OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1967 to June 30, 1968

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1968
August 1, 1968

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

My dear Governor Godwin:


Pursuant to the statutes, I have included in the report such official opinions rendered by this office during the above-stated period as would seem to be of general interest or helpful in promoting uniformity in the construction of the laws of the State, together with the required statement of cases now pending or disposed of since the last report issued by this office. Due to the increasing volume of tax collection cases on behalf of the Virginia Employment Commission, and habeas corpus proceedings, such cases have not been stated individually. A complete record of these cases is available in this office.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General
### PERSONNEL OF THE OFFICE
(Post Office Address, Richmond)

<table>
<thead>
<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robert Y. Button</td>
<td>Culpeper County</td>
<td>Attorney General</td>
</tr>
<tr>
<td>Robert D. McIlwaine, III</td>
<td>Petersburg City</td>
<td>First Assistant</td>
</tr>
<tr>
<td>D. Gardiner Tyler</td>
<td>Charles City County</td>
<td>Assistant</td>
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<tr>
<td>Reno S. Harp, III</td>
<td>Richmond City</td>
<td>Assistant</td>
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<tr>
<td>M. Harris Parker</td>
<td>Greensville County</td>
<td>Assistant</td>
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<tr>
<td>William P. Bagwell, Jr.</td>
<td>Nottoway County</td>
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<tr>
<td>A. R. Woodroof</td>
<td>Amherst County</td>
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<tr>
<td>Paul D. Stotts</td>
<td>Chesterfield County</td>
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<td>Curtis R. Mann</td>
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<td>Richard N. Harris</td>
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<td>Kelly E. Miller</td>
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<td>J. Patrick Keith</td>
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<td>Overton P. Pollard</td>
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<td>Assistant</td>
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<tr>
<td>Charles Shepherd Cox, Jr.</td>
<td>Arlington County</td>
<td>Assistant</td>
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<td>William M. Phillips</td>
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<td>Gerald L. Baliles</td>
<td>Patrick County</td>
<td>Assistant</td>
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<td>Edward J. White</td>
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<td>Assistant</td>
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<tr>
<td>Walter H. Ryland</td>
<td>Middlesex County</td>
<td>Assistant</td>
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<tr>
<td>Troy G. Arnold, Jr.</td>
<td>Richmond City</td>
<td>Assistant</td>
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<tr>
<td>Richard B. Zorn</td>
<td>Chesterfield County</td>
<td>Assistant</td>
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<tr>
<td>Eleanor W. Tilley</td>
<td>Smyth County</td>
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<tr>
<td>Agnes Reid Pickral</td>
<td>Pittsylvania County</td>
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<td>Mary Kathryn Church</td>
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<td>Charlotte R. Gasser</td>
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<td>S. Joyce Waller</td>
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<td>Ellen Nelson</td>
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<td>Deidre Leigh Mitchell</td>
<td>Nansemond County</td>
<td>Secretary</td>
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<td>Lynn C. Pugh</td>
<td>Henrico County</td>
<td>Secretary</td>
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<tr>
<td>Gwen Bruce</td>
<td>King William County</td>
<td>Secretary</td>
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<tr>
<td>Olga M. Bruggeman</td>
<td>Richmond City</td>
<td>File Clerk</td>
</tr>
<tr>
<td>Frances T. Robertson</td>
<td>Richmond City</td>
<td>Receptionist</td>
</tr>
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# ATTORNEYS GENERAL OF VIRGINIA
## From 1776 to 1968

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

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

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

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

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

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

***Hon. Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of Hon. A. S. Harrison, Jr., upon his resignation on April 30, 1961, and served until January 13, 1962.
REPORT OF THE ATTORNEY GENERAL

CASES DECIDED IN THE SUPREME COURT OF APPEALS

Ashby, George Stanley v. Commonwealth. From Corporation Court, Part II, City of Norfolk. Appeal from conviction of a crime against nature. Reversed and remanded.

Ashby, George Stanley v. Commonwealth. From Corporation Court, Part II, City of Norfolk. Appeal from conviction of a crime against nature. Reversed and remanded. Petition for rehearing granted; lower court's judgment reinstated and affirmed.


Cardwell, Martin Pete v. Commonwealth. From Corporation Court, City of Bristol. Appeal from a conviction of statutory burglary. Reversed and remanded.

Clemmer, Jack Dean v. Commonwealth. From Circuit Court, Augusta County. Appeal from conviction of driving motor vehicle while intoxicated. Reversed and dismissed.

Durham, Luther v. Commonwealth. From Circuit Court, Dinwiddie County. Appeal from conviction of murder. Reversed and remanded.


Fish, Vernon Lee v. Commonwealth. From Circuit Court, Shenandoah County. Appeal from conviction of maiming. Reversed and remanded.


Herron, Israel Wesley v. Commonwealth. From Circuit Court, Roanoke County. Appeal from conviction of statutory rape. Reversed and remanded.


Jennings, Page Lewis, Estate of, v. Commonwealth, etc. From Circuit Court, Albemarle County. Appeal by Commonwealth from order granting refund of inheritance taxes paid under protest. Affirmed.

Jones, Ronald Louis v. Commonwealth. From Corporation Court, City of Norfolk. Appeal for burglary on indictment one and conviction for attempt to commit robbery on indictment two. Reversed and remanded.


Perry, Jesse Thomas v. Commonwealth. From Circuit Court, City of Suffolk. Upon a conviction for a felony, to-wit: operating a lottery. Affirmed.
Rogers, John v. Commonwealth. From Hustings Court, City of Petersburg. Appeal from conviction of statutory burglary. Reversed and remanded.
Simmons, Howard Stuart v. Commonwealth. From Circuit Court, Wythe County. Upon a conviction for a felony, to-wit: unlawful burning of a railroad bridge. Reversed and remanded.
Thompson, Robert Herman, Jr. v. Commonwealth. From Hustings Court, Part II, City of Richmond. Appeal from conviction of attempted robbery. Reversed and remanded.

CASES PENDING IN THE SUPREME COURT OF APPEALS

Blum, Sara v. Tenth District Committee, etc. From Circuit Court, Arlington County. Appeal from disbarment.
Cardwell, Martin, Jr. v. Commonwealth. From Circuit Court, Carroll County. Appeal from conviction of a felony, to-wit: the theft of an automobile, and bringing same into Virginia.
Carter, Charles D. v. Commonwealth. From Circuit Court, Amherst County. Upon conviction for burglary.
Commonwealth, ex rel. State Tax Commissioner, et al. v. Shell Oil Company. (Two cases). From Circuit Court, City of Richmond. Involving refund of tax on aviation fuel under Chapter 13, Title 58, Code of Virginia.
Dean, Jarette Arlo v. Commonwealth. From Circuit Court, Rockingham County. Upon conviction for voluntary manslaughter.
Eastern Air Lines, Incorporated v. Commissioner, Division of Motor Vehicles, etc. From Law and Equity Court, City of Richmond. Appeal from order requiring the Commissioner to make special fuel tax refund in the amount of $27,033.04, in accordance with § 58-753.3.
Farris, Albert Wesley, Jr. v. Commonwealth. From Circuit Court, Rockbridge County. Appeal from conviction of rape.
Fletcher, Francis Lewis v. Commonwealth. (Two cases.) From Circuit Court, Arlington County. Appeal from conviction of a felony, to wit: malicious assault.
Foster, Bernard Rieves v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of statutory burglary.
REPORT OF THE ATTORNEY GENERAL

Foster, George Kent v. Commonwealth. From Corporation Court, City of Lynchburg. Upon conviction for larceny.

Harbaugh, Charles H., Jr. v. Commonwealth. From Circuit Court, Frederick County. Upon conviction of assault and battery.

Harmond, Robert D. v. Commonwealth. From Circuit Court, City of Chesapeake. Appeal from conviction of making obscene telephone calls.

Harvey, Ruth L. v. Commonwealth. From Corporation Court, City of Danville. Appeal from conviction for contempt.

Hirschkop, Phillip J. v. Commonwealth. From Corporation Court, City of Lynchburg. Appeal from conviction for contempt of court.


Houghtaling, Raymond M., Jr. v. Commonwealth. From Circuit Court, City of Waynesboro. Appeal from conviction for murder in the first degree.


Johnson, Fred W., alias, etc. v. Commonwealth. From Corporation Court, City of Alexandria. Upon conviction for attempted robbery.

Johnson, Theodore v. Commonwealth. From Corporation Court, City of Norfolk. Upon conviction of robbery.


Kirby, Robert Woodford v. Commonwealth. (Two cases.) From Corporation Court, City of Lynchburg. Appeal from conviction for statutory burglary.

Lesoine, Roger A. v. Commonwealth. From Hustings Court, City of Portsmouth. Upon conviction of attempted murder.

Lewis, Delbert v. Commonwealth. (Two indictments.) From Circuit Court, Tazewell County. Appeal from conviction of oral sodomy.


Plummer, Dora, et al. v. Director, Department of Conservation and Economic Development. From Circuit Court, Grayson County. Appeal in Park condemnation proceedings.


Rollins, Avon Williams v. Commonwealth. From Corporation Court, City of Danville. Appeal from conviction for contempt.

Salyer, Kermit W. v. Commonwealth. From Circuit Court, Franklin County. Appeal from conviction of contempt.

Sherrard, J. C., Jr. v. Commonwealth. From Hustings Court, Part II, City of Richmond. Appeal from conviction for murder.

State Highway Commissioner v. S. J. Bell. From Circuit Court, Fairfax County. Appeal in condemnation proceedings.


Wiles, Henry Lee v. Commonwealth. From Hustings Court, City of Richmond. Appeal in condemnation proceedings.
Wilson, Larry v. Commonwealth. From Corporation Court, City of Danville. Appeal from conviction for contempt.

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS

Belvin, Ernest L. v. Walter L. McCauley. Garnishee summons to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Bankers Telephone Employees Insurance Company. Pending.
Griffin, Cocheysie J.; et al. v. Prince Edward County Board of Supervisors. Operation of public schools and appropriations by Board of Supervisors. Pending.
REPORT OF THE ATTORNEY GENERAL

Loyal Order of Moose, Inc. v. Virginia A.B.C. Board. Injunction to stay order suspending beer license Dismissed.
Pettaway, Avis M. v. County School Board of Surry County, Virginia. On remand from Supreme Court of the United States. Order entered on remand. Pending.
Williams, J. Harvie, et al. v. Virginia State Board of Elections, etc., et al. Suit to enjoin Virginia’s method of selecting presidential electors and to enjoin use of “unit rule” by Virginia presidential electors. Injunction denied and complaint dismissed.

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


Conley, Nita F. v. Chesapeake Insurance Company, et al. (Thirty-four cases.) Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Chesapeake Insurance Company. Pending.

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


Gibbs, Thomas Madison, Sr. v. Virginia Real Estate Commission. Law and Equity Court, City of Richmond. Appeal from an order revoking license. Pending.

Grasty, William T., Co-Executor v. C. H. Morrissett, etc. Circuit Court, City of Richmond. Suit by Co-Executor to nullify State inheritance tax returns. Pending.

Graves, Marshall E. v. Virginia Real Estate Commission. Law and Equity Court, City of Richmond. Appeal from order revoking broker’s license. Pending.


Hanbury, Carol v. Lewis H. Vaden, Treasurer of Virginia. Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer to claims of Virginia residents against Florida Insurance Exchange, Inc. 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.


Loyal Order of Moose, Inc. v. Virginia A.B.C. Board. Circuit Court, City of Richmond. Injunction to stay order suspending beer license. Dismissed.

Luck, Bertha, Admx., et al v. The Central Mutual Telephone Company. Circuit Court, Prince William County. Suit to distribute stocks and dividends held in name of Manassas-Dumfries Telephone Company, dissolved in 1928 for failure to pay taxes due State. Pending.


Mutual Fire Insurance Company v. Marvin V. Templeton and Sons, Inc., et al. Circuit Court, City of Richmond. Motion for judgment against contractor and Highway Department for damages. Dismissed.


Powers, Pearl H. v. Virginia A.B.C. Board. Law and Equity Court, City of Richmond. Petition for mandamus to compel issuance of beer license. Dismissed.


Snyder, Bennie v. Sidney C. Day, Jr., et al. Circuit Court, City of Richmond. (Two cases.) Claim against Highway Department arising out of construction project. Pending.


State Board of Pharmacy v. Mrs. W. A. Ransone, Jr. and Horace G. Dodd. Circuit Court, City of Richmond. Appeal from action of State Board of Pharmacy. Dodd's certificate of registration reinstated and case with respect to Ransone Drug Company remanded to Board for further proceedings.

State Board of Pharmacy v. Textile Workers Union of America, etc. Circuit Court, City of Richmond. Suit to enjoin illegal practice of pharmacy. Pending.
Stevens, Shelton Horsley v. Lewis H. Vaden, etc. (Three cases.) Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Bankers and Telephone Employees Insurance Company. Pending.


Thomas, Raymond Arthur v. Lewis H. Vaden, etc. (Eight cases.) Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Florida Insurance Exchange, Inc. Pending.

Tucker, L. G., Committee, etc. v. Hobart G. Hansen, etc. Circuit Court, City of Richmond. Suit to enjoin transfer of hospital patient. Pending.

Turner, J. N., et al. v. Lewis H. Vaden, Treasurer of Virginia. Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Bankers and Telephone Employees Insurance Company. Pending.


Virginia Real Estate Commission v. Robert W. Floyd and Harry P. Davis, Jr. Law and Equity Court, City of Richmond. Appeal from an order revoking license. Pending.


CASES TRIED BEFORE THE STATE CORPORATION COMMISSION OF VIRGINIA


Commonwealth of Virginia v. Lucille June Fox. Motion under § 56-304.12 for unpaid registration and license fees. Registration cards and identification markers canceled; no new authority to be issued until Virginia license plates are secured and penalty in the amount of $500.00 is paid.

Commonwealth of Virginia v. Oscar William Fox, Jr. Motion under § 56-304.12 for judgment for unpaid registration and license fees. Judgment in the amount of $5,912.00 in favor of the Commonwealth.


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

Allen, Melvin Edward 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 certificate and registration plates under § 46.1-442, pending determination of declaratory judgment action. Injunction expired and not extended. Judgment satisfied.


REPORT OF THE ATTORNEY GENERAL

Easter, Lewis Haynes and Charles Clifton Thomas v. Chester H. Lamb, Commissioner. Law and Equity Court, City of Richmond. Injunction order entered temporarily enjoining Commissioner from enforcing orders of suspension of complainants' driving licenses, registration certificates and plates, pending determination of suit styled Virginia Transit Company v. Lewis H. Easter and Thomas C. Clifton.


Moore, Ballard v. Commissioner, etc. Circuit Court, 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 for licensee to drive a motor vehicle upon the highways. Operator's license surrendered. Pending.


Sherwood, Frank M. and Helen Langan v. Commissioner, etc. Circuit Court, Fairfax County. Appeal from an action of the Commissioner suspending the operator's licenses and privileges in accordance with the provisions of §§ 46.1-442 and 46.1-446 of the Code. Pending.


Smiley, James I. v. C. H. Lamb, Commissioner. Hustings Court, Part II, City of Richmond. Bill of Complaint filed to enjoin Commissioner from denying plaintiff motor vehicle salesman's license. Order entered directing plaintiff to follow administrative remedy in accordance with § 46.1-536 and retaining equity cause on court's docket for such other action as may be appropriately allowed. Bill dismissed.


Smith, John Junior v. Commissioner, et al. Court of Law and Chancery, City of Richmond. Bill of Complaint filed to make binding on the Commissioner adjudication as to whether or not a certain automobile liability insurance policy was in full force at the time of complainant's automobile accident. Pending.


The Home Indemnity Company and Winifred S. Hawkes v. C. H. Lamb, Commissioner, 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. Final order entered showing petitioner to have been insured at time of accident. Closed.

The National Bank of Manassas v. C. H. Lamb, Commissioner. 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. Final order entered showing petitioner to have been insured at time of accident. Closed.

The National Bank of Manassas v. C. H. Lamb, Commissioner. 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. Final order entered showing petitioner to have been insured at time of accident. Closed.

Wallingsford, Emery David v. Commissioner, etc. Circuit Court, Fairfax County. Appeal from action of the Commissioner suspending operator's license and registration certificates and plates under § 46.1-449. Pending.

Wilkins Chevrolet, Inc. v. C. H. Lamb, Commissioner, et al. Circuit Court, City of Newport News. Bill of Complaint filed to require Division to impress a lien in favor of complainant upon title to a certain motor vehicle. Commissioner dismissed as party defendant.


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


HABEAS CORPUS CASES

During the past fiscal year 468 petitions were filed in Federal courts and 574 in State courts; 179 petitions for writs of error and 168 original petitions for habeas corpus were filed in the Supreme Court of Appeals. Some 15 cases were briefed and argued in the Supreme Court of the United States, Supreme Court of Appeals of Virginia, and United States Court of Appeals for the Fourth Circuit. Approximately 460 cases were tried in trial courts of record of the Commonwealth and approximately 80 in United States District Courts.
EXTRADITION HEARINGS CONDUCTED AND REPORTS SUBMITTED
PURSUANT TO REQUEST OF THE GOVERNOR

July 17, 1967  Charles Pope
July 17, 1967  Denis R. Larkin, Sr.
July 17, 1967  Jack Roberts Malone, Sr.
July 17, 1967  Bruce A. Wolfe
July 17, 1967  Artis Tabron
August 16, 1967  Melvin Humphrey
September 5, 1967  H. Rap Brown
September 19, 1967  Bennie Junior Nesbitt
September 19, 1967  David B. Cuzzen
September 19, 1967  Samuel Davis Stevens
October 16, 1967  Allen G. Biggs
October 16, 1967  Harry L. Sizer
November 20, 1967  Norman Lee Jenkins and
                    Richard Jenkins, alias
                    Ricky Jenkins
December 18, 1967  Jack Purcell
December 18, 1967  Roy Allen
December 18, 1967  Frederick Joseph Sharpe
December 18, 1967  Martin W. LeHew
January 15, 1968  Robert Mabry
January 15, 1968  William R. Page
January 15, 1968  Marvin George White
February 12, 1968  William Alfred Moore
February 12, 1968  Delbert Harold Frye
February 12, 1968  Bernard Ray Ragland
April 15, 1968  John Sherman Nicholson
April 15, 1968  Martin David Rochelle
April 15, 1968  Aaron Ferguson
April 15, 1968  Robert N. Spence
April 15, 1968  Judy P. Blanchett
April 15, 1968  Kenneth Frank Potts
April 15, 1968  Lyle A. McDaniel
June 10, 1968  Robert F. Pierce
June 10, 1968  Levon Avdoyan, alias
               Ivan Andoyan
June 10, 1968  William H. Bowyer
June 10, 1968  Harold Clyde Hodges
OPINIONS

ADVERTISING—“For Sale” Signs Posted on Realty Adjacent to Highways—Language permitted.

