two or more political subdivisions are consolidated, the population of the consolidated county or city shall be the combined population of the consolidating subdivisions, under the last preceding United States census."

CLERKS—Courts Not of Record—Who may serve as substitute.

JUSTICE OF PEACE—May Serve as Substitute Clerk of Court Not of Record.

HONORABLE HAROLD S. SINGLETON
Judge, Amherst County Court

February 14, 1966

This is in reply to your letter of February 8, 1966, in which you ask my advice as to whether there is anything incompatible about a person who is a justice of the peace serving as a substitute clerk of the county court. You state that when serving as substitute clerk he would not be acting as a justice of the peace.

Section 16.1-46 of the Code of Virginia permits appointment of substitute clerks for certain county courts in the event the clerk is unable to perform his duties by reason of sickness, absence, vacation or otherwise. The substitute, after qualifying and giving bond, may perform all duties of the office during the absence or disability of the clerk. This section places no limitation on who may be appointed as substitute clerk.

Section 16.1-18 of the Code of Virginia provides:

"Except as provided in § 16.1-22 no person shall at the same time hold the office of judge, associate judge or substitute judge of a court not of record and the office of justice of the peace, clerk of a court, sheriff, sergeant, treasurer, or commissioner of the revenue, or deputy of either of them. If any judge of a court not of record shall accept any office for which he is ineligible under this section, such acceptance shall vacate his office as judge of such court."

Section 16.1-22 of the Code states that a substitute judge shall be eligible to hold the office of justice of the peace.

In my opinion, the only persons disqualified by § 16.1-18 to serve as justices of the peace are the judge, associate judge and substitute judge of the court. The language of § 16.1-22 is designed solely to provide an exception to this rule, and should not be taken as indicating that officers other than substitute judges are ineligible to serve as justices of the peace.

The old case of Amory v. Justices, 2 Va. Cas. (4 Va.) 523 (1826), holding the office of deputy clerk of a county court is incompatible with that of a justice of the peace, was based on a statute long since repealed, and, therefore, is not controlling.
CLERKS—Deputy—Must be resident of political subdivision where appointed.

PUBLIC OFFICERS—Deputy Clerk—Must be resident of political subdivision where appointed.

July 9, 1965

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

This will acknowledge receipt of your letter of July 8, 1965, which reads as follows:

"I have an opportunity to employ a very desirable man as deputy in this office, yet I find that he lives in the city of Chesapeake just outside Norfolk city limits. Section 15.1-51 of the Code, which has been amended and revised several times, is not entirely without doubt and I am desirous of knowing from you as to whether or not it would be possible for me to employ this gentleman who presently is not a resident of the City of Norfolk."

This office has held on numerous occasions that a deputy clerk is an officer within the meaning of that term as used in Section 32 of the Constitution of Virginia. The deputy, of course, exercises the powers of the clerk whenever the occasion demands it. In this connection I refer you to two prior opinions of this office—(1) to Hon. John H. Powell, Clerk of Nansemond County, dated December 21, 1960 (Report of the Attorney General, (1960-1961), at p. 36); and (2) to Senator Robert C. Vaden, dated February 28, 1944 (Report of the Attorney General, (1943-1944), at pp. 78-83; you will find a discussion of this question on p. 79).

I can see no escape from the conclusion that the person in question would not be eligible under the Constitution to hold the office of deputy clerk in the city of Norfolk.

October 22, 1965

HONORABLE FLETCHER B. WATSON, Judge
Juvenile and Domestic Relations Court of Pittsylvania County

This will acknowledge receipt of your letter of October 14, 1965, which reads as follows:

"In criminal cases tried in courts not of record, where a fine is imposed, a fee of $1.00 is taxed for the Clerk of the Circuit Court to be paid at the time the fine is reported, and the papers filed with him. Should we, in the Juvenile and Domestic Relations Court, where we do not turn over the records, but do report and pay to the Clerk of the Circuit Court all fines collected, tax this $1.00 fee as part of our costs?"

Under §§ 14.1-123 and 19.1-337 of the Code, the clerk of the circuit court would be entitled to a fee of $1.25 for his services in connection with the filing and indexing of papers in criminal actions transmitted to him by a county court. There is one exception, however, which you will note in § 19.1-337, limiting the fee of the clerk to twenty-five cents in cases where the accused is
acquitted or in cases where the costs are not collected from the accused in Commonwealth cases.

I am unable to find any specific statute which provides for the inclusion of this fee as a part of the costs in Juvenile and Domestic Relations Court cases. However, I feel that §§ 19.1-335 through 19.1-337 would be applicable where you make an itemized return to the clerk of the fine and cost collected in such a case. In my opinion, it would be proper to tax the amount remitted to the clerk as a part of the costs.

CLERKS—Fees—May be deposited in savings accounts.

FEES—Clerks—May be deposited in savings accounts.

April 15, 1966

HONORABLE G. EDMOND MASSIE
Chairman, State Compensation Board

This is in reply to your letter of April 8, 1966, in which you request my opinion as to whether a clerk of a court of record may place funds from earned fees in ordinary savings accounts pending the year end settlement required by Article 3, Chapter 2, Title 14.1 of the Code. You suggest that this is permissible under § 2-299 of the Code.

The provisions of § 14.1-101 of the Code do not prohibit a clerk from depositing public funds under his control in savings accounts. In my opinion, the protection provided to the treasurer under this section exists if the funds are deposited in interest bearing savings accounts in banking institutions referred to in § 2-299 of the Code.

CLERKS—Fees—May be used to purchase office equipment.

COMPENSATION BOARD—Approval for Purchase of Office Equipment.

February 16, 1966

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

This is in reply to your letter of February 14, 1966, which reads as follows:

"Section 17-68 of the Code of Virginia prescribes the procedure for the recordation of maps in the clerks' offices.

"In conjunction with this system, I propose to install a reader-printer machine as an aid to attorneys and the general public in the viewing, handling and copying of maps. I will in no way change the manner in which maps are recorded.

"Consequently, I have requested the Compensation Board to approve the purchase of this machine out of excess fees. The purpose of this letter is to determine if the Compensation Board can legally authorize the purchase of a reader-printer out of excess fees."

There is no statutory reason why a clerk may not purchase this machine if the expense for the same is approved by the State Compensation Board. You recently explained the operation of this machine to us and it would seem that this would come in the same category as any other device that promotes the efficient operation of the clerk's office.
CLERKS—Fees—Recordation of typewritten single-spaced instrument.

June 12, 1966

HONORABLE J. E. CROCKETT, Clerk
Circuit Court of Wythe County

This is in reply to your letter of January 10, 1966, in which you submitted a xerox copy of a deed of trust form and request my advice as to the correct clerk's fee to be charged for recording an instrument of this nature. The specimen deed of trust which you submitted is a xerox copy of a typewritten single-spaced instrument.

The recording fee in this instance should be in accordance with the provisions of § 14.1-112(2) of the Code. The fee relating to a typewritten paper, single-spaced, would apply.

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CLERKS—Issuing Marriage Licenses After Divorce—No duty to ascertain legal effect of foreign divorce decree.

MARRIAGE—Issuance of Licenses After Divorce—No duty on clerk to ascertain legal effect of foreign divorce decree.

October 18, 1965

HONORABLE J. PHIL BENNINGTON, Clerk
Circuit Court of Grayson County

This is in reply to your letter of October 16, 1965, which reads as follows:

"I would like to have your opinion in regard to issuing a marriage license to a person who presents a certification of divorce rendered in France with a translation by the Consular in Norfolk, Virginia with the request for a marriage license to be issued to him and a Jewish girl from French Morocco who has been in the United States a little over a year. Age limit is not a question. The nationality of the female is in question as well as her not being a naturalized citizen.

"I have a copy of what is supposed to be his divorce which I could file.

"I would appreciate a prompt reply as the applicant resides in North Carolina and might appear at anytime and apply for a marriage license."

If the parties seeking the marriage license execute the affidavit required by § 20-16 of the Code, you should issue the license. This office has previously ruled that it is not incumbent upon the clerk to question the legal effect of divorces granted in other jurisdictions. See, Report of the Attorney General (1960-1961), at p. 186. In that opinion, which is dated May 2, 1961, and addressed to the Clerk of the Hustings Court of the City of Richmond, we cited prior opinions of this office, published in Report of the Attorney General (1941-1942), at pp. 90-91, and Report of the Attorney General (1938-1939), at p. 163.
CLERKS—Not Authorized to Purchase Errors and Omission Insurance.

COMPENSATION BOARD—Insurance—Approval of purchase by board.

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

February 15, 1966

This will acknowledge receipt of your letter of February 14, 1966, which reads as follows:

"I am considering the purchase of an errors and omission insurance to cover the performance of duties as clerk, and I presume also such insurance would cover the work of the employees of my office.

"I would like your opinion as to whether it would be legal for the County of Amelia through the Board of Supervisors to pay the cost of this insurance."

In my opinion, this would not be a proper expenditure by the board of supervisors out of the general fund. This would come in the same classification as other expense connected with the clerk's office and would require the approval of the State Board of Compensation.

CLERKS—Recordation—Deed with plat attached.

RECORDATION—Subdivision Plats—Where subdivision ordinance not adopted under Article 7, Chapter 11 of Title 15.1.

HONORABLE ALDAH B. GORDON, Clerk
Circuit Court of Appomattox County

September 28, 1965

This will acknowledge receipt of your letter of September 20, 1965, which reads as follows:

"The following problems have arisen in my office and I shall be grateful for your opinion concerning same:

"(1) Is it proper to record, in the Deed Book, a hand sketch or plat made by an attorney or other person who is not a certified land surveyor when

"(a) the hand sketch or plat is incorporated in and made a part of the deed; and

"(b) the hand sketch or plat is not incorporated in and made a part of the deed?

"(2) Is it proper to record a plat, made by a certified land surveyor, when not accompanied by a deed, if the plat has not been acknowledged and is not a subdivision plat?"

On September 22 you advised me that the Board of Supervisors of Appomattox County had not adopted an ordinance with respect to subdivisions pursuant to Article 7, Chapter 11, Title 15.1 of the Code.

Inasmuch as the county has not adopted an ordinance, in my opinion a deed to which is attached a plat made either by an attorney or other person who is not a certified land surveyor should be admitted to record.
If the plat is not made a part of and attached to a deed, in my opinion, it may be recorded in the plat book if it is signed and acknowledged. Under § 55-106 in order for any instrument or document to be recorded it must be signed and acknowledged by the person signing the same or proved by two witnesses.

The provisions of Article 7, Chapter 11 of Title 15.1 do not become operative until the governing body of the county has adopted an ordinance under § 15.1-465, et seq.

CLERKS—Recordation—Not required to pass on sufficiency of execution of deeds.

RECORDATION—Deeds—Clerk not required to pass upon sufficiency of execution.

October 26, 1965

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

This will acknowledge receipt of your letter of October 22, 1965, in which you refer to §§ 55-119 and 55-120 of the Code and state:

"...There is a difference of opinion among some Clerks as to whether or not a Clerk has the authority to record a deed made by a corporation which does not have the seal affixed and is not attested by the secretary, acting treasurer, or treasurer of such corporation, or by some other person as may be authorized thereunto by the board of directors. Some take the position, and I am included, that if the name of the corporation is properly acknowledged in the manner provided in Section 55-120, the deed is recordable; that it is the responsibility of the person preparing the deed to comply with the requirement of Section 55-119, to wit: seeing that the seal of the corporation is affixed and attested by the secretary."

In my opinion, the position taken by you is correct. It is not the function of the clerk to pass upon the sufficiency of the execution of a deed. If the deed is properly acknowledged, he should record it.

CLERKS—Recordation—Not within power of clerk to determine whether or not contract in proper form.

UNIFORM COMMERCIAL CODE—Recordation—Clerk to record document pursuant to UCC after January 1, 1966.

March 31, 1966

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

This is in reply to your letter of March 21, 1966, which reads as follows:

"In the last several days I have accumulated through mail and by presentation in the Clerk's Office from several Winchester furniture and equipment stores, previously using conditional sales contracts in their financing, eight or ten old form conditional sales contracts, dated
before, and after, January 1, 1966, the date the Uniform Commercial Code became effective in Virginia, with request that I docket same as financing statements, with the representative of one Winchester firm indicating that the County of Frederick and the City of Winchester are accepting such old conditional sales contract forms for docketing as financing statements.

"It is my feeling that when the UCC went into effect in Virginia on January 1, 1966, the Code of Virginia pertaining to docketing conditional sales contracts became extinct and of no effect. Others, as above, contend that the basic essentials of a financing statement are contained in any contract, and for this reason an old form of conditional sales contract should be accepted for docketing. Before I clutter my records, I will be very grateful to have you advise me what to do with such contracts presented me as above. Also, will you kindly advise me specifically my authority to docket a 1965 conditional sales contract as a now current date.

"Further, I have been asked the question whether I would accept a regularly prepared and executed deed of trust on personal property and docket same as a financing statement. Again there may be the same basic information in the trust as a financing statement, but the question arises whether one type of instrument can be substituted for another and become a financing statement."

Sections 8.10-101 and 8.10-102 of the Code of Virginia provide as follows:

"§ 8.10-101. Effective date.—This act shall become effective on January one, nineteen hundred sixty-six. It applies to transactions entered into and events occurring after that date."

"§ 8.10-102. Provision for transition.—Transactions validly entered into before the effective date specified in § 8.10-101 and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this act as though such repeal or amendment had not occurred."

The Uniform Commercial Code is codified as Titles 8.1 through 8.10 of the Code of Virginia. The above-quoted sections appear in the last title of the Uniform Commercial Code.

This office has previously ruled that it is not within the power of a clerk to determine whether or not an instrument presented for filing is sufficient to meet the requirements of any particular provision of law. Therefore, in my opinion, it is not within the power of a clerk to determine whether or not a so-called "Conditional Sales Contract" is sufficient to meet the requirements of § 8.9-402 of the Code, specifying the formal requisites of a financing statement. Thus, if a so-called "Conditional Sales Contract," executed prior to January 1, 1966, is presented for filing, accompanied by a fee of fifty cents, it should be filed and recorded in accordance with the applicable provisions of Title 55 of the Code (the old so-called "Conditional Sales Law"), whether presented for filing before or after January 1, 1966. On the other hand, if a so-called "Conditional Sales Contract," executed prior to January 1, 1966, is presented for filing under the Uniform Commercial Code (accompanied by a fee of $1.00), on or after January 1, 1966, it should be filed in accordance with the applicable provisions of the Uniform Commercial Code. Any so-called "Conditional Sales Contract" executed after January 1, 1966, may be filed only under the applicable provisions of the Uniform Commercial Code and must be accompanied by a fee of $1.00.

A so-called "Conditional Sales Contract" may or may not be sufficient to comply with the requisites of a financing statement set forth in § 8.9-402. Again,
in my opinion, it is not within the power of a clerk to determine whether or not such an instrument is sufficient to meet these requirements.

To answer one of your specific questions, §§ 8.10-101 and 8.10-102 of the Code are the provisions which authorize you to docket so-called "Conditional Sales Contracts," executed prior to January 1, 1966, under either the provisions of Title 55 of the Code or under the provisions of the Uniform Commercial Code, or both, depending upon the request of and the amount of fee paid by the party submitting the instrument for recordation.

Your last question with reference to a deed of trust on personal property has already been answered. Again, it is not within the power of a clerk to determine whether or not an instrument presented for filing is sufficient to meet the requisites of financing statements set forth in § 8.9-402. This problem is one for the party seeking protection by the filing.

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CLERKS—Writ Tax—Interpretation of rules of court.

CIVIL PROCEDURE—Cross-Bills—Interpretation of rules of court.

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

March 29, 1966

This is in reply to your letter of February 4, 1966, which reads as follows:

"I have received a copy of an order entered January 11, 1966 by the Supreme Court of Appeals of Virginia, amending certain rules of the court.

"I would like your opinion on the following:

"1. Rule 2:2. I note that the only change in this rule are these words 'The statutory writ tax and clerk's fees shall be paid before the case is docketed.'

"Heretofore I have been extending credit to lawyers in many instances when suits were docketed and carried the receipt in my cash box as a cash item, which has been permitted by the State Auditor. Of course, if I did not later collect the writ tax and clerk's fees from the attorney I was responsible for the payment of same.

"Does this make it mandatory that the clerk actually receive the writ tax and clerk's fees before he can docket a suit, and if I extend the attorney credit would this rule be interpreted to mean that if credit is extended the suit would be subject to dismissal on motion of the defendants?

"2nd. Rule 2:14 now states in part 'Such a cross-bill is a new suit and all provisions of these Rules applicable to bills and subpoenas shall apply to such cross-bills; and all provisions of these Rules applicable to defendants shall apply to parties on whom such cross-bills are served.'

"Does this mean that a writ tax and clerk's fee would be collectible in view of the fact that it is a new suit and would the cross-bill be filed in a separate file as a new suit, or should it be filed with the original suit?

"3rd. Rule 3:3 (a) in part states: 'The statutory writ tax and clerk's fees shall be paid before the notice of motion for judgment is issued.'

"Your answer to my first question will also answer this question.

"Rule 3:9 states in part: 'A cross-claim is a new action,' etc.

"I think that your answer to my second question would also answer this question."
The amendment to the Rule 2:2 was not intended to require any procedural change in the clerk's office with respect to the collection of the writ tax and clerk's fees. If a clerk assumes the responsibility of extending credit to counsel for such fees, for which the clerk is responsible to the same extent as he would be if he had actually been paid, then, in my opinion, the suit may be docketed.

With respect to Rule 2:14, the writ tax and clerk's fee are payable on the filing of the cross-bill to the same extent as if a new suit were being brought. However, in my opinion, the cross-bill and the proceedings thereon should be filed with the papers in the original suit.

The reply to your first two questions applies to your questions regarding Rules 3:3 and 3:9.

The change made in Rule 2:14 makes obsolete the prior opinions of this office to the effect that no writ tax was required upon the filing of a cross-bill in a chancery proceeding.

COMMISSIONERS IN CHANCERY—Appointment As Tie Breaker—Prohibited.

BOARDS OF SUPERVISORS—Tie Breaker—May not be a commissioner in chancery.

HONORABLE JOHN D. HOOKER
Judge, Seventh Judicial Circuit

November 22, 1965

This will acknowledge receipt of your letter of November 19, 1965, which reads as follows:

"Section 15-240 of the 1950 Code of Virginia in regard to the appointment of a tie breaker provides in paragraph 1 that a Commissioner in Chancery shall be appointed to cast the deciding vote in case of a tie, as set forth in Section 15-245, etc. Section 15-240, which is now 15.1-535, was rewritten in 1962, and no reference whatsoever was made to the requirement that the tie breaker be a Commissioner in Chancery. However, Section 15-245, which is now 15.1-540, apparently contemplates that the tie breaker be a Commissioner in Chancery. My question is simply whether or not, in the opinion of your office, a tie breaker must be a Commissioner in Chancery. I would appreciate a reply at the convenience of your office."

In the revision of Title 15 of the Code at the 1962 session of the General Assembly, § 15-240 of the Code was amended to the extent set forth in Chapters 595 and 623. Chapter 595 was approved March 31, 1962, and amended § 15-240. It will be noted that this exact language was carried over into § 15.1-535 of Chapter 623 which was approved April 3, 1962, except that old § 15-245 was changed to § 15.1-539 so as to correspond with the new number given in the revision of Title 15. However, this reference to § 15.1-539 should have been to § 15.1-540, because § 15.1-540 takes the place of old § 15-245 referred to in Chapter 595. Through an obvious oversight, § 15.1-540 (old § 15-245) was not amended so as to conform to the provisions of § 15.1-533 and eliminate the reference to the commissioner in chancery.

In my opinion, the provisions of § 15.1-535 must control, as it is evident that it was the manifest intention of the General Assembly to repeal the prior provision of the law requiring appointment of the commissioner in chancery as tie breaker. It will be observed that § 15.1-535 specifically prohibits the appoint-
COMMISSIONERS OF ACCOUNTS—Not County or State Employees—May serve on school trustee electoral board.

SCHOOLS—Board Member’s Wife Teaching in Public School.

March 18, 1966

HONORABLE REGINALD H. PETTUS
Commissioner of Accounts of Charlotte County

This will acknowledge your letter of March 16, 1966, which reads as follows:

"I hold the office of Commissioner of Accounts, and some time ago I was appointed to the school trustee electoral board.

"At the time of the appointment I studied the law and did not feel that there was a conflict in holding the two offices. (§ 26-8 and § 15.1-50) It was my opinion that the office of Commissioner of Accounts is not a county or State office; however, I would like your opinion in regard to this and the following question:

"Can one hold the position of school board member while his wife is a teacher in that school system?"

Under the provisions of § 22-60 of the Code, members of the school trustee electoral boards are prevented from holding a county or State office. A commissioner in chancery appointed under § 26-8 is an officer of the court. In my opinion, he is neither a county officer nor a State officer as contemplated by § 22-60. Section 22-69 permits a member of the county school board to hold a position of commissioner of accounts and this office has generally held that the prohibitions with respect to the appointment of a county school board apply equally to a member of the school trustee electoral board.

In my opinion there is no legal objection to a commissioner of accounts serving on a school trustee electoral board.

With respect to your second question, this is controlled by § 22-206 of the Code. I enclose copy of an opinion issued by this office on July 8, 1957, to Dr. Davis Y. Paschall (Report of Attorney General (1957-1958), at p. 250). You will note from this opinion that whether or not the wife of a board member may teach in the public schools depends upon when she was first regularly employed as a school teacher.

COMMISSIONERS OF REVENUE—Authority—May not change County Land Book description on basis of unrecorded plat.

September 9, 1965

HONORABLE WILLIAM J. GILLS, JR.
Commissioner of the Revenue of Prince Edward County

This will acknowledge receipt of your letter of September 7, 1965, which reads as follows:

"A taxpayer's dilemma presented to me prompts this referral to your office for an opinion:
"In Prince Edward County in the year 1959 the taxpayer acquired a parcel of land described in the deed of conveyance as containing forty acres, more or less, by boundary and not by the acre. Recently the taxpayer employed the services of a certified land surveyor, whose unrecorded plat of the parcel proves the area embraced to be 23.4 acres."

"May the commissioner of the revenue, on the basis of the unrecorded plat, change the County Land Book description of the parcel to 23.4 acres, together with an adjusted value to be ascertained by him?"

"There are no building or improvements involved; the Land Book for 1965 has been completed, and the county treasurer's copy has been delivered.

"If the commissioner of the revenue cannot effect an adjustment in this matter, what action can the taxpayer take to correct the record, he not being now inclined to dispose of all or any part of the real estate?"

We have considered the question presented by you and in our opinion you do not have authority to make a correction of this assessment on the land books upon the basis of an unrecorded plat. We have discussed this matter with Honorable C. H. Morrissett, State Tax Commissioner, and he concurs in this conclusion.

The taxpayer may, in our opinion, proceed for relief under the provisions of Article 2, Chapter 22, Title 58 of the Code (§§ 58-1141, et seq.).

COMMISSIONERS OF REVENUE—Office Hours—County governing body has no authority to set.

LEGAL HOLIDAYS—Boards of Supervisors—No authority to change statutory provision.

HONORABLE BLAIR ZIRKLE
Commissioner of the Revenue of Shenandoah County

December 13, 1965

This is in reply to your letter of December 10, 1965, which reads as follows:

"Section 2-19 of the Code of Virginia specifically enumerates the legal holidays for the Commonwealth.

"My question is this, can the action of the local governing body, in this case, the Board of Supervisors, take precedence over the section of the Code referred to, by either adding additional holidays, or requiring that my office be open on any of the holidays specified in Section 2-19?"

The answer to your question is in the negative. I am not familiar with any statute which would authorize a board of supervisors to make any changes with respect to the legal holidays as set forth in § 2-19 of the Code. Furthermore, there is no statute which authorizes the governing body of a county to exercise any authority over the office hours of the commissioner of the revenue.
COMMISSIONERS OF REVENUE—Real Estate Taxation—Listing property in name of married woman.

TAXATION—Real Estate—Land book listing in name of married woman.

December 16, 1965

HONORABLE VICTOR J. SMITH
Commissioner of the Revenue of the City of Harrisonburg

This will acknowledge receipt of your letter of December 14, 1965, which reads as follows:

"I am writing to get a ruling as to whether a Commissioner of Revenue may or may not list real estate in the married name of a woman who either purchased or was willed said real estate while she was a single person.

"We have several properties in Harrisonburg carried in the names of single women who have subsequently married and who now want the property listed in their married names.

"If this is possible, can you please quote the proper statute or section of the State Code which is applicable. If it is not possible to change name, what are the governing statutes?"

I am unable to find any statute specifically relating to the question presented by you. There is a statute of this nature relating to personal property, namely, § 58-20 of the Code, but I find no comparable statute as to real estate.

Section 58-796 of the Code reads as follows:

"Each commissioner of the revenue shall commence, annually, on the first day of January, and proceed without delay to ascertain all the real estate in his county or city, as the case may be, and the person to whom the same is chargeable with taxes on that day. The beginning of the tax year for the assessment of taxes on real estate shall be January the first and the owner of real estate on that day shall be assessed for the taxes for the year beginning on that day." (Emphasis supplied)

In my opinion, whenever a married woman makes a request such as we have here, if you are satisfied that she is married, you should list the property on the land books in her married name, preserving, however, the name in which the deed was made. For example, if the property is conveyed to Mary Jones and subsequently Miss Jones marries a man by the name of Smith, the property could be shown on the books as being owned by Mary Jones Smith.

COMMONWEALTH ATTORNEYS—Fees—Misdemeanor cases—No fee unless required by statute to appear.

FEES—Commonwealth Attorneys—Misdemeanor cases—Not paid unless required by statute to appear.

November 24, 1965

HONORABLE JOSEPH MONTLEY WHITEHEAD
Commonwealth’s Attorney for Pittsylvania County

This will acknowledge receipt of your letter of November 19, 1965, which reads as follows:
"Section 14.1-121, Code of Virginia, 1950, as amended, states that no Attorney for the Commonwealth shall receive a fee for appearing in misdemeanor cases by a court not of record, except for violations of the law which he is expressly required to appear by the statutory enactment.

"Apparently there has been some confusion in some counties of the Commonwealth as to the taxing of these fees and the custom in this county has been to charge a Commonwealth's Attorney fee in any misdemeanor case in which the Attorney for the Commonwealth appears.

"I would appreciate your opinion as to the validity of this custom and if possible a list of the misdemeanor cases in which provision is made for the taking of such fees."

Section 14.1-121, as you point out, expressly provides that a Commonwealth's attorney shall not receive a fee for appearing before a court not of record in misdemeanor cases, except in those particular violations of the law where he is expressly required to appear by statutory enactment and provision is made of the taxing of his fee as a part of the costs.

Therefore, in my opinion, the custom of charging the Commonwealth's attorney fee in any misdemeanor case in which the Commonwealth's attorney appears would not be within the scope of the statute unless all such cases would come within the last paragraph of § 14.1-121.

There have been quite a number of opinions issued in the last few years with respect to this Code section. I enclose herewith copies of some of these opinions, which I believe will be helpful to you.

COMMONWEALTH ATTORNEYS—May Not Receive Separate Fee for Handling Condemnation Proceedings.

EMINENT DOMAIN—Commonwealth Attorneys—No separate fee for handling condemnation proceedings.

February 8, 1966

HONORABLE ROBERT E. BROWN
Acting Commonwealth's Attorney for King George County

This will acknowledge receipt of your letter of February 4, 1966, which reads as follows:

"Our County Board of Supervisors is contemplating the acquisition by condemnation of a tract of land adjoining the present courthouse for parking area and possible future building expansion. Will you kindly advise whether the handling of such proceedings by the Commonwealth Attorney on behalf of the Board would be a matter for appropriate attorney fee separate and apart from the regular compensation of the Commonwealth Attorney?"

Section 15.1-67 of the Code, which prohibits certain county officials from contracting with the county for compensation, applies to a Commonwealth's attorney. The sixth paragraph of this section makes certain exceptions with respect to services rendered by a Commonwealth's attorney in connection with the collection of taxes, representing the county in annexation proceedings, and suits against the county. This exception, in my opinion, does not apply to the services of a Commonwealth's attorney in connection with eminent domain proceedings brought by the county.
REPORT OF THE ATTORNEY GENERAL

COMPENSATION BOARD—Salaries of Clerks—Construing § 14.1-143.

CLERKS—Compensation—When serving additional judge or court.

June 29, 1966

HONORABLE JOHN M. RASNICK, JR.
Executive Secretary, State Compensation Board

This is in reply to your letter of June 28, 1966, which reads as follows:

"I have been instructed by the Compensation Board to request your opinion concerning the following Code Sections as they pertain to Clerks of Courts of the various counties and cities of the Commonwealth. The Code Sections in question are as follows: 14.1-143, 14.1-145, 14.1-148, 14.1-152, 14.1-153 and 14.1-155.1 (added at 1966 session of the General Assembly).

"The question is this: Should the $1000.00 per additional judge allowed Clerks serving Courts of Record having additional judges be added to the amount of base compensation set forth in the first part of § 14.1-143 prior to applying the other Code Sections mentioned above?

"I am attaching an example of one of the inquiries reviewed by this office."

The example accompanying your letter shows the compensation allowable to a clerk in one of the counties (1) by adding the $1,000 to the base salary and, (2) by adding the $1,000 to the total after taking into consideration the various increases allowed under other sections of the Code. The total compensation is more in those cases in which the $1,000 is added to the base initially fixed by § 14.1-143.

The provision pertaining to the extra $1,000 where the clerk serves as such for two or more regularly appointed or elected judges is contained in the same section that fixes the clerks otherwise "total compensation." Therefore, in my opinion, the $1,000 in question is an increase of the total compensation mentioned in the first part of this section. The other increases, based on percentages, must, in my opinion, be calculated after allowing the additional $1,000—that is, in accordance with your second example submitted along with your letter of inquiry, indicated as (1) in this opinion.

CONSERVATION AND ECONOMIC DEVELOPMENT—Forestry—Tree seedling order unenforceable.

ADMINISTRATIVE AGENCIES ACT—Tree Seedling Order Would Have to Comply.

May 25, 1966

HONORABLE GEORGE W. DEAN
State Forester

In your letter of May 18, 1966, you state:

"The State Division of Forestry, as authorized by law, grows and sells forest tree seedlings to the landowners for planting. Sometime during the 1920's when the State tree nurseries were first established there was a gentleman's agreement entered into with the Nurseriesmen's Association that the Division of Forestry would produce and sell only those
trees suitable for lumber and pulpwood production and that insofar as possible the Division would discourage the use of these trees for ornamental purposes. One device the Division believed would eliminate the resale of these seedlings by the landowner for ornamental purposes would be to discourage so far as possible the sale of the trees with roots attached. Accordingly, the Division devised a tree seedling order of the type attached. You will note that the landowner has signed the tree order certifying that he has read the conditions governing the sale of the trees for forest tree planting and places his order subject to the instructions contained on the tree order.

"Within the last year, certain landowners have sold considerable quantities of white pine seedlings 5 to 10 years of age with roots attached to persons who are using them for ornamental purposes.

"The question arises as to whether or not the tree seedling order, a copy of executed order is attached, constitutes a contract that is sufficiently valid for the State Forester to bring legal action against the violator for the recovery of the penalty set forth in Regulation No. 2."

Regulation No. 2, on the back of the Tree Seedling Order, provides:

"If trees are sold for ornamental or landscaping purposes, the seller shall be liable to the State for the payment of a penalty equal to three times the sale value of the trees sold."

As a matter of contract law, I am of the opinion that this provision may not be enforced in a suit for breach of contract. Generally speaking, courts will enforce provisions of contracts providing for liquidated damages, particularly when actual damages are difficult of ascertainment, but will not enforce penalties, even though a penalty may be labeled liquidated damages. 5 M.J. Damages, §§ 59-61, pp. 550-52. Since the regulation in question specifically labels the required payment as a penalty, and since it is hardly conceivable that the State would suffer actual damages as a result of a breach of a tree seedling contract, I doubt that this penalty may be enforced by suit.

However, if the penalty is imposed by law, or by a regulation adopted in accordance with law, in my opinion the penalty may be recovered in a civil action.

Section 10-12.1 of the Code of Virginia (1950), as amended, gives the State Board of Conservation and Economic Development "power to make rules for its own organization" and "such other general and specific powers as may be conferred upon it by law." Section 10-36 empowers the Director of the Department to establish nurseries for propagation of forest tree seedlings, and provides that seedlings may be "distributed to landowners and citizens of the Commonwealth under and subject to such rules and regulations as may be established by the Board."

I am advised that regulation No. 2, quoted above, has not been formally adopted by the Board. Therefore, there is no legal basis for enforcing this regulation. However, if it should be formally adopted by the Board under the procedure set out in Chapter 1.1 of Title 9 of the Code, I am of the opinion that seedling agreements thereafter executed, if violated, would be enforceable by suit for three times the purchase price of the seedlings involved.
CONTRACTORS—Certificate of Registration—When required.

Honorable George E. Allen, Jr.
Member, House of Delegates

This is in reply to your letter of August 30, 1965, in which you refer to the General Conditions furnished by the State agencies when soliciting bids for the performance of State contracts and in which you present the following questions:

"1. Must a contractor obtain a certificate of registration pursuant to Title 54, Chapter 7, of the Code of Virginia in order to bid upon or be awarded a contract by the Commonwealth of Virginia to furnish and install Food Service Equipment in a state college or other institution?

"2. If such a certificate of registration is not required, must the contractor in question furnish a performance bond and a bid bond as required by the Instructions to Bidders?"

I enclose copy of an opinion of this office dated October 29, 1963 to Honorable Theodore C. Pilcher (Report of Attorney General, 1963-64, at p. 53), which relates to your question 1.

Inasmuch as your question 1 covers installation, the answer is in the affirmative.

With respect to your question 2, while a contract for Food Service Equipment may not be included in the several categories set out in §§ 11-17, et seq., of the Code, I am of the opinion the State as a matter of policy may require such bonds.

CONTRACTORS—Definition Under § 54-113.

Honorable Dorothy McDiarmid
Member, House of Delegates

This is in reply to your letter of September 9, 1965, which reads as follows:

"A question has arisen in this jurisdiction concerning the applicability of Sec. 54-113 et seq. of the Code of Virginia.

"A local builder has heretofore constructed several houses on land owned by him in a subdivision in Fairfax County, and upon completion thereof subsequently offered the houses for sale. Recently this builder who is not qualified under Sec. 54-113 of the Virginia Code, entered into a contract of sale to construct on builder's lot from builder's plans and specifications a house for buyer with alterations thereto.

"The contract price of the house to be constructed is well in excess of $20,000.00 as will appear from copy of the contract transmitted herewith. The legality of the contract has been questioned on the basis that the builder is not qualified under Sec. 54-113 of the Virginia Code. The builder contends that he is not in violation of this section, that he is not a contractor, but is simply selling a house substantially similar to one he had planned to build on his lot prior to the time this contract was executed.

"I would appreciate your opinion as to whether, under the circumstances recited, this builder would be in violation of Sec. 54-113 of the Virginia Code."
The paper which you enclosed shows that the builder entered into a contract on July 29, 1965, with Alton O. McLane and Dorothy McLane for the sale of certain real estate to them for a consideration of $46,200. Under the terms of this contract, settlement of the purchase price is to be made on or before December 15, 1965, or upon completion of the financing arrangements, or as soon thereafter as a report on the title to the property can be secured. The contract further states in detail the type of building that is to be constructed on the property.

On April 5, 1939, the late Abram P. Staples, Attorney General at that time, in an opinion to the Hon. C. P. Bigger, Executive Secretary of the State Registration Board for Contractors, held that he did not believe the statutory definition of a general contractor, as it appeared in § 4359 (103) of the Code, which definition was substantially the same as is contained in § 54-113 of the Code, was applicable "to one who does not sell his services as a builder at all, but rather builds his own houses and sells nothing but the finished product." Subsequently, on February 10, 1955, this office issued an opinion with respect to § 54-113(2) of the Code, in which it was held that in each of the following situations, the provisions of that section did not apply:

"(1) a doctor buys five lots. He builds five houses costing more than $20,000. He sells the houses. He is unregistered to do work of over $20,000. He hires his own labor, and supervises the work himself.
"(2) a real estate developer buys a tract of land, hires his own labor, and builds a business building costing in excess of $20,000.
"(3) an owner buys a lot, hires his own labor, and builds his own house, (for his own occupancy) costing in excess of $20,000."

This opinion is reported in Report of the Attorney General (1954-1955), at p. 52, and, for your information, I enclose copies of both the opinions referred to herein.

In the case presented by you, it would seem that the builder has entered into a contract with the purchaser setting out in detail the type of building to be constructed and the consideration therefor. A transaction of this nature is distinguishable from those set forth in the previous opinions of this office.

In the cases involved in the prior opinions there was no prior contract with a purchaser as to the type of building when the builder constructed the houses. In this instance there is a contract for performing for a fixed price, work of the nature set forth in § 54-113(2) of the Code, and, therefore, in my opinion, the builder is a general contractor within the scope of the statute under consideration.

CONTRACTORS—Licensing—When required—Determined by real estate operation.

HONORABLE THOMAS N. FROST
Member, House of Delegates

On November 19, you left with this office a letter addressed to you from Hollin Hills, which reads as follows:

"For some time I have been trying to get Mr. Davie of the Department of Taxation at Richmond to obtain for me a ruling from the Attorney General as to my liability for taxes as set forth in copies of letters attached. . . ."
You also left with us copies of two letters written by Mr. R. C. Davenport of Hollin Hills to the supervisor of the Department of Partnership Division in the Department of Taxation in connection with Hollin Hills, and we find that the Department of Taxation has assessed a contractor's license against Hollin Hills in those instances where a building is constructed on real estate owned by Hollin Hills, in accordance with plans and specifications furnished by the purchaser, and at a sale price agreed upon, the sale to be completed when the building is finished. Hollin Hills claims exemption from the provisions of § 58-297 due to the fact that the buildings which it contracts are built on property owned by Hollin Hills. In previous opinions of this office we have held that the contractor's license does not apply in cases such as set forth below:

“(1) A doctor buys five lots. He builds five houses costing more than $20,000. He sells the houses. He is unregistered to do work of over $20,000. He hires his own labor, and supervises the work himself.

“(2) A real estate developer buys a tract of land, hires his own labor, and builds a business building costing in excess of $20,000.

“(3) An owner buys a lot, hires his own labor, and builds his own house, (for his own occupancy) costing in excess of $20,000.”

However, in those cases where the builder has entered into a contract with the purchaser setting out in detail the type of building to be constructed and the consideration therefor, although built on land owned by the builder, we have expressed the opinion that such a transaction is distinguishable from those set forth in the foregoing illustrations and, therefore, is subject to the license tax. The burden would be upon Hollin Hills to show that its transactions come within the scope of the illustrations set forth above.

____________________________

CONTRACTS—Purchase of Homes—Charges—Do not involve usury.

USURY—Not Involved in Contracts for Purchase of Homes.

September 28, 1965

Honorable George H. Hill
Member, House of Delegates

This is to acknowledge receipt of your letter of September 10, 1965, in which you enclosed photostatic copies of note ledger sheets issued to persons who have purchased homes under contracts. You ask my opinion as to the interest charges thereon.

I requested the Honorable Thomas D. Jones, Jr., Commissioner of Banking, to review the question raised in your letter. His letter to our Mr. Tyler, dated September 27, 1965, is enclosed herewith. I concur in the views expressed by Mr. Jones.

Long ago, in the case of Graeme v. Adams, 64 Va. 225, the Court of Appeals expressed the view that such contracts are not usurious. The following is the language of the Court on page 234:

“Usury can only attach to a loan of money; or to the forbearance of a debt. It is well settled that on a contract to secure the price or value of work and labor done or to be done, or of property sold, the contracting parties may agree upon one price if cash be paid, and upon as
large an addition to the cash price as may suit themselves, if credit be given; and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price, or by a per centage thereon. In neither case is the transaction usurious. It is neither a loan or the forbearance of a debt, but simply the contract price of work and labor done or property sold; and the difference between cash and credit in such cases, whether six, ten or twenty per cent, must be left exclusively to the contract of the parties; and no amount of difference fairly agreed on can be considered illegal. It is confounding subjects and terms wholly dissimilar and distinct, to treat such contracts as usurious, as coming within the definition either of a loan of money or other thing, or the forbearance of a debt."

I understand that some nineteen States have enacted consumer finance laws which regulate the sale of consumer goods under conditional sales contracts. These laws are designed to cover such cases to which you refer assuring that purchasers are protected from paying exorbitant amounts over and above the purchase price. Virginia has not enacted such a law.

CONSTITUTION—Amendments—Acts of Constitutional Convention not subject to ratification by electorate.

March 4, 1966

HONORABLE HENRY E. HOWELL, JR.
Member, Senate of Virginia

In your letter of March 3, 1966, you ask:

"1. Can Senate Bill 89 be amended so as to provide that the acts of any constitutional convention will have to be ratified by the electors of the State before becoming effective?

"2. What are the various methods that the General Assembly can provide for electing the delegates to such a convention?"

Senate Bill 89 provides both for an advisory referendum on whether the Constitution should be amended to abolish payment of poll taxes as a qualification for voting, and for an election to determine whether a convention shall be called to revise and amend the Constitution with respect to requirements for registration and voting.

The procedure provided for in the Constitution must be followed if a valid amendment is to result. Staples v. Gilmer, 183 Va. 613, 623 (1945). As you know, two methods of amendment are provided:

Section 196 provides that an amendment agreed to by a majority of the members of both houses of the General Assembly, at two successive sessions, shall be submitted to the people, "and if the people shall approve and ratify such amendment or amendments by a majority of the electors, qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become part of the Constitution."

Section 197 empowers a majority of the members of both houses of the General Assembly to submit to the electors the question: "Shall there be a convention to revise the Constitution and amend the same?" If a majority of the electors vote in favor of the convention, the General Assembly at its next session must "provide for the election of delegates to such convention; and no convention for such purpose shall be otherwise called."

The express provision for submission of an amendment to the people found
in Section 196, and the absence of such a provision in Section 197, indicate that the framers intended that there should be no submission to the voters in the case of an amendment approved by a convention. That this was not an unintentional omission is indicated by the Debates of the 1902 Constitutional Convention. When the provision which became Section 197 was before the Convention for consideration, Delegate James W. Gordon of Richmond proposed adding the following language: "And there shall be decided at the same time and in the same manner whether the proposed convention shall have full power, or whether the proposed Constitution shall be submitted to a vote of the people for their ratification or rejection."

Delegate A. C. Braxton of Augusta County offered this addition: "The question shall be decided by the electors qualified to vote for members of the General Assembly, shall there be a Constitutional Convention to be held as prescribed in the act submitting the question, in which act the powers of the proposed Convention in the matter of proclaiming or submitting the Constitution shall be specified."

Both of these amendments—which would have authorized the General Assembly to require the action of the convention to be submitted to the voters for ratification—were rejected by the Convention. 2 Debates 2755, 2757.

There is no decision of the Supreme Court of Appeals settling this question. However, in view of the above, in my opinion Question 1 must be answered in the negative.

From what is said above, it follows that the action of revising the Constitution with respect to registration and voting would be final, notwithstanding any contrary expression of opinion resulting from the advisory referendum.

In response to Question 2, Section 197 of the Constitution provides only that the General Assembly "shall provide for the election of delegates to such convention," without any limitation on the power of the legislature to determine the composition of the convention. The General Assembly might provide, for example, that one or more delegates be elected from each senatorial district, or each house district, or that delegates be elected in proportion to each house or senatorial district's representation in the General Assembly.

CONSTITUTION—Virginia—Operation of mortgage-guarantee plan by State prohibited by Sec. 185.

September 1, 1965

HONORABLE HARRY F. BYRD, JR.
Member, Senate of Virginia

I am writing in further reference to your letters of June 15, 1965, and August 28, 1965, in which you request my opinion upon the constitutional validity of the following proposal under consideration by a subcommittee of the Advisory Board on Industrial Development:

"Establish a State mortgage-guarantee plan (essentially a State-sponsored loan insurance program) to insure loans on industrial plants or expansions. Such a mortgage-guarantee plan would be administered by a State Authority. Under similar plans in other states, the state guarantees up to a maximum of 90% of the first mortgage, the remaining 10% being financed by a local development non-profit corporation which owns and leases the building for a term sufficient to amortize the first mortgage loan."

I am of the opinion that legislation embodying such a proposal would be viola-

The Supreme Court of Appeals of Virginia has not had occasion to pass upon the precise question posed in your communication, and the matter is therefore not entirely free from doubt; however, on the basis of the above-mentioned analysis, I am constrained to believe that the proposal concerning which you inquire would grant the credit of the State in aid of private persons, associations or corporations and would cause the State to become interested in the obligations of private companies, associations or corporations for the purpose of aiding in the construction or maintenance of their works, in violation of the provisions of Section 185 of the Virginia Constitution.

COSTS—Assessment for Law Library—Certain governing bodies authorized.

HONORABLE WILLIAM F. PARKERSON, JR.
Member, Senate of Virginia

In your letter of February 16, 1966, you ask “whether costs may lawfully be assessed incident to a civil action to provide for the acquisition of law books and law periodicals for the establishment, use and maintenance of a law library which shall be open for the use of the public.”

Governing bodies of certain cities and counties have been authorized by §§ 42-19.1 to 42-19.4 of the Code of Virginia to enact ordinances requiring the assessment of such costs, not to exceed one dollar per action. Such costs may not be assessed without such legislative sanction. However, I am aware of no constitutional provision which would affect the validity of statutes of this nature, or of the assessment of costs pursuant thereto.

COSTS—Criminal Procedure—Accused charged with felony and convicted of misdemeanor.

CRIMINAL PROCEDURE—Costs—Accused charged with felony and convicted of misdemeanor.

HONORABLE CHARLES R. PURDY, Clerk
Hustings Court of the City of Richmond, Part II

This is in reply to your letter of July 28, 1965, which reads in part as follows:

"'A' is arrested on a charge of Grand Larceny. In the trial court, counsel is appointed to represent him upon his making an affidavit that he is without funds to employ counsel. Counsel appears, represents him and a fee of $25.00 is set as proper sum for his services in the lower
court. The case is certified to the court of record for Grand Jury consideration. In the court of record, the defendant maintains he is without funds to employ counsel, and counsel is appointed to represent him. The Grand Jury indicts 'A' and the case comes on for trial. Assigned counsel represents the defendant, and the trial results in 'A' being convicted of Petit Larceny—a misdemeanor.

"Question: In taxing the court costs, should the Clerk tax the costs assessable in felony cases, or should he assess the costs taxable in misdemeanor cases? If only the costs assessable in misdemeanor cases are proper, should we omit from the statement of costs assigned counsel's fee in the lower court as well as in the court of record, and should we omit the item for the court reporter for reporting the incidents of his trial?"

In considering these questions, the purpose of imposing costs must be analyzed. In this connection, the following language from Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696, is pertinent:

"They are exacted simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws. It is money paid, laid out and expended for the purpose of repairing the consequences of the defendant's wrong. It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the commonwealth. Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offence."

Mr. Justice Lee, who spoke for the Court in the cited case, emphasized the point that costs are exacted from a defendant for the purpose of reimbursing the Commonwealth for the moneys she has expended as a result of the defendant's conduct. This cardinal principle serves as the cornerstone of this opinion which follows.

I will consider first the costs involved in the court not of record. Your attention is directed to the provisions of § 19.1-319 of the Code, which reads as follows:

"A judge of a court not of record or justice of the peace before whom there is any proceeding in a criminal case shall certify to the clerk of the circuit court of his county or the corporation court of his city, and a judge or court before whom there is, in a criminal case, any proceeding preliminary to conviction in another court, upon receiving information of the conviction from the clerk of the court wherein it is, shall certify to such clerk all the expenses incident to such proceedings which are payable out of the State treasury." (Emphasis added)

The provisions of the foregoing statute must be read in conjunction with § 19.1-320, which is set forth below:

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

Your attention is directed to the portion of § 19.1-320 which requires the Clerk to make up a statement of expenses incident to the prosecution when the accused is convicted. The statute does not specify the nature or gravity of the conviction but states only that the costs are to be assessed if the trial results in a conviction. It is obvious that the costs are to be assessed in all cases which do not result in acquittals. Under the facts as set forth in your letter, I am of opinion that the costs as certified to you pursuant to § 19.1-319 should be assessed against the defendant.

You inquire specifically if the attorney’s fee prescribed by § 19.1-241.5 for the court-appointed attorney’s appearance in the court not of record should be assessed as part of the costs. It is clear that this is an expense incident to the proceeding in the court not of record and is properly included in the costs assessed by the clerk of the court not of record and certified to you.

The fee for the court reporter or for the use of the recording equipment is provided for by § 17-30.1 of the Code, as amended. Here again, we find the language “if convicted.” I am, therefore, of opinion that this cost is also assessed against the defendant under the circumstances as set forth in your letter.

The schedule of fees for the Attorney for the Commonwealth is found in § 14.1-121. The fee allowed is based upon the character and gravity of the offense. The statute prescribes the fee for the trial of a felony case. I am of opinion that these fees should be assessed against the defendant under the circumstances as set forth in your letter.

The compensation for court-appointed counsel in the court of record is provided for in § 14.1-184. This statute provides that the amount allowed the attorney shall be assessed against the defendant if he is convicted. As hereinbefore pointed out, conviction is the opposite of acquittal. I am, therefore, of opinion that this cost is also assessable against the defendant under the circumstances set forth in your letter.

The foregoing constitute only examples of the costs which must be assessed by you as Clerk of a court of record. There may be others about which you have questions, and I would suggest that you inquire further if you find it necessary.

COSTS—Criminal Procedure—Apportioned between defendants.

CLERKS—Costs in Criminal Case—Apportioned between defendants.

March 28, 1966

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

This will acknowledge receipt of your letter of March 25, 1966, which reads as follows:

“Three defendants charged with arson were simultaneously tried under waivers of indictment by the Court in the Circuit Court of Tazewell County. The same four witnesses were summoned in behalf of the Commonwealth, and testified in County Court and Circuit Court.

“Pursuant to Section 19.1-320 of the Code of Virginia, I taxed at-
tendance and mileage for these witnesses, and charged each defendant with the total. Counsel has posed the question as to the sharing of witness costs among the three defendants rather than charging each defendant the total sum.

"Every instruction I have had has been to the effect that each defendant would have to pay the witness costs even though tried simultaneously with other defendants. Please advise if this is correct; if not, we would appreciate hearing from you before the end of this month so that refund can be made before monies are remitted to the Commonwealth."

In my opinion, the costs in question should be so apportioned as to assess against each defendant one-third of the taxable costs. In my opinion, the statute is not designed to collect more than the actual expenses incident to the prosecution.

The question presented by you is similar to the question presented and answered in the opinion of Attorney General Staples to M. H. Willis, Clerk, on September 20, 1936, and published in the Report of Attorney General (1936-1937), at p. 41, copy of which I enclose. Section 4964 of the Code mentioned therein is now § 19.1-320.

COSTS—Divorce—Fee not required to be paid when case is reinstated.

HONORABLE S. W. SWANSON, Clerk
Circuit Court of Pittsylvania County
January 4, 1966

This is in reply to your letter of December 23, 1965, which reads as follows:

"Please let us know if a charge should be made for reinstating a divorce suit on the docket."

In my opinion, your question must be answered in the negative. The fee prescribed by § 14.1-113 of the Code is the maximum that may be charged in a chancery proceeding. I am unable to find any provision allowing the clerk a second suit fee where a suit is reinstated under the provisions of § 20-121.1 of the Code. When a suit is reinstated under this section it does not become a new suit, but is a mere revival of the suit that was first brought. It is not the institution of a suit as that term is used in § 14.1-113 of the Code.

COUNTIES—Appropriation—May be to liquidate deficit of county association.

HONORABLE E. A. CHRISTIAN, Vice-Chairman
Louisa County Board of Supervisors
June 13, 1966

This is in reply to your letter of June 8, 1966, in which you enclosed a letter from the executive director of the Virginia Association of Counties, requesting a contribution from your county to be used to liquidate a deficit incurred by the Association during the recent session of the General Assembly. It is stated that the expense was incurred in connection with the activities of the Association before the recent session of the General Assembly for the purpose of promoting legislation beneficial to the Virginia counties.
You request my advice as to whether or not the board of supervisors has the power to make an appropriation for such purpose.

Your attention is directed to §§ 15.1-20 and 15.1-20.1 of the Code which authorize the governing bodies of two or more political subdivisions of the State to form and maintain associations for the purpose of promoting the cooperative effort, interest and welfare of the several political subdivisions. In my opinion, if your county is a member of the Virginia Association of Counties the board may make an appropriation under the provisions of the Code sections cited above to meet the deficit incurred by this organization in promoting legislation during the recent session of the General Assembly.

COUNTIES—Board of Supervisors—Election at large or in each district.

BOARDS OF SUPERVISORS—Election at Large or in Each District.

February 28, 1966

Honorable Edward E. Lane
Member, House of Delegates

This will acknowledge receipt of your letter of February 22, 1966, which reads as follows:

"I am writing to request an opinion on the following.

"Is there any provision in the law which would in any way limit or restrict the size of a district in Henrico County?

"Would any provision for the election of supervisors by districts in Henrico County only be valid under the present situation; for example, would this satisfy the one man-one vote rule?

"If there is a restriction on the size of any district, is there any method for electing supervisors by districts only which would be valid, for example, meet the one man-one vote rule?

"In Henrico County under the present district lines, would provisions for the election of supervisors by districts only and, in addition, for the election of one floater supervisor by the County at large be valid, for example, would this meet the one man-one vote rule?

"Under the laws and constitutions of Virginia and the United States, is there any way by which provisions can be made for the election of supervisors by districts in Henrico County which will be valid? Would you outline such provisions and steps which might be taken to accomplish this."

Section 111 of the Constitution provides that no additional magisterial districts shall be made containing less than thirty square miles.

Henrico County adopted the County Manager form of government and the plan, at the time it was adopted, provided that the supervisors should be elected by the voters at large but that the membership of the board of supervisors would have to consist of a resident of each district.

Under the bill introduced by Senator Parkerson, with which you are no doubt familiar, the plan has been amended so as to give the county a choice as to whether or not the board would be elected by the voters at large or by the voters of each separate district. If this bill passes and the revised plan is approved at the referendum provided for therein, then the board of supervisors may be elected by the qualified voters of each district.

With respect to the third question in your letter, it is possible, of course, under Article 4 of Chapter 12, Title 15.1 of the Code, for the districts to be
REPORT OF THE ATTORNEY GENERAL

readjusted and, if necessary, increased in number not in excess of seven so as to equalize as nearly as possible the population in each district, taking into consideration, of course, the limitation as to area contained in Section 111 of the Constitution. I cannot express an opinion as to whether or not this would meet the so-called one man-one vote rule.

With respect to the fourth question in your letter, the County Manager form of government, adopted at the referendum in 1933, does not provide for the election of a floater supervisor by the county at large.

With respect to the fifth question in your letter, as I have indicated above, the bill introduced by Senator Parkerson gives the people of the county the right to adopt the method of electing the supervisors by the qualified voters of each separate district. The presumption is that such method of election would be valid.

COUNTIES—Dogs Running at Large—Referendum pursuant to § 29-194.2.

COUNTIES—Ordinances—Need not be adopted prior to referendum pursuant to § 29-194.2.

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

May 11, 1966

This will acknowledge receipt of your letter of May 5, 1966, which reads as follows:

“Pursuant to our telephone conversation of May 3, 1966, I am submitting to you a draft of an ordinance to prohibit dogs running at large in Henrico County during any month of the year, to be effective upon the approval of a majority of voters voting in a referendum under the provisions of § 29-194.2 of the Code of Virginia as amended, and a copy of a resolution to be adopted by the Board of Supervisors on the date of passage of the aforesaid ordinance requesting the Court to order such a referendum. I would appreciate your opinion—

1. Does the County by virtue of the provisions of § 15.1-522 of the Code of Virginia have the benefit of referendum provided in § 29-194.2?
2. Is it necessary that the Ordinance be adopted before the referendum may be held as would appear from a preliminary reading of § 29-194.2?
3. Is the draft of the proposed ordinance and the draft of the proposed resolution in proper form?”

I shall answer your questions in the order stated.

1. The answer is in the affirmative. Section 29-194.2 is a general law, as distinguished from a charter provision, with respect to the powers of cities, and, therefore, such powers may be exercised by Henrico County, which is a qualifying county under § 15.1-522.

2. I do not feel that it is necessary to adopt the ordinance prior to the referendum. If it is not so adopted it is, of course, necessary that the proposed ordinance be published and the question must be framed so as to let the voters know the substance of the ordinance.

My reason for stating that prior adoption is not required is due to the terminal paragraph of § 29-194.2, which reads as follows:

“The results of such referendum shall not be binding upon the governing body of any such city but may be used in ascertaining the sense of the voters.”
I have made with pencil some suggestions as to the language of the ordinance, and I return your draft of the ordinance herewith.

COUNTIES—Electrical Code Ordinance—Applicable to territory outside incorporated towns.

ORDINANCES—Electrical Code—May apply only to unincorporated territory in county.

May 16, 1966

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

This is in reply to your letter of May 6, 1966, in which you state that your county contemplates adopting an electrical code ordinance under authority of § 27-5.1 of the Code, and you request my opinion as to whether the county may enact such an ordinance to apply only to the territory outside the limits of incorporated towns located in the county.

We have given careful consideration to your question and, in our opinion, especially in light of the fact that the incorporated towns have the power to adopt such ordinances, an ordinance of such nature by a county having application only to the territory outside the incorporated towns would be a reasonable classification.

COUNTIES—Fund Surplus—May be transferred to another category.

BOARDS OF SUPERVISORS—Surplus Appropriation—May be transferred to another category by resolution.

BOARDS OF SUPERVISORS—Appropriations—If specific, treasurer may not write check for other purpose.

May 12, 1966

HONORABLE A. C. WILLIAMSON
Treasurer of Botetourt County

In your letter of May 6, 1966, you state that the Botetourt County Board of Supervisors appropriates funds to the various county agencies, including the department of public welfare, on an annual basis; that the department has exhausted the sum appropriated to it for the current fiscal year as the local share of expenses of administration, and that it appears that funds appropriated as the local share of funds for other categories of public welfare expenditures will be in excess of needs for this fiscal year. You ask:

1. Whether “excess money from one category” may be transferred to another category.
2. What action by the board of supervisors would be necessary to accomplish this.
3. Whether such action may be taken with regard to the administration and foster care categories.
4. Whether, if the board fails to appropriate additional funds for categories for which funds have been exhausted, you may lawfully sign and release checks for payments under such categories.
I will answer these questions in order:

1. If funds in excess of needs have been appropriated for a certain category of assistance, the board of supervisors may direct that such surplus funds be transferred for use under another category, such as administration. Section 63-105 of the Code of Virginia (1950), as amended, requires the board to appropriate "such sums of money as shall be sufficient to provide for payment of public assistance including cost of administration, . . ." (Emphasis added.)

2. The board may make such a transfer by resolution.

3. Such action may be taken with regard to funds needed for administration and foster care, provided funds required for aid to dependent children, aid to the blind, aid to the totally and permanently disabled, and old age assistance are not thereby depleted below the amounts required for those programs.

4. Since the board of supervisors apparently has appropriated funds earmarked for specific categories of public welfare expenditure, rather than appropriating a lump sum for the department of public welfare, you may not lawfully issue checks chargeable to a specific appropriation, such as administration, unless funds are made available therefor by the board of supervisors.

COUNTIES—Magisterial District Debt Service Accounts—School board has no authority to borrow from.

SCHOOLS—Magisterial District Debt Service Accounts—No authority for board to borrow from.

HONORABLE E. B. STANLEY, Superintendent
Washington County Public Schools

May 11, 1966

This is in reply to your letter of May 5, 1966, which reads as follows:

"Several of the Magisterial Districts in Washington County have a debt service levy to retire bond obligations of the different Magisterial Districts. These district bonds were sold some few years ago for the purpose of securing funds to build new school buildings."

"There is an accumulated surplus in some several of these Magisterial District Debt Service accounts, and the Washington County School Board would like to know if it would be legal to use part of the accumulated surplus with the consent of the Board of Supervisors for further school improvements as a method of temporary financing. In the budget for the tax year of 1966, the Board of Supervisors have laid sufficient levies to restore to the Debt Service account any funds that might be used in this manner. In no event would any Debt Service account be reduced to the extent that it would not have sufficient funds to meet the anticipated obligations up to the time the money is restored."

"I would appreciate it if you would let me have your opinion as soon as possible."

In my opinion there is no authority for a transaction of this nature. Although § 2-297 of the Code authorizes the investment of sinking funds in obligations of counties, it does not permit the county that created the sinking fund to borrow from that fund. A similar question was presented to the Honorable Abram P. Staples during the time he was Attorney General, and he was of the opinion that borrowing by the school board from the sinking fund was not authorized and made the following statement:

"... If this were permissible, it would destroy entirely the value
and purpose for which the sinking fund is provided. If the obligor of
the bonds to be retired by the sinking fund may borrow the money
from such fund, there would be no purpose or necessity for creating
and establishing such a fund . . . .”

I agree with the conclusion reached by Mr. Staples.

COUNTIES—Officials—Not to have interest in corporation selling to county.

PUBLIC CONTRACTS—County Officials—Not to have interest in corporation selling to county.

March 8, 1966

HONORABLE T. BARCLAY ALLISON
Treasurer of Wythe County

This is in reply to your letter of March 5, 1966, which reads as follows:

“As you know, I am Treasurer of Wythe County, Virginia. I also
own 39 shares in the Wytheville Packing Company, Inc. The total
shares in this corporation are 119. They deal in wholesale meats and
frozen foods. I am Secretary of this corporation but not active in the
management.

“During the course of the county audit last December one of the
State auditors questioned the sale of meats and lard to the Wythe
County jail and until I could get a ruling on this from you I instructed
the Sheriff to stop purchasing from this corporation. They sold the
meats, etc., to the jail at wholesale prices and at a considerable saving
to the county, but not under any contract. This amounted to about
$60.00 per month.

“The section in the Code of Virginia the auditor showed me, in
my opinion, does not apply to a corporation in which I own stock.
In past audits I have discussed this with other State auditors and they
saw nothing wrong with it.

“My wife also owns stock in the Service Gas Company, the Shell
Oil Distributor in this area. Would this affect the buying of gas, oil,
etc., by the county or sheriff’s department from this corporation?”

Section 15.1-67 of the Code is applicable. This section provides that the county
officers mentioned therein, one of which is the treasurer, shall not become inter-
ested, directly or indirectly, in any contract with the county or in the profits
of any contracts, including the sale or furnishing of supplies, to the county. A
stockholder in a corporation making such contracts and sales is directly inter-
ested in such contracts and the profits thereof. This section of the Code has
been in effect for years and has never been construed to the contrary. While
the company may not have a formal agreement with the county regarding the
furnishing of the supplies to the jail, nevertheless, each sale is a contract.

With respect to the interest of your wife in the Service Gas Company, the
statute is not violated on account of the transactions between the Gas Company
and the county, since your wife is not an officer of the county.
COUNTIES—Ordinance—May reasonably prohibit certain use of firearms.
ORDINANCES—County—May reasonably prohibit certain use of firearms.
WEAPONS—County Ordinances—May reasonably prohibit certain use of firearms.

HONORABLE E. C. WESTERMAN, JR.
Commonwealth's Attorney for Botetourt County

This will acknowledge receipt of your letter of January 19, 1966, which reads as follows:

"I would appreciate it if you would let me know whether or not under existing statutes Botetourt County may enact an ordinance prohibiting the possession and use of firearms by children up to a certain age unless accompanied by an adult."

Section 15.1-510 of the Code provides as follows:

"Any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals and the adoption of regulations for the prevention of the pollution of water in the county whereby it is rendered dangerous to the health or lives of persons residing in the county."

Under this section and under the police powers of a county, in my opinion, the Board of Supervisors could enforce a reasonable ordinance of the nature suggested for the purpose of promoting the safety of the inhabitants of the county. I am unable to find any State statute of this nature.

I would suggest that probably it would be advisable for any such ordinance to be limited in application to places where a violation thereof would endanger the public. I feel that the ordinance would have to be directed to prohibiting parents and guardians of children from permitting such children to have firearms in their possession and using them in public places. An ordinance which would apply to the premises owned, such as a farm, by the parents or guardian of the child would probably be unreasonable.

You are referred to the case of King v. County of Arlington, 195 Va. 1084, in which the validity of an ordinance enacted under the above Code section (then § 15-8(5)) which prohibited an individual from keeping within the county of Arlington any dog which was known to be vicious was upheld.
COUNTIES—Ordinance—Shooting of firearms.

ORDINANCES—Shooting of Firearms in County.

WEAPONS—County Ordinances—Shooting of firearms.

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

February 11, 1966

This will acknowledge receipt of your letter of February 10, 1966, which reads as follows:

"At the most recent meeting of the Board of Supervisors a discussion was held regarding shooting of weapons near homes in rural areas of the county, and also, in subdivisions in the county.

"It is my understanding that the Board of Supervisors has authority under § 15.1-518 to prohibit the shooting of firearms in any area of the county which, in the opinion of the Board of Supervisors, is so heavily populated as to make such conduct dangerous to the inhabitants thereof and, under § 15.1-518.1 the Board of Supervisors could, by ordinance, prohibit all hunting with firearms within one-half mile of any subdivision or other heavily populated area in the county if, in the opinion of the Board of Supervisors, such hunting would be dangerous to the inhabitants thereof.

"My question is this: does the County Board of Supervisors under § 15.1-510 have the authority to prohibit promiscuous shooting of firearms in Augusta County?

"Several incidents have been called to the Board's attention where a person would shoot a rifle in a rural area, the bullet traveling over another owner's land, but would not be near a home or building. It appears that neither § 15.1-518 nor § 15.1-518.1 would cover this situation. Please advise me."

Section 15.1-510 of the Code, in my opinion, does not vest in the board of supervisors the power to enact and enforce an ordinance of the nature suggested. Your statement with respect to the authority vested in the board of supervisors under §§ 15.1-518 and 15.1-518.1, is, in my opinion, correct. These sections do not authorize the enforcement of an ordinance in an area such as you have described in the terminal paragraph of your letter.

COUNTIES—Planning Commission—Certain persons cannot serve as members.

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

April 21, 1966

This is in reply to your letter of April 18, 1966, which reads as follows:

"The Madison County Board of Supervisors has recently appointed a local Planning Commission for Madison County in accordance with § 15.1-437 as amended. Included in these appointments to the Planning Commission are, namely:
REPORT OF THE ATTORNEY GENERAL

"** Agricultural Teacher in the High School
"** Chairman of the Board of Supervisors
"** Chairman of Madison County School Board
"** County Agricultural Agent
"** Mayor of the Town of Madison and Professor of the University of Virginia
"** Clerk of the Board of Supervisors, Road Board and Circuit Court has been asked to serve as Clerk of the Commission.

"The Board of Supervisors anticipates compensating members of the Commission for their services. All of the above mentioned persons are compensated now from county, state and federal funds either severally or by combination of such funds.

"In view of the above facts, will you advise whether or not there is any incompatibility of office in the appointment of the persons named hereinabove."

Under the provisions of § 15.1-437 of the Code, relating to the qualification and appointment of local planning commissions, it is expressly provided that one member of the commission may be a member of the governing body of the county. Therefore, in my opinion, despite the provisions of § 15.1-50 of the Code, the chairman of the board of supervisors may serve on the planning commission. Section 113 of the Constitution would not apply, since a planning commission member is not one of the officers mentioned in that section. Section 22-69 provides that no State or county officer . . . shall be chosen or allowed to act as a member of the county school board. This provision is subject to certain exceptions which would not include a member of the planning commission. Therefore, in my opinion, the chairman of the county school board is prohibited from serving as a member of the planning commission by reason of this section.

I know of no reason why the agricultural teacher in the high school, the county agricultural agent, and the mayor of the town of Madison and professor at the University of Virginia, may not serve on the planning commission. In my opinion, neither § 15.1-67 of the Code nor § 15.1-50 of the Code would apply to those three officials. I know of no statute which would prevent the clerk of the circuit court from serving as clerk of the planning commission. Of course, under § 15.1-50, the clerk of the circuit court would not be eligible to be a member of the planning commission.

COUNTIES—Redistricting—Payment of costs, attorneys' fees, etc.

HONORABLE ROBERT L. POWELL
Commonwealth’s Attorney for Giles County

March 18, 1966

This will acknowledge receipt of your letter of March 17, 1966, which reads as follows:

"Pursuant to § 15.1-572 of the Code, a group of qualified voters of Giles County has petitioned the Circuit Court of Giles County for a redistricting of the county.

"The question has been raised as to whether the county can or should bear all of the costs in connection with the petition. Sections 15.1-580 and 15.1-581 provide for the payment of certain costs and my question is whether or not the county can legally pay the costs for the petitioners' attorneys fees, the cost of population surveys by a group other
than the commissioners, the costs of court reporting and any other costs that might be incident to the proceedings on the petition. To what extent do commissioners have authority to incur expenses to be paid by the county?

"I am requesting this information at the suggestion of our Circuit Judge, who would like to have as much information as possible on or before March 24."

Under § 15.1-576 of the Code it is provided that if the court dismisses the petition filed under § 15.1-572 the costs of the proceeding shall be assessed against the petitioner. There is no other provision in Article 4 of Chapter 12 of Title 15.1 which, in my opinion, would authorize the court to assess costs against the petitioner. In those cases where the magisterial districts are rearranged, increased or diminished, I am of the opinion that the necessary costs in connection therewith should be borne by the county. There is no provision in the statute with respect to the payment of the compensation for the attorney for the petitioner. This could, in my judgment, be deemed a proper expense for special legal services, the payment of which could be paid out of the county fund, upon authorization of the board of supervisors. In my opinion, the other expenses to which you refer in your letter are necessary and should be paid out of county funds.

It will be observed under § 15.1-580 that the commissioners and the surveyor shall be paid in accordance with the allowance made by the board of supervisors for that purpose and that all of the necessary expenses incurred by them shall be paid by the county. Where the petition is meritorious and the objectives of the petition have been accomplished, in my opinion, the board of supervisors may consider the other necessary services in connection therewith as items to be paid out of the general fund.

COUNTIES—Torts—Not authorized to purchase liability insurance.

BOARDS OF SUPERVISORS—Not Authorized to Purchase Liability Insurance.

TORTS—Counties—Not authorized to purchase liability insurance.

Honorable Stirling M. Harrison
Commonwealth’s Attorney for Loudoun County

February 4, 1966

This is in reply to your letter of January 28, 1966, which reads as follows:

"You will recall that a short time ago I presented to you, over the telephone, the question of the liability of a county for torts and you cited to me the case of Mann vs. County Board, 199 Va. 169, which as I read it, answers the question in the negative.

“Our Board of Supervisors have before it the question of whether or not they should purchase liability insurance and my question of you—Is the purchase by the Board of such insurance a proper expenditure by it in the light of the above cited case?

“Enclosed please find a copy of a letter of a local insurance broker to the Board of Supervisors of Loudoun County, in effect, insisting that they procure liability insurance. I will appreciate your comments thereon.”
In *Mann v. County Board*, 199 Va. 169, it is stated by the Supreme Court of Appeals of Virginia as follows:

"The principle of nonliability of a county for tortious personal injuries was determined in *Fry v. County of Albemarle* (86 Va. 195) and has been restated in several subsequent decisions—citing several cases. * * Arlington County being a political subdivision of the State, its freedom from liability for this tort may be likened to the immunity that is inherent in the State. It is fundamental and jurisdictional and could not be waived by the Board."

With the exception of the provisions of Article 2, Chapter 13, Title 22 of the Code, requiring counties and cities and other public school units to carry liability insurance for the protection of school children who are transported by public school vehicles, I know of no other statute that authorizes counties to carry liability insurance. The powers of the counties to appropriate public funds are those expressly or by implication provided by law. I am not aware of any statute which authorizes the board of supervisors of a county to extend public funds for the purpose of providing insurance for the purposes stated in your inquiry.

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**COUNTIES, CITIES AND TOWNS—Authority—Hospitalization insurance for officers and employees.**

_Honorable Carter R. Allen_
Commonwealth's Attorney for the City of Waynesboro

August 24, 1965

This will acknowledge receipt of your letter of August 23, 1965, which reads as follows:

"As Commonwealth's Attorney for the City of Waynesboro, Virginia, I can find no authority in the State Code which would authorize the City of Waynesboro to provide hospitalization insurance for its employees and/or dependents of employees, the cost of which would be paid partially by the employees on a prepaid deduction. Please advise if in your opinion Code Section 51-112 authorizes the provision of group hospitalization insurance by the use of the phrase 'group accident and sickness insurance covering the officers and employees of such city... and their dependents.'

"Additionally, the Code is confusing in that it spoke of retired or superannuated employees in one portion of the initial section of the sentence and referred to officers and employees in the latter portion of the same sentence."

In my opinion, the counties, cities and towns are authorized under § 51-112 of the Code, as amended, to provide for hospitalization insurance covering the officers and employees of such counties, cities or towns. The term "sickness insurance" may be construed as meaning hospitalization insurance. I find that some localities, acting under the authority of this section, have established a program of hospitalization insurance for the officers and employees, the premiums being payable partly out of appropriations made by the locality and partly by deductions from the wages of the persons covered.
COUNTIES, CITIES AND TOWNS—Authority—Joint ventures for improving water supply.

August 25, 1965

HONORABLE ROBERT L. POWELL
Commonwealth's Attorney for Giles County

This will acknowledge receipt of your letter of August 24, 1965, which reads as follows:

"At the last meeting of our Board of Supervisors, some representatives from the Town of Rich Creek appeared and requested that the Board appropriate to the Town of Rich Creek a sum of money to aid in the construction and improvement of the Town's water system. I would appreciate your advising me whether the County Board of Supervisors has authority to make an outright contribution to the Town of Rich Creek for such a purpose."

I am not aware of any statute which would authorize a board of supervisors to make an outright donation or contribution to the town of Rich Creek for the purpose set forth in your letter. I call your attention to Article 1, Chapter 9, Title 15.1 of the Code—§§ 15.1-292 through 15.1-306—which authorizes counties, cities and towns to enter into a joint venture for the purpose of constructing a "project" as defined in § 15.1-304. By following the procedure set out in said Article 1, the county is authorized to expend public funds for the purpose of developing or improving a water supply for the joint use of the county and the town.

COUNTIES, CITIES AND TOWNS—Consolidation—Qualified voters signing petition must have paid poll tax.

January 20, 1966

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

I have your letter of January 18, 1966, requesting the advice of this office about a petition that was filed on the 18th day of October, 1965, under the provisions of § 15.1-1132 of the Code of Virginia.

This section refers to "qualified voters of any county, etc." The matters referred to in this section would be matters of State and local concern; and I am of the opinion that to be qualified voters under this section the poll tax would have to be properly paid.

This section refers to the filing of a petition with a specified number of signatures. There is no reference in the section as to the ability to file supplemental names to the original petition. I do not believe that this can be done without the consent of the Board of Supervisors, and it is doubtful whether the Board could give its consent. Of course, at some subsequent date a new petition could be filed if the requisite number of properly qualified voters' names were attached thereto.
COUNTIES, CITIES AND TOWNS—Eminent Domain—Acquisition of property for State agency.

EMINENT DOMAIN—Cities—Acquisition of property for State agency.

HONORABLE EDWARD E. LANE
Member, House of Delegates

January 28, 1966

This is in reply to your letter of January 20, 1966, which reads as follows:

"I would appreciate your opinion as to the following:
"Would you advise me whether legislation is constitutional and otherwise legal and valid which provides that a governmental subdivision, such as the City of Richmond, could condemn property which the City itself did not need; but, which they might want to hold to make available for others, such as State schools or other State institutions.
"If such legislation would be proper, is the question of need or necessity involved. If so, how is this established?"

The relevant constitutional provision is Section 58, which says in part that the General Assembly "shall not enact any law whereby private property may be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly."

Despite the clause, added in 1928, which gives the General Assembly power to define public uses, the Supreme Court of Appeals has ruled that the question of what uses are public uses is still a judicial question. Mumpower v. Housing Authority, 176 Va. 426, 11 S. E. 2d 732 (1940). Quoting from Jeter v. Vinton-Roanoke Water Co., 114 Va. 769, 781, 76 S. E. 921, 926, the court said: "That only can be considered a public use 'where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character and difficulty, perhaps impossibility, of making provisions for them otherwise, it is alike proper, useful, and needful for the government to provide.'"

And in Hunter v. Norfolk Redevelopment and Housing Authority, 195 Va. 326, 78 S. E. 2d 893 (1953), the court said:

"It is of course true that property cannot be taken by the government without the owner's consent for the mere purpose of devoting it to the private use of another."

In Richmond v. Derwishian, 190 Va. 398, 57 S. E. 2d 120 (1950), holding the city's acquisition of property for a parking lot to be a public use, the court said a declaration by the legislature that a use is public is presumed to be right. But the court expressed no opinion as to whether such an acquisition, for lease to a private parking lot operator, would be a public use.

State institutions of higher learning, and other State institutions, are granted the power of eminent domain by Code § 25-232. Like a city, they may not acquire property by condemnation unless it is to be devoted to a public use, such as construction of educational facilities. There is nothing in the language of Section 58 of the Constitution which expressly prohibits one government from condemning land for the use of an agency of another government which has the power of eminent domain. However, the language of our court in the Mumpower and Jeter cases, quoted above, indicates that a government agency's power of eminent domain is generally limited to providing property to fill its own needs. Unless acquisition for use of another government is merely incidental to the accomplishment of a public purpose of the condemning govern-
ment, as in the case of land the housing authority in the Hunter case, supra, proposed to convey to the city for streets, it would seem that one government may not condemn property for the use of another government. A fortiori, the power of eminent domain may not be used to acquire property for use of private persons or organizations, unless such disposition is a mere incident of accomplishment of a public purpose by the condemnor, as in the case of that part of the acquired land, not needed for public projects, which was set aside for private development as part of a redevelopment project in the Hunter case, supra.

Assuming that an acquisition is for a public use, the question remains how the necessity of a proposed taking is to be determined. This depends on the particular statutory provision which is applicable. This in turn may depend on the particular use which is contemplated.

Section 18.02 of the Richmond charter (Acts of Assembly, 1948, p. 262), gives the city power to acquire property by eminent domain "whenever in the opinion of the council a public necessity exists therefor, which shall be expressed in the resolution or ordinance directing such acquisition * * *." This generally makes the question of necessity of a particular taking, as distinguished from the question of whether it is for a public use, a legislative question to be determined by the local governing body. However, in Boulevard Bridge Corporation v. Richmond, 203 Va. 212, 123 S. E. 2d 636 (1962), and Richmond v. Southern Railway Company, 203 Va. 220, 123 S. E. 2d 641 (1962), the city was held subject to § 15-668 (now § 15.1-237) of the Code of Virginia, which provides that no county, city, or town may condemn property for certain specified purposes, including streets, parking facilities, building "proper for the city or town," parks, playgrounds, and public utilities, "unless the necessity therefor shall be shown to exist to the satisfaction of the court having jurisdiction of the case." Presumably, the property to be acquired by a locality for a State institution would not fall within one of these categories. Therefore, the necessity of a taking, for other uses, by the city of Richmond would be a legislative question for determination by the city council under Section 18.02 of the charter, quoted above.

In light of the foregoing statements, the validity of legislation of the nature set forth in the second paragraph of your letter is not free from doubt under the decisions of the Supreme Court of Virginia cited herein.

COUNTIES, CITIES AND TOWNS—Joint Exercise of Power—Political subdivisions may establish joint police training facility under § 15.1-21.

January 11, 1966

HONORABLE HARRISON MANN
Member, House of Delegates

This will acknowledge receipt of your letter of January 4, 1966, which reads as follows:

"Arlington, Alexandria and Fairfax contemplate the establishment and operation of a training facility in Fairfax County for the police forces of the three localities. Each of the communities is to contribute a pro rata share of the cost of the facility and it will be held in the name of the three jurisdictions jointly.

"Is Section 15.1-21 of the Virginia Code sufficiently broad to give to the political subdivisions authority to jointly own and operate such a police academy?"
REPORT OF THE ATTORNEY GENERAL

Assuming that each county is authorized to establish and operate such a training facility alone, in my opinion, the counties may jointly exercise such power under the provisions of § 15.1-21 of the Code.

COUNTIES, CITIES AND TOWNS—Leasing of Airport—Advertisement and bidding required.

HONORABLE LUCAS D. PHILLIPS
Member, House of Delegates

April 18, 1966

In your letter of April 5, 1966, you asked whether the Town of Leesburg is required by § 15.1-308 et seq. of the Code of Virginia (1950), as amended, to advertise for bids before it can lease a portion of the Leesburg municipal airport.