HIGHWAYS—“For Sale” Signs Posted on Adjacent Realty—Language permitted.

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

May 27, 1968

This is in reply to your letter of May 16, 1968, in which you requested my opinion on the following question:

“Does the Virginia law prohibit the display by a property owner or his real estate agent of a ‘for sale’ sign on property adjacent to a primary or secondary highway for a reasonable time after the actual sale of the property with the word ‘sold’ affixed to the ‘for sale’ sign?”

The Legislature has enacted Article 1 of Chapter 7 of Title 33 of the Code of Virginia (1950), as amended, to cover the subject of Outdoor Advertising in sight of public highways. The provisions of the above-cited Article set forth the conditions under which certain signs might be erected and maintained adjacent to all public highways, and § 33-302 expressly enumerates the signs which might be maintained without a permit being secured from the Highway Department. Subsection (3) of this section provides:

“Signs upon real property posted or displayed by the owner, or by the authority of the owner, stating that the property, upon which the sign is located, or a part of such property, is for sale or rent or stating any data pertaining to such property and its appurtenances, and the name and address of the owner and the agent of such owner;”

The above-quoted language authorizes the posting of a “for sale” sign on the property but does not expressly cover the matter of erecting or maintaining a “sold” sign. That portion of the subsection which authorizes “any data pertaining to such property and its appurtenances” probably is intended by the Legislature to relate to data regarding the property itself and not to the matter of whether the property had been sold. However, I am of the opinion that the language “any data” could be broadly construed to include the information that the property had been sold. Therefore, I am of the opinion that the type of sign about which you made an inquiry could be maintained for a reasonable time after the sale of the property but in no event beyond the time of the transfer of title of such property.

AGRICULTURE AND INDUSTRY—Cattle Disease Eradication—Diagnosis of mastitis in cattle by association unlawful practice of veterinary medicine.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Veterinary Medicine—Diagnosis of mastitis in cattle by association unlawful practice.

HONORABLE MAURICE B. ROWE, Commissioner
Department of Agriculture and Commerce

May 15, 1968

This is in reply to your letter of May 13, 1968, in which you requested my opinion of the legality of the Dairy Herd Improvement Association's inspection and diagnosing of mastitis. Your letter reads in part as follows:
"The Association is now engaged in an added service. For an additional fee they use the same sample of milk as taken above and make a leukocyte count. This count is universally interpreted by the farmer to mean the animal does or does not have mastitis. Mastitis is the infectious inflammation of the udder and the leukocyte count is a way to diagnose this disease. The Association then in effect is diagnosing mastitis for a fee."

Your question is, does this procedure infringe upon the provisions of the Veterinary Practice Act, § 54-786 of the Code of Virginia (1950), as amended, where "veterinary practice" is defined? Section 54-786 sets forth what constitutes the practice of veterinary medicine and provides as follows:

"§ 54-786. What constitutes practice of veterinary medicine, surgery or dentistry.—Any person shall be regarded as practicing veterinary medicine, surgery or dentistry within the meaning of this chapter, who professes publicly to be a veterinary doctor, surgeon or dentist and offers for practice as such: or who, for hire, fee, compensation or reward, promised, offered, received or expected, either directly or indirectly, diagnoses, prognoses, treats, administers any drug, medicine or other treatment, prescribes, operates or manipulates, or applies any apparatus or appliance for the prevention, cure, or relief of any disease, pain, deformity, defect, injury, wound or physical condition of an animal, or for the prevention of, or to test for the presence of, any disease of an animal, or performs a surgical, medical or dental aid to, for or upon an animal; or who holds himself out as being legally qualified or authorized to do so; or who uses any words, letters, or titles in such connection or under such circumstances as to induce the belief that the person so using them is engaged in or legally qualified or authorized to engage in the practice of veterinary medicine, surgery or dentistry. But nothing in this chapter shall apply to residents of this State, who confine their practice solely to the castration, spaying, or dehorning of livestock, or to any person or his employee practicing veterinary medicine, surgery or dentistry on his own animals, or the animals of such employer, or to veterinarians duly licensed in other states called in actual consultation or to attend a case in this State who do not open an office or appoint a place to practice within this State, or to veterinarians employed by the United States or by this State while actually engaged in the performance of their official duties, or to any employee of this State while engaged in the performance of an official duty related to research or education or in connection with the National Poultry Improvement Plan."

The Dairy Herd Improvement Association in performing this service for a fee would be practicing veterinary medicine and by definition would not be exempt from this section. This Association would then be in violation of this chapter of the Code of Virginia and should cease its diagnosing of mastitis.

AGRICULTURE AND COMMERCE—Apples—Board may prohibit movement until properly labeled.

April 11, 1968

HONORABLE MAURICE B. ROWE, Commissioner
Department of Agriculture and Commerce

This is in reply to your letter of April 11, 1968, which reads in part as follows:

"The Virginia Department of Agriculture and Commerce in the enforcement of the apple law on occasion finds apple containers which
are improperly labeled. The Board of Agriculture and Commerce would like to require improperly labeled apples to remain where found until such time as they are properly labeled."

"Our question to you is whether or not the Board can require apples improperly labeled to remain where found until such time as the packer or some other responsible person has properly marked them?"

Section 3.1-616, Code of Virginia (1950), as amended, which deals with the enforcement of the apple law, sets forth the powers of the Board of Agriculture and Commerce in carrying out their enforcement of this law. Section 3.1-616 (c) provides as follows:

"§ 3.1-616. Enforcement of article.—The Board is charged with the enforcement of this article and for that purpose the Board or its authorized agents shall have power:

"(c) To prohibit in writing the movement in intrastate, interstate or foreign commerce of any apples found improperly marked in violation of any provision of this article or regulation adopted hereunder until such apples have been properly marked under this article or regulation adopted hereunder and released in writing by the Board or its authorized agent."

In my opinion this section expressly authorizes the Board to prohibit the movement of apples which have been found improperly marked. The movement of these apples may be prohibited by the Board until such time as the apples have been properly marked and a release in writing is given by the Board or its authorized agent.

AIR POLLUTION CONTROL—Local Air Pollution Control Committees—Powers limited.

January 19, 1968

MR. RICHARD W. AREY, Executive Secretary
State Air Pollution Control Board

This is in reply to your letter of December 29, 1967, in which you request my opinion in respect to the powers and duties which may be delegated to a local air pollution control committee by the State Air Pollution Control Board, which is authorized to appoint such committee pursuant to § 10-17.19, of the Code of Virginia. The question was raised in connection with the position taken by the law firm of Eckert, Seamans & Cherin, counsel for the West Virginia Pulp and Paper Company as indicated in the supplementary papers enclosed with your letter.

The provisions of law relating to air pollution control, found in § 10-17.30 of the Code of Virginia, permit local ordinances adopted prior to June 27, 1966, to continue in force insofar as such ordinances are not in conflict with any rule, regulation, order or requirement of the State Air Pollution Control Board and further permit any locality to adopt or amend ordinances after such date, if prior approval of the State Board as to the provisions thereof be obtained, until such time as the authority of the governing body of a locality to adopt ordinances relating to air pollution has been superseded as provided in § 10-17.19. When an air pollution control district has been created and local committee appointed pursuant to § 10-17.19, paragraph (c) thereof prescribes that all local ordinances, rules and regulations relating to air pollution within such district shall be superseded by the rules and regulations of the State Board. Paragraph (c) of § 10-17.19 further states that, "The powers and duties of the local committee shall be those delegated to it by the State Board, provided that such committee may initiate studies and make recommendations to the Board."
If it were the intention of the Legislature that the local committee enforce the rules and regulations, recommendations to the State Board would appear superfluous. Further, § 10-17.23 provides for enforcement of the rules, regulations or orders of the Board, while § 10-17.24 provides for review of any rule, regulation, order or requirements issued by the Board. Likewise, other sections of the chapter refer to action of the Board, with no mention of a local committee appointed by the Board.

Considering the foregoing, as well as the remaining sections of this chapter, it becomes apparent that once the control of local air pollution is placed in a control district pursuant to § 10-17.19, the exercise of such control rests in the State Board and may not be delegated by such Board to a local air pollution control committee. I am of the opinion, therefore, that the powers of the local air pollution control committee are limited to those of initiating studies and making recommendations to the Board and such other related duties of a like nature as delegated to it by the Board.

AIR POLLUTION CONTROL—State Board—May abolish an air pollution control district.
COUNTIES—Air Pollution Control—When authorized to adopt ordinances.
COUNTIES—Joint Exercise of Power—Conditions controlling.

March 4, 1968

HONORABLE GEORGE J. KOSTEL
Member, House of Delegates

This is in reply to your letter of February 23, 1968, requesting my response to several questions presented by the Covington-Alleghany County Air Pollution Control Committee in Mr. Claude E. Farrar's letter, dated February 21, 1968, from which I quote the following:

"1. Would it be possible for the State Air Pollution Control Board to abolish the Covington-Alleghany County Air Pollution Control District and, if so, from whom would the request for such abolition have to come? As you know, the District was formed by the State Air Pollution Control Board at the request of both the Covington City Council and the Alleghany County Board of Supervisors.

"2. If the Covington-Alleghany County Air Pollution Control District is abolished, would it be possible for the City of Covington and the County of Alleghany to enact local air pollution control ordinances and enforce the provisions of such ordinances at the local level? Of course, it is recognized that such an ordinance, before it could be enacted by the local government, would require the approval of the State Air Pollution Control Board.

"3. If the City of Covington and the County of Alleghany enact, with the approval of the State Air Pollution Control Board, an identical ordinance, would it be possible for the two local governmental institutions to join together with respect to the enforcement of such ordinance? As you know, the Federal Government will provide a two to one matching grant for the enforcement by one governmental unit, whereas it will provide a three to one matching grant if more than one governmental unit combines in an air pollution abatement program."

In regard to question numbered 1, I note that the Covington-Alleghany County District was formed at the request of the City Council and the Board of Supervisors for the respective political subdivisions. The State Board is authorized to create such district either on its own motion or upon request of the governing bodies involved. It is clear that the final decision as to whether
any such district shall be established lies with the State Air Pollution Control Board under § 10-17.19 of the Code of Virginia. While I find no statute authorizing the abolition of such district once created, the power to abolish generally accompanies the power to create and I am of the opinion the State Board would have such power. The request for such abolition could come from one or both participating local governments or could be initiated by the State Board.

Considering question numbered 2 hypothetically, that is, assuming these localities were not included in a district created by the State Board, or that the district so created had been abolished, then the City of Covington and the County of Alleghany would each be authorized to enact an air pollution control ordinance, pursuant to § 10-17.30 of the Code of Virginia. This question, therefore, is answered in the affirmative.

Respecting question numbered 3, joint exercise of power by political subdivisions is authorized by § 15.1-21 of the Code of Virginia, which provides that, "Any power or powers, privileges or authority exercised or capable of exercise by any political subdivision of this State may be exercised and enjoyed jointly with any other political subdivision of this State." If the requirements of this section be met by the named political units, I am of the opinion that there could be a joint venture for the control of air pollution which, in such event, would operate pursuant to the authority granted the governing body of any locality under § 10-17.30 of the Code. As stated in the last named section, however, it would be necessary to first obtain the approval of the State Board as to the provisions of the ordinance adopted by such joint action for the control of air pollution.

AIRPORTS—Blue Ridge Airport Authority—Leasing portions for operating facilities—Advertisement not required.

May 14, 1968

HONORABLE A. L. PHILPOTT
Member, House of Delegates

This is in reply to your letter of April 18, 1968, which reads as follows:

"The Blue Ridge Airport Authority was created by an act of the Legislature of Virginia and empowered to operate an airport for the benefit of the counties of Henry and Patrick and the City of Martinsville.

"At the present time the Blue Ridge Airport Authority has caused to be constructed an airport in the County of Henry, Virginia and has leased certain portions of the airport to various individuals for the purpose of operating airport facilities. I request that you advise the undersigned as to whether or not it is necessary for the Blue Ridge Airport Authority to advertise for bids before it can lease a portion of the Blue Ridge Airport Authority property.

"In an opinion issued by you dated April 18, 1966, to the Honorable Lucas D. Phillips, you indicated that where an airport is owned by a town advertising for bids is necessary before a lease can be effected. My inquiry is whether or not this requirement extends to airports owned and operated under an authority and more specifically under the provisions of the statute which created the Blue Ridge Airport Authority."

The legislation creating the Blue Ridge Airport Authority is found in the Acts of the General Assembly of 1964, Chapter 25, page 36.

I find nothing in the Constitution, Acts of Assembly or the Code of Virginia requiring this Authority to advertise for bids before a lease of a portion of the property owned by it can be effected. The opinion to Mr. Phillips, dated April 18, 1966, to which you refer is not applicable to this Authority.
REPORT OF THE ATTORNEY GENERAL

While the Authority is clearly a political subdivision of the State and is performing an “essential government function” (see, § 3, Chapter 25, Acts of Assembly, 1964) and property acquired by it is, in my opinion, “public property,” as that term is used in Section 125 of the Constitution, I do not believe that the provisions of Section 125 relative to advertising are applicable to the Authority. As I am unable to find any provision of Virginia law which would require the Authority to advertise for bids under the circumstances you describe, I am of the opinion that your inquiry should be answered in the negative.

ALCOHOLIC BEVERAGE CONTROL LAWS—Interdiction of Intoxicated Driver or Habitual Drunkard—Initial order limited to one year.

MOTOR VEHICLES—Interdiction of Intoxicated Driver or Habitual Drunkard—Initial order limited to one year.

HONORABLE DICK B. ROUSE
Commonwealth’s Attorney for the City of Bristol

December 27, 1967

This will acknowledge your letter of December 15, 1967, in which you invite my attention to §§ 4-51 and 4-52 of the Code of Virginia (1950), as amended, and ask my opinion as to whether the initial order of interdiction provided for in § 4-52 may be for a greater period than one year.

Section 4-51 (a) is as follows:

"Interdiction of intoxicated driver or habitual drunkard.—(a) Entry of order of interdiction.—When after a hearing upon due notice it shall be made to appear to the satisfaction of the circuit court of any county or the corporation court of any city, or the judge thereof in vacation, that any person, residing or sojourning within such county or city, has on or after March twenty-first, nineteen hundred thirty-four, been convicted of driving or running any automobile, car, truck, motorcycle, engine or train while intoxicated or has shown himself to be an habitual drunkard, the court, or the judge thereof in vacation, may make an order of interdiction prohibiting the sale of alcoholic beverages to such person until further ordered. The court or judge entering any such order shall cause a copy of the same to be forthwith filed with the Board." (Emphasis added)

Section 4-52 (a) of the Code is as follows:

"Interdiction for illegal manufacture, possession, transportation or sale of alcoholic beverages, possession by interdicted person unlawful.—(a) When any person has been found guilty of the illegal manufacture or the illegal possession or the illegal transportation or the illegal sale of alcoholic beverages or maintaining a common nuisance as defined in § 4-81, the court, or the judge thereof, or the trial justice trying the case, may without further notice or additional hearing enter an order of interdiction prohibiting the sale of alcoholic beverages to such person for one year from the date of the entry of the order, and thereafter if further ordered. Such orders of interdiction shall be published in the same manner and shall have the same effect as orders of interdiction provided for in § 4-51." (Emphasis added)

The order of interdiction provided for in both of these sections is in the nature of an additional penalty for the commission of the named offenses. While penal statutes are strictly construed, strict construction does not require nullification of legislative intent. An effort should be made to harmonize and to give effect to all parts of the statute.
Here the phrase appearing in § 4-52, "and thereafter if further ordered," clearly is indicative of legislative intent that the period of interdiction may exceed one year under some circumstances. But if the Legislature had intended that the initial order might be for a greater period of one year, it might easily have said so by employing language similar to that used in § 4-51, or at least by using the conjunction "or" instead of "and" in the phrase "and thereafter if further ordered."

In my opinion, the initial order should be limited to one year, and the court might well include in the order the statutory language "and thereafter if further ordered," and continue the cause on the docket.

ALCOHOLIC BEVERAGE CONTROL LAWS—Local Option—Validity of signatures of qualified voters prior to effective date of act.

LAWS—Effective Date—Does not preclude signing of petition for referendum prior to.

HONORABLE BERNARD LEVIN
Member, House of Delegates

This is in reply to your letter of February 19, 1968, which reads in part as follows:

"It is requested that I be advised of the opinion of your office at the earliest possible date on the following matter regarding legislation under Chapter 7, Code of Virginia 1950, as amended by the local option legislation enacted at the current session of the General Assembly:

"Under Section 4-98.12 (a), would signatures of qualified voters obtained pursuant to this section prior to the effective date of this Act be valid for filing with the Court."

In my opinion your question should be answered in the affirmative.

The act you refer to contains no emergency clause and will therefore become effective ninety days after the adjournment of the General Assembly. Section 1-12 Code of Virginia (1950), as amended; Section 53 Constitution of Virginia.

Section 4-98.12 reads in part as follows:

"The provisions of this chapter shall not become effective in any city or county until (a) a petition, signed by a number of qualified voters of such city or county equal to fifteen per centum of the number of votes cast by qualified voters of such city or county and counted for presidential electors in the last preceding presidential election in such city or county and in no event signed by less than one hundred qualified voters of such city or county, is filed with the corporation, husting or circuit court of such city or county, or with the judge thereof in vacation, asking that a referendum be held on the question, 'May mixed alcoholic beverages be sold in [the name of such city or county] by restaurants licensed under Chapter 1.1 of Title 4 of the Code of Virginia? . . . ."