Section 15.1-308 provides:

"Before granting any franchise, privilege, lease or right of any kind to use any public property or easement of any description, except in the case of and for a trunk railway, the city or town proposing to make the grant shall advertise the ordinance proposing to make the grant . . . once a week for four successive weeks in a newspaper published in the city or town; or, if no newspaper be published therein, then in some newspaper having general circulation therein . . . ."

This statute implements Section 125 of the Constitution, which provides:

"The rights of no city or town in and about its water front, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, and other public places . . . shall be sold, except by . . . vote of three-fourths of all the members elected to the council . . . . No franchise, lease or right of any kind to use such public property or any other public property or easement of any description, in a manner not permitted to the general public, shall be granted for a longer period than thirty years. Before granting any such franchise or privilege for a term of years, except for a trunk railway, the municipality shall first, after due advertisement, receive bids therefor publicly, in such manner as may be provided by law, and shall then act as may be required by law . . . ." (Emphasis added)

Section 5-38 of the Code permits any locality acquiring land for an airport to "lease the same or any part thereof, to any individual or corporation desiring to use the same for the purpose for operating an airport or landing field, or for the purpose of landing or starting airplanes therefrom or for other aviation purposes . . . such lease to an individual or a corporation or to the government of the United States shall not be of any force, effect or validity until the same shall be approved by the State Corporation Commission."

It has been suggested that Section 125 of the Constitution and § 15.1-308 of the Code are not applicable because the airport property is not "public property" within the meaning of these provisions. This phrase does not appear to have been construed by the Virginia Supreme Court of Appeals. However, it is generally held to mean simply property owned by a federal, state or local government. See, 35 Words and Phrases "Public Property," pp. 541-543. It should be pointed out that acquisition of lands for local airports have been declared by the General Assembly to be "public, governmental and municipal

The "public property" covered by Section 125 of the Constitution is not limited to the docks, streets, parks, and other property specifically described. The clause emphasized above shows that the restrictions of Section 125 on leasing apply to "such public property" (that specifically described) and also "any other public property."

It has been suggested that the decision in Williamsburg v. Lyell, 132 Va. 455, 112 S.E. 666 (1922), supports the view that no advertisement is necessary for a lease such as the one under consideration. In the Lyell case the court specifically enforced the renewal provision of a lease from the city executed before adoption of the 1902 Constitution. Neither the decision nor the briefs mentions Section 125 or the statutes implementing it. Of crucial importance in that case was the fact that the property in question had never been devoted to use by the public.

In view of the above, it is my opinion that advertising and bidding in compliance with §§ 15.1-308 and 15.1-311 is essential to the validity of such a lease.

COUNTIES, CITIES AND TOWNS—Magisterial Districts—Number may be increased with limitations.

HONORABLE EDWARD E. LANE
Member, House of Delegates

On December 23, 1965, you requested my opinion with respect to the following questions:

"(1) Is it possible, under the law, and under the form of Government presently existing, in Henrico County, to either alter the District lines so that the Districts are essentially equal in population, or, create one or two additional Districts from the existing Districts, so that the total number of Districts will be essentially equal in population.

"(2) Is there any other way in which representation on the County Board of Supervisors can be established on a population basis so that representatives will represent essentially an equal number of constituents.

"(3) Can any of the above objectives be accomplished by a change in the existing law and, if so, what changes would be required?"

Chapter 368 of the Acts of Assembly (1932), amended the Code of Virginia so as to permit counties to adopt a form of government different from that provided by Article VII of the Constitution to become effective in any county when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon, as is authorized in Section 110 of the State Constitution. That part of Section 110 of the Constitution pertinent to this opinion is as follows:

". . . Notwithstanding the provisions of this article, the General Assembly may, by general law, provide for complete forms of county organization and government different from that provided for in this article, to become effective in any county when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon."

On September 19, 1933, the question of Henrico adopting the County Mana-
REPORT OF THE ATTORNEY GENERAL

This County Manager Form, as adopted by the voters, provides for the election at large of the members of the county board of supervisors. The plan provides that the board of supervisors shall consist of not less than three nor more than seven members, and further provides that "there shall be on the board for each magisterial district one member, and no more, who shall be a qualified voter of such district."

The provisions of the Code relating to the rearrangement, increase or decrease of the magisterial districts of a county are set forth in Article 4, Chapter 12, Title 15.1 of the Code and these provisions are applicable to counties having the County Manager Form. Therefore, in my opinion, under existing law, the number of magisterial districts may be increased but not in such manner as to provide for more than seven districts, and in the process of creating additional districts, the purposes set forth in your questions (1) and (2) could be accomplished, but the members of the board could only be elected by the voters of the county as a whole.

On December 29, 1965, you presented an additional question, as follows:

"In addition to my previous request, will you advise me whether or not it can be provided that the existing districts in Henrico County shall have one supervisor for every 20,000 persons or fraction thereof."

In my opinion, under the County Manager Form of government, this cannot be done. As I have stated in replying to your first letter, the form of government adopted by Henrico County limits the number of supervisors in each district to one.

COUNTIES, CITIES AND TOWNS—Magisterial Districts—Residence of supervisors.

HONORABLE EDWARD E. LANE
Member, House of Delegates

January 28, 1966

I have your letter of January 25, 1966, which reads as follows:

"In the light of your opinion concerning the election of Supervisors for Henrico County, will you advise me whether the present law providing for the election of Supervisors is valid.

"If the answer is that it is not valid, would you advise me of the proper method for electing supervisors."

Because of recent events with which you are thoroughly familiar, I do not think it necessary to answer the question in the first paragraph of your letter.

As to the question in the second paragraph of your letter, I am of the opinion that if the presently existing statutes as affecting Henrico County are not changed in accordance with the last paragraph of Section 110 of the Virginia Constitution that at the next election for supervisors, the supervisors in Henrico County would have to reside in the district from which they are elected, but the election would be on a county-wide basis and not on a magisterial district basis. See Section 15.1-623 of the Code of Virginia.
REPORT OF THE ATTORNEY GENERAL

COUNTIES, CITIES AND TOWNS—Zoning—Portion of county may be zoned.

ZONING—County—Portion of may be zoned.

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

February 1, 1966

This will acknowledge receipt of your letter of January 28, 1966, which reads as follows:

"Please advise whether a county can zone part of its area, leaving certain sections unzoned. The case of Fairfax County vs. Parker indicates that this may be done. However, the Parker case was decided before the revision of Code § 15.1-486."

In my opinion your question must be answered in the affirmative. I know of no provisions in the zoning statutes which would overrule the decision in the case of Fairfax County v. Parker, 186 Va. 675, to which you referred.

COURTS NOT OF RECORD—Persons Other Than Juveniles Placed on Probation Subject to Supervision Under § 53-272.

HONORABLE HAROLD B. SINGLETON
Judge, Amherst County Court

January 4, 1966

This will acknowledge receipt of your letter of December 30, 1965, which reads as follows:

"This Court is having difficulty securing probation services for persons placed on probation other than juveniles. From my reading of § 53-250 of the Code of Virginia, it appears that I can place a person on probation and have him supervised by the probation officer of this County, appointed under § 53-244. Please advise if I am correct in this assumption."

Section 53-250 of the Code does not, in my opinion, authorize a county judge to place a person on probation. This section relates to the powers and duties of probation and parole officers. Under § 53-272 a sentence may be suspended and the prisoner placed on probation. This office has ruled that this section is applicable to a court not of record (Opinions of the Attorney General (1949-1950), pp. 2 and 146).

Any person placed on probation under the provisions of § 53-272 would, of course, be subject to the supervision of the probation and parole officers.

COURTS NOT OF RECORD—Records—Making available to Department of Army in discretion of judge.

HONORABLE E. BALLARD BAKER
Judge, Henrico County Court

January 4, 1966

This is in reply to your letter of December 23, 1965, in which you present the following questions:
"I write to ask your opinion as to whether juvenile records can be made available to military authorities under the following circumstances:

"When a young man appears at an Armed Forces Examining and Entrance Station operated by the Department of the Army, he may sign a Power of Attorney to procure civil and/or juvenile records, a copy of which is attached to this letter. The Examining Station then makes inquiry on DD Form 369, a copy of which is also enclosed. The Station completes the upper part of the form prior to sending it to the appropriate juvenile court. I assume it is sent to the court having jurisdiction over the address shown in the Power of Attorney.

"Should juvenile courts make these records available? Does Section 16.1-162 prevent the court from giving such information when requested as indicated above?"

In my opinion, a judge of a juvenile court may, in his discretion, furnish the information sought by the United States Army on the form to which you refer. Section 16.1-162 permits inspection of the records in your office "to such other persons as the judge... in his discretion decides have a proper interest therein." I feel that the United States Army, when considering an application of a person to join the military service, would have an interest in such a record.

COURTS NOT OF RECORD—When Recognizances May Be Taken Without Security.

JUSTICE OF PEACE—Recognizances—When taken without security.

JUSTICE OF PEACE—Bail—May not admit person after arraignment or trial.

BAIL—Commissioners—No authority to appoint in Portsmouth.

HONORABLE DONALD H. SANDIE, Judge
Municipal Court, City of Portsmouth

June 29, 1966

In your letter of June 23, 1966, you ask several questions concerning § 19.1-110 of the Code of Virginia (1950), as amended by Chapter 521 of the Acts of the 1966 General Assembly. This statute provides:

"A justice of the peace before whom a person is brought charged with a misdemeanor or a felony shall not be authorized to admit to bail any person charged with a felony, except as hereinafter prescribed.

"In all cases wherein a person is charged with a misdemeanor a justice of the peace may admit him to bail; provided, however, that the judge of any municipal court, not of record, having jurisdiction and in the judge of any county court may authorize and direct the justices of the peace, within his jurisdiction, to release, persons charged with a misdemeanor, on their own recognizance, without security.

"Notwithstanding the provisions of § 19.1-127, the judge of such municipal or county court, may prescribe the regulations and requirements to be observed by the justices of the peace in releasing persons charged with a misdemeanor on their own recognizance without security.

"No justice of the peace shall be authorized to admit to bail: (1)
any person charged with a misdemeanor after he has been arraigned or tried by a court having jurisdiction thereof; (2) any person in jail under an order of commitment, except the justice of the peace who committed him.

"If any person released on his own recognizance without security by a justice of the peace, pursuant to the provisions of this section, fails to appear at the time and place prescribed in such recognizance, he shall be guilty of a misdemeanor.

"A judge of a court of record in any county or city may authorize a justice of the peace therein to admit a person charged with a felony to bail, which authorization shall prescribe the amount of the bail and the security therefor."

First, you ask:

"Am I correct in assuming that under paragraph two of this section, the judge of a municipal court, not of record, can authorize and direct either (1) that no person charged with a misdemeanor can be released on his own recognizance without security, or (2) that all persons charged with a misdemeanor may be released on his own recognizance without security?"

The second paragraph of § 19.1-110 imposes no restrictions on the power of a county or municipal court to authorize release of such persons without security. Therefore, I am of the opinion that such a court may authorize all persons charged with misdemeanors to be released on their own recognizances without security, or may forbid release of any such persons without security.

Next, you ask:

"I would also like your opinion as to whether or not the judge of a municipal court, not of record, would have any other alternative under paragraphs two and three of this section, i.e., could a judge of the municipal court authorize and direct (1) that persons charged with certain (to be enumerated) misdemeanors be released on their own recognizance without security, or (2) that the justice of the peace, in his own discretion, may release or refuse to release misdemeanants on their own recognizance without security (similar to the discretion allowed the arresting officer in traffic cases under Section 46.1-179 of the Code of Virginia)? If either or both of these last two alternatives are proper, could such authorization be set forth in the regulations and requirements to be prescribed for the justice of the peace as provided for in paragraph three of said section?"

In my opinion, the judge of a municipal or county court may follow such a procedure, and such an authorization should be set forth in the regulations and requirements promulgated. In addition, such regulations might require a justice of the peace to take into consideration certain facts bearing on the likelihood of the person charged appearing in court at the prescribed time. Such facts as the age, marital status, employment, prior criminal record, and character of a person charged might be required to be determined by appropriate investigation.

Next, you ask:

"I should also like your opinion as to whether or not under paragraph four of said section, a judge of a municipal court, not of record, could authorize a justice of the peace to admit to bail after regular court hours, a person charged with a misdemeanor who has been
arraigned or tried and committed to jail by such court, if after regular court hours such person finds he is able to post a recognizance or appeal bond with security.”

The fourth paragraph of § 19.1-110 forbids a justice of the peace to admit to bail any person charged with a misdemeanor after he has been arraigned or tried. Therefore, in my opinion, a judge of a municipal or county court may not, under any conditions, authorize such persons to be admitted to bail.

Finally, you ask:

“Is there any provision in the State law for the appointment of a Bail Commissioner for the City of Portsmouth?”

Section 19.1-114, as amended in 1964, permits the circuit courts of certain cities to appoint bail commissioners, but Portsmouth is not one of those cities. Therefore, there is no authority for appointment of a bail commissioner in Portsmouth.

CRIMES—Bowling Tournaments Not Within Scope of § 18.1-336.

LOTTERIES—Bowling Tournaments Not Within Scope of § 18.1-336.

Honorable Robert I. Asbury
Commonwealth's Attorney for Smyth County

January 6, 1966

This will reply to your letter of January 4, 1966, in which you inquire whether or not certain bowling tournaments or contests would be violative of any provision of Virginia law prohibiting gambling, especially § 18.1-336 of the Code of Virginia (1950) as amended. From the description of the events contained in your communication, it would appear that each prospective participant in an event would pay a specified amount for the privilege of entering the contest, and prizes would be awarded on the basis of the highest average score or a specified number of consecutive strikes or a strike in a specified frame.

In this connection, I am forwarding to you a previous opinion of this office, dated September 30, 1947, to the Honorable Hugh B. Marsh, Commonwealth’s Attorney for Fairfax County, Virginia, in which the then Attorney General Abram P. Staples, later Justice Staples, had occasion to consider a substantially identical question involving shooting contests. As you will note, Attorney General Staples expressed the view that such contests would not constitute lotteries under Virginia law and also would not “constitute gambling within the contemplation of section 4687.” Section 4687 of the Code of Virginia (1919) is now § 18.1-336 of the Code of Virginia (1950), as amended. So far as I can determine from your communication, the events concerning which you inquire would fall within the scope of the enclosed opinion and would not therefore be prohibited by Virginia law. See also, Report of the Attorney General (1937-1938) p. 75; (1938-1939) p. 123; (1953-1954) p. 121.
CRIMES—Burning Crosses on Public and Private Property.

HIGHWAYS—Right-of-Way—Burning crosses thereon.

HONORABLE WILLIAM W. JONES
Commonwealth's Attorney for Nansemond County

March 23, 1966

This is to acknowledge receipt of your letter of March 17, 1966, in which you state, in part:

"I would appreciate your advising me whether or not Section 18.1-365 of the Code of Virginia prohibits the burning of crosses in the front of residences when the crosses are placed on highway right-of-way property. If this section does not include property owned by the Commonwealth of Virginia, is such action covered by Section 18.1-366 and, if so, is 'the intention of intimidating any person or persons and thereby preventing them from doing any act which is lawful or causing them to do any act which is unlawful' to be presumed from the fact that crosses are burned in front of the residences?"

Section 18.1-365, of the Code of Virginia, as amended, reads as follows:

"It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the Commonwealth of Virginia a burning or a flaming cross, or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do."

The term "property of another" refers to the property of another person which under § 1-13.19 of the Code "may extend and be applied to bodies politic and corporate as well as individuals." The Commonwealth of Virginia is a body politic and is the owner or occupier of the highway right-of-way.

I am of the opinion that § 18.1-365 prohibits the burning of crosses on public property as well as private property without the permission of the public authorities which control the property owned or occupied by such public authority. This would include the prohibition of burning crosses on highway rights-of-way.

I am also of the opinion that § 18.1-366 would be applicable where the exhibit is placed on public property as well as private property for the purpose of intimidating any person or persons and thereby preventing them from doing any act which is lawful or causing them to do any act which is unlawful.

Your attention is invited to Section 7 of rules and regulations adopted by the State Highway Commission pursuant to §§ 33-12(3), 33-46 and 33-36.2 of the Code, effective December 1, 1958. A copy of said rules and regulations is enclosed herewith. It would seem that a person using the highway right-of-way for the purpose of placing and burning a cross thereon without being authorized to do so by the State Highway Commission could be prosecuted for the violation of Section 7 of said rules and regulations.
CRIMES—Concealed Weapons—Must be on person.

GAME AND INLAND FISHERIES—Violation of Game Laws—Disposition of weapon.

JUSTICE OF PEACE—Carrying Concealed Weapons—Permit advisable.

September 16, 1965

HONORABLE E. R. HUBBARD
Justice of the Peace for Wise County

This is to acknowledge receipt of your letter of September 13, 1965. I shall answer the questions raised by you seriatim.

"1. Can a person be charged for having a concealed deadly weapon a pistol anywhere in their automobile. Also would you consider a woman's purse or pocketbook being on her person?"

Answer: Section 18.1-269, Code of Virginia (1950), as amended, prohibits the carrying of a weapon about the person hid from common observation. The Supreme Court of Appeals of Virginia, in the case of Sutherland v. Commonwealth, 109 Va. 834, held that a pistol in a scabbard and in a pair of saddlebags with lids down does not fall within the language of the statute. Hence, a woman's purse or pocketbook would not be considered as being on the person as contemplated by this statute. Therefore, this question is answered in the negative.

"2. Or does it have to be upon their body and hidden from common observation?"

Answer: This question is answered in the affirmative for the reasons expressed above.

"3. Does an officer after making arrest for a misdemeanor charge such as hunting out of season and without license have a right to take a person's gun and keep it and turn it over to the court of said county?"

Answer: In making an arrest for a violation of § 29-172 (using unlawful guns or devices) and § 29-144.2 (killing deer or elk during the night time), the implication is that the arresting officer would have authority to take charge of the unlawful device, gun, vehicle, stoplight or flashlight in possession of the accused and turn it over to the court to be used in evidence. The same would be returned to the owner or disposed of as the court may direct. However, where the offense is such as that of hunting out of season without a license and the gun used is the kind which may be used in lawful hunting (§ 29-140 of the Code), under normal circumstances, it would hardly be reasonable to require that the gun be taken by the officer for evidence. In such a case, unless there are unusual circumstances prevailing, I do not believe that the arresting officer would have authority to take the gun from the accused.

"4. Does a justice of the peace of his county have a right to carry a gun or does he have to have an order from the Circuit Judge for such permit?"

Answer: The question is answered in the affirmative. A justice of the peace is the conservator of the peace and therefore § 18.1-269 supra is not applicable to a justice of the peace. Hence, he would have a right to carry a concealed weapon without securing a permit from the circuit or corporation court. How-
ever, it would be advisable for a justice of the peace to secure such a permit and this office has so ruled. See, my letter to the Honorable Maurice E. Griffin, Jr., dated October 2, 1963. (Report of the Attorney General (1963-1964) pp. 245, 246.) Enclosed you will find a copy of said opinion.

CRIMES—Cruelty to Animals—Birds included in term “animal.”

HONORABLE WILLIAM V. RAWLINGS
Member, Senate of Virginia

September 27, 1965

This is in reply to your letter of September 24, 1965, to which was attached a letter to you from one of your constituents, in which she requests advice as to the fines imposed by the State and cities for shooting song birds.

Article 2 of Chapter 4 of Title 18.1 of the Code relates to cruelty to animals. Under § 18.1-225 of this article, the word “animal” as used therein is construed to include birds or fowl. Section 18.1-216 provides as follows:

“Any person who (1) overrides, overdrives, overloads, tortures, ill-treats, or cruelly or unnecessarily beats, maims, mutilates, or kills any animal, whether belonging to himself or another, or deprives any animal of necessary sustenance, food, or drink, or causes any of the above things, or being the owner of such animal permits such acts to be done by another, or (2) wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal; or (3) shall carry or cause to be carried in or upon any vehicle or vessel or otherwise any animal in a cruel, brutal, or inhuman manner, so as to produce torture or unnecessary suffering, shall be guilty of a misdemeanor; but nothing in this section shall be construed to prohibit the dehorning of cattle.”

It will be noted that under this section a person violating the same is guilty of a misdemeanor. Section 18.1-246 reads as follows:

“Whoever keeps or uses a live pigeon or other bird or fowl for the purpose of a target, or to be shot at either for amusement or as a test of skill in marksmanship, or shoots at a bird kept or used as aforesaid, or is a party to such shooting, or lets any building, room, field, or premises, or knowingly permits the use thereof for the purpose of such shooting, shall be punished by a fine of not more than fifty dollars or by imprisonment for not more than thirty days, or by both. Nothing herein contained shall apply to the shooting of wild game.” (Italics supplied)

Under § 18.1-9, a misdemeanor for which no other punishment is prescribed shall be punished by fine not exceeding $500 or confinement in jail not exceeding twelve months, or both, in the discretion of the jury or the court trying the case without a jury.

With respect to the penalties prescribed in the various cities, this would depend upon the powers delegated to the city under its charter and the ordinances passed pursuant thereto. This information would have to be obtained from the city officials.
CRIMES—Defense of Alcoholism—Proof needed to establish.

CRIMES—Defense of Alcoholism—Use of previous court records.

WELFARE AND INSTITUTIONS—Commitment of Alcoholic—Procedure under § 18.1-200.

June 24, 1966

HONORABLE CALVIN W. BERRY, Judge
Municipal Court, City of Danville

In your two letters of June 21, 1966, you ask several questions concerning § 18.1-200.1 of the Code of Virginia (1950), as amended, which provides:

"Any person arrested for an offense in which proof of drunkenness or being under the influence of alcohol is a necessary element of the crime and is discharged, dismissed or acquitted of such charge by reason of being an alcoholic, shall be subject to commitment to the control and supervision of the Director of the Department of Welfare and Institutions in the same manner and for the same purposes as prescribed in § 18.1-200, or to the Department of Mental Hygiene and Hospitals, or to a facility under the control of the State Health Department for the treatment of alcoholics, in the discretion of the court."

First, you ask:

"Would the Commonwealth be required to prove a prima facie case after which would the defendant be required to go forward with the evidence and show that he is an alcoholic?"

Unless the Commonwealth proves at least a prima facie case of drunkenness or being under the influence of alcohol, the charge would have to be dismissed. Alcoholism being an affirmative defense, the defendant would be required to provide proof of his alcoholism in order to be acquitted on that ground.

Next, you ask:

"In view of the recent case of Driver v. Hinant, 356 F. 2d 761 (4th Cir. 1966), what kind of evidence would establish the fact that a person is a chronic alcoholic?"

In the Driver case, the evidence showed that the petitioner had been convicted of public intoxication more than two hundred times between the ages of 24 and 59. This would seem to be amply sufficient evidence to prove chronic alcoholism. Since, as the court said in the Driver case, addiction to alcohol "is almost universally accepted medically as a disease," the most convincing evidence of alcoholism would seem to be medical testimony. However, lay testimony of the defendant's inability to control his drinking, or a long history of drunkenness, would appear to be sufficient proof. Each case, of course, would have to turn on its own facts.

Next, you ask:

"Would the fact that the records of the court show that a defendant had been convicted as prescribed in § 18.1-237, Code of Virginia (1950), as amended, be sufficient to prove that a defendant is a chronic alcoholic?"

This statute makes it a misdemeanor for a person who has arrived at the age of discretion to be drunk in public, and imposes a fine of not more than $25.00.
On conviction of being drunk in public three times within one year, this statute provides for a fine of not more than fifty dollars or imprisonment for not more than six months, or both. Section 18.1-237 is similar to the North Carolina statute involved in the Driver case, where it was held that imprisonment under such a statute of a person afflicted with chronic alcoholism is cruel and unusual punishment forbidden by the Eighth Amendment to the Constitution of the United States as applied to the States under the due process clause of the Fourteenth Amendment. Under the Driver decision, conviction of a chronic alcoholic under § 18.1-237 probably would be impossible. In my opinion, conviction under § 18.1-237 would not in itself be sufficient to prove the defendant to be an alcoholic within the meaning of § 18.1-200.1, since it is quite possible for one to be drunk in public three times in a year, or more, without being a chronic alcoholic.

Finally, you also ask whether it is necessary, in order to comply with § 18.1-200.1:

"...to follow the procedure set out in § 37-61, etc., of the Code of Virginia (1950), as amended, or may this section be complied with by entering an order setting out the facts and directing the Department of Mental Hygiene and Hospitals or the State Health Department to receive the defendant for treatment as an alcoholic?"

Section 37-61, et seq., provides a procedure for commitment of an inebriate upon complaint of any respectable citizen, or upon warrant issued by a judge on his own motion. Section 37-62 provides for convening of a commission consisting of two physicians and a judge or special justice, with this commission determining whether or not the inebriate shall be committed. In my opinion, this procedure need not be followed when alcoholism is pleaded and proven as a defense under § 18.1-200.1. The latter section provides for commitment to the Department of Welfare and Institutions, the Department of Mental Hygiene and Hospitals, or a facility under control of the State Health Department, in the discretion of the court. When commitment is to the Department of Welfare and Institutions, the statute says commitment shall be in the same manner as prescribed in § 18.1-200. The latter section permits commitment by any court of record, or any county, municipal, or juvenile and domestic relations court, upon conviction of certain offenses listed there. It further provides that the court, before fixing punishment or ordering commitment, may direct any probation officer or agency performing probation services to investigate and report the history of the accused. In my opinion, a court finding a person not guilty by reason of being an alcoholic under § 18.1-200.1 may, but is not required to, follow a similar procedure. Thus, a court in a proper case may comply with § 18.1-200.1 by setting out, in the order of dismissal or acquittal, or in a separate order of committal, the facts supporting its finding of alcoholism, and committing the accused to the appropriate agency.

CRIMES—Injury to Motor Vehicle by Owner—Does not constitute misdemeanor under § 18.1-172.

MOTOR VEHICLES—Seizure Under § 46.1-351.1—Does not deprive owner of ownership.

HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth's Attorney for Essex County

January 5, 1966

This is in reply to your letter of December 23, 1965, which I quote, in part, as follows:
"Briefly, a State Trooper seized a motor vehicle being operated by the owner thereof while such owner's privilege to operate was suspended or revoked. The Trooper advised the operator of this violation, and then left the scene to go and obtain a wrecker to tow the vehicle in. When he returned, just a few moments later, the Trooper found that the owner had taken a huge rock and broken all windows in the vehicle, had put dents in the hood and had done something to the motor so that the vehicle could not be made to start thereafter.

"I would appreciate your opinion as to whether or not such conduct on the part of the owner amounts to a violation of § 18.1-172 of the Code by reason of the fact that after such seizure, the vehicle did not thereafter remain the property of the owner and operator."

Section 18.1-172, Code of Virginia (1950), as amended, to which you refer, is as follows:

"If any person, unlawfully, but not feloniously, take and carry away, or destroy, deface or injure any property, real or personal, not his own, or break down, destroy, deface, injure or remove any monument erected for the purpose of marking the site of any engagement fought during the War between the States, or for the purpose of designating the boundaries of any city, town, tract of land, or any tree marked for that purpose, he shall be guilty of a misdemeanor."

The statute makes it a misdemeanor for any person to unlawfully injure property not his own. The quoted facts show that the injury to the motor vehicle was done by the owner himself. The act of seizing a motor vehicle pursuant to § 46.1-351.1, Code of Virginia (1950), as amended, does not, without more, deprive the owner of his ownership. If it did so deprive him, then the forfeiture proceedings now required by § 46.1-351.2 would be unnecessary. Like other criminal statutes, § 18.1-172 should be strictly construed against the Commonwealth. Assuming the given facts to mean that the owner is the sole owner and that no lien or other interest in the vehicle rests in anyone else, I am of the opinion that the action of the owner does not constitute a violation of this section.

CRIMES—Interference With Property Right.

HONORABLE ROBERT L. GILLIAM, III
Commonwealth's Attorney for Westmoreland County

February 17, 1966

This is to acknowledge receipt of your letter of February 16, 1966, in which you state, in part:

"A has a valid lease on certain oyster ground within Westmoreland County which has been properly surveyed and clearly marked. A has oystermen working this piece of ground, although A is not personally present, when B, who has no interest at all in this particular piece of oyster ground but is a resident of the same area, approaches the oystermen in a skiff with a firearm and cartridges for the same plainly visible on the seat of the skiff. B then proceeds to inform the oystermen that they have no right to be there, that they should put overboard the oysters that they have taken and stop their actions immediately because 'she does not want them to get into trouble' and makes other statements
in strong language concerning the owner of the oyster ground. Due
to this action of B the oystermen quit their work and leave.
"Could you please advise me whether or not, in your opinion, either
Section 18.1-183 or Section 18.1-366 of the Code of Virginia would be
legally applicable to this situation."

Section 18.1-183, Code of Virginia (1950), as amended, is as follows:

"It shall be unlawful for any person to enter the land, dwelling, out-
house or any other building of another for the purpose of damaging
such property or any of the contents thereof or in any manner to inter-
fere with the rights of the owner, user or the occupant thereof to use
such property free from interference. Any person violating the pro-
visions of this section shall be guilty of a misdemeanor."

This statute is applicable where there is a trespass upon the lands of another
or where there is an interference with the rights of the owner, user or occu-
pant of the land. Section 18.1-366 is designed to prevent the intimidation of a
person or persons of performing a lawful act through terror and likewise pre-
venting the forcing of a person or persons to commit an unlawful act.

Although there is good cause to believe that either of these statutes could
be used in the situation you recite, I am of the opinion that it would be better
to use § 18.1-183 because it is clear that the person designated as "B" in your
hypothetical case has interfered with the rights of the occupant of the oyster
lands by inducing the oystermen to leave their work.

CRIMES—Machines Awarding Free Games—No violation of §§ 18.1-330 or
18.1-331.

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

I am in receipt of your letter of December 6, 1965, in which you present the
following situation and inquiry:

"It has come to my attention from some of our Police Officers that there
exists a problem in the County with certain types of Pin Ball
Machines. The types to which I refer are those that by the insertion
of a nickel, entitle the player to shoot five balls, the machine being
equipped with a device that if a certain score is made an indicator
shows 'free games'. The machine, further, is so equipped that after
the insertion of the first nickel and the game is commenced, it is
possible by the insertion of additional nickels to change the odds or to
change the number of free games it is possible to win. One of our
officers has observed an instance in which one individual has deposited
$6.00 at one time during one game in an effort to change the odds,
reaching a point that had he secured the score necessary, he could have
won 300 games. It would not seem reasonable to me to believe that had
he won 300 games, he would have been able in any reasonable time to
play them. Rather it would seem reasonable to believe that the player
expected to receive a cash pay-off if he won.

"My question is, would such a situation in the absence of proof of a
cash pay-off constitute a violation under § 18.1-330 and § 18.1-331 of the
Code, in view of the fact that in 1962 the language at the end of the
first sentence of § 18.1-331 reading, "or may secure additional chances or rights to use such machine, apparatus, or device, irrespective of whether it may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication of weight, entertainment or other thing of value," was deleted."

I am constrained to believe that, in the absence of a cash payment or some collateral consideration other than "additional chances or rights to use" the machine in question, the situation you describe would not constitute a violation of § 18.1-330 or 18.1-331 of the Virginia Code. As you point out, § 18.1-331 of the Code was amended in 1962 by deletion of the language which I have quoted in the preceding sentence. Moreover, § 18.1-330(2) was amended in substantially identical fashion. It seems clear that these amendments were designed to remove from the definition of a "slot machine" prescribed in § 18.1-331 and from the area of conduct prohibited by § 18.1-330(2) any apparatus or agreement by which the user of a machine was awarded only additional chances or rights to use the device. I am therefore of the opinion that, in the absence of a cash payment or consideration other than the receipt of "free games", the situation concerning which you inquire would not fall within the scope of § 18.1-330 or 18.1-331 of the Virginia Code.

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CRIMINAL PROCEDURE—Adjournment of Case—Not to exceed ten days without consent of accused.

December 20, 1965

HONORABLE HAROLD B. SINGLETON
Judge, Amherst County Court

This is to acknowledge receipt of your letter of December 14, 1965, in which you state, in part:

"19.1-102 of the Code of Virginia reads as follows:

"'A judge or justice of the peace may adjourn an examination or, in the case of a judge, a trial, pending before him, not exceeding ten days at one time, without the consent of the accused, and to any place in the county or corporation.'

"Does this mean that any misdemeanor case in the County Court cannot be continued for more than ten days without consent of the accused?

"What constitutes consent?"

This statute seems to be free of ambiguity. The Court, in the case of Hill v. Smith, 107 Va. 848, cited language of the antecedent to this statute (§ 3963, Virginia Code (1904)) with approval.

I am of the opinion a misdemeanor case pending before the County Court cannot be continued for a longer period than ten days at any one time without the approval of the accused. The word "consent" has its usual connotation when used in this statute; that is, the accused must agree to the continuance.

_________________________
CRIMINAL PROCEDURE—Bail—Surety required unless cash deposit made.

Honorable Donald H. Sandie, Judge
Municipal Court, City of Portsmouth

This is in reply to your letter of April 11, 1966, which reads as follows:

"We pray your opinion in advising if it is proper to permit persons arrested and charged with criminal offenses to execute their own bail if they furnish proof of ownership of real estate assessed for taxation in name of accused with sufficient equity therein, and if married, should spouse be required to sign jointly with accused."

Section 19.1-111, relating to the granting of bail by a court not of record, authorizes the court "to admit to bail, upon recognizance with surety, persons charged with crime." Section 19.1-130 provides for an exception to the requirement of a surety when a person gives his personal recognizance and posts a cash deposit in lieu of surety.

The signature of the wife of a person charged with a crime may be accepted as surety if the court is of the opinion that she qualifies otherwise.

Your question is answered in the negative, subject to the foregoing exception.

CRIMINAL PROCEDURE—Capias—Trial justice may not issue.

BAIL—When Accused Fails to Appear—Court may enter capias.

Honorable E. R. Hubbard
Justice of the Peace for Wise County

This is to acknowledge receipt of your letter of July 7, 1965, in which you state, in part:

"Can I as a J. P. of Wise County, Va. issue a warrant of arrest for a person who has failed to appear in our courts and on information from the person who signed the bond as surety of bond."

When a person who has given a recognizance in a criminal case fails to appear before the court so designated therein, his default shall be entered by the Judge and the Attorney for the Commonwealth must be notified. Section 19.1-137, Code of Virginia (1950), as amended. Such court on its own motion or on motion of the Attorney for the Commonwealth issues a capias for the person who has failed to appear. After the person is arrested the trial proceeds on the original charge made against the accused. As a Justice of the Peace is no longer a trial officer, he does not issue capiases in such cases.

Your question is answered in the negative.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Committal Fee—Taxable at time person committed to jail.

FEES—Sheriff's Committal—Taxable when person committed to jail.

April 27, 1966

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

This will acknowledge receipt of your letter of April 26, 1966, which reads as follows:

"The question has arisen in this office as to when the clerk of the county court should tax as part of costs in any criminal case the committal fee for the sheriff. There is no question in my mind that a person committed to jail prior to the date of trial such a cost is taxable. I would appreciate your opinion as to whether or not such a fee is taxable when a person, who was not in jail awaiting trial, has been sentenced to jail for non-payment of fine and costs by the court."

Under § 14.1-105 (4) of the Code, the sheriff is entitled to a fee of $1.00 "for receiving and discharging a person in jail." This fee accrues to the sheriff when a person is committed to the custody of the sheriff and is confined in jail. The costs in connection with any criminal case are taxed under the provisions of Chapter 13 of Title 19.1 of the Code and are certified and reported under the provisions of §§ 19.1-319 and 19.1-320 of the Code. The sheriff's fee, in my opinion, becomes taxable at the time it accrues.

CRIMINAL PROCEDURE—Conviction on Two Offenses No Bar to Prosecution on Third Unless It Arises From Same Act.

June 7, 1966

HONORABLE J. VAUGHAN BEALE
Commonwealth's Attorney for Southampton County

This is in reply to your letter of May 23, 1966, in which you inquire whether or not a person previously convicted of reckless driving and driving on a revoked license may now be charged with involuntary manslaughter growing out of the same occurrence without violating the rule against double jeopardy.

The question must be considered in respect to § 19.1-259, Code of Virginia (1950), as amended, the relative part of which states: "If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others." In the case of Hundley v. Commonwealth, 193 Va. 449, the court said, "A test of the identity of acts or offenses is whether the same evidence is required to sustain them." It was held that driving drunk and reckless driving were separate offenses and a conviction of one was not a bar to proceedings of the other. Thereafter, § 19.1-259.1 was enacted, by Chapter 493, Acts of Assembly of 1960, requiring the dismissal of one of the dual charges of driving while intoxicated and reckless driving upon conviction of the other charge.

More directly related to the instant question is the case of Dykeman v. Commonwealth, 201 Va. 807, in which the defendant was tried and found not guilty on the reckless driving charge but convicted of the offense of involuntary manslaughter. While the failure to convict on the reckless driving charge was determinative, the court said and reiterated that "reckless driving and involun-
tary manslaughter are two separate and distinct offenses." It was further stated that because these were two separate and distinct offenses, neither § 19.1-259 nor Section 8 of the Constitution of Virginia, which forbids that a person "be put twice in jeopardy for the same offense," would bar prosecution on the involuntary manslaughter charges.

Manifestly, evidence of involuntary manslaughter is not required to sustain the charge of driving on a revoked license, or vice versa. In consideration of this and the interpretations set forth in the cases herein cited, I am of the opinion that the State may institute proceedings under charges of involuntary manslaughter without violating the statute or the Constitution, and, accordingly I shall answer your question in the affirmative.

CRIMINAL PROCEDURE—Criminal Fund—Payment of expense of truth serum and interpreter.

HONORABLE SOL GOODMAN
Commonwealth's Attorney for the City of Hopewell

February 16, 1966

In your letter of February 11, 1966, you ask under what section of the Code the State would be responsible for paying the expenses of administration of truth serum to two murder suspects.

Such services would not be for medical care within the meaning of § 53-185 of the Code of Virginia. However, it appears to be an expense covered by § 19.1-315, which provides, in part, that when in a criminal case "an officer or any person renders any other service in the State for which no specific compensation is provided, the court in which such case is may allow therefore 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."

You also inquire about payment of an interpreter needed for the defense of an indigent person. In my opinion, such an expense would also be payable under § 19.1-315.

CRIMINAL PROCEDURE—Definitions of "Feeble-Minded" and "Insane."

MENTALLY ILL—Criminal Procedure—Definitions of "feeble-minded" and "insane."

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

March 14, 1966

This is in reply to your letter of February 23, 1966, which reads as follows:

"Section 227 of Title 19.1 of the 1950 Code of Virginia as amended prohibits the trial of a person for a criminal offense while he is either insane or feeble-minded. The purpose of this letter is to have clarified in my own mind the procedure and meaning of the terms embodied in 19.1-227 and the other sections of Article 3, Chapter 9, Title 19.1 of the Code.

"First, I would like to know whether or not the definitions of 'feeble-minded' and 'insane', as embodied in 37-1.1, have any bearing on the same words used in Article 3, Chapter 9, Title 19.1 of the Code."
"Second, I would like a definition of 'feeble-minded' and 'insane' as used in 19.1-227 of the Code.

"Third, it is my understanding that some of the psychiatrists employed by the Department of Mental Hygiene and Hospitals classify anyone whose intelligence falls below a score of 80 (Full Scale I.Q.) as 'feeble-minded'. Could you tell me whether or not this falls within the statutory definition of 'feeble-minded'?

"Fourth, in view of 19.1-230.1 and 19.1-231, if a person is committed for observation before arraignment, what is the correct procedure and the proper persons to declare a person competent or incompetent to stand trial?"

Historically, the provisions of what are now §§ 19.1-227 through 19.1-239 of the Code have been read and construed together with the applicable provisions of Title 37. In Jessup v. Commonwealth, 185 Va. 610 (1946), a section of the 1942 Code of Virginia which is now § 37-1.1, wherein "feeble-minded" was defined, was read and construed together with sections of the 1942 Code which are now §§ 19.1-227, et seq. The legislative commissions on mental hygiene, appointed periodically by the General Assembly, which have studied and proposed amendments to the mental hygiene laws in Titles 37 and 19.1 have considered the technical terms used in one title as having the same meaning in the other title. In fact, several recent amendments to the two titles were adopted with the specific intention of making certain that technical terms in the two titles were the same. This is true of the words "insane" and "feeble-minded", for example. It is significant that terms, such as these, are "technical" in the sense that they are words of art used in the psychiatric profession, and these same words have been used in the Code of Virginia in an effort to conform the language of the law with the terminology of the profession.

Therefore, it is my opinion that the definitions "feeble-minded" and "insane" in § 37-1.1 are the definitions applicable to those terms where used in §§ 19.1-227 through 19.1-239.

In §§ 37-1.1(9) and (10), "insane" and "feeble-minded" are defined as follows:

"(9) 'Insane' means a person who has been adjudicated legally incompetent by a court of record or other constituted authority because of mental disease under chapter 5 (§ 37-136 et seq.) of this title;"

"(10) 'Feeble-minded' means a person who has been adjudicated legally incompetent by a court of record or other constituted authority because of mental defectiveness under chapter 5 of this title;"

An examination of Chapter 5, Title 37 (§§ 37-136, et seq.) reveals that a person adjudicated "insane" or "feeble-minded" under the provisions of that chapter or "in a court in which he is charged with crime" (see § 37-136) is entitled to have a committee appointed for him (see § 37-136) and is entitled to other protections (see § 37-137). Thus, an adjudication of insanity or feeble-mindedness by a court in which a person is charged with a crime (which is an adjudication pursuant to the applicable provisions of §§ 19.1-227 through 19.1-239) is one to which the protective provisions of Chapter 5, Title 37 apply just as they apply to a so-called "civil" adjudication under that chapter.

An adjudication under the provisions of §§ 19.1-227 through 19.1-239, therefore, would appear to be "co-equal" with one under the provisions of Chapter 5, Title 37.

Section 37-136.1 provides that a person is to be found "insane" when he is legally incompetent because of "mental illness" and is to be found "feeble-minded" when he is legally incompetent because of "mental defectiveness." Two other phrases defined in § 37-1.1 should be noted:
“(1) ‘Mentally ill’ means any person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment;”

“(2) ‘Mental deficient’ means any person afflicted with mental defectiveness to such extent that he is incapable of caring for himself or managing his affairs, who for his own welfare or the welfare of others or of the community requires supervision, control or care;”

Again, these are technical terms, used in the Code in an effort to conform it to the terminology of the psychiatric profession.

Considering Titles 37 and 19.1 and the technical terms therein together, it is my opinion that “feeble-minded” and “insane” are terms used to designate a person who has been found to be “legally incompetent” and has been so adjudicated, whereas the terms “mentally ill” or “mentally deficient,” as used in Title 37, designate a person who is simply subject to hospital commitment for care and treatment, but who has not necessarily been formally adjudicated to be “legally incompetent” because of mental illness (and therefore “insane”) or because of mental defectiveness (and therefore “feeble-minded”). So the terms “insane” and “feeble-minded,” as used in both titles, are designations of legal incompetence, although the test for legal incompetence for “civil” purposes under Title 37 is not necessarily the same as the test for “criminal” purposes under Title 19.1.

The question to be answered here is this: what is the test for determining “legal incompetence” and therefore whether or not a person is “insane” or “feeble-minded” as these latter terms are used in § 19.1-227? The test is whether or not the accused is suffering from mental disease or mental defectiveness (the first being a “disease” or “illness,” the second being an inherent defect) to such an extent that he lacks the “capacity to understand the nature and object of the proceedings against him and to conduct his defense in a rational manner; and if he passes this test he may be tried, although on some other subjects his mind may be deranged or unsound.” 44 C.J.S., Insane Persons, § 127, p. 284, and the collection of many pertinent comments and authorities in the footnotes. A further excellent statement of the test is found in Lyles v. United States, 254 F. 2d 725, 729-30 (D.C. Cir. 1957). If he fails this test because of mental illness or disease, he is “insane.” If he fails it because of mental defectiveness, he is “feeble-minded.” Thus, regardless of the reason for his incapacity, whether it is because of mental illness or disease or mental defectiveness, the test is his capacity, or lack of it, to understand the nature and object of the proceedings against him and to conduct his defense in a rational manner; and if he has the capacity to do these things, he may be tried. If he does not, he may not be tried.

The foregoing appears to answer your first and second questions. It also appears to answer your third question, but perhaps it is appropriate to comment in connection with that question that in view of what has already been said an I.Q. test score alone, obviously, is not determinative of whether or not a person is “feeble-minded” under § 19.1-227. The criteria already indicated are what are determinative.

Turning now to your fourth question, your attention is invited to the fact that § 19.1-230.1 of the Code was enacted by the 1964 General Assembly in order to fill a hiatus in the then existing law, to provide for a formal commitment proceeding for a person sent by a court to a State hospital for observation and found by the superintendent of that hospital to be insane or feeble-minded. Section 19.1-231 was amended at the same time in order to make it consistent with the provisions of § 19.1-230.1. For your information, House Bill No. 857, now before the 1966 session of the General Assembly, changes the word “may” in the second line of the second paragraph of § 19.1-230.1 to “shall.” The bill has passed both houses and awaits only the signature of the Governor. If it
becomes law, the court will be required, after receiving the report of the superintendent, to appoint a commission to examine the accused before adjudging him sane or insane, feeble-minded or not feeble-minded, as the case may be.

However, as § 19.1-230.1 now reads, upon receiving the superintendent's report, the court may (1) appoint a commission to inquire further into the person's sanity or mentality or (2) it may act upon the superintendent's report and adjudge him "insane" or "feeble-minded," or neither, as the case may be, and if "insane" or "feeble-minded," order him committed until restored. If, after receiving the superintendent's report, the court appoints a commission to inquire further into the sanity or mentality of the person, that commission is required to report its findings to the court (see § 19.1-230.1). In my opinion, it is then for the court to determine whether or not the commission has found him "insane" or "feeble-minded" or "sane" (not "insane" or "feeble-minded") within the intended use of these words in the Code. The court, in other words, should determine if the commission's finding is consistent with the meaning of these technical terms as used in the Code. In my opinion, the ultimate duty of commitment is that of the court and the court cannot fulfill this duty by simply relying upon the use by the commission in its report of terms such as "insane" or "feeble-minded," as necessarily being intended by the commission to have the same meaning as they have in §§ 19.1-227 through 19.1-239. After making this determination, if the person is "insane" or "feeble-minded," then he is to be so adjudged and committed until restored. If not, then his trial is to proceed.

CRIMINAL PROCEDURE—Indictment Charging Higher Offense Than Stated in Warrant.

HONORABLE JOHN PAUL CAUSEY
Commonwealth's Attorney for King William County

January 4, 1966

This is in reply to your letter of December 10, 1965, which reads as follows:

"A person is arrested upon a warrant charging that he did 'kill and slay' another. He is given a hearing in the County Court and is bound over to the grand jury. The grand jury returns an indictment charging that the arrested person did 'kill and murder' the other.

"Do the provisions of Section 19.1-163.1 of the Virginia Code invalidate the indictment because the person indicted was arrested and given a preliminary hearing on a charge of manslaughter, but was indicted for the offense of murder?

"Or can a person be indicted for an offense of higher degree, but arising out of the same set of facts, that the felony for which he is arrested and for which he is given a preliminary hearing?"

Section 19.1-163.1 of the Code of Virginia (1950), as amended, reads as follows:

"Preliminary examination of person arrested on charge of felony.—No person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question of whether there is reasonable ground to believe that he committed the offense and no indictment shall be returned in a court of record against any such person prior to such hearing unless such hearing is waived in writing."

Subsequent to the effective date of the Code of 1887, and prior to the enactment of § 19.1-163.1 in 1960, the rule was that a preliminary examination of one
accused of a felony was not necessary where an indictment had been found against him by a grand jury. The rule was predicated upon the reasoning that the primary purpose of the preliminary hearing being to ascertain whether there is reasonable ground to believe that a crime has been committed and the person charged is the one who committed it, the action of the grand jury in returning an indictment eliminated the necessity for a preliminary hearing and preempted the defendant's right thereto. The Supreme Court of Appeals in Webb v. Commonwealth, 204 Va. 24, noted that the purpose of § 19.1-163.1 was to change the rule as to a person who is arrested on a charge of felony and to grant him a right to a preliminary hearing before an indictment may be returned by a grand jury. The Court also noted that since the preliminary hearing may be waived, the rule is procedural rather than jurisdictional.

In the case you have given, the person was arrested on a charge of felony, to-wit, manslaughter. He was given a preliminary hearing on this charge and bound over to the grand jury. You indicate that on the factual situation upon which the preliminary hearing was predicated the grand jury returned an indictment for a higher offense. In my view this procedure does not invalidate the indictment. I do not think the purpose of the preliminary hearing is necessarily to formulate the exact charge upon which the person is ultimately tried, or to limit the action of the grand jury to framing in more technical language the charge contained in the warrant. While perhaps not free from doubt, I should think it sufficient if the preliminary hearing were predicated upon the factual situation upon which the indictment is based.

In the case you have posed, the person who was arrested on a charge of felony was given a preliminary hearing upon the question of whether there was reasonable ground to believe he had committed that felony. This, I believe, satisfied the requirements of § 19.1-163.1. If it be contended that the accused was not given a preliminary hearing upon the charge contained in the indictment, the answer would seem to be that neither was he arrested on that charge.

CRIMINAL PROCEDURE—Period of Confinement—Failure to pay fine or costs.

HONORABLE FLETCHER B. WATSON, Judge
Juvenile and Domestic Relations Court, Mecklenburg County

March 2, 1966

This is to acknowledge receipt of your letter of February 23, 1966, in which you state, in part:

"Section 19.1-334 of the Code of Virginia provides the terms of confinement in jail for persons who fail to pay fine or costs, or costs when there is no fine. It provides, in part that 'such confinement shall not exceed five days when the fine and costs, or costs when there is no fine, are less than five dollars, when less than ten dollars it shall not exceed ten days, when less than twenty-five dollars it shall not exceed fifteen days....'

"My inquiry is this: suppose the fine and costs, or costs when there is no fine, amount to, for example, $10.50, Is it mandatory that the prisoner serve fifteen days as punishment under this example, or is there any procedure, by court order or otherwise, to pro rate the time to be served with the amount involved?"

Once a person in confined in jail by order of a court under §§ 19.1-328, et seq., until he pays his fine and costs and the same exceeds $10.00 and is less than $25.00, then he can be held in confinement not exceeding fifteen days in ac-
cordance with § 19.1-334, Code of Virginia (1950), as amended. There is no mandatory requirement that such a person must be held for a period of fifteen days. Furthermore, § 19.1-332 of the Code expressly provides that the circuit court of the county or the corporation court of the city wherein a person is confined may, upon application by the person if it shall appear proper, order the person to be released from confinement without the payment of the fine and costs. As the Commonwealth's Attorney must have five days' notice of such application, it would seem that the person would not be eligible for release until the expiration of five days unless the Commonwealth's Attorney waives this notice. This authority to release the person from confinement for failure to pay the fine and costs is not vested in the county court or the juvenile and domestic relations court but solely in the circuit or corporation court.

With reference to the question presented in the last sentence of your letter, where the amount of fine and costs, or costs, as the case may be, does not exceed $10.50, the sheriff may, in his discretion, release the prisoner after he has served a jail sentence of eleven days. As pointed out by Attorney General Abram P. Staples in an opinion dated August 12, 1936 (Report of the Attorney General (1936-1937), pages 113 and 114), § 19.1-334 provides a scale by which each sheriff is to determine the time he is to confine each prisoner.

CRIMINAL PROCEDURE—Presence of Accused at Preliminary Hearing Required.

HONORABLE RICHARD W. DAVIS, Judge
Municipal Court of the City of Radford

This is in reply to your letter of March 11, 1966, in which you ask the following question:

"At the trial of an individual accused of feloniously embezzling certain funds, is it necessary that the accused be personally present during the trial of the preliminary hearing? Reference is made to § 19.1-240 of the Code of Virginia."

Article 2, Chapter 6, Title 19.1 of the Code contains the Code sections relating to preliminary hearings, these sections being 19.1-101 through 19.1-108. Section 19.1-163.1 also relates to preliminary hearings. Section 19.1-101 provides as follows:

"The judge or justice of the peace before whom any person is brought for an offense shall, as soon as may be, in the presence of such person, examine on oath the witnesses for and against him, and he may be assisted by counsel." (Italics supplied)

In light of the italicized portion of the above section, I am of the opinion that your question must be answered in the affirmative. It is not necessary for me to express an opinion as to whether or not § 19.1-240 applies to preliminary hearings, due to my opinion with respect to the proper application of § 19.1-101.

Although the question is not raised in your letter, I call attention to the fact that heretofore, in an opinion dated January 11, 1965, to Honorable Andrew L. Geisler, published in Report of the Attorney General (1964-1965), at p. 308, we expressed the opinion that a justice of the peace no longer has authority to hold preliminary hearings but that such hearings may be held by a court not of record, such as a court over which you preside.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Pre-sentence Report—No authority to direct in misdemeanor cases.

September 27, 1965

HONORABLE GEORGE ABBITT, JR.
Judge, Fifth Judicial Circuit

This will reply to your letter of September 13, 1965, in which you present the following situation and inquiry:

"Recently there have been several instances involving misdemeanors when it appeared to me that a pre-sentence report would be helpful under the circumstances. In these cases I directed that a pre-sentence report be made to the court by the Superintendent of the Department of Public Welfare for the County involved. This was a case in which I, as judge, had tried the accused on a plea of not guilty and had reached the conclusion the accused was guilty but in fixing the amount of the jail sentence, if any was to be imposed, I needed and wanted the additional information that had not been developed in the trial. I directed that the said superintendent make a report to me in a reasonable time concerning the physical, mental and social and economic condition as well as family conditions of the accused.

"I, of course, am fully aware that code section 16.1-164 applies to juveniles. I am equally aware of the fact that code section 53-278.1 applies to felonies.

"However, I would like to have your opinion as to whether or not the court has inherent or other authority to direct the services of an employee of this state to make such a report if the court deems it wise and advisable."

I have been unable to discover any provision of Virginia law which authorizes a court to order a pre-sentence investigation and report to be made in misdemeanor cases generally. As you point out in your communication, § 53-278.1 of the Virginia Code contemplates the making of such investigations and reports in those felony cases for which a sentence of death or confinement for a period of over ten years may be imposed, and the statute establishes a procedure for conducting a full hearing on such report in open court, in the presence of the accused, with right of cross-examination by defense counsel and full development of any additional facts which may be relevant. Moreover, in Linton v. Commonwealth, 192 Va. 437, 65 S. E. (2d) 534, the Supreme Court of Appeals of Virginia had occasion to consider the scope of § 53-278.1 in reviewing a judgment of conviction for an offense not punishable by confinement for a period of more than ten years. During the course of its opinion in that case, the Court declared (192 Va. at 440):

"The Reorganization Provision of 1948, supra, did not require a report from a probation officer in this case. In fact, there is no warrant of law for ordering such an investigation and report unless the crime charged is punishable by more than ten years imprisonment in the penitentiary. However, as the procedure adopted was undertaken under authority of the statute, and on motion of the accused, even though not warranted by law, if the statute had been strictly complied with, the action of the court would, at most, have been an error of which accused could not complain." (Italics supplied.)

I am not unmindful of the language of the Virginia Supreme Court in the earlier case of McClain v. Commonwealth, 189 Va. 847, in which the Court discussed the authority of a circuit court, independently of statute, to "inquire into
the record of the defendant, whom he was about to sentence, to assist the court in determining the proper punishment to be imposed within the limits fixed by law." McClain v. Commonwealth, supra, at 860. However, in light of the positive language of the Virginia Supreme Court in the later Linton case which has been italicized above, I am of the opinion that a circuit court is not authorized by Virginia law to direct an "employee of this state" to make a pre-sentence investigation and report in misdemeanor cases generally. Cf. Dyke v. Commonwealth, 193 Va. 478, 69 S. E. (2d) 483.

CRIMINAL PROCEDURE—Reckless Driving Conviction—Court suspension of operator's license—When effective.

MOTOR VEHICLES—Reckless Driving—Court suspension of license—When effective.

HONORABLE WILLIAM F. WATKINS, JR.
Commonwealth's Attorney for Prince Edward County

This is in reply to your letter of September 20, 1965, from which I quote the following:

"A defendant was convicted in the Municipal Court of the Town of Farmville on January 11, 1965, under a charge of careless and reckless driving, the sentence of the court being the imposition of a fine and the suspension of the defendant's operator's license for a period of thirty days. On January 13, 1965, the same defendant was charged with operating a motor vehicle while his license was suspended based on the above conviction. He was tried on this charge January 18, 1965, found guilty, but on the same date noted an appeal from the judgment of the County Court. On the following day, January 19, 1965, the defendant noted an appeal from the finding of the Municipal Court of January 11, 1965.

"It appears from Section 16.1-132 that the defendant had an appeal of right if made any time within the ten day period in which case the judgment of both of the courts would be terminated and the case be heard de novo. My question concerns whether or not the appeal of the case in which the defendant's driver's license was suspended after the date of the charge would render the charge of operating a motor vehicle while his license was suspended void."

The Constitution of Virginia preserves the right to an appeal and a trial by jury in such cases, under § 8 thereof, in these words: "Laws may be enacted providing for the trial of offenses not felonious by a justice of the peace or other inferior tribunal without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction." These constitutional rights are translated into statutory law through § 16.1-132 and § 16.1-136, Code of Virginia (1950), as amended, which, respectively, contain the right of a person convicted in a court not of record of an offense not felonious, to appeal to the appropriate circuit, corporation or hustings court at any time within ten days from such conviction and to trial by jury.

The named constitutional provisions and statutes enacted in pursuance thereof have the purpose of protection of the individual rights of any person who may be brought to trial accused of any such offense. It was not intended, however, that the judgment of the lower court should lie dormant pending the possible
exercise of the option to appeal. Such delay would be not only a derogation to the statute law but contrary to public policy. It is provided under § 46.1-422, with exception not here applicable, that, in addition to the penalties for reckless driving prescribed in § 46.1-192, "any court may suspend any license issued to a convicted person under Chapter 5 (§ 46.1-348 et seq) of this title for a period of not less than 10 days nor more than 6 months and such court shall require the convicted person to surrender his license so suspended to the court where it will be disposed of in accordance with § 46.1-425." The last named statute, § 46.1-425, provides that the license shall remain in the custody of the court until (1) the time allowed by law for appeal has elapsed, or (2) an appeal is effected and proper bond posted. The court convicting a person of reckless driving is, therefore, within its rights and authority to thereafter suspend the operator's license of the person so convicted unless an appeal is noted.

In the situation under consideration, the person was convicted and his license suspended by the court for a period of thirty days, according to law. The date of his conviction and his license suspension by the court was January 11, 1965. Thereafter, the person convicted had no right to drive a motor vehicle until either (1) the suspension period had expired or (2) he had noted an appeal within the time allowed by statute. When arrested on January 13, 1965, for driving while his license was suspended neither of these two events had occurred. The appeal was not noted until January 19, 1965, the day after the conviction for driving while his license was suspended. Under these circumstances, it is my opinion that the suspension was in full force and effect when the charges were brought for operating a motor vehicle while his license was suspended and the appeal, later taken, did not render such charges void.

CRIMINAL PROCEDURE—Revocation of Suspension of Sentence.

HONORABLE HARRY G. LAWSON
Commonwealth's Attorney for Appomattox County

This is in response to your letter of August 6, 1965, which reads in part as follows:

"The following questions arose in my office recently. So that we may be correctly advised and not run the risk of error or mistake in future cases, I would like to have your opinion on these matters: If John Doe is convicted of a felony on a plea of guilty and sentenced to serve three years in the penitentiary, however, the sentence is suspended for a period of five years on condition John Doe be of good behavior and not violate any laws of the State of Virginia during the five year period. During the first six months following the above mentioned conviction, sentence and suspension thereof, John Doe is convicted of a misdemeanor. The Commonwealth Attorney desires to appear before and move the Circuit Court to revoke the above mentioned order of suspension. First, should the hearing on this motion to revoke be recorded, inasmuch as a felony is involved? Second, should the Court appoint an attorney to represent the accused at this hearing? Third, does the Circuit Court have authority to direct that only a part of the three year sentence be served or should the entire three year sentence have to be served if an order of revocation is entered vacating the original order of suspension?"

It is quite clear that the proceeding at which the revocation of the order of suspension is considered is a judicial hearing. Slayton v. Commonwealth, 185 Va. 357, 38 S.E. 2d 479 (Opinions of Attorney General, 1962-63, page 5).
In § 17-30.1 of the Code, it is provided that the evidence and incidents of trial shall be recorded. In view of the foregoing, I am of the opinion that the judicial hearing at which the revocation of the suspension is considered is an incident of the trial and that it should be recorded.

You ask also if counsel should be appointed to represent the accused at such a proceeding. In Gideon v. Wainwright, 372 U.S. 335, the Supreme Court of the United States held that an indigent is entitled to court-appointed counsel at every stage of the proceeding. It is clear that the revocation hearing is a part of the proceeding. Appointment of counsel is provided for by § 19.1-241.1 of the Code. I am of opinion that under such circumstances counsel should be appointed to represent the accused. (See, Opinions of Attorney General, 1962-63, page 5.)

In conclusion you inquire if the court can provide that only a portion of the three-year sentence be served. To state it another way, may the court provide that part of the sentence be suspended and that the accused be required to serve the remaining portion. The power to suspend the execution of sentence is contained in § 53-273 of the Code. Section 53-275 of the Code provides for the revocation of the suspension. The foregoing statutes are silent as to whether or not the court may, under the circumstances as set forth in your letter, take the action you suggest. I am of opinion, however, that § 53-272 of the Code vests the court with the power to suspend part of the sentence imposed and require the accused to serve the remaining portion.

CRIMINAL PROCEDURE—Search Warrants—Seizure of items not specified.

LOTTERIES—Evidence—Numbers slips seized incidental to arrest for other crime.

HONORABLE A. J. CANADA, JR.
Assistant Commonwealth's Attorney for the
City of Virginia Beach

May 2, 1966

In your letter of April 22, 1966, you state:

"A police officer obtained a valid search warrant to look for illegal alcoholic beverages in the house of A. The officer entered the house of A to look for the illegal whiskey and saw in plain view on a chest what appeared to be 'numbered slips'. The officer asked, 'What are these?' Subject A replied, 'Those are numbers.' The officer then advised A of his right to remain silent, that anything he said could be used either for or against him in a court of law, and that he had the right to legal counsel before making any statement. The officer then asked if A had anything to say about the 'numbered slips', at which time A admitted that he was engaged in making and selling the 'numbers' in violation of the anti-lottery statute, Section 18.1-340 of the Code of Virginia. The officer then arrested A for violation of the anti-lottery statute and seized the 'numbered slips.'

"Is this evidence (numbered slips), thus obtained a result of a legal seizure and admissible in a criminal prosecution for violation of the anti-lottery statute?"

Section 18.1-340 makes illegal, among other things, possession of "a chance or ticket in or share of a ticket in a lottery," or any "writing, certificate, bill, token, or device" purporting to "guarantee or assure to any person, or entitle him to a prize or share of, or interest in a prize to be drawn in a lottery."
If this seizure was made incident to a lawful arrest for violation of this statute, then the evidence was not unreasonably seized so as to be inadmissible under the rule of *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

In *Harris v. United States*, 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947), the court said an officer who, as an incident to a lawful arrest, makes a reasonable search of the premises of the person arrested for the means or instrument of the crime committed, may seize the instruments which such an incidental search uncovers, at least where the articles seized are of a contraband nature. The court said a search valid in its inception does not become unlawful merely because it uncovers evidence of a crime not originally contemplated by the officers.

The facts cited by you are very similar to those involved in *State v. McKindel*, 148 Wash. 237, 268 P. 593 (1928). Police lawfully searched a room under a search warrant for possession of illegal liquor and found no liquor, but found in the room occupied by the defendants clothing stolen from stores. The defendants claimed the court erred in rejecting their motion to suppress the stolen goods as evidence. The conviction was affirmed, the court pointing out that police were lawfully on the premises under a legal search warrant and, while there, had reason and probable cause to believe that the defendants had committed a felony because of the easily visible stolen goods. See also *Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927); *United States v. Rabinowitz*, 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1950); *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960).

In view of these decisions, I am of the opinion that the slips in question were seized as an incident to a valid arrest for a violation of § 18.1-340 committed in the presence of the officer, and, therefore, are admissible in evidence.

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CRIMINAL PROCEDURE—Suspension of Sentence—When court may revoke

COURTS—Suspension of Sentence—When may revoke.

HONORABLE SOL GOODMAN
Commonwealth's Attorney for the City of Hopewell

July 8, 1965

I am in receipt of your letter of July 1, 1965, in which you present the following situation:

"On the 5th day of May, 1964, James Hanford Martin was convicted of Statutory Rape and sentenced by Judge Carlton E. Holladay of this judicial circuit to five years in the penitentiary to serve two years with three years suspended.

"James Hanford Martin became a disciplinary problem to the penal authorities, and at their request, I moved the Circuit Court of the City of Hopewell to revoke the suspended portion of his sentence.

"According to Judge Holladay, he felt that he did not have jurisdiction to revoke the suspended sentence because the final order read as follows: '—the Court doth hereby suspend execution of the last three years of said sentence of five years for a period of five years from the time he is released from the said penitentiary (italics supplied), and he is hereby placed on probation upon his release from the penitentiary for the period of five years, and placed under the supervision of the probation and parole officer of this Court; and upon the further conditions that during said period of time he not violate the laws of the Commonwealth, and etc.'"
You inquire whether or not the court may revoke the suspension and probation under the above-described circumstances.

I am constrained to believe that your inquiry should be answered in the negative, and I thus concur in the position taken by Judge Holladay. In this connection, I call your attention to the decisions of the Supreme Court of Appeals of Virginia in Dyke v. Commonwealth, 193 Va. 478, and Vick v. Commonwealth, 201 Va. 474. Although the precise question you pose was not under consideration in either of these cases, the Court extensively analyzed the various provisions of §§ 53-272 and 53-275 of the Virginia Code which govern the situation you present. Referring to probation under the supervision of a probation officer, the Court, in the former case declared (193 Va. at 483):

"That is the type of probation contemplated by section 53-272 in providing that in addition to suspending the sentence the court 'may also place the defendant on probation under the supervision of a probation officer.' The court may prescribe the time and the conditions of this probation. If it prescribes the time; i.e., the period of probation, the court may, under section 53-275, revoke the suspension and the probation only within the probation period." (Italics supplied).

Moreover, in the latter case, the Court reaffirmed this declaration in the following observation (201 Va. at 477):

"When a court in its order prescribes the period of suspension and supervised probation it may, under § 53-275, revoke the suspension and probation only within the probation period. Dyke v. Commonwealth, 193 Va. 478, 483, 69 S.E. 2d 483, 486." (Italics supplied).

It appears from your communication that the Circuit Court of the City of Hopewell has prescribed the period of suspension and supervised probation in the order here under discussion. In light of this circumstance and the language of the Dyke and Vick cases quoted above, I am of the opinion that the court in question may revoke such suspension and probation only within the probation period stated in its order.

CRIMINAL PROCEDURE—Warrant Charging Misdemeanor—Death of defendant before trial date—Warrant must be dismissed.

MOTOR VEHICLES—Overweight Violation—Death of defendant before trial date—Warrant must be dismissed.

February 24, 1966

HONORABLE B. T. GUNTER, JR.
Judge, Accomack County Court

This is in reply to your letter of February 16, 1966, in which you request my opinion based on the following, which I quote:

"DEFENDANT was operating a truck on the 20th day of January 1966 within the County of Accomack. On the same day a warrant was issued against him charging him with 'unlawfully violates section 46.1-339 of the Code of Virginia by operating a motor vehicle with an over weight of 3,410 lbs. on 2nd axle of same.' The warrant was returnable to the Accomack County Court and set for trial on February 7, 1966. Between January 20th and February 7th, date of trial, Defendant died. I would like to know whether this warrant will have to be dismissed on account of the Defendant's death."
A violation under the named statute constitutes a misdemeanor under § 46.1-341, Code of Virginia (1950), as amended, which states: "Any violation of §§ 46.1-339 and 46.1-340 shall constitute a misdemeanor and shall be punishable as provided in § 46.1-16." Upon conviction of any person for violation of any weight limit prescribed in § 46.1-339, the court shall assess liquidated damages pursuant to § 46.1-342. Under the given facts, however, there has been no such conviction, the defendant having died after issuance of the warrant but before the date set for trial. It is my opinion, therefore, that the warrant must be dismissed because of the defendant's death.

CRIMINAL PROCEDURE—Where Preliminary Hearing to Be Held—Transition of town to city of second class.

COUNTIES, CITIES AND TOWNS—Transition of Town to City of Second Class—Preliminary hearings in criminal cases.

January 4, 1966

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney for Rockbridge County

This is in reply to your letter of December 28, 1965, which reads as follows:

"Pursuant to Court Order entered by the Judge of the Circuit Court of Rockbridge County, Virginia, the Town of Lexington becomes a City of the second class, effective January 1, 1966. As such it will have a Municipal Court, which under Section 16.1-127 of the Code will have jurisdiction for preliminary hearings on felonies occurring within the City.

"This office has to prosecute four felony charges against one and the same person, on offenses that occurred in the Town of Lexington in May, September, and October, 1965. On October 11, 1965, the County Court committed this person to Central State Hospital for observation as to his mental condition. He has recently been returned to Lexington for trial having been found not to be mentally ill.

"This office is not prepared to have preliminary hearing on these charges until after January 1, 1966, and I want to be positive which jurisdiction should hear the preliminary hearings on the merits. In other words, should they be heard in the County Court since the offenses occurred when that Court had sole jurisdiction and that Court entered the original Order committing the accused for observation, or should they be heard in the Municipal Court which will have jurisdiction for such after January 1, 1966?"

In my opinion, the preliminary hearing must be held in the Municipal Court of the City. After December 31, the county court will have lost jurisdiction with respect to offenses that occurred in the former town of Lexington. The Municipal Court of Lexington will have exclusive jurisdiction as provided in § 16.1-124 of the Code and, therefore, under § 16.1-127, is the proper court to conduct a preliminary hearing with respect to offenses that occurred in the town.
DOG LAWS—Fox Hunting Dogs—Statutes concerning.

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

This is in reply to your letter of June 11, 1965, which reads in part as follows:

"1. Nelson County does not have a local ordinance prohibiting the running of dogs at large. Does a fox hunter hunting with dogs in Nelson County have the right to start his dogs on a hunt, when it is reasonably foreseeable that the dogs will get beyond the hunter's control and go on lands of a person who has not given consent for such hunting thereon?

"2. Are fox hunting dogs deemed to be under the control of the owner, if the dogs are chasing a fox and the hunter is listening to the chase some distance away?

"3. Is it mandatory that the owner or owners of a kennel of fox hunting dogs obtain a permit from the Game Commission under Section 29-192 of the Code of Virginia, before he can lawfully allow his dogs to hunt foxes, in which hunt it is reasonably foreseeable that the dogs will go upon property of a person who has not consented thereto?

"4. Is it mandatory for the owner or owners of a kennel of fox hunting dogs to obtain a permit from the Game Commission under Section 29-212 of the Code of Virginia, before the owner or owners of such dogs may allow them to fox hunt, as set forth above, where it is reasonably foreseeable that the dogs will go on the land of a person who has not consented thereto?

"5. What rights do owners of a kennel of fox hunting dogs have to permit such dogs to go on the property of a person who has not consented thereto, while in the act of hunting, if either one or both of the above permits are obtained by the owners of the dogs from the Game Commission?

"6. If neither one of the above permits are obtained from the Game Commission by the owner or owners of a kennel of fox hunting dogs, and the dogs are permitted by the owners to start on a fox hunt, where it is foreseeable that such dogs will go on the property of a person who has not consented thereto, and if such dogs do in fact go on the property of such person, without his consent, does the owner of the property have the right to shoot such dogs?

"7. Does the owner of property who has not given consent for fox hunting dogs to come on his property while in the act of hunting, have the right under any circumstances to shoot such dogs while they are in the act of hunting?

"8. Section 29-197 says that any person finding a dog worrying sheep shall have the right to kill such dog on sight. What, in your opinion, is the definition of the word 'worrying' in this Section of the Code?"

I will attempt to answer your questions seriatim.

In answer to your first question, in my opinion no criminal act is committed by a person who begins a hunt during which it is reasonably foreseeable that the
law will be violated—at least within the context of your question. Thus, the answer to your first question, as you have drafted it, is in the affirmative, in that the hunter would have a right to start his dogs on the hunt, even if it were reasonably foreseeable that a crime might be committed by the dogs while on the hunt. The starting of the dogs is no crime, the crime not being committed by the mere starting, even though it is reasonably foreseeable that they might commit one at a later time.

Assume, however, that the foreseeability aspect of the first question is not present, the question then is whether or not a fox hunter can permit his dogs to go beyond his control and onto the lands of a person who has not consented to the hunting. This question could not be answered unless it were known whether or not the dogs were kennel dogs. Since Nelson County has not enacted an ordinance pursuant to the provisions of § 29-194 of the Code, the common law would apply as to dogs not kennel dogs; and, under the common law of Virginia, dogs are permitted to run at large. But if the dogs are kennel dogs, then the provisions of §§ 29-192 and 29-212 would apply. If the Commission has issued a permit under § 29-192, allowing kennel dogs to run at large, or has issued a permit under § 29-212, allowing fox hounds to run at large, then the answer to this new question would be in the affirmative. If the dogs in question are kennel dogs and no permit has been issued under the provisions of either § 29-192 or § 29-212, allowing dogs to run at large, but the dogs do not go beyond the control of the hunter or custodian while hunting, no law is violated.

In answer to your question No. 2, the mere fact that the dogs “are chasing a fox and the hunter is listening some distance away” would not necessarily mean that the dogs are not under the control of the hunter. If, for example, the hunter is able to control the dogs by visual or audio signals, the dogs are by no means out of his control. The legal authorities indicate that restraint of hunting dogs need not be entirely physical. Control of such dogs depends upon training habits and instincts in a particular case, and the sufficiency of the control or the existence of the control is to be determined more from its effect upon and influence over the animals than from the nature or kind of the restraint or control. The authorities point out that dogs, of all domestic animals, yield most readily to restraint and controls other than physical. The voice or look of the dog’s owner, for example, is capable of exercising control over a dog. So your question presents a situation where control may exist, but it also presents one where control might not exist. I am unable to conclusively answer it without the benefit of more facts.

The answer to question No. 3 is in the negative. In the first place, as already mentioned, the mere starting of the hunt, even when it is reasonably foreseeable that the dogs will go upon another’s property, is not sufficient to support a prosecution of the owner for failure to have a permit, although the permit might be required if the dogs do in fact go on another’s property. Assuming, however, that the foreseeability aspect is not present in your question and that the question is whether or not the owners of a kennel of fox hunting dogs need a permit under § 29-192 to hunt foxes with the dogs and to go upon the property of another while doing so, the answer is again in the negative, if the dogs are under the control of the owner or custodian. Section 29-192 provides, in part, that “a kennel dog shall not be permitted to stray beyond the limits of the enclosure, but this shall not prohibit removing dogs therefrom temporarily while under the control of the owner or custodian for the purpose of exercising, hunting, breeding, trial or show.” In my opinion it would be permissible for the owner of kennel dogs to remove them temporarily from the kennel for the purpose of hunting, so long as the dogs remain under the control of the hunter or their custodian, even though they go upon the property of a person who has not consented thereto.

My answer to question No. 3 also answers question No. 4.

In answer to question No. 5, it is my opinion that the owner of a kennel of fox hunting dogs, who has a permit allowing such dogs to run at large, may
permit the dogs, while engaged in a hunt, to go upon the property of a person who has not consented thereto, subject, of course, to the provisions of the permit, the rules and regulations of the Commission, and the provisions of the Code section under which the permit is issued.

The answer to questions 6 and 7 is in the negative. I find nothing in the Code permitting such action on the part of the property owner. In fact, by doing so, he might well subject himself to prosecution under § 18.1-159.

In my opinion the word "worrying," as used in § 29-197 of the Code, means to run after or to molest the sheep. Incessant or prolonged barking, with nothing more, directed *exclusively* at the sheep, could well be considered "worrying," but this might be a close question. In general, I think the word is designed to describe a situation where a dog chases, pursues or runs after, or at sheep, all the while barking and perhaps nipping at them. Dogs passing by, concentrating on a hunt or the like, even though barking and yelping while doing so, would not, in my opinion, constitute "worrying" sheep.

You are, of course, familiar with the provisions of § 29-168, as amended, of the Code, which relates to conditions under which fox hunters and deer hunters may follow their dogs on prohibited lands.

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EDUCATION—Driver Training—May be supported by appropriations from General Fund.

Honorable Willard J. Moody
Member, House of Delegates

November 19, 1965

This is in reply to your letter of November 18, 1965, which reads as follows:

"I am interested in introducing legislation which would amend § 46.1-380 of the Code by reducing the fee for renewal of an operator's license. A portion of the receipts obtained for renewal of operator's licenses supports the Driver Education Fund provided for in § 22-235.1 of the Code.

"I highly favor the Driver Education Program in Virginia and I would not want to jeopardize the financial support of the program. I, therefore, would like to know whether or not under our present laws there would be any prohibition or reason why the Driver Education Program could not be supported by appropriations for education from the General Fund.

"I would appreciate the view of your office with reference to supporting the Driver Education Program from General Funds as a part of our appropriations for education, thereby eliminating the necessity of collecting these additional funds for renewal of licenses."

I know of no reason why the General Assembly may not make an appropriation out of the general fund to the State Board of Education for the support of the Driver Education Program, established under § 22-235.1 of the Code. The legislature's power to make appropriations is, of course, only limited by Constitutional prohibitions and there is nothing in the Constitution, in my opinion, which would prohibit the General Assembly from taking such action.

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EDUCATIONAL TELEVISION—Advisory Council—May approve applications for State aid grant.

HONORABLE D. V. CHAPMAN, JR., Executive Assistant
Advisory Council on Educational Television

This will acknowledge receipt of your letter of November 23, 1965, which reads as follows:

"Enclosed is copy of an Application for a State aid grant submitted to our Council by the Shenandoah Valley Educational Television Corporation, which we will appreciate being returned with your reply.

"We had first thought that perhaps an informal inquiry to your office might suffice. However, because of the nature of the assistance described in the Application, the Co-chairmen feel that we need an official opinion from your office as to whether or not the Council can approve the Application within the framework of the applicable statutes of the Commonwealth.

"We expect to bring the Application before a meeting of the Council on December 7, 1965."

In examining the application I find in Attachment (K) a statement relating to the Estimated Total Development Cost, amounting to $27,526.39, and also a statement entitled "Budgeted Disbursements" amounting to $8,050, which is the second item listed in the Estimated Total Development Cost, $5,500 of which is for salaries.

In my opinion, the Council has authority to approve the application under consideration. The general powers of the Council are set out in § 22-334 of the Code, as amended at the 1964 Session of the General Assembly, and paragraph (c) specifically authorizes the Council to assist the localities in planning and developing educational television facilities. Furthermore, in § 22-333 the Council is authorized to assist the counties and other localities in the establishment of television for educational purposes. Section 22-344 permits the Council to make a contribution to the costs of any project for educational television not to exceed one-half the cost thereof. The definition of "Project" is found in § 22-332(d) and, in my opinion, is broad enough to include the items set forth in the application.

The provisions of Chapter 16 of Title 22, known as the "Educational Television Station Facilities Construction Act" should, in my opinion, be liberally construed so as to achieve the general purposes of that chapter.

For the foregoing reasons I am of the opinion that there is no legal reason why the application may not be approved by the Council.

EDUCATIONAL TELEVISION—Station Facilities—Value may be used to match State funds.

HONORABLE DAVID V. CHAPMAN, JR., Executive Assistant
Advisory Council on Educational Television

This will acknowledge receipt of your letter of June 2, 1966, in which you refer to the Educational Television Station Facilities Act (Chapter 16, Title 22 of the Code) and present the following questions:

1. Can existing ETV Station facilities value, not previously used...
to match State funds, irrespective of date of acquisition or completion of such facilities, be used to match additional State aid grants?

2. Where the application is based on facilities already provided, and only a portion of the value of one of the Station's major component parts has been used to match State funds, can the project definition under such conditions include the total facilities, as compared with a new project definition for specific facilities to be added?

At the 1964 session of the General Assembly, several sections of Chapter 16, Title 22 were amended. In my opinion, the amendments to §§ 22-332 and 22-344 must be considered in answering your questions. Section 22-332 was amended so as to add a subsection (d) defining project, as follows:

"'Project' means the construction, improvement, maintenance and operation or acquisition of a television station, or transmission relay station, together with its component parts, or a studio facility for the development and production of television programs, or specified assistance in the development of plans for implementing television facilities and services, or a combination of the foregoing."

Section 22-344 was amended so as to permit the Virginia Advisory Council on Educational Television to make grants not in excess of one-half of the costs of a project, rather than one-third as previously allowed. In addition, § 22-344 contains the following amendment:

"... In making the determination of the applicant's share, the Council may consider the values or existing or partially completed facilities, in accordance with rules and regulations promulgated under § 22-334."

The questions presented arise from the following summary of facts found in the first and second paragraphs of your letter:

"At the last meeting of our Council, it was decided, in view of the 1964 Amendments to the Educational Television (ETV) Statutes, to request your official opinion on some questions involving qualification of existing ETV facilities for State aid under provisions of Chapter 16, Title 22 of the Virginia Code.

"To illustrate, one of the ETV Stations was operating transmitter equipment, one of the component parts of an ETV station, before our Council program was established under the enabling Act passed by the General Assembly in 1962. The value thereof has not, to date, been used to match any of the State aid grants approved for further development of the overall station facilities required. In this illustrative case, the transmitter is at one location, and the studio, subsequently built, is at another. The station representing the case in point, now wishes to apply for additional State aid. To match the State funds, it proposes to use, as required for more grants, that portion of the value of the total facilities, not used to match previous State aid grants. Because of the need presented, the Council in due course expects to consider approval of an application, if you advise that such approval, if given, would be in accordance with the controlling Statutes. . . ."

By reference to the definition of "project" it would appear that the ETV station described above qualifies.

In my opinion, the answers to both your questions must be in the affirmative.

Under § 22-344 the State may contribute one-half the costs of a project. This is true even though the project is already in existence, and grants of less than
one-half the cost have previously been made. It will be noted that the last sentence of § 22-344 quoted above after the word “values” contains the word “or.” It is clear that the sentence does not make sense by the use of the word “or.” Obviously, the word intended is “of” so that the language will read:

“. . . In making the determination of the applicant’s share, the Council may consider the values of existing or partially completed facilities, in accordance with rules and regulations promulgated under § 22-334.”

In the case of Hutchings v. Commercial Bank, 91 Va. 68, the Supreme Court of Virginia, in discussing an obvious error in a statute passed by the General Assembly, quoted as follows from Sutherland on Statutory Construction:

“. . . Sutherland, a learned author on Statutory Construction, says: ‘When one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied’—citing a large number of authorities—and adds: ‘This is but making the strict letter of the statute yield to the obvious intent.’”

In my opinion, adopting the rule of construction cited, the amendments referred to above clearly authorize the Council to make grants of State funds—provided such grants are made in accordance with established procedures adopted under § 22-334—not exceeding one-half of the total cost of a particular project upon applications of the scope outlined in questions one and two.

ELECTIONS—Absentee Ballots—Member of Armed Forces.

July 7, 1965

Mr. James E. Baylor, Secretary
Electoral Board, City of Norfolk

This will acknowledge receipt of your letter of July 6, 1965, in which you present the following questions:

1. Should all applications for absentee ballots we receive from members of the Armed Forces be forwarded to the State Board of Elections?

2. May we give in person or mail an absentee ballot to a member of the Armed Forces if he is registered to vote in Norfolk, but has not paid poll taxes? (We realize they do not have to pay poll taxes.)

3. May we give in person or mail an absentee ballot to a member of the Armed Forces if he is registered in Norfolk, and has paid the proper poll taxes, even though he did not have to do so?

4. May we give in person or mail an absentee ballot to a member of the Armed Forces if he is registered in Norfolk, and who would not be assessable for a poll tax, as in the case of new residents, and persons becoming 21 years of age?

5. Does it make any difference whether the member of the Armed Forces presents himself in person with the application for an absentee ballot, or mails it to us?”

I enclose copies of two opinions issued by this office—(1) to Hon. Levin Nock Davis, dated June 11, 1952, and (2) to Hon. Glen M. Williams, Commonwealth’s Attorney of Lee County, dated August 10, 1951. These opinions are published in Report of the Attorney General (1951-1952), at pp. 53 and 55, respectively.
If the applicant for absentee ballot wishes to vote as a member of the armed service, under the provisions of Chapter 13.1 of Title 24 of the Code—§§ 24-345.1 through 24-345.15—the procedure outlined in these opinions must be followed. The provisions of this chapter, however, in my opinion, do not prevent a member of the armed forces from exercising the right of franchise by absentee ballot in the manner provided for civilians. Thus, if a person who is in the armed services is duly qualified to vote as a civilian—that is, duly registered and has paid his poll taxes as provided by law—he may make an application upon the civilian form of application provided for in Chapter 13 of Title 24 and such person, if qualified in every respect to vote without regard to his armed service status, would be entitled to vote by absentee ballot. I do not feel that the provisions of Chapter 13.1 are exclusive, as is perhaps indicated in the enclosed opinions; however, any member of the armed services desiring to vote by mail under the provisions of Chapter 13 would have to comply with all the provisions thereof, such as § 24-323, which requires the payment of postage.

All applications received by the local electoral board from members of the armed services which are not in strict compliance with the provisions of Chapter 13 may not be processed by the local board, but these applications must be forwarded to the State Board of Elections, because under § 24-345.6 only the State Board of Elections may furnish official war ballots.

To the extent that the prior opinions of this office may hold that a member of the armed services is precluded from voting under the procedure set forth in Chapter 13, the same is hereby modified.

I feel that the foregoing answers all your questions.

ELECTIONS—Ballots—Write-in—Mistake in writing in candidate does not invalidate whole ballot.

October 14, 1965

HONORABLE JUNIE L. BRADSHAW
Member, House of Delegates

This is in reply to your letter of October 13, 1965, in which you present the following question:

“If a voter, in writing in the name of a candidate for the House of Delegates, fails to write in the name in the proper form as prescribed by law, would the mistake void just the name of the write-in or would it void the entire ballot?”

A mistake of the nature stated in your question would not have any effect upon the validity of the ballot insofar as it would pertain to the other candidates for whom the voter voted.

ELECTIONS—Candidates—Must be resident of town for six months.

April 22, 1966

HONORABLE Z. N. HALE, Chairman
Russell County Electoral Board

This will acknowledge receipt of your letter of April 18, 1966, which reads as follows:

“The Town of Honaker, Virginia, which is a municipal corporation
REPORT OF THE ATTORNEY GENERAL

organized and existing by virtue of order of the Circuit Court of Russell County, Virginia, intends to hold its municipal election on June 14, 1966.

"Two persons have filed their Notice of Candidacy for Mayor with the Clerk of the Circuit Court of Russell County, Virginia, and there has arisen a question as to the qualification of one of the said candidates.

"There is only one precinct embraced within the corporate limits of the Town of Honaker.

"Assuming that the candidate in question has been a resident of Honaker, Virginia, for a period of thirty days next preceding the election but has not been a resident of said town for a period of six months next preceding the said election, would he be eligible to run for the said office of Mayor and be entitled to have his name placed upon the official ballot?"

Under Section 18 of the Constitution and § 24-17 of the Code of Virginia, a person must be a resident of a town for at least six months in order to be qualified to vote in an election for town officers. Under § 24-132 of the Code, no person who is not qualified to vote in the election in which he offers as a candidate shall have his name printed on the ballot provided for the election, unless he is a party primary nominee.

If the person referred to in your letter will have been a resident of the town for six months on the day of the election in which he is a candidate, it will be proper for the electoral board to place his name on the ballot.

ELECTIONS—Capitation Tax—Must be paid in order to vote in State and local elections.

HONORABLE GEORGE W. TITUS
Treasurer of Loudoun County

October 11, 1965

This is in reply to your letter of October 8, 1965, which reads as follows:

"Please furnish a decision on the following:

"Since the deadline for the payment of capitation taxes has passed, we are having requests to pay capitation taxes for next year's elections. According to the code these taxpayers are required to pay all taxes assessable against them. If this is true please advise what action should be taken against the taxpayers who paid this current year's capitation taxes and expect to vote this year and next year on this one payment. Some of these taxpayers have been residents of the county for more than ten years. If some people are required to pay three years then this rule should apply to every one. I realize that next year's election is for Federal officers but there is a possibility of a county election."

Section 10(d) of the Voting Rights Act of 1965 provides as follows:

"During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political subdivision with respect to which determinations have been made under subsection 4(b) and a declaratory judgment has not been entered under subsection 4(a), during the first year he becomes otherwise entitled to
vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant."

In our opinion, the provisions requiring the payment of the current year's poll tax 45 days before the election applies only to the year in which a person first registers to vote. Those persons who took advantage of this provision during the year 1965 will not be entitled to pay the tax for the current year only in 1966 or any subsequent year and thereby qualify to vote. In my opinion, the provisions of the State Constitution and the statutes will apply in subsequent years to these persons unaffected by the provisions of the Voting Rights Act of 1965. In other words, if a person qualified to vote during the year 1965 by the payment of 1965 tax only but was assessable under State law for the years 1963 and 1964, such person, in order to vote in 1966, will be required to pay the 1963 and 1964 poll taxes six months prior to the election in order to vote in State and local elections.

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ELECTIONS—Capitation Tax—Registration and payment of tax requirements to vote in councilmanic election of Norfolk.

November 29, 1965

HONORABLE HENRY E. HOWELL, JR.
Member, House of Delegates

This is in reply to your letter of November 23, 1965, in which you present the following questions, which I shall answer in the order stated:

"(1) What is the latest date a citizen of Norfolk, who registered to vote in a state election prior to the General Election of 1965, may pay his or her poll tax in order to be eligible to vote in the Councilmanic election to be held June 14, 1966, at which time the citizens of Norfolk will elect a majority of the City Council?

"(2) How many years poll tax does such an individual have to pay in order to vote in said election?

"(3) Does a citizen who registered for the first time to vote in the November 1965 General Election for Governor and paid his or her poll tax for the year 1965 within the forty-five (45) days provision of the Voting Rights Act of 1965 have to pay any further poll tax in order to vote in the June Councilmanic election? If so, how many years tax does he or she have to pay and when is the payment deadline?

"(4) What is the deadline for one who will be voting for the first time in the 1966 local elections?"

(1) Section 21 of the Constitution and § 24-17 of the Code are applicable. Under these provisions the poll tax must be paid at least six months prior to the election which, in this instance, will be December 14, 1965.

(2) The above constitutional and statutory provisions require the payment of
all State poll taxes assessed or assessable against the voters for the three years next preceding the year in which the election is held. In this instance, the three years next preceding are 1963, 1964 and 1965.

Chapter 2.1 of Title 24 of the Code and Article XVII of the Virginia Constitution relate to voting qualifications of persons in active service as members of the armed forces of the United States. These persons are exempt from the payment of poll tax while in such service. This exemption also applies to a person discharged from active service in the armed forces of the United States on or after the first day of the calendar year preceding the year in which the election occurs, provided such discharge is not dishonorable and, provided further, that such person is registered and otherwise qualified to vote.

A person who became 21 years of age after January 1, 1965, is not assessable for any poll tax and, therefore, may register and vote in said election without the payment of such tax.

(3) In my opinion, if a citizen who registered for the first time to vote in the November 1965 general election took advantage of the provisions of Section 10(d) of the Voting Rights Act of 1965 by paying the 1965 poll tax forty-five days prior to the election, such person, in order to qualify to vote, under Virginia law, in the election to be held on June 14, 1966, must pay the poll tax assessed or assessable against him for the years 1963 and 1964 and such payment must be made not later than December 14, 1965.

(4) Persons who have never previously registered and who desire to take advantage of the provisions of Section 10(d) of the Voting Rights Act of 1965 may pay the 1966 poll tax at least forty-five days prior to June 14, 1966, and may register thirty days prior to the election. The deadline for the payment of 1966 poll tax will be April 30, 1966.

ELECTIONS—Capitation Tax—Treasurers required to furnish list of persons who have paid.

HONORABLE J. H. JOHNSON
Treasurer of the City of Roanoke

This is in reply to your letter of August 19, 1965, which reads as follows:

"Please be kind enough to advise me at your earliest convenience about the new Federal Law recently passed with respect to changes in the voting laws, what effect it will have on the operation of my office and what changes will be required, if any?

"Under the old law, we have prepared a 1965 Capitation Tax Voters List, listing the names of all persons who paid three years poll taxes, 1962-1963-1964, prior to May 1, 1965.

"What more shall be expected of me to comply with the changes made in the voting laws passed by the United States Congress. A great many citizens are asking a lot of questions which I cannot answer."

There is no requirement in Virginia election laws that the treasurers of the various localities prepare a supplemental list of persons who have paid poll taxes for the year 1965. The only list that the treasurers are required to furnish is the list required under § 24-120 of the Code and Section 38 of the Constitution.

Persons who pay their poll taxes for 1965 and register will have to exhibit the tax receipt to the judges of election when they offer to vote.
ELECTIONS—Capitation Tax—When payment required.

HONORABLE J. H. JOHNSON
Treasurer of the City of Roanoke

This will acknowledge your letter of August 22, 1965, in which you present the following question:

"Will any Virginia Citizen who was 21 years of age or older on January 1, 1965 and has not yet paid the required number of years capitation taxes under section 24-120 of the Code of Virginia, be able to pay only his 1964 State Capitation Tax on or before September 17, 1965, and register on or before October 1, 1965 and qualify to vote on November 2nd in both state and local elections?"

Your question, I assume, relates to a person who became twenty-one years of age after January 1, 1964. This person was not assessable for any poll tax for either of the three preceding years and, therefore, he may pay the 1965 State Capitation tax of $1.50 at any time before the registration books close for the 1965 election and register and vote in that election. If this person became twenty-one years of age prior to January 2, 1964, and has never registered, under the Federal Voting Rights Act of 1965 he may pay to the treasurer not later than September 18, 1965, the $1.50 poll tax for 1965 and be qualified to offer to register not later than the date the registration books close this year. The last day for registration is October 2nd and not October 1st, as stated in your letter.

If a person became twenty-one on January 2, 1965, or at any time thereafter and not later than November 2, 1965, he can register and vote in the November election without the payment of any poll tax.

You will note from the above that the federal voting law only affects the person who became twenty-one years of age prior to January 2, 1964. Persons who became twenty-one years of age on January 2, 1964, or since that time, may qualify to vote under State law without regard to the federal statute.

ELECTIONS—Capitation Tax Lists—No longer required.

HONORABLE WALTER B. GENTRY, Treasurer
City of Richmond

This is in reply to your letter of May 3, 1966, in which you refer to a bulletin issued by Honorable Levin Nock Davis, Secretary of the State Board of Elections, in which he states:

"(3) All of the provisions of the Virginia Law requiring local officials to prepare, post and furnish a certified list of poll tax payments are no longer of any practical use, and the officials need not comply with these provisions."

You are advised that this office is in accord with the above statement.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Closing of Registration Books.

Miss Blanche C. Boots
General Registrar, City of Fredericksburg

March 17, 1966

This will acknowledge receipt of your letter of March 16, 1966, which reads as follows:

"When we close registration records here on May 14th for the city election on June 14th and the records remain closed until July 13th—the day after the Primary—due to the overlap in closing dates, does this closing date apply also to the Federal Records?

"As the counties are not having a municipal election in June their records will not close for the Primary until June 11th, (almost a month later than ours) and there is some controversy here as to whether the Federal Records should remain open until June 11th even though the State Records are closed."

With specific reference to your question concerning the registration of voters under § 24-67.1 of the Code for federal elections only, any persons offering to register thirty days prior to the primary election to be held on July 12, 1966, should be registered provided they meet the requirements of registration.

With respect to persons who offer to register under § 24-67 of the Code, in my opinion, the applications of such persons must be accepted by you and other city registrars during the period the registration books are closed for the city election. Such applications, however, must be held in suspense and the names of the applicants who qualify may not be registered or posted upon the registration books until the day after the municipal election. Section 24-74 of the Code requires that each registrar in the counties and cities shall annually, thirty days before the date fixed by law for every primary election, complete the registration of voters for the succeeding primary and there is no statute which would authorize a registrar to refuse to take an application of a person desiring to register for the primary during the period that the registration books are closed for the municipal election.

ELECTIONS—Democratic County Committees—Authorized to provide method of candidate selection.

Honorable Rufus V. McCoy, Sr.
Member-elect, House of Delegates

December 8, 1965

This is in reply to your letter of December 6, 1965, in which you state that the political parties in Dickenson County are divided on the way of selecting their candidates for the election to be held in 1967. One faction wants a primary and the other faction wants the nomination made by convention or committee. Your question is as follows:

"After a convention is called, and officers are elected, or selected, how many names of qualified voters are required on a petition to override the convention and hold a primary?"

There is no provision in State law which would authorize the decision of the county committee to hold a convention to be overridden by a petition of the qualified voters. Section 24-364 of the Code provides as follows:
"Each party shall have the power to provide in any way it sees fit for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy, and the nomination and election of its State, county or city committees."

The Democratic Party Plans contain the following provision:

"15. City and county committees shall have power to provide for the nomination of candidates for county, city and other local offices and for the election of Party Committee members and delegates to Party Conventions by either mass meetings, conventions or primaries as the respective committees may see fit. Whenever such nominations for office or elections of committeemen or delegates are ordered to be made by primary election such primary elections shall be held in conformity with all the provisions of the State Primary Law."

I do not have access to the Republican Party Plan.

There is a provision in the Code—§ 24-418—which provides that upon a petition of the voters a call for a convention may be cancelled and a primary may be held in lieu thereof. This provision, however, applies to cities and there is no comparable provision with respect to counties.

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ELECTIONS—Electoral Board—Member may not receive compensation from Federal Government.

March 31, 1966

HONORABLE W. E. SPENCER, Clerk
Circuit Court of Floyd County

This is in reply to your letter of March 29, 1966, which reads as follows:

"Would you please be so kind as to enlighten me by giving your opinion as to whether or not a conflict exists (Section 24-31 of the Code and also the last paragraph of Section 31 of the Constitution) in a member of the Electoral Board doing part time work as a Clerk or secretary for the local office of the Community Action Program, Inc. or better known as 'Poverty Program'?"

If the Community Action Program, Inc., is a United States government operation and the person is receiving any compensation from the United States government for his services, he is no longer eligible to serve on the electoral board or as registrar or judge of an election.

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ELECTIONS—Electoral Board—No power over registrars other than in § 24-36.

ELECTIONS—Electoral Board—May not designate where registrars sit.

REGISTRAR—Electoral Board Powers—Specified in § 24-36.

June 8, 1966

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

This is in reply to your letter of June 7, 1966, in which you refer to
Chapter 291, Acts of Assembly (1942), as amended by Chapter 297, Acts of Assembly (1956), and present the following questions:

“(1) Does the electoral board have any power of supervision over registrars in the various election districts, other than found in § 24-36 of the Code?
“(2) May the electoral board forbid district registrars to sit when and where they choose within their districts so long as they comply with the other requirements of the statute, such as § 24-74?
“(3) Would that portion of the opinion of the Attorney General, dated Feb. 28, 1951 to Mr. Sam C. Stowers, reading as follows, be applicable to district registrars provided for in Chap. 291, Acts of Assembly, 1942, as amended?

"I am of the opinion that the registrar, in the exercise of his discretion and for purposes of public convenience, could sit and receive applications for registration and register those qualified to register, at some convenient place within his election district other than the customary place of registration. This matter being within the discretion of the registrar, he could prescribe the times when he would so sit and the place where he would receive application and register persons entitled to registration.

"While the question is not posed, this opinion is not to be construed as giving sanction to a local registrar canvassing and soliciting promiscuously applicants for registration."

Chapter 297, Acts of Assembly (1956), provides that a county having a density of population of 4,000 or more per square mile shall have a general registrar for the county and, in addition, precinct registrars who "shall be appointed as provided by law and assume office in accordance with such provisions." These precinct registrars are required upon registering any person who appears before them, to certify the same to the general registrar.

I can find nothing in this Act that gives the electoral board any power over these precinct registrars. Therefore, questions (1) and (2) presented by you are answered in the negative and question (3) is answered in the affirmative.

ELECTIONS—Electoral Board—Teacher may serve.

ELECTIONS—Judges—Justice of peace may not serve.

ELECTIONS—Judges—Town policeman should not serve.

May 31, 1966

HONORABLE RUFUS V. Mccoy, Sr.
Member, House of Delegates

This is in reply to your letter of May 27, 1966, in which you present the following questions:

“(1) Can a teacher in the public schools of Dickenson County serve as a member of the Trustee Electoral Board of Dickenson County?
“(2) Can an elected justice of the peace serve as judge or clerk of an election?
“(3) Can a town police appointed by the town council serve as judge of an election?”
Section 24-31 of the Code provides as follows:

"No person, nor the deputy of any person, holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city or town thereof, shall be appointed a member of the electoral board or a registrar or judge of election."

Question (1) is answered in the affirmative. It does not appear that a school teacher would be disqualified from serving on the electoral board under the above section since the position of school teacher is not an elective office.

With respect to your question (2), I enclose copy of an opinion to Hon. T. C. Talley, dated March 9, 1955 (Report of the Attorney General (1954-1955), at p. 91), in which we held that a justice of the peace is not eligible to serve as an election official.

With respect to your question (3), a strict interpretation of the statutes alone would not disqualify a town policeman from serving as judge of an election. However, inasmuch as a town policeman is charged with the duty of law enforcement, and his regular duties could possibly interfere with his duty as an election judge, I do not feel that the offices are compatible.

ELECTIONS—Incorporation of Towns—County to pay for election.

COUNTIES, CITIES AND TOWNS—Incorporation of Town—County to pay for election.

HONORABLE JOSEPH MOTLEY WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

May 10, 1966

This will acknowledge receipt of your letter of May 6, 1966, which reads as follows:

"On May 3, 1966, an election was held pursuant to a special law enacted by the General Assembly at its Session in 1966, relative to the incorporation of the Town of Hurt, in Pittsylvania County. This election or referendum was to submit the question as to whether or not said Town was to be incorporated as such to the electors of the Town. Prior to the election an incorporation committee was set up by the people of the Town of Hurt, however, the regular election officials superintended this election, just as for general elections.

"My inquiry is who is responsible for the payment of the costs of this election—the newly formed Town of Hurt or the County of Pittsylvania?"

House Bill No. 114 (Chapter 40, Acts of 1966) provided that such referendum should be held pursuant to §24-141 of the Code. Section 24-207 provides for the payment of the compensation of election officials of any election, and §24-209 provides that such payments shall be made by the county, city or town in which the election is held. The referendum election was held by the electoral board and other election officials of the county. Under the terms of the Act establishing the town it will not come into existence until January 1, 1967. Therefore, under the statutes cited, I am of the opinion the expenses of the referendum shall be paid by the county.
ELECTIONS—Powers of Electoral Board Over Registrars, Etc.

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

May 23, 1966

This will acknowledge receipt of your letter of May 18, 1966, calling attention to the opinion of this office reported in the Report of the Attorney General (1959-1960), at p. 166, which was furnished to Honorable Linwood E. Toombs, from which you have quoted. You request my advice as follows:

"I should like to be informed whether or not this ruling encompasses precinct registrars. In other words, does the electoral board have any power of supervision over precinct registrars, and may they forbid them to sit when and where they choose within their jurisdictions so long as they comply with the other requirements of the statute, such as Sec. 24-74?"

The opinion does apply to precinct registrars to the same extent as it applies to a general registrar. Your reference to precinct registrars, I assume, relates to assistant registrars which may be appointed under § 24-118.8 of the Code. It will be noted that in this section the provisions of § 24-118.1, et seq., apply to assistant registrars to the same extent as they apply to general registrars. The facilities for the assistant registrars would, therefore, be such as are provided for in § 24-118.2.

In my opinion, the registrar is required to accept registrations in his office and it is not the function of any registrar to leave his office for the purpose of soliciting applications for registration. I doubt very much whether the Electoral Board has any control over the registrar during the hours he is not required to be in his office.

I call your attention to § 24-36 of the Code, which authorizes the Electoral Board to remove from office any registrar who fails to discharge the duties of his office according to law.

ELECTIONS—Primary—Workers may be paid for working at polls on election day.

HONORABLE THOMAS W. MOSS, JR.
Member, House of Delegates

June 28, 1966

This will acknowledge your letter of June 27, 1966, which reads as follows:

"I was recently confronted by one of my constituents with the question as to the legality of paying poll workers to work at the polls for a particular candidate at a primary election in Virginia.

"My attention was called to § 24-405 of the Code of Virginia, as amended, and I am writing requesting your opinion as to whether this section makes it illegal to pay poll workers."

Section 24-405 of the Code, to which you refer, reads as follows:

"No person shall solicit, request, or demand, directly or indirectly any money, intoxicating liquor or anything of value to influence his vote, or to be used, or under the pretense of being used, to procure the vote of any person or persons, at any primary or second primary
for or against any candidate for office. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty nor more than five hundred dollars and conviction shall disqualify such person from voting in this State for five years thereafter."

This section is for the purpose of preventing the buying and selling of votes, or the offer to buy or sell the same. This section, in my opinion, does not prohibit a candidate in a primary election from employing paid workers at the polls on election day. The workers, of course, are prevented by this section from offering any money, liquor, or anything of value to a voter for the purpose of influencing his vote.

ELECTIONS—Registration and Payment of Capitation Taxes, as affected by Voting Rights Act

December 3, 1965

MRS. NELL C. IRVIN
Central Registrar for the City of Roanoke

This is in reply to your letter of December 2, 1965, which is, in part, as follows, and which I have numbered for the purpose of reference:

"(1) In Section 3 of this letter (referring to letter to Hon. H. H. Howell, Jr., dated November 29, 1965, copy of which was sent to Mrs. Irvin by Levin Nock Davis), people who registered for the November, 1965 election were allowed to register with 1965 poll tax paid in advance as authorized in a letter from Mr. Levin Nock Davis to all Registrars on August 5, 1965.

"(2) In Section 4 of this letter, persons who have never previously registered may register by paying 1966 poll tax in advance by April 30, 1966.

"(3) It seems the problem is what to do with people registering between the November election and January 1, 1966 since this tax is not assessable until this date according to our City Treasurer, and according to our City Treasurer, he will not accept a 1966 poll tax until after January 1.

"(4) Since we were authorized August 5 to register people with one year's poll tax of 1965 and have been registering them since the November election to January 1 with the same 1965 tax, what disposition should we make of these people since the 1966 poll tax will not be assessed until the first of the year and we have had no instruction from the State Board of Elections to do otherwise.

"(5) The letter received from the State Board of Elections stated they could register with one year of tax and vote in the November election, which we understand. They did not have to pay back taxes for 1963 and 1964 to vote in the Gubernatorial election, and we do not understand why they would have to do this for a Council election.

"(6) We have registered people for the Federal election without paying any tax and were instructed by the State Board of Elections that these people could re-register for all elections by paying their 1965 poll tax and vote in the November election. Our letter from the State Board of Elections read:

"Persons who registered last year for Federal Elections Only may re-register and pay the $1.50 tax by September 18,
as they are now registering for the first time for State elections.'

"We presume this is still in effect till the first of the year, at which time they will pay their 1966 poll tax in advance.

"(7) Will you kindly advise us of the procedure until the first of the year at which time we will register with the 1966 poll tax paid in advance."

(1) The persons who first registered for the November 1965 election were required to pay the 1965 tax forty-five days prior to the election. This payment of 1965 tax did not qualify these persons to vote in future elections. This class of persons may qualify to vote in the June 1966 city election by paying poll taxes assessed or assessible against them for 1963 and 1964—payment to be made not later than December 14, 1965.

(2) You have stated the matter correctly.

(3) and (4) There is no provision in the "Voting Rights Act of 1965" requiring the State to register persons who have never previously registered during the period between the November 1965 election and the end of the year 1965. We are not aware of any instructions from the office of Mr. Levin Nock Davis or from this office permitting such procedure.

After December 31, 1965, persons who have never registered at any time, under the Federal Act, may pay the 1966 poll tax forty-five days prior to the date of the general election in June and register to vote in that election. They cannot pay the 1966 poll tax prior to January 1, 1966, because none is assessable prior to that date.

By reference to my reply to question (1), you will note that those people who were registered by you after November 2, 1965, upon the payment of the 1965 taxes only (if they were assessed or assessible for the previous years of 1964 and 1963) must pay these taxes not later than December 14, 1965, in order to be qualified to vote in the election on June 14, 1966. These persons were not entitled to be registered by the payment of the 1965 tax only if they were assessed or assessible for the two prior years, or either of such years.

(5) I believe I have sufficiently covered this question.

(6) Your conclusion is not correct. Those people who registered for Federal elections only could register for "All Elections" during the period from November 3, 1965 to December 31, 1965, by paying the poll taxes assessed or assessable against them for the years 1963, 1964 and 1965. After December 31, 1965, they can register for "All Elections" by paying the 1966 tax not later than forty-five days prior to June 14, 1966 (April 30th), or by paying the poll taxes assessed or assessable for the years 1963, 1964 and 1965, whichever they may select.

(7) I believe I have answered this question in the comments above.

ELECTIONS—Registration and Payment of Capitation Taxes—Local voting eligibility for June 1966.

December 1, 1965

Mr. L. Randolph Poarch
General Registrar of Greensville County

This will acknowledge receipt of your letter of November 27, 1965. I enclose herewith copy of an opinion we furnished Mr. Henry E. Howell, Jr., member of the House of Delegates, Norfolk, Virginia, on November 29th, which relates to payment of tax for city and town elections to be held in June, 1966.

You will note from the enclosed opinion that under the Voting Rights Act
of 1965, a person, if not previously registered, may pay the tax for 1966 (which is assessable as of January 1, 1966) not later than April 30, 1966, and register thirty days before the June 14 election. Those who paid the 1965 tax only and have been registered by you prior to and since the November 1965 election will be required to pay the tax for 1963 and 1964—if such tax were assessed or assessable against them—in order to vote in the town elections in June 1966, and such tax will have to be paid not later than December 14, 1965.

ELECTIONS—Registration—Establishment of domicile.

June 8, 1966

Miss Margaret F. Rice
Registrar, City of Fairfax

This will acknowledge receipt of your letter of June 6, 1966, which reads as follows:

"The State Board of Elections has suggested that I get a ruling from you on two registrations:

"Mr. and Mrs. Fant registered with my assistant on Saturday, June 4. On the registration form they have stated that they moved into Virginia in November, 1962. They have actually lived at this address since they returned from Germany, but have only claimed legal residence for tax purposes since August 1, 1965, the time of his retirement from service. They have also been voting absentee in Georgia. My problem concerns their eligibility to vote in the School Bond Referendum to be held on July 12. I know they are eligible to vote in the Democratic Primary, but would appreciate an answer regarding the referendum. I am enclosing copies of their registration forms."

Under Sections 26 and 35 of the Constitution of Virginia these persons, if they will have been actual residents of the State for a period of one year at the time of the general election in November, 1966, with the intention of abandoning their prior residence in the State of Georgia, are entitled to register and vote in the primary election to be held on July 12. Whether or not these persons will be entitled to vote in the school bond referendum to be held on July 12 depends upon whether or not they abandoned their voting residence in Georgia at least one year prior to July 12. It is noted on the application of Col. Fant that he has been voting by absentee ballot in the State of Georgia, and I suppose this applies to his wife also. If they have voted by absentee ballot during the twelve months preceding July 12, 1966, I do not think they would be qualified to vote in the bond issue election.

ELECTIONS—Registration—Persons in line—Practice set forth.

May 17, 1966

Mrs. Leslie C. Curdts
General Registrar, City of Norfolk

This will acknowledge receipt of your letter of May 16, 1966, which reads as follows:

"We would appreciate a ruling on whether or not the Registrar is required to register every person who is standing in line at the closing hour, as posted in accordance with § 24-75 of the Code of Virginia, on
the last day to register as set in § 24-74 of the Code of Virginia."

The Code sections to which you refer are silent with respect to whether or not those persons standing in line at the closing hour posted by the registrar shall be entitled to register. Actually, the deadline for registration is midnight of the last day upon which registration may be had for any election. There is no requirement, however, to accept applications after the normal office hours. In those cases where a notice has been posted as required by § 24-75 of the Code setting a closing hour for the registration office, I think it would be better to announce shortly before the deadline arises that only those persons who have shown up and are standing in line at the hour for closing the office may be registered. The registrar could ascertain who those persons are. That is the practice here in Richmond and harmonizes with § 24-182 of the Code, which relates to the closing of the polls.

I enclose a copy of an opinion dated June 16, 1939 (Report of the Attorney General (1938-1939), p. 89) to Paul E. Brown, which relates to this matter.

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ELECTIONS—Registration—Readjustment of books when districts changed.

September 23, 1965

MR. E. RAY WINTERS, Secretary
Electoral Board of Hanover County

This is in reply to your letter of September 22, 1965, which reads as follows:

"In Hanover County there were several changes made in Districts and Precincts. This has brought about a number of changes in the resident location of registered voters from one Precinct to another.

The question I would like to have resolved is: John Doe has been registered in and has always voted in Precinct 'A'. Because of the change in Precinct lines he is now located in Precinct 'B'. On election day he comes to Precinct 'A' and insists on voting where he has always voted. Can election officials vote him at Precinct 'A' or will he have to be sent to Precinct 'B'?

For a time we are going to have a number of these instances and we need to know just how to handle them."

Your attention is directed to § 24-90 of the Code, which reads as follows:

"When a rearrangement of existing election districts is made, the registrars thereof shall make out, certify, and deliver to each other, lists of the registered voters in their respective districts whose voting places are changed by the rearrangement. When a new election district is created out of one or more already existing, the registrar of the old district or districts shall make out, certify, and deliver to the registrar of the new district, a list of the registered voters who have been placed by the change in the new district. The registrars to whom such lists are delivered, shall forthwith enter the names of the persons contained in such lists in their respective registration books; and such persons shall at once acquire the right to vote in the districts, respectively, to which they are so transferred. The names thus transferred shall be stricken, by the registrars transferring them, from their registration books. When a new district is created as aforesaid, the registrar of the old district shall, after making such transfers, make out new registration books for his district. For such services as may be rendered by the registrars under this section, the board of supervisors of the
county or the council of the city, as the case may be, shall make proper allowance."

You will note that under this section it is the duty of the registrars in each of the registration districts affected to readjust the respective registration books so as to accurately reflect the voting place of all the voters. The phrase "registration district," as used in this section, is synonymous with "precinct." It is furthermore the right of the voters under § 24-89 to obtain a transfer. This, however, should not be necessary since it is the duty of the registrars to make the changes without being requested to do so by the voter. The transfer under § 24-89 can be obtained by the voter any day before election day under § 24-85.

In case the necessary change of a voter's registration from one precinct to another is overlooked, this should not prevent the person from being able to vote in the precinct where he originally registered.

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ELECTIONS—Residence—Place of residence depends on intention.

November 5, 1965

HONORABLE GRIER L. CARSON, Secretary

Electoral Board of Augusta County

This is in reply to your letter of November 4, 1965, in which you present the following question:

"In order to properly advise the registrars of Augusta County, I would like to get a ruling from you on what constitutes a permanent residence and voting residence of an individual in the Commonwealth of Virginia.

"During the recent Gubernatorial Election, the Electoral Board received applications from people presently residing outside of Augusta County, several even lived outside of the State."

This office has ruled on several occasions that a person's residence, within the meaning of that term as used in the voting laws, depends upon the person's intention. If a person has established his residence for voting purposes in a county or city he can continue to vote there as long as he has the intention of returning to that place, even though he has moved away. In this connection, I enclose copies of three opinions which relate to this question. These opinions are as follows:

Opinion to Hon. A. L. Philpott
dated 1/22/59 (Report, 1958-59, p. 129)

Opinion to Hon. Thomas C. Phillips

Opinion to Hon. R. J. Bolton
dated 12/6/39 (Report, 1939-40, p. 95)
ELECTIONS—Tie-breaker—May vote in election for mayor of the City of Chesapeake.

August 18, 1965

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

This will acknowledge your letter of August 17, 1965, which reads as follows:

"In Section 3.08 of the Chesapeake City Charter provision is made for the appointment of a tie-breaker by the Judges of the Courts of Record. It further states 'The tie-breaker shall vote only in the case of a tie vote of all members of the Council, and the provision of Section 15-245 of the Code as to tie-breakers for Boards of Supervisors shall apply so far as applicable.' In section 3.09 of the City Charter it is provided as follows: 'At its first regular meeting of the term the Council shall choose by majority vote of all the members thereof, one of its members to be Mayor and one to be Vice-Mayor.'

"I would appreciate an opinion from your office stating whether or not the tie-breaker can vote in the event there is a tie in electing the Mayor, pursuant to Section 3.09 of the City Charter."

In my opinion, the charter does not contain any provision which would prevent a tie-breaker from voting on the question of the election of a mayor. By reference to Section 3.01 of the charter, the council is composed of ten members. All of the members would have to be present at the meeting and all members would have to vote before the provisions of Section 3.08 of the charter could be invoked.

ELECTIONS—Voting Machines—May be unlocked within thirty days.

STATE EMPLOYEES—May Run for Elective Office.

March 17, 1966

MR. JAMES E. BAYLOR, Secretary
Electoral Board, City of Norfolk

This will acknowledge receipt of your letter of March 16, 1966, which reads as follows:

"In reference to § 24-314 of the Virginia Election Laws, is it necessary to have a court order to unlock the voting machines after the June election, in order to prepare them for the July Primary? Also, how long after the June election must we wait to open the machines?

"We would also like a ruling on whether a person whose salary is paid by the State of Virginia can run for an elective office."

The provisions of § 24-314 of the Code requiring that voting machines shall remain locked for a period of thirty days after an election and for as long a period as may be necessary or advisable on account of any threatened contest over the result of the election are subject to two exceptions, the first of which is that they may be opened "as may be necessary to prepare the machines for another election."

The city election will be held on June 14, 1966, and the primary election will be held on July 12, 1966. It is obvious, therefore, that the machines cannot remain locked for thirty days if they are to be used in the July primary.
In my opinion the electoral board may unlock the machines whenever they conclude that such action is necessary in order to prepare them for the July primary.

With respect to your second question, there is no statute which prevents a person who is in the employment of the State of Virginia from running for an elective office.

ELECTIONS—Voting—Registration and payment of capitation tax—When required under Voting Rights Act.

August 20, 1965

MRS. INEZ J. ASHE, General Registrar
Electoral Board, City of Hampton

This will acknowledge receipt of your letter of August 19, 1965, in which you present the following question:

"There is still one question on which I am confused. I am getting numerous calls from persons, already registered to vote in All Elections, who are delinquent one or more years in their Capitation Tax, most of these are the 1964 Tax, but some are for years even earlier than 1962. What is the status of these persons? Can they pay the current year, (1965) and vote this November or are they penalized and not permitted to vote for the nonpayment of the Capitation Tax on or before May 1, 1965?"

The Voting Rights Act of 1965 does not apply to persons who have heretofore registered to vote in all elections. These people will not be able to vote in the November election unless they have complied with the State law and the State constitutional provisions with respect to the payment of poll tax. The Federal Voting Rights Act applies only to people who are registering for the first time so as to vote in State and other local elections. Under the provisions of the Federal Act these people may pay their poll tax for the current year 1965 not later than September 18 and register not later than thirty days prior to the November 2nd election and, upon the presentation to the judges of election of their poll tax receipt showing the payment of the current year's tax by the above date, they will be entitled to vote.

Those persons who registered under the provisions of § 24-67.1 of the Code—that is, under the 24th Amendment to the Federal Constitution, those who are entitled to vote only in Federal elections—may only vote in the election this year if they pay the 1965 poll tax not later than September 18 and register under the provisions of § 24-67 of the Code. The registration under § 24-67.1 of the Code is not considered as a registration entitling a person to vote in any State or local election.

ELECTIONS—Voting Rights Act—Registration requirements under Section 10 of the Act.

August 20, 1965

HONORABLE R. S. BURRESS, JR.
Member, Senate of Virginia

This will acknowledge receipt of your letter of August 18, 1965, in which you present the following questions:
REPORT OF THE ATTORNEY GENERAL

“(1) Do new registrants have to pay only one year’s poll tax 45 days before the next General Election, on Nov. 2, 1963, and not the three-years requirement?
“(2) Is a person who is registered only for federal elections, and not registered for state elections, considered a new registrant under the state law?
“(3) If a registrant for federal elections only is considered a new registrant for state elections, does he have to pay one year or three years tax 45 days prior to the next General Election, which is on Nov. 2nd?”

Section 10 of the Voting Rights Act of 1965 directed the Attorney General of the United States to institute a suit attacking the constitutionality of the poll tax requirements of this and other States. Such a suit was filed. Subsection (d) of this section provides:

“(d) During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political subdivision with respect to which determinations have been made under subsection 4(b) and a declaratory judgment has not been entered under subsection 4(a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.”

In my opinion, under this Federal Act, your question (1) must be answered in the affirmative, subject to the qualification that the one year’s poll tax must be the tax for the year 1965 and must be paid not later than September 18 of this year.

Your question (2) is answered in the affirmative.

With respect to question (3), a person who has registered under the provisions of the 24th Amendment to the Federal Constitution and thus entitled to vote only in Federal elections, would be treated as a new registrant and come under the provisions of the answer to your question (1).

ELECTIONS—Voting Rights Act—When poll tax to be paid.

February 18, 1966

Mr. Paul C. Kinchloe, Secretary
Electoral Board of Fairfax County

This is in reply to your letter of February 17, 1966, enclosing a memorandum from the State Board of Elections, in which you present the following questions, which I shall answer in the order presented:

“A. Is payment of the current year’s poll tax at least forty-five days before the July 12, 1966 primary a prerequisite to eligibility to register
for all elections under the provisions of the Voting Rights Act prior to the closing of the registration books on June 11, 1966?

"If answer to "A" is "Yes"—

"B. Is May 28, 1966 the deadline date for payment of the 1966 poll tax in order to register before the primary?

"C. Will applicants whose 1966 poll tax is paid after May 28, 1966 be ineligible to register until after July 12, 1966?

"If answer to "A" is "No"—

"D. Should persons be registered through June 11, 1966, provided the 1966 poll tax has been paid when they apply for registration, regardless of the date of payment?

"D-1. If so, should the names of persons whose 1966 poll tax was paid after May 28, 1966, be placed in the registration books to be sent to the polls for the primary election of July 12, 1966?"

A. Under the Federal Voting Rights Act, a person who has never previously registered may pay his poll tax for the year 1966 not later than 45 days prior to the date of the November election and register thirty days before that election and then be entitled to vote in the general election. However, if he wishes to register to vote in all elections by the payment of the 1966 poll tax only and within sufficient time to qualify for voting in the primary election on July 12, he will, of course, have to pay the tax in time to be able to register thirty days before the primary election—that is, such payment must be made not later than June 11.

B. The deadline for the payment of 1966 taxes only for those persons who have never registered and who are taking advantage of the Federal Voting Rights Act by payment of the current year's tax if they wish to qualify and vote in the primary election, as pointed out in the answer to "A", would be the last day on which he could register in order to vote in the primary, that is, June 11, 1966. Those persons who have previously registered and wish to continue to be qualified to vote in all elections will have to pay their poll taxes for the three preceding years six months (not later than May 7, 1966) prior to the election, since the election this year will fall on November 8.

C. As stated in answer to the previous questions, a person may pay the 1966 poll tax on the day the registration books close for the July 12 primary and register on that day. Such tax does not have to be paid on May 28 or before that time. The forty-five day provision in the Federal Voting Rights Act is construed to relate to general elections and any person can vote in a primary who is qualified to vote in the general election for which the primary is being held.

D. The answer to this question is in the affirmative.

D-1. The answer to this question is as indicated in the answers to the previous questions that the person will have to pay the tax not later than June 11 and register not later than June 11.

It should be borne in mind with respect to the primary that only those persons who are qualified on that date to vote in the general election for which the primary is being held are entitled to vote in the primary.
EMINENT DOMAIN—Land Acquisition for Establishment of Sewage Disposal Facility—When power exercisable by county.

COUNTIES—Land Acquisition for Establishment of Sewage Disposal System—When power of eminent domain exercisable.

December 6, 1965

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

This will acknowledge receipt of your letter of November 19, 1965, in which you state that the Lovingston Sanitary District, established under Chapter 2, Title 21 of the Code of Virginia, does not contain sufficient land for the construction of a sewage disposal facility and it will be necessary to acquire land for this purpose outside the area composing the sanitary district. You request my advice as to whether or not the county may exercise the power of eminent domain to acquire sufficient land outside the sanitary district to establish the disposal facility. Under § 21-118 of the Code the power of eminent domain delegated to the sanitary district is limited to real estate located in the district and, therefore, it is without authority to condemn the necessary real estate located outside the district.

Section 15.1-320, to which you refer, confers the power of eminent domain upon a county where it is establishing a "sewage disposal system." I do not believe this section is applicable. "Sewage disposal system" as used in § 15.1-238 apparently relates to a system established under § 15.1-320. The power of a board of supervisors to condemn property for the purpose stated, in my opinion, may be exercised only within the boundary of the sanitary district or in those cases where a disposal system has been created. This power, of course, may be exercised by a county that has established an Authority under Chapter 28, Title 15.1 of the Code.

ESTATES—Appointment of Appraisers—Must be in each county where decedent owned property.

May 5, 1966

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

This will acknowledge receipt of your letter of May 4, 1966, which reads as follows:

"Section 64-126 of the Code of Virginia states that every clerk who qualifies personal representatives may appoint appraisers, etc.

"Question in point, a very wealthy resident of Albemarle died owning real and personal estate in at least five or more counties in Virginia,—

how many appraisers or groups of appraisers do I appoint to appraise these properties, and do I have to appoint at least five sets of appraisers, residents of the several counties, location of the estate of said decedent?

"The National Bank & Trust Company, Charlottesville qualified as Executor and appointed his appraisers, Albemarle and or Charlottesville residents, can they appraise any real property or tangible property not in Albemarle or Charlottesville?"

The statute to which you refer unquestionably provides that three or more appraisers shall be appointed in every county or corporation in which there may be any goods or chattels of the deceased. It would seem that the statute
contemplates that the appraisers shall be residents of the county or corporation in which they will act as appraisers.

The following comments by Honorable Brockenbrough Lamb, former Judge of the Chancery Court of the City of Richmond, which are contained in his book entitled "Virginia Probate Practice," are quoted for your information:

"... There is a provision of this statute, Code § 64-126, that has apparently come to the attention of few personal representatives. It is certainly rarely, if ever, complied with. The first sentence requires the court or Clerk to appoint appraisers 'in every county or corporation in which there may be any goods or chattels of the deceased'; and, also, in the case of a will, 'every county or corporation in which there is any real estate which the personal representative is authorized to sell or of which he is authorized to receive the rents and profits.'

"The settled practice in every Clerk's Office to which the attention of the writer has been called is for the order of qualification of the personal representative to appoint, in form and manner as has been indicated, a single group of five persons, any three of whom may act, to appraise the personal property produced to them, and, in the case of testacy (to be treated in detail later), any real estate the personal representative is authorized to sell or of which he is authorized to receive the rents and profits.

"The idea of appointing several sets of appraisers, one for each county or corporation where there are goods and chattels, or real estate, as the case may be, has probably never occurred to any court or Clerk, and doubtless never will. It may be just as well. Judicial officers are not supposed to imitate Kipling's weaver, who went out to harvest corn and stopped to unravel the stalks. It should be recognized that such useful purpose as statutory appraisements of the estates of decedents may have served in the past is now more adequately met by modern methods. Casual appraisement by unskilled appraisers, casually appointed in routine fashion, is considered obsolete and might well be dispensed with by appropriate legislation.

"So much for appraisement. Now as to inventory:

"It is important to note that when a personal representative qualifies in Virginia upon the estate of a decedent, whether testate or intestate, an INVENTORY is required. Appraisement may be considered obsolete but inventory remains of vital importance. It is the starting point and the basis upon which the accounting rests."

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ESTATES—Inventory—Must be recorded.

HONORABLE J. KENNETH RADER
Commissioner of Accounts of Goochland County

October 7, 1965

This is in reply to your letter of September 29, 1965, in which you refer to § 64-126 of the Code which was amended by Chapter 448 of the Acts of 1964 to the effect that estates that do not exceed the value of $2500 are no longer required to be appraised. In this connection you present the following questions:

"1. In estates of less than $2,500.00 value as estimated by the personal representative, should the Clerk deliver to the personal representative an inventory form with instructions to prepare the inventory and file it with the Commissioner of Accounts even though no appraisement is made? (In this connection, your attention is invited to Section 26-13 through 16.)"
"2. If question one is answered in the affirmative, should such inventories be recorded as other inventories are recorded even though no notary certificate is appended?

"3. Is there any justification for the failure of the Clerk of the Circuit Court of Goochland County to provide the Commissioner of Accounts each month with a list of qualifications had in his office during the previous month as required by statute regardless of the size of the estate?

"4. If such inventories are not to be made or filed, what are the responsibilities of the Commissioner of Accounts with regard to the inventory and account of personal representatives of estates having a value of less than $2,500.00?"

I enclose herewith copy of an opinion to Miss Edith H. Paxton, Clerk of the Circuit Court of Staunton, Virginia, dated May 11, 1965, regarding the amendment to § 64-126 of the Code.

In my opinion, an inventory must be filed in connection with the administration of estates pursuant to the provisions of § 26-12 of the Code and in addition thereto, all of the provisions pertaining to the duties of a personal representative contained in §§ 26-12 through 26-37 must be complied with. The waiving of the appraisal in estates of $2500 or less has no effect whatsoever upon the requirements set out in Chapter 2 of Title 26 of the Code. In connection with the filing of the inventory the Honorable Brockenbrough Lamb, in his book entitled "Virginia Probate and Practice," at p. 32, makes this observation:

"... It is important to note that when a personal representative qualifies in Virginia upon the estate of a decedent, whether testate or intestate, an INVENTORY is required. Appraisal may be considered obsolete but inventory remains of vital importance. It is the starting point and the basis upon which the accounting rests."

Further discussion of this question by Judge Lamb is found on page 210, et seq., of his book.

I believe this answers all the questions presented by you except your question No. 2. There is nothing in the statute which requires the inventory to be sworn to.

Therefore, in my opinion the inventory, whether sworn to or not, must be recorded under the provisions of § 26-16 of the Code.


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

January 20, 1966

This is to acknowledge receipt of your letter of January 14, 1966, in which you state, in part:

"I would greatly appreciate receiving your opinion as to whether or not Section 55-273 prescribes the appropriate method for computing joint life estates of persons having survivorship rights. If the Section does not so provide, I would appreciate reference to any other Code Section or authority which does prescribe the method for computing joint and survivor life estates, such as described herein."

Sections 55-273 and 55-272 must be read together. It will be noted that the
following terms are used in these statutes: In § 55-272 "two parties as joint tenants for life;" in § 55-273 "the life tenants" and "joint tenants for life." Nowhere in these statutes is the word "survivorship" or the term "survivorship rights" or terms similar thereto used. Where estates by entireties are created in contemplation of § 55-21 of the Code, the right of survivorship in the joint tenants is recognized. Apparently § 55-272 and § 55-273 do not consider the contingent interest of joint tenants when the instrument creating the tenancy provides that the part of the one dying should belong to the other, and these sections do not lay down any rule to evaluate that interest.

I am therefore of the opinion that § 55-273 is not applicable for computing joint life estates of persons having survivorship rights. I know of no statute that does.

FEES—Transfer of Real Property—Not chargeable on survivorship property.

CLERKS—Transfer Fees—Not chargeable on survivorship property.

REAL ESTATE—Transfer Fees—Not chargeable on survivorship property.

February 11, 1966

HONORABLE N. C. LOGAN, Clerk
Circuit Court of Roanoke County

This is in reply to your letter of February 9, 1966, in which you ask "whether a transfer fee should be charged by the Clerk on wills where real estate is held in survivorship only." You state that your practice has been "not to charge any probate tax or transfer fee on survivorship property."

Presumably, you refer to real estate held by husband and wife as tenants by the entireties. Under such a tenancy "upon the death of either spouse the whole estate by the entireties remains in the survivor. This is so not because he or she is vested with any new interest therein, but because in the first instance he or she took the entirety which, under common law, was to remain in the survivor." Vasillion v. Vasillion, 192 Va. 735, 740 (1951).

Section 58-66 of the Code of Virginia imposes a tax of ten cents per hundred dollars of value on real estate passing by will or intestacy. As pointed out in an opinion dated May 18, 1955, Report of the Attorney General (1954-1955), p. 261, the tax under § 58-66 is not payable in a situation involving a survivorship deed because the property does not pass under a will or under the intestate succession statute.

A transfer fee of $1.00 is assessed under § 58-816 of the Code for making an entry "transferring on the land books to one person lands before charged to another." In my opinion, this fee would not be chargeable where the land, before death of one spouse, stood in the names of both spouses as tenants by the entireties.

FIRE LAWS—Special Levy—Fire house must be owned by county.

COUNTIES—Levy for Fire Protection—Fire house must be owned by county.

March 7, 1966

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

This will acknowledge receipt of your letter of March 2, 1966, relating to § 27-26 of the Code of Virginia, in which you present the following question:
"Can the proceeds of a fire levy be used for the construction of a new fire house to be owned by a volunteer fire company that exists as a corporation?"

Section 27-26 reads as follows:

"The governing bodies of the several counties of this State may create and establish by defined metes and bounds, fire zones or districts in such counties, within which may be located and established one or more fire departments, to be equipped with apparatus for fighting fires and protecting property within such zones or districts from loss or damage by fire.

"In the event of the creation of such zones or districts in any county, the county governing body may acquire, in the name of the county, real or personal property to be devoted to the uses aforesaid, and shall prescribe rules and regulations for the proper management, control and conduct thereof, and such governing body shall also have authority to contract with, or secure the services of, any individual corporation, organization or municipal corporation, or any volunteer firemen for such fire protection as may be required.

"To raise funds for the purposes aforesaid, the governing body of any county in which such zones or districts are established may levy annually a tax not exceeding ten cents on the hundred dollars of the assessed value of all property real and personal within such zones or districts, subject to local taxation, which tax shall be extended and collected as other county taxes are extended and collected; provided, that in any county having a population between twenty-five thousand and twenty-five thousand five hundred, the maximum rate of tax under this section shall be thirty cents on the one hundred dollars of assessed value.

"The amount realized from such levy shall be kept separate from all other moneys of the county and shall be applied to no other purpose than the maintenance and operation of the fire departments established under the provisions of this section."

The second paragraph of the foregoing section authorizes the governing body of the county to acquire real or personal property to be used in establishing and equipping a fire department and also authorizes it to contract with volunteer firemen for such fire protection as may be required.

The third paragraph provides that "To raise funds for the purposes aforesaid . . ." an annual levy not in excess of ten cents on the hundred dollars may be made.

The fourth paragraph is inconsistent with the provisions in the third paragraph as to the use of the funds collected from the special levy of ten cents because it provides that "The amount realized from such levy . . . shall be applied to no other purpose than the maintenance and operation of the fire departments. . ." I am of the opinion that the provisions in this section with respect to the use of the proceeds of the levy should be construed so as to carry out what seems to be the obvious intent of the General Assembly—that is to use the proceeds for the establishment, maintenance and operation of the fire prevention facilities. It can hardly be assumed that the General Assembly intended to nullify the language in the third paragraph by the use of the language used in the terminal paragraph. See Ruling Case Law—Statutes—Section 222.

There is no language in this Code section which would authorize the board of supervisors to use any portion of the funds collected from the special levy for the purpose of building a fire house to be owned by the voluntary fire department. Any facility for use as a fire house if financed out of these special funds would have to be owned by the county.
FISHERIES—Commission—May permit taking of soft-shelled clams from private oyster lease grounds.

May 17, 1966

HONORABLE MILTON T. HICKMAN, Commissioner
Commission of Fisheries

This will acknowledge receipt of your letter of May 16, 1966. You state:

"The Commission of Fisheries would like a ruling from your office relative to its authority to issue permits for the taking of soft-shelled clams from private oyster lease grounds in the waters of the Commonwealth of Virginia, pursuant to the provisions of § 28.1-134 of the Code."

I understand your main concern is whether clams may be taken by means of a hydraulic dredge.

The statutes make no distinction between soft-shelled and hard-shelled clams. Section 28.1-132 makes it unlawful to take clams with a dredge "except as provided by law." Section 28.1-134 provides in part:

"It shall be lawful for any resident of this State holding under legal assignment oyster-planting ground totaling at least five acres and having paid the rent therefor, to dredge or scrape the same at any time, except on Sunday or at night; provided he obtain from the Commission of Fisheries a permit to do so. . . ."

I am of the opinion that the language of the latter section is broad enough to allow dredging for clams on private oyster grounds, upon obtaining a permit to do so from the Commission of Fisheries.

GAME AND INLAND FISHERIES—Bath County Damage Stamp Fund—May be paid to lessee for damage to crops.

May 31, 1966

HONORABLE HALE COLLINS
Member, Senate of Virginia

This is in answer to your letter of April 25, 1966, in which you enclosed a copy of a lease between the Commission of Game and Inland Fisheries and Mr. M. G. O'Farrell. This lease covers certain property in the Gathwright Wild Life Area in Bath and Alleghany Counties, which the Commission has leased to Mr. O'Farrell for agricultural purposes.

Your letter reads in part as follows:

"I am enclosing herewith a copy of a lease by Michael Farrell of Mt. Grove, Virginia. As lessee of this property his crops were damaged by game and he applied to the Board of Supervisors for payment out of the Damage Stamp Collection. He was refused payment, as I understand, because as lessee he was not entitled to collect. I would appreciate it very much if you would advise me in this matter."

I assume that your reference to the "Damage Stamp Collection" is to a fund which the governing body of certain counties may create in order to pay claims for damage to crops caused by certain wild life. I further assume that your inquiry concerns that portion of the leased property located in Bath County.
As you know, Chapter 420, Acts of Assembly of 1962, authorizes the governing bodies of certain counties (among them Bath, but not Alleghany) to adopt an ordinance which in essence creates a special fund into which will be paid monies received from the sale of special stamps required to be purchased by persons who wish to hunt bear and deer.

I assume that Bath County has enacted such an ordinance. Such ordinance should simply adopt the Act of Assembly and make it effective in Bath County.

I have also assumed that this leased property is open for hunting by the general public. I make this assumption based upon the fact that the lease indicates that the property is located in the Gathwright Wildlife Area.

I find nothing in the Act of Assembly which prohibits payment to a claimant from the special fund because his crops are located on property which he has leased from the Commission of Game and Inland Fisheries. If that is the sole reason for the denial of payment, then, in my opinion, payment from the fund should be made.

GAME AND INLAND FISHERIES—Damage Stamp Fund—How surplus may be used.

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney for Rockbridge County

February 8, 1966

This will acknowledge receipt of your letter of February 2, 1966, which reads as follows:

"This office has been requested to seek your opinion as to whether any surplus in the local Damage Stamp Fund might be used for the purchase of land in order to enable the construction of a lake site in the interests of conservation.

Enclosed is a copy of a letter which Mr. Chester F. Phelps, Executive Director, Commission of Game and Inland Fisheries, mailed to Mr. L. V. Snyder, Executive Secretary for the Board of Supervisors of Rockbridge County, Virginia.

"This office will appreciate hearing from you so that our Board of Supervisors might be advised."

The fund which you refer to is accumulated under the provisions of Chapter 420 of the Acts of Assembly (1962). This provides, in part, as follows:

"... Any surplus remaining in the fund, which surplus has been in the fund more than three years, shall be earmarked for conservation, restoration, protection of wildlife and preventing damage by wildlife to property in said county under the direction of the board of supervisors and in cooperation with the Commission of Game and Inland Fisheries. Provided, however, that any county board of supervisors may transfer funds from such special fund before the end of three years for the purposes set forth above, so long as such board of supervisors appropriates sufficient money to satisfy claims which cannot be met by reason of such transferal. . . ."

The answer to the question you have presented depends upon whether or not the building of the lake will be for the purposes set forth in the portion of the Act quoted above. If the lake is to be used for fishing and boating and similar purposes, of course, it would not be in compliance with the statute. In my opinion, it is very doubtful whether the statute contemplates the use of this money for such a purpose,
GAME AND INLAND FISHERIES—Fishing License—Not required under sixteen years of age.

HONORABLE GEORGE E. HOLT, JR., Clerk
Circuit Court of Botetourt County

In your letter of April 13, 1966, you state:

"Section 29-52, sub-section (3) of the Code of Virginia states:

"'License shall not be required of resident persons under sixteen years of age to trap or fish, nor of resident persons seventy years of age or over to hunt, trap or fish on private property in the county in which he resides.'

"Section 29-55, sub-section (b), states as follows:

"'(1) State resident season license to fish in designated waters stocked with trout shall be $1.00; provided that no such license shall be required of resident persons seventy years or older.'

"My question concerns whether or not a person under the age of sixteen would be required to purchase a license to fish in designated waters stocked with trout under Section 29-55?"

In my opinion, the exemption concerning residents of Virginia less than sixteen years of age, found in § 29-52(3), controls. Section 29-54(b) imposes, for fishing in streams stocked with trout by the Commission of Game and Inland Fisheries, special fees "in addition to the regular fishing license," which clearly indicates that only those persons required to obtain regular licenses need pay such special fees.

GAME AND INLAND FISHERIES—Hunting Licenses—Not required of residents seventy years of age or over.

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

This is in reply to your letter of November 15, 1965, which reads as follows:

"I have a question, Sec. 29-52 Exemptions from license requirements. "Persons over 70 years of age, residents of a county OR A CITY WHOLLY WITHIN A COUNTY, can hunt without licenses. "Charlottesville is within the bounds of Albemarle, are they permitted to hunt without a license if they are over 70 years of age?"

Section 29-52(3) of the Code, as amended at the 1964 session of the General Assembly, provides as follows:

"License shall not be required of resident persons under sixteen years old to trap or fish, nor of resident persons seventy years of age or over to hunt, trap or fish on private property in the county in which he resides."
Section 29-57(f) of the Code, as amended at the same session of the General Assembly, provides as follows:

"Residents of cities the limits of which are wholly within the county wherein the license is applied for, provided such resident has physically resided within said city for a period of six consecutive months before making application for license."

Under this latter section it is clear that a person living within a city situated wholly within the area of a county, is entitled to a county license provided he has resided in the city for at least six consecutive months before making application for the license. The latter section has the effect of including such residents of a city as residents of the county for the purpose of hunting in such county. In my opinion, a person who resides in such a city may be considered as a resident of the county within the meaning of § 29-52(3) of the Code.

GAME AND INLAND FISHERIES—Hunting Seasons—Automatically extended for a period not exceeding time forests closed by Governor's proclamation.

HONORABLE CHESTER F. PHELPS, Executive Director
Commission of Game and Inland Fisheries

November 23, 1965

This is in reply to your letter of November 23, 1965, which reads as follows:

"Section 27-54.1 to Section 27-54.4, inclusive, of the Code of Virginia relate to the closure of lands in the state where an extraordinary fire hazard exists. Chapter 83, Acts 1950 and Chapter 40, Acts of 1958 establish the open season for hunting bear and deer in certain counties. Ordinarily the dates of hunting seasons are established by the Commission through regulation. Since the season in these particular counties is established by Legislative Act, the closing date being November 30, there is a question as to whether or not the season in these particular counties can be extended beyond the date of November 30 under the provisions of Section 27-54.2 when all or part of the area has been closed by proclamation of the Governor.

"Your opinion in this matter would be appreciated."

In my opinion, § 27-54.2 of the Code, to which you refer, applies to open hunting seasons established by an Act of the General Assembly to the same extent that it applies to such hunting seasons established by regulation of the Commission of Game and Inland Fisheries. The only exception to the application of § 27-54.2 relates to the season on migratory birds or water fowl, the limits of which are prescribed by any agency of the Federal government. Therefore, in my opinion, the season established under the Acts of Assembly mentioned in your letter will automatically be extended for a period not exceeding the legal number of hunting days during which the Governor's proclamation is in effect.
This constitutional section to which you refer applies to members of the General Assembly during the sessions of their respective Houses and prevents them from being arrested during that time except for treason, felony or breach of the peace. This constitutional section is implemented by §§ 30-6 and 30-7 of the Code, which read as follows:

"§ 30-6. During the session of the General Assembly, and for five days before and after the session, a member of the General Assembly, the clerks thereof and their assistants shall be privileged from being taken into custody or imprisoned under any process except as provided in § 30-7; nor shall such persons for such periods of time be subject to process as a witness in any case, civil or criminal."

"§ 30-7. No member of the General Assembly and no clerk thereof or his assistants shall be privileged from arrest or impeachment for treason, felony or breach of the peace."

Whether the privilege from arrest would apply in the case presented has never, to my knowledge, been tested in the Virginia courts. It is stated in 81 C.J.S., at page 946, that—

"... Privilege from arrest granted to members of the legislature by statutory or constitutional provisions is sometimes held to include exemption from service of summons, although not accompanied with the arrest of the person, but the weight of authority is to the contrary. . . ."

"The extent of the privilege of freedom from arrest accorded members of a state legislature is usually regulated by statute, and a member of a state legislature has been held not to be privileged from arrest where the charge is a commission of a criminal offense. The constitutional privilege of senators and assemblymen from arrest in all cases 'except treason, felony, and breach of the peace,' while going to, attending, or returning from sessions of the legislature, confers a privilege from arrest only in civil cases, since the quoted words of exception are broad enough to include all crimes within the exception to the privilege. . . ."

The constitutional provision does not prevent the arrest of a member of the General Assembly permanently, but merely during the sessions of the General Assembly.
REPORT OF THE ATTORNEY GENERAL

GENERAL ASSEMBLY—Attorney Members—Computation of time for filing of pleadings.

September 22, 1965

HONORABLE KENNETH I. DEVORE
Member, House of Delegates

This will acknowledge receipt of your letter of September 21, 1965, which reads as follows:

"While in Richmond at the extra session a client of mine was served with three motions for judgment.
"The question has come up as to my legislative immunity and would you advise me as to whether or not I have twenty-one days to answer these pleadings after the expiration of my legislative immunity of thirty days."

Section 30-5 of the Code, dealing with legislative continuances, provides, in part, as follows:

"...and the period required by any statute or rule for the filing of any pleading or the performance of any act relating thereto shall be extended until thirty days after any such session."

In my opinion, under the wording of this statute the answer to your question must be in the negative. I do not see how this statute could be construed so as to extend the time for filing any pleadings for a period in excess of thirty days after the end of any legislative session.

GENERAL ASSEMBLY—Lobbying—Definition of lobbying, expenses, etc.

January 17, 1966

HONORABLE FREDERICK T. GRAY
Member, House of Delegates

This will acknowledge receipt of your letter of January 12, 1966, relating to the Lobbying Act—Chapter 2.1 of Title 30 of the Code. You have raised several questions, one of which is with respect to the constitutionality of § 30-28.1(a), which excludes officers, agents and employees of political subdivisions but does not exclude persons holding official positions with the State or any of its agencies.

It must be assumed that the General Assembly had a good and rational basis for exempting the local governments and their agencies from the requirements of this statute. I can see no ground for holding that this provision violates any constitutional provision. The presumption is in favor of the reasonableness of the classification.

You raise a question with respect to §§ 30-28.1(c) and (e) in the following manner:

"Section 30-28.1(c) needs clarification. As it is written, an employee of a person employed for the purpose of lobbying or otherwise is engaged in lobbying when he approaches a member of the General Assembly in the capitol building for the purpose of influencing him to support or oppose pending legislation. The employee of a person, designated (i), is not engaged in lobbying if he does nothing more than testify at public hearings for his employer or sit as an observer
at hearings or legislative sessions. It would appear that an employee of a person (corporation) would have to register as a lobbyist if he came to the capitol to see his delegate from his district on a legislative matter bearing directly on his corporate interest.

"This section also appears to say that an individual who is retained or employed only for the purpose of lobbying, designated (ii), is engaged in lobbying if he testifies on behalf of any other person and/or communicates with members of the General Assembly for the purpose of influencing their support or opposition on a pending legislative measure. The distinction between (i) and (ii) is not at all clear. Also, in the case of (ii), this section makes lobbying out of appearing before a legislative committee to speak on a legislative measure on which a public hearing has been called. In this instance, all interested parties have a constitutional right to be heard without being discriminated against.

"Section 30-28.1(e). The communications referred to in this section need clarification. Do letters or telephone calls received by members of the General Assembly on pending measures at the capitol building constitute lobbying?"

Subsection (c) defines lobbying. Whether or not the definition is wise or unwise, is not a matter upon which this office should express an opinion. Subsection (c) reads as follows:

"(c) 'Lobbying' means promoting, advocating or opposing any matter which may come, or is pending, before either House of the General Assembly or any committee thereof by an individual (i) who is an employee of a person whether his employment is for the purpose of lobbying or otherwise, or, (ii) who is employed or retained for such purpose, in whole or in part, and who, either under (i) or (ii), appears on behalf of, or for, any other person for such purpose; provided that (i) shall not apply to appearances before a committee of either House or a joint committee thereof."

This section must be read and considered with subsection (e), which reads as follows:

"(e) 'Promoting,' 'advocating' or 'opposing' means any act, speech, communication or conduct within the Capitol Building on the part of a lobbyist which influences, or is intended to influence, a member of the General Assembly to vote or use his influence, for or against any matter which may come, or is pending, before either House of the General Assembly or any committee thereof while the General Assembly is in session."

In my opinion, these provisions mean (1) a person who is an employee of another person (including a corporation) and is not being paid any specific compensation for representing his employer before the General Assembly is not subject to the act if his only activity in the State Capitol is appearing before a committee, but if he, while in the Capitol, confers otherwise with a member of the General Assembly with respect to legislation, he is subject to the statute, and (2) any person who contacts a member of the General Assembly in the capitol or appears before a committee in behalf of or against any legislation, and such person is being paid compensation in addition to his regular salary for his activities relating to such legislation, or otherwise employed and paid for that purpose only, he is subject to the Act. By way of illustration, assume Mr. A is the president or other employee of "C" corporation. If his activity in behalf of "C" corporation is limited to appearances before
committees and he receives no extra compensation for that service, he is not subject to the statute.

With respect to § 30-28.1(e), the answer is in the negative. Calling a member of the General Assembly on the telephone or communicating with him by letter, telegram or otherwise, in connection with legislation is not lobbying.

The terminal paragraph of your letter is as follows:

"Section 30-28.1(g). This definition of expenses defies interpretation. The mere dissemination of factual and technical information on a pending measure before the Virginia General Assembly of one individual to another individual cannot per se be classified as lobbying or a lobbying expense regardless of what it might cause the recipient to do or not to do. The question here is how far can the lobbying act be extended into communications or communication expenses."

This section, in my opinion, simply means (1) that the lobbyist must keep an account of and report his expenses in connection with his service as well as the amount paid to him by his employer and (2) the employer is required to file a statement showing what amount he paid to such person for such service. These requirements with respect to filing expense accounts are set forth in § 30-28.5.

GENERAL ASSEMBLY—Lobbying—Virginia Association of Counties' employees and members of boards of supervisors not to register.

This is in reply to your letter of January 7, 1966, in which you request my opinion with respect to the questions presented to you in a letter from George R. Long, Executive Director of the Virginia Association of Counties. Mr. Long points out that the Virginia Association of Counties is an association formed in accordance with the provisions of § 15.1-20 of the Code. He further states:

"The purpose of this letter is to inquire if I, as Executive Director of the Virginia Association of Counties, which is a full time position year in and year out and irrespective of the Sessions of the Virginia General Assembly, am classified under the new lobbyist law as a lobbyist. If so, will it be necessary for me to register as a lobbyist and/or to obtain the prescribed identification tag. If I am required to so register, will members of county boards of supervisors be also required register?

"The Virginia Association of Counties also requests information of a similar nature relating to its President, Mr. Stuart B. Carter, a former member of the Virginia House of Delegates and the Virginia State Senate, and now Chairman of the Botetourt County Board of Supervisors, who will also represent the Association at the 1966 Session of the Virginia General Assembly. Mr. Carter will not be paid a salary or compensated for his services in any way. The Association will pay the expenses he incurs during the Session."

Section 30-28.1 of the Code defines "person" as follows:

"When used in this chapter, unless the context requires a different meaning, the following terms shall have the meanings respectively set forth:
"(a) 'Person' includes an individual, firm, association, corporation, partnership or business trust; an officer, board, department, institution or agency of the Commonwealth of Virginia or employee thereof; but not an officer, board, department, institution or agency of any political subdivision of the State or employee thereof, or a political subdivision of the State."

It will be noted that under this definition, officers of an agency of any political subdivision of the State, or employees thereof, or a political subdivision of the State are not included within the requirements of the lobbying statute. It will be observed that paragraph (d) of the above Code section provides that a "lobbyist" is a "person" engaged in lobbying. In my opinion, the employees of the Virginia Association of Counties and the members of the boards of supervisors of the several counties are not subject to the requirements of the lobbying act.

GENERAL ASSEMBLY—Members—Acceptance of reduced transportation rate—Construing Section 161 of Virginia Constitution.

Honorable Harrison Mann
Member, House of Delegates

This will acknowledge receipt of your letter of December 23, 1965, which reads, in part, as follows:

"... A newly elected member of the House of Delegates is an employee of an air carrier which does not do business in Virginia. As part of the compensation of air carriers, employees have the privilege of receiving reduced rate transportation on other air carriers including some which do business in Virginia. This is a practice followed because the air carriers in the U. S. have an extensive arrangement whereby personnel of one air carrier can sell tickets on other air carriers and reduced rate transportation is, therefore, regularly exchanged between the various carriers for the employees of other air carriers.

"The question is, does Section 161 [of the Virginia Constitution] prohibit the acceptance of such reduced rate transportation by a member of the House of Delegates?

"Would it make any difference in your opinion if the reduced rate transportation was received only by members of his family?"

This provision of the Constitution was considered by the Supreme Court of Appeals of Virginia in the case of Commonwealth v. Gleason, 111 Va. 383. In that case, members of the council of the city of Clifton Forge were employees of a railway company and, as part of the compensation for their services to the railroad, they were issued passes. The court held that the members of the city council were not violating Section 161 of the Constitution. There has been no change in this section of the Constitution that would affect that decision.

The case cited is applicable to the question presented by you. Therefore, in my opinion, the member of the General Assembly will not be in violation of the Constitution if he continues to take advantage of the reduced rate of transportation while continuing in the employment of the air carrier.

In view of my negative answer to your first question, I do not consider it necessary to answer the second question.
GENERAL ASSEMBLY—Members—May serve on Park Authority.

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

This will acknowledge receipt of your letter of October 26, 1965, which reads as follows:

"Is there any statutory provision that would prohibit an employee of the Northern Virginia Regional Park Authority from being elected to the General Assembly of Virginia, and if elected, from serving in the General Assembly?"

It is my understanding that the Park Authority in question is organized under the Virginia statutes.

Section 44 of the Constitution sets forth the qualifications and disqualifications for service in the General Assembly of Virginia. There is nothing in this section that would prevent a member of the House of Delegates from continuing to serve on a Park Authority organized under Virginia statutes, such as Chapter 27, Title 15.1 of the Code.

GENERAL ASSEMBLY—Reapportionment—Construction of Section 43 of Constitution of Virginia.

Constitution—Reapportionment—Construing Section 43.

Honorable J. Sargeant Reynolds
Member, House of Delegates

I am in receipt of your letter of recent date in which you request my opinion concerning the constitutional authority of the General Assembly of Virginia to reapportion the House and Senate districts of the Commonwealth at the present session of the Legislature. Noting the prescriptions of Section 43 of the Constitution of Virginia that a reapportionment of such districts shall be made in 1932 and every ten years thereafter, you inquire whether or not there is any constitutional prohibition forbidding a reapportionment prior to 1972.

While the Supreme Court of Appeals of Virginia has not had occasion to consider the question you present, the matter has been the subject of decision in a number of jurisdictions having constitutional provisions similar to that embodied in Section 43 of the Virginia Constitution. A leading case in this connection is Denny v. State, 144 Indiana, 503, 42 N. E. 929, in which the Supreme Court of Indiana held that the relevant provisions of the Indiana Constitution forbade reapportionment of that State at any time other than that prescribed by law. On this point, the Court stated (144 Ind. at 510, 511, 512):

"The main question in the case, as made by the pleadings, and as discussed by counsel in their briefs and in the oral argument, arises under this head, namely: Whether under the constitution, any apportionment act could be passed at the time when the alleged apportionment law of 1895 was enacted.

"The appellee contends that, since the constitution has fixed a time, once in six years, when an enumeration of the voters of the State shall be taken, and an apportionment of senators and representatives made by law, there is thereby created a limitation upon the power of the legislature to make such apportionment at any other time."
"The appellants argue, on the contrary, that, since the making of an apportionment is an exercise of political power, and hence committed to the legislative department in the general grant of power to that department, therefore the legislature may exercise this function at any time; and that the provisions of the constitution requiring the enactment of an apportionment law at the beginning of each period of six years were inserted in the fundamental law so that such apportionment should be made at least once in six years, but were not intended as a prohibition upon the general assembly from making other apportionments as often as that body might deem best.

• • •

“We think the legitimate and necessary conclusion to be drawn from these two sections is, that an enumeration of the voters shall be taken once every six years; and that, upon such enumeration as a basis, the apportionment of members of the legislature shall be made at the next ensuing session of the general assembly, and only then.

• • •

“The fixing, too, by the constitution of a time and a mode for the doing of an act, is, by necessary implication, a forbidding of any other time or mode for the doing of such act. So it was held in Morris v. Powell, 125 Ind. 281 (9 L.R.A. 326): 'When the constitution commands how a right may be exercised, it prohibits the exercise of that right in some other way.' Citing Cooley Const. Lim., 64. See also the Town of Williamsport v. Kent, 14 Ind. 306; City of Evansville v. State, ex rel., 118 Ind. 426; Page v. Allen, 58 Pa. St. 338 (98 Am. Dec. 272).

"It follows, then, that counsel are in error when they argue that because the legislature is not expressly forbidden to pass an act of apportionment at a time different from the time fixed for that purpose, therefore it may, by virtue of its general power to legislate, enact apportionment laws whenever it pleases." (Italics supplied)

To the same effect is the decision of the Supreme Court of Illinois in People ex rel. Mooney v. Hutchinson, 172 Ill. 486, 50 N.E. 599, in which that Court declared (50 N.E. at 601):

"Where there are provisions inserted by the people as to the time when a power shall be exercised, there is at least a strong presumption that they design it should be exercised at that time, and in the designated mode only; and such provisions must be regarded as limitations upon the power. Cooley, Const. Lim. (6th ed.) 94. If legislative power is given in general terms, and is not regulated, it may be exercised in any manner chosen by the legislature; but where the constitution fixes the time and mode of exercising a particular power it contains a necessary implication against anything contrary to it, and by setting a particular time for its exercise it also sets a boundary to the legislative power." (Italics supplied).

Similarly, in State v. Zimmerman, 266 Wis. 307, 63 N.W. (2d) 52, 56, the Supreme Court of Wisconsin observed:

"It is now settled that without a constitutional change permitting it no more than one legislative apportionment may be made in the interval between two federal enumerations."

Finally, in the recent case of Harris v. Shanahan, 192 Kansas, 183, 387 Pac. (2d) 771, 779-780, the Supreme Court of Kansas concluded:
"It is the general rule that once a valid apportionment law is enacted no future act may be passed by the legislature until after the next regular apportionment period prescribed by the Constitution."


It is manifest that the central inquiry in resolving the question you pose is whether or not the provisions of Section 43 of the Virginia Constitution requiring a reapportionment in 1932 and every ten years thereafter should be construed to command a reapportionment at least once every ten years or only once every ten years, i.e., whether or not the affirmative constitutional mandate to reapportion at a specified time carries with it, by necessary implication, a negative prohibition forbidding reapportionment at any time other than that prescribed. As indicated by the above-mentioned decisions, the decided weight of authority in other jurisdictions is that such a provision does, by necessary implication, limit the authority of legislatures in this respect to the time specified by law. As the Supreme Court of Appeals of Virginia has not considered the precise question under Section 43 of the Virginia Constitution, no dispositive answer to your inquiry can be made; however, in light of the decisions canvassed in this opinion, it would clearly appear that the authority of the General Assembly of Virginia to enact a valid reapportionment statute at any time prior to 1972 is subject to serious doubt.

GOVERNOR—Authority—May accept grants from and enter into agreements with federal agency administering Economic Opportunity program.

Honorable Robert H. Kirby, Coordinator
Economic Opportunity Programs

July 21, 1965

This will acknowledge receipt of your letter of June 21, 1965, which reads as follows:

"Section 209(b) of the Economic Opportunity Act of 1964, a copy of which is enclosed, provides for grants and contracts with appropriate State agencies to render technical assistance to communities for developing, conducting and administering Community Action programs under Title II of the Economic Opportunity Act.

"Effective, as of November 1, 1964, Governor Albertis S. Harrison, Jr., of Virginia, designated the writer as Coordinator of Economic Opportunity programs in Virginia. Please find enclosed a copy of Governor Harrison's letter officially charging the writer with this responsibility.

"It has been requested by officials of the Office of Economic Opportunity in Washington that your office render an opinion as to the legal authority of the Virginia Office of Economic Opportunity to enter into agreements with the U.S. Government to receive funds under the Economic Opportunity Act for purposes of rendering technical assistance; accordingly, I respectfully request such an opinion from you."
There are no statutes relating to the Economic Opportunity Program in this State. The administration of this program in the absence of any specific statute, of necessity, has to be within the Governor's Office. The Governor, under his inherent powers as chief executive of the State, may exercise authority where the public interest makes such action necessary. In recognition of this power, the General Assembly in every general Appropriation Act makes an appropriation to meet such contingencies.