The case of Burks v. Commonwealth, 126 Va. 763, involving an act passed by the General Assembly in 1914, which act, having no emergency clause, did not take effect until ninety days after the adjournment of the General Assembly. The act pertained to catching fish by seines or nets in Rockbridge County and was not to become effective in that county at all unless adopted and ratified by the Board of Supervisors of Rockbridge County, which body was also authorized to modify the act in certain respects. The Board of Supervisors did pass an ordinance ratifying and modifying the act, the ordinance being passed prior to the expiration of the ninety day period. As to this point
in the ensuing litigation, the Supreme Court of Appeals made the following statements:

"The question upon which the whole case depends is whether the board of supervisors could validly adopt and ratify the act of 1914 before the same actually took effect as a law. It is argued on behalf of the defendants that the action of the board on June 1, 1914, was null and void, and that their subsequent action in 1916, being merely an amendment to a void proceeding, could not have the effect of validating the original adoption and ratification.

"It is undoubtedly true as a general proposition of law that until the time arrives for a statute to take effect, all acts purporting to have been done under it are null and void. 36 Cyc. 1192, and cases cited. It is also true that a void act cannot be made the subject of a mere amendment. [Citing authorities]. We do not think, however, that these propositions apply to the question under consideration, and while we have not found and have not been referred to any decision or other authority directly in point, we are unable to give our assent to the contention that the first action of the board of supervisors was void. 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."

I do not perceive anything in § 4-98.12 that would indicate a legislative intent that persons desiring to sign a petition for a referendum would have to wait until the expiration of the ninety-day period.

ALCOHOLIC BEVERAGE CONTROL LAWS—Local Option—Whiskey-by-the-drink—Referendum required in each political subdivision qualifying.

COUNTIES, CITIES AND TOWNS—Whiskey-by-the-Drink—Referendum required in each political subdivision constituting separate local option unit.

May 9, 1968

HONORABLE GUY O. FARLEY, JR.
Member, House of Delegates

This is in reply to your letter of May 7, 1968, which reads in part as follows:

"The question has arisen in Fairfax County as to whether or not the Town of Vienna, which had a population in excess of 2,500 inhabitants, according to the last preceding U.S. Census, has to have its own referendum to determine whether or not mixed alcoholic beverages can be sold within the town limits.

"Also, if the town is required to have a referendum whether or not the vote would be tabulated with the vote in the county. Further, if the town is not required to have a referendum whether or not its vote is tabulated with the county vote."
Under the provisions of House Bill No. 17, approved February 7, 1968, among other things a new chapter numbered 1.1, containing sections numbered 4-98.1 through 4-98.17, was added to Title 4 of the Code of Virginia. Under this chapter the Virginia Alcoholic Beverage Control Board is authorized to issue Mixed Beverage Restaurant Licenses in political subdivisions where the chapter becomes effective.

Under § 4-98.12 you will find that the chapter may become effective in cities, in counties, and in towns having a population in excess of two thousand five hundred inhabitants according to the last preceding United States census, provided that this is the wish of the voters of such political subdivisions as indicated by the outcome of elections held therein pursuant to the prescribed statutory procedures.

In my view, each of the named political subdivisions constitutes a separate local option unit. Thus, I am of the opinion that a county referendum would have no legal effect upon the Town of Vienna, and vice-versa; further, that voters of the Town of Vienna could not lawfully vote in a county referendum on the question.

ALCOHOLIC BEVERAGE CONTROL LAWS—Remuneration or Gifts for Appearance Before Board—Officers of the Commonwealth may receive as fees for legal services.

PUBLIC OFFICERS—Members of General Assembly and Commonwealth’s Attorneys—Considered officers of the Commonwealth.

August 10, 1967

HONORABLE JOHN W. HARDY, Chairman
Virginia Alcoholic Beverage Control Board

I am in receipt of your letter of July 27, 1967, in which you call my attention to § 4-80 of the Virginia Code and present the following inquiries:

"The Board respectfully requests your official opinion as to whether members of the Senate, members of the House of Delegates of the General Assembly of Virginia, or Commonwealth Attorneys of the Commonwealth are considered to be officers or employees of the Commonwealth under this Section. If it is your opinion persons holding these positions are officers or employees of the Commonwealth, we respectfully request a further opinion covering the matter outlined below.

"If, in your opinion, persons occupying these positions are not officers or employees of the Commonwealth, it will not be necessary to consider rendering an opinion covering the matter outlined below.

"If the persons occupying one of the above referred to positions are ruled to be officers or employees of the Commonwealth, we respectfully request your opinion when such persons are practicing attorneys in the Commonwealth if they represent a vendor before this Board in offering alcoholic beverages for sale to the Board for compensation, would such activity on the part of such officer or employee of the Commonwealth be considered as legal services referred to in the underlined language of the attached copy of Section 4-80; or, would such officer or employee of the Commonwealth be in violation of this Section?"

Section 4-80, of the Code of Virginia (1950), as amended, provides:

"If any member, officer, agent or employee of the Board shall be directly or indirectly interested or engaged in any other business or undertaking; dealing in alcoholic beverages, whether as owner, part
owner, partner, member of syndicate, shareholder, agent or employee and whether for his own benefit or in a fiduciary capacity for some other person, or if any member, officer, agent or employee of the Board shall solicit or receive, directly or indirectly, any commission, remuneration or gift whatsoever from any person or corporation having sold, selling or offering alcoholic beverages for sale to the Board in pursuance of this chapter, or any person or corporation holding a license to sell alcoholic beverages issued by the Board or a license to sell alcoholic beverages issued by any other state, or any person or corporation which shall have applied to the Board for a license to sell alcoholic beverages, or if any member, officer, agent or employee of the Board shall solicit or receive, directly or indirectly, any commission, remuneration or gift whatsoever from any person or corporation knowing that that person or corporation then intends to apply to the Board for a license to sell alcoholic beverages, or if any officer or employee of the Commonwealth shall solicit or receive any commission, remuneration or gift from any such person or corporation in connection with the sale or offering for sale of alcoholic beverages to the Board other than for legal services, or, if any person selling or offering for sale to, or purchasing alcoholic beverages from, the Board, or any person or corporation holding a license to sell alcoholic beverages issued by the Board or a license to sell alcoholic beverages issued by any other state, or any person or corporation who shall have indicated their intention to apply to the Board for a license to sell alcoholic beverages by either posting such a notice upon their premises or inserting such a notice in a newspaper, shall either directly or indirectly, offer to pay or pay any commission, profit or remuneration, or make any gift, to any member, officer, agent or employee of the Board, or to anyone on behalf of any such member, officer, agent or employee, he shall be guilty of a felony and upon conviction shall be confined in the penitentiary not less than one year or more than ten years, or, in the discretion of the jury or the court trying the case without a jury, confined in jail not more than twelve months or fined not more than five hundred dollars, or both."

(Italics supplied.)

With respect to your initial inquiry I am of the opinion that a Member of the Senate, a Member of the House of Delegates or a Commonwealth’s Attorney would be considered an “officer . . . of the Commonwealth” within the meaning of the language of § 4-80 italicized above. An individual who occupies any of the above-mentioned positions is undoubtedly a constitutional officer, i.e., one whose office is created and its term fixed by the Constitution of Virginia. See, Sections 40, 41, 42, 44, 110, 112, 113, 119, Constitution of Virginia (1902). Moreover, Members of the House of Delegates have been held to be State officers within the ambit of various provisions of the Virginia Code limiting the scope of permissible activities of specified officials, and I am of the opinion that the views expressed in such instances would be equally applicable to Members of the Senate of Virginia. See, Commonwealth v. Barrett, 14 Va. Law Reg. 271; Reports of the Attorney General (1948-1949), p. 174; (1943-1944), p. 138. In addition, the position of attorney for the Commonwealth is also an office within the purview of similar statutory provisions. See, § 15.1-50, Code of Virginia (1950), as amended; Commonwealth v. Rouse, 163 Va. 841; Reports of the Attorney General (1954-1955), p. 44; (1941-1942), p. 33.

Significant with regard to your second question is the concluding portion of that passage of § 4-80 of the Virginia Code which has been italicized above, i.e., “in connection with the sale or offering for sale of alcoholic beverages to the Board other than for legal services.” In light of this language it seems clear that the statute under consideration contemplates that legal services may permissibly be rendered “in connection with the sale or offering for sale of alcoholic beverages” to the Board. Thus the statute does not simply permit an officer or employee of the Commonwealth to render legal services generally
without infringing its provisions, but specifically permits such exempt legal services to be rendered in connection with the sale or offering for sale of alcoholic beverages to the Board. I am therefore of the opinion that in those instances in which an officer or employee of the Commonwealth is a practicing attorney in Virginia and is retained in his capacity as such, he may represent a vendor before the Board in offering alcoholic beverages to the Board for compensation without violating § 4-80 of the Virginia Code.

ALCOHOLIC BEVERAGE CONTROL LAWS—Rules and Regulations—Board may adopt to require wholesale licensees to post prices—Also, to regulate operations of nonresident brewers.

February 16, 1968
HONORABLE EDWARD E. LANE
Member, House of Delegates

This is in reply to your letter of February 9, 1968, in which you request my opinion on certain questions pertaining to the Alcoholic Beverage Control Act. First, you ask my opinion as to whether the power conferred by the General Assembly of Virginia upon the Alcoholic Beverage Control Board to make regulations is sufficiently broad to allow the Board to promulgate a regulation requiring wholesale licensees of the Board to file and post prices at which they sell beer to retail licensees. In my view, this question should be answered in the affirmative.

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

"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 otherwise. . . ."

Section 4-7 of the Code of Virginia (1950), as amended, reads in part as follows:

"The functions, duties and powers of the Board shall be as follows:

(1) Generally to do all such things as may be deemed necessary or advisable by the Board for the purpose of carrying into effect the provisions of this chapter."

Section 4-11 of the Code reads in part 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 may deem necessary to carry out the purposes 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; . . . ."

The power of the Board to regulate advertising was sustained in Commonwealth v. Anheuser-Busch, Inc., 181 Va. 678, the Court noting that such exercise of the regulatory power conferred by what is now § 4-11 of the Code was reasonable and consistent with the purposes of the A.B.C. Act as expressed in the title to the Act. See also Dickerson v. Commonwealth, 181 Va. 313, aff'd. 321 U.S. 131, wherein the power of the Board to regulate the transportation of alcoholic beverages was sustained.
As you point out, the North Carolina Alcoholic Beverage Control Board and the control boards in some other states have promulgated regulations in respect to the filing and posting of prices by wholesalers. Such regulations would not seem to me to be necessarily inconsistent with the discernible purpose of the General Assembly to strictly regulate and control the sale of alcoholic beverages and the rule-making power delegated to the Virginia A.B.C. Board to effectuate such purpose.

Your second question is set forth in your letter as follows:

"The Board has also taken the position that it cannot under existing law exercise any restraint on out-of-state breweries which may engage in practices forbidden by the A.B.C. Act and the 3.2 Act. The Board has penalized Virginia representatives of such breweries. I am further advised that none of the out-of-state breweries which sell beer in Virginia have asked for and received authority to conduct business in Virginia, taking the position, I assume, that they are engaged in interstate commerce and are not required to domesticate. Section 4-79 of the State A.B.C. Act, and the comparable section of the 3.2 Act (4-115), reads in part as follows

"'No manufacturer, bottler or wholesaler of beverages, whether licensed in this state or not. . . .'

and goes on to state what things may and may not be done. This section would certainly indicate that the draftsmen of these laws were of the opinion that the A.B.C. Board could discipline non-resident breweries for infractions of the Acts by forbidding the sale of their beer in the State or other appropriate action. I would appreciate an opinion from you as to the powers of the Board in respect to the foregoing."

I am not certain that I understand the precise nature of this question. There are certain laws and regulations that out-of-state brewers must comply with; e.g., §§ 4-26, 4-79, 4-115, and Regulation No. 13. A representative of a non-resident brewer, for example, must register with the Board and obtain a permit pursuant to § 4-26 in order to solicit the sale of the brewer's product in Virginia. The Board has prescribed in its Regulation No. 35 the grounds for suspension or revocation of these permits.

Code §§ 4-79 and 4-115 are aimed at preventing the evil known as the "tied house," the purpose being to prevent the integration of wholesale and retail outlets by removing the retailer from financial obligation to the wholesaler. These are criminal statutes the violation of which constitutes a misdemeanor.

Regulation No. 13 pertains to labeling, and non-resident brewers must have the labels on their products approved by the Board in order to sell them in Virginia.

I do not find that there is at the present time any statute or regulation that specifically authorizes the Board to forbid a non-resident brewer to sell his product should the brewer violate the same. If, however, your question is as to the power of the Board to adopt regulations that might have this result, it may well be that the Board is endowed with this power. If the Board's experience with non-resident brewers indicates a need for additional controls with respect to the sale and distribution of their products in the State, suitable regulations could probably be adopted.
ARREST—Felony—Accused taken before court on first day court sits.

CRIMINAL PROCEDURE—Appearance—Person charged with felony to be brought before court not of record on first day court sits.

SHERIFFS AND SERGEANTS—Arrest—Person charged with felony to be brought before court not of record on first day court sits.

HONORABLE W. E. NEWMAN
Sheriff of Mecklenberg County

This is in response to your recent letter in which you ask the following question:

"I shall appreciate your giving me a ruling on how soon after a person is charged with a crime and placed in jail that an officer is required to carry him before the court to have an attorney appointed, if needed, as well as having the bond set and be heard?"

Section 19.1-241.2 of the Code reads in part as follows:

"Every person charged with the commission of a felony not free on bail or otherwise shall be brought before the judge of a court not of record on the first day on which such court sits after the person is charged. At this time, the judge shall inform the accused of his right to counsel and the amount of his bail. The accused shall be allowed a reasonable opportunity to employ counsel of his own choice or if appropriate, the statement of indigence provided for in §19.1-241.3 of the Code shall be executed."

In view of the foregoing provision of law, I am of opinion that a person charged with commission of a felony must be brought before the judge of the court not of record on the first day on which such court sits after the person is charged with the crime.

ARREST—Justice of Peace—Authority as "conservator of the peace."

JUSTICE OF PEACE—Authority of Arrest as "Conservator of the Peace."

HONORABLE H. HAMPTON OLIFF
Justice of the Peace, Westmoreland County

I am in receipt of your letter of November 17, 1967, in which you present the following questions:

"1. What power does a justice of the peace have in a county or district in making an arrest for acts of violences committed in his presence in a case where life, state or county property may be destroyed or a person seriously injured, when a sheriff or state trooper cannot be reached, is out of town or off duty?

"2. Is it true that a justice of the peace in his county or corporation is clothed with all the powers of a 'Conservator of the Peace', to enable him to perform the duties of his office?"

In this connection, I call your attention to the following provisions of § 19.1-20 of the Virginia Code which would appear to answer both of your inquiries:

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

ATTORNEYS—Entitlement—Indigent entitled to in proceeding for writ of error coram vobis.

CRIMINAL PROCEDURE—Attorneys—Indigent entitled to in proceeding for writ of error coram vobis.

March 29, 1968

HONORABLE SIDNEY C. DAY, JR.
Comptroller

This is in response to your letter of February 27, 1968, in which you inquire whether or not the Commonwealth is required to compensate an attorney appointed to represent an indigent prisoner in a proceeding for a writ of error coram vobis.

I have previously considered this matter in an opinion to Honorable Ruth M. Bailey, Clerk of the Hustings Court of the City of Petersburg, of April 21, 1967, Report of the Attorney General (1966-1967), p. 15. I would call your attention, however, to the fact that the attorney representing the prisoner in a proceeding for a writ of error coram vobis is essentially rendering a service to the Commonwealth in connection with a criminal case. In view of the foregoing, I am of opinion that counsel fees and necessary expenses should be paid out of the Criminal Fund pursuant to the provisions of § 19.1-315 of the Code.

ATTORNEYS—Exemption from Real Estate Licensing—When performing legal services.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Attorney exempt from license when performing legal services.

May 2, 1968

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

This is in reply to your letter of April 23, 1968, in which you refer to portions of Chapter 18, Title 54 of the Code of Virginia, relative to the license requirements for real estate brokers and salesmen and certain exemptions thereto. You request my advise as to whether or not an attorney at law is exempt from the requirements of this chapter when such attorney enters into an agreement with a property owner setting forth the following provisions:

"It is agreed that my fee for services rendered will be as follows: $1500.00 retainer, to be paid in no more than five installments of $300.00 per month, beginning January 1, 1967, plus expenses, and 6% of the gross sales price of the property, if the sale is completed."

As you point out, § 54-749 makes it unlawful for any person to act as real estate broker or salesman without being licensed by the Virginia Real Estate Commission. Any service rendered by an attorney at law in the performance of his duties as such attorney at law is exempt under § 54-734.
The quoted provisions of the attorney's agreement with the property owner show that the attorney is to receive, as his fee, a retainer, plus expenses, and in addition, six percent of the gross sales price of the property, if sold. There is nothing to show, however, that the attorney is contracting with the property owner for the sale of real estate. While the provision that his fee shall include six percent of the gross sales price of the property, if sold, may evoke such an inference, it falls short of establishing a sale or an offer or a negotiation for the sale of real estate as contemplated by §§ 54-730 and 54-731. In fact, the quoted language, in itself, is not sufficient to show that the fee or any part thereof is for anything other than legal services and, in the absence of such showing, I am of the opinion that the exemption found in § 54-734 applies in this situation.

ATTORNEYS—Showing of Realty and Negotiating Sale Therefor—Acts as real estate broker not attorney.

REAL ESTATE—Attorney—Showing of realty and negotiating sale therefor—Acts as real estate broker not attorney—Real estate broker's license required.

June 13, 1968

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

This is in reply to your letter of May 27, 1968, in which you request my opinion as to whether or not an attorney at law, without being the holder of a real estate broker license, may perform the services set forth in the following:

"This office represents a corporate client having interests in Virginia realty. These interests are mainly concentrated in the Tidewater Virginia area. They are mostly subject to existing trust liens; and my client's equity in each is small.

"My client desires to advertise for the sale of these properties in its name, but the phone will be in my office, to be answered by my office. This phone will be in the client's name.

"In response to any calls, it will be my task to negotiate any proposed sale. This will include showing the property. Depending on my schedule, from time to time I anticipate that an office employee of mine (not an attorney) may meet a prospective purchaser and permit an examination of the property.

"Any office employee assisting me would be a salaried employee."

Section 54-730 provides that any person who for a compensation or valuable consideration "sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate," as a whole or partial vocation, is a real estate broker within the meaning of Chapter 18, Title 54 of the Code of Virginia. Section 54-734 of the Code provides that this chapter shall not be "construed to include in any way the service rendered by an attorney at law in the performance of his duties as such attorney at law."

Under the given facts, the acts to be performed by the attorney would be "showing the property" and to "negotiate any proposed sale." I do not believe such acts qualify as legal service in the performance of his duties as attorney at law so as to be exempt under § 54-734. One who negotiates a sale of real estate is specifically included in the definitive language of § 54-730. Accordingly, your question is answered in the negative.
BAIL—Justice of Peace—May admit felon to bail only upon authorization of judge of court of record.

JUSTICE OF PEACE—Ball—Authority to admit felon to bail dependent upon judge of court of record.

HONORABLE JOHN S. HEUBI
Justice of the Peace, City of Fredericksburg

This is in reply to your letter of September 1, 1967, in which you request my opinion as to the authority of justices of the peace to admit to bail.

You first ask:

"Will you please advise if there is a statute that prohibits a justice of the peace from setting the amount of bond in felony cases?"

Section 19.1-110 of the Virginia Code (1950), as amended in 1966, 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.

"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."

It is manifest that a justice of the peace does not have authority to admit to bail any person charged with a felony without the express authorization of a judge of a court of record.

You also inquire who is authorized to admit to bail at or prior to commitment if the justice of the peace is precluded from so doing.

Sections 19.1-111 and 19.1-112 of the Code have extensive provisions specifying the authority of the officers of courts not of record and courts of record to admit to bail.

BAIL AND RECOGNIZANCE—Justice of Peace—Authority to admit to bail.

JUSTICE OF PEACE—Bail—May admit to bail those committed by him.

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

August 1, 1967

I have your letter of July 29, 1967, which is as follows:

"Justice of the Peace 'A' issues a criminal misdemeanor warrant against one John Doe, and gives it to a police officer to serve. Defendant is found later and taken before Justice of the Peace 'B' for bond. Defendant cannot post bond so Justice of the Peace 'B' issues a mittimus and commits defendant to jail.

"Which Justice of the Peace is entitled to bail defendant under § 19.1-110 of the Code? Justice of the Peace 'A' who issued the warrant of arrest or Justice of the Peace 'B' who issued the mittimus? Your opinion will be greatly appreciated."

Section 19.1-110 of the Code of Virginia, as amended by the 1966 Acts of the General Assembly, provides in part in the fourth paragraph, as follows:
"No justice of the peace shall be authorized to admit to bail: (2) any person in jail under an order of commitment, except the justice of the peace who committed him."

Therefore, Justice of the Peace "B" who issued the mittimus and committed the defendant to jail would be the only one entitled to bail him.

BOARDS OF SUPERVISORS—Appropriations—May make for maintenance of recreational facilities of a city.

HONORABLE E. EUGENE GUNTER
Commonwealth's Attorney for Frederick County

This is in reply to your letter of March 4, 1968, in which you inquire whether or not the Board of Supervisors of Frederick County may appropriate county funds for the maintenance and operation of recreational facilities of the City of Winchester which are used by residents of the county.

I am of the opinion that the board of supervisors may appropriate funds for the purpose in question pursuant to § 15.1-25 of the Virginia Code. This statute authorizes the governing bodies of counties to appropriate funds from their respective treasuries to nonprofit recreational associations or organizations which are not controlled in whole or in part by any church or sectarian society, which sums may be used for construction purposes or operating expenses, or both. In an analogous situation, this office ruled that a county could appropriate funds for the support of a clinic maintained by the State Hospital Board and the Department of Mental Hygiene and Hospitals, pursuant to that provision of § 15.1-25 which authorizes the making of appropriations to any "charitable institution or nonprofit or other organization" conducting a hospital. See, Report of the Attorney General (1963-1964), p. 12. In light of the view expressed in the above-mentioned ruling, I am of the opinion that the Board of Supervisors of Frederick County may properly make the appropriation concerning which you inquire.

BOARDS OF SUPERVISORS—Appropriations—May make for nursing home if qualifies as charitable institution or association.

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

I am writing in further connection with your letters of October 20 and November 10, 1967, and our intervening discussion of your inquiry concerning the power of the Board of Supervisors of Highland County to invest public funds in the construction and operation of a nursing home or home for the aged.

Initially in this connection, I do not believe that § 15.1-510 of the Virginia Code authorizes the governing body of a county to invest funds for the purpose in question, nor have I been able to discover any other provision of Virginia law expressly conferring such authority. While § 15.1-25 of the Virginia Code empowers the governing bodies of counties to make gifts and donations of property or money to any charitable institution or nonprofit or other organization conducting a hospital or other specified activities, I do not believe that the language of this statute is sufficiently broad to embrace nursing homes or homes for the aged.

However, I call your attention to § 15.1-24 of the Virginia Code which provides:
"Counties, cities and towns of this Commonwealth are authorized to make appropriations of public funds, of personal property or of any real estate to any charitable institution or association, located within their respective limits; provided, such institution or association is not controlled in whole or in part by any church or sectarian society. The words 'sectarian society' shall not be construed to mean a nondenominational Young Men's Christian Association or a nondenominational Women's Christian Association. Nothing in this section shall be construed to prohibit any county or city from making contracts with any sectarian institution for the care of indigent, sick or injured persons." (Italics supplied.)

In light of the language of the statute italicized above, it would appear that the board of supervisors could make the appropriation concerning which you inquire if the prospective recipient is a "charitable institution or association" within the meaning of § 15.1-24 of the Virginia Code.

BOARDS OF SUPERVISORS—Appropriations—May not be made to 4-H Educational Center.

BOARDS OF SUPERVISORS—Appropriations—May be made to community hospital.

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

October 9, 1967

I am in receipt of your letter of September 28, 1967, in which you present the following inquiries:

"The West Central 4-H Educational Center, Inc., has requested the Board of Supervisors of Roanoke County to make a $2,000.00 donation to that organization. I am enclosing herewith a copy of a letter showing what this organization does. My question is, does the Board of Supervisors have a right to make such a donation if they see fit to do so?

"Also, a proposed Community Hospital to be located in the Town of Salem has requested the Board of Supervisors to make a donation of $10,000.00 for the purpose of helping to construct said hospital. My question here is, does the Board of Supervisors have a right to make this donation?"

With respect to your initial inquiry, I have been unable to discover any provision of Virginia law which authorizes a board of supervisors to appropriate public funds to organizations such as the West Central 4-H Educational Center, Inc.

In connection with your second inquiry, I call your attention to § 15.1-25 of the Code of Virginia (1950), as amended, which in pertinent part provides:

"The governing bodies of counties, cities and towns are authorized to make gifts and donations of property, real or personal, or money to be appropriated from their respective treasuries, to any charitable institution or nonprofit or other organization conducting a hospital, and to any association or other organization furnishing voluntary fire-fighting services, and to any nonprofit life-saving crew or life-saving organization, or rescue squad, within or without the boundaries of the respective counties, cities and towns, and to nonprofit recreational associations or organizations; provided the nonprofit recreational association or organization is not controlled in whole or in part by any church or sectarian society. Donations of property or money to any such charitable, non-
profit or other hospital institution or organization, or nonprofit recreational association or organizations may be made for construction purposes, for operating expenses, or both."

From your communication, it would appear that the community hospital you mention would fall within the scope of the language of the above-mentioned statute, and it would therefore appear to be permissible for the Board of Supervisors of Roanoke County to appropriate funds to aid in the construction of such hospital.

BOARD OF SUPERVISORS—Appropriations—Schools and welfare—Limitations on reducing specific items.

SCHOOLS—Budget Estimates—Board of supervisors may appropriate lump sum or designate major categories.

WELFARE—Local Board—Limitation on board of supervisors to vary budget estimates.

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

This is in reply to your letter of May 2, 1968, in which you inquire as to the power of the board of supervisors to reduce specific items or categories in the budgets submitted by the school board and the board of public welfare. You also request information as to any recent legislation pertinent to these topics.

This office has ruled in the past that §§ 15.1-160, 15.1-161, 15.1-162 and §§ 22-120.3 through 22-120.5 were to be construed together to give the board of supervisors the power to disapprove specific items in the budget submitted by the school board. See, Report of the Attorney General (1959-1960), p. 66. However, these opinions have now been superseded by the recent amendment to § 22-127 of the Code, Acts of 1968, Chapter 614, a copy of which is enclosed. The effect of the amendment is to restrict the appropriation for school purposes to either a lump sum appropriation or one designating the sums appropriated under the major categories of expenses.

This office has ruled previously that the board of supervisors has no authority to eliminate specific items or decrease the total budget submitted by the local board of public welfare. See, Report of the Attorney General (1966-1967), p. 43. Section 63-105 requires the board to appropriate funds to meet the estimates submitted by the local welfare board when the supporting data required by § 63-69 of the Code is furnished. While § 63-105 was amended in Acts of 1968, Chapter 666, it is my opinion that this amendment does not change the existing limitation on the power of the board of supervisors to vary the budget estimates presented by the local board of public welfare.

BOARD OF SUPERVISORS—Authority—May not adopt ordinance on open housing.

ORDINANCES—Open Housing—Counties not authorized to adopt.

HOUSING—Open—Ordinances—Counties not authorized to adopt.

HONORABLE WALLACE G. DICKSON
Member, House of Delegates

This is in reply to your letter of January 30, 1968, in which you ask whether
the Arlington County Board of Supervisors "has the existing power to enact... a local ordinance to prevent discrimination in the sale or rental of housing."

In addition to your letter, you forwarded to me a letter received by you from Jay E. Ricks, Esquire, dated January 31, 1968, with several enclosures.

I have examined the cases which you cite in your letter, namely, Porter v. City of Oberlin, 1 Ohio St. 2d 143, 205 N.E. 2d 363 (1965); Chicago Real Estate Board v. City of Chicago, 36 Ill. 2d 530, 224 N.E. 2d 793 (1967); King v. Arlington County, 195 Va. 1084, 81 S.E. 2d 587 (1954); Weber City Sanitation Comm'n v. Craft, 196 Va. 1140, 87 S.E. 2d 153 (1955). I have also read the memoranda and appendices submitted by Mr. Ricks, including the unsigned memorandum, dated January 13, 1968.

Additionally, I have reviewed the authorities cited in the annotation at 93 A.L.R. 2d 1028, and I have studied those provisions of the Code of Virginia cited in the various memoranda.

It is obvious that there is a definite division of authority among the states with reference to the power of a local governing body to enact a so-called "open housing" ordinance.

In the opinion to the Honorable Bernard Levin, Member of the House of Delegates, dated January 10, 1968, we answered a similar inquiry. A copy of that opinion is enclosed. As you see, it concerned the Council of the City of Norfolk.

My opinion with reference to the Arlington County Board of Supervisors is the same as that expressed with reference to the City of Norfolk in my letter to Mr. Levin. The Arlington County Board of Supervisors possesses only those powers assigned to it by the General Assembly, and I do not believe that under Virginia law the general granting of police power to local political subdivisions is sufficient to authorize the enactment of the particular ordinance about which you inquire. I know of no provision of general law from which it could be concluded that the Board of Supervisors of Arlington County has the power to enact such an ordinance. Therefore, the answer to your question is in the negative.

BOARD OF SUPERVISORS—Authority—May not condemn land for charitable hospital.

COUNTIES, CITIES AND TOWNS—Town of Wytheville—May not condemn land on behalf of charitable institution for hospital.

HONORABLE W. P. PARSONS
Commonwealth's Attorney for Wythe County

November 14, 1967

I am in receipt of your letter of November 2, 1967, in which you present the following situation and inquiry:

"The Wythe County Community Hospital, a non-stock, non-profit charitable corporation, is working on plans to construct a hospital in Wythe County. The Board of Supervisors of Wythe County is, and has been, interested in this hospital as a proper venture for the benefit of the public generally and some months ago the Board caused a bond referendum to be held in the county. The vote was overwhelmingly in favor of a hospital bond issue and in due course the Board plans to sell the bonds and contribute the proceeds to the Wythe County Community Hospital.

"The hospital has taken options on several tracts of land but there is one tract where it and the owner cannot agree. The question now arises as to whether or not the Board of Supervisors of Wythe County would have the power to institute and conduct condemnation proceedings in order to acquire this property and then convey it to the hospital."
REPORT OF THE ATTORNEY GENERAL

Please give us your opinion as to whether or not the Board of Supervisors has this power.

"Should your opinion be in the negative, then please advise whether or not the Town of Wytheville would have the power to condemn said property for the benefit of the hospital."

The governing bodies of counties are authorized by various provisions of Virginia law to make gifts or donations of money or property to charitable institutions for the construction or operation of hospitals. See, §§ 15.1-24, 15.1-25 and 32-134.1, Code of Virginia (1950), as amended. However, I have been unable to discover any provision of Virginia law which purports to authorize the governing body of a county or town to institute condemnation proceedings for the purpose of acquiring real property on behalf of, or to be conveyed to, a charitable institution for such purpose. So far as I have been able to determine, condemnation proceedings with respect to the establishment of hospitals are authorized (1) by § 32-131, when the governing body of a county or town itself establishes a hospital pursuant to the provisions of Article 1, Chapter 8, Title 32 of the Virginia Code, (2) by § 32-258, in those instances in which a hospital authority has been created under the Hospital Authorities Law contained in §§ 32-212, et seq., of the Virginia Code, and (3) by § 32-288, when a hospital or health center commission has been created by proper resolution of one or more political subdivisions of the Commonwealth in accordance with the provisions of Chapter 14, Title 32 of the Virginia Code.

In light of the specific authority contained in the above-canvassed statutes and the absence of any express authority empowering the governing body of a county or town to institute condemnation proceedings on behalf of a charitable institution conducting a hospital, I am of the opinion that your inquiries should be answered in the negative.

BOARDS OF SUPERVISORS—Authority—May not pay office rent for Agricultural Stabilization and Conservation Service.

Honorable J. Vaughan Beale
Commonwealth's Attorney for Southampton County

December 7, 1967

This is to acknowledge receipt of your letter of December 2, 1967, in which you request my opinion on the question of whether or not the board of supervisors has the authority to pay a portion of the rent for the office of the Agricultural Stabilization and Conservation Service. You enclose a letter from the Honorable George O. Bryant, Executive Secretary of the Board of Supervisors of Southampton County, in which he states the board of supervisors for several years has been paying a small amount each month to supplement the Farmer's Home Administration's rental of an office.

Both of these organizations, as you know, are federal agencies. The Farmer's Home Administration, in addition to lending money to private individuals, also enters into projects with the county, such as making studies relative to the formation of plans for the development of the county, the installation of water and sewerage systems, etc. Grants are made for such projects—the county paying a certain percentage and the federal government likewise paying a percentage of the cost of the same. On the other hand, the county does not enter into any projects in conjunction with the Agricultural Stabilization and Conservation Service. That agency deals directly with the property owner concerned. As indicated by the opinions heretofore issued by this office, when the county government has no connection with projects performed by a federal agency, then county funds cannot be used to help pay the costs of that agency such as office rent, etc. On the other hand, when the county enters into projects with the federal agency, it is permissible to use county funds to help defray the cost.

I am, therefore, of the opinion that a board of supervisors is without authority to pay office rent for the Agricultural Stabilization and Conservation Service, which operates in the county.

BOARDS OF SUPERVISORS—Authority—May provide microwave unit of fire-fighting equipment upon privately owned property.

December 29, 1967

HONORABLE C. W. ALLISON, JR.
Commonwealth's Attorney for Alleghany County

This is to acknowledge receipt of your letter of December 22, 1967, in which you state in part:

"The Board of Supervisors of Alleghany County has authorized the purchase of microwave units for the various fire departments in the county. These units are for the purposes of communication with the various members and will be installed in the homes of the members as well as in the fire department building.

"Question: Does the governing body of the county have the authority to donate money to fire departments for the purchase of equipment, part of which may be installed in private homes?"

Attention is invited to § 27-25, Code of Virginia (1950), as amended; which reads as follows:

"The governing body of every county shall have power to provide for the purchase, operation, manning and maintenance of suitable equipment for fighting fires in or upon the property of the county and of its inhabitants, and to prescribe the terms and conditions upon which the same will be used for fighting fires in or upon privately owned property."

The language "suitable equipment for fighting fires in or upon the property of the county and its inhabitants" in the statute is broad enough to include microwave units installed in the private homes of the members of the fire department for the purpose of proper communication therewith.

I am therefore of the opinion that the question you submit should be answered in the affirmative.

BOARDS OF SUPERVISORS—County Board Form of Government—Determination of compensation.

February 28, 1968

HONORABLE ALBERT M. SHELTON
Commonwealth's Attorney for Scott County

This is in reply to your letter of February 21, 1968, in which you inquire as to whether the compensation of members of the Scott County Board of Supervisors is determined pursuant to § 15.1-702 of the Code or pursuant to
§ 14.1-46 of the Code. You state that Scott County is a county of less than 50,000 population which has adopted the county board form of government. Section 15.1-702 fixes a maximum salary of $720.00 per annum for members of the Board of Supervisors of a county which has adopted a county board form of government pursuant to §§ 15.1-697, et seq., of the Code. Section 14.1-46 establishes a salary range of $250.00-$1800.00 per annum for supervisors in counties of less than 50,000 population.