Inasmuch as the Governor has established the administration of this program within the office of the Governor, it follows that he may delegate these administrative duties to any person appointed by him for such purpose. The Governor, or you as his agent, may accept grants from and enter into agreements with the Federal agency administering the program.

HEALTH—Dental Service Corporation—Reciprocal agreements.

January 3, 1966

HONORABLE WILLIS M. ANDERSON
Member, House of Delegates

This is in reply to your letter of December 20, 1965, which reads as follows:

"Chapter 121, Acts of Assembly, 1964, provides in Section 5 thereof: 'A corporation may enter into contracts with like or similar corporations within or without this State for the interchange of services to those included in subscription or other like contracts, and may provide in subscription contracts for the substitution of such services in lieu of those therein recited.'

"I would appreciate it very much if you could provide me with an answer to the following question: Does Section 5 of the Act aforesaid permit a corporation to enter into a contract with an independent insurance company to underwrite a prepaid dental plan or plans?"


As you probably know, organizations such as are contemplated under Chapter 121, Acts of 1964 (Chapter 11.1, Title 32 of the Code) have reciprocal arrangements with similar organizations for the purpose of processing claims of policy holders who have moved from one jurisdiction to another. For example, Blue Cross in Virginia will honor a claim on a policy issued by Blue Cross in another area of operation, subject to being reimbursed by the Blue Cross unit that sold the policy. I think the provision under consideration authorizes similar reciprocal arrangements. The phrases "like or similar corporations" and "for the interchange of services" indicate the purpose of the provision.

I do not feel that this section authorizes a corporation organized under Chapter 11.1, Title 32, to enter into contracts of the nature stated in your inquiry.
REPORT OF THE ATTORNEY GENERAL

HIGHWAYS—Abandonment—Accomplished by action of board of supervisors.

BOARDS OF SUPERVISORS—Highways—Abandonment accomplished by action of board.

HONORABLE JOHN F. EWELL
Commonwealth's Attorney for Warren County

September 2, 1965

This is in reply to your letter of July 22, 1965, in which you requested my opinion regarding the abandonment of a portion of Route 622 in Warren County.

After reviewing the contents of your letter and the attachment thereto, I am of the opinion that the action of the Board of Supervisors in 1944 was sufficient to abandon the road in question and to extinguish any recorded rights the public had in such right of way.

From the information set forth in your letter, there is some question as to whether a portion of the same road was re-established as a part of the Secondary System by the action of the Board of Supervisors in 1947, or whether the public has retained a prescriptive right to use such road. However, both of these questions involve factual issues, which would have to be established by proper judicial determination.

I trust that the foregoing will fully answer your inquiry.

HIGHWAYS—Condemnation—Necessity for taking of land not subject to review by court.

HONORABLE EDWARD E. LANE
Member, House of Delegates

January 24, 1966

This is in reply to your letter of January 17, 1966, in which you made certain inquiries regarding the eminent domain statutes. These inquiries will be stated and considered seriatim:

(1) "Will you state whether or not under the existing law it is necessary that anything, such as need or necessity be established at any time in a condemnation proceeding on the part of the Highway Commission or any other condemning authority where condemnation is authorized pursuant to state law."

In condemnation proceedings instituted by the State Highway Commissioner, the court has no authority to determine the question of necessity for such acquisition.

In the case of State Highway Commissioner v. Yorktown Ice and Storage Corporation, 152 Va. 559, the Supreme Court of Virginia held that under the eminent domain statute in question, the State Highway Commissioner could determine the necessity for condemnation and his decision as to such necessity was not subject to review by the courts. The case further held that this determination was a legislative question, and a hearing thereon was not essential to due process under the Fourteenth Amendment of the Constitution of the United States. The Court affirmed this decision in the later case of Prichard v. State Highway Commissioner, 167 Va. 219.

In condemnation proceedings instituted pursuant to Title 25 of the Code, questions of necessity, propriety or expedience of the public improvement is a legislative and not judicial matter. Light v. Danville, 168 Va. 181. Furthermore, the determination of what property or what amount thereof is necessary for the
public improvement is not subject to judicial review unless there is a very clear abuse of power. *Virginia Electric and Power Company v. Webb*, 196 Va. 555.

(2) "If the answer to the above is yes, will you state at what point in the proceedings this matter is established and the manner in which it is established."

The answer to Question No. 1 makes it unnecessary to answer this question.

(3) "I would further request your opinion as to whether or not all or any part of our existing condemnation laws are contrary to either the Constitution of Virginia or the Constitution of the United States."

In my opinion, there is no provision or provisions in the existing condemnation laws of Virginia which I would consider to be contrary to the Constitution of the United States.

**HIGHWAYS—Condemnation—Recovery of damages due to invalidation of certificate pursuant to § 33-70.7.**

**HONORABLE EDWARD E. LANE**
Member, House of Delegates

This is in reply to your letter of December 23, 1965, in which you made the following inquiry regarding existing condemnation law:

"I would appreciate your advising me whether or not, in your opinion, the landowner may recover damages in the event of an invalidation of a certificate, and whether or not there is any limit or restriction on the nature or type of damage he may recover and what the procedure for such a recovery might be."

As I previously advised you in my letter of December 9, 1965, there is no express provision in the Code allowing a landowner to recover damages arising out of the invalidation of a certificate pursuant to § 33-70.7. However, I am of the opinion that the last sentence in this section clearly indicates legislative intent that a landowner should recover for such damages and several trial courts in this State have permitted recovery on the basis of this language.

I am further of the opinion that damages for the invalidation of a certificate would be restricted to those which the landowner could prove to the satisfaction of the court he had actually suffered by such action.

The trial courts which have allowed recovery of damages in the above instances have followed the procedure of permitting evidence of such damage to be introduced at the hearing on the petition for invalidation and including a provision in the final order directing payment of the amount found by the court to be proper.

**HIGHWAYS—Disposal of Certain Property—Hearing not required.**

**HONORABLE FREDERICK A. BABBSON, Chairman**
Fairfax County Board of Supervisors

This is in reply to your letter of March 15, 1966, in which you made the following inquiry:

"I respectfully request a ruling from your office as to the legality of the contract between the Virginia Department of Highways and the
Virginia Electric and Power Company, whereby the former has agreed to convey to the latter a portion of the right-of-way of the Washington and Old Dominion Railway, contingent upon the grant of permission to the Railroad by the State Corporation Commission and the Interstate Commerce Commission to abandon railroad operations.

"I specifically refer to Section 33-76.6 of the Code of Virginia, which requires that notice of disposal of property by the Highway Department and an opportunity for hearing prior thereto be given to local government. Fairfax County received no such notice and opportunity for hearing."

I am of the opinion that any contract the Virginia Department of Highways might have with the Virginia Electric and Power Company whereby the Commonwealth would convey a portion of the right-of-way of the Washington and Old Dominion Railroad to the Power Company would not require compliance with any notice provisions contained in § 33-76.6 of the Code. Section 33-76.6 refers specifically to conveyance of rights of way of any primary road or portion thereof which has been abandoned in accordance with the provisions of Article 6.1 of Chapter 1 of Title 33 and has no bearing on the disposition of this property.

The General Assembly, in 1960, enacted a statute authorizing the Highway Department to acquire the right of way of the Washington and Old Dominion Railroad, and this statute which is found in Chapter 338 of the Acts of Assembly (1960) provides in part as follows:

"The Highway Commissioner is authorized to dispose of any portions of the lands mentioned hereinabove which are not deemed necessary for highway purposes, either by sale or in exchange for other lands which may better serve highway purposes."

The above quoted statute does not place any limitations or restrictions on the disposition of this property, and if any restrictions are imposed they would appear to be imposed by the provisions of §§ 33-117.2 through 33-117.4 of the Code, which relate to the acquisition of an entire tract of land when only a part is to be utilized for highway purposes.

Section 33-117.4 deals specifically with the disposition of such residue parcels of land and authorizes the Highway Commission to dispose of the same "upon such terms and conditions as in the judgment of the Commission may be in the public interest". I find no provision in this statute which would require the Highway Commission to give notice to a local government or to afford such body an opportunity for a hearing.

In view of the foregoing, I do not feel that the failure to give the notice referred to in your letter would affect the legality of any contract for the disposition of any right of way acquired by the Department of Highways from the Washington and Old Dominion Railroad.

December 9, 1965

HONORABLE EDWARD E. LANE
Member, House of Delegates

This is in reply to your letter of December 2, 1965, in which you made certain
inquiries regarding the rights and duties of the Highway Commissioner in connection with the exercise of the power of eminent domain. These inquiries will be stated and considered *seriatim*.

(1) "Under existing highway condemnation law, may the Highway Commissioner file a certificate taking land without filing any further condemnation proceedings?"

Under Sections 33-70.1 and 33-70.4, Code of Virginia (1950), as amended, the Highway Commissioner is authorized to file a certificate and take title to the land necessary for the construction of a highway, and he may, in his discretion, institute condemnation proceedings before, during or after construction of the highway.

(2) "When is the Highway Commissioner required to file further condemnation proceedings?"

Section 33-70.9 requires the institution of condemnation proceedings within sixty (60) days after completion of the highway and this section provides in part that:

"At any time after the recordation of such certificate, but within sixty days after the completion of the construction of such highway, * * * the commissioner shall institute condemnation proceedings, as provided in this article, unless said proceedings shall have been instituted prior to the recordation of such certificate. * * *"

(3) "What is the earliest date after the filing of the certificate when the landowner may take steps to force the Commissioner to file further proceedings in order that the value of the land taken might be ascertained?"

Under Section 33-75 the landowner may take action to have the value of the property determined upon the expiration of sixty (60) days after completion of the construction of the highway project or the expiration of one year after the Highway Commissioner has entered upon and taken possession of the property, whether or not the project has been completed.

(4) "What steps must be taken by the landowner to accomplish this?"

After setting forth the time when the landowner may act, Section 33-75 further provides that he may:

"* * * petition the circuit court of the county in which the greater portion of the property lies, or the judge thereof in vacation, for the appointment of commissioners to determine just compensation for the property taken and damages done, if any. * * *"

(5) "What rights does the Highway Commissioner have to require the return of any funds drawn by the landowner pursuant [sic] to the certificate before condemnation proceedings are filed?"

Under the language of Section 33-70.7, the judge can permit a Certificate of Deposit to be invalidated for an error in the description of the land, the name or names of the owner or owners or for any other error with respect to the certificate. If such certificate is invalidated and a revised certificate covering the same property is not filed, I am of the opinion that the Highway Commissioner can recover from the landowner any funds previously withdrawn pursuant to Section 33-70.6.

(6) and (7) "In connection with the last question, is it necessary that the Highway Commissioner return title to the land to the former landowner?" and "How is this accomplished?"

Since Questions (6) and (7) are directly related, they will be answered together.

The invalidation of a certificate under Section 33-70.7 would have the effect of nullifying any transfer of title to the Commonwealth and probably would render unnecessary any retransfer of title to the landowner. However, in order to remove any possible cloud on the title, a provision should be included in the court order invalidating the certificate, whereby title reverts in the landowner.
(8) "Is the landowner entitled to recover costs, attorney's fee, damages, compensation for the use of the land by the Commonwealth or anything else in this instance?"

While there is no expressed provision in the Code allowing a landowner to recover for damages arising out of the invalidation of a certificate pursuant to Section 33-70.7, there is the following language which would indicate that the landowner could recover:

"... Nothing herein contained shall be construed to prohibit or preclude any person damaged thereby, from showing in the proper proceeding the damage suffered by reason of such mistake or the invalidation of a certificate of deposit as herein provided. . . ."

(9) "I would like to further request that you advise me whether or not and to what extent any of your answers to the above questions apply to any condemnation proceedings other than by the State Highway Commission."

All of the above answers would be applicable to the condemnation proceedings instituted by any State or local authority which the Legislature has given the power to exercise the rights under Section 33-60.1, et seq., Code of Virginia (1950), as amended.

HIGHWAYS—Recordation of Certificates, Plats, Orders—Fees charged.

Honorable N. C. Logan, Clerk
Circuit Court of Roanoke County

March 21, 1966

This is in reply to your letter of February 24, 1966, in which you made the following inquiry:

"We would like your opinion as to the proper Clerk's charges in the following situations:

"#1. When the original certificate of deposit from the State Highway Commissioner of Virginia is received for recordation, having one plat attached;

"#2. After original certificate of deposit has been recorded, local council for the State Highway Department, presents a petition and order, pursuant to Section 33-70.7, authorizing the filing of an amended certificate of deposit, together with the amended certificate of deposit to be recorded immediately following the order of the Court permitting the filing of said certificate. This amended certificate of deposit also has one plat attached thereto.

"When replying to the above inquiries as to the proper Clerk's charges, we would also like to have the authority for your opinion as Section 33-70.8 is somewhat ambiguous, and does not appear at all to cover Situation #1. May we charge $2.50 for filing the petition and order, and also $2.50 for filing the amended certificate on the Chancery side of the Court under Section 33-70.7?"

The answer to your inquiry in regard to Situations #1 and #2 is the same and will be answered jointly.

A review of the language of § 33-70.8 of the Code clearly indicates that the Clerk is to receive a fee of $2.50 for the recording of a certificate of deposit from the State Highway Commissioner. The language of this section referring to "such certificate" is, in my opinion, a reference to any certificate which is recorded under the provisions of Article 5 of Chapter 1 of Title 33, be it an original certificate or an amended certificate under § 33-70.7.
In addition to the fee of $2.50, the Clerk is entitled to a fee of $.50 per plat for each plat which is attached to the certificate. This fee is in accordance with the provisions of § 17-69.1 of the Code.

With reference to the last inquiry set forth in your letter, I am of the opinion that you would be entitled to a fee of $.50 for the petition filed in connection with the amended certificate under § 33-70.7 and a fee of $2.50 for the order entered by the Court permitting the filing of the amended certificate. In addition to the fee for the petition and order, you would be entitled to a fee of $2.50 for the filing of the amended certificate as well as the fee for the accompanying plat or plats.

HIGHWAYS—Streets—Private—No authority in county to name.

COUNTIES—Authority—None to name private streets.

HONORABLE CHARLES B. PHILLIPS

Assistant Commonwealth's Attorney for Roanoke County

September 27, 1965

This will acknowledge your letter of September 10, 1965, which reads as follows:

“I am writing to you concerning the interpretation of the captioned Code Section of Virginia which was amended in 1962. [§ 15.1-379] The Roanoke County Board of Supervisors passed a resolution naming a private road a certain name. The question has come up whether this Code Section gives the Roanoke County Board of Supervisors the authority to name all streets, roads and alleys outside the corporate limits of towns whether they be county maintained or not. The street which they named by resolution runs into a county maintained road and I would like an interpretation whether they overstepped their authority or are they authorized by Code Section 15.1-379 to give names to private roads and streets.”

In my opinion, § 15.1-379 of the Code relates to public streets, roads and alleys as distinguished from private streets and rights of way. Chapter 10 of Title 15.1 relates to streets over which the county may exercise the powers set forth in that chapter and this can only relate to public streets.

HUSING—Local Housing Authority—Selection of tenants.

HONORABLE SOL GOODMAN

Commonwealth's Attorney for the City of Hopewell

October 22, 1965

This is in reply to your letter of October 20, 1965, which reads as follows:

“I would appreciate it if I could have your opinion concerning the following. Our problem is this: The Hopewell Redevelopment and Housing Authority rented one of its units to a tenant who is retired on a small pension and pays an extremely low monthly rental. The Authority can rent the unit to others for a higher rent and still remain within the requirements of Section 36-22 of the Code of Virginia. The lease between the tenant and the Authority contains a pro-
vision by which either party can terminate the tenancy upon giving fifteen days' written notice.

"We realize that the fifteen-day provision would probably be valid in the usual landlord and tenant situation.

"However, can the Hopewell Authority created under Title 36 of the Code of Virginia arbitrarily evict a tenant who has and is qualified in accordance with Section 36-22 and who has been a tenant for several years?

"The tenant, if evicted, will in all probability be unable to obtain 'decent, safe, and sanitary living accommodations' for the same amount she is currently paying the Authority, if this has any bearing on the question."

The basis for determining the amount of rent to be paid by tenants in a housing authority is prescribed in § 36-21 of the Code. The basis for determining whether or not a tenant's income qualifies him is set forth in § 36-22. If the income potential of the housing authority is sufficient to meet the requirements of § 36-21, in my opinion, there is no good reason why a tenant who comes within the qualifications of § 36-22 should be evicted solely for the purpose of accepting another tenant who is able to pay a higher rent. The Housing Act is a remedial statute and should be liberally construed so as to accomplish the purpose for which it has been established—that is, to provide housing accommodations for people of low income and, in my judgment, it should not be administered in a way that would deprive a low income tenant of reasonable accommodations if the total of the rates meets the standard prescribed in § 36-21.


Honorable C. H. Lamb, Commissioner
Division of Motor Vehicles

May 27, 1966

This is in reply to your letter of May 13, 1966, which I quote, in part, as follows:

"Your attention is respectfully invited to Chapter 623 of the Acts of the Assembly of 1966, which was introduced as House Bill No. 820, and which I understand will be assigned the Code Section 38.1-70.13, such title being that covering insurance statutes generally.

"In brief, this additional statute requires the insurer or his agent to report certain cancellations or terminations of motor vehicle liability insurance policies to the 'Commissioner' within fifteen (15) days of the cancellation thereof.

"If, in the event the word 'Commissioner' is construed to mean the Commissioner of the Division of Motor Vehicles, then will you please advise me what, if any, affirmative action is required of the Division of Motor Vehicles under this section other than to receive, file and make available upon proper inquiry the facts thus received which are pertinent to such cancellations or terminations, particularly in view of the fact the legislature appropriated no funds for the administration of this statute.

"Under such circumstances, and should your interpretation of the word 'Commissioner' refer to this Division, will you further advise me as to your interpretation of the requirement related therein that
the terminations or cancellations required to be reported within fifteen (15) days of the cancellation thereof, should be construed to mean (a) fifteen (15) days prior to the effective date of such cancellation or (b) fifteen (15) days after the effective date of such cancellation, or (c) the period for fifteen (15) days on either side of the effective date of such cancellation."

By reference to the enrolled bill, Chapter 623 is entitled, "An Act to amend the Code of Virginia by adding a section relating to certain notice to be given the Commissioner of the Division of Motor Vehicles upon the cancellation of certain automobile liability insurance." The full text of the statute is as follows:

"When any policy of insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle is cancelled or terminated the insurer or his agent shall report such fact to the Commissioner within fifteen days of the cancellation thereof."

It is understandable that there has been some question as to the proper identification of the word "Commissioner," as used in the quoted statute. This is especially true since the term "Commissioner," as defined in § 38.1-1 (3) of Title 38.1, Code of Virginia (1950), as amended, unless the context or subject matter requires otherwise, means "the administrative or executive officer of the division or bureau of the Commission established to administer the insurance laws of the State." The title of the Act, as set forth in Chapter 623, quoted supra, however, makes it clear that the intent of the law is that such report be made to the Commissioner of the Division of Motor Vehicles. This matter has been discussed with representatives of the Division of Statutory Research and Drafting and I am advised that, in placing this statute under Title 38.1, proper insertions will be made to clarify this intent and cross references to Title 46.1, Code of Virginia (1950), as amended, will be shown in the footnotes.

The statute requires no specific affirmative action by the Commissioner of the Division of Motor Vehicles. It relates to "any policy of insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle" which may be "cancelled or terminated," whether this be initiated by the insurer or the insured. The duty to report to the Commissioner, however, is placed upon the "insurer or his agent" in either event. Incidentally, I do not interpret this statute to have any effect upon the notice required under § 46.1-514, Code of Virginia (1950), as amended, before termination of a policy certified as proof of financial responsibility.

In regard to your last query, I am of the opinion that the words "within fifteen days of the cancellation thereof" mean within fifteen days after the date of such cancellation.

JAILS AND PRISONERS—Confinement for Failure to Pay Fine and Costs—May be held for six months on each separate sentence.

October 4, 1965

HONORABLE W. L. PAINTER, Director
Department of Welfare and Institutions

I am in receipt of your letter of September 28, 1965, in which you call my attention to § 53-221 of the Virginia Code and present the following inquiry:

"Should this section be construed in such a way as to allow a maximum of six months to be served for the nonpayment of a fine and costs on each separate sentence received, or where a prisoner receives
several separate sentences, does the limitation of six months apply to
the total of such sentences, thus prohibiting confinement for the non-
payment of fine and costs to six months regardless of the number of
sentences containing unpaid fines and costs?"

In pertinent part, § 53-221 of the Virginia Code provides:

"Every person held to labor in the State convict road force, or in
a chain gang, or State Farm, or State Industrial Farm for Women, for
the nonpayment of fine and costs, shall be entitled to a credit on such
fine and costs, or costs, of seventy-five cents for each day he shall
work, and of twenty-five cents for each other day of confinement.
A statement of the amount of the fine and costs, or costs, shall be
made out by the judge or trial justice trying the case, or his clerk,
and he shall deliver such statement to the person into whose custody
the prisoner is committed for delivery to the State convict road force,
chain gang, State Farm, or State Industrial Farm for Women. The
prisoner shall work out the fine and costs, or costs, and shall thereupon
be discharged from custody, provided no person shall be held for the
nonpayment of fine and costs, or costs, in the State convict road force,
chain gang, State Farm, or State Industrial Farm for Women for a
longer period than six calendar months, although the credit due shall
not discharge the fine and costs, or costs, in full.

* * *

"Upon discharge from custody, as heretofore provided, the fine and
costs, or costs, of every prisoner shall be discharged in full, and the
person in whose custody he shall be at the time of his release shall
certify the fact that the prisoner has served his sentence for the non-
payment of fine and costs, or costs, to the clerk of the court, in the
office of which the judgment is docketed, who shall file the certificate
with the papers of the case, and shall endorse the fact of the discharge
of the fine and costs, or costs, by virtue of such certificate, upon the
margin of the judgment lien docket where the judgment for such fine
and costs, or costs, is docketed."

Although we have not previously had occasion to render an opinion upon
the precise question presented in your communication, I am forwarding to you
copies of two opinions of this office, dated December 5, 1939, and December
21, 1953, in which a substantially identical question was considered under the
provisions of § 19-309 (now 19.1-334) of the Virginia Code. I am constrained
to believe that the views expressed in the enclosed opinions would be equally
applicable to § 53-221 of the Virginia Code, and that the statute in question
contemplates that a person committed under it for nonpayment of fines and
costs, or costs, may be held for the maximum period of six months on each
separate sentence received for such nonpayment.
REPORT OF THE ATTORNEY GENERAL

JAILS AND PRISONERS—Sentences—When serving of felony sentence takes precedence over misdemeanor.

WELFARE AND INSTITUTIONS—Prisoners—Sentences—Precedence of serving sentence for felony over misdemeanor.

HONORABLE W. L. PAINTER, Director
Department of Welfare and Institutions

This will acknowledge receipt of your letter of September 28, 1965, which reads as follows:

"Occasionally, a prisoner is received as a misdemeanant in a penal institution operated by the Department of Welfare and Institutions, and after he has served part of his sentence (in some cases several months) he is given a felony sentence.

"According to Section 19.1-295, a felony sentence takes precedence over a misdemeanant sentence and is to be served first. However, there is a question as to whether this law refers only to those cases where prisoners receive such sentences at approximately the same time.

"We would like to know whether we have the authority, in cases where a man received a felony sentence some time after he starts serving a sentence as a misdemeanant, to interrupt the latter sentence and start him serving at once on his felony sentence. If so, may we give him credit on his felony sentence for time served as a misdemeanant and let him serve his entire misdemeanant sentence after his felony sentence has expired?"

Section 19.1-295 of the Code reads as follows:

"When any person is convicted of a combination of felony and misdemeanor offenses and sentenced to confinement therefor, in determining the sequence of confinement, the felony sentence and commitment shall take precedence and such person shall first be committed to serve the felony sentence."

The provisions of the foregoing statute are applicable only under the limited scope thereof. Under the circumstances set forth in your letter, I am of opinion that you are without authority to interrupt a misdemeanant's sentence as suggested in the terminal paragraph of your letter. I am further of opinion that under such circumstances the misdemeanant must continue to serve the sentence or sentences which he has received for misdemeanors before commencing the service of his felony sentence.

JUDGES—Retirement—Construing various provisions to determine eligibility.

RETIREMENT—Judges—Construing various provisions to determine eligibility.

HONORABLE GEORGE M. WARREN, JR.
Member, Senate of Virginia

HONORABLE SIDNEY C. DAY, JR., Comptroller

You ask whether the judge of the Corporation Court of the City of Bristol is
entitled to retire on September 30, 1966, pursuant to § 51-3 of the Code of Virginia (1950), as amended.

The judge attained the age of sixty-two years on December 17, 1965. He has been on the bench since August 25, 1938, or slightly less than twenty-eight years. When he was first appointed to the Corporation Court, Bristol was a city of the second class. It became a city of the first class on October 15, 1942.

Section 51-3, as amended in 1964, provides in part:

“(a) Any judge of a circuit court, or of any corporation or city court of any city of the first class, who has attained the age of sixty-five years and has served for not less than ten years as judge of any one or more of such courts, and any such judge who has attained the age of sixty-eight years prior to July first, nineteen hundred and sixty-two, and has served for not less than ten years as judge of any one or more of such courts, and any judge of any such circuit, corporation or city court who has attained the age of sixty-two years and has served for not less than twenty-five consecutive years as judge of any one or more of such courts, may retire from active service upon the bench.

“(a1) Notwithstanding the provisions of paragraph (a) of this section or of any other provision of law to the contrary, any judge of a circuit court, or of any corporation or city court of any city of the first class who, on the thirty-first day of December, nineteen hundred sixty-one, was participating in, and was in good standing under, the provisions of this chapter and who, after such date, attained, or hereafter attains, the age of sixty years and has, or shall have, served for not less than twenty-five consecutive years as judge of any one or more of such courts, may retire from active service upon the bench.” (Emphasis added here and below)

By “such circuit, corporation or city court” the statute, as amended, clearly means a corporation court of a city of the first class. The judge in question is now a judge of such court, but his court will not have been a court of a city of the first class for a period of twenty-five years until October 15, 1967. The question is whether § 51-3 requires all the years of service to have been on a court which was a court of a city of the first class.

Originally, the statute providing for retirement of judges of courts of record (Acts 1928, c. 524, p. 1369) provided in part:

“That any judge of a corporation or circuit court who shall have attained the age of eighty years and who shall have served continuously as judge of such court for thirty years, may at any time after this act becomes effective, apply to the governor for retirement . . .”

The 1928 act was repealed by Acts 1938, c. 222, p. 354, which added to the Code a new § 5978(a), providing in part:

“Any judge of any circuit court, or of any corporation or city court of any city of the first class of this State, who has attained the age of seventy years and has served not less than fifteen years as judge of any circuit court, or as judge of any corporation or city court of record of this State, or of any two or more of such courts, may retire from active service upon the bench . . . .”

Thus, it can be seen that, when the judge in question was appointed to the bench in 1938, the statute required a corporation court judge to be serving on a court of a city of the first class upon his date of retirement, but the required years of service could be on any corporation court.
The same can be said of § 5978(a) as amended by Acts 1946, c. 30, p. 52, to provide in part:

"Any judge of any circuit court, or of any corporation or city court of any city of the first class, of this state, who has attained the age of seventy years and has served not less than fifteen years as judge of any circuit court, or as judge of any corporation or city court of record of this state, or of any two or more of such courts, or any judge of any circuit court, or of any corporation or city court of any city of the first class, of this state, who has attained the age of seventy-five years, and who was commissioned prior to April first, nineteen hundred thirty-seven, and who has served continuously from that date, regardless of the number of years of his service, may retire . . . ."

Further amendment of this section, to permit retirement at age sixty, similarly permitting the required twenty-five years' service to be on any corporation court, was made by Acts 1948, c. 539, p. 1109, providing:

"Any judge of any circuit court, or of any corporation or city court of any city of the first class of this State, who has attained the age of seventy years and has served not less than fifteen years as judge of any circuit court, or as judge of any corporation or city court of record of this State, or of any two or more of such courts . . . or any judge of any circuit, corporation or city court who has attained the age of sixty years and who has served not less than twenty-five years as judge of any such court, may retire . . . ."

An apparent change was made in this section (now § 51-3 of the Code of 1950) by Acts 1954, c. 635, p. 803, which provided in part:

"Any judge of a circuit court, or of any corporation or city court of any city of the first class, who has attained the age of sixty-five years and has served for not less than twelve years as judge of any one or more of such courts, and any judge of any such circuit, corporation or city court who has attained the age of sixty years and has served for not less than twenty-five consecutive years as judge of any one or more of such courts, may retire . . . ."

Here, for the first time, the court on which the required service was to be performed was "one or more of such courts," meaning, apparently, the corporation court of a city of the first class. The same terminology was retained when § 51-3 was amended by Acts 1962, c. 432, p. 704, to provide in part:

"Effective January 1, 1962, any judge of a circuit court, or of any corporation or city court of any city of the first class, who has attained the age of sixty-five years and has served for not less than twelve years as judge of any one or more of such courts, and any such judge who has attained the age of sixty-eight years prior to July 1, 1962, and has served for not less than ten years as judge of any one or more of such courts, and any judge of any such circuit, corporation or city court who has attained the age of sixty-two years and has served for not less than twenty-five consecutive years as judge of any one or more of such courts, may retire . . . ."

Approximately the same terminology was retained when § 51-3 was further amended in 1964 to its present form, quoted above.

A pension act is beneficent in purpose and should be liberally construed to

In view of this rule, I believe the reference to "such courts" in § 51-3 should be interpreted to include a corporation court which is now a court of a city of the first class, even though it may have formerly been a court of a city of the second class, and that any service on such a corporation court, both before and after it became a court of a city of the first class, should be used in determining the eligibility of its judge for retirement.

This being so, I am of the opinion that the judge in question is entitled to retire as of September 30, 1966.

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**JUDGES—Vacation—Period extended from three weeks per year.**

June 7, 1966

HONORABLE W. H. OVERBEY
Judge, Campbell County Court

Since writing to you on yesterday regarding your inquiry of May 27, 1966, I have given further consideration to the effect of the amendments to § 16.1-33 of the Code as found in Chapter 246, Acts of Assembly (1966). This section, as amended, effective the first moment of June 27, 1966, reads as follows:

"(a) In any county except a county having a density of population in excess of five thousand per square mile every judge of a court not of record and every associate judge who serves full time shall be allowed an annual vacation period with pay of, for the first five years of service, one and one-half working days for each full calendar month of service, and upon completion of the fifth year, and each year thereafter, in addition to the one and one-half working days per month, shall be allowed one additional day of vacation for each complete year of service after the fifth, the maximum number of days vacation to be twenty-four.

"(b) In the discretion of the committee of judges referred to in § 14-50, every judge, associate judge, clerk, or deputy clerk may be allowed additional leave to attend such meetings and conferences and engage in such other activities as in the opinion of the committee will tend to improve the administration of the court and be in the public interest.

"(c) Every clerk, deputy clerk, clerical assistant and other employee of each such court shall be allowed an annual vacation period with pay of, for the first year of service, one working day for each full calendar month of service, and upon completion of the second year, and each year thereafter, in addition to the one working day per month, shall be allowed one additional day of vacation for each complete year of service after the first, the maximum number of days vacation to be twenty-four.

"(d) In the discretion of the committee of judges, there may be allowed an additional vacation period, with or without pay as the committee shall determine. Such committee may, in its discretion, also provide for sick leave for such judges, clerks and other employees.

"(e) Every judge, associate judge, clerk, deputy clerk, clerical assistant, and other employee of such court with less than ten years of service, may accumulate vacation to not more than thirty days, and those with ten years of service, may accumulate vacation to not more than forty days."
Prior to the amendment the annual vacation period for judges and associate judges who serve full time was three weeks.

In my opinion, the earned vacation period for the year 1966 should be calculated for the first six months of 1966 under the law existing prior to the amendment and for the last six months of 1966 in accordance with the formula set out in the amendment.

The same rule of calculation would apply to the persons mentioned in paragraph (c) of the amendment.

I am not advised as to the policy of the committee of judges as to the procedure in regard to those working on a six-day or five-day basis, and the memorandum from that committee, which I am informed is being furnished, may provide the answer to that part of your inquiry.

JUSTICE OF PEACE—Compatibility of Office—May serve as police for a city.

PUBLIC OFFICERS—Compatibility—Justice of peace may perform as police for a city.

HONORABLE D. W. Bishop
Justice of the Peace of Stafford County

November 22, 1965

This will acknowledge receipt of your letter of November 18, 1965, which reads as follows:

"In January 1964, I was elected Justice of the Peace for Stafford County.
"On November 1, 1965, I accepted a position with the Campus Police of Mary Washington College, Fredericksburg, Virginia. My question is, will this position in the City of Fredericksburg necessitate resigning as Justice of the Peace in Stafford. I don't write warrants or take bonds for the City of Fredericksburg."

In my opinion, there is no statutory provision which would prevent a justice of the peace of a county from holding a position on the police force of a city. The position of city policeman is not incompatible with that of the office of justice of the peace in an adjoining county, especially where the justice of the peace does not perform any official duties in connection with violations against the city ordinance.

JUSTICE OF PEACE—Construing § 19.1-110—Does not include judge of court not of record.

COURTS NOT OF RECORD—Section 19.1-110—Does not apply to judge.

HONORABLE DONALD H. SANDIE, Judge
Municipal Court, City of Portsmouth

June 20, 1966

In your letter of June 16, 1966, you referred to § 19.1-110 of the Code of Virginia (1950), as amended by Chapter 521 of the Acts of the 1966 General Assembly, which provides in part:
"No justice of the peace shall be authorized to admit to bail: (1) any person charged with a misdemeanor after he has been arraigned or tried by a court having jurisdiction thereof; (2) any person in jail under an order of commitment, except the justice of the peace who committed him."

You ask if the phrase "justice of the peace" in this provision includes the judge of a municipal court who may have committed a person to jail.

Section 19.1-110 refers only to bail by a justice of the peace. Bail by a judge of a court not of record is covered by § 19.1-111. Therefore, the question you ask is answered in the negative.

JUSTICE OF PEACE—Employee of Private Company—May not issue warrant where employer is plaintiff.

HONORABLE FRED M. BURNETT, III
Justice of the Peace, City of Chesapeake

I acknowledge receipt of your letter of December 8, 1965, in which you state that you were elected justice of the peace for the city of Chesapeake and on December 7, 1965, you qualified in the Corporation Court. You state that you are an employee of the W. T. Grant Company and, as such, you are the collection manager of the company's store located on Granby Street, Norfolk, Virginia. In this capacity you have been obtaining warrants for delinquent accounts and appearing before the trial court in connection with the claim for which the warrant has been issued. You present the following questions:

"Is it allowable for an employee of a corporation, to which have been given the duties of Justice of the Peace, to issue, prosecute, and to use his elected office for the issuance of civil warrants or criminal warrants if the offense occurs in his jurisdiction, for the benefit of his corporation or is it required that another Justice of the Peace in the said city write the warrants?

"Secondly, if someone, with authority of management requests this warrant(s) other than the Justice of the Peace, can he not write the warrant for the company although the Justice of the Peace is an employee, referring to myself?"

You state that Judge E. Preston Grissom, of the Municipal Court of the City of Chesapeake, raised some question as to the propriety of you as justice of the peace issuing warrants upon claims of the store in which you are employed for the purpose of making collections.

In my opinion, so long as you are an employee of the W. T. Grant Company, it would not be proper for you to act as an issuing justice on any accounts due to W. T. Grant Company. You state:

"There is no question as to the legality of writing civil warrants for other branch stores of the W. T. Grant chain in the immediate area."

In my opinion, such practice would be improper. The question involved here is not only the legality of the warrant, but the propriety of an employee, performing such duties for his employer, issuing any warrant where that employer is the plaintiff while acting in the capacity of justice of the peace. This would apply to criminal as well as civil warrants.

The questions raised in your letter involve to some extent legal ethics. In
this connection you are referred to two opinions found in the 1965 Issue of the Opinions of the Virginia State Bar on pages 21 and 36 and numbered 17 and 35, respectively. These opinions relate to lawyers who hold the office of justice of the peace, but the same ethical principle would apply, I feel, to a layman who is a justice of the peace.

JUSTICE OF PEACE—May Not Qualify as Bondsman in Other Jurisdiction.

Honorable Maurice E. Griffin, Jr.
Justice of the Peace, City of Chesapeake

March 2, 1966

This is to acknowledge receipt of your letter of February 21, 1966, in which you state, in part:

"I am a Justice of the Peace in the City of Chesapeake and this is My only Jurisdiction. I May only set bonds in the City of Chesapeake. I would like to know if I could Qualify as a Bondsman in the City of Portsmouth Virginia, and Legally Bond in this City. I would not be Setting Bonds in the City of Portsmouth, only in the City of Chesapeake. Could I Legally be a Justice of the Peace in the City of Chesapeake and a Bondsman for a surety Co., in the City of Portsmouth."

Section 58-371.2 of the Code of Virginia (1950), as amended by Chapter 576, Acts of 1964, which deals with the licensing of bondsmen, provides in part:

"No person shall be licensed hereunder either as a professional bondsman of an agent for any professional bondsman, when such person, or his or her spouse, holds any office as justice of the peace, magistrate, clerk or deputy clerk of any court."

It would follow therefore that you as justice of the peace are ineligible to be licensed as a bondsman under the aforesaid section of the Code.

JUSTICE OF PEACE—Residence—Must be district in which office held.

Honorable David A. Lyon, III
Secretary and Treasurer
Association of Justices of the Peace

August 26, 1965

This is in reply to your letter of August 23, 1965, which reads as follows:

"I have been requested to obtain your opinion on the following question:
"A Justice of the Peace was elected from Magisterial District A. He later moved his residence to Magisterial District B in the same county. Can he continue to act as a Justice of the Peace for the remainder of his term, there being no vacancy for a Justice of the Peace in Magisterial District B?"

Under the provisions of § 15.1-51 of the Code, it is provided that a district officer of a county must be a resident of the district in which he holds office.
Section 15.1-52 provides that removal from the district vacates the office. Therefore, the justice of the peace who was elected from Magisterial District A and subsequently moved his residence to Magisterial District B in the same county, has vacated his office.

JUSTICE OF PEACE—Splitting of Fees.

HONORABLE W. J. BREEDLOVE
Justice of the Peace, City of Chesapeake

February 9, 1966

This is to acknowledge receipt of your letter of January 14, 1966, in which you request my opinion on the following question:

“There is a practice existing in the Tidewater Area which I believe merits your attention, and I would like a ruling in connection with this question in order to set the record straight. The question which needs answering is, Is it legal or proper for a Justice of the Peace in one city to act as a clearing house for Plaintiffs in that city and, subsequently, send warrants into a neighboring city to be executed by a Justice of the Peace in that city, under an arrangement whereby the two Justices of the Peace would split the fee?”

The justice of the peace for the city would have no authority to issue warrants in that city returnable to courts in the neighboring city. See, an opinion of this office, dated February 21, 1961, to Mr. E. R. Hubbard, Justice of the Peace (Report of the Attorney General (1960-1961), p. 173). A person who is a justice of the peace may operate a collection agency but may not issue warrants on claims he is trying to collect nor can he split fees with those persons who appear before him to have warrants issued by him as a justice of the peace.

In the case you state, the justice of the peace apparently receives claims from “would-be” plaintiffs and refers these claims to a justice of the peace in a neighboring city, where the civil warrants are actually issued by the justice of the peace in the neighboring city. For his services in referring these claims, the first justice of the peace receives a portion of the fee charged by the second justice of the peace.

The justice of the peace who forwards the claims to other justices of the peace performs no service in this connection for which a fee can be charged. The “would-be” plaintiffs must swear to the validity of the civil claim either in person before the issuing justice or file with him an affidavit as to the validity of the claim; that is to say, he must satisfy the issuing justice that he has a bona fide claim before that justice of the peace issues the warrant. The preparation of such an affidavit and the advice given thereon (by the non-issuing justice) would constitute the practice of law and would be illegal unless he were an attorney. A lawyer, if he were a justice of the peace, could render this service to his clients, but he does this not as a justice of the peace but as an attorney. He would have no authority to split justice of the peace fees with other justices.

I am of the opinion that such a practice as described in your letter is not authorized by any statute and is outside the scope of the statutory duties of a justice of the peace.
REPORT OF THE ATTORNEY GENERAL

JUSTICE OF PEACE—Transition of Town to City of the Second Class.
COUNTRIES, CITIES AND TOWNS—Justice of Peace—Transition of town to city of second class.

December 20, 1965

HONORABLE HARRY B. WRIGHT
Clerk of Rockbridge County

This is in reply to your letter of December 17, 1965, which reads as follows:

"As of January 1, 1966, the Town of Lexington will become a city of the second class pursuant to Chapter 22, Sections 15.1-998 through 15.1-978 of the Code of Virginia, as amended. I have the following question for your opinion:

"The Lexington Magisterial District, in which the Town of Lexington is located, has two duly elected Justices of the Peace. One living in the Town of Lexington and the other living in the County of Rockbridge. Under the above enumerated sections of the Code, I cannot find Justice of the Peace mentioned, other than in § 15.1-991.

"My question is, 'Can the duly elected Justice of the Peace for the Lexington Magisterial District continue to act as Justice of the Peace for the newly created City of Lexington?'"

I assume you have reference to §§ 15.1-978 through 15.1-998.

In my opinion, your question must be answered in the negative. The territory of the newly created city will cease to be a part of the Lexington Magisterial District, and, therefore, will no longer be within the jurisdiction of a justice of the peace in the county.

You will note that under § 15.1-995 the justice of the peace living in the area taken into the city may continue to hold office for the remainder of his term and for so long as he can be successively elected. He would not have the power to exercise the powers of his office in the area that has become a part of the city.

It would seem that there will be a vacancy in this office in the city, assuming that the town of Lexington has no such officer. This vacancy can be filled by the judge of the court of record under the provisions of the last sentence of § 15.1-992 of the Code.

JUVENILE AND DOMESTIC RELATIONS COURTS—Authority—May not require State to pay support payments under § 20-63(a) where person convicted of contempt.

August 26, 1965

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth's Attorney for the City of Hampton

I am in receipt of your letter of August 5, 1965, in which you present the following situation and inquiry:

"I request your opinion as to whether or not the Commonwealth of Virginia will pay monies set forth in 20-63(a), Code of Virginia, if a person is found guilty of contempt of court under 20-88.26, Code of
Virginia. In other words, assume that a Juvenile and Domestic Relations Court enters an order under 20-88.24, Code of Virginia, and subsequent thereto the defendant refuses to comply with the court order and is sentenced to the road force under 20-88.26, Code of Virginia. Would the State of Virginia send or provide for a sum of not less than $5.00 nor more than $15.00 for each week in the discretion of the court under 20-63(a), Code of Virginia?"

Pertinent to the resolution of the question you present are §§ 20-88.24 and 20-88.26 of the Code of Virginia (1950), as amended. These statutes are separate provisions of the Uniform Reciprocal Enforcement of Support Act embodied in Chapter 5.2 of Title 20 of the Virginia Code and, in relevant part, prescribe:

"§ 20-88.24.—If the court of the responding state finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to such order."

"§ 20-88.26.—In addition to the foregoing powers, the court of this State when acting as the responding state has the power to subject the defendant to such terms and conditions as the court may deem proper to assure compliance with its orders and in particular:

(c) To punish a defendant who violates any order of the court to the same extent as is provided by law for contempt of the court in any other suit or proceeding cognizable by the court."

From the above-quoted statutes it appears that a juvenile and domestic relations court of Virginia—acting as the court of a responding State under the Uniform Reciprocal Enforcement of Support Act—is authorized to order a defendant to furnish support in those cases in which a duty of support is found to exist, and is also empowered to punish a defendant who violates such order to the same extent that a juvenile and domestic relations court might punish "for contempt of the court" in any other suit or proceeding cognizable by such juvenile and domestic relations court. In light of the foregoing analysis, the pivotal consideration in resolving the question you pose is whether or not a juvenile and domestic relations court is authorized by law—in any other suit or proceeding cognizable by it—to punish an individual for contempt of the court by sentencing such person to the State convict road force, rather than by imposing the usual penalties for contempt of court prescribed in §§ 16.1-26 and 18.1-293 of the Virginia Code.

In this connection, I have been unable to discover any provision of Virginia law which authorizes juvenile and domestic relations courts to punish for contempt by commitment to the State convict road force. True it is that such courts may sentence certain individuals (husbands or fathers) to "the State convict road force at hard labor for a period of not less than ninety days nor more than twelve months" pursuant to the provisions of § 20-61 of the Virginia Code—with the resulting payment by the State treasury of the sums specified in § 20-63 of the Virginia Code—but the above-described punishment (1) is that imposed for the criminal offense of desertion or non-support under the circumstances specified in the cited statute, (2) is that imposed following a plea of guilty to, or conviction of, the criminal offense denominated by the statute as a misdemeanor, and (3) is not a punishment imposed for contempt of court.

If the imposition of such penalties is suspended by a juvenile and domestic relations court and a defendant placed on probation under an order to provide support in accordance with the provisions of § 20-72, subsequent violation of such an order by a defendant may be punished by confinement on the State convict road force pursuant to § 20-80 of the Virginia Code, but I believe it is manifest that this punishment also is not that imposed for contempt of court.

Collateral support for the foregoing view is provided by a comparison of the power of a juvenile and domestic relations court under §§ 20-61, et seq. of the Virginia Code and the power of a court of record in divorce proceedings under § 20-89 of the Virginia Code. In the latter instance—as you point out in your communication—§ 20-115 expressly authorizes a court of record to commit and sentence a person to the State convict road force as provided for in §§ 20-61 and 20-62 and initiate payment of the sums prescribed in § 20-63 of the Virginia Code “upon conviction of any party for contempt of court in failing or refusing to comply with any order or decree for support, maintenance or alimony . . . .” (Italics supplied.) In contrast to this express grant of authority to a court of record in divorce proceedings to punish for contempt by commitment to the State convict road force, I find no similar grant of authority to juvenile and domestic relations courts to impose comparable punishment for contempt.

In light of the foregoing, I am constrained to believe that your inquiry should be answered in the negative and that the sums prescribed in § 20-63 of the Virginia Code would not be payable by the State treasury in those instances in which a defendant is adjudged guilty of contempt under the provisions of § 20-88.26 of the Virginia Code.

JUVENILE AND DOMESTIC RELATIONS COURTS—Purchasing—Magazines, periodicals and memberships in organizations not considered supplies.

PURCHASING—Juvenile and Domestic Relations Courts—Magazines, periodicals and memberships in organizations not considered supplies.

HONORABLE C. P. MILLER, JR.
Assistant Comptroller

December 20, 1965

This will acknowledge receipt of your letter of December 17, 1965, relating to an inquiry received by you from the Chief Probation Officer of the Second Juvenile and Domestic Relations Court for the counties of Halifax, Mecklenburg and Pittsylvania, which reads as follows:

“I have been asked by Judge Watson to write to you for information and clarification regarding the State's policy in purchasing or allowing the Regional Courts to purchase certain reference books, textbooks, subscriptions to journals applicable to the field, memberships in professional organizations, and other training materials indigenous to the Juvenile Court work.

“I need only to mention the importance of continuous study, training and up-grading of well trained people as well as relatively untrained ones in this critical discipline.

“Specifically, will the state pay for yearly subscriptions, or part of a year, to such professional journals as: Crime and Delinquency, American Journal of Orthopsychiatry, Journal of Social Therapy, and Social Casework; and also, will the state pay for Regional Courts' memberships in organizations such as the NPPA and the VSCW?”

You have requested my advice as to whether or not there is an obligation upon the State to pay for the items listed in the inquiry out of the criminal fund. The only possible authority for making such payment would be upon
the theory that these items are supplies within the meaning of § 16.1-143.2 of the Code. In my opinion, these items do not come within the classification of supplies.

In an opinion dated October 8, 1954, to the Honorable S. Page Higginbotham (Report of the Attorney General (1954-1955), at p. 242), we made the following statement with respect to the definition of supplies:

"I think it is the generally accepted rule that the word 'supplies' when used in statutes of the nature under consideration, connotes pencils, paper, rubber bands, blanks, ink and articles of that description (as distinguished from equipment) required and constantly used in the operation of an office of the character under consideration here."

Magazines, periodicals and memberships in organizations would not come within this definition.

LABOR—Economic Security Act—Delegation of rule-making power must be specific.

CONSTITUTION—Economic Security Act—Delegation of rule-making power must be specific.

February 1, 1966

HONORABLE MARY A. MARSHALL
Member, House of Delegates

You have asked my opinion in a letter dated January 20, 1966, concerning the constitutionality of a bill to enact a Virginia Economic Security Act, which would, among other things, establish a minimum wage of $1.25 per hour and require payment of one and one-half times normal pay for hours worked in excess of forty per week, with certain exceptions. The bill proposes exemption from these requirements of persons employed in agriculture; in domestic service; in executive, administrative, and professional capacities; by State, federal and local governments, or by nonprofit organizations. Authority would be granted to the Commissioner of Labor to administer the act and to promulgate certain rules and regulations, and to inspect the records and premises of employers.

Section 63 of the Virginia Constitution extends to the General Assembly authority over "all subjects of legislation, not herein forbidden or restricted." This means it "can do those things which are not forbidden by the State or federal constitutions, or which are not repugnant to those elementary social rights on which society, as we know it, rests." Quesenberry v. Hull, 159 Va. 270, 165 S. E. 382 (1932).

Possible constitutional objections are that the proposed act would deprive employers of property without due process of law; that it purports to cover a field which has been preempted by Congress; that its exemptions discriminate unlawfully in favor of certain classes of employers, and that it would delegate legislative power to an administrative officer. These matters will be discussed in turn.

The bill in many respects resembles, and apparently was patterned after, the Federal Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. The federal act was upheld, despite an argument that it deprived employers of property without due process of law, in United States v. Darby Lumber Co., 312 U. S. 100, 61 S. Ct. 451 (1940).

The proposed act would apply only to employers and employees in Virginia. By enactment of the Federal Fair Labor Standards Act, Congress did not intend to occupy the entire field of regulation of wages and hours, even in industries
engaged in production of goods for interstate commerce. The federal act still leaves an area for regulation by the states. Mitchell v. H. B. Zachry Co., 362 U. S. 310, 80 S. Ct. 739 (1960); Wirtz v. Modern Trashmoval, Inc., 323 F. 2d 451 (4th Cir. 1963), cert. den. 377 U. S. 925; Goldberg v. Wade Labor Const. Co., 290 F. 2d 408 (8th Cir. 1961), cert. den. 368 U. S. 902. The federal act applies only to employees who are engaged in, or produce goods for, interstate commerce, or certain large enterprises, with annual gross sales of $1 million or more, which are engaged in, or produce goods for, interstate commerce. In addition, the act expressly states that it does not excuse noncompliance with any State or local law which establishes a minimum wage higher, or a maximum workweek shorter, than those prescribed by the federal act. 29 U. S. C. § 218. Since the maximum workweek and the minimum wage are the same under the federal act and the proposed Virginia act, there appears to be little likelihood of conflict between them. In case of conflict as to employees covered under both State and federal laws, the federal law would prevail.

The proposed Virginia act is similar to the federal act in its exemptions of certain classes of employees, although there are fewer exemptions in the bill in question. The fact that a law affects only one class, or only certain classes, does not render it invalid. See, Perry v. Board of Funeral Directors and Embalmers, 203 Va. 161, 123 S. E. 2d 94 (1961).

The only serious constitutional question about the proposed act arises from the power it would vest in the Commissioner of Labor to adopt rules and regulations. Section 7(a) would give him power to make regulations, "including definition of terms, as he shall deem appropriate to carry out the purposes of this act . . . ." Section 7(c) says such regulations may "include, but are not limited to, regulations defining and governing outside salesmen; bonuses; part-time rates; special pay for special or extra work, . . . ." and other matters. Section 7(d) would empower the Commissioner to "issue regulations providing for the employment of handicapped workers at wages lower than the wage rates applicable under this act . . . and providing for the employment of learners and apprentices at wages lower than the wage rates applicable under this act . . . ."

Section 5 of the Virginia Constitution provides that the legislative and executive departments of the State government shall be separate and distinct. This does not mean that the legislative branch may not delegate to administrative officials power to make rules having the force of law. Where the policy is prescribed by statute, matters of detail in carrying out and giving effect to legislation may be delegated to administrative officers. Butler v. Commonwealth, 189 Va. 411, 53 S.E. 2d 152 (1949); Dickerson v. Commonwealth, 181 Va. 313, 24 S. E. 2d 550 (1943). But statutes vesting discretion in administrative officers "must lay down rules and tests to guide and control them in the exercise of the discretion granted in order to be valid." Chapel v. Commonwealth, 197 Va. 406, 89 S.E. 2d 337 (1955), quoting from Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604 (1930).

The outcome of litigation involving rule-making power delegated to executive officers is very difficult to predict. However, I seriously question whether the bill you referred to me establishes sufficiently definite guides to govern the Commissioner of Labor in adopting rules providing for the definition of terms and the regulation of outside salesmen, bonuses, handicapped workers and apprentices. The bill would be much less open to question on constitutional grounds if it were redrafted in part to provide legislative definitions covering these matters.
REPORT OF THE ATTORNEY GENERAL

LABOR—Unpaid Wages—Warrants for violation of § 40-24.

HONORABLE EDMOND M. BOGGs, Commissioner
Department of Labor and Industry

This will acknowledge receipt of your letter of September 8, 1965, which reads as follows:

"Recently this Department had occasion to obtain warrants against the manager of the Downtowner Restaurant in Danville, Virginia, who was found in violation of Section 40-20 of the Code of Virginia, for refusal to pay wages to an employee. Later the attorney for the Downtowner Restaurant claimed that the manager never employed anyone, personally, that the person worked for Virginia Restaurant Associates, Inc., a Virginia corporation for which the manager was general manager for the Downtowner Restaurant.

"The Commonwealth's Attorney has suggested that we obtain an opinion from you as to whether warrants should have been obtained against the manager of the restaurant or against the corporation. It has been the policy of the Department, over many years, to obtain warrants against managers who were in charge of the business operation.

"Further complaints have been received against this manager of the Downtowner Restaurant, and it would be greatly appreciated if you would advise me as to how the warrants should be obtained in taking this matter into court."

You have advised me by telephone that your reference to the Code section is incorrect and that you intended to refer to § 40-24. An examination of this section reveals that it prescribes the procedure by which the employer of a business establishment as defined in § 40-1.1 of the Code shall pay the wages earned by its employees. "Business establishment" is defined in § 40-1.1 as follows:

"(§) '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."

Under this definition, the restaurant in question is a business establishment and is subject to the provisions of § 40-24. This section places the penalties prescribed therein on the employer who is operating a business establishment.

"Employer" is defined in § 40-1.1 as follows:

"'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."

Under this definition the employer in this instance is the corporation that is operating the business as distinguished from the manager who may be in charge of the restaurant.

The penalty for violation of § 40-24 is against the employer and, therefore, in my opinion, any warrant for violation of this section or any of its terms must be issued against the employer which, in this instance, is the corporation.

In light of the foregoing, I deem it unnecessary to reply to the last paragraph of your letter.
REPORT OF THE ATTORNEY GENERAL

MARRIAGE—Alien—May obtain license in this State.

HONORABLE J. PHIL BENNINGTON, Clerk
Circuit Court of Grayson County

This will acknowledge receipt of your letter of October 25, relating to my opinion of October 18, 1965.

You state that I made no mention in my prior opinion in regard to the nationality of the female. You state that she is a French girl but she has not been naturalized as a citizen in this country. You further state that the question of race is not involved.

There is nothing in the marriage statutes in Virginia that would prevent an alien from obtaining a license to marry in this State. Chapter 3 of Title 20 of the Code contains the statutory provisions relating to unlawful marriages. From the facts stated by you, it does not appear that this marriage would be in violation of any of these provisions.

MENTAL HYGIENE AND HOSPITALS—Burial Expenses—Arrangement with Department.

HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This will acknowledge receipt of your letter of June 17, 1966, which reads as follows:

“I would appreciate it if you would advise me as to the following legal position the State has in reference to:

“Question: When a person is a patient at one of our mental institutions and that patient has an estate, whether said patient can set aside an appropriate sum to provide for a suitable burial of her own choice?”

There is no statute pertaining to this matter. It is my understanding that the department, in those cases in which it felt that the situation justified such an arrangement, has agreed to a reservation of a portion of the estate of the patient for the purpose of providing for necessary burial expenses.

I suggest that you get in touch with Mr. R. F. Thompson, Jr., Department of Mental Hygiene, 9 N. 12th Street, Richmond, Virginia, for the purpose of working out some arrangement.

MOTOR VEHICLES—Application for Temporary License—Statutes construed.

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This is in reply to your letter of May 13, 1966, which I quote, in part, as follows:

"Your attention is directed to Chapter 61, Acts of the Assembly of 1966, this being House Bill No. 82 approved February 28, 1966,"
amending Section 46.1-121(a) by adding at the end of the last sentence 'and Sections 46.1-167.1, 46.1-167.2 and 46.1-167.3 of this Title' and deleting Paragraph (c).

"Will you please advise me if I may assume that in view of the provisions of Section 46.1-64(a) that it is not unlawful for the owner of a motor vehicle issued temporary license plates under the amended provisions of Section 46.1-121(a) to operate or permit the operation of such vehicle, provided the owner complies with the applicable provisions of Sections 46.1-167.1, 46.1-167.2 and 46.1-167.3 by having in effect as to such vehicle automobile liability insurance with sufficient limits or by paying the statutory uninsured vehicle fee to the Division of Motor Vehicles so as to avoid the penalty provisions of Section 46.1-167.3 as amended by Chapter 568 of the Acts of the Assembly of 1966; or do the provisions of Chapter 61 impose a duty upon me to insure the payment of the statutory uninsured motor vehicle fee to the dealer issuing the temporary license plates so as to attempt administratively to prohibit the possible commission of a misdemeanor or impose any duty upon the dealer to collect such uninsured vehicle fee except when such dealer upon request of the vehicle owner transmits to the Division as provided in Section 46.1-124 the application for titling and registration of the purchased vehicle accompanied by the prescribed fees therefor."

An amendment enacted by Chapter 252, Acts of Assembly of 1960, added to § 46.1-121, Code of Virginia (1950), as amended, paragraph (c) which states that "No application under subsection (a) of this section should be construed to be a registration of a motor vehicle as provided in § 46.1-167.1." Thereafter, in an opinion found in Report of the Attorney General (1961-1962), page 189, the view was expressed that a person operating a motor vehicle bearing a temporary license, without obtaining liability insurance or paying the uninsured motor vehicle fee prescribed under § 46.1-167.1, Code of Virginia (1950), as amended, was not guilty of the violation of § 46.1-167.3.

The amendment effected under Chapter 61, Acts of Assembly of 1966, added to the provision already contained in § 46.1-121 (a) "that such owners shall comply with the applicable provisions of this article" the words "and §§ 46.1-167.1, 46.1-167.2 and 46.1-167.3 of this title." It also deleted paragraph (c) of § 46.1-121, quoted supra. By these changes, it is clear that display of temporary license plates issued by a dealer to an owner pursuant to § 46.1-121, et sequel, subjects such owner to compliance with §§ 46.1-167.1, 46.1-167.2 and 46.1-167.3. Furthermore, the amendment to § 46.1-167.3, cited as Chapter 568, Acts of Assembly of 1966, provides, in part, that "Any person owning an uninsured motor vehicle ... displaying temporary license plates provided for in § 46.1-121 who operates or permits the operation of such motor vehicle without first having paid to the Commissioner with respect to the motor vehicle a fee of fifty dollars, ... shall be guilty of a misdemeanor, punishable as set forth in § 46.1-16." I shall, therefore, answer your first question in the affirmative.

In regard to your other question, which is phrased in the alternative to the first, the key to the answer appears to lie in the second paragraph of § 46.1-167.3, as amended by Chapter 568, Acts of Assembly of 1966. This authorizes you, or your duly authorized agent, when you or your agent have "good reason to believe that a motor vehicle is operated or has been operated on any specific date" and the uninsured motor vehicle fee has not been paid as to such vehicle, to require the owner of such motor vehicle "to submit the certificate of insurance provided for by § 46.1-167.1." His failure to do so shall be prima facie evidence that the motor vehicle was uninsured at the time of such operation. I interpret the words "certificate of insurance provided for by § 46.1-167.1" to mean "a certificate of insurance executed by an authorized agent or representative of an insurance company authorized to do business in this State," as stated
REPORT OF THE ATTORNEY GENERAL

in § 46.1-167.1. Under that statute you may require any registered owner of a motor vehicle or any applicant for registration of a motor vehicle “declared to be an insured motor vehicle” to submit such certificate of insurance. I am of the opinion that, insofar as it concerns the application of the amended statutes cited herein, the applicant for temporary license plates pursuant to § 46.1-124 stands in the shoes of one applying for registration of a motor vehicle and, therefore, must either pay the uninsured motor vehicle fee or certify that such motor vehicle is an insured vehicle, as defined in § 46.1-167.2, as a prerequisite for the issuance of such license plates.

MOTOR VEHICLES—Blood Analysis—Implied consent—Accused must be arrested within two hours of alleged offense.

HONORABLE L. J. HAMMACK, JR.
Commonwealth's Attorney for Brunswick County

I am in receipt of your letter of August 12, 1965, in which you present certain questions involving the interpretation and application of the amended Virginia “implied consent” law embodied in § 18.1-55.1 of the Virginia Code. These questions will be stated and considered seriatim.

“1. Does Section 18.1-55.1 of the Code of Virginia, commonly known as the ‘implied Consent Law,’ require that the blood sample of the accused, in order for the result of the blood test to be admissible in evidence, be taken within two hours of the alleged offense?”

Answer: No. Section 18.1-55.1(b) of the Virginia Code provides that any person who operates a motor vehicle upon a public highway in Virginia shall be deemed to have consented to submit to a blood test “if such person is arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town within two hours of the alleged offense.” In light of the above-quoted language, which is substantially identical to that contained in the original Virginia “implied consent” law formerly contained in § 18.1-55 of the Virginia Code, this office has consistently ruled that both the original and the amended statutes would have no application unless an individual was arrested for driving under the influence of intoxicants within two hours of the alleged offense. See, Report of the Attorney General (1962-1963), pp. 155, 159. However, the amended statute contains no provision which requires the sample of an accused person's blood to be withdrawn within two hours of the alleged offense or within any specified time of the alleged offense.

“2. Does Section 18.1-55.1 of the Code impose any limitation at all with reference to the time within which a sample of the blood of the accused is to be taken?”

Answer: No. See answer to Question 1 above.

“3. If every effort is made to obtain a blood sample following the consent of the accused to the taking thereof, or request therefor, but, for some reason beyond the control of the Commonwealth, no sample can be taken, or no proper test made of a sample which is taken, does the law require that a subsequent prosecution for driving under the influence be dismissed, or may the prosecution proceed without the result of a blood test being available for introduction in evidence?”
Answer: The amended Virginia "implied consent" law does not require that a subsequent prosecution for driving under the influence of intoxicants be dismissed, and the prosecution may proceed without the results of a blood test being available for introduction in evidence. In this connection, I am forwarding to you copies of two previous opinions of this office, dated August 28, 1964, and October 29, 1964, in which situations substantially similar to that outlined in your third question were considered and decided in a manner consistent with that stated in the preceding sentence.

MOTOR VEHICLES—Blood Analysis—Implied consent—Trial for unreasonable refusal to submit to test.

HONORABLE HARRY G. LAWSON
Commonwealth’s Attorney for Appomattox County

September 14, 1965

I am in receipt of your letter of September 1, 1965, in which you present several questions involving the interpretation and application of certain provisions of § 18.1-55.1 of the Virginia Code, generally known as the amended Virginia "implied consent" law. Your inquiries particularly concern those provisions of the above-mentioned statute governing disposition of situations in which a person accused of operating a motor vehicle while under the influence of intoxicants refuses to submit to a blood test. The questions you pose will be stated and considered seriatim.

"First, when an accused is charged with refusal to take the blood test as provided in Code Section 18.1-55.1, and is convicted by the County Court and takes an appeal to the Circuit Court, should the court or the jury try the case? In other words, if the attorney for the Commonwealth insists upon the Court (Judge) trying the case without a jury, under the last sentence of Sub-section (m), should his motion be granted, although the accused demands a jury?"

Answer: I am of the opinion that an accused should be granted a jury trial in every instance except those in which he expressly waives such trial in accordance with the applicable provisions of Section 8 of the Constitution of Virginia. Pertinent in this connection are the provisions of § 18.1-55.1(j) through (p) of the Virginia Code which respectively prescribe:

"(j) The form referred to in paragraph (c) shall contain a brief statement of the law requiring the taking of a blood sample and the penalty for refusal, a declaration of refusal and lines for the signature of the person from whom the blood sample is sought, the date and the signature of a witness to the signing. If such person refuses or fails to execute such declaration, the committing justice, clerk or assistant clerk shall certify such fact, and that the committing justice, clerk or assistant clerk advised the person arrested that such refusal or failure, if found to be unreasonable, constitutes grounds for the revocation of such person's license to drive. The committing or issuing justice, clerk or assistant clerk shall forthwith issue a warrant charging the person refusing to take the test to determine the alcoholic content of his blood, with violation of this section. The warrant shall be executed in the same manner as criminal warrants."

"(k) The executed declaration of refusal or the certificate of the committing justice, as the case may be, shall be attached to the warrant and shall be forwarded by the committing justice, clerk or assistant
clerk to the court in which the offense of driving under the influence of intoxicants shall be tried."

(l) When the court receives the declaration or refusal or certificate referred to in paragraph (k) together with the warrant charging the defendant with refusing to submit to having a sample of his blood taken for the determination of the alcoholic content thereof, the court shall fix a date for the trial of said warrant, at such time as the court shall designate, but subsequent to the defendant's criminal trial for driving under the influence of intoxicants."

“(m) The declaration of refusal or certificate under paragraph (k), as the case may be, shall be prima facie evidence that the defendant refused to submit to the taking of a sample of his blood to determine the alcoholic content thereof as provided hereinabove. However, this shall not be deemed to prohibit the defendant from introducing on his behalf evidence of the basis for his refusal to submit to the taking of a sample of his blood to determine the alcoholic content thereof. The court shall determine the reasonableness of such refusal."

“(n) If the court shall find the defendant guilty as charged in the warrant, the court shall suspend the defendant's license for a period of 90 days for a first offense and for six months for a second or subsequent offense or refusal within one year of the first or other such refusals; the time shall be computed as follows: The date of the first offense and the date of the second or subsequent offense.”

“(o) The court shall forward the defendant's license to the Commissioner of the Division of Motor Vehicles of Virginia as in other cases of similar nature for suspension of license unless, however, the defendant shall appeal his conviction in which case the court shall return the license to the defendant upon his appeal being perfected.”

“(p) The procedure for appeal and trial shall be the same as provided by law for misdemeanors.” (Italics supplied).

Although these provisions do not specifically denominate the “offense” of unreasonably refusing to submit to a blood test as a misdemeanor or felony, it would appear from the language of the provisions italicized above and the language contained in § 18.1-6 that the unreasonable refusal to submit to a blood test in violation of § 18.1-55.1 is an offense which constitutes a misdemeanor under Virginia law. While the language of the provisions under consideration is not specific on this point and the question therefore is not entirely free from doubt, I am constrained to believe that—under familiar principles—this doubt should be resolved in favor of the accused and that a jury trial should be accorded him or expressly waived in accordance with Section 8 of the Virginia Constitution. In this connection, I call your attention to the decision of the Supreme Court of Appeals of Virginia in Boaze v. Commonwealth, 165 Va. 786, 183 S. E. 263, in which an analogous situation involving the application of certain desertion and nonsupport statutes (§§ 20-61, et seq. of the Virginia Code) was considered and resolved in a manner consistent with the view herein expressed. See also, Report of the Attorney General (1962-1963), p. 151.

"Second, if the accused is acquitted of the drunk driving charge, what effect does such acquittal, if any, have upon the trial or charge of the refusal to take the test? That is, is such acquittal admissible in evidence, or is it a bar to this prosecution?"

Answer: I am of the opinion that the acquittal of an accused for the offense of operating a motor vehicle while under the influence of intoxicants would have no effect upon the trial of a charge of unreasonable refusal to submit to a blood test. In this connection, this office has previously ruled that the unreasonable refusal to submit to a blood test in violation of § 18.1-55.1 constitutes an offense
which is "separate and distinct" from that of operating a motor vehicle while under the influence of intoxicants in violation of § 18.1-54 of the Virginia Code or a similar ordinance of any county, city or town. See, Report of the Attorney General (1962-1963), p. 154. Evidence of acquittal of the offense of operating a motor vehicle while under the influence of intoxicants would not therefore be admissible in evidence upon a trial for the offense of unreasonably refusing to submit to a blood test, nor would acquittal of the former offense bar a prosecution for such unreasonable refusal.

"Third, does the phrase 'shall be prima facie evidence' in Sub-section (m) apply to only the question of refusal or does it apply also to the question of 'reasonableness of such refusal?'"

Answer: I am of the opinion that the phrase in question applies only to the issue of an accused's "refusal" to submit to a blood test and that the declaration or certificate referred to in § 18.1-55.1(m) does not constitute prima facie evidence of the reasonableness or the unreasonableness of such refusal.

"Fourth, if it is your opinion that the case should be tried by jury, if one is requested, what is the definition of 'reasonableness' as it should be given in an instruction to the jury?"

Answer: I am of the opinion that the court should instruct the jury that if they believe that the accused arbitrarily, capriciously and without good cause refused to submit to a blood test, then they shall find him guilty of unreasonably refusing to submit to such test in violation of § 18.1-55.1 of the Virginia Code.

MOTOR VEHICLES—Chauffeur’s License—Required if person employed for principal purpose of operating delivery truck.

Honorable Harold B. Singleton
Judge, Amherst County Court

This is in reply to your letter of October 20, 1965, in which you request my advice "as to whether or not a student who drives a delivery truck for a drug store during his leisure time is required to have a chauffeur’s license."

The term “chauffeur” is defined in § 46.1-1 (2), Code of Virginia (1950), as amended, to which you refer, as:

"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."

There appears no exception or reservation touching hours of employment, so long as the principal purpose of such employment is that of operating a motor vehicle. A person employed for the chief or main purpose of performing other duties, however, who drives a motor vehicle only occasionally or incidentally, may do so on an operator’s license. The principal purpose for which the person is employed is the determining factor. It is my opinion, therefore, that if the student is employed for the principal purpose of operating the delivery truck a chauffeur’s license is required.
MOTOR VEHICLES—Checking Speed on Highway—When proof of theory of operation of checking device required—When not.

CRIMINAL PROCEDURE—Checking Speed of Motor Vehicles by New Device—Necessity for proving theory of operation.

February 23, 1966

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

This is in reply to your letter of February 11, 1966, with which you enclosed certain information regarding a machine known as VASCAR, an instrument for determining the speed of a motor vehicle traveling on the highway. You request my opinion as to the legality of its use under present Virginia law and raise two questions in this respect, which I quote as follows:

"If the speed of a vehicle is clocked by such instrument, will it require proving in each case the theory of the operation of the machine by an expert witness?

"Could the General Assembly of Virginia adopt a statute similar to §46.1-198 making it prima facie evidence of speed when the speed is determined by such device?"

The present laws, in my interpretation, do not establish exclusive methods for determining the velocity of vehicles on the highways. Under the provisions of §46.1-198, Code of Virginia (1950), as amended, the "speed of any motor vehicle may be checked by the use of radio microwaves or other electrical device." As I understand the device known as VASCAR, it may be described as electromechanical and does not fall within the term "radio microwaves or other electrical device," as contemplated under §46.1-198. The Supreme Court has held, in the case of Royals v. Commonwealth, 198 Va. 876, and other cases, that the present statute, §46.1-198, has eliminated the necessity for proving in each case the theory of the operation of such electrical devices as radar by expert witness. As the device now under consideration is new and is neither specifically authorized nor prohibited by existing statutes, I conclude that it could be used under present Virginia laws but such use would require proving in each case the theory of its operation by an expert witness and, therefore, I shall answer your first question in the affirmative.

In the case of Dooley v. Commonwealth, 198 Va. 32, in considering the contention that §46-215.2 (now §46.1-198) contravenes the due process clause of the Constitution, the Court stated: "The general rule is that the test of the constitutionality of statutes making proof of a certain fact prima facie or presumptive evidence of another fact is whether there is a natural and rational evidentiary relation between the fact proven and the fact presumed. Where such evidentiary relation exists and where the presumption is found to be both reasonable and rebuttable it does not violate the due process amendment." Applying this rule to the matter under consideration, I am of the opinion that the General Assembly of Virginia has the power to adopt a statute, similar to §46.1-198, making the results of speed checks by such device prima facie evidence and accordingly, I shall also answer your second question in the affirmative.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Counties May Not Adopt Ordinance Requiring Signs Displayed on Slow-moving Vehicles.

COUNTIES—Regulation of Traffic—Not authorized to adopt ordinance requiring display of signs on slow-moving vehicles.

November 5, 1965

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

This is in reply to your letter of October 20, 1965, in which you request my advice on the question raised by the Board of Supervisors of Surry County as to whether or not the County is authorized to adopt an ordinance requiring slow-moving vehicles, such as farm trailers and tractors, to display a sign on the rear of such vehicles to indicate they are slow moving.

The powers of local authorities in general, in regard to the regulation of traffic, are found in Article 2 of Chapter 4, Title 46.1, Code of Virginia (1950), as amended, and under § 46.1-180 thereof, counties are authorized to adopt ordinances to regulate the operation of vehicles on the highways of such counties, not in conflict with the provisions of Title 46.1. The same section prohibits a county from providing penalties for the violation of any ordinance so adopted which is greater than the penalty imposed for a similar offense under the provisions of Title 46.1. An examination of the laws controlling the regulation of traffic, including those found under Title 46.1, reveals no provision or regulation similar to the one under consideration.

It is noted that the legislature has provided for the placing of caution signs on the rear of vehicles operated by rural mail carriers, to warn of frequent stops, under § 46.1-249 and for warning notices on school buses, under § 46.1-190 and § 46.1-287. As no such statutory provision has been made with regard to slow-moving vehicles, such as farm trailers and tractors, I am of the opinion that the County of Surry is not authorized to adopt an ordinance requiring the display of signs of the type you describe.

MOTOR VEHICLES—Criminal Procedure—Charges pursuant to §§ 46.1-423.1 and 46.1-423.2—Parallel ordinance authorized—Use of state and town warrants.

CRIMINAL PROCEDURE—Charges Pursuant to §§ 46.1-423.1 and 46.1-423.2—State warrant must be used unless town has parallel ordinance.

July 6, 1965

HONORABLE FRANK L. THOMASSON
Town Attorney for the Town of Bedford

This is in reply to your letter of June 7, 1965, which reads as follows:

"I have been requested by the Hon. Franklin Raflo, Judge of the Bedford County Court who also is Judge of the Mayor's Court of the Town of Bedford, to request an opinion from your office. The question he raises is with respect to Sections 46.1-423.1, and 46.1-423.2. He raises the question in trying a Town Warrant which upon conviction of the accused, resulted in a conviction of drunk driving for the fourth time within a period of ten years. The preceding convictions were alternately under state warrants and town warrants.

"The Town has no parallel ordinance and inquiry No. 1 would be; could the Town enact an ordinance paralleling either or both of these
REPORT OF THE ATTORNEY GENERAL

two sections. Secondly, if the Town has no such ordinance, should the charge under these two sections be brought on a state warrant and therefore tried subsequent to the town warrant. Third, does the question of the time of the previous convictions have any bearing if they are both prior to the enactment of these sections in 1962 as well as subsequent to that date."

Chapter 424 of the Acts of Assembly of 1962 provided for an additional fine and jail sentence for fourth convictions within a period of five years of certain offenses in § 46.1-423.1, Code of Virginia (1950), as amended. By amendment, under Chapter 433 of the Acts of Assembly of 1964, the accumulation period was changed from five years to ten years and the statute presently reads as follows:

“If any person, having been convicted three times of any offense or offenses set forth below, within a period of ten years, be again convicted of any one of such offenses within such ten year period, he shall, in addition to the penalty otherwise prescribed by law for such offense, be fined not less than one hundred dollars nor more than one thousand dollars and confined in jail not less than three months nor more than twelve months. The offenses for a fourth conviction of which such penalties may be imposed are the following: Violations within Virginia of §§ 18.1-54, 46.1-176, 46.1-191, 46.1-350, or of any similar ordinance of any county, city or town in Virginia, and manslaughter involving the operation of a motor vehicle, voluntary or involuntary. Provided, however, that for the purposes of this section where more than one manslaughter conviction results from a single act or omission, then only the first such conviction shall constitute an offense."

At the time the foregoing statute was originally enacted the legislature enacted, and included within the same Chapter, § 46.1-423.2, relating to revocation of license upon a fourth conviction, in the following language:

“In addition to the penalties set forth in § 46.1-423.1, if any person be convicted of a fourth offense as therein provided, the court in which such conviction is had shall revoke the operator’s or chauffeur’s license of such person for a period of five years.”

The purpose of these statutes is to protect the public against habitual violators of the traffic laws named therein and to impose further penalty upon that particular class of offenders. Each statute, by its use of the word “shall,” indicates a mandatory intent. In reference to your first question, I am of the opinion that the Town is authorized to enact an ordinance paralleling the named sections. Under § 46.1-180, the governing body in counties, cities and towns may adopt ordinances to regulate the operation of vehicles on the highways of such counties, cities and towns not in conflict with the provisions of Title 46.1, Code of Virginia (1950), as amended.

In reference to your second question, if the Town has no such ordinance, any charge under § 46.1-423.1 should be brought on a State warrant. I am of the opinion that this should not be an additional warrant, however, but the warrant charging the fourth offense. In other words, if the fourth offense is charged as a violation of the State statute, it must be brought on a State warrant. There should not be two warrants relative to the same offense as the wording of the statute indicates an additional penalty for the fourth offense of the statutes indicated or similar ordinances of any county, city or town in Virginia, rather than an additional offense. Upon a conviction of a fourth offense, as provided in
§ 46.1-423.1, the five year suspension of license required by § 46.1-423.2 becomes mandatory.

In response to your third and final question, it is my opinion that the time of the previous convictions has no bearing as long as all three of these occurred within the same period of ten years as the fourth conviction, as provided in § 46.1-423.1. The fact that some of the convictions occurred prior to 1962, when the statute was enacted, and some occurred subsequent thereto would not prevent these sections being applied. Only the fourth such conviction must have occurred since the statute became effective in 1962, as the additional penalty attaches to such conviction.

MOTOR VEHICLES—Dealer's License Plates—Determining authorized use.

February 10, 1966

HONORABLE WARREN J. DAVIS
Assistant Commonwealth's Attorney for Fairfax County

This is in reply to your letter of January 26, 1966, in which you request my opinion as to whether or not an authorized dealer in new trucks and mobile homes may use dealer's plates on his truck to transport a mobile home owned by him to his place of business.

Paragraph (c) of § 46.1-115, Code of Virginia (1950), as amended, cited in your letter, does not appear to apply to the instance in question. The applicable portion of § 46.1-115 is in paragraph (a) thereof, which I quote as follows:

“(a) Such dealer's license plates may be used on motor vehicles, trailers and semitrailers owned by, or assigned to, duly licensed motor vehicle dealers of this State when operated on the highways of this State by such dealers or their authorized representatives. Dealers' license plates shall not be used on motor vehicles such as wrecking cranes or other service motor vehicles for the use or operation of which dealers charge or receive compensation.”

The first sentence in the quoted paragraph has been limited for a period in the past by the phrase “for demonstration and sale,” which, however, was deleted by the 1964 amendment. The present language contains only the limitation found in the second sentence, which prohibits the use of dealer's plates on a motor vehicle when a charge is made or compensation received for the service. Assuming the dealer does not charge or receive compensation therefor, it is my opinion that his use of the license plates for the purpose stated is permitted under the statute and, therefore, I shall answer your question in the affirmative.

MOTOR VEHICLES—Drag Racing—Person aiding and abetting may be charged.

CRIMES—Drag Racing—Person aiding and abetting drivers may be charged.

July 8, 1965

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

This is in reply to your letter of June 17, 1965, in which you request my opinion as to whether a person is guilty of engaging in a race between two or
more vehicles on the highways of this State, as contemplated by § 46.1-191, Code of Virginia (1950), as amended, under the facts which read as follows:

"An individual whom I will call 'Accused' was present on foot at a point on a primary highway in Virginia where two automobiles were lined up side by side preparatory to having a drag race on the highway between these two automobiles. 'Accused' waived his arms and halted oncoming traffic, forcing the oncoming traffic to stop, explaining to the driver of the oncoming vehicle that he would have to stop because a drag race was about to take place. 'Accused' then left the vehicle which he had just stopped, walked to the front of the two cars which were lined up for the drag race, and while standing on the road, gave them the starting signal by swinging his arm, whereupon the two cars involved in the race took off side by side at a very high speed and proceeded to have the drag race."