It is my opinion that a county which adopts the county board form of government ceases to be subject to the provisions of § 14.1-46 of the Code, and the compensation of the members of the board of supervisors of such a county shall be fixed under § 15.1-702. Section 14.1-46 applies to counties generally, but not to counties operating under a special form of government where other provision is made for the compensation of the members of the governing body. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated February 14, 1967, in which a substantially identical question involving the board of supervisors of a county which had adopted the urban county executive form of county government was considered and discussed. See, Report of the Attorney General (1966-1967), p. 33.

BOARDS OF SUPERVISORS—County Free Library—May acquire land for construction.

COUNTIES—Free Library System—May acquire land for establishment.

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

January 16, 1968

This is to acknowledge receipt of your letter of December 27, 1967, in which you state in part:

"The County of King George has been offered a library to include the constructing, furnishing, equipping, staffing, and maintaining of building, fixtures, books and library materials, together with an endowment designed to perpetuate all of the above. The State Library Board has been consulted and participated in consideration and planning of the project.

* * *

"Your opinion is respectfully requested as to whether the Board of Supervisors of King George County may acquire land by purchase for use as a library as outlined above."

In this connection, § 42-4 of the Virginia Code authorizes the governing body of any county to establish a county free library system for the use and benefit of the residents of the county. Moreover, § 15.1-262 of the Virginia Code permits the county governing body to "purchase any such real estate as may be necessary for the erection of all necessary county buildings." In light of the fact that § 15.1-266 of the Virginia Code empowers the county governing body to locate and construct a suitable building for a county free library system on the same lot as that on which the courthouse is located, I think it is manifest (1) that such a library building would fall within the scope of the above-quoted language of § 15.1-262, and (2) that the Board of Supervisors of King George County may acquire such real estate as may be necessary for the erection of the library building concerning which you inquire.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Exchange and Conveyance of Public Property—Subject to provisions of § 15.1-262.

May 24, 1968

HONORABLE JACK F. DEPOY
Commonwealth's Attorney for the County of Rockingham

This will reply to your letter of May 17, 1968, in which you present the following situation and inquiry:

"The County owns a farm which was formerly used as a parish farm. There are a number of old buildings which are in an extremely bad state of repair. In fact, it is the opinion of most of the Supervisors that they are hazardous. The farm has not been used as a parish farm for many, many years and is being leased and used by the lessee for farming purposes. The present lessee has offered to tear down the afore-mentioned buildings and to replace them with a picnic area completely at his own expense, provided the county can give him the buildings.

"My question is simply—Can the County Board of Supervisors enter into such an agreement with the lessee?"

You state that the term "parish farm" is synonymous with the term "poor farm," as utilized in Article 2, Chapter 13 of Title 63 of the Virginia Code.

In this connection, I call your attention to § 15.1-262 of the Virginia Code, which provides:

"The governing body of the county shall have power to sell, at public or private sale, or exchange and convey the corporate property of the county; to purchase any such real estate as may be necessary for the erection of all necessary county buildings; to provide a suitable farm as a place of general reception for the poor of the county, and to make such orders as they deem expedient concerning such corporate property as now exists or as may hereafter be acquired; provided, that no sale or exchange of such property shall be made without the approval and ratification of such sale and exchange by an order of the circuit court of the county or by the judge thereof in vacation, entered of record. But this section shall not be construed to deprive the judge of the right to control the use of the courthouse of the county during the term of his court therein." (Italics supplied.)

In light of the language italicized above, I am of the opinion that the property you mention would fall within the purview of the quoted statute. It would thus appear that the board of supervisors of the county could exchange and convey the buildings concerning which you inquire to the lessee in consideration of the lessee's agreeing to raze and remove such buildings and replacing them with a picnic area at his own expense, provided such exchange is approved and ratified by an order of the circuit court of the county as required by the statute under consideration.

BOARDS OF SUPERVISORS—Henry County—Member may serve on board of directors of Fieldale Sanitary District.

December 18, 1967

HONORABLE KENNETH M. COVINGTON
Commonwealth's Attorney for the City of Martinsville

I am in receipt of your letter of December 8, 1967, in which you present the following situation and inquiry:
"I have been requested to seek your opinion concerning the compatibility of a person who has recently been elected to the Henry County Board of Supervisors, to take office January 1, 1968, who is also a member of the Board of Directors of the Fieldale Sanitary District. As you know, the Sanitary District Board members are appointed by the Board of Supervisors. This gentleman desires to know whether he can continue as a member of the Board of the Sanitary District after his qualification as a new member of the Board of Supervisors. It is this gentleman's feeling that since he serves on the Sanitary District Board without compensation, that he should be allowed to continue in that capacity."

In this connection, I am forwarding to you a copy of a previous opinion of this office, dated June 17, 1949, to the Honorable W. R. Broaddus, Jr., Member of the House of Delegates, in which the origin and status of the District Board of the Fieldale Sanitary District were considered and discussed. See, Report of the Attorney General (1948-1949), p. 184. Section 1560-o of the Virginia Code, to which reference is made in the enclosed opinion, is now § 21-118(7) of the Code of Virginia (1950), as amended.

From the enclosed opinion, it appears that the Fieldale Sanitary District Board is not the governing body of the Fieldale Sanitary District, the operation and control of the district being under the jurisdiction of the county board of supervisors. Rather, it appears that the Fieldale Sanitary District Board is an agency established by the Board of Supervisors of Henry County pursuant to the authority conferred upon it by § 21-118(7) of the Virginia Code to retain assistance in the construction, operation or maintenance of the district's system or systems. As such, the Fieldale Sanitary District Board is not a legal entity for which express statutory provision is made. Its members are not vested with statutory powers and duties, are not denominated officers by statute, do not serve specified statutory terms and are not required to take an oath of office or give bond. On the contrary, the members of the Fieldale Sanitary District Board are merely agents of the Board of Supervisors of Henry County and have no official status under Virginia law.

Since the position of a member of the Fieldale Sanitary District Board is thus not an "office" under Virginia law, I am of the opinion that the provisions of § 15.1-50 of the Virginia Code forbidding dual office holding would not apply in the situation you present.

BOARDS OF SUPERVISORS—Industrial Development—Appropriation of funds to Authority for acquisition of site for lease, not donation, to private industry.

INDUSTRIAL DEVELOPMENT—Authorities—May finance and construct facilities to be leased to private industry.

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney for Rockbridge County

September 15, 1967

I am in receipt of your letter of September 1, 1967, in which you present the following inquiries:

"This office has been requested to inquire if the Board of Supervisors of Rockbridge County has authority to appropriate public funds to be used for a donation of land in connection with industrial development. If the Board of Supervisors does not have such authority under statutes pertaining to their power, can this be accomplished by appropriation of public funds into the Industrial Development Authority of Rockbridge County, Virginia, that was created sometime back under
Section 15.1-1376 of the Code, with the proceeds therefrom being used for a donation of land in connection with industrial development?"

With respect to the first question you present, I have been unable to discover any provision of Virginia law which authorizes boards of supervisors to appropriate public funds to purchase land to be donated to private interests in connection with industrial development, and I am, therefore, of the opinion that your initial inquiry must be answered in the negative.

With regard to your second question, it appears from your communication that the Industrial Development Authority of Rockbridge County was created pursuant to the provisions of the Industrial Development and Revenue Bond Act. See, §§ 15.1-1373 through 15.1-1390, Code of Virginia (1950), as amended. Particularly pertinent to your inquiry are §§ 15.1-1378(1) and 15.1-1388. The former provision authorized an Industrial Development Authority "to accept contributions, grants and other financial assistance from . . . any political subdivision . . . of the Commonwealth." The latter provision empowers a county to "acquire a facility site by gift, purchase or lease" and to "transfer any facility site to an authority by sale, lease or gift." Further in this connection, I call your attention to § 15.1-511.1 which prescribes:

"The governing body of any county in this State may give, lend or advance in any manner that to it may seem proper funds or other county property, not otherwise specifically allocated or obligated, to any authority created by such governing body pursuant to law."

In light of the language of the above-mentioned provisions of Virginia law, I am constrained to believe that the Board of Supervisors of Rockbridge County may appropriate funds to acquire a facility site to be transferred to the Industrial Development Authority of Rockbridge County, or may give, lend or advance funds to such industrial development authority for acquisition of a facility site by the authority. Once the facility site has been acquired by the industrial development authority, it may then be leased to private interests by the authority in accordance with the provisions of the Industrial Development and Revenue Bond Act. This view is supported, I believe, by the recent decision of the Supreme Court of Appeals of Virginia in Development Authority v. Coyner, 207 Va. 351, in which case the Court sustained the validity of Chapter 643 of the Acts of Assembly of 1964 creating industrial development authorities in Virginia Beach, Danville, and the county of Fairfax. During the course of its opinion, the Court noted the close similarity between the provisions of the statute there under consideration and the provisions of the Industrial Development and Revenue Bond Act and declared (207 Va. at 357, 360):

"Now counties, cities and towns throughout the State are authorized to establish industrial development authorities for the promotion of industry and trade. Acts of Assembly, 1966, ch. 651, p. 998 (codified as §§ 15.1-1373 through 15.1-1390). The provisions of that chapter closely parallel the provisions of Chapter 643.

"The legislative determination that the promotion of industrial development is for a public purpose and thus a proper governmental function is presumed to be correct. There is nothing in the Constitution which prohibits the General Assembly from creating industrial authorities and clothing them with the power to finance and construct facilities to be leased to private industry pursuant to the provisions of Chapter 643.

"Having determined that Chapter 643, creating the Industrial Authority and empowering it to issue revenue bonds for the construction of a facility to be leased to a private industry, was to serve a public purpose and thus constituted a proper function of government, there is

"No public funds are here used for a private purpose. The $10,000 appropriated by the county board of supervisors was purely voluntary and was to be repaid when the proposed revenue bonds were sold, but even if the proposed bonds are not sold the money appropriated was for a public purpose and no tax funds would have been used for a non-governmental purpose." (Italics supplied.)

BOARDS OF SUPERVISORS—May Require Monthly Reports of County School Boards.

BOARDS OF SUPERVISORS—School Funds—May appropriate on monthly basis.

SCHOOLS—Boards of Supervisors—May require monthly reports of school boards and appropriate school funds on monthly basis.

December 20, 1967

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

I am in receipt of your letter of December 13, 1967, in which you present certain questions which will be stated and considered seriatim.

"(1) Can the Board of Supervisors in a county require the County School Board to give a detailed monthly report to the Supervisors on financial expenditures by the School Board?"

Answer: Yes. In this connection, § 15.1-163 of the Code of Virginia (1950), as amended, provides:

"The governing bodies of counties, cities and towns may require the heads of other responsible representatives of all departments, offices, divisions, boards, commissions and agencies of their respective localities to furnish such information as may be deemed advisable and in such form as may be required in relation to their respective affairs and activities."

"(2) Can the Board of Supervisors validly appropriate school funds one month at a time?"

Answer: Yes. Pertinent with respect to this inquiry are the following provisions of §§ 15.1-162 and 58-839 of the Code:

"§ 15.1-162.—No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body." (Italics supplied).

"§ 58-839.—The laying or making of a levy in an amount sufficient to cover or pay all estimated and contemplated expenditures for the fiscal year shall not be construed as imposing any obligation or duty on the board of supervisors or other governing body to appropriate any amount whatsoever. No part of the funds raised by the general county levies or taxes shall be considered available, allocated or expended for any purpose until there has been an appropriation of funds for that expenditure or purpose by the board of supervisors or other governing body either annually, semiannually, quarterly, or monthly." (Italics supplied).
This office has previously ruled that the above-mentioned provisions of Virginia law authorize county boards of supervisors to make appropriations to local school boards on a monthly basis. See, Reports of the Attorney General (1958-1959), p. 46; (1959-1960), p. 66.

**BOARDS OF SUPERVISORS—May Require Reports From County School Boards.**

**SCHOOLS—School Boards—May be required to submit reports to boards of supervisors.**

February 1, 1968

HONORABLE PAUL W. MANNS
Member, Senate of Virginia

I am in receipt of your letter of January 25, 1968, in which you present the following inquiries:

“(1) Can the Board of Supervisors of a county require the County School Board to furnish a comprehensive budget reflecting the number employed in each department along with their salaries and positions, total salaries to further reflect the portions paid by County, State and Federal Funds? Such a report would apply to all department heads with the school system, their titles, the amount of monies requested, the number of persons employed, and the services rendered. It would also apply to all principals and teachers.

“(2) If the above report is authorized by the Code of Virginia, i.e., Sec. 15.1-163, what sanctions are available to the Board of Supervisors if the School Board refuses to submit same?”

In response to your initial question, I am forwarding to you a copy of a previous opinion of this office, dated December 20, 1967, to the Honorable George C. Rawlings, Jr., Member of the House of Delegates, in which a question substantially identical to that which you present was considered and answered in the affirmative. See, § 15.1-163, Code of Virginia (1950), as amended.

With respect to your second question, I am of the opinion that § 15.1-163 of the Virginia Code imposes an affirmative duty upon the specified officials to furnish the governing bodies of counties, cities and towns with the information mentioned in that statute. Moreover, the duty imposed would appear to be entirely ministerial in character and to involve no exercise of discretion on the part of the officer required to supply the information. In this connection, a writ of mandamus is the appropriate legal means of compelling the performance by a public officer of a duty imposed upon him by some express provision of law. See, *Eubank v. Boughton*, 98 Va. 499 36 S.E. 529; cf., *Andrews v. Shepherd*, 201 Va. 412, 111 S.E. (2d) 279.

In addition, it is clear from the provisions of Virginia law cited in response to the second question set forth in the enclosed opinion that (1) no funds raised by the general county levy or taxes can be paid out for any contemplated expenditure until there has been an appropriation for such purpose by the governing body of the county, and (2) such appropriations by a county governing body may be made on a semi-annual, quarterly or monthly basis. If a county appropriates funds to the local school board on one of the above-mentioned bases, it can, of course, decline to make an appropriation for the impending semi-annual, quarterly or monthly period until the information requested in accordance with § 15.1-163 of the Virginia Code has been furnished.
BOARDS OF SUPERVISORS—Meetings—Procedure where tie vote cast on question—Conduct of other business.

December 28, 1967

HONORABLE GEORGE C. KAWLINGS, JR.
Member, House of Delegates

I am in receipt of your letter of December 15, 1967, in which you present a series of questions concerning the activities of a tie breaker for a county board of supervisors. These questions will be stated and considered seriatim.

"(1) Once a tie vote is cast on a motion before the board of supervisors, may any other official business be conducted by the board prior to a decision from the tie breaker?"

Answer: Yes. It is clear from the language of § 15.1-540 of the Virginia Code that some period of time may elapse before the tie breaker is prepared to cast his vote, and there is nothing in the statute which forbids the board of supervisors from considering other official business during that period. See also, § 15.1-542, Code of Virginia (1950), as amended.

"(2) If a tie vote was reached on December 13th and no decision is given by the tie breaker prior to January 1, 1968, does the motion die, or is the matter continued until a decision vote is made by the tie breaker?"

Answer: Section 15.1-540 of the Virginia Code prescribes that when all members of the board of supervisors are present and there is a tie vote upon a question, the clerk shall record the vote and notify the tie breaker. This statute also provides for the adjournment of meetings and continuances if necessary, not to exceed thirty days, for the tie breaker to cast his vote and further declares:

"When he casts his vote the clerk shall record his vote and the tie shall be broken, and the question shall be decided as he casts his vote."

In light of the foregoing, I am of the opinion that a question necessitating the use of a tie breaker is continued within the limits specified in § 15.1-540 until the tie breaker casts his vote. See, Report of the Attorney General (1963-1964), p. 25.

"(3) Does a change in the makeup of the board of supervisors with three out of four new members as of January 1st affect the situation in any way?"

In light of the views expressed in the answer to your second question, I am of the opinion that a change in the composition of the board of supervisors would not affect the situation you present.

"(4) In the event the new board of supervisors disagrees with the decision by the tie breaker, can they rescind the action taken on the pending motion upon which a tie vote was cast by the old board and broken one way or the other by the tie breaker?"

Answer: Whether or not the matter decided by the tie breaker's vote could be rescinded would depend upon the nature of the question decided and the extent of any action taken in accordance with or reliance upon the board's determination. Generally speaking, however, there is nothing which would prevent a board of supervisors from acting upon a motion to reconsider a vote previously taken. See, Report of the Attorney General (1961-1962), p. 12.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Member—Must disassociate himself from insurance firm writing insurance for county.

PUBLIC OFFICERS—Contracts—Member of board of supervisors must disassociate himself from insurance firm writing insurance for county.

HONORABLE WADE S. COATES
Commonwealth's Attorney for Tazewell County

December 11, 1967

I am in receipt of your letter of November 30, 1967, in which you present the following situation and inquiries:

"At the November 1967 election, an insurance agent for a large mutual insurance company, having several agents and area officers in Tazewell County, was elected to the Board of Supervisors. The County for several years has had fire insurance placed with this firm. It is my understanding that the area office divides the commission for sale of this insurance among its several agents in the County.

"Please advise if this constitutes a conflict under Section 15.1-67 of the Code of Virginia, and in the event your conclusion is positive would it be proper to place the insurance with this company, if Supervisor-Agent waived any interest in the commission?"

In response to your communication, I am forwarding to you copies of two previous opinions of this office, dated November 25, 1959, and March 7, 1963, in which situations substantially identical to that which you present were considered and discussed. See, Reports of Attorney General (1959-1960), p. 30; (1962-1963), p. 215. As you will note, in both of these opinions it was ruled that § 15-504 (now § 15.1-67) of the Virginia Code prohibited a member of a board of supervisors from writing insurance on county property.

Moreover, I am constrained to believe that the waiver by a supervisor of his interest in commissions on insurance covering county property would not suffice to remove such supervisor from the prohibitions of § 15.1-67 of the Virginia Code. In this connection, I call your attention to the view expressed in the following language of the enclosed ruling of March 7, 1963:

"In my opinion, if the person in question is elected and qualifies as a member of the board of supervisors, he would have to disassociate himself from the insurance firm which is currently writing this insurance, if that firm is to continue writing such insurance." (Italics supplied.)

HONORABLE WADE S. COATES
Commonwealth's Attorney for Tazewell County

January 15, 1968

COMMONWEALTH ATTORNEYS—Office Space—Authority to governing bodies to supply and furnish equipment.

HONORABLE E. EUGENE GUNTER
Commonwealth's Attorney for Frederick County

This is to acknowledge receipt of your letter of January 8, 1968, in which you request my opinion on the question of whether or not the Board of Supervisors of Frederick County would have the authority to rent an office for your use in the discharge of your duties as Commonwealth's Attorney and to furnish items of equipment for such office.

Section 15.1-257 of the Code of Virginia (1950), as amended, provides in part:
"The governing body of every county and city shall provide a courthouse with suitable space and facilities to accommodate the various courts of record and officials thereof serving the county or city, and, within or without such courthouse, a clerk's office the record room of which shall be fireproof, a jail, and, upon request therefor, suitable space and facilities for the attorney for the Commonwealth to discharge the duties of his office..." (Italics supplied.)

Section 15.1-258 of the Code likewise provides in part:

"The governing body of each county and city shall, if there be offices in the courthouses of the respective counties and cities available for such purposes, provide offices for the treasurer, attorney for the Commonwealth, sheriff, commissioner of the revenue, commissioner of accounts and division superintendent of schools for such county or city." (Italics supplied.)

This office has ruled that a board of supervisors has the authority notwithstanding the provisions of § 15.1-258 (formerly § 15-689) to secure an office for use of the Commonwealth's Attorney at a rental to be determined by such governing body. See, opinion to the Honorable John T. Duval dated March 8, 1950, Report of the Attorney General (1949-1950), p. 21, a copy of which is enclosed. The underlined portion of § 15.1-257, supra, was included in the amendment to that section by Chapter 241, Acts of 1964. It would seem, therefore, that the term "suitable space and facilities for the attorney for the Commonwealth" would include office equipment as well as the rental of office space.

I am, therefore, of the opinion that the Board of Supervisors would have the authority to provide a rental allowance to secure an office suitable for the use of the Commonwealth's Attorney in discharging the duties of that office and also providing the necessary items of equipment for that office.

BOARDS OF SUPERVISORS—Ordinances—May amend ordinances other than license tax ordinances, at meeting at which adopted.

ORDINANCES—Amendment—Board of supervisors may amend at meeting at which adopted.

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

This is in reply to your letter of August 7, 1967, which reads as follows:

"Section 15.1-504 of the Code was amended in 1966 by eliminating the former provision requiring publication of an ordinance, other than license tax ordinances, after passage and providing that such ordinance shall become effective upon adoption or upon a date fixed by the Board of Supervisors. Prior to the 1966 amendment, it was my understanding that an ordinance, other than license tax ordinances, could be amended at the meeting of the Board of Supervisors at which it was adopted without further publication or notice. In view of the 1966 amendment, I would appreciate your opinion as to whether or not an ordinance, other than license tax ordinances, may now be amended at the meeting at which it is adopted without further publication of notice of intention to propose and adopt such ordinance."

I am not familiar with any opinion of this office construing the particular provision of § 15.1-504, about which you inquire, as it read prior to the 1966 amendment. Your pre-1966 "understanding" was apparently based on an opinion to you from this office dated December 2, 1957, found in Report of
the Attorney General (1957-1958), p. 194. That opinion construed provisions similar to those now in § 15.1-504. Those provisions were then found in §§ 15-8 and 15-10 of the Code.

The present language of § 15.1-504 applicable to ordinances other than license tax ordinances is similar to the language of the third paragraph of § 15-10 at the time of the opinion of December 2, 1957, to you. In my opinion, the conclusion reached on December 2, 1957, as to that language is entirely correct and is applicable to your present inquiry.

The third and fourth paragraphs of § 15.1-504 require that notice of intention to propose an ordinance for passage (other than a license tax ordinance which is provided for in the sixth paragraph) must be given prior to its adoption, in the manner specified, and there is no requirement that an ordinance, as proposed or adopted, be published before becoming effective. Therefore, as was stated in the opinion of December 2, 1957, in construing similar provisions of old § 15-10, it is my opinion that ordinances (other than license tax ordinances) adopted pursuant to the provisions of the third and fourth paragraphs of § 15.1-504 may be amended, and adopted as amended, at the same meeting of the Board of Supervisors. Thus, the answer to your question is in the affirmative.

BOARDS OF SUPERVISORS—Ordinances—Public dumps—May designate specific areas for abandoned automobiles and impose penalties for violations.

ORDINANCES—Public Dumps—Abandoned automobiles—Designation of specific areas and imposition of penalties for violations.

HONORABLE HENRY S. HATHAWAY
Commonwealth's Attorney for Richmond County

November 14, 1967

I am in receipt of your letter of November 9, 1967, in which you present the following situation and inquiries:

Richmond County, Virginia, has recently acquired a tract of land for a public dump, as provided by section 15.1-282 of the Code of Virginia, which has not been opened to the public. The Board of Supervisors feel that the indiscriminate dumping of abandoned automobiles could easily become a detriment to the operation of the dump, and have asked me whether or not they may establish rules designating specific areas for the dumping of abandoned automobiles. In fact, they feel that it would be better if dumping of abandoned automobiles were forbidden, but I do not see how that can be done as 15.1-282 provides 'a dumping place for waste materials including abandoned automobiles.'

I would like your opinion as to whether or not the Board of Supervisors may establish a rule designating specific areas in the public dump for the dumping of abandoned automobiles; and if they may, the law that provides punishment for violation of the regulation.

In response to your communication, I am forwarding to you copies of two previous opinions of this office, dated May 7, 1958, and April 8, 1966, in which the powers conferred upon boards of supervisors by §§ 15.1-504, 15.1-505, 15.1-510 and 15.1-282 (formerly §§ 15-8 and 15-707) of the Virginia Code to enact ordinances governing the establishment of dumping places or the disposal of waste materials were considered and discussed at length. See, Reports of the Attorney General (1957-1958), p. 19; (1965-1966), p. 224. As you will note from the enclosed opinions, this office has ruled (1) that a board of supervisors may adopt ordinances regulating the disposal of garbage and waste materials. (2) that such ordinances may prescribe how garbage and waste materials shall be prepared or treated before being deposited in a dumping place, and (3)
that a board of supervisors may prescribe penalties for violations of such ordinances within the limits of § 15.1-505 of the Virginia Code.

In light of the views expressed in the enclosed rulings, I am of the opinion that the Board of Supervisors of Richmond County may enact an ordinance designating specific areas of a dumping place established under § 15.1-282 of the Virginia Code for the deposit of abandoned automobiles and may impose penalties for violations of such an ordinance as prescribed in § 15.1-505 of the Virginia Code.

BOARD OF SUPERVISORS—Ordinances—Publication necessary.

ORDINANCES—Counties Generally—Publication necessary.

HONORABLE J. B. WYCKOFF
Commonwealth's Attorney for Amherst County

January 30, 1968

This is to acknowledge receipt of your letter of January 23, 1968, in which you ask whether or not publication is necessary with reference to contemplated enactment by the Amherst County Board of Supervisors of ordinances with respect to reckless driving, drunk driving and drunk and disorderly offenses.

I direct your attention to § 15.1-504, Code of Virginia (1950), as amended, which sets forth the methodology by which the above contemplated ordinances may be enacted by the Amherst County Board of Supervisors. In applicable part, that Code section reads:

"Except as otherwise authorized by law, no such ordinance shall be passed until after descriptive notice of an intention to propose the same for passage shall have been published once a week for two successive weeks prior to its passage in some newspaper published in the county, and if there be none such, in some newspaper published in an adjoining county or a nearby city and having a general circulation in the county. The publication shall include a statement that a copy of the full text of the ordinance is on file in the clerk's office of the circuit court of the county."

You will please observe that although Code § 15.1-504 apparently excuses publication of the proposed ordinance in full, it nevertheless sets forth the minimal requirement of publication of a descriptive notice of intention to propose the ordinance for enactment. While it is permissible to publish the ordinance in full, I am of the opinion that notice of the proposed ordinance in summary form is sufficient to comply with the requirement of § 15.1-504 of the Virginia Code.

BOARD OF SUPERVISORS—Ordinances Imposing License Tax on Carnivals, Etc.—Must parallel State statute.

TAXATION—Licenses—Carnivals, etc.—County ordinance must parallel State statute.

ORDINANCES—County—Requiring licenses for operation of carnivals, etc.—Must parallel State law.

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

September 29, 1967

This is in reply to your letter of September 22, 1967, which reads as follows:
"On December 17, 1948, the Board of Supervisors of Gloucester County enacted a county tax on carnivals, etc., pursuant to 153a of the Tax Code (58-283 Code of 1950). This ordinance imposes a tax upon every person, firm, company or corporation, who or which exhibits in the County of Gloucester, in the State of Virginia, performances in a side show, dog and pony (or either) show, trained animal show, carnival, circus and menagerie or any other show, exhibition or performance similar thereto.

"My questions are: 1.) May the County exempt from taxation the events hereinabove listed which are sponsored by civic, benevolent, religious or charitable groups by amending the ordinance? 2.) As the ordinance now stands, can the County exempt civic, benevolent, religious or charitable groups without amending the ordinance?"

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

Section 58-279 contains the only exemptions from the tax required by §58-283 and reads as follows:

"§ 58-279. The three preceding sections shall not be construed to prohibit a resident mechanic or artist from exhibiting any production of his own art or invention without compensation, nor shall any registration, bond or license be required of any industrial arts exhibit nor of any agricultural fair or the shows exhibited within the grounds of such fair or fairs, during the period of such fair, whether an admission be charged or not, nor of resident persons performing in a show or exhibition for charity or other benevolent purposes, nor of exhibitions of volunteer fire companies, whether an admission be charged or not. Whenever such show, exhibition or performance is given, whether exempted by the terms hereof or licensed, those engaged therein and operating under either such license or exemption, shall be exempt from a license tax for performing or acting thereat."

This section is qualified by § 58-280, which reads:

"§ 58-280. The provisions of the preceding section shall not be construed to allow without payment of the tax imposed by law a performance for charitable or benevolent purposes by a company, association or persons, or a corporation, who make it their business to give exhibitions, no matter what terms of contract may be entered into or under what auspices such exhibition is given by such company, association or persons, or corporation, for benevolent or charitable purposes, it being the intent and meaning of this article that every company, association or persons, or corporation, which makes its business that of giving exhibitions for compensation, whether a part of the proceeds are for charitable or benevolent purposes or not, shall pay the license tax prescribed by law; nor shall the provisions of the preceding section be construed to allow, without the payment of the State and local taxes imposed by law, exhibition or performances by a company, association, persons or a corporation, other than a bona fide local association or corporation organized for the principal purpose of holding and which holds legitimate agricultural exhibitions or industrial arts exhibits, who make it their business to give such exhibitions or performances, when they rent or lease fair or exhibition grounds or buildings for the purpose of giving such exhibitions or performances and exhibit therein agricultural or industrial arts products as a part of the exhibition offered."

Neither of these sections exempt from taxation the exhibition or performance in a side show, dog and pony (or either) show, trained animal show, carnival, circus, menagerie and circus or any other show, exhibition or performance
similar thereto, because it is sponsored by civic, benevolent, religious or charitable groups.

The legislature having classified this subject for taxation, including the exemptions thereto, the county is bound to follow the State, if it desires to require a license for this particular business. See, Hill v. City of Richmond, 181 Va. 744, 754.

Moreover, exemptions under statutes providing for taxes are generally given strict construction against the person seeking to qualify under the exemptions. Since the exemptions contained in §§ 58-279 and 58-280 do not include those events herein listed because they are sponsored by civic, benevolent, religious or charitable groups, I do not believe the ordinance can be amended so as to exclude these events.

BOARDS OF SUPERVISORS—Ordinances Imposing License Tax on Slot Machine Operator—Must conform to definition in enabling act.

TAXATION—Licenses—County ordinance must conform to enabling act of State.

ORDINANCES—County—License tax on slot machine operators—Must conform to State enabling act.

September 29, 1967

HONORABLE HERBERT T. WILLIAMS, III
Commonwealth's Attorney for Dinwiddie County

This is in reply to your letter of September 18, 1967, which reads as follows:

“The question has been raised in our County concerning the interpretation of Section 58-359 of the Code of Virginia and a certain ordinance providing for County license for slot machines, copy of which is enclosed herewith. Specifically, the problem relates to interpretation of the phrase "*** a coin machine operator ***", the last phrase in the first sentence of Section 58-359, and the words "*** operating anywhere in the County of Dinwiddie a slot machine ***" contained in the first sentence of the County ordinance and elsewhere in the ordinance (see paragraph 2 of the said ordinance).

"It has been the policy in this county to interpret the term operator ($1,000 license requirement State and $500 license requirement County) as being one in the business of selling, leasing, renting, etc. subject machine to various merchants and businessmen for commercial use in their establishments. Such merchants and businessmen would only pay a per machine tax of $25.75 and would not pay operators license tax. State and County. However, there are some such merchants and businessmen who own their own machines, which machines would be subject to the operators license tax (State and County) under a literal interpretation. This category does not pay such operators license tax. Thus the problem.

"I would appreciate your giving us interpretation of said ordinances as they apply to our situation here in the County and specifically as to whether there is a distinction between the businessman or merchant who owns his own machine and a man who is in the business of selling, leasing, renting, etc. machines to other persons for purposes of placing them in various locations and/or businesses."

Examination of the copy of the ordinance furnished, dated February 5, 1937, shows that it purports to derive its authority from Chapter 398, Acts of Assembly of Virginia (1936), page 744 (presently § 58-359 Code of Virginia). There is no authority in this chapter or section to define operator of a slot machine to include "any person, firm or corporation operating anywhere in the
REPORT OF THE ATTORNEY GENERAL

County a slot machine." The language in this section defines an operator as "Every person, firm or corporation selling, leasing, renting or otherwise furnishing a coin-operated machine or device operated on the coin-in-the-slot principle, or placing such machine or device with others shall be deemed to be a coin machine operator."

I find no authority under which a county adopting such an ordinance may prescribe definitions different from those contained in the enabling act. In my opinion, therefore, the ordinance should be amended to reflect the statutory definition in § 58-359 and any other appropriate changes consistent with it.

BOARDS OF SUPERVISORS—Referendum—Cannot be rescinded after filing with court.

PUBLIC OFFICERS—Compatibility—Member of town council may not be interested in contract with the town.

TOWNS—Purchases and Sales of Equipment—Advertising for bids not required except where town has a purchasing agent.

June 12, 1968

HONORABLE RUFUS V. MCCOY, SR.
Member, House of Delegates

This is in reply to your June 7, 1968, letter in which you ask my opinion on the following:

"No 1. Can the Board of supervisors enter an order on May 6 with the Clerk of the Circuit court ordering that the question be put on the Nov. ballot this fall giving the voters the chance to vote on whether to adopt the County Board Form of Government, then on May 25 rescind the order?

"No. 2. According to the town charter of Clintwood Va. and the laws of the State of Va., is it legal for the town of Clintwood to make purchases from business owned by it's counsel members?

"No. 3. Can the town of Clintwood buy or sell equipment without advertising for competitive bids?"

In answer to your first question, I am enclosing a copy of a previous opinion given by this office on April 29, 1966, to the Honorable Russell W. Yowell, Judge, Madison County Court, in which the inquiry you present was considered and discussed at length and answered in the negative. This opinion is contained in the Report of the Attorney General (1966-1967), p. 42.

Your second question is similarly answered in the negative in a previous opinion given by this office on September 22, 1960, to the Honorable Bernard Mahon, Commonwealth's Attorney for Caroline County. This opinion, which considers and discusses this question, is contained in the Report of the Attorney General (1960-1961), p. 327. I am enclosing a copy of it. There is no provision in the Clintwood Town Charter, Acts of Assembly (1946) Chapter 16, which would have any effect on this opinion. For your information, § 15-508, as referred to in this opinion, may now be found in § 15.1-73, Code of Virginia.

In considering your final question, I have reviewed the provisions of § 15.1-108 of the Code which requires competitive bidding for the purchase or sale of county equipment in those counties having purchasing agents. This office has previously ruled, Report of the Attorney General (1951-1952), p. 17, that if there is no purchasing agent this section is not applicable. From my examination of the statutes, I can find no requirement that towns, in the purchase or sale of equipment, solicit competitive bids. In the absence of such a requirement, I do not think it is necessary for the town to call for competitive bids.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Russell County—No authority to supplement salaries of deputy clerks.

CLERKS—Deputies—Salaries—No authority for Russell County to supplement.

HONORABLE GEORGE W. COZZOLINO, Clerk
Circuit Court of Russell County

December 14, 1967

I am in receipt of your letter of December 4, 1967, in which you present the following situation and inquiry:

"On October 24, 1966, I submitted to the State Compensation Board of Virginia C. B. Form 14, requesting an increase of three hundred ($300.00) dollars per year of the salaries of each of my three deputies, William J. Dorton, Jr., Patty A. Puckett, and Peggy Blevins. By letter dated December 15, 1966, from G. Edmond Massie, Chairman of the Compensation Board, I received approval for said salary increase for my deputies to become effective Jan. 1, 1967.

"As of this date it is apparent that I will not collect sufficient fees from the business of the Clerk's Office to pay my deputies the total amount of salary due them.

"My question is, would it be legal for the Board of Supervisors to supplement the salary of the deputies in my office from funds derived from the general county levy?"

In this connection, I have been unable to discover any provision of Virginia law which authorizes the Board of Supervisors of Russell County to supplement the salaries of the deputy clerks under the circumstances set forth in your communication. Although express provision is made by §§ 14.1-166 and 14.1-167 of the Virginia Code for the governing bodies of certain counties having prescribed populations to contribute funds derived from the general county levy toward the salary or compensation of the deputy clerks of the circuit courts of such counties, it does not appear that Russell County falls within any of the classifications therein specified. In the absence of any provision of law conferring similar authority upon the governing body of Russell County, I am of the opinion that your inquiry should be answered in the negative.