The portion of the cited statute directly bearing on the question under consideration is expressed in these words: "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." Unless otherwise defined by the legislature, words used in a statute are interpreted in their usual meaning. Among the definitions for the intransive verb *engage*, found in Webster's New International Dictionary, are "to take a part," "to employ or involve one's self," and "to devote attention and effort." Black's Law Dictionary, Third Edition, likewise, contains the definitive phrases, "to employ or involve one's self" and "to take part in." It is arguable that under these definitions the statute is more comprehensive than would be true if it limited the violation to driving one of the motor vehicles involved.

Pursuing the question along the line of principals and accessories, your attention is invited to the case of *Spradlin v. Commonwealth*, 195 Va. 523, wherein the Court stated that: "Every person who is present lending countenance, aiding or abetting another in the commission of an offense is liable to the same punishment as if he had actually committed the offense. In misdemeanor cases there are no accessories but all participants in the crime are principals." Further, "all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime." The law places equal responsibility upon all persons who are present purposely giving aid and comfort to the actual wrongdoer. In misdemeanor cases, one who would have been an accessory before the fact if the offense had been a felony may be tried before the actual perpetrator of the crime. If one who aids and abets others in a misdemeanor would escape the penalty provided by law, he must cease to act in complicity as soon as he has knowledge of the criminal conduct. See, 22 C.J.S. Criminal Law § 81.

The facts given indicate that "Accused" was present aiding and abetting before and during the offense. He was taking an active part by waiving his arms and forcing traffic to stop in preparation for the race and, later, by giving the starting signal for the race to proceed. His explanation to the driver of an approaching vehicle that such driver must stop because a drag race was about to take place is further proof of his full knowledge of and concurrence in the offense perpetrated. In my opinion, therefore, "Accused" is chargeable under the given facts with the misdemeanor set forth in § 46.1-191, and I shall answer your question in the affirmative.
MOTOR VEHICLES—Drunk Driving Conviction—Person may not operate "industrial tractor" over highway between industrial sites during period of revocation.

April 26, 1966

HONORABLE L. VICTOR MCFALL
Commonwealth's Attorney for Dickenson County

This is in reply to your letter of April 16, 1966, which I shall quote as follows:

"Please advise whether a person convicted of driving while under the influence may operate, while his operator's license is revoked, an industrial tractor on the highway from one industrial site to another industrial site. Under Code Section 46.1-352.1 it is permissible for such a person to operate a farm tractor from one farm to another. Also, please advise whether such a person may operate, on private property, industrial tractors, road machinery and other motor vehicles not required to be licensed."

Under § 18.1-59, Code of Virginia (1950), as amended, a conviction for driving while under the influence of intoxicants or drugs, of itself, operates to deprive the person so convicted of the right to drive or operate "any such vehicle, conveyance, engine or train in this State." Because of the reference in this section to § 18.1-54, a person so convicted is prohibited from driving any "automobile or other motor vehicle, car, truck, engine or train" for the period therein stated. The one exception is found in § 46.1-352.1, which states that such conviction "shall not operate to prevent or prohibit such person from operating a farm tractor upon the highways when it is necessary to move such tractor from one tract of land used for agricultural purposes to another tract of land used for the same purposes, provided that the distance between the said tracts of land shall not exceed five miles." (Emphasis supplied.) No vehicle, other than a farm tractor, is named in this section and I find no statute specifically exempting any other vehicle from the mandatory language of the statutes controlling as to driving under the influence of intoxicants or drugs.

In consideration of the foregoing, it is my opinion that the law does not permit a person so convicted to operate an "industrial tractor" on the highway from one industrial site to another. In reference to your second question, however, I am of the opinion that such person may operate these vehicles on private property.

MOTOR VEHICLES—Drunk Driving, Reckless Driving—On private property—Police authorized to prefer charges.

June 22, 1966

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

This is in reply to your letter of June 13, 1966, in which you request my opinion on several questions which I shall quote and consider separately and in the order presented, as follows:

"(1) Can a person be charged for driving drunk on private or own property or does it have to be on developed highway?"

In the case of Valentine v. Brunswick County, 202 Va. 696, the Court held that under § 18-75, Code of Virginia (1950), as amended, (now § 18.1-54), or a
county ordinance similar to such Virginia statute, which prohibits driving while under the influence of intoxicants and is silent as to the place where the offense may be committed, a person may be convicted for the offense committed while driving on private property. Accordingly, I shall answer your question in the affirmative.

“(2) Can an officer charge a person with reckless driving resulting in accident when it happens in front and around a Super Market?”

Yes. It is specifically provided in paragraph (k) of § 46.1-190 that a person shall be guilty of reckless driving who shall “drive or operate any automobile or other motor vehicle upon any driveway or premises of a church, or school, or of any recreational facilities or of any business property open to the public, recklessly or at a speed or in a manner so as to endanger the life, limb or property of any person.” I am of the opinion that this clause was enacted to cover the precise situation indicated by your question.

“(3) Have all police officers the right to work such case in their towns, county, and state?”

Yes. By force of § 46.1-6 the law enforcement officers of every county, city and town as well as the State Police are authorized and required to enforce the motor vehicle laws of this State. Also, the local officers have not only the right but the duty to enforce local ordinances paralleling the State laws.

MOTOR VEHICLES—Electronic Devices for Measuring Speed—Testing necessary.

Honorable James T. Adams
Commonwealth's Attorney for the City of Buena Vista

October 22, 1965

This is in reply to your letter of recent date, which I quote as follows:

“The Buena Vista Police Department has installed radar equipment in its police vehicle and has adopted the following procedure in radar surveillance:

“1. The police car comes to rest at a point on a city street.
“2. The radar equipment is put into operation and a test is made through the use of a tuning fork.
“3. When violators are detected thereafter, the vehicle with the radar equipment goes in pursuit of the offender.
“4. After making an arrest the radar equipment is then tested at a position which may be miles from the point of the original radar detection.

“The question has been raised as to whether or not the radar reading would be admissible in evidence insomuch as the machine would have been tested in two different locations.
“Would your office be kind enough to furnish us with your opinion as to the legal ramifications of such evidence?”

The authorization for the use of electrical devices for checking the speed of any motor vehicle on the highway is contained in § 46.1-198, Code of Virginia (1950), as amended, the pertinent part of which is as follows:
“(a) The speed of any motor vehicle may be checked by the use of radio microwaves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue.

“(b) The driver of any such motor vehicle may be arrested without a warrant under this section provided the arresting officer is in uniform and displays his badge of authority; provided that such officer has observed the registration of the speed of such motor vehicle by the radio microwaves or other electrical device, or has received a radio message from the officer who observed the speed of the motor vehicle registered by the radio microwaves or other electrical device; provided in case of an arrest based on such a message that such radio message has been dispatched immediately after the speed of the motor vehicle was registered and furnished the license number or other positive identification of the vehicle and the registered speed to the arresting officer.”

This section is silent as to the procedure necessary to assure the accuracy of the electrical devices used and I find no other statute relative to this point. It will be seen that this section makes the results of such checks prima facie evidence of the speed of the motor vehicle checked. As pointed out by the court in the case of Royals v. Commonwealth, 198 Va. 876, however, the language of the statute does not eliminate the necessity for the Commonwealth to prove that the machine used for measuring speed had been properly set up and recently tested for accuracy.

In the Royals case, the court quoted from a scientific treatise approving the method of checking the accuracy of the meter at the beginning and at the end of use in each location. The method therein cited for checking meter accuracy is to have a car with calibrated speedometer run through the zone of the meter, once at the speed limit for the zone and once at a speed of ten or fifteen miles per hour greater. In view of this case, the Department of State Police adheres to a similar procedure, employing the use of two officers at any given location at which the radar machine is to be used. Where the electrical measuring device is checked both before and after use at a given location, any possible disruptive effect attendant upon moving the machine or transporting it to another location is eliminated.

Incidentally, no scientific data on the tuning fork method of testing the accuracy of radar equipment has come to my attention. Assuming the efficiency of the method, however, I am not apprised of the probable effect transporting the radar equipment in the pursuit vehicle over a distance of several miles from the location to which it was used before it is checked again for accuracy. I find no case relative to the point, other than the Royals case, herein cited, which strongly infers that radar equipment should be checked for accuracy both before and after use in each location. It is my opinion, therefore, that additional scientific information is required before the method you describe may be established as proper.

MOTOR VEHICLES—Engaged in Highway Construction—Department of Highways may not authorize unlicensed vehicles to operate on highway.

June 22, 1966

Honorable Kermit L. Racey
Commonwealth's Attorney for Shenandoah County

This is in reply to your letter of June 13, 1966, requesting my opinion in regard to the following, which I quote:
"The question is this: May the Commonwealth of Virginia, Department of Highways, authorize unlicensed and overweight vehicles engaged in highway construction work to operate over any parts of the public highways of this state?"

The requirement for the registration and titling of a motor vehicle before the same is operated upon any highway in this State is contained in § 46.1-41, Code of Virginia (1950), as amended. As referred to therein, § 46.1-43 provides for temporary registration by the Division of Motor Vehicles for the transportation of construction and other heavy equipment upon the highways of this State. The use of any such vehicle to be registered under the latter must first be authorized by the State Highway Commission pursuant to § 46.1-343. In my interpretation, these two sections must be considered together, since one provides for the registration and the other requires a special permit for operating a vehicle on the highway of the size or weight exceeding the maximum set forth in Title 46.1, Code of Virginia (1950), as amended. A similar view is expressed in Report of the Attorney General (1961-1962), p. 182. Any such vehicle so operated on the highway must carry the registration and the special permit required by § 46.1-43 and § 46.1-343, respectively, which shall be open to inspection by any police officer.

I know of no law which abrogates the foregoing statutory requirements and accordingly, I shall answer your specific question in the negative.

MOTOR VEHICLES—Forfeiture—Not defeated where one of two party owners has actual knowledge of illegal use.

CIVIL PROCEDURE—Forfeiture—Motor vehicles—Application where one of two party owners has knowledge of illegal use.

July 1, 1965

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth's Attorney for the City of Hampton

This is in reply to your letter of June 10, 1965, which reads, in part, as follows:

"I request your opinion as to Title 46.1-351.2, paragraph E, which in part states '... if it shall appear to the satisfaction of the court that such claimant, if he claims to be the owner, was the actual bona fide owner of the conveyance or vehicle at the time of the seizure, that he was ignorant of such illegal use thereof, and that such illegal use was without his connivance or consent, express or implied, and that such innocent owner has perfected his title to the conveyance or vehicle, if it be a motor vehicle ... the court shall relieve the conveyance or vehicle from forfeiture and restore it to its innocent owner. . . .'.

"Specifically, under the foregoing section, would the court have the right to order the vehicle sold if it is determined the vehicle is owned by two parties, one of whom is innocent and the other has knowledge of its illegal use? Secondly, would the court have the right to sell the vehicle in the event the motor vehicle is owned by two parties with the right of survivorship, if it is determined that one of the owners is innocent and the other owner has knowledge of the illegal use of the motor vehicle?"

The quoted portion of § 46.1-351.2 contemplates a showing satisfactory to the court that the actual bona fide owner of the vehicle was ignorant of the illegal use. The motor vehicle laws, by Chapter 3 of Title 46.1, Code of Virginia
(1950), as amended, make it clear that ownership follows title. A motor vehicle is one unit and must be conveyed as a whole. It is not subject to division into separate portions. Under the laws of this State there may be only one valid title for any one motor vehicle at any given time. Before operating the motor vehicle the owner is required to obtain registration and a certificate of title. If the motor vehicle is titled in the name of two parties, both such parties together comprise the bona fide owner.

The purpose of §§ 46.1-351.1 and 46.1-351.2 is to restrict the operation of motor vehicles to lawful operation. While such statutes are to be strictly construed, the intent and purpose of the statutes must be carried out. It is well settled that the forfeiture proceedings constitute an action in rem against the vehicle rather than an action in personam. Insofar as third parties are concerned, the two parties registered as owner are entitled to the benefits of the vehicle and contrariwise they are liable for damages resulting from the use of the vehicle to the same extent as would be true if ownership rested in one person.

The statutes concerned make no special provision for instances of vehicles titled in more than one name. Neither do I find any case on the point raised by your questions. In light of the considerations herein expressed, however, I am of the opinion that knowledge of one party is imputed to the other under the stated circumstances, and where one such party has knowledge of the illegal use of the vehicle the court is within its rights to order the vehicle sold under § 46.1-351.2. Any other view would defeat the purpose of the statute and, in my estimation, would be contrary to public policy. I see no basis for an opposite conclusion where the vehicle is owned by two parties with the right of survivorship and one such party has knowledge of the illegal use, and, accordingly, I shall answer both of your questions in the affirmative.

MOTOR VEHICLES—Forfeiture Proceedings—Payment of storage when vehicle returned to innocent owner.

September 17, 1965

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

This is in reply to your letter of September 14, 1965, which I quote as follows:

"In a proceeding to forfeit a motor vehicle under the above captioned law, it was held that the owner of the vehicle was ignorant of such illegal use and the vehicle was ordered to be turned over to her. This motor vehicle had been stored for nearly three months at a garage and the storage bill was very substantial.

"Under the provisions of 46.1-351.2 (e) the law provides that the vehicle be restored to its innocent owner and the costs of the proceedings will be paid by the Commonwealth. My question is, can the garage man be compelled to deliver this car to the innocent owner before he is compensated for the storage?

"Should the garage owner be compelled to turn the vehicle over to the innocent owner without compensation, what provisions of the law would provide for his compensation by the Commonwealth?

"I would also like to know whether or not the garage owner or the innocent owner of the vehicle would have civil recourse against the illegal user for storage or any money paid for the storage, as the case may be."

In the situation you describe, the applicable words of paragraph (e) of § 46.1-351.2, Code of Virginia (1950), as amended, are that "the court shall relieve
the conveyance or vehicle from forfeiture and restore it to its innocent owner, and the costs of the proceedings shall be paid by the Commonwealth as now provided by law." In such event there is no obligation on the owner of the vehicle to a garage owner who stored the vehicle at the request of the Commonwealth and, in my opinion, the vehicle must be surrendered by the garage owner, in order that the court may restore it to its innocent owner upon relieving it from forfeiture, pursuant to the mandate of the statute. The garage owner may render his bill to the Commonwealth for reasonable storage charges which shall be included among the costs of the proceedings as provided by law. My answer to this question renders unnecessary consideration of the question as to recourse of a garage owner or innocent owner against the illegal user for storage costs and I shall reserve comment in this regard.

MOTOR VEHICLES—Forfeiture Procedure Under ABC Laws—When failure to notify lienor invalidates.

May 19, 1966

HONORABLE WILLIAM V. RAWLINGS
Member, Senate of Virginia

This is in reply to your letter of May 9, 1966, which I quote in part, as follows:

"Recently, a local Bank held a lien on an automobile to secure a loan made to the owner. Sometime ago, the owner was apprehended for the illegal transportation of alcoholic beverages. The automobile was sold prior to the trial of the owner and driver and was sold without any notification to the Bank, which held the lien.

"I would appreciate your opinion as to whether the automobile could legally be sold prior to the trial and conviction of the driver and second, whether the sale is valid and the purchaser has a valid title in view of the fact the lien holder had no notice what-so-ever of the sale."

In the case of Ives v. Commonwealth, 182 Va. 17, the Supreme Court of Appeals denominated the forfeiture proceedings held under § 4-56, Code of Virginia (1950), as amended, because of a violation of the Alcoholic Beverage Control Act, a proceeding in rem rather than in personam, and a civil action against an automobile and not a criminal action against a person. In regard to the first question, in interpreting § 46.1-351.2, which is modeled after § 4-56, this office has previously held that it is not necessary to hold the forfeiture proceedings in abeyance pending a finding of guilt or innocence against the accused operator in the criminal proceeding, although good practice may dictate otherwise. Consistent with this view, I am of the opinion that the automobile could legally be sold prior to the criminal trial and conviction of the driver, if the proper proceedings were brought against the vehicle.

Before a forfeiture may be had, all persons interested in the seized property must be made parties defendant to the information filed by the Commonwealth and afforded an opportunity to contest the right of forfeiture. See, McNelis v. Commonwealth, 171 Va. 471. Section 4-53, Code of Virginia (1950), as amended, provides that in respect to contraband articles subject to forfeiture, the proceedings for the confiscation of motor vehicles used in violation of the Alcoholic Beverage Control laws shall be in accordance with § 4-56. Paragraph (d) of the latter section states, in part, as follows:

"The owner of and all persons in any manner then indebted or liable for the purchase price of the property, and any person having a lien thereon, if they be known to the attorney who files the information,
shall be made parties defendant thereto, and shall be served with the notice hereinafter provided for, in the manner provided by law for serving a notice, at least ten days before the day therein specified for the hearing on the information, if they be residents of this State; . . . ."

In regard to your second question, the facts do not disclose whether or not the local bank had its lien properly recorded with the Division of Motor Vehicles so that it was shown on the face of the motor vehicle title certificate, as provided by law. In this relation, § 19.1-366 states that: "Unless otherwise specifically provided by law, no forfeiture shall extinguish the rights of any person without knowledge of the illegal use of such property who is the lawful owner or who has a lien on the same which has been perfected in the manner provided by law." Assuming that it was so shown according to law, the quoted portion of paragraph (d) of § 4-56 would require that the bank holding the lien be notified and made a party defendant to the forfeiture proceedings. Failure to comply with the statute in this respect, in my opinion, would render both the sale and the purchaser's title invalid as against an innocent lien holder.

MOTOR VEHICLES—Forfeiture—Release of vehicle to lienor must be in accordance with statute.

CIVIL PROCEDURE—Forfeiture—Release of vehicle to lienor must be in accordance with statute.

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

July 9, 1965

This is in reply to your letter of July 1, 1965, in regard to §§ 46.1-351.1 and 46.1-351.2, Code of Virginia (1950), as amended, in which you state a situation and request my opinion relative thereto, as follows:

"My office and the other offices of Commonwealth Attorneys in this State are constantly running into the situation wherein a seized vehicle has a lien on it equivalent to or exceeding the value of the vehicle. Under such circumstances no financial gain can be attained by the Commonwealth and in addition the time of the Court and its officials are being used in hearing these matters. I would like very much to have your opinion as to whether these matters should be prosecuted or released to the lien holder in those cases where the lien is equivalent to the value or in excess of the value of the vehicle seized."

The requirements for proceedings concerning vehicles seized pursuant to § 46.1-351.1, as you know, are set forth in § 46.1-351.2. The requisites for the release of a seized vehicle to a lienor are included in the latter section, under paragraph (f), the pertinent part of which reads as follows:

"If any such claimant be a lienor, and if it shall appear to the satisfaction of the court . . . that such lienor was ignorant of the fact that such conveyance or vehicle was being used for illegal purposes, when it was so seized, that such illegal use was without such lienor's connivance or consent, express or implied, and that he held a bona fide lien on such property and had perfected the same in the manner prescribed by law, prior to such seizure (if such conveyance or vehicle be an automobile the memorandum of lien on the certificate of title issued by the Commissioner of the Division of Motor Vehicles on the automobile
shall make any other recordation of the same unnecessary), the court shall, by an order entered of record establish the lien, upon satisfactory proof of the amount thereof; and if, in the same proceeding, it shall be determined that the owner of the seized property was himself in possession of the same, at the time it was seized, and that such illegal use was with his knowledge or consent, the forfeiture herebefore in this section declared, shall become final as to any and all interest and equity which such owner, or any other person so illegally using the same, may have in such seized property, which forfeiture shall be entered of record. In the last mentioned event, if the lien established is equal to or more than the value of the conveyance or vehicle, such conveyance or vehicle shall be delivered to the lienor, and the costs of the proceedings shall be paid by the Commonwealth as now provided by law; if the lien is less than the value of the conveyance or vehicle, the lienor may have the conveyance or vehicle delivered to him upon the payment of the difference. Should the lienor not demand delivery as aforesaid, an order shall be made for the sale of the property by the sheriff of the county, or sergeant of the city, in the manner prescribed by law, out of the proceeds of which sale shall be paid, first, the lien, and second, the costs; and the residue, if any, shall be paid into the Literary Fund.

From the language of this section it is clear that a vehicle is to be turned over to a lienor only when such lienor is the claimant and is ignorant of the illegal use of the vehicle and such illegal use was with the knowledge or consent of the owner. If these conditions are met and the lien established is equal to or more than the value of the vehicle, such vehicle shall be delivered to the lienor; if the value of the vehicle exceeds the lien, the vehicle may be delivered to such lienor upon the payment of the difference. In instances in which the lienor does not demand delivery of the vehicle, as aforesaid, an order shall be made for the sale of the property.

While it is understandable that the problem to which you refer may have been the subject of rather widespread concern, the remedy appears to be a legislative matter. In my opinion, the fact that the proceedings may result in no financial gain to the Commonwealth, or, may take additional time of the court and its officials, does not act to authorize a dispensing with the prosecution or a release of the vehicle to a lienor, except in accordance with the specifications of the statute.

MOTOR VEHICLES—Forfeiture Under § 46.1-351.2—Construing statute.

CIVIL PROCEDURE—Forfeiture Proceedings—Burden on owner of motor vehicle to establish innocence.

HONORABLE W. B. KEELING
Commonwealth's Attorney for Charlotte County

November 23, 1965

This is in reply to your letter of November 10, 1965, which I quote, as follows:

"I shall appreciate your opinion as to whether Section 46.1-351.1 is being violated by the facts described below:

"The owner of a motor vehicle does not have a driver's license and does not attempt to drive, but instead relies upon a friend to do the driving for her. On this occasion the owner gave consent to friend to drive other persons to their homes after which the friend gave con-
sent to a third party to drive the vehicle. The friend gave the consent knowing that the third party had had his driving permit revoked. Third party was arrested for driving after his permit had been revoked and the vehicle seized. On trial of the Information filed by the Commonwealth Attorney, defendant, in seeking to have vehicle restored to her, testified that she allowed the friend to drive as indicated above; did not authorize friend to turn vehicle over to third party; had no knowledge it was being used by third party; that such illegal use was without her connivance or consent, express or implied; yet admits that vehicle at the time of seizure was being operated under conditions that the operator was, or should be, convicted as provided in Section 46.1-350 or 46.1-351.

"First: Where owner of vehicle gives consent to second party and that party in turn gives consent to a third party, said second party knowing at the time that third party has had his driver's permit revoked, does the consent of the second party constitute consent of the owner to make out implied consent under the meaning of Section 46.1-351.2 (c) on the grounds of the agency relationship involved? That is, is the defendant bound by the act of the second party under the provisions of the criminal statute involved.

"Second: Where the evidence establishes and it is further admitted by the defendant that the vehicle at the time of the seizure was being operated under conditions that the operator was, or should be, convicted as provided in Section 46.1-350 or 46.1-351, is the burden upon the Commonwealth to show beyond a reasonable doubt that the claimant was the owner, that the owner was ignorant of the illegal use to which it was being put, and that such illegal use was without his connivance or consent, express or implied or is the burden upon the claimant to establish this evidence to the satisfaction of the jury, or court, trying the case under the provisions of Section 46.1-351.2 (c) which requires that 'such defendant shall set forth fully any reason or cause which he may have to show against the forfeiture of the property.'"

In connection with your first question, your reference to "Section 46.1-351.2 (c)," obviously, was intended to be § 46.1-351.2, paragraph (e), Code of Virginia (1950), as amended, the pertinent part of which is as follows:

"* * * if it be admitted by the claimant that the conveyance or vehicle at the time of the seizure was being operated under conditions that the operator was, or should be, convicted as provided in §§ 46.1-350 or 46.1-351; nevertheless, if it shall appear to the satisfaction of the court that such claimant, if he claims to be the owner, was the actual bona fide owner of the conveyance or vehicle at the time of the seizure, that he was ignorant of such illegal use thereof, and that such illegal use was without his connivance or consent, express or implied, * * * the court shall relieve the conveyance or vehicle from forfeiture and restore it to its innocent owner * * *"

The facts show that the owner relies upon a friend to drive for her. On one occasion, the friend permitted a third party to drive without the authorization, knowledge, connivance or consent of the owner. There is nothing to establish agency between the owner and the third party, either by direct authorization or by course of action. The statute should be strictly construed in this respect for the protection of the innocent. In my opinion, the defendant owner is not bound by the act of the second party who consented to the illegal use without the knowledge or consent of the owner, express or implied. It follows that the consent of the second party is not consent of the owner within the meaning of
the statute and, pursuant thereto, the vehicle should be restored to its innocent owner.

In regard to your second question, the burden is not upon the Commonwealth but upon the claimant to show that such claimant is the owner, that the owner was ignorant of the illegal use and that such illegal use was without his connivance or consent, express or implied. See, Bandy v. Commonwealth, 185 Va. 1044. There, the Court said that in a proceeding for the forfeiture of a vehicle, for a violation of the ABC laws, the burden of proof is upon the claimant. Forfeiture is the rule and release therefrom is the exception. The statute, § 46.1-351.2, with which we are concerned here, is patterned directly after § 4-56, former § 4675 (38a), under consideration in that case.

MOTOR VEHICLES—Inspection Sticker—Owner or operator may be held responsible.

MOTOR VEHICLES—Improper Equipment—Owner held responsible.

CRIMINAL PROCEDURE—Separate Charges on Traffic Ticket.

March 25, 1966

HONORABLE RUFUS V. McCOY, Sr.
Member, House of Delegates

This is in reply to your letter of March 21, 1966, in which you ask my opinion on several questions relative to certain assumed facts. I shall quote those facts and quote and consider the related questions separately and in the order presented, as follows:

"I will use myself as an example. Supposing I let my inspection sticker expire. I started hauling a load of coal to a coal dock, another man wanted to drive the truck on this trip. We had four hundred feet of state highway to travel. On this highway a state trooper, stopped the truck, gave me a ticket not the man who was driving the truck. Someone is responsible for violation of the law."

Number 1: Who is responsible?

The laws pertaining to the requirements for the inspection of motor vehicles, trailers and semitrailers are found in Article 10, Chapter 4 of Title 46.1, Code of Virginia (1950), as amended. Thereunder, § 46.1-315 authorizes the Superintendent of the Department of State Police, by proclamation of the Governor or otherwise, to compel the owner or operator of any motor vehicle, trailer or semitrailer operated upon the highways of this Commonwealth to submit such vehicle to an official inspection station for inspection. The statute further states, in part, "any such owner or operator who fails to submit a motor vehicle, trailer or semitrailer operated upon the highways of this State to such inspection . . . shall be guilty of a misdemeanor." While either the owner or operator may be guilty of a violation under the quoted language, I am of the opinion that you, as owner, would be responsible under the given facts.

Number 2. Could they give me a ticket and fine me for failing to have a sticker?

Yes. Your failure to procure inspection and the subsequent operation of your vehicle upon the highway with expired sticker would subject you to this law.

Number 3: Could they fine me for improper lights?
Yes. Under § 46.1-259, every vehicle operated or moved upon a highway within this State shall at all times be equipped with the lights required in Article 7, Chapter 4 of Title 46.1, Code of Virginia (1950), as amended. The fact that the inspection law has been violated by no means vitiates the laws pertaining to specific equipment requirements.

Number 4: Could they fine me for a bad muffler?

Yes. Under Article 8 of the chapter and title previously cited herein, § 46.1-301 states that no owner of a motor vehicle shall permit or allow the operation of any owned vehicle upon the highway unless such vehicle is equipped with proper exhaust system "in good working order and in constant operation to prevent excessive or unusual noise, annoying smoke and escape of excessive gas, steam or oil."

Number 5: Can these separate charges be made on one traffic check and a fine assessed on each of these charges separately?

Yes. In my opinion there is no reason why a person may not be found guilty under proper evidence and a fine assessed under each of these charges. I know of no law requiring dismissal of the other of the several named charges upon conviction of one of such charges.

MOTOR VEHICLES—Interpreting § 46.1-449 in Light of Amended § 46.1-400.

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

May 17, 1966

This is in reply to your letter of May 3, 1966, which I quote, in part, as follows:

"By the enactment of Chapter 130, Acts of Assembly of 1966, Section 46.1-400 of the Code was amended so as to provide for the reporting of a motor vehicle accident resulting in total property damage to an apparent extent of $100.00, the present statute providing for reporting as to total property damage to an apparent extent of $50.00. Section 46.1-449 of the Code, providing for suspension of operating license and registration certificates and plates, relates to receipt of a report or notice of an accident with total property damage less than $100.00 and it being indicated in the report or notice that the damage to any one person is $50.00 or more, should the provisions of Section 46.1-449 subject to the limitations of Section 46.1-450 as amended, be applied or should the provisions of Section 46.1-449 not be applied on the basis that the accident was not reportable under the amended provisions of Section 46.1-400?"

The basic statutory requirements for reporting accidents to the Division of Motor Vehicles, exclusive of the additional reports required under § 46.1-176,
REPORT OF THE ATTORNEY GENERAL

Code of Virginia (1950), as amended, generally known as the "hit and run" statute, are found in § 46.1-400, to which you refer. This section states, in part, as follows: "The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of fifty dollars, or more, shall, within five days after the accident, make a written report of it to the Division."

Other reporting statutes, such as § 46.1-401 and § 46.1-402, Code of Virginia (1950), as amended, pertaining to the reports of investigating officers and reports of occupants of the vehicle other than the driver in certain instances, respectively, are dependent upon the criteria of this section. The same may be said of § 46.1-167.4, Code of Virginia (1950), as amended, which refers to certain uninsured motor vehicles involved in a "reportable accident." This is true because none of these statutes, except § 46.1-400, describes the specifications for reporting. They only refer to a "reportable accident" or "an accident of which a report is required." It follows that these other sections apply only when an accident results in death, personal injury or total property damage to an apparent extent of fifty dollars until the effective date of the amendment of § 46.1-400 by Chapter 130, Acts of Assembly of 1966, at which time "one hundred dollars" will replace "fifty dollars" as the minimum total property damage for which a report is required.

Under § 46.1-449, which, like § 46.1-400, is a part of Chapter 6, Title 46.1, Code of Virginia (1950), as amended, which comprises "The Virginia Motor Vehicle Safety Responsibility Act," you are required to take the suspension action therein indicated after receipt "of the report or notice of an accident which has resulted in bodily injury or death, or in damage to the property of any person to the extent of fifty dollars or more." (Emphasis supplied). In my interpretation, the import of the emphasized language is the report or notice required by law. The only report required by law, except as herein previously indicated, is based on fifty dollars minimum with respect to total property damage. Projecting this to the effective date of the amendment of § 46.1-400, no report will then be required by law in the case of property unless such damage totals "one hundred dollars," or more. The Legislature, in raising the minimum total property damage from fifty dollars to one hundred dollars, must have taken into account the increase in repair costs and the corresponding increased burden that reporting such minor accidents would place upon the Division.

In accordance with the foregoing, I am of the opinion that you should apply the provisions of § 46.1-449 only to accidents for which reports are required by law and, after the above cited amendment becomes effective, such provisions should not be taken to include reports of accidents based solely on total property damage of less than one hundred dollars. In any case in which such total property damage is at least one hundred dollars, however, the provisions of § 46.1-449 shall be applied if there is "damage to the property of any person to the extent of fifty dollars or more." Under this interpretation full force and effect are given both statutes.

MOTOR VEHICLES—Liability Insurance—Division not authorized to withdraw and return SR-21 after expiration of statutory period.

February 14, 1966

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This is in reply to your letter of February 2, 1966, in reference to a factual situation in which an accident occurring on December 12, 1964, was reported to the Division on December 16, 1964, for which Insurance Company filed its written notice of insurance, Form SR-21, on December 30, 1964, and by letter
dated March 15 and received in your office March 17, 1965, requested you to remove said filing and return the SR-21. You request my advice in regard to the two following questions, which I quote, except that the names of certain parties involved have been deleted:

“(1) Was the Division of Motor Vehicles on March 17, 1965, or subsequent thereto, authorized to accept Insurance Company’s statement that their policy did not apply to the accident?

“(2) Was the Division of Motor Vehicles on March 17, 1965, authorized to return to Insurance Company a document statutorily provided for under Section 46.1-451?”

As you point out, Insurance Company’s letter requesting withdrawal of the SR-21 was received in your office on a day subsequent to the running of the ninety days allowed by the statute. Under § 46.1-449, Code of Virginia (1950), as amended, not less than thirty or more than ninety days after receipt by him of notice of an accident resulting in bodily injury or death, or damage to the property of any person to the extent of fifty dollars or more, the Commissioner shall suspend the operating license and registration certificates and plates of any person operating any motor vehicle involved. You are not authorized to proceed in this prior to the running of thirty days after the receipt of the notice of the accident nor subsequent to the expiration of ninety days after receipt of such notice. The language used in the statute is mandatory, in my interpretation, and you must take the required action within the time stated and not otherwise.

The requirements imposed upon the insurance carrier by § 46.1-451 are included in paragraph (a) thereof, which I quote as follows:

“(a) Upon receipt of notice of the accident, the insurance carrier or surety company which issued the policy or bond shall determine whether or not the policy or bond was applicable to liability if any there was, as to the named insured and any other person using the automobile, resulting from the accident. Thereupon and not later than sixty days following receipt of notice of the accident, the insurance company or surety company shall cause to be filed with the Commissioner a written notice that the policy or bond was or was not applicable to liability if any there was, as to the named insured and any other person using the automobile, resulting from the accident.”

This section gives the insurance carrier a period in which to determine whether the policy was or was not applicable, but, in either event, the filing with the Commissioner must be made not later than sixty days following receipt of notice of the accident. With the exception of this requirement that the insurance carrier file its written notice that the policy was or was not applicable to liability if any there was, I find no other authorization for filing with the Commissioner any notice accepting or disclaiming liability. In my judgment, these statutory limitations are intended to place a time limit upon the administrative action required of the Commissioner of the Division of Motor Vehicles and insurance carriers in such cases and may not be extended or waived by either. I believe this view is tacitly condoned in the case of Insurance Company v. Sacchio, 204 Va. 769, in which the Court held that filing an SR-21 form with the Division did not, as a matter of law, estop the insurance carrier from denying coverage. The matter of insurance coverage in case of such denial, however, is one for the courts to decide.

Under the given facts, both the sixty days allowed the insurance carrier for filing its written notice with the Commissioner pursuant to § 46.1-451 and the ninety days permitted the Commissioner for issuing any order required under § 46.1-449 had expired when the insurance carrier’s letter of request for with-
drawal of its SR-21 was received in the Division. In answering your first ques-
tion, therefore, it is my opinion that on March 17, 1965, or subsequent thereto
the Division was not authorized to accept Insurance Company's statement that
its policy did not apply to the accident. Likewise, in regard to your second
question, I am not of the opinion that the Division was authorized to return
Insurance Company's SR-21 form, which had been filed as prescribed by
§ 46.1-451.

MOTOR VEHICLES—License Plates—For Hire—Required on trucks used in
business of garbage removal for compensation.

April 8, 1966

HONORABLE LUCAS D. PHILLIPS
Member, House of Delegates

This is in reply to your letter of March 29, 1966, in which you request my
opinion as to whether a constituent of yours is required to have "for hire tags"
or "T tags" under the following facts, which I quote:

"I have a constituent who operates a business known as Tri-County
Refuse Service. He serves Loudoun and adjacent counties and some
of the towns within these counties and he also serves individuals.

"The nature of his service is to remove and dispose of trash and
garbage for the various governmental units and individuals. He has a
contract with the governmental units and individuals to collect and
remove trash from public buildings, business houses and individual
homes for the amount agreed upon between him and the governmental
units and individuals he serves.

"There has been a difference of opinion as to whether he is re-
quired to get 'For Hire Tags' or 'T Tags,' for his trucks, which he
owns, used in collecting and disposing of the trash and garbage. Under
the contracts entered into by my constituent the trash and garbage
becomes his property and he is permitted and required to make
such disposition thereof as he desires."

Under the given facts, the person operating the business receives compensa-
tion for the service of collecting, removing and disposing of trash and garbage
for various governmental units and individuals. He uses his trucks for the purpose
of collecting and disposing of the trash and garbage. So long as motor vehicles are
used for such purposes, it is obvious that a portion of the compensation received is
for such use. Considering the other named elements of the contract under
which the service is performed and the nature of the transaction as a whole,
the fact that the contract provides that the trash and garbage becomes the
property of the person who removes and disposes of it does not appear to
alter the situation. The net result is the acceptance or receipt of compensation
for the services of the motor vehicles.

Under § 46.1-1, Code of Virginia (1950), as amended, I quote paragraph (35)
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' as de-

(Emphasis supplied)
The language employed in the emphasized portion of the quoted paragraph indicates that the term "for rent or for hire" applies whenever compensation is accepted or received for the service of operating a motor vehicle over the highways. The coverage is sufficiently broad to include a service of the nature described in the facts under consideration. I find no applicable exception elsewhere in the statutes which would tend to lead to a different conclusion as to the vehicles so engaged. Accordingly, I am of the opinion that the trucks operated under such circumstances are required to be licensed with "for hire tags."

MOTOR VEHICLES—License Plates—Person employed as teacher for nine months of year required to license vehicle.

February 18, 1966

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

This is in reply to your letter of February 14, 1966, in which you request an opinion from this office in regard to the given facts and question stated, which I quote, as follows:

"A school teacher, teaching at Stanley, Virginia, in Page County, for nine months of the year, owns a home in the State of Maryland, pays personal property and real estate taxes in Maryland, votes in the State of Maryland, returns to her home on each weekend that the weather permits her to, but when the weather is bad she sometimes misses a weekend returning to her home. The question is whether or not she is required to purchase a State of Virginia license for her automobile."

The Reciprocal Agreement to which the States of Maryland and Virginia are parties permits free movement of properly licensed private passenger vehicles between these States. This has not been interpreted as an exemption applying to vehicles owned by persons residing within one of these States while gainfully employed there. Both States have statutory laws which hold that a person who maintains a temporary residence and accepts employment within such State is a resident for the purposes of the motor vehicle laws. In this relation, I invite your attention to paragraph (16) (b) of § 46.1-1, Code of Virginia (1950), as amended, which is 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."

Under the relevant facts the person is gainfully employed in this State as a school teacher for nine months of the year. Assuming that her automobile was used in this State during this employment, it is my opinion that such person is required to purchase Virginia license plates.
MOTOR VEHICLES—Local Licenses—Exemption to non-domiciliary member of armed forces not affected by purchase of Virginia license plates.

May 26, 1966

HONORABLE C. H. DAVIDSON, JR.
Commonwealth’s Attorney for
Rockbridge County

This is in reply to your letter of May 11, 1966, with which you enclosed a copy of an Ordinance adopted by the Rockbridge County Board of Supervisors concerning county license plates for motor vehicles of residents of the County. I quote from your letter, as follows:

“This office has been requested by the Board of Supervisors to seek your opinion as to whether service personnel stationed at VMI, and any other service personnel in Rockbridge County can be required to comply with this Ordinance. The Board of Supervisors has received a letter from service personnel stationed here requesting a refund for purchase of county auto tags. The letter expresses the opinion that your office rendered a decision during April 1966, that automobile license fees levied by counties, cities, and towns could not be imposed on service men temporarily living in county levying the auto license fee. If such service personnel have a Virginia license tag could they still be exempt from having a county license tag?”

Service personnel stationed at VMI or elsewhere in Rockbridge County under military or naval orders have the same rights under the Soldiers’ and Sailors’ Civil Relief Act as persons in other capacities under military or naval orders. I am not of the opinion that license fees levied by counties, cities or towns may be imposed on an automobile owned by a non-domiciliary serviceman residing in any such jurisdiction in compliance with military or naval orders. In this regard, I am enclosing a copy of my letter of April 14, 1966, to the Commonwealth’s Attorney for Essex County, which gives consideration to the interpretation of the Soldiers’ and Sailors’ Civil Relief Act by the United States Supreme Court in the case of California v. Buzard, 15 L. ed. 436, decided January 18, 1966.

In respect to your specific question, I believe such non-domiciliary service personnel are exempt from the payment of a county license fee regardless of whether they register their automobiles in their state of domicile or in the State of Virginia.

MOTOR VEHICLES—Local Licenses—Fee may not be imposed on non-domiciliary member of armed forces.

April 14, 1966

HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth’s Attorney for
Essex County

This is in reply to your letter of March 31, 1966, which I shall quote, as follows:

“For a number of years, I have been a member of the Active Reserves of the United States Air Force, serving with the Office of the Judge Advocate General. On my most recent tour of active duty at the
Pentagon, the case of California v. Buzard, decided on January 18, 1966 by the United States Supreme Court was called to my attention. A copy of this decision is enclosed.

"I learned at that time that the Legal Assistance Officers in the military departments take the position that the Buzard decision constitutes a holding that revenue raising licensing requirements imposed under § 46.1-65 of the Code of Virginia can no longer be asserted against non-domiciliary servicemen stationed in Virginia pursuant to military orders who elect to meet the licensing requirements of this state rather than those of their home states. In this connection, I am aware that footnote 7. in the Buzard case does cite as contra, the case of Whiting v. City of Portsmouth, 202 Va. 609, 118 SE2d 505. I am also aware that part (b) of § 46.1-65 provides that revenue derived from all county, city or town taxes and license fees imposed upon motor vehicles by virtue of this section shall be applied to general county, city or town purposes, or paid into the school fund.

"Essex County requires a $5.00 county license fee on all vehicles whose owners reside in the county. I would indeed be obliged if you would give me your opinion as to whether this charge can legally be imposed on a non-domiciliary serviceman residing in Essex County."

The Buzard case, to which you refer, has been examined in this office recently, especially in relation to questions raised by various legal officers from several branches of the armed services. As you know, the opinion in that case is directed to a decision of the Supreme Court of California which demoninated a "license tax" imposed by that State a revenue tax and not essential to the purpose of registration of motor vehicles as a matter of law. It is my understanding that the tax objected to was a tax on gross value imposed under the California Revenue and Taxation Code, which amounted to approximately one hundred dollars in addition to the flat registration fee imposed under the California Motor Vehicle Code. The United States Supreme Court affirmed the California Supreme Court's reversal of Buzard's conviction in a California lower court, on the grounds that the Soldiers' and Sailors' Civil Relief Act exempted the nonresident serviceman from such California revenue tax. The United States Supreme Court rejected the California Supreme Court's interpretation of the words "required by," as used in the proviso of § 514 (2) (b), however, and stated: "The serviceman who has not registered his car and obtained license plates under the laws ‘of’ his home State, whatever the reason, may be required by the host State to register and license the car under its laws."

The matter of taxes or fees imposed by a political subdivision of any State was not at issue in the Buzard case. The opinion stated, however, that "it would be inconsistent with the broad purposes of § 514 to read subsection (2) (b) as allowing the host State to impose taxes other than 'licenses, fees, or excises' when the 'license, fee, or excise' of the home State is not paid." The footnote reference at the terminus of this statement cited, as contra, the case of Whiting v. City of Portsmouth, 202 Va. 609. Considering this reference to the Whiting case in conjunction with the general tenor of the opinion in the Buzard case, it is clear that a State, or political subdivision thereof, under such interpretation of the Soldiers' and Sailors' Civil Relief Act, is prohibited from imposing a revenue tax against nonresident servicemen. Referring to "the overall purpose of § 514 as well as the words of subsection (2) (b)," the court concluded "that subsection (2) (b) refers only to those taxes which are essential to the functioning of the host State's licensing and registration laws in their application to the motor vehicles of nonresident servicemen."

Considering now the matter of a county, city or town assessing taxes and charging license fees pursuant to § 46.1-65, Code of Virginia (1950), as amended, I am constrained to believe that the primary purpose of such license fees lies not in the registration of motor vehicles but in raising revenue. Since these
are not essential to the functioning of this "State's licensing and registration laws in their application to the motor vehicles of nonresident servicemen," I am of the opinion that the Essex County license fee of five dollars may not be imposed on a non-domiciliary serviceman residing in Essex County in compliance with military or naval orders.

MOTOR VEHICLES—Local Licenses—When affected by Soldiers' and Sailors' Civil Relief Act.

Honorable William J. Hassan
Commonwealth's Attorney for
Arlington County

May 11, 1966

This is in reply to your letter of April 28, 1966, from which I quote the following:

"I have been requested by Colin C. MacPherson, our Treasurer, to obtain your answer to the following questions which are raised in the light of your recent opinion concerning the subject matter which was an opinion dated April 14, 1966, and directed to the Hon. Joseph E. Spruill, Jr., Commonwealth's Attorney for Essex County, Virginia.

"(1) Does this ruling also apply to persons in the public health service, attached to military?

"(2) Does this ruling also apply where the vehicle in jointly owned by the serviceman and another who is not a serviceman?

"(3) Must the serviceman be actually stationed here pursuant to military orders, and if so, would this apply to a serviceman living in Arlington, but stationed nearby in another jurisdiction?

"(4) Does the ruling have any retroactive effect, which might require refunds on tags previously purchased?"

The opinion to which you refer states that the County of Essex may not impose its motor vehicle license fee of five dollars on a non-domiciliary serviceman residing in the county in compliance with military or naval orders. The reason behind this is that the primary purpose of the county license fee is to raise revenue. The United States Supreme Court held, in the Buzard case, that the Soldiers' and Sailors' Civil Relief Act prohibits the host State from imposing a revenue raising tax upon a nonresident serviceman stationed there under military or naval orders.

The Soldiers' and Sailors' Civil Relief Act applies to nonresidents located in this State solely by reason of compliance with military or naval orders. It relates to military personnel so absent from their State of domicile. I find nothing in the Act which would indicate its application to civilian personnel, even though, incidentally, these may be attached to the military. Accordingly, I shall answer question numbered (1) in the negative.

To relieve from taxation a vehicle jointly owned by a person not covered under the Soldiers' and Sailors' Civil Relief Act, in my interpretation, would extend that Act beyond its clearly delineated application to persons absent from their State of residence or domicile solely by reason of compliance with military or naval orders. My reply to question numbered (2), therefore, is also in the negative.
As I read the Soldiers' and Sailors' Civil Relief Act, immunity enures to the serviceman because of his *absence from his State of domicile* under military or naval orders. He shall not be deemed to have acquired a residence or domicile in *any other* state, territory, possession, or political subdivision of any of these, "solely by reason of being so absent." It is not essential that he be stationed in the same county in which his living quarters are located. Many servicemen are stationed at military establishments which are not considered a part of any State or any political subdivision because exclusive jurisdiction is held by the United States. In any such case, and there are many, the servicemen living off post would necessarily be living in a jurisdiction other than that in which actually stationed. In considering question numbered (3), therefore, I am of the opinion that the Act would apply to a non-domiciliary serviceman living in Arlington County but stationed near-by in another jurisdiction.

In respect to question numbered (4), opinions issued by this office are advisory in nature but are not binding on the courts. I am not of the opinion, therefore, that my opinion of April 14, 1966, to which you refer, has the retroactive effect of requiring refunds on fees for county tags previously purchased. I believe this is a matter which should be resolved by the local authorities.

**MOTOR VEHICLES—Must Display Tag or Sticker Issued by State Corporation Commission.**

**November 5, 1965**

**Honorable Harold B. Singleton**
Judge, Amherst County Court

This is in reply to your letter of October 20, 1965, which I quote as follows:

"We have had several cases in this Court in which a person has been charged with failure to display a tag or sticker issued by the State Corporation Commission.
"I am unable to find a statute which requires such a tag or sticker.
"Could this be a regulation which is covered by 56-335 (a), (b), (c), or is it a statute which I have been unable to find?
"I would appreciate your opinion."

The regulations you seek are found in Article 8, Chapter 12 of Title 56, Code of Virginia (1950), as amended. Specifically, with reference to vehicles required to be licensed in Virginia, § 56-304 states, in part, as follows:

"No person shall operate or cause to be operated for compensation on any highway in this State any self-propelled motor vehicle that is required by law to display license plates issued by the Division of Motor Vehicles unless there has been issued by the Commission to the owner or the operator of the vehicle a warrant or an exemption card and a classification plate for each vehicle so operated.

* * * * *

"At all times the classification plate shall be displayed on the vehicle and the warrant or exemption card carried in the vehicle."

Likewise, § 56-304.1 contains the requirements relative to vehicles not required to be licensed in Virginia, as follows:

"No person shall operate or cause to be operated for compensation on any highway in this State any passenger vehicle having seats for more than seven passengers in addition to the driver, or any road
tractor, or any tractor truck, or any truck having more than two axles, that is not required by law to display license plates issued by the Division of Motor Vehicles, unless there has been issued by the Commission to the owner or the operator of the vehicle a registration card and an identification marker for each vehicle so operated. At all times the registration card shall be carried in the vehicle for which it was issued. The marker shall have on it the same number that appears on the registration card and shall at all times be displayed on the vehicle.”

The appropriate penalty statute concerning violations of either of the quoted sections is § 56-304.11, which makes it a misdemeanor for any person to operate or cause to be operated on any highway in Virginia any motor vehicle that does not carry the warrant, exemption card or registration card or does not display the classification plate or identification marker prescribed by the State Corporation Commission under this article. Upon conviction, the punishment shall be by fine of not less than ten dollars nor more than two hundred dollars. Section 56-335, (a), (b), and (c), to which you refer in your question, does not have application since it has reference to violations for which a penalty is not otherwise provided in Chapter 12 of Title 56.

MOTOR VEHICLES—Operating Farm Truck After Driver’s License Revoked—When permissible—When not.

HONORABLE W. B. KEELING
Commonwealth’s Attorney for
Charlotte County

June 3, 1966

This is in reply to your letter of May 20, 1966, in which you state that the County Court has under advisement a case in which a person has been arrested for operating a farm truck on the highway after his license was revoked for “driving under the influence.” You pose two questions, one of which is related to this case and one which is apparently unrelated to the case.

First, you inquire: “If a man is convicted of driving drunk and loses his license or privilege to operate, is he restricted to the operation of a farm tractor on the highway or can he operate a farm truck also?”

This question relates directly to the pending case. It is the policy of this office not to render opinions in regard to cases pending in court. It so happens, however, that I have previously answered a similar, though differently phrased, question in an opinion expressed in my letter of March 10, 1966 to Mr. Edgar Kirk, Justice of the Peace for Lee County, and a copy of that letter is herewith enclosed for your information. As you will observe, the question as to whether § 46.1-352.1, Code of Virginia (1950), as amended, applies to the operation of a farm truck is answered in the negative.

Your second question, which appears unrelated to the pending case, is as follows: “If a man is convicted of two offenses for speeding and loses his license for 60 days is he permitted to operate a farm truck on the public highways?”

As stated in the enclosed opinion, previously herein identified, § 18.1-59, Code of Virginia (1950), as amended, provides that the judgment of conviction for an offense under § 18.1-54 or for a similar offense under any county, city or town ordinance shall, of itself, deprive the person so convicted of the “right to drive or operate any such vehicle, conveyance, engine or train in this State.” This means that a person convicted of “driving drunk” is peremptorily prohibited from driving any motor vehicle in this State regardless of whether or not the
operation of such vehicle requires an operator’s license under the motor vehicle laws. It was necessary, therefore, to enact a law such as § 46.1-352.1 in order to make a specific exception to permit a person so convicted to operate a farm tractor upon the highways, even under the narrow limitations therein stated.

There is no law, comparable to § 18.1-59, which operates independently of the motor vehicle laws to automatically prohibit from driving a person convicted of two offenses of violating the lawful rate of speed. It is true that convictions of a person for two such separate offenses occurring within a twelve-month period require the revocation of the person’s license to drive for a period of sixty days. It is specifically stated in § 46.1-352, however, that: “No person shall be required to obtain an operator’s or chauffeur’s license for the purpose of driving or operating a road roller, road machinery or any farm tractor or farm machinery or vehicle defined in § 46.1-45, temporarily drawn, moved or propelled on the highways.” (Emphasis supplied). By reference to § 46.1-45, it is obvious that this statute includes a farm truck temporarily drawn, moved or propelled on the highways. Accordingly, it is my opinion that a person whose license is revoked because of his convictions of two offenses of speeding may operate a farm truck within the limitations imposed by this statute and, therefore, I shall answer this question in the affirmative.

MOTOR VEHICLES-Operation and Licensing of Farm Tractor, Farm Truck.

March 10, 1966

HONORABLE EDGAR KIRK
Justice of the Peace
for Lee County

This is in reply to your letter of February 25, 1966, in which you request my opinion on several questions, which I shall quote and consider separately and in the order presented, as follows:

“1. Would Section 46.1-352.1 of the Motor Vehicle Code apply to the operation of a farm truck as well as a farm tractor?”

No. It is expressly stated in § 18.1-59, Code of Virginia (1950), as amended, that a conviction under § 18.1-54 or for a similar offense under any county, city or town ordinance shall of itself operate to deprive the person so convicted or found not innocent of the right to drive or operate any such vehicle, conveyance, engine or train in this State for the periods therein stated. Section 46.1-352.1, to which you refer, provides that such conviction for driving under the influence of intoxicants or self-administered drugs “shall not operate to prevent or prohibit such person from operating a farm tractor upon the highways when it is necessary to move such tractor from one tract of land used for agricultural purposes to another tract of land used for the same purposes, provided that the distance between the said tracts of land shall not exceed five miles.” This section specifically exempts the operation of a farm tractor from the automatic processes required under § 18.1-59. In my opinion, therefore, the section must be strictly construed and would not include a farm truck.

“2. Would Section 46.1-45 of the Motor Vehicle Code apply to a farm truck or farm tractor being used to transport tobacco from the farm to a warehouse for the purpose of selling such tobacco? Would it apply to transporting animals to a livestock market for sale?”

Section 46.1-45, Code of Virginia (1950), as amended, like § 46.1-352.1 con-
considered in your first question, must be strictly construed against the person claiming immunity thereunder, although, for different reasons. The basis for such strict construction of § 46.1-45 is that it offers an exemption from the license tax requirements of § 46.1-41 and related statutes. Under § 46.1-45, one finds a number of specific exemptions from the requirement of obtaining annual registration and license plates. I do not find among such exemptions, however, the transporting of tobacco from the farm to a warehouse for the sale of the tobacco. Neither do I find among such exemptions the transporting of animals to a livestock market for sale. Accordingly, I am of the opinion that § 46.1-45 does not apply to either of such activities and I shall answer these questions in the negative.

"3. Under Section 46.1-160 of the Motor Vehicle Code, if a vehicle licensed for 17,000 pounds gross weight displaying license plates entitling it to be operated exclusively not for hire is operated for hire, would it be in violation of Section 46.1-160 after reading the definition of For Hire in Section 46.1-1 (35)?"

You have reference to § 46.1-160, which is as follows:

"If a vehicle of over 18,000 pounds gross weight displaying license plates entitling it to be operated exclusively not for hire is operated for hire, the licensee thereof shall be guilty of a misdemeanor and shall be fined an amount not to exceed one hundred dollars, which penalty shall be in addition to the penalty prescribed by § 46.1-159."

Section 46.1-160 applies only to vehicles over 18,000 pounds gross weight and, hence, a vehicle of 17,000 pounds of gross weight would not be in violation of this statute even though operated for hire while licensed exclusively not for hire. The section applies only where the for hire fees are greater. The amount of registration and license fees required to operate private carriers or for hire carriers is the same up to and including 18,000 pounds gross weight. Under the provisions of § 46.1-99, however, the Division of Motor Vehicles is required to issue appropriately designated license plates to applicants who operate as carriers for rent or for hire. Paragraph (c) thereof states that: "No vehicles shall be operated upon the highways of this State without displaying the license plates required by this chapter." Further, I might add that vehicles operated for compensation are subject to regulation by the State Corporation Commission, regardless of gross weight classification, and, in that connection, are subject to the requirements of § 56-304, and related laws.

MOTOR VEHICLES—Operation for Hire—Presumption created by transportation of property belonging to another.

June 15, 1966

HONORABLE JOSEPH A. MASSIE, JR.
Commonwealth's Attorney for
Frederick County

This is in reply to your letter of June 10, 1966, in which you request my opinion in regard to the factual circumstances and relative question, which I quote, as follows:

"A operates a can manufacturing plant. Unusable scraps of metal are placed in a motor vehicle trailer parked in a convenient place adjoining the manufacturing plant, and the scrap metal is placed therein. When the trailer is filled, it is hauled away to the scrap yard of B, who
owns the motor vehicle trailer, where the metal is compressed, bound and redelivered to A, who pays a lump-sum rate per trailer load for the services performed by B.

"QUESTION: Does the hauling of the metal by B in his own trailer, under the above circumstances, come within the presumption created by Section 56-275.1 of the Code of Virginia and thus be a violation of the statute?"

Motor vehicles operated for compensation are subject to certain license requirements under Title 46.1, Code of Virginia (1950), as amended, as well as certain requirements for regulation by the State Corporation Commission under Title 56, Code of Virginia (1950), as amended. Under the former, it is stated in § 46.1-1, paragraph (35), that the terms operation or use for rent or for hire "mean any owner or operator of any motor vehicle, trailer or semitrailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly; but such terms shall not be construed to mean a 'truck lessor' as defined herein." (Emphasis supplied). Under the same title, it is further provided, in § 46.1-99, paragraph (b), that the Division shall issue appropriately designated license plates for property-carrying vehicles to applicants who operate as carriers for rent or for hire. Paragraph (c), under the same section, states that: "No vehicles shall be operated upon the highways of this State without displaying the license plates required by this chapter."

The pertinent part of § 56-275.1, to which you refer, is as follows:

"The presence on a motor vehicle, trailer or semitrailer of property as to which the owner or operator of such motor vehicle, trailer or semitrailer is unable to show evidence of ownership or of having produced the same, or that he has sold the same in the regular course of his usual business, shall be prima facie evidence that he is transporting such property for compensation."

The given facts show that B owns the motor vehicle and is compensated for the named services by A, who owns the scrap metal, at a "lump-sum rate per trailer load." Obviously, a portion of this compensation represents a charge for the transportation of the scrap metal owned by A from his plant to B's scrap yard, for processing, and back to the plant. Considering these facts in light of § 46.1-1 (35) and § 56-275.1, as previously herein quoted, in part, I am of the opinion that such transportation comes within the presumption created by the latter. Assuming, therefore, that B has not obtained the "for hire" license plates and registration required by law for his vehicle, I shall answer your question in the affirmative.

MOTOR VEHICLES—Operator's License—Minor's failure to have revalidated.

HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth's Attorney for Essex County

This is in reply to your letter of September 9, 1965, in which you request my opinion concerning the proper interpretation of § 46.1-357, Code of Virginia (1950), as amended, in regard to the following facts and question, which I quote:

"He received a license in June, 1962 at the age of sixteen. Upon reaching the age of eighteen in June, 1964, he did not have his
license revalidated as required by law. In May, 1965 he was involved in an accident and was charged with having no operator's license. Upon presenting himself at the Division of Motor Vehicles in Richmond requesting that his permit be revalidated (after the above charge was made) he was advised that it was not necessary for him to have the permit revalidated after reaching the age of eighteen and that he had a valid permit.

"The question, therefore is this: if a youthful driver who obtains a permit before the age of eighteen thereafter fails to have it revalidated as the statute requires, will the permit be valid once such driver reaches the age of eighteen years?"

The pertinent paragraph of § 46.1-357 is as follows:

"(2) Each operator's license issued pursuant to the provisions of paragraph (1) hereof shall contain thereon a suitable legend that such license must be revalidated by the Division of Motor Vehicles within twelve months from the date of original issuance and each succeeding twelve-month period thereafter until the holder thereof attains the age of eighteen years, unless such license is sooner revoked, suspended or cancelled in accordance with other provisions of law. The absence of such evidence of revalidation appearing on such license shall be considered sufficient to prohibit and make unlawful the operation of any motor vehicle in this State by the licensee if such operation occurs after twelve months from the date of issue or last revalidation stamp appearing on such license. The holder of each such operator's license issued pursuant to the provisions of paragraph (1) hereof must apply in person to any point designated by the Division for the examination of operator's or chauffeur's licenses and must be accompanied by a parent, spouse or guardian from whom the original consent for the issuance of such license was obtained and such consent shall be reaffirmed by such person at the time of appearance; provided, however, the Division may waive this requirement for good cause shown. The Division, upon receipt of application for revalidation, shall examine the driving record of each such applicant and may revalidate the license or take such other action as may be appropriate in accordance with any other provision of law."

Paragraph (1) of this statute, to which the quoted portion refers, applies to "a minor of the age of fifteen years and under the age of eighteen years." Any person within such age group is prohibited from driving during any period in which his license does not show compliance with the law in regard to proper revalidation. The absence of the required evidence of revalidation after the expiration of twelve months from the date of issuance or last revalidation stamp "shall be considered sufficient to prohibit and make unlawful the operation of any motor vehicle in this State by the licensee." It is significant, however, that the requirement for license revalidation obtains "until the holder thereof attains the age of eighteen years." After the holder of a license attains the age of eighteen years the requirement for revalidation no longer exists.

In consideration of the foregoing, in my opinion, the fact that a person failed to have his license revalidated prior to attaining the age of eighteen years does not act to suspend or revoke the license after he has attained such age. Accordingly, I shall answer your question in the affirmative.
MOTOR VEHICLES—Operator's License—Restrictions applicable to licensee may be imposed.

October 1, 1965

HONORABLE A. DOW OWENS
Commonwealth's Attorney for Pulaski County

This is in reply to your letter of September 24, 1965, which I quote as follows:

"I have recently had an occasion to try a defendant charged with the violation of Section 46.1-378 for failing to wear his glasses while driving a vehicle even though the restrictions placed upon his operator's license by the Division of Motor Vehicles required him to wear the glasses while operating a vehicle.

"It would appear that the original act gave the Division of Motor Vehicles the right to place such restrictions upon licenses as the Division may deem to be appropriate 'to assure the safe operation of a motor vehicle by the licensee.' However, the amendment enacted in 1960 deleted the words, 'to be appropriate to assure the safe operation of a motor vehicle by the licensee,' and thus apparently removed any standard to be applied by the Division of Motor Vehicles in imposing restrictions on a licensee.

"Our local Court is concerned that the removal of this standard would raise some serious constitutional question in that the legislature has delegated a general authority to the Division of Motor Vehicles without setting up or establishing any standard for the administration of the same.

"Your comments and thoughts in this respect would be greatly appreciated."

The portion of § 46.1-378, Code of Virginia (1950), as amended, to which you have reference, is as follows:

"The Division upon issuing an operator's or chauffeur's license may, whenever good cause appears, impose restrictions suitable to the licensee's driving ability with respect to the type of, or special mechanical control devices required on, a motor vehicle which the licensee may operate or such other restrictions applicable to the licensee as the Division may determine." (Emphasis supplied).

As I interpret this sentence, the authority of the Division is qualified by the emphasized words. This section authorizes the Division to restrict a licensee's driving to motor vehicles equipped with special mechanical control or to impose such other restrictions as it may determine to be applicable to the licensee. The use of the words 'such other restrictions' seem to limit other restrictions to those which are "suitable to the licensee's driving ability." Good cause must appear and the restriction must be applicable to the licensee. In other words, a driver does not have to be perfect physically to be issued a license but such license may be restricted to the use of compensatory equipment applicable to the licensee's particular deficiency. For instance, where the Division finds that the visual acuity of an applicant is deficient, any license issued to such person could and should be restricted to the use of corrective glasses.

This section should not be considered alone, but in conjunction with other related sections comprising the Virginia Operators' and Chauffeurs' License Act. While this section authorizes restrictions on particular licensees, its intent must be related to § 46.1-369, Code of Virginia (1950), as amended, which requires that the Division of Motor Vehicles shall examine every applicant for operator's or chauffeur's license before issuing any such license, with certain exceptions not here applicable. The latter section requires that "the Division shall examine
the applicant as to his physical and mental qualifications and his ability to operate a motor vehicle in such manner as not to jeopardize the safety of persons or property.” It further contains the restriction that “such examination shall not include investigation of any facts other than those directly pertaining to the ability of the applicant to operate a motor vehicle with safety, or other than those facts declared to be prerequisite to the issuance of a license under this chapter.” Thus, it will be seen that the last named section limits any examination made by the Division to facts directly pertaining to the ability of the applicant to operate a motor vehicle with safety and those facts otherwise declared by Chapter 5 of Title 46.1, Code of Virginia (1950), as amended, the Virginia Operators’ and Chauffeurs’ License Act, to be prerequisite to the issuance of a license. The restrictions placed on a licensee under § 46.1-378, by the terms of that section, must be applicable to such licensee. Such applicability is determined from the examination made under the limitations imposed by § 46.1-369, which limitations exclude irrelevant facts.

Considering the foregoing, while the concern expressed for the language of the statute, as it now reads, is understandable, I do not interpret it as such grant of authority as would render it unconstitutional.

MOTOR VEHICLES—Operator’s License—Revocation—Date effective.

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

July 12, 1965

This is in reply to your letter of July 2, 1965, requesting my opinion regarding the effective date of revocation of an operator’s license after a “driving under the influence conviction.” In this connection the related facts and the question which you pose read as follows:

“A man was convicted of a second offense of ‘driving under the influence’ in the Circuit Court of Chesterfield County on March 26, 1965, and his operator’s license was taken by the court. On June 17, 1965 the Division of Motor Vehicles entered an Order of Revocation and Suspension under the provisions of Sections 46.1-421 and 46.1-418 of the 1950 Code of Virginia, as amended, revoking his operator’s license for three years.

“On June 12, 1965 this person was charged with driving after his operator’s license had been revoked, and his automobile was seized. The certified copy of his driving record furnished by the Division of Motor Vehicles indicates that his operator’s license was revoked as of June 17, 1965.

“Since the Order of Revocation by the Division of Motor Vehicles is dated after the date of the arrest and seizure of the vehicle, would the effective date of the revocation by the date the order was issued by the Division of Motor Vehicles or the date of the conviction, under Section 18.1-59?”

Under the provisions of § 46.1-421, the Commissioner, Division of Motor Vehicles, is required to forthwith revoke the operator’s or chauffeur’s license of any person upon receiving a second conviction of such person for a violation of the provisions of § 18.1-54, Code of Virginia (1950), as amended, or any county, city or town ordinance similar thereto. Likewise, § 46.1-418 requires him to suspend the registration certificates and plates issued for any motor vehicle registered in the name of the owner so convicted. The date the order is issued under §§ 46.1-421 and 46.1-418, however, does not determine the effective date of revocation.
Your attention is invited to § 18.1-59, especially the part which reads as follows:

“The judgment of conviction, or finding of not innocent in the case of a juvenile, . . . shall of itself operate to deprive the person so convicted or found not innocent of the right to drive or operate . . . for a period of three years from the date of the judgment of conviction or finding of not innocent thereof . . . .”

It will be noted that a person convicted for an offense under § 18.1-54 or for a similar offense under any county, city, or town ordinance, thereby loses his right to drive or operate a motor vehicle in this State as an incident of such conviction. No additional action on the part of the court or the Division of Motor Vehicles, or otherwise, is necessary to deprive such person of the right to drive. The effective date of the revocation upon any such conviction is the date of the conviction itself, as the statute is self-operative. Accordingly, it is my opinion that, under the given facts, the effective date of revocation was March 26, 1965, the date the person was convicted, such revocation having been effected by operation of law pursuant to § 18.1-59. As the revocation runs for a period of three years from that date, it was in full force and effect on June 12, 1965, the date the automobile was seized.

MOTOR VEHICLES—Operator's License—When required for non-domiciliary member of armed forces.

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth's Attorney for the
City of Hampton

June 8, 1966

This is in reply to your letter of May 25, 1966, in which you present certain circumstances and pose two questions, which I quote, as follows:

“A member of the military, who is domiciled in a state other than Virginia, pursuant to orders is stationed in Virginia. While stationed in Virginia he secures Virginia registration for his motor vehicle. This is only for the sake of convenience, and not because he plans to make Virginia his domicile. He has a valid motor vehicle operator's license from his state of domicile. Is it necessary for him to secure a Virginia motor vehicle operator's license?

“Would your answer to the above question change in the event he had a motor vehicle operator's license issued by a state other than his state of domicile?”

Before making a determination as to the application of Virginia law, it is necessary to determine what is meant by the phrase “stationed in Virginia.” In instances in which such non-domiciliary serviceman is residing on a military reservation over which the United States has assumed exclusive jurisdiction, the securing of Virginia registration for his vehicle does not affect his privilege to operate in Virginia on an operator's or chauffeur's license issued him under the laws of his home state. Such military reservation is not considered an address within this State and the nonresident member of the military residing thereon is entitled to the same reciprocity as any nonresident is granted under § 46.1-355, Code of Virginia (1950), as amended.

Assuming that the non-domiciliary member of the armed forces lives “off post” within this State and registers a motor vehicle, listing an address within
this State in the application for registration, paragraph (16) (c) of § 46.1-1 re-
quires that he “shall be deemed a resident for the purposes of this title.” Any
person so deemed to be a resident for the purposes of Title 46.1 is prohibited,
by § 46.1-349 thereof, from driving any motor vehicle on any highway of this
State until such person has procured an operator’s or chauffeur’s license ac-
cording to law. Under these conditions, I shall answer your first question
in the affirmative.

By the terms of § 46.1-355, previously cited herein, reciprocity as to the
use of an operator’s or chauffeur’s license issued by another state or country
obtains when the non-resident is properly licensed “in his home state or coun-
try.” I know of no law which permits a nonresident to drive on the highways
of Virginia by virtue of an operator’s or chauffeur’s license issued by some
foreign state or country other than his home state or country. I interpret the
words “home state or country,” in this context, to mean state or country of
domicile and in regard to your second question, therefore, my answer would be
the same under such conditions, inasmuch as he would be required to obtain a
Virginia license to drive in this State.

MOTOR VEHICLES—Procedure Under § 46.1-179—When police officer
does not issue summons.

COURTS NOT OF RECORD—May Prescribe Certain Procedure for Jus-
tices of the Peace.

June 20, 1966

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

In your letter of June 15, 1966, you referred to § 46.1-179 of the Code of
Virginia (1950), as amended by Chapter 639 of the Acts of the 1966 General
Assembly, which provides:

“If any person is: (1) Arrested and charged with an offense causing
or contributing to an accident resulting in injury or death to any per-
son; (2) believed by the arresting officer to have committed a felony;
(3) believed by the arresting officer to be likely to disregard a sum-
mons issued under § 46.1-178; (4) charged with reckless driving; the
arresting officer, unless he issues a summons, shall 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 re-
quired by § 46.1-178, who shall determine whether or not probable
cause exists that such person is likely to disregard a summons, and
may issue either a summons or warrant as he shall determine proper.”
(Words added by the 1966 amendment are emphasized.)

You ask whether the person referred to as issuing the summons in § 46.1-179
is the police officer or the justice of the peace.

As you know, § 46.1-178 permits the arresting officer to release on summons a
person arrested for a violation of Title 46.1 punishable as a misdemeanor. Section
46.1-179, as amended, applies only to procedure to be followed if the arresting
officer does not issue a summons. The person issuing a summons under the last
clause of this section, as amended, is the justice of the peace, other judicial
officer, or other person qualified to admit to bail.

You ask what form of summons the justice of the peace should issue in such a
case. I enclose a copy of the form used by the State police, which should
be sufficient.
You also ask whether the regulations which may be issued by a court governing the admission to bail of persons charged with felonies, or the release without security of persons charged with misdemeanors, under § 19.1-110 are applicable under the circumstances governed by § 46.1-179, as amended.

Section 19.1-110, as amended by Chapter 521 of the Acts of the 1966 General Assembly, provides in part that the judge of a municipal or county court "may prescribe the regulations and requirements to be observed by the justices of the peace in releasing persons charged with a misdemeanor on their own recognizances without security" and that a judge of a court of record in any county or city "may authorize a justice of the peace therein to admit a person charged with a felony to bail, which authorization shall prescribe the amount of the bail and the security therefor."

I see no conflict between the cited provisions of §§ 46.1-179 and 19.1-110. Therefore, I am of the opinion that a justice of the peace, in determining whether or not to release a person charged and brought before him under the provisions of § 46.1-179, is bound by any applicable regulations which may have been adopted, pursuant to § 19.1-110, by the appropriate court.

MOTOR VEHICLES—Reciprocal Provisions As To Arrest of Nonresident —Construing § 46.1-179.2(c).

HONORABLE PAUL D. BROWN, Judge
County Court of Arlington County

This is in reply to your letter of November 18, 1965, in which you refer to the three sections contained in Article 1.1 of Chapter 4, Title 46.1, Code of Virginia (1950), as amended, and pose two related questions which I quote, as follows:

"With reference to Code § 46.1-179.2 (c), is the warrant of arrest obtained by the arresting officer for the original charge or is it the 'Failure to Appear' warrant?

"If a defendant has already been tried in his absence in Virginia on the original charge, is the statute still applicable if the officer thereafter obtains a 'Failure to Appear' warrant?"

In reference to your first question, paragraph (c) of § 46.1-179.2 prescribes that: "Upon the failure of any nonresident to comply with the terms of a traffic citation, the arresting officer shall obtain a warrant for arrest and shall report this fact to the Division of Motor Vehicles." Under paragraph (a) of § 46.1-179.3, the Division is required to transmit a certified copy of such report to the reciprocating jurisdiction in which the nonresident resides. Paragraph (b) of the same section prescribes that the Division shall suspend any driver's license issued by this State upon receipt of "a certification of noncompliance with a citation issued in a reciprocating state." While it is not free from doubt, I am of the opinion that the warrant of arrest required by this section has reference to the nonresident's failure to comply with the terms of his traffic citation, including a "Failure to Appear," rather than to the original charge.

The statute makes no exception for a nonresident who is tried in his absence. I conclude, therefore, that so long as the defendant has failed to comply with the terms of his citation, whether tried in his absence or not, the statute is applicable and, accordingly, I shall answer your second question in the affirmative.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Reckless Driving—Nonresident—Court may suspend privilege to drive but not license issued by other state.

CRIMINAL PROCEDURE—Sentencing Nonresident to Jail for Reckless Driving—May not be conditioned upon surrender of nonresident operator's license.

HONORABLE D. R. TAYLOR, Judge
County Court of James City County

This is in reply to your letter of November 17, 1965, which I quote, as follows:

“In my capacity as County Judge of James City County, the question has arisen whether or not I have the right in a reckless driving case to require a non-resident of Virginia to surrender his nonresident operator's permit in the event he is convicted of reckless driving and as a part of the sentence his driving privileges on the highways of Virginia are revoked. Also, I would like to know if I have the authority, in my capacity as County Judge, to impose a jail sentence upon a non-resident operator who appears in my Court on a reckless driving charge and who is a holder of a non-resident operator's license, which will be suspended upon the condition he surrenders his nonresident's operator's license to the Clerk of our Court to be retained for the period of suspension involved.

“Your kind considerations and advices regarding this matter will be deeply appreciated.”

In regard to your first question, under § 46.1-422, Code of Virginia (1950), as amended, any court, upon conviction of any person for reckless driving, may suspend any license issued to such person under Chapter 5 (§ 46.1-348 et seq.) of Title 46.1, Code of Virginia (1950), as amended, for a period of not less than 10 days nor more than 6 months. In the event of such suspension, the court shall require the convicted person to surrender his license so suspended. Special provision is made in paragraph (b) of the same section for a person who has not obtained the license required by such chapter, or who is a nonresident, in the following language, which I quote:

“If a person so convicted has not obtained the license required by such chapter, or is a nonresident, the court may direct in the judgment of conviction that such person shall not, for a period of not less than 10 days or more than 6 months as may be prescribed in the judgment, drive or operate any motor vehicle in this State.”

Nothing is said of suspension, nor of surrendering a license, although, in many cases, the nonresident has a license issued by his state of residence. Instead, the trial court is authorized to direct in the judgment of conviction that the nonresident so convicted shall not drive any motor vehicle in this State. When the convicted nonresident has been so directed by the court, his privilege to drive in Virginia stands suspended regardless of any operator's license issued him by any other state. Such license does not give the nonresident the privilege to drive in Virginia, as this privilege is granted only under the laws of this State. On the other hand, the Virginia courts have no authority to suspend his privilege to drive outside of this State. Accordingly, I am of the opinion that such conviction does not give you, as trial judge, the right to require a nonresident to surrender his nonresident operator's permit.

Referring to your second question, the authorized penalties upon conviction
of reckless driving are controlled by § 46.1-192, Code of Virginia (1950), as amended, which prescribes that the penalties shall be as provided by § 18.1-9 for the first violation and as stated therein for each second or subsequent conviction for such offense. In any such conviction, the penalty may include a jail sentence, although, for the reasons already stated herein, I am not of the opinion that such jail sentence may be conditioned upon the surrender of an operator's license issued the convicted nonresident by another state. Here again, the court's authority extends to the convicted person's privilege to drive in Virginia rather than to any operator's license issued such nonresident by some other state.

MOTOR VEHICLES—Registration—Permit issued under § 46.1-343.1 does not exempt vehicle from registration and license based on maximum gross weight when loaded.

HONORABLE WESCLOTT B. NORTHAM
Commonwealth's Attorney for Accomack County

This is in reply to your letter of August 10, 1965, which reads, in part, as follows:

"Would you please construe for me Section 46.1-343.1 of the 1950 Code of Virginia, as amended.

"As you will note, this Section provides for the issuance of a permit through the office of the State Highway Commission provided certain conditions are met. It would further appear that the Section is restricted to Accomack and Northampton Counties by reason of paragraph (c).

"Assuming a tandem axle vehicle is licensed to the maximum weight that it is allowed to carry, and further assuming that a permit is hereunder granted by the Highway Department which allows a load of four thousand pounds in excess of the legal limit, does this require an increase in the license of the vehicle to cover the additional four thousand pounds for transportation in the two counties of Accomack and Northampton when this owner is not allowed to haul said weight consisting of Virginia grown farm products in any other County in Virginia or parts thereof?"

The statute under consideration, which was enacted under Chapter 192 of the Acts of Assembly 1962, reads as follows:

"(a) In addition to the permits provided for in § 46.1-343, the State Highway Commission and local authorities of cities and towns, in their respective jurisdictions, upon application in writing made by the owner or operator of a three-axle vehicle used for hauling farm produce grown in Virginia and having a gross weight not exceeding fifty thousand pounds, a single axle weight not exceeding eighteen thousand pounds, and a tandem axle weight not exceeding thirty-six thousand pounds, or any four-axle combination hauling Virginia grown produce, a tandem axle weight of thirty-six thousand pounds and otherwise in conformity with the provisions of § 46.1-339, shall issue to such owner or operator, without cost, a permit in writing authorizing the operation of such vehicle upon the highways. No such permit shall designate the route to be traversed nor contain restrictions or conditions not applicable to other vehicles in their general use of the highways; but no permit issued under this section providing for tandem axle weight in excess
of thirty-two thousand pounds shall be issued to include travel on the Federal Interstate System of highways.

"(b) Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any officer and it shall be a misdemeanor for any person to violate any of the terms or conditions of such special permit.

"(c) Paragraphs (a) and (b) of this section shall only apply to the lesser part of the State which is entirely separated from the greater part of the State by at least two miles of salt water."

The maximum gross weight and axle weight to be permitted on the road surface of any highway is stated in § 46.1-339, Code of Virginia (1950), as amended. That statute provides, under paragraph (c) thereof, that the single axle weight of any vehicle or combination shall not exceed eighteen thousand pounds, nor shall the tandem axle weight of any vehicle or combination exceed thirty-two thousand pounds. The effect of § 46.1-343.1 is to increase the maximum tandem axle weight permitted by law from thirty-two thousand pounds to thirty-six thousand pounds on vehicles and combinations which come within the terms of § 46.1-343.1 and otherwise conform to the provisions of § 46.1-339. In other words, three-axle vehicles and four-axle combinations generally are limited to a tandem axle weight not exceeding thirty-two thousand pounds, whereas, by obtaining a permit under the provisions of § 46.1-343.1 such vehicles are permitted a tandem axle weight of thirty-six thousand pounds, an increase of four thousand pounds per tandem axle weight.

The increase in maximum tandem weight as permitted in § 46.1-343.1, does not change the law in regard to registration and license plates, which is found in § 46.1-154, for such vehicles. Under the latter, each vehicle is required to be licensed according to 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. The fee for registration and license plates is based upon such gross weight rather than upon axle weight. The permit issued under § 46.1-343.1 does not permit a load of four thousand pounds in excess of the legal limit. It only increases the legal limit of the weight for a tandem axle and nothing more. A vehicle or combination is subject to similar penalties for being over gross weight or over axle weight. For example, where no such permit has been issued, a three-axle vehicle licensed for fifty thousand pounds gross weight carrying thirty-six thousand pounds on its tandem axle would constitute a violation and subject the operator to conviction under the penalties provided in § 46.1-341 and, likewise, would subject the owner, operator or other person causing the operation of such over-weight vehicle to the payment of liquidated damages for the four thousand pounds excess axle weight, pursuant to § 46.1-342.