BOARDS OF SUPERVISORS—Sale of County Property—Unanimous vote of members required.

BOARDS OF SUPERVISORS—Member—May vote upon question of sale of land of county to bank of which he is a director.

HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth's Attorney for the County of Essex

March 1, 1968

I am in receipt of your letter of February 26, 1968, in which you present the following situation and inquiry:

"A local bank has recently requested the Board of Supervisors of Essex County to sell to it a certain parcel of land adjacent to our Court House property. The matter has been considered but has not yet been voted on by the supervisors.

"One member of our Board of Supervisors is also a director of the bank which desires to make the purchase. I have been requested to determine whether there would be any impropriety if the supervisor to whom I refer were to vote on this issue because of a possible conflict of interest."
"Of course, § 15.1-656 of the Code of Virginia requires the unanimous consent of all members of the Board in the event of sale of any county property. This statute also requires the approval of the Circuit Court in such cases. I can find nothing which indicates that the supervisor to whom I refer would be acting inappropriately in voting on this matter."

In this connection, § 15.1-656 of the Virginia Code is directly applicable by its terms only to counties which have adopted the County Manager Form of Government. See, Report of the Attorney General (1966-1967), p. 260. However, the statute in question would appear to be made applicable to the situation you present by the reference to it in § 15.1-69 of the Virginia Code, which provides,

"The provisions of § 15.1-67 shall not be construed to apply to real estate purchased from or sold to the county in the manner prescribed by § 15.1-656."

As you are aware, § 15.1-67 is the general statute forbidding county supervisors and other county officials from becoming interested, directly or indirectly, in any contract with the county. I am of the opinion that § 15.1-69 creates an exception to the prohibitions of § 15.1-67 in instances involving the sale or purchase of real estate by a county, if such sale or purchase is effected in the manner prescribed by § 15.1-656 of the Virginia Code. This office has previously ruled that real estate transactions involving members of a county board of supervisors and other county officials may validly be consummated if the procedure set out in the concluding paragraph of § 15.1-656 is followed. See, Report of the Attorney General (1964-1965), p. 29; (1965-1966), p. 258. Since one of the conditions precedent to the making of a valid purchase or sale of real estate in the manner prescribed by § 15.1-656 is the approval, in advance, of such purchase or sale, and the terms thereof "by unanimous vote" of all members of the governing body of the county, the names of the members so approving to be spread on the minutes of the governing body," I am of the opinion that the supervisor concerning whom you inquire may properly vote on the issue in question.

I am not unaware of the language of § 15.1-71 of the Virginia Code which states that it shall not be lawful for any supervisor of any county to be "personally or pecuniarily interested, either directly or indirectly, in any sale, exchange or purchase of corporate property under the provisions of § 15.1-262." However, I do not believe that the transaction here under consideration would be effected under the provisions of § 15.1-262, which requires only a majority vote of the board of supervisors to authorize a sale, but would be made in accordance with the provisions of § 15.1-656 of the Virginia Code which, as previously pointed out, requires a unanimous vote of all members of the governing body of the county.
"The Board of Supervisors of Prince William County, by resolution, signified their intention to create a water authority with the right and privilege to perform any of the utility functions permitted under Chapter 28 of Title 15.1. Sections 1242 and 1243 of Title 15.1 were complied with and the matter came on to be heard at public hearing on Thursday, September 28, 1967. At the public hearing, written petitions signed by what is in excess of ten percent of the qualified voters of a sanitary district lying within Prince William County were filed with the governing body calling for a referendum. The Board, by unanimous vote, deferred action upon the resolution and petition for two weeks. The question has now been asked, and a request for an opinion from the office of the Attorney General of Virginia has been made, as to whether the Board of Supervisors can vote down the resolution to create the authority or, in view of the petition, do they have, in effect, a mandate from the people to submit the matter to referendum regardless of what the Board's wishes may be?"

As you recognize in your letter, the answer to your first question is found in the last sentence of §15.1-1244 of the Code. In my opinion, the provisions of that sentence are mandatory. If the petition mentioned in that sentence is filed at the public hearing, then the referendum must be ordered by the Board of Supervisors. It is to be noted that the results of the referendum provided for by §15.1-1244 are not binding upon the Board, but are advisory only. See, Report of the Attorney General (1965-1966), p. 311, a copy of which is enclosed.

BOND ISSUES—County—Referendum—Form of notice.

BOARDS OF SUPERVISORS—Bond Referendum—Type of notice required by §15.1-187.

June 6, 1968

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

This is in reply to your letter of June 4, 1968, from which I quote the following:

"Recently a bond issue referendum was conducted in Stafford County pursuant to a resolution of the Board of Supervisors and proper court order.

"In preparation and advertisement of the bond issue, the Stafford County Board of Supervisors ran several ads in the local newspaper, distributed a flyer, and on election day distributed sample ballots that were not marked. A question has arisen with respect to the authority of the County to pay for these advertisements, and I would appreciate your answering the following question:

"Can the county legally appropriate funds from the county general fund for an advertisement, flyers, and sample ballots such as the ones enclosed, for the education of the public with respect to the bond issue referendum?"

The law regarding bond issues by counties is found in Article 3, Chapter 5, Title 15.1 of the Code of Virginia, which requires a resolution of the board of supervisors, proper court order of the judge of the circuit court and a referendum to determine whether such bonds shall be issued.

The adoption of the resolution by the board of supervisors is the initial step in this procedure and is, in itself, indicative of a determination by such board that it is advisable to contract a debt and issue general obligation bonds
of the county to finance the given project. This may be carried out only upon the approval of a majority of the qualified voters voting in an election held for the purpose according to law.

In this connection, it is a requirement of § 15.1-187 that notice of the election in the form prescribed by the judge of the circuit court shall be published in a newspaper of general circulation in the county, at least ten days before the election. I find no law authorizing a board of supervisors to publish any other type notice or to publish advertisements of a persuasive nature such as those supplied with your letter. Accordingly, I shall answer your question in the negative.

BOND ISSUES—Referendum—School Bonds—Persons qualified to vote.

SCHOOLS—School Bonds—Referendum—Persons qualified to vote.

ELECTIONS—School Bond Referendum—Persons qualified to vote.

June 7, 1968

HONORABLE WALLACE G. DICKSON
Member, House of Delegates

I am in receipt of your letter of May 27, 1968, in which you state that a "special election for school bonds" will be held in Arlington County on June 11, 1968, that date being the second Tuesday in June of this year. You request my opinion upon the following question:

"Can those voters, qualified to vote at the regular election to be held on the Tuesday after the first Monday in November of this year, vote in a special election (bond referendum) held on or after the second Tuesday in June of this year, as provided for in Section 24-22 of the Code of Virginia (1950), if they will have resided in Virginia for one year by the time of the November election but for less than one year by the time of the June 11 bond referendum?"

Pertinent to the resolution of your inquiry is § 24-22 of the Virginia Code which, in pertinent part, prescribes:

"The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at general election, but at any such special election, held before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held, and at any such special election, held on or after the second Tuesday in June in any year, any person shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the first Monday in November of that year." (Italics supplied.)

In this connection, I am forwarding to you a copy of a previous opinion of this office, dated May 21, 1956, to the Honorable Robert D. Stoner, Clerk of the Circuit Court of Boutetourt County, in which a situation substantially identical to that which you present was considered and discussed at length. See, Report of the Attorney General (1955-1956), p. 74. On that occasion, as you will note, we ruled that:

"... those persons who, will be qualified to vote in the November
REPORT OF THE ATTORNEY GENERAL

6th election, 1956, will be qualified to vote in the bond issue election to be held on June 12th." (Italics supplied.)

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


May 13, 1968

HONORABLE DONALD G. PENDLETON
Member, House of Delegates

I am in receipt of your letter of May 7, 1968, in which you present the following inquiry:

"I would appreciate an opinion from you in reference to the bond referendum which was recently passed by the 1968 General Assembly. It is my understanding that this law is authorized under Section 184-A of the Virginia Constitution.

"What concerns me in reference to the bond referendum is whether Section 187 of the Virginia Constitution modifies Section 184 in that a sinking fund would need to be set up prior to the issuance of the bonds.

"The specific question that I ask is, 'If the referendum is approved, would it be necessary to comply with the constitution to have a sinking fund established as outlined in Section 187 of the Constitution,' since apparently we did not at the '68 session set up any type of sinking fund. The question in the alternative is, 'Can these bonds be issued prior to the setting up of the sinking fund as set forth under Section 187?'"

The legislation to which you refer is contained in Chapters 16 and 17 of the Acts of Assembly of 1968, which enactments are denominated respectively as the State of Virginia Mental Hospitals and Institutions Bond Act of 1968 and the State of Virginia Higher Educational Institutions Bond Act of 1968. With respect to your inquiry, I call your attention to § 10 of each of these enactments, which section provides:

"The full faith, credit and taxing power of the State of Virginia are hereby pledged for the payment of the principal of and the interest on the bonds and notes herein authorized.

"In order to insure the payment of the interest on and the principal of said bonds, there is hereby created a sinking fund for such purpose to which there shall be deposited annually, out of any available moneys in the general fund of the State treasury, a sum sufficient to pay the interest on and the principal of said bonds becoming due in each year. In the event that any series of said bonds shall all become due in one year, there shall be deposited annually to such sinking fund, in addition to the amount necessary to pay interest on such bonds, a sum sufficient for redeeming or paying all such bonds by their stated maturity, the amounts of such annual deposits to be determined by the Treasury Board, by and with the consent of the Governor, prior to the issuance of such bonds.

"The moneys in such sinking fund shall be invested by the Treasury Board in accordance with the provisions of general law relating to the
investment of sinking funds belonging to or within the control of the State."

I am of the opinion that the above-quoted provisions of each of the statutes in question fully comply with the requirements of Section 187 of the Virginia Constitution.

CEMETERIES—Establishment—Prohibited distances from residences.

ORDINANCES—Cemetery—Must embody statutory requirements as to distance from residences.

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

July 13, 1967

This is in reply to your letter of June 27, 1967, which I quote as follows:

"The Board of Supervisors of Gloucester County, Virginia, has considered an ordinance whereby certain private individuals are 'authorized to establish a cemetery on any portion or all' of two tracts or parcels of land in this county. The property in question is within 250 yards of one or more residences and is also within 250 feet of one or more residences separated by a state highway.

"My questions are as follows:

"1. Is it sufficient merely to authorize the establishment of such a cemetery, or should the ordinance go into more detail as to the distance requirements?

"2. If it is not necessary to recite the distance requirements in the ordinance, would the ordinance still be valid if it recited all of the prohibitions and restrictions of § 57-26 of the Code of Virginia?

"3. In the event a cemetery is established closer than the prescribed distance, what would be the recourse against the cemetery owners respectively in behalf of the County, the Commonwealth, and the owners of the affected residences?"

The restrictions as to the location of cemeteries are contained in paragraph (1) of § 57-26 of the Code, which, apropos to the questions under consideration, states that no cemetery shall be hereafter established within a county unless authorized by appropriate ordinance subject to any zoning ordinance duly adopted by the governing body of such county. The same paragraph proceeds to enumerate the restrictions, including those establishing the minimum distance a cemetery may be located from a residence under the conditions therein set forth.

Construing this section under the factual situation outlined, in response to question numbered 1, I am of the opinion that the ordinance should state the statutory requirements as to distance. Otherwise, the language "authorized to establish a cemetery on any portion of or all" of the described land would be in conflict with the prohibitions contained in the statute, since a portion of such land is located within two hundred fifty yards of one or more residences and within two hundred fifty feet of one or more residences separated by a State highway. In view of my answer to this question, no answer to question numbered 2 is required.

In response to your question numbered 3, I am of the opinion that, in addition to the right of injunction, the county may prosecute any violator of the prescribed distance under its own ordinance. The statute leaves enforcement under local control, as no statutory provision is made for the prosecution of a violator other than under county ordinance. An owner of a residence affected by any such violation could initiate action for obtaining a warrant..."
against a violator of the county ordinance or seek damages in a civil action as provided in paragraph (3) of this section where there is evidence of damage to such property owned.


CRIMINAL PROCEDURE—Juveniles—Fingerprint records not released to Central Criminal Records Exchange.


December 22, 1967

HONORABLE WALTER A. EVANS, Director
Division of Central Criminal Records Exchange

This is in response to your letter of December 21, 1967, which reads as follows:

"The Division of Central Criminal Records Exchange has received inquiries relating to the authority of law enforcement agencies to fingerprint and submit records for violations of offenses by juveniles as listed in 19.1-19.3 of the Code.

"I feel this question should be clarified in order that the various law enforcement agencies may be notified prior to January 1, 1968.

"It is therefore requested that you render an opinion as to whether juveniles may be fingerprinted for violations of offenses reportable to the Exchange.

"If they may be fingerprinted for such violations, does the Exchange have the authority to distribute such information to law enforcement and other agencies as listed in 19.1-19.2 (B) of the Code?"

In view of the provisions of § 16.1-176 (a), I am of the opinion that a juvenile under the age of fourteen may not be fingerprinted. Until such time as a juvenile over the age of fourteen is certified to the Grand Jury by the Juvenile Court and a warrant is served upon him, he has not been "arrested" as contemplated by § 19.1-19.3 of the Code; and he cannot be fingerprinted until after such warrant is served upon him.

Your attention, however, is directed to the provisions of § 16.1-163 of the Code which is set forth below:

"The police departments of the cities of the State, and the police departments or sheriffs of the counties, as the case may be, shall keep separate records as to violations of law committed by juveniles, and the Division of Motor Vehicles shall keep separate records as to violations of the motor vehicle law committed by juveniles, and such records shall be withheld from public inspection and shall be exhibited only to persons having a legal interest therein and with the express approval of the judge; provided, however, 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."

In view of the foregoing provision of law, I am of the opinion that although juveniles may be fingerprinted under the circumstances set forth above, such records may not be released to the Division of Central Criminal Records Exchange.
This is in reply to your letter of July 27, 1967, which reads as follows:

"It has come to my attention that the qualifications required of a candidate for election to the Norfolk City Council and those for election to the General Assembly differ in a great degree. It has also been suggested to me by responsible officers that it would be desirable to have the qualifications in both instances to be similar. Under any circumstances, unless it was requested by the Norfolk City Council, I would not initiate such changes. However, there is some question in my mind as to the constitutionality of the City Charter resulting from the difference in its requirements. It is, therefore, requested that I be advised whether or not Chapter 18-19, et seq., of the Norfolk City Charter complies with Section 63, Subsection 11, of the Constitution of Virginia."

I understand that your reference to "Chapter 18-19, et seq.," is a reference to Sections 18 through 23 of the Norfolk City charter (Acts of Assembly, 1918, pp. 42-44). There appears to be no conflict between the provisions of Section 18 and the provisions of general law. However, portions of Sections 19 through 23 are at variance with general law. Your question concerns the methods of qualifying for councilmanic elections, contained primarily in Section 19. Your question is answered by an opinion of April 20, 1950, from this office to the Honorable W. L. Prieur, Jr., Clerk of Courts for Norfolk (see, Report of the Attorney General (1949-1950), p. 46), a copy of which is enclosed. In that opinion it is stated that Sections 19 and 20 of the Norfolk City charter are not unconstitutional and that Section 63 of the Constitution is not applicable thereto. The reasons for this conclusion are clearly set forth. I concur in the opinion.

These conclusions are amply supported by the recent case of Pierce v. Dennis, 205 Va. 478 (1964). There, a section of the charter of the City of Falls Church provided that employees of the federal government were not disqualified from serving as officers of the city. This is precisely contrary to § 2-27 of the Code which prohibits federal employees from holding State or local offices. In finding the provisions of the Falls Church charter valid, the Court referred, among others, to its opinion in Fallon Florist v. City of Roanoke, 190 Va. 563. In commenting upon that opinion, the Court in Pierce stated (see 205 Va. p. 483):

"The discussion which follows makes it crystal clear that the court was holding that when an act for the organization and government of a city or town is adopted in the manner prescribed by and pursuant to the authority of § 117, its validity is unassailable upon grounds of unconstitutionality either under § 63 or § 64."

Additionally, in response to the argument that the provision of the Falls Church charter had "nothing to do with the organization and government of cities" (under Section 117), the Court stated at 205 Va. page 486, that:

"A law which determines the qualifications and capabilities of potential officeholders, which says who may serve or who may not, and which touches upon the political privilege of the election or appointment to and the holding of public office, is surely a law for the
organization and government of the jurisdiction affected thereby.”
(Italics supplied.)

Sections 63 and 64 apply only to cases not otherwise provided for. Charter provisions concerned with the organization and government of cities and towns are controlled by Section 117. In my opinion, the methods of qualification contained in § 19 of the Norfolk City charter are elements of the organization and government of cities as those terms are used in Section 117 of the Constitution. Therefore, Section 63 of the Constitution does not apply to § 19 of the charter.

CITIES--Colonial Heights--Council Meetings—Use of mechanical recording devices—May adopt rules regarding.

October 11, 1967

HONORABLE JOHN S. HANSEN
Member, House of Delegates

I am in receipt of your letter of September 25, 1967, in which you request an opinion upon the validity of a resolution (No. 67-18) of the city council of Colonial Heights forbidding the use of tape recording machines and other mechanical recording devices at agenda sessions of the council unless such use is approved by a two-thirds majority of the council members present at such sessions.

While meetings of the city council, with certain limited exceptions, are required by § 4.7 of the city charter to be public meetings, § 4.6 of the charter expressly provides that the council “shall have power” to adopt its own rules of procedure. In addition, § 2.1 of the charter provides that the city shall have and may exercise all powers which are now or may hereafter be conferred upon or delegated to cities under the laws of the Commonwealth and all other powers pertinent to the conduct of a city government. Significant in this respect is § 15.1-810 of the Code of Virginia (1950), as amended, which in part prescribes:

“The council, or each branch as the case may be, may adopt such rules . . . as it may deem proper for the regulation of its proceedings and for the convenient transactions of business. . . .”