The same vehicle bearing the same tandem axle load, however, could operate lawfully under a permit issued in accordance with § 46.1-343.1, provided the total weight of vehicle and load is not in excess of the weight for which it is registered and licensed.

In consideration of the foregoing, it will be seen that a vehicle or combination for which a permit is issued under § 46.1-343.1 must be licensed according to its maximum gross weight when loaded, just as is the case of any similar vehicle or combination for which no such permit has been issued. Accordingly, I shall answer your question in the affirmative.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Registration and Licensing—Conscientious objector not exempt.

February 16, 1966

HONORABLE C. B. LILLARD
Sheriff of Madison County

This is in reply to your letter of February 7, 1966, in which you seek my opinion as to whether or not a person exempted from military service as a conscientious objector and employed at a nursing home in your county at the direction of the Selective Service System is exempt from purchasing State license plates for his automobile.

It is my understanding that, under the Universal Military Training and Service Act, conscientious objectors who have been excused from military service of all types are assigned by the Selective Service to work for a definite period in one of the activities approved under the Act. Such activities are those considered to contribute to the national health, safety and welfare. They include employment with the Government of the United States, the District of Columbia, a State or any political subdivision thereof. They also include employment with non-profit organizations or associations conducted for the benefit of the general public.

These persons are not members of the military or naval forces of the United States, nor are they under military or naval orders. They receive their compensation from the institutions or agencies by which they are employed. The provisions in Title 30 of the United States, generally known as the 'Soldiers' and Sailors' Civil Relief Act," apply only to persons sojourning outside of their State of residence or domicile solely by reason of their compliance with military or naval orders. As I interpret that Act, it includes only those persons serving in the military or naval forces of the United States and does not apply to persons excused from such services, regardless of the fact that the latter may be required by the Selective Service to obtain employment in an activity of public benefit.

In consideration of the foregoing, it is my opinion that a conscientious objector so excused from military service is in the same position in respect to the payment of taxes as any other civilian. It is further my opinion that any such person using his automobile on the highways of Virginia is subject to the motor vehicle laws of this State, and if such person be a resident or deemed a resident under Title 46.1, Code of Virginia (1950), as amended, this includes § 46.1-41 and all other laws pertaining to the registration of motor vehicles. Under § 46.1-1, paragraph (16) (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 Title 46.1.

MOTOR VEHICLES—Registration and Licensing—Required where vehicles regularly operated in this State.

October 27, 1965

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for
Pittsylvania County

This is in reply to your letter of October 18, 1965, in which you assume certain facts and pose a question, which I quote as follows:

"Assuming a situation where X Corporation has entered into an agreement with Y Railroad Company to remove telegraph wires along Y Railroad Company right of way for a distance through several States,
REPORT OF THE ATTORNEY GENERAL

including Virginia, and, X Corporation, a foreign corporation to Virginia, is operating vehicles and trailers licensed in a foreign State in the removal of said telegraph lines which requires these vehicles to be operated on the public highway of Virginia; is it necessary for X Corporation to secure registration and obtain licenses in Virginia for these vehicles?

In regard to the requirements for registration, § 46.1-41, Code of Virginia (1950), as amended, is as follows:

"Except as otherwise provided in §§ 46.1-42 through 46.1-49, 46.1-119 and 46.1-120 every person, including every railway, express and public service company, owning a motor vehicle, trailer or semitrailer intended to be operated upon any highway in this State shall, before the same is so operated, apply to the Division for and obtain the registration thereof and a certificate of title therefor."

The operations outlined in the quoted facts do not fall within any of the exceptions noted in § 46.1-41. Neither do the facts indicate any other basis for exemption from such section. Under § 13.1-102, "No foreign corporation shall transact business in this State until it shall have procured a certificate of authority so to do from the Commission." In this connection, § 46.1-1 (16) (a) states that "Any foreign corporation which is authorized to do business in this State by the State Corporation Commission shall be deemed a resident of this State" for the purposes of Title 46.1 and, hence, would be required to register and license its vehicles.

The assumed facts are silent as to whether or not the X Corporation has been authorized by the State Corporation Commission to do business in this State. Regardless of whether the corporation is so authorized, however, assuming the truck owner is "regularly operating" such vehicles, within the meaning of that term as it is used in § 46.1-134, registration and licenses are required under § 46.1-136, which states that "Every nonresident, including any foreign corporation, carrying on business within this State and owning and regularly operating in such business any motor vehicle, trailer or semitrailer within this State shall be required to register such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this State."

For the foregoing reasons, it is my opinion that registration and licenses are required under the stated circumstances and I shall answer your question in the affirmative.

MOTOR VEHICLES—Stopped on Highway—Constitutes misdemeanor under certain conditions.

CRIMINAL PROCEDURE—Defective Warrant—Court may correct or issue new warrant under certain conditions.

June 10, 1966

Honorable C. H. Davidson, Jr.
Commonwealth's Attorney for
Rockbridge County

This is in reply to your letter of June 1, 1966, in which you present the phraseology used in a certain warrant and pose the relative question which I shall quote, as follows:

CHARGE: "unlawfully leave a motor vehicle on the improved surface of a public highway, namely Route # 631, so as to constitute a
hazard in the use of said highway by reason of it being parked there in violation of Section 46.1-2 of the 1950 Code of Virginia, as amended."

QUESTION: "In the event that the evidence established that such parking constituted a hazard in the use of said highway, is such violation a misdemeanor as defined in Section 46.1-16?"

The authority for the removal and disposition of an unattended or abandoned motor vehicle found on the highway, under certain conditions, is contained in § 46.1-2, Code of Virginia (1950), as amended. This statute, however, does not provide for any criminal action against the owner of any such vehicle.

The statute making it a crime to leave a motor vehicle stopped "in such manner as to impede or render dangerous the use of the highway by others" is § 46.1-248. I believe the quoted charge would be proper if § 46.1-248 had been shown in place of § 46.1-2. As you know, § 16.1-137 authorizes the court to amend the warrant or to issue a new warrant if the defects in the original warrant so require.

Under proper charges, if the evidence establishes that a vehicle is so stopped on the highway, except in case of an emergency as noted in § 46.1-248, I am of the opinion that such violation constitutes a misdemeanor and is punishable pursuant to § 46.1-16. The latter section makes it a misdemeanor to violate any of the provisions of Chapters 1, 2, 3 and 4 (§§ 46.1-1 through 46.1-347) of Title 46.1, Code of Virginia (1950), as amended, unless such violation is by any such provisions declared to be a felony.

MOTOR VEHICLES—Traffic Violations—Juvenile court not prohibited from sending record to Division of Motor Vehicles.

JUVENILE AND DOMESTIC RELATIONS COURTS—Traffic Charges Against Juvenile—Not prohibited from sending record to Division of Motor Vehicles.

HONORABLE KENNETH B. ROLLINS, Judge
County Court of Loudoun County

December 16, 1965

This is in reply to your letter of December 10, 1965, which I quote, in part, as follows:

"In an opinion rendered by your office on January 23, 1964, you state that the law requires a juvenile traffic offender to be tried in the Juvenile and Domestic Relations Court rather than in the County Court.

"I would like to inquire as to whether or not the Clerk of the County Court is prohibited from sending an abstract of conviction to the Division of Motor Vehicles if a juvenile is convicted of a traffic offense in the Juvenile and Domestic Relations Court."

Certain motor vehicle laws make specific reference to findings of "not innocent in the case of a juvenile." In this respect, I direct your attention to §§ 46.1-417, 46.1-419 and 46.1-420, Code of Virginia (1950), as amended, each of which requires the Commissioner of the Division of Motor Vehicles to revoke the license of a person convicted or so "found not innocent."

Something of an anomaly exists between these statutes and §§ 46.1-412 and 46.1-413, which require every county or municipal court or court of record.
to keep records of charges of violations pertaining to the operator or operation of a motor vehicle and in the event a person is convicted of such charges to submit an abstract of the record to the Commissioner. No reference is made to juvenile courts or findings of not innocent. This may well share in the responsibility for the apparent inconsistency in the reporting of such findings by various juvenile courts.

If I correctly interpret your question, you have reference to such findings of not innocent by a juvenile court although you use the term conviction. By reference to Chapter 8 of Title 16.1, Code of Virginia (1950), as amended, § 16.1-158, with the exceptions thereafter provided, places exclusive original jurisdiction over the trial of a minor who violates the State law in the juvenile and domestic relations court. Under § 16.1-163 of the same chapter “the Division of Motor Vehicles shall keep separate records as to violations of the motor vehicle law committed by juveniles.” This section further provides “that records of violations of the motor vehicle laws with reference to the operation of such motor vehicles by juveniles shall be open to public inspection.” Considering these statutes pertaining directly to juvenile violations of the motor vehicle laws in conjunction with the statutes, cited herein, which authorize the Commissioner to revoke a license, I am of the opinion that you are not prohibited from sending such records to the Division of Motor Vehicles.

MOTOR VEHICLES—Transporting Farm Produce—Interpreting §§ 46.1-45 and 46.1-280.

HONORABLE H. BENJAMIN VINCENT
Commonwealth’s Attorney for
Greensville County

This is in reply to your letter of November 11, 1965, in which you request my opinion as to whether or not you properly interpreted the law in your letter of September 16, 1965, from which I quote the essential passages, as follows:

“1. All persons, firms or corporations who use trailers or vehicles to transport agricultural products of another from farm to farm or farm to packing shed and/or processing plant shall be required to obtain license plates and to pay the fee prescribed therefor for each trailer or vehicles so used.

2. All persons, firms, or corporations who use trailers or vehicles exclusively for transporting agricultural products of another from farm to farm or farm to packing shed and/or processing plant shall not be required to equip said trailers or vehicles with brakes controlled or operated by the driver of the towing vehicle.”

I concur in your interpretation expressed in the first paragraph. Vehicles and trailers so used are not exempt from registration and license plates under § 46.1-45, Code of Virginia (1950), as amended, nor under any other statute. As a matter of law, any such operation for compensation requires the purchase and use of “for hire” license plates.

In regard to your paragraph numbered 2, I quote § 46.1-280, Code of Virginia (1950), as amended, in part, as follows:

“(a) Every semitrailer or trailer or separate vehicle attached by a drawbar, chain or coupling to a towing vehicle other than a farm tractor or a vehicle not required to obtain an annual registration certificate for license plates under § 46.1-45 and having an actual gross
weight of three thousand pounds or more, shall be equipped with brakes controlled or operated by the driver of the towing vehicle which shall conform to the specifications set forth in § 46.1-279 and shall be of a type approved by the Superintendent. Provided, however, that farm trailers used exclusively for hauling raw agricultural produce from farm to farm or farm to packing shed and/or processing plant within the normal growing area of said packing shed or processing plant shall be exempt from the requirements of this section.”

This section makes an exception to the requirement that certain towed vehicles shall be equipped with brakes controlled or operated by the driver of the towing vehicle. The exception applies only to farm trailers used exclusively for hauling raw agricultural produce from farm to farm or farm to packing shed and/or processing plant within the normal growing area of said packing shed or processing plant. The emphasized words are limiting. In my opinion, the exception does not apply to vehicles other than farm trailers so operated. The words “or vehicles,” therefore, should be deleted from paragraph 2 of your letter, as such provisions should be strictly construed. I do not interpret it as significant under this section, however, whether the produce transported belongs to another or to the owner of such farm trailer.

MOTOR VEHICLES—Uninsured Motorist Fee—Must bear reasonable relationship to cost of coverage.

HONORABLE WILLIAM F. STONE
Member, Senate of Virginia

December 7, 1965

This is in reply to your letter of November 18, 1965, which I quote as follows:

“The Virginia Advisory Legislative Council, of which I am a member, has under discussion at the present time, the matter of recommending to the next session of the General Assembly of Virginia an increase in the uninsured motorist fee from $20.00 to $50.00 per year.

“One member has raised the question that this might be unconstitutional for the reason that $50.00 is somewhere close to what it would cost to insure a car and this might be construed in some of our State Courts that instead of a regulatory fee it might be a penalty tax, and that the Courts might throw out the whole uninsured motorist Act if the fee was increased to this amount.

“Would you please give me an opinion on this matter at your earliest possible convenience inasmuch as we are going to try to finish our VALC studies prior to December 31, 1965.”

The purpose of the uninsured motorist fee, as I understand it, is to help reduce the cost of coverage against personal injury and property damage, caused by uninsured motorists, for the benefit of persons holding or covered within the terms of a motor vehicle liability insurance policy.

Section 46.1-167.6, Code of Virginia (1950), as amended, requires the placing of all such funds collected in the State treasury in the Uninsured Motorists Fund to be disbursed as prescribed by law and provides that the Commissioner may expend for administration such amount thereof as fixed by the Governor. Section 12-65 prescribes that the Uninsured Motorists Fund now or hereafter provided by law shall be used “for the purpose of reducing the costs of motor vehicle liability insurance as defined by § 38.1-21, as amended.” From
§ 12-66, it is apparent that this relates to paragraph (b) of § 38.1-381, which requires each such policy to contain an endorsement or provision undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within the limits stated in § 46.1-1 (8).

Under Section 63, Constitution of Virginia, the authority of the legislature extends to all matters not therein forbidden or restricted. The determination of the amount or reasonableness of a tax or fee ordinarily rests within the discretion of the legislature and will not be interfered with by the courts unless it is clearly apparent that there has been an abuse of discretion. In my opinion, increasing the uninsured motorist fee in the stated amount would not, in itself, render the uninsured motorists Act unconstitutional so long as the funds, resulting from the collection of such fees, bear a reasonable relationship to and are used to help defray the cost of coverage against injury and damage caused by uninsured motorists, as set forth in the laws herein outlined.

MOTOR VEHICLES—Virginia Motor Vehicle Dealer Licensing Act—Not applicable to Tennessee dealer sending salesmen into Virginia under certain circumstances.

HONORABLE GEORGE M. WARREN, JR.
Member, Senate of Virginia

November 2, 1965

This is in reply to your letter of October 13, 1965, in which you request an opinion from this office as to whether or not the "Virginia Motor Vehicle Dealer Licensing Act," applies to sales of motor vehicles made under the following circumstances, which I quote:

"Henard Enterprises, Incorporated is a corporation under the laws of Virginia, domesticated in Tennessee, and has its only place of business in Bristol, Tennessee. It is franchised by a large manufacturer to distribute motor vehicles manufactured by the company.

"The local corporation proposes to expand its business and sell heavy duty trucks. It contemplates sending its salesmen into the coal fields in Southwest Virginia in Wise, Buchanan, and Lee Counties to call on prospective customers. Its salesmen will sell from printed material showing the manufacturer's specifications and other pertinent information. The salesmen will not make any demonstrations of trucks in Virginia. No inventory will be maintained in Virginia and all of the trucks when sold will be obtained from distribution points outside the State of Virginia.

"In many instances the sales will be for cash without trade-ins. In other instances prospective purchasers may agree to trade a vehicle. In every instance a sale order will be signed by the customer subject to acceptance and approval at the corporation's office in Bristol, Tennessee.

"The corporation carries very few heavy duty trucks in its inventory, and in most instances will secure the trucks from distributors outside the State of Virginia or from the factory after the order is secured.

"The trucks will be brought to the corporation's place of business in Bristol, Tennessee, serviced for delivery at its garage and delivered to the customer in Bristol, Tennessee. Final papers will be signed and delivered in Bristol, Tennessee."

Chapter 7 of Title 46.1, Code of Virginia (1950), as amended, § 46.1-515 et
sequel, which comprises the "Virginia Motor Vehicle Dealer Licensing Act," contains the following definitions under § 46.1-516:

"(a) 'Motor vehicle dealer' means any person who
(1) For commission, money or other thing of value, buys, sells, exchanges, either outright or on conditional sale, bailment lease, chattel mortgage or otherwise howsoever, or offers or attempts to negotiate a sale or exchange of an interest in, new motor vehicles or new and used motor vehicles or used motor vehicles alone or trailers or semitrailers.
(2) Is engaged, wholly or in part, in the business of selling new motor vehicles or new and used motor vehicles, or used motor vehicles only, or trailers or semitrailers, whether or not such motor vehicles are owned by such person, partnership, association or corporation.

(c) 'Motor vehicle salesman' or 'salesman' means any person who is employed as a salesman by, or has an agreement with, a motor vehicle dealer to sell or exchange motor vehicles."

In regard to licensing requirements, § 46.1-523 of the same chapter includes the following:

"It is unlawful for any new motor vehicle dealer, trailer or semitrailer dealer, used motor vehicle dealer, motor vehicle salesman, manufacturer, factory branch, distributor branch, factory or distributor representative to engage in business as such in this State without first obtaining a license as provided in this chapter."

By its own terms § 46.1-523 has application only to business conducted in this State. According to the stated facts, the corporation in question has its only place of business in Bristol, Tennessee. The business is operated and controlled from that location. The vehicles sold will be serviced for delivery at its garage located there. The final papers will be signed and delivered there and any vehicle sold will be delivered to the customer at that location, no inventory being maintained in Virginia. The corporation contemplates sending its salesmen into several counties of Virginia to call on prospective customers. The salesmen will not make any demonstrations of the vehicles in Virginia but will solicit sales from printed material showing specifications and other pertinent information. The purpose of the salesmen, under the stated facts, is to solicit business in this State. While I find no case centered around soliciting for the sale of motor vehicles across state lines, there have been numerous federal cases involving soliciting in interstate commerce in regard to other subject matter. Among these is the case of Nippert v. City of Richmond, 327 U.S. 416, 90 L. ed. 760, which held that a license tax laid by an ordinance of the City of Richmond, Virginia, upon engaging in business as a solicitor would not be effective against an employee of a garment company in Washington, D. C., who took orders for ladies' garments in Richmond, Virginia, because of the protection given interstate commerce by the Federal Constitution. In Memphis Steam Laundry Cleaner v. Stone, 342 U.S. 389, 96 L. ed. 436, the court held a Mississippi statute invalid under the Commerce Clause of the Federal Constitution against a Tennessee laundry which sent trucks into Mississippi where its drivers picked up, delivered and collected for laundry and sought new customers. In the Virginia case of Commonwealth v. Olan Mills, Inc., 196 Va. 898, the court, in citing these and other cases and the Commerce Clause, Article 1, Section 8, of the Constitution of the United States, affirmed the judgment of the trial court that the tax imposed by § 58-393 of the Code of Virginia, requiring every photographer or agent or canvasser for same to obtain a license, was not applicable to the soliciting of orders and taking pictures in this State for development in another
state, on the basis that these acts constituted integral parts of interstate commerce. In this case, the court stated that "what the defendant sells and what the customer buys is not the negative taken in Virginia but the finished picture which comes to him by mail from Tennessee." It would seem that this may be paraphrased to apply to the instant set of facts, inasmuch as, it is not the picture of the truck or its specifications shown in Virginia, which Henard Enterprises, Incorporated, will sell or the customer will buy, but the vehicle itself which will be delivered in Tennessee.

In consideration of the foregoing, I am constrained to believe that the "Virginia Motor Vehicle Dealer Licensing Act" is not applicable to the situation described in the related facts and, accordingly, I shall answer your question in the negative.

MOTOR VEHICLES—Warning Lights on Police Vehicles—Red authorized.

November 16, 1965

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth's Attorney
for the City of Hampton

This is in reply to your letter of October 25, 1965, in which you request my opinion as to whether §§ 46.1-226 and 46.1-267, Code of Virginia (1950), as amended, permit the use of blue warning lights or a combination of red and blue warning lights on police vehicles in the City of Hampton. You quote a letter received from the City Attorney, City of Hampton, Virginia, which I shall quote, in part, as follows:

"A peculiar problem relative to the enforcement of traffic laws has developed in this City, and the crux of the problem appears to be the red warning lights on the police vehicles.

"The Chief of Police of this City has advised this office that on several occasions late at night, female motorists have failed to stop when overtaken by police vehicles having the warning lights on. The approved practice in the residential neighborhoods precludes the use of sirens for all but the most serious violations. In lieu of the siren, the police officer turns on the warning lights when in pursuit of a violator.

"When finally apprehended these motorists give as the prime reason for not stopping the fact that so many vehicles, not police vehicles, have red warning lights. These women feel safer in not stopping than to chance being harrassed.

"In order to remedy this situation the Chief of Police is desirous of equipping the police vehicles with blue warning lights or a combination of red and blue warning lights."

In relation to the exemption of police officers from regulations governing the movement of vehicles under certain conditions, I quote § 46.1-226, in part, as follows:

"(a) The operator of any publicly owned vehicle operated by or under the direction of a police officer in the chase or apprehension of violators of the law or persons charged with or suspected of any such violation, ** may, without subjecting himself to criminal prosecution:

"(1) Proceed past red signal, light, stop sign or device indicating moving traffic shall stop if the speed and movement of the vehicle is
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reduced and controlled so that it can pass a signal, light or device with
due regard to the safety of persons and property.

“(2) Park or stand notwithstanding the provisions of this chapter.
“(3) Disregard regulations governing a direction of movement of
vehicles turning in specified directions so long as the operator does not
endanger life or property.
“(b) These exemptions, hereinbefore granted to such a moving
vehicle, shall apply only when the operator of such vehicle displays a
flashing, blinking or alternating red light and sounds a siren, bell, or
exhaust whistle, as may be reasonably necessary. * * * *”

In regard to the type of warning lights permissible on police vehicles, I
quote § 46.1-267, in part, as follows:

“Any police vehicle, * * * may be equipped with flashing, blinking
or alternating warning lights of a type approved by the Superin-
tendent.”

Under the quoted portion of § 46.1-226, a police officer may commit the acts
set forth in paragraphs (a) (1), (2) and (3) thereof without subjecting himself
to criminal prosecution only when the vehicle displays a red light, as described
in paragraph (b) of that section. The Statute is silent as to the use of other
type lights by police officers under situations not involving the acts enumerated
in paragraphs (a) (1), (2) and (3). Section 46.1-267 quoted herein, however,
places approval of warning lights for police vehicles under the control of the
Superintendent of the Department of State Police and provides that:

“No motor vehicle shall be operated on any highway which is equip-
ped with any lighting device other than lamps required or permitted
in this article or required or permitted by the Superintendent.”

While any party concerned is at liberty to check with the Superintendent
further in this regard, I am advised by a representative of his office that blue
lights have not been approved for use as warning lights on police vehicles. In the
absence of such approval or any statutory reference to warning lights of any
color other than red, as prescribed in § 46.1-226, quoted herein, I am of the
opinion that the city of Hampton is without authorization for the use of
either blue warning lights or a combination of red and blue warning lights on
its police vehicles.

MOTOR VEHICLES—When SCC Registration Not Required for Two Axle
Truck.

Honorable Joseph M. Whitehead
Commonwealth's Attorney for
Pittsylvania County

June 9, 1966

This is in reply to your letter of May 26, 1966, which I shall quote, as follows:

“With reference to Sections 56-304, 56-304.1 and 58-627, Code of Vir-
ginia of 1950, as amended, I would request from you a ruling as to the
following:
“Relative to two (2) axle trucks, delivering interstate commerce for
compensation where the person, firm or corporation owns or operates
more than one such truck under the above sections of the statute cited,
is it a violation of the law for such vehicle (vehicles) to be operated on the highways of this State without a warrant card or exemption card and classification plate for each vehicle so operated?"

The purpose of § 58-627, Code of Virginia (1950), as amended, is to define certain terms used in Article 12 of Chapter 12, Title 58, relative to road tax on motor carriers. Under this section, the term "motor carrier" does not apply to two axle trucks. This section has no application to the requirements for warrant cards but does affect the requirements for exemption cards, both of which are controlled by Article 8 of Chapter 12.

Under the latter, § 56-304 prescribes the conditions under which a person, who shall operate or cause to be operated for compensation on any highway any self-propelled motor vehicle required to display Virginia license plates, is required to procure from the State Corporation Commission a warrant or an exemption card and a classification plate for each vehicle so operated. If any such vehicle is not exempt under § 56-274, Code of Virginia (1950), as amended, a warrant card shall be issued. If it is exempt under one or more of the exemptions listed under § 56-274, an exemption card shall be issued, unless all the operations of the vehicle are exempt from the road taxes imposed by Articles 12 and 13 of Chapter 12 of Title 58, in which event no exemption card or classification plate is required. This excludes two axle trucks. Whenever either a warrant card or an exemption card is required a classification plate is also required to be displayed on the vehicle. This statute relates only to a motor vehicle required by law to display license plates issued by the Division of Motor Vehicles. It applies, therefore, if the vehicles are engaged in intrastate operations or, if for any other reason they are required to be licensed in this State.

The requirements for registration cards and identification markers, issued by the State Corporation Commission, are found under § 56-304.1. This section applies only to vehicles operated for compensation which are not required to display Virginia license plates. It does not include two axle trucks. If, therefore, the two axle trucks in question are not engaged in intrastate operations but only in interstate operations under such circumstances that they are not required by law to display license plates issued by the Division of Motor Vehicles, then no registration with the State Corporation Commission under § 56-304.1 is required. In such event, I shall answer your question in the negative.


June 29, 1966

HONORABLE G. GARLAND WILSON
City Attorney of Radford

This is in reply to your letter of June 28, 1966, which reads as follows:

"I would appreciate your construing § 15.1-431 of the 1964 Replacement Volume to the Code of Virginia pertaining to the publication of notice of 'once a week for two successive weeks.' Does this statute mean that the earliest a hearing could be held would be not less than five days after the expiration of fourteen days for the two-weeks publication, or does it mean that the hearing may be held not less than five days after the actual date the notice was published for the second week? I would appreciate your opinion in this matter."

Under the rule stated in Dillard v. Krise, 86 Va. 410, the publication will not be completed until two weeks, or fourteen days, has elapsed from the date
of the first publication of the notice. Therefore, in my opinion, final publication occurs seven days, or one week, after the date of the second publication of the notice, and the hearing cannot be held until five days thereafter. Assuming the paper publishes the notice on the 11th and 18th of a month, the hearing cannot be held until the 30th of that month.


JURISDICTION—Where to Prosecute Child for Nonsupport of Parent.

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

January 20, 1966

This is to acknowledge receipt of your letter of January 13, 1966, in which you state, in part:

"An elderly lady is a patient in a nursing home located in Mathews County, Virginia. This lady was born and lived in Wilson, North Carolina. On or about July, 1961, she came to Virginia to live with her adopted son in the City of Portsmouth. From November of 1961 until March of 1963, she was a patient in Parson's Nursing Home, Portsmouth, Virginia. She then went to King Daughters Hospital, Norfolk, Virginia, for treatment of a broken hip. Then she was placed in the George Holmes Nursing Home, Virginia Beach, Virginia, from March 10, 1963, to January 10, 1964. In the later part of January, 1964, she was placed in the Horn Harbor Nursing Home, New Point, Mathews County, Virginia.

"This lady has an adopted son who resides in the City of Portsmouth. Her condition is such that she desires and intends to remain in the Horn Harbor Nursing Home for the rest of her natural life.

"Kindly advise me of your opinion as to the proper venue in regard to this matter."

Section 20-88, Code of Virginia (1950), as amended, which provides for support of parents by children, states in part:

"Prosecution under this section shall be in the jurisdiction where the parent or parents reside."

From what you state, the mother of this adopted son made her home with the son from July, 1961, until the latter part of January, 1964, in the City of Portsmouth where she resided. During that period she was hospitalized at various nursing homes and at a hospital.

Under the statute, the city or county in which the parent resides or where the parent resided prior to being placed in an institution (such as a nursing home or hospital, etc.) for her or his care is the proper jurisdiction in which to prosecute the child for his or her failure to care for the mother. The term "residence" in this statute does not mean the place wherein the parent stays for the preservation of his or her health, but that place in a private or public institution.

I am therefore of the opinion that the City of Portsmouth is the proper jurisdiction in which to prosecute under this statute in the case to which you refer.
NOTARIES PUBLIC—Listing in Telephone Book.

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

February 7, 1966

This is in reply to your letter of February 3, 1966, which is, in part, as follows:

"In the yellow pages of the telephone directory, under the heading 'Notaries-Public', (p. 263 of the Richmond Telephone Directory) certain persons are listed as notaries. In addition, there are certain companies listed, such as AA Bonding Company, Fred Bender Realty and Insurance Co., Voron Lou Realty, etc.

"Is it legal and proper for these companies, who apparently employ notaries, to advertise their services in this manner? A notary public holds a Governor's commission and is generally considered a public official.

"Is it proper for a notary public to list himself in the directory in this manner?"

I am unable to find any statute preventing advertisements of this nature. In the absence of such a statute, no action could be taken to require the advertisements to be discontinued.

NOTARIES PUBLIC—Malfeasance—Recovery where damages occur.

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

September 3, 1965

This is in reply to your letter of September 2, 1965, which reads as follows:

"Several instances recently have been brought to my attention in which a notary public has notarized the signature of a person not personally present before him and not acknowledging the same before him. In one case, this caused a woman a loss of some $2,000.00.

"I would like to inquire:

"1. If a notary notarizes the signature of a person not present before him and not acknowledging the same before him, under what code section may a criminal prosecution be brought against him?

"2. In order to qualify before a court as a notary, he must have a $500.00 bond. In case of malfeasance, is the $500.00 bond forfeited to the Commonwealth of Virginia?

"3. Can any portion of the bond be used to compensate the person who suffers a loss by reason of the notary's malfeasance?"

I can find no statute under which criminal prosecution may be brought against a notary public for certifying an acknowledgement in the manner stated in your question No. 1. It does not seem that the perjury statute would apply. The notary's commission, of course, could be revoked by the Governor under the provisions of § 47-1 of the Code.

With respect to your question No. 2, I assume that the bond executed by a notary pursuant to § 47-1 (4) is always given in favor of the Commonwealth and that it contains a forfeiture provision in the event the notary does not faithfully discharge the duties of his office. Under such circumstances the proceeds of the forfeiture would go to the Commonwealth.
Your question No. 3 is answered in the negative. We can find no statutory authority for using the proceeds of the bond to compensate a person who has suffered a loss because of the notary’s violation of the law. The only recourse such a person would have, in my judgment, is against the notary in an appropriate suit.

NOTARIES PUBLIC—Residence—Need not be resident of locality in which commissioned.

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

This is in reply to your letter of June 15, 1966, in which you state that an applicant for appointment as a notary public actually resides in Shenandoah County but is employed in Page County and desires to be commissioned as a notary public for the county of Page only. You have requested my advice as to whether or not this person may be commissioned as a notary public for the county of Page only.

By reference to § 47-1(5) of the Code, you will find that it is provided as follows:

“A notary public may or may not be a resident of any county or city for which he is appointed.”

This provision was placed in this section by Chapter 380 of the Acts of Assembly (1938), as an amendment to § 2850 of the prior Code. At the same time, the General Assembly deleted from § 2850 the following language:

“... The removal of a notary from the county or city in which said notary resided when appointed, unless said removal be into another county or city for which said notary may have been appointed, shall be construed as a vacation of said office. ...”

Also, in Chapter 380, this language appears:

“... The appointments and commissions of all notaries public heretofore made for counties or cities in which said notaries public did not or do not reside are hereby approved, confirmed and ratified as of the date of their appointments and all acknowledgments and other official acts of said notaries public heretofore taken are hereby validated.”

Section 32 of the Constitution is, in part, as follows:

“Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; and except, further, that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill positions or posts requiring special technical or professional training and experience.”

It would appear from the 1938 amendment that the General Assembly was of the opinion that a notary public would come within the exception contained in Section 32 of the Constitution.
Furthermore, upon inquiry to the Secretary of the Commonwealth, I find that the Governor has been commissioning persons as notaries public for counties in which they do not reside. Therefore, in my opinion, this person may be commissioned as a notary public for the county of Page only.

ORDINANCES—Construing Isle of Wight Public Dumping Ordinance.

COUNTIES—Ordinance—Construing Isle of Wight Public Dumping Ordinance.

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

April 8, 1966

This will acknowledge receipt of your letter of April 6, 1966, enclosing a draft of an ordinance to be enacted by the board of supervisors under § 15.1-282 of the Code of Virginia. You present the following questions:

1. The Board of Supervisors may acquire and establish more than one parcel of land for public dumping purposes?
2. Violations and punishment therefor should be under the statute as a state law after the establishment of such dumps?
3. An ordinance in substantially the form of the enclosed copy is sufficient to establish public dumping places in the county under § 15.1-282 of the Code?
4. The proposed ordinance is subject to the provisions of the first paragraph of § 15.1-504, supra, with respect to notice, publication and effective date?
5. Such dumps may be established by the adoption by the Board of Supervisors of a resolution without complying with the notice, etc. provisions of § 15.1-504, supra?
6. Fines collected for violations of such ordinance and statute should be paid to the State?

We have revised your rough draft to some extent and enclose a copy herewith.

With respect to the questions presented, I will answer them in the order stated:

1. The answer to this question is in the affirmative.
2. The answer to this question is in the affirmative, subject to my comments under the answer to question (6).
3. The revised ordinance which we enclose herewith is substantially in the form submitted by you and will, in our opinion, be sufficient.
4. The answer to this question is in the affirmative.
5. The answer to this question is in the negative.
6. Under the ordinance as drawn the violations would be punishable under the provisions of § 15.1-282 and, therefore, violations of a State law.

I call your attention to § 15.1-505 of the Code, which, prior to the revision of Title 15 of the Code, was included in § 15-8. In my opinion, you can prescribe the penalties for violation of the ordinance within the limits of this section. In this manner any fines collected would go to the county. You will note that maximum penalties under this method would be less than under § 15.1-282, which would be controlled by § 18.1-9 of the Code. Should you decide
to proceed under § 15.1-505, paragraph (b) of the proposed ordinance will have to be redrafted.

ORDINANCES—County—Dogs running at large—Where adopted must cover all breeds of vicious or destructive dogs.

COUNTIES—Ordinances—Dogs running at large—Where adopted must cover all breeds of vicious or destructive dogs.

HONORABLE WILLIAM W. JONES
Commonwealth's Attorney for Nansemond County

November 1, 1965

This will acknowledge receipt of your letter of October 28, 1965, which reads as follows:

"The Board of Supervisors of Nansemond County is interested in determining whether or not it can enact an ordinance preventing German shepherd and German police dogs from running at large. I would appreciate your opinion as to whether or not the Board has authority to enact such an ordinance under either Section 29-194 of the Code or Section 29-196.

"I note from Section 29-194 that the governing bodies are authorized, in their discretion, to prohibit the running at large of dogs during such months as they may designate. Would this allow them to limit the breed of dogs that would be so restricted?

"Under Section 29-196, the governing bodies are given authority to prevent the spread of rabies and to regulate and control the running at large of vicious or destructive dogs. Could the Board establish a finding setting forth in the ordinance that German shepherd and German police dogs are by nature vicious or destructive dogs, thus permitting enactment of the ordinance proposed? As a matter of fact, the Game Warden reports that more German shepherd and German police dogs are involved in offenses than any other breeds.

"The Board would like to prevent their running at large but does not desire to prevent all dogs from running at large. Therefore, your opinion on the question presented would be appreciated."

I have given careful consideration to the question presented by you, and I have serious doubt as to the validity of an ordinance which would prevent German shepherd and German police dogs from running at large but which would not apply to other breeds of dogs. Section 29-196 of the Code authorizes the board to pass an ordinance to control the running at large of vicious or destructive dogs and to provide penalty for violation of any such ordinance. The board, in my judgment, could adopt an ordinance prohibiting the running at large of vicious or destructive dogs. I do not feel that the board could by ordinance define what constitutes a vicious or destructive dog. Obviously, if there should be an alleged violation of such ordinance, the court would have to make a determination in light of the evidence presented.
ORDINANCES—County—May not require registration of boats.

COUNTIES—Ordinances—May Not require registration of boats.

September 10, 1965

HONORABLE ROBERT L. GILLIAM, III
Commonwealth's Attorney for
Westmoreland County

This is in reply to your letter of recent date, which reads as follows:

"Could you please advise me whether or not a County has authority to enact an ordinance or ordinances requiring the individual owners of trailers and boats to register their ownership together with their name and address with a designated county official, such as the Commissioner of Revenue.

"I am aware that under Chapter six of Title #35, of the Code of Virginia, trailer camps and parks can be regulated and licensed but am unable to find any provisions concerning individual owner or any provisions for the county registration of boats."

Chapter 6 of Title 35, Code of Virginia (1950), as amended, which you cite, has reference only to that class of trailers which are designed for use as sleeping quarters for one or more persons. The term "trailer" is defined by paragraph (33) of § 46.1-1 as, "Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle." In regard to that portion of your question relative to trailers, § 46.1-65 authorizes counties, as well as cities and towns, to levy and assess taxes and charge license fees under the conditions therein stated. This process may be considered registration of the vehicles by the individual owners and I am of the opinion that the information mentioned in your letter may be required of all persons coming under such ordinance.

The control of boat registration is placed under the State Commission of Game and Inland Fisheries by Chapter 11.1 of Title 62, Code of Virginia (1950), as amended. Thereunder, § 62-174.5 requires the owner of each motor boat requiring numbering by this State to file an application for number with the Commission. Paragraph (f) of the same section requires the Commission to furnish the annual lists of boat registrations, as of January one of each year, to the commissioners of revenue, of each county or city, except where any such commissioner of revenue requests that he not receive such lists.

Any county, city or town may, provided it first obtain proper approval by the Commission, enact ordinances regulating the operation of vessels on any waters within its territorial limits, pursuant to § 62-174.15 of the same title. I find nothing in this title nor elsewhere in the Code, however, which would authorize a county to enact an ordinance requiring owners of boats to register their ownership with the county and I shall answer this portion of your inquiry in the negative.

ORDINANCES—County—Not authorized to require marina operators to furnish names and addresses of boat owners.

COUNTIES—Ordinances—Not authorized to require marina operators to furnish names and addresses of boat owners.

October 6, 1965

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

This is in response to your letter of September 27, 1965, in which you in-
quire whether the County of Westmoreland may "enact an ordinance that would require the operators of Mariners within the County to furnish a list of names and addresses of the owners of boats tied up in their Mariners on January 1st of each tax year."

In my letter of September 10, 1965, to which you refer, the question of whether or not a county could enact an ordinance requiring owners of boats to register their ownership with the county was decided in the negative. Therein, attention was directed to Chapter 11.1 of Title 62, Code of Virginia (1950), as amended, which places control of boat registration under the State Commission of Game and Inland Fisheries, and requires the Commission to furnish the commissioners of revenue, of each county or city, the annual list of such registrations as of January one of each year.

The registrations referred to in Chapter 11.1 of Title 62 include each motorboat required to be registered by this State, as indicated in § 62-174.4 thereof. Under § 62-174.7, however, a motorboat which has been awarded a number pursuant to a federally approved numbering system of another state is not required to be registered in this State, provided it shall not have been within this State for a period in excess of ninety consecutive days. Thus, a motorboat properly registered in another state, while on a temporary sojourn within this State, is exempt from registration, in a manner similar to a motor vehicle of a non-resident temporarily operated within this State.

In regard to your specific inquiry, I find nothing in the statutes herein referred to, nor elsewhere in the Code, which would authorize a county to enact such an ordinance and, accordingly, I shall answer your question in the negative.

ORDINANCES—County Prohibiting Sale of Beer on Sunday—Ordinance of 1938 valid.

COUNTIES—Ordinances—Prohibiting sale of beer on Sunday valid.

HONORABLE ROBERT I. ASBURY
Commonwealth's Attorney for
Smyth County

January 18, 1966

This is in reply to your letter of January 12, 1966, which reads, in part, as follows:

"At the January 11th, 1966 regular monthly meeting of the Smyth County Board of Supervisors several persons licensed to sell beer in Smyth County appeared before the Board and requested that the Smyth County ordinance prohibiting the sale of beer in Smyth County on Sunday be repealed. The Board indicated by resolution that the necessary steps be taken to repeal the County Ordinance adopted in Smyth County on November 7th, 1938 prohibiting the sale of beer on Sunday. A copy of said ordinance passed on November 7th, 1938 is enclosed herewith. I am also enclosing a copy of an amendment to this ordinance which was passed on June 14th, 1949. You will notice that both ordinances refer to the sale of beer only.

* * *

"May I have your opinion as to whether or not the Smyth County ordinance prohibiting the sale of beer is valid inasmuch as it was passed prior to the 1940 Acts of Assembly, Chapter 25.

"Of course, if you find that said ordinance is not valid then it will not be necessary for the Board to take any action to repeal the same. On
the other hand, if the ordinance is valid as to the sale of beer, will it be necessary to pass an ordinance in the manner prescribed by law to repeal the same?"

The ordinance passed by the Board of Supervisors of Smyth County on November 7, 1938, contained two sections. The first section prohibited the sale of beer in Smyth County, outside of the incorporated towns thereof, between the hours of 12:00 o'clock post meridian of each Saturday and 6:00 o'clock ante meridian of each Monday. Section 2 of the ordinance simply provided a penalty.

On June 14, 1949, Section 1 of the 1938 ordinance was amended by excepting "a private club, holding a club type license" from its operation. Chapter 129 of the 1938 Acts of Assembly became effective June 21, 1938, and in part provided:

"...[T]he board of supervisors or other governing body of each county shall have authority to adopt ordinances effective in that portion of such county not embraced within the corporate limits of any city or incorporated town ... prohibiting the sale of beer and wine, or either beer or wine, between the hours of twelve o'clock post meridian of each Saturday and six o'clock ante meridian of each Monday ..." (Emphasis added)

It seems perfectly clear to me that the 1938 Smyth County ordinance was a valid exercise of the power conferred by the 1938 Acts, Chapter 129, provided procedural requirements for the passage of the ordinance were complied with.

Chapter 25 of the 1940 Acts amended and re-enacted Chapter 129 of the 1938 Acts. The only change made in the original version of said Chapter 129 was the insertion of the following paragraph:

"On and after the effective date of any ordinance adopted pursuant to the provisions of this enactment, the provisions of such ordinance shall have like effect upon the sale of beverages as defined in Chapter three of the Acts of the General Assembly of nineteen hundred and thirty-three, approved August twenty-nine, nineteen hundred and thirty-three; and further during the hours between which wine and beer or wine or beer shall not be sold, persons holding licenses to sell wine, beer and beverages or one or more of such shall not permit the consumption of either wine, beer or beverages upon the premises mentioned in said license."

It does not appear to me that anything in the foregoing amendment could properly be construed as casting any doubt on the validity of the 1938 Smyth County ordinance, or the 1949 amendment thereof. The power of the Smyth County board of supervisors to prohibit entirely the Sunday sale of beer necessarily includes the power to prohibit such sale except as to "a private club, holding a club type license." I therefore concur in the view expressed in the last paragraph of your letter that the Smyth County ordinance, as amended, is valid, assuming procedural requirements to have been complied with, and that it will be necessary for the board of supervisors to adopt a repealing ordinance in the manner prescribed by § 15.1-504 of the Code of Virginia (1950), as amended.
ORDINANCES—Regulation of Solicitors and Canvassers.

COUNTIES—Ordinances—Regulation of solicitors and canvassers.

Honorable H. Selwyn Smith
Commonwealth's Attorney for Prince William County

This is in reply to your letter of December 15, 1965, relating to an ordinance recently passed by the board of supervisors, the title of which is as follows: "An Ordinance Regulating Solicitors and Canvassers in the County of Prince William, Virginia, and Providing a Penalty for the Violation of the Terms of this Ordinance."

In our opinion, there is no statute under which the board of supervisors would have the power to enact and enforce an ordinance of this nature. There is grave doubt as to whether or not a statute which would authorize a county to adopt and enforce such an ordinance would be constitutional. In this connection you are referred to an opinion dated June 29, 1961, to Mr. E. C. Westerman, Jr., Commonwealth's Attorney of Botetourt County (Report of the Attorney General (1960-1961), at p. 300), which relates to magazine salesmen. In this opinion, reference is made to the case of Moore v. Sutton, 185 Va. 481. Your attention is especially directed to the quotation in that case at page 489 from 12 Corpus Juris. Your attention is also called to the case of Commonwealth v. Olin Mills, 196 Va. 898. An opinion dated May 27, 1965, also relates to this subject. This opinion is published in the Report of the Attorney General (1954-1955), at p. 21.

Those provisions of the ordinance which would authorize the Commissioner of the Revenue to pass upon the fitness of an applicant are clearly unconstitutional. Whether or not the county could impose a reasonable license fee upon solicitors which would be issued upon payment of the fee without regard to the discretionary powers of the commissioner of the revenue, I am not expressing an opinion.

ORDINANCES—Regulation of Traffic on Private Property—Cities and towns not authorized by law.

Honorable George C. Rawlings, Jr.
Member, House of Delegates

This is in reply to your letter of December 28, 1965, in which you request my opinion in regard to the question posed, which I quote, as follows:

"Does a city or town in the State of Virginia without some provision in its charter have the power to enact traffic ordinances concerning speed, parking, right of way, and other pertinent matters with respect to private property, having particular regard to shopping centers and private parking areas?"

The powers of local authorities in general to regulate traffic are set forth in Article 2 of Chapter 4, Title 46.1, Code of Virginia (1950), as amended. Therein, § 46.1-180 states, in part, as follows:

"(a) In counties, cities and towns the governing body may adopt ordinances to regulate the operation of vehicles on the highways of such counties, cities and towns not in conflict with the provisions of this title and may repeal, amend or modify such ordinances and may erect
appropriate signs or markers on the highway showing the general regulations applicable to the operation of vehicles on such highways."

It is clear that the authority given in this statute relates to the control of vehicular traffic on the highways of such counties, cities and towns. I find no law, however, which would give a city or town the power to enact traffic ordinances with respect to private property. Accordingly, I shall answer your question in the negative.

ORDINANCES—Shooting of Firearms in County—Boundaries of "heavily populated area" should be set out.

COUNTIES—Shooting of Firearms Ordinance—Boundaries of "heavily populated area" should be set out.

WEAPONS—Shooting of Firearms Ordinance—Boundaries of "heavily populated area" should be set out.

May 11, 1966

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

This will acknowledge receipt of your letter of May 10, 1966, which reads as follows:

"I have been instructed by our Board of Supervisors to draft an ordinance which would prohibit the shooting of firearms in certain areas of the County, pursuant to § 15.1-518 of the Code.

"I have made diligent inquiry and done a considerable amount of research in attempting a definition of a 'heavily populated area' and, thus far, without any success.

"It is my opinion that if an ordinance is drafted without defining a heavily populated area, it will be struck down as being void for vagueness.

"I enclose a copy of the proposed ordinance, and would greatly appreciate your advice regarding a definition of a 'heavily populated area.'"

The ordinance submitted by you does not seem to be sufficient. The ordinance, in order to comply with the statute, must, in my opinion, describe the area, or areas, which, in the opinion of the board, are so heavily populated as to make the shooting of arms therein dangerous to the inhabitants.

I am of the opinion that the boundaries of the areas should be set out in the ordinance. I believe the ordinance should contain a statement that the board "finds the following area (or areas) to be so heavily populated as to make the shooting of firearms therein dangerous to the inhabitants thereof" and then follow that up with the boundary description and the language of the ordinance prohibiting the shooting in such defined areas and providing the punishment for violation.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Accountants—Advertising—Uncertified accountant may advertise as a member of National Society.

August 10, 1965

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

This will acknowledge receipt of your letter of August 6, 1965, which reads as follows:
The Virginia State Board of Accountancy requests your opinion in the following matter.

Section 54-100, Code of Virginia as amended provides:

"Any person not registered as a public accountant by the Board, who shall represent himself to be a public accountant either by the use of the words "public accountant" on his door or stationery, or in advertising of any kind, or by signing in the capacity of a public accountant a certificate in writing in reference to any financial statement, or by any other form of representation, oral or written, shall be deemed guilty of a misdemeanor."

"In view of the foregoing, is it permissible for a person who is not a holder of a CPA Certificate and is not licensed as a public accountant in this State to advertise that he is a 'Member National Society of Public Accountants' on announcements, advertisements in the newspapers or listings in the classified sections of the telephone directory?"

"For your consideration, I am enclosing a copy of one such announcement referred to above."

The announcement (omitting the name) is as follows:

Announces

**NEW** Office Location:
Suite No. 203 Seay Building
3122 West Clay

**NEW** Telephone 358-8357

**NEW** Services:
*Data Processing for Individual and Small Businesses
*Monthly Profit and Loss
*Customer Statements
*Balance Sheets
*Management Services

" 'Member National Society of Public Accountants'"

The fact that this person announces that he is a member of the National Society of Public Accountants does not necessarily constitute a statement to the effect that he represents himself as a public accountant. It is my information that the National Society of Public Accountants admits persons to membership who do not hold either a CPA Certificate or a certificate licensing him as a public accountant.

This statute is penal in nature and must be strictly construed. In my opinion, the statute does not prohibit a person from revealing the organizations to which he belongs.

I call your attention to the opinion of this office to you dated June 6, 1961, published in Report of the Attorney General (1960-1961), at p. 1, which is applicable.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Accountants—Not necessary all partners be CPA's.

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

January 12, 1966

This will acknowledge receipt of your letter of January 6, 1966, which reads as follows:
Your opinion is requested in the following matter. Section 54-91 of the Code provides as follows:

"Any partnership practicing accountancy in this State may use the designation or practice as certified public accountants under a firm name only if all the members thereof are holders of certified public accountants' certificates granted under the laws of this State, and any partnership practicing accountancy in this State may use the designation or practice as public accountants under a firm name only if all the members thereof are duly registered and qualified as public accountants under the provisions hereof or are registered with the Board under the provisions of § 54-102. Each of the members of any partnership which shall use the designation "certified public accountants" or "public accountants" except upon compliance with the requirements hereinbefore made shall be subject to the penalties prescribed in § 54-100."

"In administering the provisions of the aforementioned section of the Code, the Board of Accountancy now requires all partners practicing accounting in this State under a firm name only to qualify for a CPA Certificate either by examination or by reciprocity and renew annually such certificate or be registered as public accountants in accordance with § 54-102 of the Code.

"There are many large accounting firms which practice public accountancy on a national basis and several of these accounting firms have offices in the majority of the states. The partnership structure provides for general partners as well as limited partners. The duties of the general partners are set forth as follows:

"All powers and authority in respect to the practice, business and property of the partnership are vested in the General Partners. They have the exclusive power to:

1. Construe and amend the partnership agreement or terminate the partnership.
2. Admit new partners and terminate the membership of an existing partner.
3. Elect new General Partners and fix their profit participations.
4. Elect the Managing Partner and the Executive Committee for two-year terms, to whom they have delegated the administration and management of the firm.
5. Determine how the partnership name shall be used.

"The limited partners who are not classified as general partners have no voice in the administration or management of the firm except as it has been delegated to them by the general partners or the executive committee of the firm.

"Inasmuch as Chapter 5 of Title 54 does not define a partner of an accounting firm, will you please advise if, in your opinion, § 54-91 makes it mandatory for all partners who practice as Certified Public Accountants under a firm name only to be required to be duly registered and qualified as certified public accountants under the provisions of Chapter 5 of Title 54 of the Code, or to be registered with the Board of Accountancy under the provisions of § 54-102 of the Code whether they be general partners, managing partners or limited partners of such firm."

Under Chapter 2 of Title 50 of the Code of Virginia a limited partnership may be formed. Such partnership is defined in § 50-44 of the Code as follows:

"A limited partnership is a partnership formed by two or more
persons under the provisions of § 50-45, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership."

Under this chapter, the General Assembly has approved the establishment of a partnership with some of the members being general partners and some being limited partners. Under § 50-55 the same person may be a general partner and a limited partner in the same partnership at the same time. Section 54-91, to which you have referred, requires that any partnership in the practice of accountancy in this State may practice as certified public accountants under a firm name, provided all the members thereof are holders of certified public accountant certificates granted under the laws of the State of Virginia and provided further that any partnership practicing accountancy in Virginia may practice as public accountants under a partnership firm name provided all the members of the partnership are registered and qualified as public accountants or qualify under the provisions of § 54-102 of the Code relating to foreign accountants.

In my opinion, it is not necessary that all of the partners be general partners. The qualification relates to the question as to whether or not all the members of the firm are certified public accountants or public accountants, as the case may be.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Barber Teacher—Circumstances requiring license.

March 22, 1966

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

This is in reply to your letter of March 21, 1966, in which you refer to § 54-83.3 of the Code and make the following statement:

"... It has come to the attention of the Virginia State Board of Barber Examiners that a registered barber, who is currently licensed, is offering to teach those persons who are duly registered as registered barbers and are currently licensed a course in order that they might become a Master Hairdresser. The courses offered are as follows:

Salesmanship and Lecture
Razor Shaping
Blow Waving
Hair Coloring
Tinting
Hair Straightening

"This person is to charge $300 for the complete course.
"Will you please advise if, in your opinion, the person who is to teach the classes mentioned above will be required to first obtain a certificate from the Board of Barber Examiners as a barber teacher. The Board is somewhat reluctant to make a decision in this matter inasmuch as the courses offered are only offered to those persons already authorized and licensed to practice barbering in this State and not to student barbers just entering the trade."

As you pointed out in your letter, § 54-83.3 provides that "no person shall teach or attempt to teach in a school of barbering in this State without a current
certificate of registration as a registered barber teacher." The term "school of barbering" is not defined in the Act; however, § 54-83.3 relates to schools of barbering and sets up the standards for operation. The courses offered by the person under consideration to registered barbers would seem to come within the category of "post graduate course" mentioned in the seventh paragraph of § 54-83.8.

In my opinion, this person is offering to operate a school of barbering, within the terms of the above-mentioned paragraph, which would be subject to approval under § 54-83.8 and the courses of instruction could only be given by persons holding a certificate of registration as a registered barber teacher as required under the provisions of the second paragraph of § 54-83.3.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Opticians—May not offer discount.

November 9, 1965

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

This will acknowledge receipt of your letter of November 5, 1965, which reads as follows:

"Subsection 5 of § 54-398.23 of the Code prohibits a licensed optician from advertising or offering any gift or premium or discount in any form or manner in conjunction with his practice.

"We, here in Virginia, are confronted with the following problem. Many discount and chain stores lease their optical department to licensed opticians with the understanding that the optician will honor each employee of the discount or chain store with a discount on all products bought in the optical department.

"In your opinion, is the foregoing agreement entered into between the discount and chain store and the optician contrary to the provisions of Subsection 5 of § 54-398.23 of the Code?"

The statutory provision to which you refer provides as follows:

"The Board shall revoke or suspend the certificate of registration of any person for any of the following causes:

* * * *

"(5) If such person shall advertise or offer any gift or premium or discount in any form or manner in conjunction with the practice of an optician, or directly or indirectly advertise that any one class of duly licensed eye examiners is preferable to any other class qualified and authorized under the laws of Virginia to make visual or eye examinations and to prepare prescriptions for eyeglasses, or advertise in any manner that would tend to mislead or deceive the public, or engage in any form of house to house canvassing or soliciting for the sale of spectacles or other ophthalmic products or services."

Under the circumstances stated by you the operator of a mercantile business, which includes an optical department, leases this department to an optician and one of the provisions of the lease is that the optician to whom the lease has been made will sell its optical products to employees of the store at a discount. I understand it is customary for mercantile establishments to grant discounts to the employees. The statute under consideration, it would seem, was enacted for the purpose of preventing opticians from offering or giving a rebate or discount..."
to their customers. No exceptions are authorized by this statute. The arrange-
ment made in this case between the merchant and the optician contains an offer
by the optician to give a discount to a class of customers, and this is prohibited.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate
Commission—Hearings on complaints.

December 16, 1965

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

This will acknowledge receipt of your letter of December 14, 1965, in which
you state as follows:

"The Virginia Real Estate Commission is at present receiving approx-
imately twenty written complaints each month. This is creating somewhat of a hardship on the Commission members in that the
Commission, in accordance with § 54-762 of the Code, is required to
hold a hearing if such complaints make out a prima facie case against
one of its licensees.

"As you well know, the members of the Commission, in order to
fulfill their obligations to the State, have to take time away from their
businesses to attend executive sessions, hearings, and examinations,
which creates a financial burden on the members.

"From past experience, the Commission has learned that many hear-
ings on complaints could have been avoided after hearing the evidence
or testimony of the witnesses. The Commission feels that it could reduce
its workload so far as hearings are concerned and save the State a sub-
stantial sum of money if the Commission has the authority to conduct
preliminary hearings by means of the use of subordinates of this De-
partment."

You request my opinion as to whether or not the Commission can by regula-
tion have this matter referred to a hearing examiner for a preliminary hearing
prior to being heard by the Real Estate Commission. In my opinion, the answer
to your question must be in the negative.

I call your attention to § 54-763 of the Code, in which it is provided that
before the Virginia Real Estate Commission may deny an application for license
or suspend or revoke the same, it must, after due notice, hold a hearing and
give the applicant or licensee an opportunity to be heard. There is nothing in
this section that would indicate that a licensee or applicant could be required
to appear before a hearing examiner prior to a hearing held by the Commission.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate
Commission—Suspension of real estate broker's license.

October 22, 1965

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

This will acknowledge receipt of your letter of October 15, 1965, which reads
as follows:

"Your opinion is requested in the following matter."
"In December, 1964, a real estate broker signed a contract to purchase a house and lot in Fairfax County, as a result of the broker selling the owner of such property another house and lot. The contract was dated December 10, 1964.

"On January 21, 1965, the broker negotiated the sale of the property, which he had contracted to buy, to another person. The contract was between the original property owner and the purchaser. The broker did not disclose at the time of the second contract being negotiated that the contract which he entered into with the owner was still in force and effect.

"Three days after the second contract was signed, the broker and the owner, by mutual consent, cancelled the first contract.

"Article 14 of the enclosed copy of the Code of Ethics of the National Association of Real Estate Boards makes it mandatory for a member of the aforementioned Association to make full disclosure of any ownership interest in property listed with him both to the listing owner and to the purchaser. So far as can be determined, the enclosed is the only Code of Ethics recognized by any group of licensed real estate brokers in this State.

"Subsection (10) of § 54-762, Code of Virginia, provides that the Real Estate Commission shall have the power to suspend or revoke any license issued under the provisions of Chapter 18 of Title 54, when such licensee has been deemed guilty of 'any other conduct, whether of the same or a different character from that herein specified, which constitutes improper, fraudulent, or dishonest dealing.'

"Taking into consideration the provisions of the Code of Ethics and the aforementioned Section of the Code, in your opinion, does the Virginia Real Estate Commission have the authority to suspend a real estate broker's license when such broker fails to disclose to a prospective purchaser of real property that he is a party in interest in such property. Further, is it mandatory that a real estate broker, in negotiating a sale of real property as agent, disclose the name of the property owner prior to the signing of the contract or prior to the submission of an offer to purchase to the owner."

In answer to a telephone inquiry from this office, you stated that the broker involved was not a member of the National Association of Real Estate Boards. You further stated that the Real Estate Commission has never adopted a regulation defining "improper dealing," as contained in subsection (10) of § 54-762 of the Code. For this reason, inasmuch as the provisions of § 54-762 must be strictly construed in favor of the broker, I am of the opinion that the Virginia Real Estate Commission does not have authority to suspend the real estate broker's license for the actions set forth in the first three paragraphs of your letter.

With respect to the last sentence of the terminal paragraph quoted above, I am of the opinion the answer must be in the negative. I am unable to find anything in Chapter 18 of Title 54 of the Code that makes it mandatory for a real estate agent or broker to make such a disclosure.
PROFESSIONS AND OCCUPATIONS—Optometrists—Referrals by school authorities—How made.

PUBLIC OFFICERS—School authorities referring pupils to optometrists.

HONORABLE WILLIAM L. WINTON
Member, House of Delegates

November 16, 1965

We have considered your letter of October 12, 1965, in which you enclosed a form being used by the Fairfax County schools entitled "Vision Report." This form is directed to the parents of the child involved and is prepared for the signature of the principal of the school or director of health and physical education of the school. The first paragraph of the form reads as follows:

"The results of the routine vision screening at school show that your child may need an eye examination. We suggest that you discuss this with your family physician and get his advice about an examination by an eye specialist."

You refer to our opinion of April 30, 1964 (see Report of the Attorney General, 1963-64, page 254), relating to practices that allegedly discriminate against optometrists. You stated that the American Medical Association Code of Ethics "prohibits physicians from referring parents to optometrists."

Assuming that the Code of Ethics is as stated by you, I am of the opinion that the use of the underscored language in the form, set forth above, is contrary to the views expressed in my opinion of April 30, 1964. If the school authorities should substitute for the underscored language a sentence substantially as follows, it would comply with our previous opinion:

"We suggest that you consult an eye specialist of your own selection with respect to this matter."

The language as presently used in the form has the effect of directing a parent to a physician who, on account of his Code of Ethics, will not refer the child to an optometrist, and this would be discriminatory.

PUBLIC FUNDS—Depository—Not limited to one depositor by § 58-944(b).

HONORABLE F. B. HUBER
Treasurer of Campbell County

November 23, 1965

This is in reply to your letter of November 19, 1965, which reads as follows:

"Section 58-944(b) of the Code of Virginia provides in effect that a depository may, in lieu of pledging securities, by resolution of its board of directors, pledge its assets to a depository of public funds, provided that such public funds on deposit shall not be in excess of sixty per centum of the capital and surplus of the depository."

"I cannot find that the statute limits the number of depositors of public funds who may be protected in this manner by the same depository."

"Should a depository have several depositors with substantial balances covered in this manner, it occurs to me that there could be such a dilution of protection as to make it almost meaningless."

"I would appreciate your opinion as to whether Section 58-944(b)
contemplates that only one depositor may be protected by its provisions or is there no limit as to the number who may be so protected."

In my opinion, § 58-944(b) does not limit a depository to one depositor of public funds. I assume that some of the larger banks are accepting deposits from more than one county treasurer and under the provisions of this statute the bank could adopt the resolution provided for therein making it applicable without priority to each separate public fund on deposit in the bank. The question as to whether or not this statute authorizing a depository to give priority to public funds over the funds of its other depositors has not been tested in the courts of this State. See, Opinions of Attorney General (1960-1961), p. 250, raising a question as to the validity of such a resolution where Federal banks are involved.

I assume that any county treasurer, who may be dissatisfied in case a depository takes advantage of paragraph (b) of § 58-944, may transfer such deposit to a bank that will secure the deposit as required in the prior portion of § 58-944.

PUBLIC FUNDS—Neighborhood Youth Corps Funds—Not handled as other school funds.

SCHOOLS—Neighborhood Youth Corps Funds—Not handled as other school funds.

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

March 14, 1966

This is in reply to your letter of February 16, 1966, which reads as follows:

"Section 22-133 of the Code of Virginia provides that all funds made available to the School Board for Public School and/or education purposes in the counties, both state and local, shall be handled by the County Treasurer and paid out in the same manner as other county funds.

"The Wise County School Board entered into a contract with the United States Department of Labor, Manpower Administration, Neighborhood Youth Corps for work training projects under the supervision of the School Board.

"I have been requested to obtain an opinion as to whether or not this money must be paid out by the County Treasurer under the provisions of § 58-951 of the Code of Virginia, or whether or not it may be deposited in a special fund and paid out over the signature of the Superintendent of Schools and Chairman of the School Board.

"A copy of the agreement between the school board and the Department of Labor, Neighborhood Youth Corps, is enclosed herewith for your use."

The funds under consideration are provided pursuant to the provisions of the Economic Opportunity Act of 1964, and in accordance with an agreement between the United States Department of Labor and the Wise County School Board. It is required by the "Special Provision" relating to revenue and funds which is a part of the contract by reference that the funds shall be deposited in a Special Bank Account to the credit of the Wise County School Board, no part of which may be mingled with any other funds. Such funds may be withdrawn by the School Board solely for the purpose of making expenditures approved by the Department of Labor. Upon request of the Secretary of Labor, the school board must repay to the federal government any part or all of the
unliquidated balance in the fund, and if the board fails to make such payment the Secretary of Labor may draw on the bank for such fund. The federal government retains a lien on the money in the bank, paramount to all other liens.

Section 22-133 of the Code, in my opinion, does not apply to funds of this nature. The school board in this instance is acting in the capacity of agent for the federal government.

The circumstances and conditions under which this fund is received prevents such fund from becoming a part of the county funds as that term is used in Titles 22 and 58 of the Code. Therefore, in my opinion, no part of the fund under consideration should be deposited to the credit of the county treasurer—but it should, as required by the agreement, be deposited to the credit of the school board as a special account free from any control or responsibility of the county treasurer.

I have discussed this question with the State Auditor and with Mr. J. G. Blount, Jr., Administrative Assistant for the State Board of Education, and several questions have been raised by them with respect to their responsibility in connection with this matter and also with respect to the handling of matching funds made available by the county. In our opinion, neither the State Auditor nor the State Board of Education has any responsibility or duties in connection with the handling of the federal funds in question. I suggest that the school board and the county treasurer should communicate with the State Auditor with respect to the procedure to be followed in connection with the handling of the local funds involved in this matter.

PUBLIC OFFICERS—Compatibility—Justice of peace should not act as agent of bonding company in executing bond in any matter pending before him.

October 11, 1965

HONORABLE C. G. BLANKENSHIP
Justice of the Peace of Pulaski County

This will acknowledge receipt of your letter of October 7, 1965, which reads as follows:

"Will you please advise me if a justice of the peace in Virginia can represent a bonding company without interfering with the office of the justice of the peace."

There is no provision in the statutes which would prevent a justice of the peace from acting as an agent of a surety company. However, in my opinion, it would be improper for a justice of the peace to represent a surety company upon a bond that such justice of the peace has required a person to execute. For example, if a justice of the peace fixes a bail bond for a person who has been brought before him, he should not be the agent of the surety company in executing the bond. In other words, the justice of the peace should not act as agent of a bonding company in executing a bond in any matter pending before him.
PUBLIC OFFICERS—Contracts—Justice of peace may not contract with city during term of office.

JUSTICE OF PEACE—Contracts—May not contract with city during term of office.

HONORABLE WILLIAM M. DUNBAR
Justice of the Peace, City of Petersburg

This will acknowledge receipt of your letter of November 2, 1965, which reads as follows:

“As a justice of the peace receiving fees for services rendered the State of Virginia and the City of Petersburg, Virginia, may I seek and attain employment in the Petersburg City Jail working for a salary paid jointly by the city and state, and while so doing continue to be paid fees as a justice of the peace?”

Section 15.1-73 of the Code provides in part as follows:

“No member of the council, board of aldermen or member of the school board, or any other officer, or agent, or any commissioner appointed for the opening of streets, or any other member of a committee constituted or appointed for the management, regulation or control of corporate property of any city or town, or constable, policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, civil or police justice, sheriff, sergeant, superintendent of the poor or any other paid officer of any city or town, during the term for which they are elected or appointed, shall be a contractor or subcontractor, with the corporation. . . .” (Italics supplied)

Inasmuch as a justice of the peace is an officer it would seem that he is disqualified from making contracts with the city during the term for which he has been elected or appointed.

PUBLIC OFFICERS—Contracts—Member of Virginia Water and Sewer Authority may provide insurance coverage for Authority.

PUBLIC OFFICERS—Contracts—Member of Virginia Water and Sewer Authority may sell water system to Authority.

HONORABLE W. BARNEY ARTHUR, Counsel for Campbell County Utilities and Service Authority

This will acknowledge receipt of your letter of July 21, 1965, in which you, on behalf of the Campbell County Utilities and Service Authority, which was established under the provisions of the Virginia Water and Sewer Authorities Act (Chapter 28 of Title 15.1 of the Code) present the following questions:

“(1) A member of the Board of the Authority is a general insurance agent. Can he legally bid on and provide insurance coverage on the property of the Authority and against liability of the Authority?
“(2) A member of the Board of the Authority owns a water system (wells, pumps, pipes and meters) desired by the Authority. Can he legally consummate a sale of this system to the Authority?”
The members of the Authority receive a compensation of $50.00 per month as permitted under § 15.1-1249 of the Code. The Virginia Water and Sewer Authorities Act does not contain any provision with respect to contracts between the Authority and members appointed to serve on the Board. Section 15.1-67 is the general statute with respect to the prohibitions as to contracts between county officials, the county and its various agencies. This office has held on several occasions that this statute, being penal, must be strictly construed, and it does not seem that it would apply to the situation presented by you.

Frequently, provisions of the nature of § 15.1-67 are contained in the Acts establishing or authorizing the establishment of commissions and authorities by the localities. For example, the Housing Authorities Act, found in Title 36, contains a provision prohibiting any officer of the Authority from having any interest, direct or indirect, in contracts with the Authority. A similar prohibition is found in the Act authorizing the establishment of airport commissions. Inasmuch as there is no such prohibition in the Virginia Water and Sewer Authorities Act, I feel that both of your questions must be answered in the affirmative.

PUBLIC OFFICERS—Contracts—School board member may contract for fuel oil with school board.

PUBLIC OFFICERS—Contracts—School board member cannot contract for fuel oil with board of supervisors.

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

September 30, 1965

This will acknowledge receipt of your letter of September 29, 1965, which reads as follows:

“A member of the Brunswick County School Board is also a partner in a firm engaged in the retail oil business.

“The following questions have arisen:

“1. Is it permissible for the firm in question to contract with the County School Board in furnishing its fuel oil requirements, notwithstanding the fact that a partner in the firm is a member of the School Board?

“2. Is it permissible for this firm to contract with the Board of Supervisors in furnishing the general fuel oil requirements for the County Government?

“I might add that an opinion of the Attorney General, which appears on page 153 of the Opinions of the Attorney General for 1936-37, construing the provisions of law which are now contained in Section 22-213 of the Code of Virginia, would appear to make it permissible for this firm to contract with the School Board, but that, in the light of the provisions of Section 15.1-67 of the Code of Virginia, there is, in my mind, some doubt as to whether the firm can contract with the Board of Supervisors.”

The opinion of former Attorney General Abram P. Staples, to which you refer, applies to a merchant who, in the regular course of trade and without employing agents to solicit the business, sells gas and oil to the school board. It will be noted that Mr. Staples stated in his opinion that it would be prudent for transactions of this nature to be approved by the State Board of Education. This opinion has not been overruled by this office.
With respect to your question No. 2, transactions of this nature would, in my opinion, be in violation of § 15.1-67 of the Code.

PUBLIC OFFICERS—Deputy Treasurer—May not administer zoning ordinance.

COUNTIES—Deputy Treasurer—May not administer zoning ordinance.

HONORABLE W. E. BAGWELL
Treasurer of Northampton County

This is in reply to your letter of May 27, 1966, which reads as follows:

“Our County has completed all the necessary arrangements for a zoning and planning ordinance. It is ready to be put on the records as soon as someone is selected to implement same.

“The question has arisen as to whether or not a Deputy Treasurer may on a part time basis administer the ordinance.”

In my opinion, the provisions of § 15.1-67 of the Code prohibit a deputy treasurer of a county from entering into any contract with the county. The prohibitions of this section apply to the deputy of a treasurer to the same extent as to the treasurer himself. Furthermore, a deputy treasurer is a paid officer of the county and the prohibitions of this section would apply for that reason.

None of the exceptions appearing in §§ 15.1-68 through 15.1-73.1 of the Code apply in this instance.

REAL ESTATE—Agents—Obtaining distress warrants for rent prohibited.

RENT—Real Estate Agents—Prohibited from obtaining distress warrants.

WARRANTS—Distress—Real estate agents prohibited from obtaining.

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

In your letter of January 31, 1966, you asked my opinion as to whether or not a real estate agent, acting as an agent for a person claiming rent, may procure a distress warrant from the Clerk of the Municipal Court.

Section 54-42 of the Code of Virginia states that the only persons who may practice law in Virginia are those licensed to practice under the laws of this State or lawyers licensed by other states occasionally appearing in association with Virginia lawyers.

The question raised is whether obtaining such a warrant constitutes the practice of law.

Section 54-48 of the Code gives the Supreme Court of Appeals power to adopt regulations defining the practice of law.

Part I of the Rules for Integration of the State Bar defines the practice of law. This rule states in part:

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

* * *
“(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal,—judicial, administrative, or executive,—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one especially employed as an expert in respect to such facts and figures when such presentation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.” (174 Va. at xix; 201 Va. at lxxxvi)

Section 55-230 of the Code of Virginia provides for issuance of a distress warrant on affidavit of the person claiming the rent, or his agent, that the money is justly due on the contract of rental. This section specifically permits an agent of the landlord to execute the required affidavit. It does not, however, say the agent may procure the warrant from the court clerk.

On July 19, 1940, the Unauthorized Practice of Law Committee of the Virginia State Bar issued an opinion stating that a real estate agent cannot institute or conduct proceedings for collection of rent. This ruling was approved by the Council of the Virginia State Bar on December 9, 1940. To the same effect is Opinion No. 11, issued by the Committee on February 21, 1940, saying obtaining of warrants by a lay collection agent on behalf of creditors constitutes the practice of law.

The Law and Equity Court of the City of Richmond on August 26, 1957, in the case of Virginia State Bar v. Schmidt & Wilson, Inc., enjoined a real estate firm from, among other things, “representing its patrons in court in the collection of rent and other matters.”

In my opinion, the act of real estate agent in applying to the clerk for a distress warrant would be undertaking to represent the interest of another before the court, within the meaning of the rule quoted above.

REAL ESTATE—Subdivision Plats—Title to streets and alleys.

RECORDATION—Subdivision Plats—Title to streets and alleys.

HIGHWAYS—Subdivision Plats—Title to streets and alleys.

February 11, 1966

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

This is in reply to your letter of February 10, 1966, in which you state that a subdivision plat has been admitted to record under the provisions of Article 7, Chapter 11 of Title 15.1 of the Code, and that the owner of the land who recorded the plat made a notation thereon to the effect that the subdivider retained the fee simple ownership to the streets and alleys as shown on the plat. You present the following question:

“Please advise as to whether or not it is possible for a subdivider to retain ownership in the streets and alleys as above stated, and whether or not it will be necessary for the county to perform any act before the dedication of the streets and alleys will be completed.”

Section 15.1-478 of the Code, to which you made reference, expressly provides that the recordation of such a plat—

“...shall operate to transfer, in fee simple, to the respective counties and municipalities in which the land lies such portion of the
REPORT OF THE ATTORNEY GENERAL

premises platted as is on such plat set apart for streets, alleys, or other public use and to transfer to such county or municipality any easement indicated on such plat to create a public right of passage over the same. . . ."

In my opinion, under the provisions of this statute, the fee simple title to the streets and alleys passed to the county and the notation made on the plat is of no effect. In answer to the second portion of your letter, I know of no further action that the county board of supervisors should take in connection with this matter.

REAL ESTATE BROKERS—Sale of Personally Owned Property—Not within scope of § 54-730.

February 28, 1966

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

This is in reply to your letter of February 23, 1966, which reads as follows:

"Your opinion is requested in the following matter:

"Section 54-730 of the Code defines a real estate broker. Section 54-732 of the Code enumerates acts to constitute real estate broker or salesman. Section 54-762 of the Code grants the Virginia Real Estate Commission the authority to suspend or revoke a license as a real estate broker or salesman when a licensee performs or attempts to perform any of the acts enumerated in this section.

"Will you please advise if, in your opinion, a licensed real estate broker of long standing in his community is subject to the provisions of Chapter 18 of Title 54 of the Code when such broker negotiates the sale of real property which he owns. In other words, can a licensed real estate broker have two sets of standards; one set which governors him in the negotiation of the sale of real property belonging to others; another when he sells real property belonging exclusively to him."

In my opinion, the provisions of § 54-762 of the Code apply only to acts done or committed by a real estate broker or real estate salesman in connection with transactions coming within the scope of § 54-730 of the Code and for which a person has to obtain a license under Chapter 18 of Title 54 in order to exercise the functions of a real estate broker or a real estate salesman. Whenever a person who has a license as a real estate broker is offering for sale, property solely owned by him, he is not engaged in selling for others—that is, he is performing no act that would require a broker's license and, therefore, the penal provisions of Chapter 18, Title 54, in my opinion, would not be applicable. Provisions of this nature must be strictly construed in favor of the accused.

RECORDATION—Deeds—Church property—Better practice to record in name of each trustee.

CLERKS—Deeds to Church Property—Better practice to record in name of each trustee.

June 10, 1966

HONORABLE T. F. TUCKER, Clerk
Corporation Court, City of Danville

In your letter of June 7, 1966, you state:
"Section 17-79 of the Code of Virginia describes the manner in which general indexes for clerk's offices shall be maintained.

"My question is concerning the proper indexing of an instrument executed by the trustees of a church. We have always indexed deeds in which a church was a party in the name of each trustee appearing in the deed as well as the name of the church. Is it necessary that the name of each trustee be entered on the general index or is it sufficiently indexed if indexed in the name of the church only?"

Section 57-8 of the Code provides for court-appointed trustees in whose names legal title to real estate owned by a church shall be held. Section 57-11 provides that suits involving such real estate shall be in the names of such trustees.

Subsection (1) of § 17-79 requires the clerk to index deeds "in the names of all parties appearing therein who are thereby shown to be affected by the instrument." Subsection (3) provides that a deed "made by a person in a representative capacity . . . shall be indexed in the names of the parties and the name of the former record title owner, shown by the instrument."

While the matter is not free from doubt, I am of the opinion that the better practice would be to index such a deed in the name of each trustee executing it, as well as in the name of the church.

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RECORDATION—Partnership Certificates—Form and place of filing.

HONORABLE H. BRUCE GREEN, Clerk
Circuit Court of Arlington County

September 22, 1965

This is in reply to your letter of September 17, 1965, in which you enclosed a certified copy of the articles of incorporation of the partnership of Paine, Webber, Jackson & Curtis, which consists of approximately 28 pages. This was submitted to you by a law firm in Washington, D. C., to be filed in accordance with the provisions of § 50-74 of the Code. Chapter 3 of Title 50, which includes §§ 50-74 through 50-78, does not contemplate the recording of the entire articles of partnership under this chapter, but it merely provides for filing a short certificate setting forth those things specifically mentioned in § 50-74. This, of course, would be a very short certificate and it must be signed and acknowledged by each of the partners. The fee for recording this certificate would be 50¢ under § 50-75.

I do not believe it is customary to record partnership agreements in the clerk's office, but I assume that if this agreement were executed in the manner provided in § 55-106 and duly acknowledged it would be a recordable instrument and the fee would be based upon the statutory charge for recording deeds and other instruments and indexing the same.

The only way the partnership can give proper notice of the formation of the partnership together with the names and addresses of the partners, etc., as required in § 50-74, is to have it recorded in the manner prescribed in § 50-75 of the Code. The certificate submitted to you by this partnership does not, in my opinion, comply with the requirements of Chapter 3 of Title 50.

I return herewith the papers which you submitted to us.
RECORDATION—Subdivision Plats—When clerk required to record.

CLERKS—Recordation—Subdivision plats.

Honorable A. D. Johnson
Commonwealth’s Attorney for Isle of Wight County

This is in reply to your letter of September 23, 1965, which reads as follows:

“In 1964 Isle of Wight County adopted a subdivision ordinance, effective as of July 1, 1964, pursuant to Article 7 of Chapter 11 of Title 15.1 of the Code of Virginia, fixing certain requirements as to the size of lots, streets, water, sewage, other improvements and the approval and recordation of plats.

“On June 29, 1962, a landowner made a survey and plat of a part of his land and subdivided it into lots. The plat was not recorded at the time of the survey and subdivision of the land, but a few lots have been sold since then and lots are still being offered for sale. The Clerk was recently requested to record the plat without compliance with the County subdivision ordinance. At the time the survey and subdivision were made the County had no subdivision ordinance.

“It would seem that, since this survey and subdivision were made before the effective date of the County subdivision ordinance and even though the plat was not recorded at that time, this subdivision would not be subject to the County subdivision ordinance and the plat should be recorded without compliance with said ordinance. The Clerk, however, desires to know and I will appreciate your opinion as to whether or not the aforesaid subdivision is subject to said ordinance and if said ordinance should be complied with before the plat is recorded.”

In my opinion, the clerk cannot refuse to record this plat merely because it does not comply with the county subdivision ordinance which was adopted under Article 7 of Chapter 11 of Title 15.1 of the Code of Virginia subsequent to the time that the subdivision plat was made by the landowner. It will be noted by reference to § 15.1-473 that full compliance with the provisions of Article 7 is not required unless the subdivision is made subsequent to the adoption of the ordinance. Subsection (e) of § 15.1-473, which restricts the power of the clerk to record a plat of the subdivision, refers to plats made subsequent to the effective date of the subdivision ordinance.

REFERENDUMS—Pork Industry Commission—Department of Agriculture authorized to conduct.

TAXATION—Pork Industry Commission—Payment into special fund may not be used to pay for referendum.

Honorable William V. Rawlings
Member, Senate of Virginia

This will acknowledge receipt of your letter of June 17, 1966, which reads as follows:

"Section 8 states as follows: 'The provisions of this act shall become effective only after having been approved by a majority of the votes cast in a state-wide referendum of all producers who in the preceding twelve months sold at least twenty-five feeder pigs and/or slaughter hogs, said referendum to be conducted by the Virginia Department of Agriculture and Immigration.'

"The question has arisen as to who should pay the cost, estimated at approximately $5,000.00 for conducting the referendum. I would appreciate your opinion as to whether the language indicates that the cost of conducting the referendum should be borne by the Virginia Department of Agriculture and Immigration. If not to be borne by the Virginia Department of Agriculture and Immigration, from what source should these funds for the conduct of the referendum come."

There is no specific appropriation in the Appropriation Act of 1966 for the payment of this expense. The holding and supervision of the referendum is an administrative duty and, in my opinion, it would be proper to pay the expenses incurred out of the appropriation made in Item 154 of the Appropriation for the administrative expenses of the department.

In the event the referendum should be in favor of enforcement of Chapter 658, I am of the opinion that the provisions of Sections 3 and 6(a) are not broad enough to permit the reimbursement of the general fund out of the special fund created under Section 6 of said chapter.

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REGISTRAR—May Not Serve as Administrator of Subdivision Ordinance.

June 1, 1966

HONORABLE IMOGENE W. TUNSTALL, Clerk
Circuit Court of Cumberland County

This will acknowledge receipt of your letter of May 31, 1966, which reads as follows:

"The Chairman of the Cumberland County Board of Supervisors has asked that I request your opinion as to whether or not the Board of Supervisors may appoint Mr. R. W. Norman, who is General Registrar for this County, as Administrator for the Subdivision ordinance for the county, for which he would receive compensation.

"Your early advice would be appreciated, because the Board would like to make the appointment at its next meeting to be held on June 3, 1966."

In my opinion, the provisions of § 15.1-67 of the Code would prevent the general registrar for the county from performing the service referred to above for compensation. This, in my judgment, would constitute a contract which is prohibited from being made between the board of supervisors and any paid officer of the county. The registrar is an officer within the meaning of that term as used in § 15.1-67. He is required under § 24-65 to take the oath of office prescribed in the Constitution.
SANITARY DISTRICTS—Bonds—Referendum required prior to issuance.

BOARDS OF SUPERVISORS—Sanitary District Bonds—Referendum required prior to issuance.

March 16, 1966

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

This is in reply to your letter of March 15, 1966, in which you present the following question:

"May the Augusta County Board of Supervisors issue straight revenue bonds, such bonds to be payable solely from revenues without any recourse to an ad valorem tax, in behalf of the Weyers Cave Sanitary District without a referendum?"

The statutory provisions with respect to the issuance of bonds on behalf of a sanitary district are found in Article 2, Chapter 2 of Title 21 of the Code. Under these provisions, which are set out in §§ 21-122 through 21-140.2, it is mandatory that the qualified voters of the district shall, at an election held for such purpose, approve the issuance of the bonds. These statutes carry out the provisions of Section 115a of the Constitution.

SCHOOLS—Adult Basic Education Program—Not part of public school system.

April 4, 1966

MR. R. P. REYNOLDS
Division Superintendent, Carroll County Schools

This will acknowledge receipt of your letter of April 1, 1966, which reads as follows:

"Carroll County is now operating a program of instruction for adults who have less than an eighth grade education. The program is entitled Adult Basic Education. Teachers and teacher aides are employed in various schools of this county in furnishing appropriate instruction. Ten percent of the cost of the program will be paid from Carroll County School Operating Funds. Ninety percent will be supplied from Federal funds.

"In your opinion could a relative of one of our school board members be employed as a teacher or teacher aide or in any capacity in this Adult Basic Education Program and paid from funds supplied from our local School Board and Federal funds on the ten percent ninety percent basis without this employment being in violation of § 22-206 of the Virginia law which relates to the employment of relatives of school board members?"

In my opinion, the provisions of § 22-206 of the Code apply only to teachers in the employment of a public free school system, established under Title 22 of the Code. Although the local school board has apparently sanctioned and is participating in the Adult Basic Education program, I do not consider that it is a part of the statutory system of public free schools. Therefore, your question is answered in the affirmative.

HONORABLE EDWARD M. HUDGINS
Member, House of Delegates

This is in reply to your letter of August 17, 1965, in which you request my opinion regarding the effect of Public Law 89-10, 89th Congress, known as the “Elementary and Secondary Education Act of 1965.” You are particularly interested in knowing whether the provisions of Item 459 of the Appropriations Act of 1964, Chapter 658, Acts of Assembly (1964) are affected by Section 207(c)(1) of Public Law 89-10.

The material provisions of Item 459 of the Appropriations Act of 1964 read as follows:

"Item 459 b 7.—'Adjusted Federal operating aid'—two-thirds (2/3) of any Federal funds provided and/or available for local operating expenses."

"Item 459 c 8.—In the event the availability of Federal funds for local operating expenses is conditioned upon their exclusion from a State apportionment formula, the State Board of Education shall exclude both such Federal funds and the average daily attendance for the pupils involved from the application of this item."

The pertinent provisions of Public Law 89-10 read as follows:

"TITLE I—FINANCIAL ASSISTANCE TO LOCAL EDUCATIONAL AGENCIES FOR THE EDUCATION OF CHILDREN OF LOW-INCOME FAMILIES AND EXTENSION OF PUBLIC LAW 874, EIGHTY-FIRST CONGRESS"

"Sec. 2. The Act of September 30, 1950, Public Law 874, Eighty-first Congress, as amended (20 U.S.C. 236-244), is amended by inserting: ‘TITLE I—FINANCIAL ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITY’ immediately above the heading of section 1, by striking out ‘this Act’ wherever it appears in sections 1 through 6, inclusive (other than where it appears in clause (B) of section 4(a), and inserting in lieu thereof ‘this title’, and by adding immediately after section 6 the following new title: ‘TITLE II—FINANCIAL ASSISTANCE TO LOCAL EDUCATIONAL AGENCIES FOR THE EDUCATION OF CHILDREN OF LOW-INCOME FAMILIES’"

"[Sec.207] (c)(1) No payments shall be made under this title for any fiscal year to a State which has taken into consideration payments under this title in determining the eligibility of any local educational agency in that State for State aid, or the amount of that aid, with respect to the free public education of children during that year or the preceding fiscal year."

The only material amendments to Public Law 874 (Federal impact areas) by Public Law 89-10, were to extend that legislation and change the words "this Act" to "this title" wherever those words appear in the Act of September 30, 1950. As will be noted from the foregoing quoted provisions the aid to low-income areas is now Title II of Public Law 874, 81st Congress. Section 207(c)(1) is a portion of Title II. It refers to payments made under "this title." I am of the
opinion that the inhibition in that section does not refer to Title I, which is little more than a reenactment of Public Law 874.

In view of the foregoing, I am of the opinion that Item 459 of the Appropriations Act of 1964 is unaffected by the provisions of Public Law 89-10 insofar as Federal funds for local educational agencies in areas affected by Federal activities (Title I of Public Law 874) are concerned. On the other hand, Federal financial assistance to local educational agencies for the education of children of low income families as provided in Title II of P.L. 874 (as now amended by P.L. 89-10), may not be taken into consideration in determining the eligibility of any local educational agency for State aid, or the amount of that aid, with respect to free public education of children. Consequently, the provisions of Item 459 b 7. and 459 c 8. cannot be applied to Federal funds made available for that purpose.

SCHOOLS—Board of Supervisors—May eliminate school budget items under certain conditions.

SCHOOLS—Superintendent—Board of supervisors may not appropriate for salary under certain conditions.

HONORABLE DONALD G. PENDLETON
Member, House of Delegates

May 10, 1966

This will acknowledge receipt of your letter of May 3, 1966, which reads as follows:

"I am writing in reference to how much authority the County Board of Supervisors have in relationship to the school budget.
"1. Can the Board of Supervisors eliminate any specific item in the school budget?
"2. Does the Board of Supervisors have to approve a raise granted to the Superintendent of Schools which is to be paid by local funds?
"3. What effect does the above two questions have in relationship to the new legislation which was passed by the 1966 General Assembly?"

On June 3, 1960, this office issued an opinion to Honorable C. Harrison Mann, Jr., which is published in Report of the Attorney General (1959-1960), at p. 66. I enclose herewith copy of that opinion. You are referred to the reply to questions 3 and 4 and 5 and 6 in that opinion, found on pages 7 and 8 of the enclosed copy, which, in my judgment, answers your question No. 1. An affirmative answer to your question would not apply in every case. For example, as you will note from our answer to question No. 2, there is a statutory duty upon the board of supervisors under § 22-37 of the Code to provide for the payment of 40% of the minimum salary of the superintendent of public schools. You will note that in our answer to questions 5 and 6, we have quoted from § 58-839 wherein there are certain exceptions to the provisions that there is no mandatory duty upon the board of supervisors to make appropriations.

With respect to question No. 2, the board of supervisors is required by statute to pay 40% of the minimum salary of the school superintendent. In my opinion, there is no mandatory obligation upon the board of supervisors to make an appropriation for such purpose in addition to the prescribed minimum. Attention is directed to the case of Griffin v. Board of Supervisors, 203 Va. 321, 124 S. E. (2d) 227. This case held that there is no mandatory duty upon a board of supervisors to levy taxes and make appropriations for public school purposes. But where the board makes an appropriation for public school purposes and such appropriation contains an item for administrative expenses without
further identification, in my opinion the school board could pay the minimum or any increase thereof out of such appropriation.

With respect to question No. 3, we do not have access to all of the legislation passed at the 1966 session of the General Assembly involving the powers of boards of supervisors and school boards and, therefore, cannot express an opinion at this time as to what effect any such legislation would have upon the questions presented by you. A reference to the cumulative index of the bills introduced and passed does not indicate that any such legislation was enacted.

SCHOOLS—Principal—Acceptance of other employment while drawing salary depends upon terms of contract with school authorities.

HONORABLE W. A. HOWLETT
Treasurer of Carroll County

This will acknowledge receipt of your letter of July 27, 1965, in which you present the following questions:

"Is it lawful for a school principal who is paid on a twelve month period by county and state, to receive a salary as Director of Head Start Program for the services rendered, while drawing the salaries outlined above?

"Does the payment of these salaries impose any legal obligations on this office?"

With respect to your first question, I am not aware of any statute that would prevent the school principal from being paid compensation for his services with the Head Start Program while drawing his salary under his contract with the local school board. Whether or not he can accept other employment depends upon the terms of his contract with the school authorities.

I am not aware of any obligations—other than those in connection with all authorized disbursements—that are imposed on your office by reason of the fact that the school principal is being paid for outside work in addition to his regular compensation under his contract with the school board.

SCHOOLS—Regulations of School Board Concerning Married Students—Must not be discriminatory.

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

This will acknowledge receipt of your letter of August 18, 1965, enclosing a letter from the Division Superintendent of Campbell County Schools, which reads as follows:

"Several questions have been raised concerning the policy of the Campbell County School Board with reference to the attendance of married students in school. Married students are permitted to attend school, but the school board has certain regulations governing their attendance.

"Enclosed is a copy of the school board policy concerning this. Would any of the regulations included in this policy be considered
improper or illegal? Paragraph 22-218 of the Code deals only with the attendance of married students and not with the regulations governing their attendance."

The school board policy referred to in the letter from the Division Superintendent reads as follows:

"MARRIED STUDENTS POLICY"

"A married student wishing to attend the public schools of Campbell County must appear before the School Board in person accompanied by the spouse at the first regular meeting of the School Board following marriage and sign an agreement to abide by the restrictions as set forth below:

"RESTRICTIONS—FOR ALL MARRIED STUDENTS:

"1. Refrain from discussing marriage relationships with any student and conduct myself at all times according to accepted conventions of married people."

"2. Provide my transportation to and from school.

"3. Forego membership and participation in all extra-curricular activities.

"FOR MARRIED GIRLS:

"1. Notify the principal and voluntarily withdraw from school if pregnancy occurs.

"2. Provide the principal with a physician's statement concerning pregnancy if requested.

"THE AGREEMENT TO BE SIGNED BY THE MARRIED STUDENT:

"I agree to observe the foregoing restrictions and to accept the violation of any one of them as a just cause for dismissal from school.

"Signed

(Husband)

(Wife)

(Address)

I enclose herewith copies of two opinions relating to this subject as follows:


You will observe that under these opinions a school board is limited in its power to treat a married student on a basis different from an unmarried person. The right of a person to be admitted to the public free schools is set forth in § 22-218 of the Code and a child who meets the qualifications therein may not in the opinions referred to be denied attendance because of marriage.

In my opinion, a student may not be denied admittance to a public school solely on the ground that he or she refuses to execute the agreement shown on the "Married Students Policy" form adopted by the school board.
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SCHOOLS—Residence in County and City—Election of parents controlling.

HONORABLE CARTER R. ALLEN
Commonwealth's Attorney for the City of Waynesboro

April 19, 1966

This will acknowledge receipt of your letter of April 15, 1966, which reads as follows:

"Recently it has come to my attention that a lot in one of the newer subdivisions in Waynesboro is diagonally and equally divided half in the county of Augusta and half within the city limits of Waynesboro. The residence constructed on the lot is situated about 60 percent in the county and 40 percent in the city of Waynesboro. The question has arisen under the provisions of § 22-218 of the Code as to which school system, that of the county or of the city, is obliged to take the child without tuition."

The question presented was considered in an opinion dated November 29, 1955, to Honorable Kossen Gregory, Member of the General Assembly, and published in Report of the Attorney General (1955-1956), at p. 213. In that case, the family resided in a house located partly in the city of Roanoke and partly in the county of Roanoke. I quote as follows from that opinion:

"... Where a family resides in a house situated in two jurisdictions, such as Roanoke City and Roanoke County, I am of the opinion the parents would have the right to elect whether their children would attend the city or county schools. I am informed that in similar situations in Richmond the wishes of the parents control. The parents could, if they so desired, divide the children between the two jurisdictions, without the payment of tuition to either of them. . . ."

SCHOOLS—Retirement System—Local school board cannot pay employees' contribution for group life insurance.

RETIREMENT SYSTEM—Schools—Local school board cannot pay employees' contribution for group life insurance.

HONORABLE CHARLES H. SMITH, Director
Virginia Supplemental Retirement System

January 27, 1966

This is in reply to your letter of January 26, 1966, which reads as follows:

"We have received a request from a local public school board requesting that we obtain an opinion as to whether or not a local School Board has the authority to pay the employee contributions for group life insurance under the State Group Life Insurance program, Section 51-111.67:1 through Section 51-111.67:13, of the Code of Virginia."

The burden is placed on the employee by § 51-111.67:5 to pay the employee contribution required under Article 9, Chapter 3 of Title 51 of the Code. I can find no provision in any statute authorizing the political subdivisions of the State or any agency thereof to make such payments on behalf of their employees. You will note by reference to the Code section cited herein that it provides that "each employee so insured shall contribute to the cost of such life insurance . . . in an amount to be determined . . . by the Board. . . ."
"Board" as used herein relates to the Board of Trustees of the Virginia Supplementary Retirement System and not to a local board.

In my opinion, there is no provision in the statutes authorizing the counties to make donations to their employees for such purpose, and it would seem that if such a policy can be adopted it should apply to all employees of the county equally.

SCHOOLS—Scholarships for Private Schools—State and locality to each pay half.

SCHOOLS—Annual Cost of Tuition—May not be donated.

May 10, 1966

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

In your letter of May 5, 1966, you ask whether the Prince William County School Board may donate the annual cost of tuition, approximately $800.00 per child, to a nonprofit school for retarded children aged six to nineteen and one-half years.

Section 141 of the Constitution prohibits appropriation of public funds to any school not owned or exclusively controlled by the State or a political subdivision thereof, except that, subject to limitations imposed by the General Assembly, funds for educational purposes may be expended in furtherance of elementary, secondary, collegiate or graduate education in public nonsectarian private schools, and that localities may appropriate funds to nonsectarian schools of manual, industrial or technical training. The school you mentioned does not appear to fall in this latter category. The only authority for appropriations in a situation such as that described by you is found in §§ 22-115.29 to 22-115.37 of the Code of Virginia (1950), as amended. Section 22-115.30 provides for State scholarships of not more than $125.00 per year for children aged six to twenty attending private elementary schools, and $150.00 per year for those attending high schools. Section 22-115.32 permits localities to provide local scholarships of not more than $125.00 for children attending elementary schools or high schools.

Thus, grants may be made totaling not more than $250.00 for elementary school students and $275.00 for high school students, apportioned between the State and locality as set out above. I am aware of no provision of law permitting grants in excess of these amounts.

SCHOOLS—School Boards—Assistant superintendent of State Farm may serve as member.

PUBLIC OFFICERS—Local School Boards—Assistant superintendent of State Farm may serve.

May 9, 1966

HONORABLE W. L. PAINTER, Director
Department of Welfare and Institutions

This will acknowledge receipt of your letter of May 6, 1966, which reads as follows:

"The question has been raised in Southampton County as to whether
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or not Mr. K. R. Purvis, Assistant Superintendent of Southampton Correctional Farm, is barred by statute from serving as a member of the Southampton County School Board.

"I would appreciate it if you would give me your official opinion in this matter."

In my opinion there is no statute that would prevent Mr. Purvis from serving as a member of the Southampton County School Board.

Section 22-69 of the Code provides as follows:

"No State or county officer, or any deputy of such officer, and no supervisor shall be chosen or allowed to act as a member of the county school board, provided that the provisions herein contained, shall not apply to county superintendents of the poor, commissioners in chancery, commissioners of accounts, registrars of vital statistics, notaries public, clerks and employees of the federal government in Washington, or officers and employees of the District of Columbia. In Northumberland county, a justice of the peace or an oyster inspector may be chosen and allowed to act as a member of the county school board. In the county of Lunenburg, a member of the county library board, a member of the board of public welfare, and a justice of the peace may be chosen and allowed to act as a member of the county school board."

There is nothing in the statutes providing that the Superintendent of the State Farms, such as the Southampton Correctional Farm, shall take the oath required by § 49-1 of the Code, and I am informed by Mr. Glass that at no time has there ever been any requirement that their assistants shall execute such oath of office.

In my opinion, Mr. Purvis is an employee of the State, but not an officer as that term is used in § 22-69 of the Code, and, therefore, not disqualified from serving on the local school board.

SCHOOLS—School Boards—Conflict of interest—Member may not sell automobiles to county.

COUNTIES—School Board Member—May not sell to county.

Honorable Leonard F. Jones
Commonwealth's Attorney for Campbell County

March 31, 1966

This is in reply to your letter of March 28, 1966, which reads as follows:

"A member of the County School Board who is an officer and stockholder of an automobile agency and garage located in the county has asked me to request your opinion as to whether or not the county may purchase police cars or other vehicles (on basis of competitive bids) from his firm. Also, whether county owned cars or cars titled by other agencies of the county (other than the School Board) may be taken to his firm for repair and maintenance. It would be understood that he would not solicit any of this business."

In my opinion, the provisions of § 15.1-67 prevent the automobile agency mentioned from contracting with the school board or any other department of the county while the officer and stockholder is a member of the county school board. The members of the local school board are "paid officers" of the county as that term is used in this section of the Code. At least I am assuming that
the school board members are paid under the provisions of § 22-67.2 of the Code. This office has ruled on several occasions that officers may not waive their compensation in order to prevent the application of § 15.1-67.

The prohibitions of this Code section apply to repair and maintenance of motor vehicles owned by any department of the county. Therefore, both questions are answered in the negative.

You will recall our opinion to you on May 25, 1965, relating to a member of a school board furnishing automobiles without charge to the school board for student driving training purposes, which opinion is published in the Report of the Attorney General (1964-1965), at p. 295. Had the automobile agency in that case received consideration for such transaction, we would have held that § 15.1-67 would be violated.

SCHOOLS—School Boards—Contracts—Limitations.

HONORABLE WADE S. COATES
Commonwealth's Attorney for Tazewell County

This will acknowledge your letter of July 19, 1965, which reads as follows:

"The Boosters Club of the Graham High School of Bluefield, Virginia, desires the County School Board of Tazewell County to approve a contract with a local firm whereby the firm will erect and maintain an electric scoreboard on the Graham High School Athletic field, the cost of this scoreboard to be liquidated over a period of five years by business advertisements which firm will sell and place on the scoreboard. It is understood at the end of five years the scoreboard will become the property of the school board.

"Please advise me if the County School Board may properly approve this contract."

The School Board of Tazewell County cannot enter into a contract whereby it obligates the school board to pay for the scoreboard over a period of five years. Such contract would be in violation of Section 115a of the Constitution. The school board, however, in my opinion, may permit the erection of the scoreboard on the school property with the understanding that in no event will there be any liability upon the school board for the payment of the cost. In other words, the school board may give a permit to the firm allowing it to install the scoreboard on the athletic field without any financial obligation upon the school board.

SCHOOLS—School Boards—Employment of local school board member's wife.

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

This is in reply to your letter of January 26, 1966, which reads as follows:

"I have been requested by the Superintendent of Henry County Schools to seek your opinion regarding the legality of the employment of the wife of a school board member as a worker in one of the public school cafeterias."
"As I understand the situation, the selection of workers in the cafeteria is made by the cafeteria manager and there is no direct contractual relation between the School Board and the employees of the cafeteria."

The answer to your question depends upon the interpretation of § 22-206 of the Code which provides, in part, as follows:

"It shall not be lawful for the school board of any county . . . to employ or pay any teacher or other school board employee from the public funds if such teacher or other employee is the . . . wife . . . of any member of the school board."

If the cafeteria manager is employed by the school board for the purpose of operating the cafeteria, it would seem that the other employees, although selected and hired by the manager of the cafeteria, would nevertheless be employees of the school board and the prohibitions of § 22-206 of the Code would be applicable. Furthermore, if any of the public school funds are used in paying the employees, this Code section would prevent their employment. However, if the cafeteria manager is operating the facility as an independent contractor and no part of the public county funds are used in connection with its operation, in my opinion, the provisions of § 22-206 do not prohibit the employment of the wife of a member of the school board.

SCHOOLS—School Boards—May make loan to be paid in one year.

HONORABLE MEREDITH C. DORTCH
Commonwealth's Attorney for Mecklenburg County

April 21, 1966

This is in reply to your letter of April 15, 1966, in which you request my advice as to whether or not the School Board of Mecklenburg County may make a temporary loan. You refer to § 22-120 of the Code. Under this section, the school board may make a temporary loan provided the board of supervisors approves the same.

This section must be considered subject to the restrictions contained in Section 115a of the State Constitution, which provides that such debts may be created in anticipation of the collection of the revenue for the year in which the debt is created. See, American-LaFrance v. Arlington County, 164 Va. 1. In this case the court said:

"An approval by a majority of the citizens voting on the question properly submitted to them, is a prerequisite to the power of the board of supervisors to create an obligation for any purpose payable at some future time beyond the termination of the current fiscal year. In no other way, directly or indirectly, can the board bind the county on any such obligation."

In this case the court was discussing the power of the board of supervisors to create a debt under Section 115a of the Constitution, but it will be observed that the prohibitions of this constitutional provision apply to the county school board. Therefore, to the extent that § 22-120 of the Code permits a debt to be created by a school board to be paid in one year, it must be considered in light of the case cited herein. Any debt created to fall due as provided in § 15.1-546 would not be contrary to the opinion in the LaFrance case.
SCHOOLS—School Boards—Must be appointed pursuant to § 22-60.

Honorable Raymond M. Hudson, Chairman
Powhatan County Board of Supervisors

This is in reply to your letter of June 28, 1966, which reads as follows:

"The Powhatan County School Electoral Board was appointed to four year terms in 1959 and 1963. These appointments were not on schedule according to the STATE DEPARTMENT OF EDUCATION VIRGINIA SCHOOL LAWS, § 22-60 School Trustee Electoral Boards, which states: 'In each county there shall be a board, to be known as the school trustee electoral board, which shall be composed of three resident qualified voters, who are not county or State officers, to be appointed by the circuit court of each county, or the judge in vacation, within thirty days after the first day of July, nineteen hundred fifty and every four years thereafter.'

"I am of the opinion that the Electoral Board should be appointed in 1966 in order to get the appointment back on schedule. I would appreciate your giving me a ruling on this by June 30, 1966."

The statute cited by you required that the trustee electoral board be appointed not later than thirty days after the first day of July, 1950, and every four years thereafter. I understand that, no doubt inadvertently, some time previously an appointment was made not at the time and for the term fixed by the statute. Under the terms of the statute, additional appointments should have been made not later than thirty days after the first day of July, 1954, 1958 and 1962, and under this statutory cycle the next appointment should be made within thirty days after the first day of July, 1966.

The last appointment, I am advised, was made within thirty days after the first day of July, 1963, and it is my understanding that under the order entered by the court the members were appointed for a term of four years. In my opinion, the statutory terms have priority over any order of court in variance thereof.

Therefore, in my opinion, it would be proper for the judge of the circuit court to appoint this board within thirty days after the first day of July, 1966, to serve until a similar appointment is made in 1970.

SCHOOLS—School Boards—Purchase of real property in which members have interest.

Honorable J. Clifford Hutt, Member
Westmoreland County Board of Supervisors

This is in reply to your letter of August 26, 1965, which reads as follows:

"There is a parcel of real property with a building situated on it which is owned by a local bank in Westmoreland County. This property is for sale, and the School Board of Westmoreland County would like to purchase it. Two members of the four-member School Board are directors of the bank, and one member of the three-member Board of Supervisors is a director and president of the bank, and each of the aforementioned are stockholders in the corporation.

"Section 15.1-67, which generally prohibits contracts between the county and business connected with officers of the county, in the fifth paragraph specifically excludes banks; however, § 15.1-69 seems to
exempt 15.1-67 from real estate transactions. In its third paragraph, §
15.1-656 provides a method for purchasing real property in which a
county officer has a financial interest, but § 15.1-717 seems to prohibit
the sale and purchase of real property in which a county officer has
an interest, as does § 15.1-780.

"In regard to school board members, § 22-213 prohibits contracts in
which board members have a financial interest but seems to allow them
where the State Board grants specific permission.

"In view of the sections quoted and their, to me, apparent conflict, I
would like to know whether the county can lawfully purchase the real
property aforementioned and if so, specifically what action is required
with regard to the School Board and with regard to the Board of
Supervisors."

The procedure set forth in the third paragraph of § 15.1-656 of the Code is
the proper method by which this transaction can be made without violation of
any statute. Section 15.1-717 does not apply. This section applies only to coun-
ties having the county board form of government. Section 15.1-780 of the Code
applies to counties having the urban county management form of government.

SCHOOLS—Special Districts—May levy up to $3.00 irrespective of magis-
terial district levy.

HONORABLE PAUL X. BOLT
Commonwealth's Attorney for Grayson County

April 1, 1966

This will acknowledge receipt of your letter of March 30, 1966, which reads
as follows:

"The Town of Fries, located in the Providence Magisterial District of
Grayson County, is a special school district operated by a separate
school board from the County; however, the current school levy is the
same in the Town of Fries as the Providence Magisterial District of
Grayson County. The school needs are much greater for the Town of
Fries than that for the Providence Magisterial District due to the fact
that there is located in the Town of Fries an elementary and high school
and there is located in the Providence District only an elementary
school.

"Please advise whether or not in your opinion a school levy in the
Town of Fries could be increased to meet the needs of their schools
and leave the levy for the Providence District at the present rate.

"Your opinion as to whether or not a debt service obligation could
be paid out of the Grayson County General Fund would also be
greatly appreciated."

Section 22-126 of the Code authorizes a town constituting a separate school
district to levy a tax upon all property in the town subject to local taxation
for the purpose of establishing, maintaining and operating a public school. This
section limits the rate of taxation to $3.00.

The town council, of course, may lay a specific school levy within the
limitations of the above section of the Code without regard to the levy made
by the board of supervisors of the county for the same purpose in the magisterial
district in which the town is located.

With respect to the last paragraph of your letter, you do not state whether or
not the obligations referred to therein are district obligations or county-wide obli-
gations. Before we can consider this question it will be necessary to have that
information, and also whether or not the obligation is a bond issue or a loan obtained from the Literary Fund or the Virginia Supplemental Retirement Fund.

SHERIFFS AND SERGEANTS—Deputies—Age requirement.

HONORABLE W. E. NEWMAN
Sheriff of Mecklenburg County

September 7, 1965

This will acknowledge receipt of your letter of September 3, 1965, in which you request my advice as to whether or not a deputy sheriff must be at least twenty-one years of age in order to hold that position.

Under § 53-168 of the Code, the sheriff of a county is the official jailer and may appoint a deputy to perform the duties of that office subject to the direction of the sheriff. This office has frequently held that a deputy of an officer must possess the same qualifications as the principal.

Section 32 of the Constitution requires all persons to be qualified to vote in order to be eligible to hold any office within the county. Therefore, in my opinion, a deputy jailer must be at least twenty-one years of age.

SHERIFFS AND SERGEANTS—Disability of City Sergeant Does Not Create a Vacancy.

SHERIFFS AND SERGEANTS—Disability of City Sergeant—No authority to appoint acting city sergeant.

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

July 19, 1965

This is in reply to your letter of July 16, 1965, which reads as follows:

"Several months ago, Mr. P. Holt Lyon, Sergeant of the city of Danville, suffered a series of strokes, and since that time, has been confined in the hospital and now is a patient in Roman Eagle Memorial Home in Danville, a private nursing facility. Mr. Lyon has not been able to perform any of the official functions of his office of city sergeant, since the first day of his illness.

"Mr. Walter M. Riddle, chief deputy city sergeant, has performed all of the official duties of that office in a most commendable fashion. He very handily defeated his opponent in the recent primary and will be the Democratic nominee in the general election this November.

"Judge A. M. Aiken has asked me to write to you and find out if there is any authority for him to appoint Mr. Riddle as acting city sergeant in the place and stead of Mr. P. Holt Lyon who remains hopelessly ill in the nursing home."

Under the provisions of Article 1 of Chapter 3 of the Charter of the city of Danville (Chapter 378, Acts of Assembly (1952)), it is provided as follows:

"There shall be elected by the qualified voters of said city, on the Tuesday after the first Monday in November, 1953, and quadrennially thereafter, the following officers: one attorney for the Commonwealth, one Commissioner of the Revenue, one city Sergeant and one city Treasurer, who shall hold their offices for the term of four years from
the first day of January ensuing their election and until their successors are duly elected and qualified, unless sooner removed from office . . . ."

Section 120 of the Constitution of Virginia is, in part, as follows:

"In every city there shall be elected, by the qualified voters thereof, one city treasurer, for a term of four years; one city sergeant, for a term of four years, whose duties shall be prescribed by law . . . ."

Under these provisions the city sergeant will continue to hold that office until the expiration of the term for which he was last elected and qualified. There is no statutory provision for the appointment of an acting city sergeant. I have made a cursory examination of the charter and can find nothing therein relating to the filling of vacancies in Constitutional offices and, therefore, the provisions of general law would apply. See, § 24-145 of the Code. The mere disability of the sergeant, of course, does not create a vacancy. Should a vacancy occur, the court would have the power to appoint a city sergeant, but, as already stated, there is no provision for the appointment of an acting city sergeant.

SHERIFFS AND SERGEANTS—Fees—Serving papers returnable out of State.

FEES—Sheriff's and Sergeant's—Serving papers returnable out of State.

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

August 24, 1965

This is in reply to your letter of August 20, 1965, which reads as follows:

"Will you again be so kind as to advise us the proper interpretation to be placed upon Code Section No. 14.1-105, subsection (9)—"For serving any papers returnable out of State, six dollars."

"Does it mean six dollars for service upon each person when more than one or six dollars in the aggregate regardless of the number of persons served?"

In my opinion, the service fee is based upon the number of persons served. The officer would be entitled to a six dollar service fee for each person upon whom service is made.

SHERIFFS AND SERGEANTS—Not Required to Report Purpose of Phone Calls.

EXPENSES—Sheriff Not Required to Report Purpose of Phone Calls.

HONORABLE E. M. JONES, Clerk
Circuit Court of Rappahannock County

January 13, 1966

This will acknowledge receipt of your letter of January 10, 1966, which reads as follows:

"The Rappahannock County Board of Supervisors has requested me
to write you in regard to approval of the telephone bill of the Sheriff of Rappahannock County.

"Several months ago, the Board by resolution at a regular meeting, requested all County officers for whom the County pays telephone service and long distance calls, to report monthly when the bills are submitted, the purpose for which all long distance calls were made.

"The Sheriff of Rappahannock has refused to make this report. The Board would like to know from you what their recourse is, if any, in this matter. Is there any way by which the Sheriff can be compelled to make this report?"

Article 7, Chapter 1 of Title 14.1 of the Code provides that the State Compensation Board shall fix the salaries and expense allowances for sheriffs and certain other local officers. Sections 14.1-50 and 14.1-51 of the Code. Under § 14.1-79, the Commonwealth shall pay two-thirds of the salary and expense allowance of the sheriff, and the locality shall pay one-third.

Section 14.1-75 of the Code provides as follows:

"Each sheriff and each sergeant, and such full-time deputy of either, shall keep a record of all expenses incurred by him including expenses for traveling, telephone, telegraph, clerical assistance, office facilities and supplies, bond premiums, cook hire, maintenance and repair cost of automobile police radio equipment including radio transmitter system and all accessories thereto, and any other expense incident to his office. Each such full-time deputy shall file a monthly report with his principal showing in detail the expenses incurred by him."

Section 14.1-76 requires each sheriff to submit a statement of all expenses incurred by him and his full-time deputies to the State Compensation Board monthly on forms provided by the Board. This section requires the sheriff to transmit a copy of such statement to the board of supervisors or other governing body of the county.

Section 14.1-80 provides as follows:

"Whenever a sheriff or sergeant purchases office furniture, office equipment, stationery, office supplies, telephone or telegraph service, or repairs to office furniture and equipment in conformity with and within the limits of allowances duly made and contained in the then current budget of any such officer under the provisions of this chapter, the invoices therefor, after examination as to their correctness, shall be paid by the county or city directly to the vendors, and the State shall monthly pay the county or city the State's proportionate part of the cost of such items on submission by such officer to the Compensation Board of duplicate invoices and such other information or evidence as the Compensation Board may deem necessary. This action shall also apply to the payment of the premiums on the official bonds of such officers, their deputies and employees, and to the premiums on burglary and other insurance. Duly authorized postage necessary for any such officer shall be purchased by the county or city for his official use on certification by him of his need therefor to the appropriate county or city authorities from time to time, and the State shall monthly reimburse the county or city for the State's proportionate part of the cost of such postage on submission of satisfactory evidence to the Compensation Board."

Under this section, the locality is required to pay the invoices for telephone services and other services "within the limits of allowances duly made and contained in the then current budget of any such officer." The invoices may be
examined by the county for the purpose of determining whether or not they are correct—that is, whether or not the service was actually rendered. This can be determined by examining the invoice received from the telephone company.

In my opinion, this is the extent of control by the board of supervisors over the expenses for telephone service. In my opinion, the sheriff is the judge of what telephone calls are necessary in connection with the operation of his office. Of course, if his telephone and other expenses exceed the maximum fixed by the Compensation Board he will be entitled to appeal to the Board for an increase in the allowance. The Board has the right under § 14.1-76 to reduce or increase the allowance necessary to defray the proper expenses of the sheriff’s office based upon the monthly reports filed with that Board.

Specifically answering your question, in my opinion, the board of supervisors does not have the power to require the sheriff to report to it the purpose for which his long distance calls were made.

SHERIFFS AND SERGEANTS—Sale Under Execution—Commission and expenses deducted from proceeds of sale.

April 5, 1966

HONORABLE ROBERT W. LEGARD
Sheriff of Loudoun County

This is in reply to your letter of March 28, 1966, which reads as follows:

“I am faced with the question of how to realize my commission on funds collected by the levy of execution as provided for under § 8-411 to § 8-415 of the Code of Virginia. Do I collect upon such levy additional funds over and above the amount of the judgment as an element of the costs to satisfy my commission aforesaid, or should this commission be taken out of the principal amount of the judgment?”

Under the provisions of § 8-429 of the Code your commission and expenses incident to sale under execution should be deducted from the proceeds of sale. If the proceeds from the sale are sufficient to pay the amount shown by the execution to be due and also the commission and expenses of sale, and a surplus remains, this surplus should be turned over to the owner of the property which was levied upon. If the proceeds of the sale are not sufficient to pay all of these items, that which remains after payment of commission and expenses would be turned over to the judgment creditor to be applied on the judgment.

I enclose copies of two opinions relating to commissions, as follows:


STATE BUREAU OF PROPERTY RECORDS AND INSURANCE—May recommend type of insurance to State Agencies.

STATE AGENCIES—Immune from Liability.

April 6, 1966

HONORABLE STEWART R. MOORE, Administrator
Bureau of Property Records and Insurance

In your letter of March 29, 1966, you state:
"Under the provisions of Chapter 125, Acts of Assembly of 1964, this office has jurisdiction over property insurance consisting of fire, extended coverage and vandalism and malicious mischief carried on State-owned properties. In our dealings with the heads of the various State agencies and institutions, the question often arises as to the State's requirements in regard to liability insurance coverage. With the recent advent of multi-peril package policies, which combine several types of insurance into one special policy, this question arises more frequently. In the absence of any jurisdiction by this office, such questions must now be left up to each individual agency to resolve.

"Many State agencies look to this Bureau for insurance guidance. With the thought that a definite service may be rendered those agencies seeking our advice, we would appreciate an opinion from you, if in order, with regard to the necessity of liability coverages on State-owned properties."

I understand that under certain "package" policies it is possible to obtain liability insurance coverage at a very slight increase in cost over fire, extended coverage, vandalism and malicious mischief insurance. It seems safe to say that there is no "necessity" of liability coverage on State-owned properties because the State is immune from suits arising from negligent injuries, including those caused by maintenance of unsafe places. Insurance coverage, while not strictly necessary, might be desirable for the protection of members of the public who might be injured on State property or the protection of individual State employees who might be found guilty of negligence causing such injuries. This is a matter of policy which each agency must determine for itself.

Section 2-77.10(b-1) of the Code of Virginia (1950), as amended, gives the State Insurance Board "final responsibility with respect to coverage, noncoverage, provisions of policies, quantity, and type of fire and extended coverage, including vandalism and malicious mischief coverage . . . ." Section 2-77.11 requires the Board to "study and investigate all phrases of fire and extended coverage, including vandalism and malicious mischief insurance, the advisability of blanket coverage, noncoverage, deductible program, the rate credit entitlement of the State due to diversity of risk and any other aspects of property insurance which might lead to a more favorable insurance coverage of State property" and also requires the Board to instruct the Bureau of Property Records and Insurance "as to policies, the application of which would be in the best interest of the State."

Under this authority, in my opinion, the State Insurance Board and the Bureau of Property Records and Insurance may consider the advisability of, and make recommendations concerning, the addition of liability coverage to other coverages. Neither the Bureau nor the Board has authority to require such coverage to be obtained.

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STATE EMPLOYEES—Union Members As Temporary Employees—Nothing to prohibit increased rate of pay for payment into pension fund.

January 12, 1966

HONORABLE JOHN W. GARBER
Director of Personnel

This is in reply to your letter of January 4, 1966, which reads as follows:

"A State agency which employs union bricklayers on a temporary basis has requested an increase of fifteen cents per hour in the rate authorized for these temporary employees. The basis for the request is described as a requirement of the Bricklayer's Union that every em-
ployer of union bricklayers pay fifteen cents per hour for each hour of employment into a union pension fund.

"The request contains the following statement:

"'It is proposed that the current rate of $4.00 per hour be changed to $4.15 and that deduction be made for social security and tax purpose only on the $4.00 amount.'"

"The Virginia Personnel Act of 1942 excludes from its provisions temporary employees and employees compensated on an hourly basis. Authorizations for hourly rates, however, require the approval of the Director of the Division of Personnel and the Director of the Division of the Budget.

"May the increased rate requested by the agency be properly approved on the basis of the reason stated?"

I know of no reason why the rate of pay may not be increased as suggested, but, in my opinion, the deduction for social security and income tax purposes would have to be made upon the basis of the increase.

Furthermore, any deduction made from the wage earner's pay for the pension fund of the bricklayer's union would have to be authorized in writing by the wage earner.

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STATE INSTITUTIONS—Virginia Military Institute—Sale of real estate.

August 12, 1965

MAJOR GENERAL GEORGE R. E. SHELL
Superintendent, Virginia Military Institute

This is in response to your request relative to the disposition of certain real estate in the State of West Virginia devised The Virginia Military Institute under the will of George Randall Collins. As I understand it, you desire my advice relative to the procedure to be followed in liquidating this real estate.

The portion of the Collins' will pertaining to The Virginia Military Institute reads as follows:

"After all of the above bequests have been satisfied, I give devise and bequeath the remainder of my Estate to the Virginia Military Institute, Lexington, Virginia to be used as a trust to perpetuate and maintain as a Memorial of the Battle of New Market and to place improvements thereon for educational purposes the real estate of approximately one hundred seventy one acres owned by me located one mile north of New Market in Shenandoah County Virginia."

Under the terms of § 23-92 of the Code of Virginia (1950), as amended, The Virginia Military Institute is a statutory corporation. It is also classified as an educational institution and declared to be a public body and constituted as a governmental instrumentality for the dissemination of education under § 23-14. It has the power "to acquire and hold real or personal property or interests therein in its own name" under § 23-16.

Section 23-100.1 of the Code reads as follows:

"The Virginia Military Institute, or its board of visitors on its behalf, upon the prior written consent of the Governor is empowered to receive, take, hold and enjoy any and every gift, grant, devise, or bequest heretofore or hereafter made to the Institute or its board of visitors for charitable or educational purposes, and to use and administer same for the uses and purposes designated by the donor if designation be
Governor A. S. Harrison, Jr., by his letter to you of July 16, 1964, authorized the acceptance of the residual estate of Mr. George R. Collins.

Section 55-26 validates bequests and devises for charitable or educational purposes. Section 55-27 authorizes corporations to take and hold for the uses prescribed by the testator gifts mentioned in § 55-26, and § 55-31 declares that charitable trusts shall not fail for indefiniteness.

In view of the foregoing, I am of the opinion that The Virginia Military Institute is qualified to receive and to administer the trust established by the Collins' will.

It is to be noted that the will neither authorizes nor prohibits the sale of the land in West Virginia. Should The Virginia Military Institute deem it advisable in administering the trust to liquidate the West Virginia land, its Board of Visitors may adopt a resolution appropriate to that end. The consent of the Governor should also be obtained pursuant to § 23-4.1 of the Code which reads as follows:

"The boards of visitors or trustees of all State educational institutions, with the approval of the Governor first obtained, are hereby authorized to sell and convey whatever interest they may have in real property that has been or may hereafter be acquired by will or deed of gift.

"The proceeds from such sales and conveyances shall be held, used and administered in the same manner as all other gifts and bequests are held, used and administered.

"Nothing in this section shall be construed as authorizing or empowering the sale and conveyance of such real property contrary to the terms and conditions of the will or deed of gift."

Upon the accomplishment of these preliminaries, viz., the resolution of the Board of Visitors and the consent of the Governor, The Virginia Military Institute will then be in position to proceed to liquidate the West Virginia land. It may well be necessary, in addition, to obtain the approval of a court of proper jurisdiction in the State of West Virginia. As to this latter possibility, I express no opinion, but would suggest that the advice of a competent West Virginia attorney be sought.

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SUBDIVISIONS—Ordinances—What constitutes violation.

ORDINANCES—Subdivisions—Certain sales constitute violation.

HONORABLE G. M. CORNELL
Executive Secretary, Nansemond County

March 16, 1966

In your letter of February 22, 1966, you ask whether the Nansemond County Subdivision Ordinance is violated by the transfer of certain lots. You state that the lots were sold without first having a subdivision plat approved and recorded, as required by the ordinance when a subdivision occurs.

Section II of the ordinance defines "subdivision" as:

"Any division of a lot, tract or parcel of land into three (3) or more lots or parcels for purpose of transfer of ownership for building development or if a new street is involved, any division of a parcel of land;"
provided that a division of land for agricultural purposes into lots or parcels of five (5) acres or more and not involving a new street shall not be deemed a subdivision, or the partition of any tract of land ordered by a court of competent jurisdiction. The term includes re-subdivision and, when appropriate to the context, shall relate to the process of subdividing or land subdivision."

You state that four lots have been sold from one tract, none of such lots including as much as five acres. They were conveyed by a deed dated July 10, 1961, and recorded August 7, 1961; another dated June 11, 1962, and recorded May 14, 1963; another dated August 1, 1962, and recorded April 2, 1964, and another dated January 28, 1966. You ask if the ordinance was violated by the third or fourth transfers listed above, and the date of violation.

Under the definition of "subdivision" contained in the ordinance, conveyance of the second lot would result in the original parcel being subdivided, provided each of the three resulting parcels consisted of less than five acres. Assuming that one of the three parcels resulting from the first two transfers was in excess of five acres, then subdivision did not take place until the third lot was conveyed, by the deed dated August 1, 1962. The date of subdivision would be the date the deed to this lot was delivered. Thereafter, a further subdivision occurred when the fourth lot was conveyed, by the deed dated January 28, 1966. This would be another violation, which took place on the date the deed was delivered.

You state that the ordinance provides for a fine of $50.00 to $300.00 for each violation of the ordinance. Section 15.1-473(d) of the Code of Virginia (1950), as amended, provides for a fine of not more than $100.00 for each parcel subdivided, transferred, or sold in violation of that section. In my opinion, the fine provided for in § 15.1-473(d) is the only one which may be imposed for a violation. See Report of the Attorney General (1963-1964), p. 227, in which it is stated that § 15-967.8(d), now § 15.1-473(d), is the applicable penalty provision, since the subdivision statutes "do not contain any provision under which the ordinance may prescribe a penalty for violation."

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TAXATION—Assessment—Alleghany County may not appoint continuing assessors.

April 15, 1966

HONORABLE C. W. ALLISON, JR.
Commonwealth's Attorney for Alleghany County

This will acknowledge receipt of your letter of April 8, 1966, in which you present the following question:

"In your opinion, does Alleghany County, under existing statutes, have the right to appoint a permanent board of real estate assessors?"

The population of Alleghany County as shown by the United States Census of 1960, is 12,128. The populations of the cities of Covington and Clifton Forge are not included and may not be considered when considering the population brackets of counties under §§ 58-769 and 58-769.1 of the Code. It does not appear that your county qualifies for continuing assessors under either of these sections.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Assessment—Board of equalization—Authority limited to taxable year in which appointed.

HONORABLE GEORGE W. TITUS
Treasurer of Loudoun County

September 8, 1965

This will acknowledge receipt of your letter of September 3, 1965, which reads as follows:

"On January 1, 1964, our new reassessment became effective. Shortly afterward an equalization board was appointed. This board did not complete the requests by December 31, 1964. In March, 1965, the board was reappointed for the period ending December 31, 1965. The Board has processed all of the requests carried over from 1964 and has accepted complaints during 1965.

"In some cases the board took action this year to reduce reassessments without receiving complaints. There have been 5 refunds made on these cases for last year. The board is now taking action on the complaints filed this year and authorizing refunds. There have not been any refunds made on complaints filed this year by taxpayers. Should the refund be retroactive to 1964 or only for the year in which the form is filed?"

The equalization board appointed in 1965 must be treated as a new board. It cannot be treated as a continuation of the board that was appointed in 1964. The board that was appointed in 1964 could make adjustments in tax assessments for the year 1964 only. The board that was appointed in March 1965 can make adjustments in tax assessments effective during the taxable year 1965, but not retroactive, since in our opinion the board of equalization does not have authority to reduce or increase assessments for any preceding taxable year. See § 58-910 of the Code. Therefore, the question set out in the last sentence of your letter is answered in the negative.

I am enclosing copy of an opinion of this office dated December 12, 1941, Report of Attorney General (1941-1942), at p. 153, which touches upon the question under consideration.

TAXATION—Assessment of Motor Vehicle—Title passes upon execution of bill of sale.

MOTOR VEHICLES—Assessment for Taxation—Title passes upon execution of bill of sale.

HONORABLE JAMES E. DURANT
Treasurer of the City of Falls Church

January 11, 1966

This will acknowledge receipt of your letter of January 7, 1966, which reads as follows:

"Your opinion is requested for the proper assessment of personal property as in the following:

"An automobile was purchased with bill of sale dated December 20, 1965 but not titled with the Division of Motor Vehicles until January 4, 1966.

"Is the automobile properly for assessment for the 1966 tax year?"
The date shown upon the title certificate issued by the Division of Motor Vehicles is not necessarily the date on which the owner of the car acquired title. An applicant for a title certificate does not apply for a certificate of title until after title has passed from the seller to the applicant. See, §§ 46.1-51 and 46.1-52 of the Code.

In my opinion, the title of the automobile passed to the purchaser upon the execution of the bill of sale on December 20, 1965. Therefore, I am of the opinion that the automobile is subject to assessment for taxation under §§ 58-834 and 58-835 of the Code.

TAXATION—City Owned Property—May be taxed under certain conditions.

HONORABLE J. LUCK RICHARDSON, JR.
Commissioner of the Revenue for Roanoke County

June 7, 1966

In your letter of June 1, 1966, you state:

"The City of Roanoke owns the Municipal Airport which is located wholly in the County of Roanoke. In the course of their operations, they are leasing a hangar to Piedmont Airlines, leasing other hangars to flying schools, charter flight companies and sales agencies. They are also leasing part of their building to a restaurant and floor space to airline ticket agencies and rental car agencies. The parking lot is also leased to a profit-making concern.

"The following questions are the ones on which we are asking your office for a legal opinion:

"1. Can the County legally make a leasehold assessment on the buildings, the land they occupy and adjacent taxi area leased to Piedmont Airlines?

"2. Can the County make the same leasehold assessments on the lessees of these other hangars and the land they occupy?

"3. Can the portion of the operations building and land be assessed to the operator of the restaurant and auto rental agencies?

"4. Can the land leased to the operator be assessed to the lessee?"

Section 58-758 of the Code of Virginia (1950), as amended, provides in part:

"For the purposes of this chapter, and other provisions of law relating to the assessment of real estate for taxation, the term 'taxable real estate' shall include a leasehold interest in every case in which the land or improvements, or both, as the case may be, are exempt from assessment for taxation to the owner."

Under this statute, all of your questions must be answered in the affirmative, provided the property is "exempt from assessment for taxation to the owner," the City of Roanoke. If the city is exempt from taxation with respect to this property, then § 58-758 is applicable; if the city is not exempt from taxation, § 58-758 may not be applied.

To determine whether the city is taxable, reference must be made to Section 183 of the Constitution, which provides in part:

"Unless otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local . . . (a) property owned directly or indirectly by the Commonwealth or any political subdivision thereof . . . . Whenever any building or land,
or part thereof, mentioned in this section, and not belonging to the State, shall be leased or shall otherwise be a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town. But the General Assembly may provide for the partial taxation of property not exclusively used for the purposes named herein."

Section 58-16 of the Code provides that real estate owned by an exempt organization, which is not used exclusively for its purposes, is subject to taxation on that portion of the property which is leased or otherwise a source of revenue or profit.

Thus, the property of the city may be taxed, and the leasehold may not be taxed, if the city property "shall be leased or shall otherwise be a source of revenue or profit" within the meaning of Section 183.

In Commonwealth v. Hampton Institute, 106 Va. 614, 56 S.E. 594 (1907), the Institute was held generally tax exempt, but subject to taxation on parcels of land leased by it to others. On the other hand, in Board of Supervisors v. Norfolk, 153 Va. 768, 151 S.E. 143 (1930), certain farms acquired by the city to protect its water supply and leased to others were held nontaxable since "it is perfectly apparent that the city has not used these farms for profit except incidentally." Other decisions of our Court of Appeals determining whether city property was "a source of revenue or profit," but not involving leases, are Commonwealth v. Richmond, 116 Va. 69, 81 S.E. 69 (1914); Norfolk v. Board of Supervisors, 168 Va. 606, 192 S.E. 588 (1937), and Mumpsower v. Housing Authority, 176 Va. 426, 11 S.E. 2d 732 (1940), in which the municipal property was held not taxable; and Warwick County v. Newport News, 153 Va. 789, 151 S.E. 417 (1930); York County v. Newport News, 153 Va. 824, 151 S.E. 428 (1930), and Newport News v. Warwick County, 159 Va. 571, 166 S.E. 570 (1932), holding the property taxable.

The test stated in Commonwealth v. Richmond, supra, 116 Va. at 80, quoted with approval in Board of Supervisors v. Norfolk, supra, 153 Va. at 777, is:

"If the use made of the property so held has direct reference to the purposes for which it is by law authorized to be owned and held, and tends immediately and directly to promote those purposes, then its use is within the provisions exempting the property from taxation, although revenue or profit is derived therefrom as incident to such use."

From these decisions, it can be seen that no set rule will determine whether or not revenue-producing municipal property is taxable. Every case must turn on its own facts. Generally, it can be said that if the revenue from the leasing of city property is relatively inconsequential, it may well be held that the property retains its exempt character, while if the revenue from the property is substantial, it may be held taxable to the city.
REPORT OF THE ATTORNEY GENERAL

TAXATION—City Sales and Use Tax—Power does not extend into other political subdivisions.

COUNTIES, CITIES AND TOWNS—Sales and Use Tax—City charter does not extend tax power into adjoining political subdivisions.

CITIES—Charter Provisions—Power limited to express grant, fair implication, essential to declared purposes.

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

January 18, 1966

This is in reply to your letter of December 29, 1965, relating to the Sales and Use Tax Ordinance of the City of Richmond (Richmond City Code of 1963, Chapter 35, Article 8), adopted May 24, 1965, as amended, in which you present the following questions:

"1. Does the City of Richmond have the authority to require non-resident merchants to collect the use tax and impose penalties upon them for their failure to do so?

"This readily divides itself into three possible categories of sales.

"A. Sales made in the County with delivery of the goods by the merchant to the purchaser at an address in the city.

"B. Sales made in the County but charged to the purchaser at an address in the city.

"C. Over the counter sales for cash to residents of the City with delivery made to the purchaser in the County at the time of the sale.

"2. Would the city License Inspector or Director of Finance have the authority to require county merchants to permit their books and records to be inspected by city officials for purposes of determining the compliance with the use tax ordinance?"

The power of the city to levy taxes is set forth in Section 2.02 (a) of the City Charter, found in the Acts of Assembly (1948), p. 177. The first sentence of this Charter section is sufficient to authorize the city to levy a sales tax. See Falon Florist v. Roanoke, 190 Va. 564, where a similar charter provision was held to authorize the city of Roanoke to impose a sales tax. The language of this provision is as follows:

"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. . ." (Emphasis supplied)

It is settled law in Virginia that the powers of municipal corporations are limited by the provisions of the Charter. It would seem useless to cite authorities in support of this assertion. However, in the case of Richmond City v. Henrico County Board, 199 Va. 679, the Supreme Court of Virginia stated:

"In Virginia, counties and cities are independent of each other
politically, governmentally and geographically. Each of them, within its particular boundaries, is a coequal political subdivision and agency of the State.

"In Donable v. Harrisonburg, 104 Va. 533, 535, 52 S. E. 174, we approved the following statement from Dillon on Municipal Corporations, Section 89:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied." Winchester v. Richmond, 94 Va. 204, 26 S. E. 586, 36 L. R. A. 554; Railway Co. v. Dameron, 95 Va. 545, 28 S. E. 951; Duncan v. City of Lynchburg, 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331.

"In Jordan v. South Boston, 138 Va. 838, 843, 122 S. E. 265, we said:

"A municipal corporation is a mere local agency of the State and has no powers beyond the corporate limits except such as are clearly and unmistakably delegated by the legislature. Whiting v. West Point, 88 Va. 905, 14 S. E. 698, 29 Am. St. Rep. 750, 15 L. R. A. 860; Washington, etc., Ry. Co. v. Alexandria, 98 Va. 344, 36 S. E. 385."

"We approved the following statement in Light v. Danville, 168 Va. 181, 205, 190 S. E. 276:

"The general rule is that a municipal corporation has no extraterritorial powers; but the rule is not without exceptions. The legislature has undoubted authority to confer upon cities and towns jurisdiction for sanitary and police purposes in territory contiguous to the corporation."

"The power of a municipality, unlike that of the state legislature, must be exercised pursuant to an express grant, and in the particular manner prescribed if one is specified. South Hill v. Allen, 177 Va. 154, 163, 12 S. E. 2d 770; Wallace v. Richmond, 94 Va. 204, 26 S. E. 586, 36 L. R. A. 554.

"See also, Seyemour v. Commonwealth, 133 Va. 775, 778, 112 S. E. 806; Charlottesville v. Marks Show, 179 Va. 321, 328, 18 S. E. 2d 890. Murray v. Roanoke, 192 Va. 321, 326, 64 S. E. 2d 804."

Subsequently, in City of Richmond v. Hanes, 203 Va. 102, where Section 9.06 of the City Charter relating to the "Department of Personnel" and the power granted to the personnel board to adopt a certain rule, the Court said:

"Obviously this section of the charter gave the personnel board no express authority to adopt § 154 of its rules, and if it had such authority it was by implication alone.

"If the [asserted] power has not been expressly granted, or is not necessarily implied, it does not exist. If it be even doubtful, the doubt must be resolved against the existence of the power." Winchester v. Richmond, 93 Va. 711, 717, 25 S. E. 1001, 1003.

"It is firmly settled that a municipality has only the powers (1) granted in express words; (2) necessarily or fairly implied in, or incidental to, the powers expressly granted; (3) essential to its declared objects and purposes, not simply convenient but indispensable. City of Richmond v. County Board, 199 Va. 679, 684, 101 S. E. 2d 641, 645; 13 Mich. Jur., Municipal Corporations, § 25."

I can find nothing in the City Charter nor any reported case involving powers
under a city charter that would imply that the charter provision of the City of Richmond authorizes the city council to enforce an ordinance exercising any form of dominion with respect to revenue over retail merchants who are doing business under a license granted in any other political subdivision of the State. Only those merchants subject to the licensing provisions of the City Charter are subject to the ordinance under consideration here.

Therefore, to the extent that Section 35-258.1 of the ordinance requires "every non-resident vendor" to collect a sales tax from residents of the city who make purchases from the non-resident vendor, it is beyond the scope of any authority that has been delegated by the General Assembly to the city under its charter. The charter, it will be observed, authorizes the city to raise revenue "by taxes and assessments in the city." The city cannot require merchants licensed outside the city to keep a check upon the place of residence of their customers, nor to report mercantile transactions with persons whom they know to be residents of Richmond.

Attention has been directed to cases from other jurisdictions, including the Supreme Court of the United States, involving state laws concerning the enforcement of state sales and use taxes. We do not consider these cases to be pertinent because states may exercise powers more far-reaching than municipalities. These cases generally turn on due process. Here we are confronted with an intrastate situation, and the question of jurisdiction depends upon the state law. The interstate cases give us a very imperfect analogy. The question in interstate cases is always whether or not the state can exercise the power it claims; the question here is limited to whether or not the State has granted a specific power to the city of Richmond either by charter or general law. As stated herein, municipal powers are derived solely from the state and must be construed strictly against a grant of power to exercise dominion in other political jurisdictions within the state.

In light of the foregoing statements, each question presented by you is answered in the negative.

TAXATION—Counties—Local sales tax may be enacted.

April 15, 1966

HONORABLE DAVID D. BROWN
Commonwealth's Attorney for
Washington County

In your letter of April 13, 1966, you ask the effective date of the sales tax statute enacted by the 1966 General Assembly, and whether a county board of supervisors may enact a local sales tax ordinance before that date.

Since the statute was not enacted as an emergency act, it becomes effective June 27, 1966, although the State tax levied thereby will not be in force until September 1, 1966.

Section 58-441.49(c) of the statute provides that a local governing body may enact a local sales tax ordinance before the effective date of the State law, but provides further that no such local tax may become effective before September 1, 1966, and that any such local ordinance must be effective on the first day of a month at least sixty days after its adoption.
REPORT OF THE ATTORNEY GENERAL

TAXATION—County License Tax Ordinance—Mathews County may adopt.

May 26, 1966

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

This will acknowledge receipt of your letter of May 25, 1964, which reads as follows:

“The undersigned has been directed by the Board of Supervisors of Mathews County to prepare a County License Tax Ordinance to impose a license tax on merchants, businesses, trades, professions, occupations and callings. Upon my review of the law, there is considerable doubt in my mind as to the Board’s power to enact such an ordinance.

“The Report of the Secretary of the Commonwealth of Virginia for 1964-65 sets forth that Mathews County has a land area of 87 square miles and has a population of 7,121 according to the 1960 United States census. Section 58-266.1 of the Code of Virginia gives a county the power to levy a license tax, but has a limitation that a county cannot levy such a tax if it is prohibited by any general law of the State. Section 58-266.2 of the Code of Virginia recites the necessary requirements which a county must have in regard to population and land area in order to enact a license tax.

“In view of said code sections, it is my opinion that Mathews County cannot adopt a license tax ordinance as set forth above.

“At your convenience, I would appreciate your advising me of your opinion in regard to the above.”

In my opinion, your county may impose license taxes under § 58-266.1 of the Code. This section, as you recall, was materially amended by Chapter 424 of the Acts of 1964 so as to authorize counties to impose such license taxes. Section 58-266.2, to which you refer, was enacted prior to the amendment referred to above and constituted an exception to § 58-266.1 as it previously existed. To the extent that § 58-266.2 authorizes certain counties coming within the classification therein set forth to levy license taxes, its provisions are no longer necessary. I do not feel that § 58-266.2 in any way affects the power of your county to levy the license taxes allowed under § 58-266.1.

TAXATION—Deferral for Open Space Sites—Discussion.

December 15, 1965

HONORABLE FITZGERALD BEMISS
Member, Senate of Virginia

We have examined the suggested proposal for legislation to establish a tax deferral system for open space sites which you submitted with your letter of November 2. You requested my advice as to whether or not the proposal is in conflict with the provisions of the Virginia Constitution. Whether or not such a system could be devised so as to be valid under the Virginia Constitution, I express no opinion. The plan suggested, it seems, contains several doubtful provisions. I shall comment upon a few of them, but the omission of the other provisions should not be considered as a holding by this office that they are constitutional.

On page 1 of the proposal, there is a footnote to the effect that each community can decide what it considers to be desirable open space sites. If a valid plan can be designed, I think it would be necessary that the Act establishing the system would set the standards. Any scheme which would leave the establish-
ment of the standards to the counties would, it would seem, be of doubtful validity. On the same page, paragraph (2), it is contemplated that the tax deferral would be available to private landholders operating riding stables, golf courses, etc. Any scheme of the nature contemplated would, in my judgment, have to be for a public purpose as distinguished from a private enterprise. On page 6, paragraph (5) states that under this scheme, if the property is later purchased by a public agency, such as a county or the State, the tax that has been deferred would not be due but would be forgiven. This, in my judgment, would be clearly in violation of Sections 168 and 183 of the Constitution. Paragraph (7) on page 6 would limit the number of years the tax would be deferred to twenty years and would provide that in case the period was extended beyond twenty years—for each year of extension—a prior year's tax would be cancelled. This, too, would be in violation of Sections 168 and 183 of the Constitution. The latter section provides what real estate may be free from taxation.

As you know, Section 168 of the Constitution—to which we have alluded—provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. It can be presumed that all owners of open space property in a county would not take advantage of the tax deferral device, even though the property owners would be eligible to participate in the plan. Those who did not participate would not have the advantage of a tax deferral.

Whether or not it would be possible to draft legislation which would establish a reasonable classification for properties of the nature under consideration, we do not know.

Any attempt to give a reasoned opinion in regard to legislation of this nature would have to be given with respect to an actual draft of the proposed legislation, rather than mere suggestions such as are contained in the papers submitted by the Northern Virginia Regional Planning and Economic Development Commission. I can state, however, at this time that any plan which would defer the tax upon one property owner in a political jurisdiction and would not operate to defer the tax upon another property owner in the same jurisdiction, would be of doubtful validity under our State Constitution.

On page 2 of the paper that was submitted, under the heading “Historical Precedent” reference is made to §§ 10-22 through 10-31 of the Code of Virginia, relating to taxation of certain properties under the control of the Department of Conservation and Economic Development. The illustration is not applicable to anything contained in the scheme under consideration here. The taxes that are suspended under those sections are upon lands leased to the Department of Conservation and Economic Development.

TAXATION—Exemptions—Corporations—Must meet requirements of Section 183 (d) and (f) of the Virginia Constitution to qualify.

HONORABLE BLAIR ZIRKLE
Commissioner of the Revenue of Shenandoah County

December 6, 1965

This will acknowledge receipt of your letter of December 1, 1965, in which you enclosed copy of the charter of the Sigma Sigma Sigma, Inc., and requested my advice as to whether or not this corporation is exempt from local taxation. You state that the real estate owned by the corporation is used as its national headquarters. The purposes of the corporation are stated as follows:

"The purposes of this corporation shall be literary, and the promotion of friendship and social intercourse among the undergraduates of such schools and colleges in the United States in which chapters of this association shall be formed, the organizations of such chapters, the con-
tinuance of the ties of friendship and social intercourse among such members after they have left their respective schools and colleges, and the organization of alumnae chapters at such places as may be found desirable;"

In order for this corporation to be exempt from taxation it is necessary that it come within the provisions of either Section 183(d) or Section 183(f) of the Constitution. These sections read as follows:

"183. Unless otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

"(d) Property owned by public libraries, incorporated colleges or other incorporated institutions of learning, not conducted for profit, together with the endowment funds thereof not invested in real estate. But this provision shall apply only to property primarily used for literary, scientific or educational purpose or purposes incidental thereto. It shall not apply to industrial schools which sell their product to other than their own employees or students."

"(f) Buildings with the land they actually occupy, and the furniture and furnishings therein, belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes."

Although one of the purposes for which the corporation is organized is literary, this does not appear to be the primary purpose. The corporation appears to be organized principally for social intercourse among the undergraduates of schools and colleges and for the purpose of continuing the ties of friendship of those members after they have completed their college education.

In my opinion, the corporation fails to meet the requirements of these constitutional provisions.

TAXATION—Exemptions—Leased town—town- or church-owned property not exempt.

Honorable Otis B. Crowder
Treasurer of Mecklenburg County

July 2, 1965

This will acknowledge your letter of July 1, 1965, which reads as follows:

"One of the incorporated towns in Mecklenburg County owns what used to be a small farm of 41 acres. The town receives some rent for the tobacco acreage as well as a little income from rental of the houses on the place.

"Under Section 183 of the Constitution it appears that property owned by a political subdivision is exempt from taxation, but inasmuch as a portion of this real estate is rented, I would like your opinion as to whether or not it is tax free.

"Also some of our churches own land from which they receive income from rent. Would such property be exempt from local taxation?"
It is true that Section 183 of the Constitution exempts from taxation property owned by a town. It is further provided in the fourth paragraph of subsection (g) of this constitutional provision as follows:

"Whenever any building or land, or part thereof, mentioned in this section, and not belonging to the State, shall be leased or shall otherwise be a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town. But the General Assembly may provide for the partial taxation of property not exclusively used for the purposes herein named."

Under this paragraph the land owned by the town and leased would cease to be tax free during the time it is leased. This same situation would apply to property owned by a church.

**TAXATION—Exemptions—YWCA and church camp property exempt.**

**CHURCHES—Taxation—Property held as youth camp exempt.**

March 2, 1966

Honorable B. C. Graves
Commissioner of the Revenue of
New Kent County

In your letter of February 24, 1966, you inquire whether the following property is exempt from local taxation:

1. A 220-acre tract acquired by a Young Women's Christian Association which is to be developed for recreational use.
2. A 318-acre tract owned by the Norfolk Presbytery of the Presbyterian Church which is being developed into a youth camp and recreational area for churches of the Presbytery. You state that the property is used for religious and recreational purposes, that the cost of operation is set up in the budget of the Presbytery, and that a nominal charge for use is made to cover operational expenses.

Property tax exemptions are determined by Section 183 of the Constitution of Virginia. Subsection (e) exempts:

"Real estate belonging to, actually and exclusively occupied and used by, and personal property, including endowment funds, belonging to Young Men's Christian Associations, and other similar religious associations, orphan or other asylums, reformatories, hospitals and nunneries, conducted not for profit, but exclusively as charities, also parks, or playgrounds held by trustees for the perpetual use of the general public."

The Debates of the 1902 Constitutional Convention, Volume 2, pp. 2682-89, clearly show that Young Women's Christian Associations were considered to be religious associations similar to Young Men's Christian Associations. Therefore, in my opinion, the Y.W.C.A. property is clearly exempt from taxation.

The question is not entirely clear as to the land owned by the Norfolk Presbytery. It does not appear to be exempt under Section 183, subsection (b) of the Constitution, which exempts:

"Buildings with land they actually occupy, and the furniture and furnishings therein and endowment funds lawfully owned and held by
churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building."

Section 58-12(5) of the Code of Virginia (1950) purports to exempt, in addition to property owned by Y.M.C.A.'s and similar associations, "property owned by any church, religious association or denomination . . . and used or operated exclusively for religious, denominational, educational or charitable purposes and not for profit . . . ." This appears to be an invalid attempt to extend exemptions beyond those provided in Section 183 of the Constitution, which provides that the property described therein, "and no other," shall be exempt from taxation.

However, I am of the opinion that the courts would hold that the Norfolk Presbytery may be considered sufficiently similar to a Young Men's Christian Association so that the property in question would be exempt from taxation under subsection (e) of Section 183, quoted above. Denominational church corporations were held to be religious associations similar to Y.M.C.A.'s in two cases decided by the Hustings Court of the City of Richmond in which the Supreme Court of Appeals refused to grant writs of error. City of Richmond v. Trustees of the Funds of the Protestant Episcopal Church in the Diocese of Virginia, Record No. R. 5625 (January 14, 1963); City of Richmond v. Virginia Christian Missionary Society, Record No. R. 6497 (October 5, 1965). I also call your attention to the following opinions of this office: Report of the Attorney General (1953-1954), p. 205, holding exempt property owned by the Masanetta Bible Conference, operated by the Presbyterian Church, and used as a summer camp, and Report of the Attorney General (1956-1957), at p. 253, holding exempt property owned by the Potomac Conference Corporation of Seventh-Day Adventists, used as an educational camp.

What is said above applies to the personal property of these organizations, as well as their real estate.

TAXATION—Income—Member of Armed Forces—Residence determines liability.

August 2, 1965

HONORABLE HUNTER B. ANDREWS
Member, Senate of Virginia

Your letter of July 28, 1965, enclosing a letter you had received from Alfred D. Minniti, T/Sgt. USAF, 1916 Rawood Drive, Hampton, Virginia, has been given consideration.

You also enclosed with your letter a photographic copy of a letter dated July 12, 1965, from Commissioner of the Revenue Franklin, of the City of Hampton, to Sgt. Minniti, informing him that inasmuch as he was in the armed forces of the United States and claimed Pennsylvania as the State of his domicile, his status in Virginia for tax purposes was that of a nonresident, and requesting him to file a nonresident income tax return in lieu of the resident return he had filed.

Sgt. Minniti claims that he ought to be allowed to file a resident return covering the Virginia income he received for non-military services and omitting his military income. He says that he has "maintained an abode in Hampton for more than four years." In support of his claim, he relies on § 58-77(8) of the Code of Virginia, which defines a resident as "every person domiciled in this State on the last day of the taxable year and every other person who, for more than six months of the taxable year, maintained his place of abode within this State, whether domiciled in this State or not . . . ."
The answer to this inquiry, however, is found in the Federal Soldiers' and Sailors' Civil Relief Act and not in the Virginia statutes. The Federal Act expressly provides, in relation to a person in the armed forces, that:

"For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent."

The quoted sentence is the first sentence of § 574 of U.S.C.A., Title 59 APP., as last amended by an Act of October 9, 1962; and under the quoted sentence Sgt. Minniti has not acquired a residence or domicile in, or become resident in or a resident of, Virginia.

Sgt. Minniti has maintained an abode in Hampton for more than four years, but as long as he can successfully claim that he is a domiciliary of Pennsylvania, and absent therefrom solely by reason of compliance with military orders, and therefore entitled to the benefits of the Federal Soldiers' and Sailors' Civil Relief Act, his status under that Act in Virginia is that of a nonresident. The Federal Act takes precedence over § 58-77(8) of the Code of Virginia in this respect. If he were held to be a resident of Virginia, he would be taxable on his entire net income, including his military income.

TAXATION—Livestock and Farm Machinery—May be classified separately at different rate.

TAXATION—Livestock and Farm Machinery—May not be eliminated completely.

HONORABLE MATT G. ANDERSON
Member, House of Delegates

May 18, 1966

This will acknowledge receipt of your letter of May 16, 1966, enclosing a letter from Ronald Nowland, in which the following questions are presented:

"Question one. Do the county Boards of Supervisors have the authority to classify livestock and farm machinery as a separate tangible personal property item, with a purpose of establishing a different tax rate than that imposed on other tangible personal property.

"Question two. In interpreting Section 58-851 of the Code of Virginia, do county Boards of Supervisors have the authority to eliminate completely the tax on livestock and farm machinery if it is classified separately?

"Question three. Can livestock and farm machinery be completely removed from the tax rolls of the county or must they remain on the rolls with a possible tax rate of zero?"

Question one is answered in the affirmative. This is permitted under § 58-851 of the Code.
Question two is answered in the negative. This section does not authorize the complete elimination of the tax upon the subjects involved. In this connection I call your attention to the terminal sentence of Section 169 of the Constitution, which reads as follows:

"The General Assembly may define as a separate subject of taxation household goods and personal effects and may allow the governing bodies of counties, cities, and towns to exempt or partially exempt such property from taxation."

It will be noted that under this Constitutional provision only those articles mentioned therein may be entirely exempted from taxation. The answer to Question three is in the negative.

TAXATION—Mineral Lands—Assessment.

December 16, 1965

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

This will acknowledge receipt of your letter of December 14, 1965, which reads as follows:

"Wise County is now undergoing its reassessment of real estate. Section 58-774.2 of the Code of Virginia requires a general reassessment of the mineral lands, but also provides that they shall be separately assessed from other real estate under § 58-774 of the Code of Virginia.

"The Board of Assessors is in disagreement as to whether or not they must use the same formula for assessing mineral lands as assessing the other real estate. More specifically, hypothetically speaking, if they adopted 25% for all other real estate as a basis for determining fair market value, must they also use the 25% for the mineral assessment. I have advised them that the assessment must be uniform.

"Would you advise me if you agree on this proposition?"

In my opinion, it is not necessary that the ratio with respect to the assessment of mineral rights under § 58-774 of the Code be the same as the ratio for the assessment of other lands. The ratio, of course, with respect to mineral rights must be the same for all lands within that classification and the assessment with respect to other lands must be uniform for that class. Assessments in this manner would not be in violation of Section 168 of the Constitution, but would be in conformity with this section. Furthermore, under Section 172 of the Constitution, it is provided as follows:

"Coal and other mineral lands shall be assessed or reassessed for local taxation, in such manner and at such times as the General Assembly has heretofore prescribed, or may hereafter prescribe, by general laws."

The answer to your question, therefore, must be in the negative.
TAXATION—Mobile Homes—Constitute separate classification of tangible personal property.

HONORABLE JACK P. BLANKENSHIP
Commissioner of the Revenue
for Campbell County

This is in reply to your letter of May 19, 1966, from which I quote the following:

"We have just completed a general reassessment program in Campbell County and there has been some discussion on the characteristics of how mobile homes should be taxed. If the owner is in possession of the land and the trailer does he qualify under the law to have this taxed as Real Estate?"

Mobile homes constitute a separate classification of tangible personal property under Chapter 16 of Title 58, Code of Virginia (1950), as amended. From this Chapter, I quote § 58-829.3, which states: "All vehicles without motive power, used or designed to be used as mobile homes or offices or for other means of habitation by any person are hereby defined as separate items of taxation and shall constitute a classification for local taxation separate from other such classifications on tangible personal property provided in this chapter; provided, however, that the rate of assessment and the rate of tax shall not exceed that applicable to other classes of tangible personal property."

The quoted statute, enacted under Chapter 418, Acts of Assembly of 1960, places all mobile homes in the same classification for local taxation. No exception is made for instances in which the owner is in possession of the land and the mobile home. In my interpretation, all such vehicles are classified by the statute as tangible personal property. Accordingly, I shall answer your question in the negative.

TAXATION—Motor Fuel Tax—Dealer not exempt from liability for tax on fuel used by voluntary fire companies.

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

This is in reply to your letter of recent date in which you request my opinion as to whether § 58-712, Code of Virginia (1950), as amended, exempts a dealer from payment of the tax on motor fuel purchased by Fairfax County for delivery to and use by the volunteer fire departments located therein.

It is noted that on May 24, 1965, you inquired whether Fairfax County could make the requests for refunds of tax on the gasoline it purchased for use by the volunteer fire departments of the County. At that time you advised that the fire departments were incorporated and owned their own buildings and the fire fighting and rescue equipment was titled to the individual fire departments, with the exception of a few pieces owned by the County. In my reply of June 9, 1965, I stated that the County could make such requests for refunds on the gasoline it purchased for delivery to the volunteer fire departments. Under § 58-715, the person who purchases motor fuel on which the tax is imposed, in quantities of five gallons or more, for the purpose of operating equipment of voluntary fire fighting companies "shall be reimbursed and repaid the amount of such tax or taxes paid."
In regard to the conditions under which dealers are exempt from the payment of motor fuel taxes, I quote § 58-712, as follows:

"Each and every dealer in gasoline or other like products of petroleum by whatsoever name designated shall be exempt from the payment of any and all motor fuel taxes upon gasoline or other like products of petroleum sold by such dealer in the State to the State or any political subdivision thereof when such gasoline or other like products of petroleum are sold and delivered by such dealer in bulk lots of not less than five hundred gallons in each delivery to and for the exclusive use by the State or any political subdivision thereof."

(Emphasis supplied.)

Prior to the amendment of the quoted section by Acts of Assembly of 1960, Chapter 458, the tax was "payable upon motor fuel sold and delivered to or used by the State and every political subdivision thereof." For many years before that, however, § 58-712.1 exempted dealers from the tax on motor fuel sold and delivered in lots of not less than five hundred gallons for the exclusive use by the United States. That section states that the "term 'exclusive use by the United States, its departments, agencies and instrumentalities' shall be construed to specifically exclude the use of such gasoline and other like products of petroleum by any person, firm or corporation, whether operating under contract with the United States, its departments, agencies and instrumentalities or not, the original purchase by whom from a dealer in gasoline or other products of petroleum in this State would have rendered such dealer liable for the payment of motor fuel taxes." (Emphasis supplied.)

While § 58-712 does not define the term "exclusive use by the State or any political subdivision thereof" it seems reasonable that it should be interpreted the same for the State and its political subdivisions as set forth in § 58-712.1 for the United States and its instrumentalities. This is particularly true since the two sections are verbatim in the essentials here under consideration, the language of § 58-712, as amended in 1960, obviously having been adopted from that used in § 58-712.1 which has not been amended since 1948. Further, § 58-712, by its own terms, is limited to motor fuel for the exclusive use of the State or its political subdivisions and does not include a reference to voluntary fire fighting companies.

The exemption of a dealer from liability for taxes on motor fuel sold is the exception to the rule and § 58-712, therefore, must be strictly construed against such dealer. While the County is eligible for refunds, as in the past, the clear meaning of the statute may not be waived for the sake of expediency. Accordingly, in my opinion, the dealer is not exempt from liability for the tax under the conditions stated and I shall answer your question in the negative.

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TAXATION—Motor Vehicles—Assessable against resident member of armed forces.

MOTOR VEHICLES—Local Licenses—Taxing authority where member of armed forces resides.

HONORABLE A. BURKE HERTZ
Commissioner of the Revenue for the City of Falls Church

September 16, 1965

This is in reply to your letter of September 7, 1965, in which you request my opinion as to whether or not your jurisdiction will be legally correct in assessing
REPORT OF THE ATTORNEY GENERAL

for tangible personal property taxation a motor vehicle belonging to a member of the armed forces who has maintained his legal residence in the City of Falls Church, Virginia, but who is stationed under competent military orders in another jurisdiction.

You draw my attention to the Soldiers' and Sailors' Civil Relief Act and the fact that the Act does not relieve the serviceman from tax liability to his home jurisdiction. This is correct. The purpose of the Act is to prevent multiple taxation in respect of any person who is required to sojourn in one or more jurisdictions other than that of his domicile solely by reason of compliance with military or naval orders. By virtue of his military assignment he neither gains nor loses his standing as a resident or nonresident, nor does he lose the attendant tax obligations or immunities, as the case may be. The Act states that "such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, ... or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing."

It has been held that every man is deemed to have a domicile somewhere. Before a domicile once established becomes lost or changed, a new domicile must be acquired by removal to new locality with intent to remain there, and the old domicile must be abandoned without intent to return. See, Dotson v. Commonwealth, 192 Va. 565. As I understand the facts now under consideration, the serviceman was domiciled in Falls Church, Virginia, before entering the service and thereafter retained his domicile there. The terms of the Soldiers' and Sailors' Civil Relief Act, quoted herein, prevent the assessment for personal property tax by the jurisdiction in which he is stationed solely by reason of compliance with military orders. See, Dameron v. Brodhead, 345 U.S. 322.

Such circumstances indicate that his motor vehicle was constructively located in the jurisdiction of his domicile on January 1 of the tax year. Under Chapter 16 of Title 58, Code of Virginia (1950), as amended, § 58-837 requires that: "Every taxpayer owning any of the property mentioned in this chapter on January first of any year shall file a return thereof with the commissioner of the revenue for his county or city." Within the same chapter, the commissioner of the revenue is required by § 58-838 to "enter the fair market value of such property and assess the same" when "any taxpayer liable to file a return of any of the subjects of taxation mentioned in this chapter neglects or refuses to file the same for any year within the time prescribed." This chapter includes motor vehicles under the classification of tangible personal property.

In consideration of the foregoing, I am of the opinion that you are legally correct in assessing the motor vehicle described for tangible personal property taxation.

TAXATION—Motor Vehicles—Member of Armed Forces—Assessable in locality where owner is a resident.

HONORABLE CHARLES A. CALLAHAN
Commissioner of the Revenue of the City of Alexandria

July 8, 1965

This is in response to your letter of June 23, 1965, in which you request my opinion as to whether or not a person who has retained his domicile in Virginia while a member of the armed forces is subject to the State personal property tax upon his automobile while he is on active duty in said armed forces. Your letter indicates that your inquiry concerns a person who retained a domicile in Alexandria while serving in the armed forces and has now been discharged and has applied for a city license. Your letter further indicates that the Code of the City of Alexandria provides that all delinquent personal property taxes shall
be paid as a prerequisite to the issuance of any such city license. You also state that this person's automobile was not physically located in Virginia while he was a member of the armed forces.

Apparently the Honorable C. H. Morrissett, State Tax Commissioner, received a copy of your letter of June 23, because he has forwarded to me a copy of a letter which he wrote on July 10, 1964, to Captain Daniel B. Peyser of the United States Air Force, in which he opined on a question almost identical to that propounded by you. A copy of Mr. Morrissett's letter of July 10, 1964, is enclosed.

I agree with Mr. Morrissett's conclusion, and I am, therefore, of the opinion that the exserviceman, about whom you inquire, is subject to payment of the personal property taxes on his automobile in accordance with the provisions of the Code of the City of Alexandria.


TAXATION—Motor Vehicles—Personal property—Situs for taxation.

MOTOR VEHICLES—Personal Property—Situs for taxation.

December 14, 1965

HONORABLE MERLE P. GANZERT
Commissioner of the Revenue of the
City of Richmond

This is in reply to your letter of November 26, 1965, concerning the authority to assess personal property tax on a motor vehicle which belongs to a business located in the City of Richmond, but is garaged at the home of the driver who resides in Henrico County.

As pointed out in Report of the Attorney General (1959-1960), to which you refer, § 58-834, Code of Virginia (1950), as amended, prescribes that the situs for the assessment and taxation of tangible personal property shall be the county or city in which such property may be physically located on the first day of the tax year. The facts, upon which that opinion was based, were that the business was located in the City of Portsmouth and the operator of the vehicle garaged it in the County of Norfolk. The opinion expressed the view that the County of Norfolk would have the authority to assess and levy the personal property tax on motor vehicles normally garaged there on the first day of the tax year.

Inasmuch as that opinion was written some years later than the letter dated December 3, 1952, a copy of which you enclosed, any conflict should be resolved in favor of the more recent opinion, which is consistent with our present views on the subject.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Motor Vehicles—Situs.

MOTOR VEHICLES—Local Licenses—Taxing authority determined by residency of owner.

November 17, 1965

HONORABLE CATHERINE C. LUCIE
Commissioner of the Revenue for the
City of Colonial Heights

This is in reply to your letter of October 29, 1965, in which you request an opinion from this office as to which is the proper situs for the purpose of city or county automobile tags under the following facts, which I quote:

"A male taxpayer owns an automobile, but since he is under 25 the car is registered in his father's name for insurance purposes. This taxpayer is married and lives in Colonial Heights where his auto is housed the year around. A city tag was purchased in Colonial Heights for 1965. Chesterfield County feels that this tag should be purchased there, since the car is registered in the county, although it is physically housed at all times in Colonial Heights."

Since, under the given facts, the car is registered in Chesterfield County in the father's name, it appears that the father is not a resident of Colonial Heights but is a resident of Chesterfield County and that the vehicle is titled in his name. Under § 46.1-1, paragraph (18), Code of Virginia (1950), as amended, the term, "Owner" is defined as: "A person who holds the legal title of a vehicle or, in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this title. * * * *" (Emphasis supplied). In the absence of any such agreement for conditional sale or lease, the father, who holds the legal title of the vehicle, is the owner for the purposes of Title 46.1, by force of this statute.

The authorization for counties, incorporated cities and towns to charge license fees upon motor vehicles is found in § 46.1-65. Certain limitations on the imposition of such fees are contained in § 46.1-66, from which I quote the following:

"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 limitation, no other county, city or town is permitted to impose a license fee upon the vehicle, since the County of Chesterfield, of which the owner is a resident, already imposes such a fee. Accordingly, I am of the opinion that the proper situs for imposition of such fee and tags is the County of Chesterfield.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Motor Vehicles—Situs.

MOTOR VEHICLES—Taxation—Situs—Where vehicle physically located on first day of tax year.

November 18, 1965

HONORABLE CATHERINE C. LUCIE
Commissioner of the Revenue for the City of Colonial Heights

This is in reply to your letter of October 29, 1965, which I shall quote, as follows:

“The question has come up between Commissioners of the Revenue in Colonial Heights and Petersburg concerning the proper situs for the taxation on several vehicles.

“Burton P. Short & Son and the Short Paving Co., Inc. have four employees who reside in Colonial Heights. Each of these four men drive the trucks, which they operate, home every night. Therefore, all four trucks are physically located in Colonial Heights each night. City auto tags were also purchased for all of these trucks in Colonial Heights.

“We have always used Section 58-834 as the basis for assessing personal property tax (especially when the vehicles were housed here every night of the year).

“I would appreciate an opinion as to which is the proper situs for taxation.”

According to § 58-834, Code of Virginia (1950), as amended, the situs for the assessment and taxation of tangible personal property is the county or city in which such property may be physically located on the first day of the tax year. By virtue of § 58-835, tangible personal property shall be returned for taxation as of January first of each year and the value of all property shall be taken as of such date. In an opinion found in Report of the Attorney General (1959-1960), p. 354, the view was expressed that the authority to assess and levy the personal property tax on motor vehicles is in the jurisdiction in which such vehicles are normally garaged on the first day of the tax year, as opposed to the jurisdiction in which the principal business is located.

As I interpret the facts given in the instant case, the trucks are habitually garaged in Colonial Heights, as they return there each night of the year, including January first. Under such circumstances, I am of the opinion that the City of Colonial Heights is the proper situs for the assessment and taxation of these vehicles.

TAXATION—Personal Property Exemption—County may adopt ordinance before levy fixed.

COUNTIES—Taxation Ordinance—Board may adopt exemption ordinance before levy fixed.

May 13, 1966

HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney for Floyd County

This is in reply to your letter of May 12, 1966, which reads as follows:

“Reference is made to § 58-829.1, current Code of Virginia, and especially to the following language therein, to-wit:
"The governing body of any county, city or town may, by ordinance duly adopted, exempt in whole or in part from taxation all or any of the above classes of household goods and personal effects."

"An opinion is requested as to whether or not the governing body of a county may adopt such an ordinance now exempting the therein classified property from taxation beginning with tax year 1967, or, would such action have to be taken in the first part of 1967 at the time the levy is fixed."

I know of no reason why the board of supervisors may not adopt the ordinance at its June, 1966, meeting exempting the property described in § 58-829.1 of the Code for the tax year beginning January 1, 1967, and subsequent tax years.

Of course, if the board wishes, it may delay this action until the 1967 meeting. Furthermore, if it is so disposed, it could adopt such an ordinance at the June meeting of the current year, making it effective for the tax year commencing January 1, 1966.

TAXATION—Personal Property—Exemption ordinance may have retroactive effect.

May 9, 1966

HONORABLE ANDREW J. ELLIS, JR.
Commonwealth's Attorney for Hanover County

This will acknowledge receipt of your letter of May 6, 1966, which reads as follows:

"There has been proposed for adoption in Hanover County an ordinance exempting from taxation the household goods and personal effects enumerated in § 58-829.1 of the 1950 Code of Virginia, as amended. The public hearing on the ordinance will be held on June 29, 1966.

"Will it be possible to make the effective date of the ordinance January 1, 1966, so that no taxes on the enumerated items will be due in December of 1966, or will it be necessary to make the ordinance effective on and after January 1, 1967?"

In my opinion, the ordinance may be made effective so as to apply to the tax year beginning January 1, 1966. In my opinion, the ordinance will be timely if it is enacted within the time prescribed in § 58-839 of the Code.

TAXATION—Personal Property—May exempt items in § 58-829.1.

COUNTIES—Taxation—Items in § 58-829.1 may be exempted.

March 18, 1966

HONORABLE E. A. CHRISTIAN, Vice-Chairman
Louisa County Board of Supervisors

This will acknowledge receipt of your letter of March 17, 1966, in which you present the following question:

"I am writing to ask your opinion on the question whether or not
the Board of Supervisors of a County has the power to exempt the citizens from paying personal property taxes under the existing statutes?

"Several of my colleagues feel like myself that due to the impending sales tax law recently enacted by the General Assembly that the people of Louisa County and especially the farmers should be relieved from paying personal property taxes and we will endeavor to do so if we have the power to do so under the laws."

You are referred to § 58-829.1 of the Code of Virginia. Under this section the board of supervisors of the county may by proper ordinance exempt, in whole or in part, from taxation the household goods mentioned in that section. Any personal property that is not included in the foregoing section is not subject to exemption from taxation.

TAXATION—Personal Property—Merchants' capital may be exempted.

TAXATION—Personal Property—Different rates of levy for merchants' capital, personal property, etc.

May 26, 1966

HONORABLE GEORGE P. SMITH, JR.
Commonwealth's Attorney for Fluvanna County

This will acknowledge receipt of your letter of May 20, 1966, which reads as follows:

"The Board of Supervisors of Fluvanna County proposes to eliminate the tax on merchants capital, machinery and tools, and all classes of tangible personal property, with the exception of motor vehicles and trailers required to be licensed by State law or County ordinance. Would such action be legal?

"If not, would such action be legal if the personal property tax on motor vehicles were also eliminated?

"Your opinion on the foregoing questions is respectfully requested and will be appreciated."

We have recently issued an opinion to Honorable Matt G. Anderson, under date of May 18, 1966, copy of which I enclose, which relates to the questions presented by you.

Section 58-829.1 of the Code contains a list of the personal property that may be entirely exempted from taxation. This section implements the terminal sentence of Section 169 of the Constitution, referred to in the enclosed opinion. The opinion to Mr. Anderson does not relate to merchants' capital which is defined in § 58-833 of the Code. The merchants' capital has not been considered as tangible personal property within the meaning of that term as used in Section 169 of the Constitution, and, in my opinion, it may be exempted as an item of local taxation. Under § 58-266.1 (5) whenever a county imposes a license tax on merchants, no merchants' capital tax can be imposed.

Motor vehicles are not included in the classifications set forth in § 58-829.1 and, therefore, may not be excluded from assessment and taxation as personal property.

Your attention is called to § 58-851 of the Code, which permits a different rate of levy on tangible personal property and merchants' capital than is imposed on real estate. Under this section the board of supervisors may impose one rate of levy on real estate, another rate on tangible personal property, and another rate of levy on merchants' capital, or it may impose the same rate of levy
on any two or all of these subjects of taxation. Under this same section, the board of supervisors may in its discretion classify farm machinery, farm tools and farm livestock separately from other tangible personal property and may fix a different rate of levy thereon from the rate imposed on other tangible personal property, but such rate shall not be higher than that imposed on other tangible personal property.

TAXATION—Personal Property—Rate and exemptions may be fixed at separate meetings.

BOARDS OF SUPERVISORS—Personal Property Taxation—Rate and exemptions may be fixed at separate meetings.

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

May 2, 1966

This will acknowledge your letter of April 28, 1966, in which you state that the Board of Supervisors of Isle of Wight County has published a notice of a public hearing on the budget for the purpose of fixing the rate of taxation at its regular meeting on May 3, 1966. The Board is considering exempting household goods and personal effects under § 58-829.1 of the Code. You request my advice as to whether or not the Board may fix the tax rate at the regular May meeting of the Board and enact the ordinance exempting household goods and personal effects at its June meeting or whether or not the tax rate and ordinance exempting household goods must be enacted at the same meeting.

In my opinion, the Board has the authority to fix the tax rate at the May meeting and pass the ordinance exempting household goods at the June meeting. I know of no requirement that these ordinances be considered at the same meeting.

TAXATION—Personal Property—Situs defined.

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

April 27, 1966

In your letter of April 21, 1966, you ask the proper situs for taxation of certain pleasure boats owned by residents of Newport News, one located on January 1 in Florida, and one located on January 1 in Gloucester County.

The applicable statute is § 58-834 of the Code of Virginia (1950), as amended, which states: “The situs for the assessment and taxation of tangible personal property . . . 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.”

This statute was applied in Hogan v. Norfolk County, 198 Va. 733, 96 S. E. 2d 744 (1957), holding taxable in Norfolk County certain taxicabs owned by a resident of Portsmouth but operated by him in the county on January 1 of each of the tax years in question. The court said at p. 735: “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 not 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.”
Thus, the residence of the owner does not determine by which jurisdiction personal property may be taxed. Unless you are convinced that the boats in question are normally kept in Newport News, and were outside the city on January 1 only as the result of a casual or transitory change of location, then such boats are not taxable by Newport News.

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TAXATION—Real Estate—Against whom property assessed when grantor reserves a portion thereof.

December 17, 1965

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

This is in reply to your letter of December 15, 1965, which reads as follows:

"I herewith enclose a copy of the proposed deed from Norman Fen-ton Carr et ux to The Presbyterian Home, Lynchburg, Virginia, for the conveyance of the real estate therein described which consists of open land, woodland, main dwelling, tenant house and certain other buildings. The transaction is to be closed around the end of December, 1965. You will note that the seller reserves the open land and tenant house for the years 1966 and 1967 and that the purchaser will get possession there-of on January 1, 1968. We are not advised at this time of the purpose for which the purchaser will use the residue of the property.

"I will appreciate your opinion as to how and in whose name that part of said property reserved by the seller for the years 1966 and 1967 should be listed and assessed for tax purposes for those two years, and as to how the residue of the property conveyed by said deed should be charged and listed for those two years."

In my opinion the property should be assessed in the name of the grantee, The Presbyterian Home, without regard to the reservation made in the deed. The legal title under the deed is in the Home. There is no provision for separating the property for taxation purposes under such circumstances. The former owners and the grantee may, of course, agree on what portion of the tax shall be paid by the grantors, but the liability for the tax is against the Presbyterian Home.

If the property would qualify for exemption under any provision of Section 183 of the Constitution, it would seem that the exemption would not be effective during the time the reservation continues.

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TAXATION—Real Estate—Collection—Commissioner of revenue may rely on records in the clerk's office of his county.

July 26, 1965

HONORABLE BLAIR ZIRKLE
Commissioner of the Revenue of Shenandoah County

This is in reply to your letter of July 23, 1965, in which you state:

"A deed duly recorded in the clerk's office of this county shows that title to a certain parcel of land in this county is vested in Mr. Smith, and is so carried on the land books of the county with the notation that the tax bills are to be mailed in care of Jas. Hamilton."
Since the date of recordation of the above mentioned instrument, another deed has been duly recorded conveying certain property from Lee Williams to Jas. Hamilton. This property is identified in this deed as being the same property conveyed to Williams by the will of one, Minnie Headly, whose will is recorded in Frederick County.

Mr. Hamilton's attorney has been rather insistent in his views that my duties require me to pursue the records of Frederick County to establish that the second instrument is conveying the same property our records show as being vested in Smith.

It is obvious that, if such is the case, there must be two deeds and/or wills recorded in Frederick County since we do not know how title passed from Smith to Headly.

I contend that my duty or authority does not extend that far and that he or one of the interested parties should cause to have recorded in Shenandoah County authenticated copies of any and all instruments recorded in Frederick County which pertain to the parcel in question which is in Shenandoah County.'"

There is no statutory duty upon the Commissioner of the Revenue to examine the records of another jurisdiction for the purpose of making the annual assessments on the land books. The Commissioner, in making up the land book showing the assessments of real estate for each year, is entitled to rely upon the records in the clerk's office of his county. This statement is subject to the qualification with respect to improvements added or razed or destroyed.

TAXATION—Recordation—Bill of sale conveying personal property.

RECORDATION—Tax—Bill of sale conveying personal property.

Honorable Bertha R. Drinkard, Clerk
Corporation Court of the City of Bristol

This is in reply to your letter of January 25, 1966, relating to an inquiry received by you as to whether or not a bill of sale conveying only personal property is subject to the recordation tax of fifteen cents per one hundred dollars of the consideration.

Attention is directed to § 58-58 of the Code which provides that "On every contract relating to real or personal property . . . which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for . . . ."

Under the foregoing section of the Code, a bill of sale conveying only personal property is subject to the recordation tax.

TAXATION—Recordation—Deed subject to §§ 58-54 and 58-65.1.

RECORDATION—Tax—Deed subject to §§ 58-54 and 58-65.1.

Honorable George E. Holt, Jr., Clerk
Circuit Court of Botetourt County

This will acknowledge receipt of your letter of May 26, 1966, which reads as follows:
"Enclosed please find a copy of a deed from Frederick Elwood Taylor et al., Trustees under the will of D. M. Taylor, deceased, parties of the first part, and Nancy Mackall Lurton.

"The approximate value of the 8/63 interest in lands would be $8,800.00. Would you please advise us if this deed could be recorded for a 50¢ state tax, or whether it would be proper to charge the regular 15¢ per $100.00 recordation tax, and the 5¢ per $100.00 county recordation tax?"

I assume that your question is raised upon the theory that this deed would come within the provisions of § 58-57 of the Code. In my opinion, however, this conveyance does not qualify under that section. Under the terms of the will, title to the property vested in the trustees with direction to convey the property in equal shares to the grandchildren of the testator at such time as each grandchild attains the age of twenty-one years.

The deed, it will be noted, conveys an undivided 8/63rd interest in the property to the grantee. It is therefore subject to the recordation tax imposed under § 58-54 of the Code. It is also subject to the local tax imposed under the provisions of § 58-65.1 of the Code. Whenever the total of the property has been conveyed in such manner to the grandchildren, if they should decide to partition the property, such deed or deeds would be subject only to the tax required by § 58-57.

In this connection I enclose copies of two prior opinions of this office—one dated January 24, 1946, to the Clerk of Northumberland County (Report of the Attorney General (1945-1946), at p. 116), and the other dated June 29, 1948, to Hon. C. H. Morrissett (Report of the Attorney General (1947-1948), at p. 185).

TAXATION—Recordation of Lease—How amount of tax ascertained.

RECORDATION—Deed of Lease—How amount of tax ascertained.

LEASES—Recordation Tax—Amount ascertained.

February 11, 1966

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

This will acknowledge receipt of your letter of February 9, 1966, which reads as follows:

"Please advise the proper recording tax on the following lease: the lease is dated January 1, 1957 for a term of one year. The lessee has the option of renewing the lease for bi-monthly or annual periods by paying the appropriate rental in advance. He has exercised that option, and now wishes to admit this instrument to record.

"We pose the question, should the value of the lease be $3,000 or $27500, which represents 110 months of occupancy by the tenant?"

Section 58-58 of the Code applies. You will note that this section provides that when the annual rental under a lease, multiplied by the term for which the lease runs, equals or exceeds the actual value of the property leased, the tax for recording the deed of lease shall be based upon the actual value of the property at the date of the lease. In this instance where the option to renew has been exercised and the rental has been paid for the duration of the lease, if the
amount of the rent is less than the actual value of the property, the recordation tax should be measured by the amount of rent paid.

TAXATION—Richmond City Sales Tax—State agency not subject to collection provisions.

CITIES—Sales Tax—State agency not subject to collection provisions.

STATE INSTITUTIONS—Richmond Professional Institute—Not subject to collection provisions of city sales tax.

March 7, 1966

MR. RAYMOND T. HOLMES, JR., Comptroller
Richmond Professional Institute

In your letter of February 25, 1966, you ask my opinion as to the applicability to Richmond Professional Institute of the City of Richmond admissions tax ordinance. You state that some dances and other entertainment events are held at the Mosque, owned by the city, and advertised for general admission, and others are held on R.P.I. property, primarily for student participation. You state that admission to some of these events is paid wholly or in part by the student activities fee, and persons other than students who attend pay at the door.

Section 2.02(a) of the Richmond charter (Acts of 1948, p. 177) empowers the city to collect taxes, "for admission to or other charge for any public amusement, entertainment, performance, exhibition, sport or athletic event in the city. . . ."

Section 35-74 of the Richmond City Code of 1963 provides that the admissions tax is "levied upon and shall be collected from every person who pays an admission charge . . . ." Section 35-77 requires that "every person receiving any payment for admission to any place of amusement or entertainment . . . shall collect the amount of the tax imposed . . . from the person making an admission payment . . . ." Section 35-78 requires the person collecting the tax to make reports and remittances to the city.

Clearly, the admission tax is not a tax on Richmond Professional Institute, but rather on the person seeking admission. The only question, then, is whether the city may compel R.P.I. to collect and remit admissions taxes in connection with events conducted by it.

A similar question was discussed in an opinion found in the Report of the Attorney General (1948-1949), p. 255, involving the applicability of the Harrisonburg admissions tax ordinance to events held at Madison College in connection with its student activities program. That opinion concludes:

"I know of no statute expressly authorizing Harrisonburg to impose duties upon a State agency with respect to the collection of admission taxes imposed by it and, unless [the city attorney] can refer you to a charter or statutory provision authorizing such action, it is my opinion that Madison College is under no duty in respect thereto and should not consider the ordinance applicable to it."

In my opinion, Richmond Professional Institute cannot be compelled to collect the Richmond admissions tax. This does not mean that student or other private organizations conducting dances or other entertainment events cannot be made subject to the collection provisions of the ordinance.
TAXATION—Sales and Use Tax—City may include tax on wine and beer.

HONORABLE J. T. CAMBLOS
Commonwealth's Attorney for the City of Charlottesville

This is in reply to your letter of August 19, 1965, in which you enclose copy of an ordinance adopted by the council of the city of Charlottesville, known as “The City of Charlottesville, Virginia Retail Sales and Use Tax.”

You have requested my advice as to whether this ordinance may be enforced with respect to the sale at retail of beer and wines. You call attention to an opinion issued by Honorable J. Lindsay Almond, Jr., while he was Attorney General, in which he held that an ordinance enacted by the city of Roanoke levying an excise tax on beer and wine in that city was not valid. This opinion is published in the Report of Attorney General (1948-49), at p. 2.

The ordinance then under consideration by the Council of the city of Roanoke purported to levy an excise tax “on each and every purchaser of beer and wine within the city of Roanoke” to be collected by the retailer from the purchaser at the time of sale and remitted as provided therein.

The question then propounded, however, appears to me to be different from that propounded by you. I say this because if a locality seeks to single out beer and wine for special additional taxation in any form, this is not the same as including sales of beer and wine in the base for measuring a local general retail sales and use tax. For this reason, I am inclined to the view that a city in adopting a general retail sales and use tax need not exclude the sales of beer and wine.

This view finds support in the legislation of 1946 under which it was made clear that local beer and wine license taxes did not relieve retail merchants of merchants’ license taxes measured by sales. (See, §§ 4-38 and 4-107 of the Code of Virginia, as amended.)

There is no general law authorizing cities to impose a general sales and use tax such as has been done by the council of the city of Charlottesville; however, if the charter of that city authorizes the imposition of such a tax, the power therein granted is not, in my opinion, affected by any of the provisions of Title 4 of the Code pertaining to the control of the sale at retail of wines and beer.

The opinion of the Attorney General, in the Report of Attorney General (1948-49), at p. 2, to the extent it may be in conflict with this opinion, is overruled.

TAXATION—Sales Tax—Charter change in town of Amherst does not affect local share.

COUNTIES, CITIES AND TOWNS—Town Charter Change—Sales tax share to county not affected.

HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This will acknowledge receipt of your letter of May 16, 1966, which reads as follows:

“I have a question which I hope you can answer for me in reference to HB 222 which was passed by this last session of the General Assembly. I refer in particular to paragraph (h) on page 22 on said bill in reference to the provision which states that the election of Council and Mayor for a period of at least four years.
"The Town of Amherst in its Charter which was granted in the 1950 session only allows for an election of Council every two years. Question, does this exclude the Town of Amherst from participating in the recently enacted one per cent local sales tax, if it does then this was not the intent of the legislature in reference to small towns who elect their Council on a two year basis."

The pertinent portion of paragraph (h) of Chapter 151, Acts of Assembly (1966), reads as follows:

"One-half of such payments to counties are subject to the further qualification, other than as set out in paragraph (g) above, that in any county wherein is situated any incorporated town not constituting a separate special school district which has complied with its charter provisions providing for the election of its council and mayor for a period of at least four years immediately prior to the adoption of the sales tax ordinance, . . . ."

The above language does not mean that the charter of the town shall provide for an election of its council or mayor for four-year terms; it merely requires that the town shall have complied with its charter provisions relating to the election of the mayor and council over a period extending for at least four years immediately prior to the time the town adopts a sales tax ordinance.

TAXATION—Sales Tax—Counties may adopt levy prior to effective date of act.

COUNTIES—Adoption of Sales Tax—May be before effective date of act.

HONORABLE A. L. PHILPOTT
Member, House of Delegates

May 19, 1966

This will acknowledge receipt of your letter of May 19, 1966, which reads as follows:

"Under the provisions of Chapter 151 of the Acts of Assembly of 1966, the boards of supervisors of the respective counties were authorized to enact a 1% local sales tax. Within the provisions of this act, there was a statement permitting the local governing bodies to adopt this tax prior to the effective date of the act. It is my understanding that this act did not contain an emergency clause and that the effective date of the act will be June 27, 1966.

"Since the act will not become effective until June 27, 1966, and this is the only authority for the local governing body to enact a sales tax ordinance, is it possible for this ordinance to be adopted prior to the effective date of the enabling legislation, namely June 27, 1966?"

It is true that Chapter 151 of the Acts of Assembly (1966) contains no emergency clause and its effective date will be the first moment of June 27, 1966. However, although this office has not heretofore rendered any written opinions on the subject, we have taken the position that the boards of supervisors of the various localities may adopt an ordinance imposing the 1% sales tax as of September 1, 1966, without waiting until after June 26.

The ordinance may be adopted pursuant to § 15.1-504 of the Code. The Honorable C. H. Morrissett has issued a bulletin dated May 12, to the various officials giving instruction as to the adoption of such an ordinance.
We are familiar with the recent case of the Supreme Court of Virginia under the style of Supervisors v. Corbett, 206 Va. 167, but we have not considered this case to be in point. In that case there was no legislative authority for the counties to levy a sales tax at any time.

It is our position that the case of Burks v. Commonwealth, 126 Va. 763, is in point. In that case an ordinance adopted by the board of supervisors prior to the effective date of the legislative act was attacked. The court said in that case:

"... There is nothing in the act to indicate any intention on the part of the legislature to require the board to wait until the law would inevitably become effective before signifying approval of its terms, and we perceive no reason or principle which would require such a course. The evident purpose of the legislature was to make the action of the board a condition precedent to the effectiveness of the act; and it was left optional with the board whether the law should come into force at the end of ninety days from its passage, or at a later period, or should remain entirely dormant. If it was to become effective at the end of ninety days from its passage, the more promptly the board acted the better opportunity the public would have to respect its terms. This view seems reasonable and just, and is in accord with the modern trend of legislation regarding the time when laws, other than emergency laws, shall take effect."

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TAXATION—Sales Tax—Imposition of tax to become effective at later date held valid.

CONSTITUTION—Taxation—Sales tax to become effective at later date held valid.

February 7, 1966

HONORABLE EDWARD E. WILLEY Member, Senate of Virginia

This is in reply to your letter of February 4, 1966, which reads as follows:

"Senate Bill 181 is now before the Finance Committee of the Senate. "On page 5 of the printed bill, part of line 30 and all of line 31 provides for the imposition of an additional sales tax of 1%—to become effective July 1, 1968. Since no need has been developed for the use of this money I wish to know from your office whether this violates section 188 of our Constitution."

Section 188 of the Constitution, to which you refer, is as follows:

"No other or greater amount of tax or revenue shall, at any time, be levied than may be required for the necessary expenses of the government, or to pay the indebtedness of the State."

In my opinion, the provision in the Sales Tax Bill, to which you refer, in no way violates this provision of the Constitution. It is within the province and discretion of the General Assembly to anticipate what revenues may be required to meet the necessary expenses of the government.
TAXATION—Virginia Military Institute—Lexington City sales tax construed.

April 15, 1966

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

In your letter of March 28, 1966, you asked about the applicability of the City of Lexington sales tax ordinance, and of the State sales tax statute, to the following operations at the Virginia Military Institute:

1. Meals supplied by the Cleaves Food Service Corporation of Silver Springs, Maryland.
2. The cadet canteen, book store, cleaning and pressing shop, vending machine and telephone concessions, operated by Wynmar, Incorporated, of Lexington.

First, it should be pointed out that Article II, paragraph 1(f) of each contract provides that the contractor assumes liability for all Federal, State and local taxes.

Since the State sales tax will not be in effect until September 1, 1966, we have adopted a policy of not issuing opinions on its application until after regulations concerning it are promulgated by the State Tax Commissioner. Therefore, what follows will be confined to the Lexington sales tax.

Under the food service contract, the contractor purchases food and prepares it with equipment provided by VMI. Each cadet is charged $12.00 per week, which is collected by VMI, and the contractor reimbursed, with 50% of the contractor's net profits going to VMI. It is clear that VMI is the consumer of the food, the cost of which is recovered in bills rendered to the cadets.

The Lexington ordinance, § 6, exempts sales to the “United States government, to any State or county or municipality thereof,” and also exempts sales to church and other “educational, religious or charitable institutions.” Since the sale to VMI is a sale to the State, and certainly, a sale to an educational institution, in my opinion, the food service operation is not subject to the Lexington sales tax.

This does not mean, however, that sales of food or other goods to the contractor by suppliers will be exempt from the tax.

The City would be without power to tax the canteen, book store, cleaning and pressing shop, and other concessions if these sales were made by VMI, because a city may not tax a state agency. These sales, however, are made by the concessionaire, who enjoys no such immunity.

The telephone concession is not mentioned in the Lexington ordinance, and therefore is not taxed. Vending machine sales are exempt under § 6 of the ordinance. The cleaning and pressing concession is not taxed by the ordinance, according to Rule 33 adopted thereunder. The book store and canteen sales are not exempt under the ordinance, and, therefore, are taxable.

What is said above will not be fully applicable on and after September 1, 1966, because the only permissible local sales taxes after that date will be those conforming to the State sales tax law.

TOWNS—Authority—Town of Gate City may not contribute funds for Rural Area Development Project.

August 9, 1965

HONORABLE JAMES B. FUGATE
Member, House of Delegates

This is in reply to your letter of August 4, 1965, which reads as follows:

“A Rural Area Development Project for the construction of an
athletic field and stadium for the Gate City High School, located in Gate City, Scott County, Virginia, has been approved by the federal authorities.

"The field and stadium is to be constructed on land owned by the county on its Gate City High School property. When the facilities are complete, they will be owned, controlled and operated under the supervision of the Scott County School Board. These facilities will be used for athletic contests, school playground and recreational purposes.

"All high school students living within the corporate limits of the Town of Gate City, as well as students in the area in close proximity, attend the Gate City High School, and will receive the benefit of these facilities.

"Under this project, the federal authorities contribute funds for most of the labor and a small portion for the materials, and the residue of the funds for the purchase of materials to be used in this project, must be contributed by the locality.

"The Town Council of the Town of Gate City feels that the general welfare of the town would be promoted and that it would be to the best interest and highly beneficial to the Town to have these facilities located within the corporate limits of the Town of Gate City. Therefore, the Town desires to make a contribution to be used for the purchase of material in connection with the project.

"My inquiry is whether or not in your opinion the Town of Gate City has authority to make such contribution under the provisions of Section 15.1-24 and Section 15.1-25 of the Code of Virginia, or any other pertinent statutes."

In my opinion, the sections of the Code cited by you do not authorize a town to make appropriations for such a purpose. Section 15.1-24 relates to charitable institutions and § 15.1-25 relates to hospitals, voluntary fire-fighting organizations and to nonprofit recreational and historical associations and chambers of commerce. To the extent that this project may be recreational in character, it is a part of the public school system, operated by the county school board, and is not a nonprofit recreational organization as contemplated by the statute. The power of a town under general law to appropriate public funds for public school purposes is contained in § 22-126 of the Code, which reads as follows:

"Each county, city, and town if the town be a separate school district, is authorized to raise sums of money by a tax on all property, subject to local taxation, at such rate as may be deemed sufficient, but in no event more than three dollars on the one hundred dollars of the assessed value of the property in any one year to be expended by the local school authorities in establishing, maintaining and operating such schools and in their judgment the public welfare requires and in payment of scholarships for the furtherance of elementary or secondary education and transportation costs as required or authorized by law; provided that in counties with a population of more than six thousand four hundred but less than six thousand five hundred, such rate may be increased to four dollars on the one hundred dollars of the assessed value of the property therein in any one year; and provided further that in counties having a population of more than thirty-seven thousand but less than thirty-nine thousand such rate may be increased to four dollars on the one hundred dollars of the assessed value of the property therein in any one year."

Unless the charter of the town of Gate City authorizes this expenditure, in my opinion, the council of the town cannot appropriate public funds for this project,
It is my understanding that Gate City is not a separate school district. The provision limiting § 22-126 to towns having a separate school district (using the same language as is contained in Section 136 of the Constitution) was enacted at the Extra Session of the General Assembly of 1959. See, Acts of Extra Session 1959, Chapter 79. Prior to that amendment, a town that was not a separate school district could levy a tax for school purposes.

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

This will acknowledge receipt of your letter of September 9, 1965, which reads as follows:

"The Town of Amherst desires to open up a street which would connect with the present street leading to the county jail. This would involve the taking of some private property by condemnation or otherwise. The Town has approached the Board of Supervisors asking for financial assistance with the possibility of the county being asked to conduct in its name the condemnation proceeding for the purpose of acquiring rights of way for the proposed street. "Does the county have the authority to contribute financially to such a proposal? "Would the county have authority to make these financial expenditures and carry out the proceeding in the name of the county? "If the county has the right to make such an expenditure, would it proceed under Section 33-142, etc., or § 15.1-236?"

Although the property located in a town is also located in the county in which the town is situated, I feel that your first two questions must be answered in the negative. I can find no statutory authority authorizing a county board of supervisors to expend public funds upon streets owned by and located within a town.

Under § 15.1-236 of the Code, counties, cities and towns are given the right of eminent domain for the purpose of acquiring land for public use. Since the street will be owned by the town, the town itself would have to bring the suit for condemnation.

In view of my answer to the first two questions, no reply to the third question is required.

HONORABLE R. B. CHANDLER
Justice of the Peace, Mecklenburg County

This will acknowledge receipt of your letter of April 5, 1966, which reads as follows:

"Please advise at your very earliest convenience if it is legal for the husband of a town employee to qualify and serve if elected as a
member of the Town Council, and the employee continue to work as an employee of the town."

Section 15.1-73 of the Code provides that a member of the council of a town may not be interested in any contract with the town. The prohibitions of this statute, however, would not prevent the wife of a member of the town council from being employed by the town.

Unless the charter of the town of Clarksville contains a provision prohibiting the wife or other relatives of a member of the town council from being in the employ of the town, it would seem that there is no violation.

TRAILER CAMPS—License Tax—Exemptions must be uniform.

TAXATION—Trailer Camp License—Exemptions must be uniform.

April 29, 1966

HONORABLE E. C. WESTERMAN, JR.
Commonwealth’s Attorney for Botetourt County

This will acknowledge your letter of April 27, 1966, which reads, in part, as follows:

"Botetourt County has enacted an ordinance providing for a license tax upon the operation of trailer camps and trailer parks, pursuant to Title 35, Chapter 6, Article 1.1 of the 1950 Code of Virginia.

"The Board is now considering whether or not to exempt operators who rent trailer spaces in conjunction with recreation and camping areas during the summer months. As I understand it, these rentals range anywhere from overnight to several weeks.

"I refer you to § 35-64.5, which, in part, states ‘...the license so imposed by the governing body on such trailer park or trailer park operators to be uniform in its application. . .’

You have requested my advice as to whether or not the exemption set forth in the second paragraph of your letter may be enacted by the Board and still conform with the provisions of § 35-64.5 of the Code. This section reads as follows:

"Nothing in this article shall be construed as exempting any trailer park or trailer camp operator from the payment of any license or tax imposed by existing law, and the governing body of any such political subdivision is hereby authorized to impose an annual license on the operator or owner of any such trailer park or trailer camp of not less than five dollars nor more than fifty dollars per trailer lot used or intended to be used as such, the license so imposed by the governing body on such trailer park or trailer park operators to be uniform in its application, and the amount thereof to be fixed by an ordinance duly adopted by said governing body."

In my opinion, the exemption would not be contrary to the provisions of the statute if the exemption applies equally and uniformly over the county.
REPORT OF THE ATTORNEY GENERAL

TREASURERS—Collection of Delinquent Taxes—Status and priority of judgment liens.

TAXATION—Personal Property—Delinquent—How treasurer of county may collect.

HONORABLE A. C. WILLIAMSON
Treasurer of Botetourt County

July 15, 1965

This will acknowledge receipt of your letter of June 18, 1965, which reads as follows:

"There seems to be conflicting opinions particularly with lawyers and bankers in regard to a treasurer levying for collection of taxes. I would like the following question cleared up.

"A treasurer brings suit in the county court for an amount of $200.00 for unpaid personal property taxes which involves car, household furniture, farm equipment and livestock. Of this $200.00, only $40.00 would be tax on car. Sheriff has to levy on car and put it up for sale. The car only brings $600.00 and the bank has a lien for $560.00.

"1. Is the treasurer entitled to collect the full $200.00 with the bank taking the loss or can he only collect the amount of the tax actually due on the car?

"2. Also, suppose the car does not bring as much as the lien held by bank? What is treasurer's position?

"3. Treasurer has sued in county court, received judgment and had it recorded in Clerk's Office as lien against real estate. What position does this lien take in regard to other judgments?"

You subsequently advised this office that the situation involved in questions (1) and (2) are the result of a judgment obtained in the county court upon a suit brought by the treasurer. With respect to question (1), assuming that the property levied on and sold pursuant to the levy was in the possession of the taxpayer when the levy was made, then, in my opinion, the total tax has priority over the bank's lien. See, Chambers v. Higgins, 169 Va. 345, in which § 58-1009 (formerly Sec. 381 of the Tax Code) of the Code of Virginia was applied. A prior opinion regarding this question is published in the Attorney General Report for 1955-56, at p. 212. If the property was not in possession of the taxpayer, the tax assessed against that property would have priority over the bank's lien and the other taxes involved would be subordinate to the bank's lien. In answer to question (2), in my opinion, the bank would be entitled to the surplus after satisfying the taxes and the costs.

I assume that question (3) involved a situation where a judgment has been obtained for personal property taxes and has been docketed. The judgment lien in this instance, in my opinion, would not enjoy priority merely because it is a judgment for taxes. The judgment in this case would stand upon the same basis as any other judgment and its priority would be controlled by the statutory provisions with respect to priority between judgment liens.

TREASURERS—Monthly Reports to Comptroller—Date of filing.

HONORABLE PHILIP P. BURKS
Treasurer of Bedford County

December 13, 1965

This is in reply to your letter of December 10, 1965, which reads as follows:
"Referring to Section 2-166 of the Code of Virginia providing that county and city treasurers and clerks of court receiving State moneys shall on or before the tenth day of each month, make certain reports to the Comptroller, please advise whether or not a treasurer is acting within the requirements of said section of the Code if the said reports are mailed and postmarked on or before the tenth day of the month. Does the said section require that the said report be in the office of the Comptroller on or before the tenth day of the month? It appears that in instances where a treasurer mailed said report on Friday, the eighth day of the month, if the Comptroller's office was closed on Saturday, the ninth, then the report would not reach the Comptroller's office until Monday, the eleventh day of the month."

We have consulted with the office of the Comptroller in connection with this matter, and we are advised by that office that they have adopted the policy of considering this section has been complied with if the report shows it is postmarked not later than the tenth day of the month. In my opinion, this is a reasonable interpretation of the statute.

UNIFORM COMMERCIAL CODE—Application—Security trusts on personal property.

October 6, 1965

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

This is in answer to your letter of September 23, 1965, in which you ask whether or not § 55-58.1 of the Code will be applicable to the Uniform Commercial Code, which becomes effective January 1, 1966.

Bearing in mind that the Uniform Commercial Code is not applicable to real property, but only to transactions intended to create security interests in personal property and fixtures, § 55-58.1 is applicable to the Uniform Commercial Code insofar as § 55-58.1 relates to personal property and fixtures covered by the Uniform Commercial Code. But it must be remembered that § 8.10-103 of the Code (a section in the U.C.C.) provides that "all acts and parts of acts inconsistent with this act (U.C.C.) are hereby repealed." Thus, if any portion of § 55-58.1 is inconsistent with any portion of the Uniform Commercial Code, the U.C.C. prevails.

I know of no provision of the U.C.C. with which § 55-58.1 is inconsistent and, therefore, in my opinion, § 55-58.1 would apply to those instruments, prepared and/or filed in accordance with the U.C.C., which come within the definition of a "security trust, as defined in § 55-58.1(1) of the Code.

UNIFORM COMMERCIAL CODE—Fee Charged by Clerk Pursuant to § 8.9-405.

FEES—Uniform Commercial Code—Charged by clerk pursuant to § 8.9-405.

January 24, 1966

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

This is in reply to your letter of January 22, 1966, which reads as follows:

"A question has arisen here in Scott County about the amount of the
filing fee that should be charged by the filing officer, the Clerk of the Circuit Court, for filing a financing statement pursuant to § 8.9-403 of the Code, when the financing statement presented for filing discloses an assignment of the security interest on the face of the statement. Honorable E. Ford Hubble, Clerk of the Circuit Court of Scott County, upon advice of members of the staff of the Auditor of Public Accounts, is charging a fee of $2.00 for the filing of a financing statement which contains an assignment of security interest.

"Mr. Hubble is of the opinion that he should collect a $1.00 fee for the filing of the statement pursuant to § 8.9-403, and a $1.00 fee for the filing of the assignment of security interest pursuant to § 8.9-405; which two $1.00 fees account for the $2.00 fee now being charged for the filing of a financing statement with an assignment of security interest on its face.

"My question is whether the Commercial Code sections 8.9-403 and 8.9-405 require the filing officer to charge a $2.00 fee for the filing of a financing statement which contains an assignment of security interest on its face, or should such a financing statement be filed for a fee of $1.00?"

This office has heretofore interpreted paragraph (1) of § 8.9-405 of the Commercial Code to mean that the clerk's fee for filing the paper under that paragraph is limited to $1.00. The type of paper under that paragraph is a financing statement that shows an assignment on its face as contemplated therein.

After this paper is filed, if there is a subsequent assignment, the clerk is allowed $1.00 under paragraph (2) of the above section for filing and indexing the assignment.

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UNIFORM COMMERCIAL CODE—Filing of Financing Statements With State Corporation Commission—Effective date and sufficiency of instrument presented.

December 1, 1965

HONORABLE N. C. LOGAN, Clerk
Circuit Court of Roanoke County

This is in reply to your letter of November 16, 1965, which reads, in part, as follows:

"First, I have been advised, based on the recommendations of the State Corporation Commission, to accept 'Financing Statements' as of December 1, 1965, holding same until January 3, 1966, to be filed as of 8:30 A.M. January 3, 1966. It is my contention that if a clerk accepts an instrument, with the fee as required by law, the instrument is deemed to have been filed at that time. Since the Uniform Commercial Code does not become effective until January 1, 1966, I do not feel that 'Financing Statements' as called for under the Uniform Commercial Code should be accepted and filed until January 3, 1966.

"Second, Conditional Sales Contracts may be executed until December 31, 1965, and some of these probably will not be presented for filing until after January 1, 1966. Since the section of the 1950 Code of Virginia, as amended, dealing with Conditional Sales Contracts, is being repealed as of December 31, 1965, and no provision is made in the new law for the filing of such contracts after December 31, 1965, as far as filing a contract is concerned, does the date of the instrument or
the date of filing prevail? Is it the duty of the Clerk to accept for filing, after December 31, 1965, with the fee of 50¢ paid, Conditional Sales Contracts, regardless of the date executed?"

With reference to your first question, I am advised by the Honorable William C. Young, Clerk of the State Corporation Commission, that no such recommendation as you suggest was made by him or the commission regarding practices to be followed by clerks of courts of record. The Commission has published and distributed a pamphlet in which it is indicated that the Clerk of the Commission will receive Financing Statements after December 1, 1965, accompanied by the filing fee, and will hold the Statements until January 2, 1966, at which time they will be filed in the order in which they were submitted. This is being done, according to Mr. Young, as an administrative convenience, since it would be physically impossible to otherwise file all the Financing Statements submitted to the S.C.C. for filing on the first day the Uniform Commercial Code becomes effective. But at no time, according to Mr. Young, has any "recommendation" been made to clerks of courts that this same procedure be followed by them. The S.C.C. has simply spelled out what will be its procedure. It has not presumed to make recommendations to county clerks.

However, I find nothing which would prohibit a clerk of a court of record from following the same procedure, if he is so disposed. But whatever practical procedure is followed, there can be no "filing" under the Uniform Commercial Code until it becomes effective. So, if a Financing Statement and filing fee are received prior to the effective date of the Uniform Commercial Code, they could, as a practical matter, be held until the law becomes effective and then "filed" on the first day, the procedure which will be followed by the S.C.C. The Statement would be considered as having been presented for filing or accepted by the filing officer on the first day the Act is effective (See, § 8.9-403, Code of Virginia).

In answer to your second question, it is to be noted that after the Uniform Commercial Code becomes effective, the instruments to be filed are a "financing statement" or "security agreement," as those terms are defined in the U.C.C. Section 8.9-402 of the Code sets out the formal requisites of the paper to be filed. What we now know as a "Conditional Sales Contract" may or may not comply with these requisites. If it does not, it will not provide protection under the U.C.C., even if filed, and, of course, it is the date of filing, not the date of execution of the instrument, which is significant for purposes of achieving protection under the U.C.C. However, in my opinion, it is not within the power of the clerk to determine whether or not an instrument presented for filing is sufficient to meet the requirements of any particular provision of law. Therefore, if a so-called "Conditional Sales Contract," executed prior to January 1, 1966, is presented for filing, accompanied by a fee of fifty cents, it should be filed and recorded in accordance with the applicable provisions of Title 55 of the Code, whether presented for filing before or after January 1, 1966. And if a so-called "Conditional Sales Contract," executed prior to January 1, 1966, is presented for filing under the Uniform Commercial Code (accompanied by a fee of $1.00), on or after January 1, 1966, it should be filed in accordance with the applicable provisions of the Uniform Commercial Code.

My conclusion that it is not within the power of the clerk to determine whether or not an instrument presented for filing is sufficient to meet the requirements of law is especially applicable to the Uniform Commercial Code. Section 8.9-403(1) provides that "presentation for filing . . . and tender of the filing fee" or "acceptance . . . by the filing officer constitutes filing" under the U.C.C. If presentation of the instrument for filing, accompanied by the filing fee, is alone sufficient to constitute filing there does not appear to be any grant of authority to a clerk to determine whether or not an instrument conforms with the requisites of the U.C.C.
UNIFORM COMMERCIAL CODE—Recordation—Name of debtor to be indexed.

RECORDATION—Uniform Commercial Code—Indexing name of debtor.

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

March 4, 1966

This is in reply to your letter of February 21, 1966, in which you state as follows:

"Will you please once again be so kind as to advise us whether or not an instrument filed as a Financing Statement under the Uniform Commercial Code in which an unincorporated firm, partnership or association, signed by one, two or more members of the association, should be indexed in the debtor index in the individual names as well as the 'trade name' or would it suffice to index the instrument in the 'trade name' only."

There is no provision of law specifically answering your question. Section 8.9-403(4) of the Code requires the clerk to index financing statements "according to the name of the debtor." In my opinion, where the "debtor" is one of the organizations referred to in your letter, (something other than a corporation), the best practice would be to include in the index all names which appear as debtors in the financing statement. In other words, individual names, as well as trade names, appearing in the document as debtors, should all be indexed.

UNIFORM COMMERCIAL CODE—Statement of Assignment—How indexed by clerk.

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

January 20, 1966

This is in reply to your letter of January 13, 1966, in which you quote subsection (1) of § 8.9-405 of the Code, and then state in part as follows:

"I would like to know how broad the meaning of the two words 'disclose' and 'indication' are as used in this section. To make myself clearer, let me give you an example. Several banks in the City of Danville have prepared a form, upon the face of which is a block numbered '6', which contains the printed words, 'The Assignee of the Secured Party and Address. First National Bank of Danville, Danville, Virginia, 24540.' A copy of this form, as well as a copy of a financing statement presented for filing, are enclosed to further explain my question.

"The original secured party has signed this instrument and in block No. 2 is listed as the secured party. The First National Bank has not signed this instrument. Actually, the First National Bank is the secured party and the only disclosure and indication of this on this instrument are the printed words in block No. 6. Is the meaning of the words 'disclose' and 'indication' broad enough to authorize me to list the First National Bank of Danville on the index as the secured party, instead of Sparks Giles Furniture Company, Inc., even though Sparks Giles Furniture Company has signed the instrument as the 'secured party?'"
Although your letter indicates that there were two different forms submitted for filing, a financing statement and a separate written statement of assignment, the forms which you have sent me are identical. Therefore, I am not certain whether there has been an assignment in accordance with subsection (1) or subsection (2) of § 8.9-405 of the Code.

In any event, the answer to your question is found in § 8.9-405 and the "Official Comment" following. Subsection (3) of § 8.9-405 states that, after the disclosure or filing of an assignment under this section, the assignee becomes the "secured party of record." There is a block in the instrument enclosed specifically disclosing the First National Bank of Danville as the assignee. Therefore, in my opinion, after an assignment the name of the so-called "secured party" to be indexed should be the name of the assignee. The assignee then is the "secured party of record."

If the assignment is one in accordance with the provisions of subsection (1) of § 8.9-405, even though the instrument has been signed by the original secured party, the "secured party of record" is in fact the assignee, and the instrument should be so indexed.

If the assignment has been made in accordance with the provisions of subsection (2) of § 8.9-405, the so-called "secured party" index will already have thereon the name of the original secured party. That subsection provides that upon presentation of the "separate written statement of assignment," the filing officer shall note the assignment on the index. This has the effect of replacing the name of the original secured party with that of the assignee, the new "secured party of record."

VIRGINIA STATE BAR—Witness Fee—Does not include loss of time.

WITNESSES—Virginia State Bar—Does not include loss of time.

HONORABLE R. E. BOOKER
Secretary-Treasurer of the Virginia State Bar

October 6, 1965

This is in reply to your letter of October 4, 1965, which reads as follows:

"On Oct. 29, 1959, your office advised the Virginia State Bar the procedure to be followed in paying witness attendance fees at hearings before committees of the Virginia State Bar.

"At a recent hearing before one of our District Committees, one of the material witnesses summoned on behalf of the committee, has requested that she be reimbursed for one-half day's pay that she lost as a result of such appearance. Please advise whether or not Code Sec. 14.1-190 would allow the Virginia State Bar to reimburse the witness for her loss of time."

In my opinion, § 14.1-190 does not authorize the payment to a witness of any amount in excess of the mileage and the $1.00 attendance fee. The statute does not authorize the reimbursement to a witness for loss of wages.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Judges—What constitutes basic annual salary under Retirement Act.

JUDGES—Virginia Supplemental Retirement Act—What constitutes basic annual salary.

HONORABLE C. CHAMPION BOWLES
Judge, Ninth Judicial Circuit

January 3, 1966

This will acknowledge receipt of your letter of December 29, 1965, in which you request my opinion as to whether or not the compensation of $1,000 per annum you are receiving as a member of the Committee of Judges appointed under § 14.1-40 of the Code shall be included in measuring your retirement compensation under § 51-4 of the Code when your retirement becomes effective on February 15, 1966.

Section 51-4 of the Code provides that a judge "shall, after retirement and for so long as he may live, be paid by the State ... annual compensation in an amount equal to three-fourths of the basic annual salary being paid him by the State immediately prior to his retirement."

"Basic annual salary" is defined in § 51-5 of the Code as follows:

"'Basic annual salary' as used in § 51-4 shall mean the salary paid out of the State treasury regardless of whether the State is reimbursed for any part thereof or not."

The "basic annual salary" of the judges of courts of record is fixed for each biennium by the Appropriation Act. Item 13 of the Appropriation Act of 1964 (Chapter 658, Acts of 1964) makes an appropriation "for adjudication of legal cases" for the first and second years of the biennium 1964-1966 and provides that—

"Out of this appropriation shall be paid the following salaries:

'Judges (80), each at.................. $15,000.'"

Item 81 of this Appropriation Act is an appropriation to the Department of Accounts "For criminal charges" and provides for payments in paragraph a. as follows:

"a. Salaries of county court judges, substitute judges, and employees (§ 14-53); also in quarterly installments, to each member of the committee of Circuit Court Judges (§§ 14-50 and 14-53) the sum of $1,000 for each year of the current biennium and in addition thereto the actual expenses of the members of such committee (§ 14-50)."

I feel that there is no escape from the conclusion (1) that the appropriation made in Item 13 is the basic salary appropriation for the payment of salaries to the judges of courts of record, and (2) the appropriation made in Item 81a is for the payment to the judges—who are members of the Committee of Circuit Court judges—for their service on the Committee. This payment, in my opinion, cannot be deemed to be a supplement or addition to the salary fixed in Item 13. It has never been deemed to be a part of the basic salary for the purpose of making payments into the retirement fund under the provisions of Article 7, Chapter 1, Title 51 (§§ 51-25 through 51-29) of the Code.
WARRANTS—Court Not of Record—No authority to amend charge on warrant.

CRIMINAL PROCEDURE—Warrants—Court not of record cannot amend charge.

COURTS NOT OF RECORD—Warrants—No authority to amend charge.

HONORABLE DONALD H. SANDIE, Judge
Municipal Court of the City of Portsmouth

April 5, 1966

This is to acknowledge receipt of your letter of March 31, 1966, in which you state, in part:

"Recently one of the Justices of the Peace issued warrant of arrest in which it is alleged that defendant 'did unlawfully violate Sec. 19-53 of the Portsmouth City Code, to-wit: destroy property shooting pistol in ceiling at Suburban Luncheonette'.

"Defendant should have been charged with violation Title 18.1-66 Code Virginia by maliciously discharging a firearm within building occupied by one or more persons, etc.

"Therefore, since Defendant was arrested on warrant charging violation of City Code, we pray your opinion in advising if proper to amend said warrant to read violation State Code as to Commission of felony in violation Title 18.1-66 Code of Virginia."

There does not seem to be any express statutory authority which would permit a court not of record to amend a criminal warrant making a substantial change in the charge initially made against the accused. The authority in a judge of such a court would be limited in correcting apparent defects in the form of the warrant. See, an opinion of the Attorney General expressed in a letter to the Honorable Charles G. Stone, dated January 14, 1955 (Report of the Attorney General (1954-1955) p. 220). Section 16.1-137, Code of Virginia (1950), as amended, applies only to courts of record.

The question is therefore answered in the negative.

WATER AND SEWERAGE SYSTEMS—Authorities—Other county agencies not to have control over.

HONORABLE WILLIAM C. CARTER
Commonwealth's Attorney for Cumberland County

May 9, 1966

This will acknowledge receipt of your letter of May 5, 1966, which reads as follows:

"The Cumberland County Board of Supervisors has requested that I ask an opinion of your office as to whether or not the Cumberland Service Authority, created under Chapter 28, Title 15.1 of the 1950 Code of Virginia, as amended, has the authority to make a comprehensive plan for water and sewer needs in Cumberland County rather than the Cumberland County Planning Commission, which was established by the Cumberland Board of Supervisors in accordance with §§ 15.1-437 and 15.1-446 of the Code of Virginia.

"It would appear to the Board of Supervisors that it is more feasible
for the Cumberland Service Authority, which has the advice of engineers, to make such a comprehensive plan rather than to have it done by the Planning Commission, which does not have the advice of consulting engineers.

An Authority, established under Chapter 28 of Title 15.1 of the Code (§§ 15.1-1239 through 15.1-1270), is vested with the power set forth in § 15.1-1250. There is nothing in this chapter nor the section just cited to indicate that any other agency of the county may exercise any control over the Authority. The Authority is established as an instrumentality exercising public and essential governmental functions to provide for the public health and welfare of the people located in the county or in the area included in the Authority. There is nothing to prevent the Authority from consulting with the Planning Commission or other agency of the county with respect to the water and sewage needs, but in my opinion, the Authority may exercise its discretion and judgment in connection with the project subject to such limitations as may be contained in other sections of Chapter 28 of Title 15.1, an example of which is found in § 15.1-1251 of the Code, and § 15.1-1247 and such other limitations as may appear in said Chapter.

WATER AND SEWERAGE SYSTEMS—Condemnation of Private System—No impairment of existing contract rights.

CONTRACTS—Condemnation of Water System—No impairment of existing rights.

March 2, 1966

HONORABLE ANDREW J. ELLIS, JR.
Commonwealth’s Attorney for Hanover County

In your letters of January 12 and February 8, 1966, you ask whether, if certain water systems owned by the Sydnor Pump and Well Company are acquired by purchase or condemnation by a sanitary district in Hanover County, the Board of Supervisors would be bound by provisions concerning rates and charges contained in agreements between Sydnor and developers of subdivisions served by it.

You sent me copies of two agreements which you state are typical of those in question. In these agreements, the subdividers granted to Sydnor Pump and Well Company certain easements and other property for use in operating water systems. Each agreement provides:

“To each consumer the water rent or charge shall be a minimum charge of $3.00 per month with additional charge at the rate of 75 cents per month for each 1,000 gallons of water in excess of 4,000 gallons furnished such consumer in any one month; provided, however, that Sydnor may, in its sole discretion and from time to time, increase such charges in the proportion (or less than the proportion) that the cost of living shall have increased over the July 15, 1960 cost of living.”

Each agreement provides that if the water system contemplated under the agreement shall be condemned by public authority, “Sydnor shall be entitled to collect and receive any and all damages or compensation that may be awarded on account thereof.”

The two agreements you sent me differ as to the effect of an assignment of contract rights by Sydnor to a governmental body or agency, such as the sanitary district. The first agreement provides that in case of such an assignment
water would thereafter be supplied "according to rates, rules and regulations of
the governmental body or agency."

The second agreement provides that in event of assignment to, and acceptance
by, a governmental body or agency "Sydnor shall thereupon be immediately re-
leased from any and all liabilities and obligations hereunder and all of its said
liabilities and obligations and privileges and rights and interests hereunder shall
immediately become vested in said . . . governmental body or agency."

Under the first agreement clearly Sydnor may assign its contract, and sell
its property, to the sanitary district without binding the district to continue
existing rates and service charges. Upon acquisition of such property, the Board
of Supervisors would be free to set rates under the authority granted it by §§ 21-118 and 21-118.4 of the Code of Virginia (1950), as amended.

Under the second agreement, assignment of the contract rights to the sanitary
district, and acceptance of the assignment by the district, would bind the district
to continue the existing rates, subject to the right to raise them in accordance
with the cost of living.

It would seem that a voluntary purchase transaction involving the property
composing the system contemplated under the second agreement, even though
not in the form of assignment and acceptance of contract rights and obligations;
might be held to subject the district to continuation of the agreement's provisions
concerning rates and charges. If the board should attempt to increase the rates ap-
plicable to the system covered by the second agreement, it might be held to be an
impairment of the obligations of the contract, contrary to Article I, Section 10,
of the United States Constitution. I am aware of no case directly on point. In
Commonwealth ex rel Page Milling Company v. Shenandoah River Light and
Power Corporation, 135 Va. 47 (1923), and in City of Richmond v. Chesapeake
and Potomac Telephone Company, 127 Va. 612 (1920), it was held that obligations
of contracts were not unconstitutionally impaired by rate increases authorized
by the State Corporation Commission, despite the fact that lower rates had been
specified by unexpired contracts between the parties. It could be argued that
the exercise of somewhat similar rate-making power by the Board of Supervisors
under §§ 21-118 and 21-118.4 was a comparable exercise of the police power
which would not unconstitutionally impair the obligations of the contracts in
question. I am not sure this analogy would hold up, however, because in the
cases cited above, the agency setting the new rates was not the owner of the
property.

Therefore, in my opinion, if the sanitary district should acquire by purchase
the water system covered by an agreement such as the second agreement you sent
me, there is a strong likelihood that the Board of Supervisors would be held to
be powerless to increase rates above those provided for by that agreement.

In the case of condemnation of such a system, however, in my opinion the
Board of Supervisors would be free to exercise its rate-making authority pursuant
to §§ 21-118 and 21-118.4. In both agreements you sent me, under the clause
quoted above, the parties contemplated that in event of condemnation compensa-
tion would be payable only to Sydnor. No acquisition of contract rights would
be involved, and the district, in condemning the property, would not assume the
obligations of the contracts between Sydnor and the subdividers.

In light of the additional information contained in the contracts, our opinion
of January 14, 1966, should be ignored. We are withdrawing that opinion from
our official files.
WATER AND SEWERAGE SYSTEMS—Creation of Sanitary District—May not include town.

COUNTIES, CITIES AND TOWNS—Sanitary Districts—May not include town within boundaries.

Honorable H. Selwyn Smith
Commonwealth's Attorney for Prince William County

May 26, 1966

This will acknowledge receipt of your letter of May 20, 1966, which reads, in part, as follows:

"The undersigned, who are Commonwealth's Attorney and Attorney for the Town of Haymarket respectively, have been asked to rule upon the possibility of the creation of a sanitary district which would include the existing Town of Haymarket and the effect such a creation might have, particularly upon the marketability of bonds of the sanitary district."

I enclose copy of an opinion dated May 28, 1959, to Honorable J. Gordon Bennett, in which we took the position that the statutes do not authorize the establishment of a sanitary district so as to embrace a town. This opinion is published in the Report of the Attorney General (1958-1959), at p. 68. In addition, I enclose copy of an opinion dated June 24, 1959, to Hon. Stanley A. Owens, relating to the same question. This latter opinion is also published in the Report for 1958-1959, at p. 67. There have been no amendments to the sanitary district laws since these opinions were issued which would justify a modification of the opinions referred to.

You will note that in our opinion to Mr. Bennett we expressed the view that the purpose of a sanitary district was to provide a legal method whereby sanitary needs for the protection of the citizens could be enforced and that whenever a community is a municipal corporation it is the proper governing entity to provide for the sanitation facilities and it already has the power to do so.

In view of our position with respect to the question just answered, we assume that it will not be necessary to discuss the other questions raised in your letter.

WATER AND SEWERAGE SYSTEMS—Joint Water Authority—Referendum is advisory only in county where held.

Honorable Andrew J. Ellis, Jr.
Commonwealth's Attorney for Hanover County

May 9, 1966

This will acknowledge receipt of your letter of May 6, 1966, which reads as follows:

"Hanover and Henrico Counties have proposed a concurrent resolution to establish a joint water authority pursuant to the provisions of Title 15.1, Chapter 28 of the 1950 Code of Virginia, for the purpose of constructing a dam on the Pamunkey River and distributing water therefrom. A public hearing will be held in both counties on May 25, 1966 on the proposed resolution.

"In the event that ten per cent of the qualified voters of one of the counties or any sanitary district therein file a petition at the hearing
so requesting, a referendum will be called on the question of undertaking the projects named in the resolution. This is provided for in § 15.1-1244 of the Code.

"In the event that the petition as hereinabove set forth is presented to only one county, will it be necessary to have the referendum in both counties or will the referendum only be held in the county so requested?

"In the event that such a referendum is held, will the resolution thereof be binding on the county in which the referendum takes place or will the resolution only be advisory in nature?

"If the results of the referendum are binding, at what time in the future could the same projects be undertaken?"

In answer to the question set forth in the third paragraph of your letter, in my opinion, the petition should be considered only by the governing body of the county to which it is presented. A petition signed by the voters of Hanover County would be presented to the board of supervisors of that county, and a petition signed by the voters of Henrico County would be presented to the board of supervisors of that county. The answer to this question, therefore, is in the negative.

With respect to the question set forth in the fourth paragraph of your letter, in my opinion, the referendum would not be binding, but advisory only. There is nothing in this statute to indicate that the board of supervisors would be bound by the result of the vote upon the referendum.

WATER AND SEWERAGE SYSTEMS—Public Water Supply—Authority of board of supervisors to construct dam.

BOARDS OF SUPERVISORS—Public Water Supply—Authority to construct dam without court approval.

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

January 20, 1966

This will acknowledge receipt of your letter of January 19, 1966, which reads as follows:

"The Board of Supervisors of Stafford County has undertaken a project which involves the construction of a dam to impound water for a public water supply in the county. The following question has arisen:

"Can the Board of Supervisors appropriate and expend county funds to acquire the necessary land and easements for this project without obtaining prior approval from the Stafford Circuit Court?"

"Section 15.1-37 of the Virginia Code would seem to give the Board of Supervisors adequate authority but in view of Section 62-95 through 62-106, some question has arisen as to the exact authority of the Board."

The county is authorized under §§ 15.1-292, et seq., to establish a water system for the county. It may also establish an Authority under §§ 15.1-1239, et seq., to accomplish this purpose. Section 15.1-37, clearly authorizes the appropriation of public funds for this purpose. Sections 62-95, et seq., of the Code, to which you referred, relate to the building of a water mill, or other machine, manufactory, or engine, and the building of a dam, etc., in connection therewith. Chapter 6
of Title 62-§§ 62-95 through 62-106, in my opinion, does not have application to the powers of a county granted under the Code sections I have cited. Your question is answered in the affirmative.

WATER AND SEWERAGE SYSTEMS—Purchase by Public Authority—Proration of real estate tax prior to passing of title.

August 31, 1965

HONORABLE F. B. HUBER
Treasurer of Campbell County

This will acknowledge receipt of your letter of August 26, 1965, relating to the real estate tax for 1965 on the property owned by the Virginia Sanitary System, Inc., and being purchased by the Campbell County Utilities and Service Authority, established under the Virginia Water and Sewage Authority Act, Chapter 28, Title 15.1 of the Code. You attached to your letter a copy of a contract between the Board of Supervisors of Campbell County and the Virginia Sanitary System, Inc., which is in the nature of an option to purchase the property of the Virginia Sanitary Service, Inc. You state that this contract has been assigned over to the Campbell County Utilities and Service Authority and that subsequent to the assignment, said Authority purchased the sanitary system on August 16, 1965. You state that one of the items in the settlement is the unbilled property tax for the year 1965 which, of course, is assessed against the Virginia Sanitary Service, Inc. You state further:

"I would also appreciate your opinion as to whether these taxes can be prorated from January 1, 1965 to August 15, 1965, the date of final settlement, and that portion due for the period from August 15 until the end of the year 1965 be exonerated, this assuming that it is not your opinion that the tax should be exonerated for the entire year. . . ."

Under § 58-822 of the Code, the tax may be prorated from and after the date upon which the title passed. In my opinion, the title did not pass until August 16, 1965, and, therefore, under the statute no exoneration could be made for that portion of the tax that accrued prior to August 16, 1965. Inasmuch as the Authority is a public body by virtue of § 15.1-1241 of the Code, I am of the opinion that it is not subject to real estate tax after the date that the title passed.

WATER AND SEWERAGE SYSTEMS—Sanitary Districts—Sewer system in portion of districts.

COUNTIES—Sanitary Districts—No authority to levy in portion of district.

February 16, 1966

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

In your letter of February 8, 1966, you state:

"Amherst County has a Sanitary District which covers what is now two of our magisterial districts. It is desired to put in a sewer system for a portion of that district and we wish to be advised whether or not a district may be organized within this district for sewage purposes."
Under § 21-118 of the Code of Virginia, the board of supervisors may construct a sewerage system within a sanitary district, and levy taxes and collect service fees to pay for the construction, maintenance and operation of the system. However, this section does not authorize a sanitary district levy to be laid on property in only a part of the sanitary district.

Power to create "small districts" within sanitary districts is conferred on certain counties by Chapter 161 of the Acts of 1926, as amended. However, § 1 of Chapter 161 restricts its operation to counties having a density of population of five hundred inhabitants per square mile, adjoining counties with a population of more than one thousand inhabitants per square mile, or adjoining cities with a population of one hundred seventy thousand or more. Since Amherst County does not fall within any of these descriptions, it does not have power to create a small district under Chapter 161.

Of course, the existing sanitary district may be abolished by following the procedure set forth in § 21-117.1 of the Code, and new districts created in the desired size under the provisions of § 21-113, et seq. In addition, under the Virginia Water and Sewer Authorities Act, found in Title 15.1, Chapter 28 of the Code, it would be possible to establish an authority to operate a sewer system which would serve only a part of the sanitary district.

WATER AND SEWERAGE SYSTEMS—Water Charges—Town has authority to assess penalty for late payment.

TOWNS—Water Charges—Penalty for late payment may be assessed.

March 15, 1966

HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This is in reply to your letter of March 14, 1966, which reads as follows:

"In May 1958, the Town Council of the Town of Amherst passed a resolution, a copy of which is herewith enclosed, assessing a penalty of 10% for water bills not paid within the first fifteen days of the succeeding month. This provision was plainly printed on the water bills submitted to the consumers and has been enforced since this time.

"A question has come up as to whether this is an unconstitutional penalty.

"I would appreciate your advising me so that I may advise the Town of the legal status of this penalty.

..."

The ordinance to which you referred, is as follows:

"BE IT ORDAINED: By the Council of the Town of Amherst that when water and sewer service charges due the Town of Amherst have not been paid by the 15th of the month for the preceding month that 10% of the total bill be added and collected as a penalty. All ordinances or any part thereof in conflict with this ordinance are hereby repealed. This ordinance shall be in effect on and after May 1, 1958."

In my opinion there is no constitutional provision which would prevent the council of a town from enforcing an ordinance of this nature. It is within the discretion of a town council to fix the water and sewer service rates and to assess a penalty for nonpayment when the charges are due.
REPORT OF THE ATTORNEY GENERAL

WEAPONS—Act of 1926 Repealed.

HONORABLE J. B. FRAY
Treasurer of Madison County

In your letter of May 23, 1966, you state:

"The 1926 Acts of the General Assembly, Chapter 158, page 285, provided that an owner of a pistol or revolver was required to obtain a license from the County Treasurer.

"From time to time, we have inquiries as to whether or not pistols have to be registered.

"Will you please give an opinion as to the status of the law pertaining to the licensing of pistols and revolvers under the 1926 Acts of the Assembly."

The 1926 act to which you refer was repealed by Acts of 1936, Chapter 297, p. 486.

WELFARE AND INSTITUTIONS—Child Abuse Reports—No immunity unless statute complied with.

VITAL STATISTICS—Child Abuse Reports—No immunity unless statute complied with.

PHYSICIANS—Child Abuse Reports—No immunity unless statute complied with.

HONORABLE M. CALDWELL BUTLER
Member, House of Delegates

In your letter of May 5, 1966, you state that the Roanoke Academy of Medicine has adopted a resolution recommending that physicians and hospitals report each case involving head injury, fracture, multiple contusions or malnutrition of children under three years of age to the Roanoke City Health Department, and suggesting that the department correlate such reports and keep hospitals posted on the multiple-injury reports received with regard to any child.

You ask whether establishment of such a system and reports of such injuries to the department would expose reporting physicians or the department to any civil liability in view of Chapter 577 of the Acts of the 1966 General Assembly.

Chapter 577 adds to the Code of Virginia §§ 63-307.1 to 63-307.4. Section 63-307.3 provides:

"Any person participating in the making of a report pursuant to this act or participating in a judicial proceeding resulting therefrom shall be immune from any civil liability in connection therewith, unless it is proved that such person acted in bad faith or with malicious intent."

By "a report pursuant to this act" the statute means a report provided for in § 63-307.1. The latter section requires that a physician, nurse, or hospital receiving information that a child under sixteen years of age has suffered serious bodily injury, neglect, or sexual abuse shall report the matter to the Juvenile and Domestic Relations Court of the locality, or to its sheriff or police chief. Section
63-307.2 requires a sheriff or police chief receiving such a report to make a report of his findings and action to the appropriate Juvenile and Domestic Relations Court. Section 63-307.1 requires the court to send a copy of such report to the Bureau of Vital Statistics of the State Department of Health.

Section 63-307.3, quoted above, clearly immunizes those making reports pursuant to the act from civil liability, provided there is no malice or bad faith. The statute does not provide any such immunity for reports to a local health department. The sheriff or police chief, Juvenile and Domestic Relations Court, and the Bureau of Vital Statistics are the only agencies to which reports may be made enjoying the immunity provided by § 63-307.3. Reports made in any other manner or to any other agency might subject the informer, if the information turned out to be false, to possible liability for libel or slander.

WELFARE AND INSTITUTIONS—Child Born at State Mental Hospital—County of residence has responsibility for care and custody.

CHILDREN—Born at State Mental Hospital—County of residence has responsibility for care and custody.

May 19, 1966

HONORABLE WILLIAM C. CARTER
Commonwealth's Attorney for Cumberland County

In your letter of May 17, 1966, you ask my opinion on the responsibility for custody and welfare of a child born under the following circumstances:

"The mother . . . was formerly a resident of Cumberland County, Virginia, and has been a resident of the State of New Jersey since 1948. She was a patient in the Essex County Overbrook Mental Hospital, Cedar Grove, New Jersey, from April 28, 1953 through June 29, 1961. While visiting her father in Cumberland County, Virginia, she was committed to Central State Hospital, Petersburg, Virginia on April 4, 1962. . . . [She] has continually remained at Central State Hospital from April 4, 1962 and remains a patient there. On April 27, 1965, over three years after her admission, she gave birth to a son . . . ."

"Under the above circumstances, is Cumberland County responsible for the care and custody of said child under the provisions of Section 37-96 and Section 16.1-178 of the 1950 Code of Virginia, as amended?"

You state that a proceeding to determine responsibility for custody of the child is now pending in the Juvenile and Domestic Relations Court of Dinwiddie County.

Section 16.1-178(3) provides that a child found to be within the purview of the Juvenile and Domestic Relations Court Law may be committed to the local board of public welfare of the county or city in which the court has jurisdiction or to the local board of the county or city in which the child has residence.

Section 37-96 provides that any child born in a colony or hospital shall be deemed a resident of the county or city in which the mother had legal residence at the time of commitment.

Thus, if the mother was a resident of Cumberland County on the date she was committed to the hospital, Cumberland County would be responsible for the custody of the child. If, on the other hand, the mother was not a resident of Cumberland County, then custody of the child is the responsibility of Dinwiddie County, where the court has jurisdiction.

The petition which you sent with your letter states that the mother was a
resident of Cumberland County. The facts stated in your letter, and quoted above, indicate that the mother may not have been a resident of any Virginia city or county. If the evidence shows that she had established a residence in New Jersey, and did not intend to again become a resident of Cumberland County when she returned to visit her father, or that she was not then of sufficient mental capacity to form an intent to so change her residence, then the child will be the responsibility of Dinwiddie County.

WELFARE AND INSTITUTIONS—Day Nursery—Must obtain license.

HONORABLE WILLIAM L. PAINTER, Director
Department of Welfare and Institutions

November 16, 1965

This is in reply to your letter of November 12, 1965, to which you attached a prospectus submitted to you by Mr. and Mrs. Gary G. Briggs of Alexandria, Virginia. It appears that Mr. and Mrs. Briggs contemplate building and operating a child care center in Alexandria for the purpose of taking care of children in the afternoon and evening between the hours of four P.M. and three A.M., whose parents may be engaged in social or business activity during that time. It is pointed out that this plan would obviate the necessity of hiring baby sitters on an individual basis. You request my opinion as to whether or not such a child care center would require licensing by your department under the provisions of § 63-232 of the Code.

Section 63-233 of the Code reads as follows:

“(a) Every person who constitutes, or who operates or maintains, a child placing agency, children's home, or day nursery, other than a children's home operated or maintained under the supervision of the Department or of a licensed child placing agency or of a county or city board or department of public welfare, shall obtain an appropriate license, from the Commissioner, which he shall have renewed annually.”

“Day nursery” is defined in § 63-232 as follows:

“'Day nursery' means (a) any institution operated for the purpose of providing care and maintenance to children separated from their parents or guardian during a part of the day only, but not for any period between the hours of seven P.M. and six A.M., except a public school or other bona fide educational institution, and (b) any private family home which provides care and maintenance to children under the same conditions as those set out in clause (a), except a home in which such care and maintenance is provided for children related by consanguinity or affinity to the person who maintains such home, and for children as occasional bona fide personal guests, and for no other child or children. . . .”

Under the definition of “Day nursery” you will note that any period between the hours of seven P.M. and six A.M. would be excluded. However, since this facility would operate from four P.M. to three A.M., it does not come within the exception to the definition. It would seem, therefore, that this facility will be a day nursery as defined in the statute and, therefore, would be subject to the licensing provisions.
REPORT OF THE ATTORNEY GENERAL

WELFARE AND INSTITUTIONS—Probation Officers—Clerical staff of court may assist.

CLERKS—Courts Not of Record—Staff may assist probation officer.

HONORABLE HAROLD B. SINGLETON
Judge, Amherst County Court

February 10, 1966

This will acknowledge receipt of your letter of February 8, 1966, which reads as follows:

"The Board of Supervisors of Amherst County is unable to provide the money for a secretary for the Superintendent of Public Welfare, who acts as Probation Officer for the County Court. They have suggested that she make such investigations as are required by this Court and that the Court Staff type all these reports, which would be dictated to them by the Superintendent of Public Welfare, who would be acting as Probation Officer.

"Please advise if it would be proper and legal for the Clerk of the County Court and the Clerical Assistant to do this work for the Department of Public Welfare."

In my opinion, there is no requirement that the clerical or stenographic staff employed by the county court shall perform such duties for the Superintendent of Public Welfare, acting as Probation Officer. However, I am not aware of any statutory provision which would prevent your staff from doing such work for the Probation Officer upon your authorization.

WRIT OF POSSESSION—Duty of High Constable—Plaintiff placed in possession.

PUBLIC OFFICERS—Liability—Property under writ of possession.

March 24, 1966

HONORABLE BERNARD LEVIN
Member, House of Delegates

This is to acknowledge receipt of your letter of March 17, 1966, in which you request my opinion on several questions. These will be answered seriatim.

"(1) Is the High Constable required, in serving a writ of possession, to remove or see to the removal of the tenant's or other personal property which is on the premises covered by the writ of possession?"

A writ of possession for the recovery of specific property, real or personal, is issued by a court pursuant to § 8-402, Code of Virginia (1950). This writ, of course, must conform to the order entered by the court. The duty of the officer executing this writ is to place the plaintiff in possession of his property. This necessitates the removal of the defendant's property from the premises. However, the plaintiff, of course, must make satisfactory arrangements with the officer to assure payment of the necessary expenses incurred in removing the effects from the plaintiff's property. The writ is not properly executed by merely serving a copy thereof on the defendant.

"(2) Under Section 8-825.1 of the Code of Virginia as amended, does the High Constable have an affirmative duty to remove the personal
property from the premises in serving the writ of possession in such cases where the person in possession refuses to remove his personal property?"

Section 8-825.1 of the Code provides that when personal property is removed pursuant to an action of unlawful detainer or ejectment or pursuant to any other action in which personal property is removed from the premises in order to restore such premises to the person entitled thereto, the sheriff, city sergeant or high constable shall cause such personal property to be placed in a storage area designated by the local governing body of the city or county, if such storage area has been made available by the governing body, unless the owner of such personal property then and there removes the same from the public way. If there is no storage area so designated, then the officer's duty ends when he has had such personal property placed in the public way. As above stated, the cost of removing this from the premises is initially borne by the plaintiff, which may be recovered by him from the owner of the property that was removed. If the owner fails to redeem his property, in case of removal and storage, the same is sold and the proceeds of sale are applied to cover the cost of removal and storage.

"(3) Under the aforesaid section, what is the liability of the High Constable for possessions placed by him or his agents in the public streets or in storage when removing personal property from the premises in order to restore such premises to the person entitled thereto in accordance with Section 8-825.1 of the Code of Virginia?"

There is no liability on the officer in removing the personal property from the premises and placing same in the public way (street), or having it placed in storage, provided he performs his duties pursuant to the provisions of the writ and the statutes.
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**ATTORNEY GENERAL OF VIRGINIA**

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