The general rule concerning the power of city councils in this regard is well stated in 62 C.J.S. 759, Municipal Corporations: Section 400, in the following language:

“Orderly procedure requires some rules for the proper dispatch of business and deliberation in the conduct of the council or governing body of a municipal corporation. It is competent for the body to adopt its own regulations and rules of procedure when they are not prescribed by statute or charter provision, or when it is empowered to do so by statute or charter.”

I have been unable to discover any decision of the Supreme Court of Appeals of Virginia or any prior ruling of this office in which the precise question you present has been considered. Moreover, there appears to be a division of authority in those jurisdictions in which the question you pose has been adjudicated. Compare, Davidson v. Common Council of City of White Plains, 244 N.Y.S. (2d) 385, 40 Misc. (2d) 1053 (council rule forbidding use of mechanical recording devices held valid), with Nevens v. City of Chino, 44 Cal. Rptr. 50, 233 C. A. (2d) 775 (council rule forbidding use of mechanical recording devices held invalid). While I am constrained to believe that the factual situation under consideration in the Davidson case, supra, was more
closely parallel to that which you present, in the absence of a decision of the
Supreme Court of Appeals of Virginia, I am unable to furnish a dispositive
response to your inquiry. However, in light of the power expressly conferred
upon the city council by the charters and statutory provisions mentioned above,
I am of the opinion that the resolution concerning which you inquire con-
stitutes a valid exercise of the authority of the city council of Colonial Heights
to adopt its own rules of procedure, and to regulate its proceedings for the
convenient transaction of business.

CITIES—Transition to From Town—Effective when court order entered under
§ 15.1-982.

BOARDS OF SUPERVISORS—Candidate For Who Resides in Town When
Town Becomes City.

TOWNS—Transition to City—Effective when court order entered under § 15.1-
982.

ELECTIONS—Candidate For Board of Supervisors Residing in Town.

HONORABLE L. C. HARRELL, JR.
Member, House of Delegates

Your letter of July 17, 1967, states that a resident of the Town of Emporia
was nominated at the recent primary for the office of Supervisor for Zion
Magisterial District, Greensville County. The Town of Emporia has passed
an ordinance petitioning the Circuit Court for an enumeration of residents
for the purpose of becoming a city of the second class, and the Court has
entered an order appointing the enumerators. You inquire as to the status
of this candidate when and if the Town of Emporia becomes a city.

Section 15.1-982 of the Code of Virginia provides that if it shall appear
from the enumeration that such incorporated community has a population of
five thousand or more, an order shall be entered declaring that fact to exist
"and thereafter such incorporated community shall be known as a city." The
town becomes a city immediately upon the entry of the order.

Section 15.1-995 of the Code is, in part, as follows:

"Any county officer . . . of any county who resides in the county
or in any town therein, and has an established home therein, which
homesite has become or hereafter becomes a part of a city since such
officer's election or appointment, shall not vacate his office by
reason of his residence in such city, but shall continue to hold such office so
long as he shall be successively elected or appointed to the office held
by him at the time of such transition." (Italics supplied)

I assume that the candidate referred to by you meets all of the requirements
of § 15.1-995 of the Code as to residence and an established home within the
Town of Emporia. Nomination at the recent primary is not an election. The
candidate will not be elected until the November election and will not actually
take office until January 1. If the order of the Court required by § 15.1-982 of
the Code making the Town of Emporia a city is entered prior to the election in
November, this individual would not be a resident of the Magisterial District
at the time of his election and would not be eligible to serve. See, § 15.1-51 of
the Code. If, however, the order was not entered until after the election and
this individual was elected, then he would, under § 15.1-995 of the Code, be
eligible to serve.

If Emporia becomes a city prior to the election in November, the residents
of the city would not be entitled to vote for the members of the Board of
Supervisors for Greensville County. A supervisor is not covered by § 15.1-994 of the Code.

CITIES—Transition to From Town—Effective when court order entered under § 15.1-982.

BOARDS OF SUPERVISORS—Members—Serving when town becomes city.

TOWNS—Transition to City—Effective when court order entered under § 15.1-982.

HONORABLE L. C. HARRELL, JR.
Member, House of Delegates

Your letter of July 17, 1967, states that the member of the Board of Supervisors for Hicksford Magisterial District, Greensville County, resides within the Town of Emporia; that this individual was nominated at the recent primary to succeed himself; and, further, that the Town of Emporia has passed an ordinance petitioning the Court to appoint enumerators for the purpose of becoming a city of the second class and the order appointing such enumerators has been entered. You inquire as to the position of this supervisor if he should be reelected and if the voters of Emporia would be entitled to vote in the election for supervisor.

Under § 15.1-982 of the Code, the Town of Emporia would become a city immediately upon the entry of a court order declaring that it has a population of five thousand or more.

However, this present member of the Board of Supervisors would, under § 15.1-995, be entitled to continue to hold office so long as he shall be successfully elected to the office held by him at the time of such transition. This is true whether the order referred to above is entered prior to or subsequent to the November election.

However, if the order making Emporia a city is entered prior to the election in November, the residents of the city cannot vote in the election for members of the Board of Supervisors of Greensville County. A supervisor is not covered by § 15.1-994 of the Code.

CITIES AND TOWNS—Bonded Indebtedness—Limited by Section 127 of Virginia Constitution.

COUNTIES—Bonded Indebtedness—Not limited by Section 127 of Virginia Constitution.

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

This is in reply to your letter of January 13, 1968, in which you request my opinion on the following questions:

1. Is 18% the limit of county debt?
2. If so, are school bonds included in the 18% limit of county debt?
3. Is the assessed value of real estate, including that of public utilities, the basis for county bond issues?

The constitutional limitation upon the bonded indebtedness of cities and towns is eighteen per centum of the assessed valuation of the taxable real estate
in such cities and towns, respectively. (Section 127 of the Constitution of Virginia.) There is no similar constitutional limitation upon the bonded indebtedness of counties and districts. Therefore, the answers to your questions are in the negative. (Section 115-a of the Constitution of Virginia.)

CIVIL PROCEDURE—Attachment Proceeding—Bond required where principal debtor fails to appear.

ATTACHMENTS—Bond Required Where Principal Debtor Fails to Appear.

April 3, 1968

HONORABLE DICK B. ROUSE
Commonwealth’s Attorney for the City of Bristol

This is in reply to your letter of March 22, 1968, in which you inquire as follows:

"'A' institutes an attachment proceeding against 'B', a non-resident, in a Municipal Court. 'C', the co-defendant, has $180.00 which is owed to 'B'. 'C' has been properly served with process in the State of Virginia. 'B' has been proceeded against by order of publication as provided in Section 16.1-105. Assuming that all preliminary procedures have been complied with, on the date of the hearing 'B', the principal defendant, has not been served with process in the State of Virginia nor has he made an appearance. In this situation, can the Judge enter an in rem judgment and turn over the attached wages to 'A' without requiring the bond as set forth in Section 8-542?"

Section 16.1-105 of the Code, to which you refer, specifies that the provisions of Chapter 24 of Title 8 of the Code are applicable to attachments brought under this section. One of these provisions is the requirement in § 8-542 that the attaching plaintiff post a bond where the principal debtor has failed to appear. I am unable to find any exception elsewhere in the Code which would render it unnecessary to follow this procedure, especially in view of the fact that §§ 8-562 and 8-563 of the Code permit the absent defendant to petition for a rehearing within up to five years of the date of judgment.

CIVIL PROCEDURE—Detinue—When defendant has option to pay or surrender the property.

June 27, 1968

HONORABLE CALVIN W. BERRY, Judge
Municipal Court, City of Danville

This is in reply to your letter of June 20, 1968, which I quote as follows:

"Assume that plaintiff files affidavit under Code § 8-586 and furnishes bond under Code § 8-587; that the sheriff finds and delivers a particular automobile to plaintiff who has possession at the time of trial. How is Code § 16.1-98 applied to this situation? When is the defendant 'not given the option under Code § 8-593 to pay or surrender the property?'"

Section 8-586 of the Code provides that whenever in any action of detinue the plaintiff shows by affidavit that the enumerated conditions exist, the clerk or trial justice before whom the action is pending shall order the property seized and delivered to the plaintiff. Section 8-587 requires that plaintiff give
bond, as therein prescribed, payable to the defendant as a prerequisite to the issuance of the order authorized by § 8-586.

The applicable portion of § 16.1-98 of the Code of Virginia is as follows:

"When the judgment is for personal property and the defendant is not given the option under § 8-593 to pay the amount of the judgment or surrender the property, the plaintiff may, at his option, have a writ of possession for the specific property and a writ of fieri facias for the damages or profits and costs, and if the writ of possession prove ineffectual he may have a writ of fieri facias for the alternate value."

In regard to your first question, under § 16.1-98, when the judgment is for personal property and defendant is not given the option under § 8-593 to pay the amount of the judgment or surrender the property, the plaintiff may at his option have a writ of possession for the specific property and a writ of fieri facias for damages or profits and costs. If the writ of possession prove ineffectual, the plaintiff may have a writ of fieri facias for the alternate value of the property. In any instance in which the defendant is given the option under § 8-593 to either (1) pay the amount of the judgment or (2) surrender the property, the quoted clause in § 16.1-98 does not come into operation.

Secondly, you inquire, "When is the defendant not given the option under § 8-593 to pay or surrender the property?" The answer is found in the following language, which I quote from § 8-593:

"... and when in any such action or warrant the plaintiff shall prevail under a contract which, regardless of its form or express terms, was in fact made to secure the payment of money to the plaintiff or his assignor, judgment shall be for the recovery of the amount due the plaintiff thereunder, or else the specific property, and costs, and the defendant shall have the election of paying the amount of such judgment or surrendering the specific property."

This gives the defendant the option of paying the amount of the judgment or surrendering the specific property only when the plaintiff prevails in the final judgment on a contract made to secure the payment of money to the plaintiff or his assignor. The statute gives defendant such option under no other conditions.


WITNESSES—Material—Justice of peace may not issue warrant for arrest.

JUSTICE OF PEACE—Warrant—May not issue for arrest of material witness.

HONORABLE ANDRE EVANS
Commonwealth's Attorney for the City of Virginia Beach

March 26, 1968

This is in response to your letter of March 8, 1968, which reads in part as follows:

"A question has arisen and I would like your advice. I understand that for a number of years the local police have been obtaining what amounts to a warrant for the arrest of a material witness."

"I will appreciate your advising whether there is any such authority and how such matters should be handled when it appears that the witness is material and is about to leave the State."
I do not find any specific statutory authority for the issuance of a warrant for the arrest of a material witness.

I would call your attention, however, to the provisions of § 19.1-106, which permits the justice of the peace to recognize material witnesses and require recognizance with or without sureties, as he deems proper. The justice of the peace is, of course, authorized to cause summonses to be issued for witnesses pursuant to the provisions of § 19.1-91 of the Code.

In accordance with the provisions of § 19.1-128, the condition of the recognizance shall be that he appear to give evidence in connection with the case. Should he fail to appear before the justice of the peace after having been recognized, the justice of the peace certifies the matter to the circuit or corporation court in accordance with the provisions of § 19.1-138 of the Code. Should he fail to appear before a court, the procedure to be followed is governed by the provisions of § 19.1-137. Should the witness fail to appear before a court, of course, a capias would issue pursuant to the provisions of § 19.1-144, or his surety could surrender him. In addition, for failing to appear, the witness could be punished for contempt in accordance with the provisions of § 18.1-292.

CLERKS—County—Compensation which may be received.

HONORABLE N. G. HUTCHESON
Clerk of Mecklenburg County

June 18, 1968

This is in answer to your June 15, 1968, letter which I quote:

"Section 14.1-164 of the Acts of the Assembly, 1968 providing for allowance for county clerks: The clerk of Mecklenburg County may be allowed from $1,200.00 to $1,800.00.

"Section 15.1-533 of the Acts of 1968 provides that clerks may be compensated as clerk of the Board of Supervisors a sum not exceeding $2,500.00. Such salary shall be in lieu and in satisfaction of any salary allowed under 33-160.

"Do you interpret these statutes to mean that clerks receive compensation under both of these statutes?"

Section 14.1-164, Code of Virginia, as amended by the Acts of Assembly (1968), Chapter 233, p. 367, provides for a range of annual allowances to be paid the county clerk from which the governing body of a county shall select.

In the case of Mecklenburg County, as you have stated, this range is $1200.00-$1800.00.

Where the county clerk serves as ex officio clerk of the board of supervisors, the newly amended § 15.1-533 (Acts of Assembly (1968), Chapter 328) permits the clerk to receive for these services a maximum of $2500.00. Chapter 328 of the 1968 Acts also provides that any salary he receives as clerk of the board of supervisors shall not be considered in computing his total annual compensation permitted under §§ 14.1-136 and 14.1-143.

In my opinion, county clerks may receive compensation under both §§ 14.1-164 and 15.1-533, as amended by the 1968 General Assembly.
HONORABLE JOHN H. MATTHEWS, Clerk
Circuit Court of Henry County

This is in reply to your letter of August 2, 1967, in which you refer to several suits brought by the Henry County Public Service Authority to obtain perpetual easements for a sewage project now under construction and inquire as to the proper amount of filing fee to be assessed in these suits.

The amount of the clerk's fee in any chancery case is established by § 14.1-113 of the Code, the applicable language of which is as follows:

"In all chancery causes the clerk's fee chargeable to the plaintiff shall be twenty dollars to be paid by the plaintiff at the time of instituting the suit, which shall include the furnishing of a duly certified copy of the final decree."

This statute further provides that the provisions of this section shall control the fees charged by clerks of courts of record notwithstanding any other provision of law to the contrary. I am of the opinion, therefore, that the prescribed fee for filing each of the named suits is twenty dollars. The correct fee for recording a deed or other writing is controlled by § 14.1-112 of the Code.

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HONORABLE MARGARET B. BROWN, Clerk
Circuit Court of Culpeper County

This is in reply to your letter of April 1, 1968, which reads as follows:

"Mr. J. L. Fray has filed nine (9) Petitions for Relief from Erroneous Assessment and says no fee is required.

"I do not find in the Code anything about a fee, but our clerk's fee book says a $5.00 fee is required for each one, and I do not want the auditor to charge me up with $45.00, if I should have charged and did not.

"I am enclosing a copy of one of these petitions, and will appreciate your advice. Also, I am handling this as a law case. Am I correct?"

I am of the opinion that the petitions for relief from erroneous assessment should be classified as actions at law and that the proper clerk's fee, under the provisions of § 14.1-112(23), to be charged for the filing of each is five dollars.
HONORABLE DOUGLAS B. FUGATE, Commissioner
Department of Highways

This is in reply to your letter of May 8, 1968, in which you request my opinion as to whether it is proper for clerks of courts not of record and for clerks of record to charge filing fees in civil cases instituted by the Department of Highways on behalf of the Commonwealth.

Section 14.1-87, Code of Virginia (1950), as amended, provides:

"No clerk, sheriff, sergeant or other officer shall receive payment out of the State treasury for any services rendered in cases of the Commonwealth, except when it is allowed by statute."

Sections 14.1-125 and 14.1-112 set forth the fees for commencing litigation that may be charged by a clerk of a court not of record and a clerk of a court of record. These sections are general legislation and no express mention is made of cases involving the Commonwealth.

My predecessors were of the opinion that in tax cases on behalf of the Commonwealth, § 14.1-87 prohibits payment of any fees to the clerk or sheriff. See, Reports of the Attorney General (1953-1954), p. 113; (1957-1958), p. 80; (1959-1960), p. 340. In the last of the above cited opinions the view is expressed that the provisions of § 14.1-125 (then § 14-133) did not constitute an exception within the last clause of § 14.1-87 (then § 14-98) of the Virginia Code, and this position was subsequently reaffirmed in an opinion to the Honorable J. H. Johnson, Treasurer of the City of Roanoke, contained in the Report of the Attorney General (1960-1961), p. 293. Moreover, I have ruled that § 14.1-87 prohibits payment of a clerk's or sheriff's fee where a case is brought under § 46.1-351. See, Report of the Attorney General (1964-1965), p. 234.

Inasmuch as neither § 14.1-125 nor § 14.1-112 provides specifically for the payment of fees in civil cases involving the Commonwealth, I am of the opinion that no such fee is allowable.

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

This is to acknowledge receipt of your letter of January 13, 1968, in which you state:

"I have had recently a number of distress warrants returned to this office. Section 55-237 requires me to receive the warrant, enter the same upon the execution book, and file it. If there is no levy made, I file the warrant, if a levy is made and the property remains unsold, I am to issue a writ of venditioni exponas thereon.

"The question I ask is this. What is the fee payable to the clerk
REPORT OF THE ATTORNEY GENERAL

for the above? Would the clerk be due the fee mentioned in Section 19.1-337?"

Initially, I am of the opinion that § 19.1-337 of the Code would not apply because that section has to do with clerk's fees in connection with serving executions or other proper processes for fines and costs.

The writ of venditioni exponas is an order of sale under the levy of the original execution (fieri facias), and is frequently referred to as a writ of execution. Since § 55-237 of the Code of Virginia (1950) directs the clerk to issue the writ "just as if the return were upon a writ of fieri facias," I am constrained to believe that the writ in question should be treated in the same manner as a writ of fieri facias, insofar as the fees charged by the clerk are concerned. Section 14.1-112 of the Code, as amended, provides that for issuing any execution and recording the return thereof, the clerk of a court of record shall charge a fee of $1.50.

I am therefore of the opinion that you should charge a fee of $1.50 for services in issuing a writ of venditioni exponas in accordance with the provisions of § 14.1-112(8) of the Code, as amended.

CLERKS—Filing of Cross-claim—Writ tax chargeable; no clerk's fees.

CIVIL PROCEDURE—Cross-claims—Writ tax chargeable.

TAXATION—Writ Tax—Chargeable upon filing of cross-claim.

February 28, 1968

HONORABLE GILES W. GOODYKOONTZ, Clerk
Circuit Court of the City of Radford
HONORABLE JOHN H. POWELL, Clerk
Circuit Court of Nansemond County

I am in receipt of your letters of February 8, 1968, and February 13, 1968, in which you make reference to an opinion of this office dated January 25, 1968, which was rendered to the Honorable Samuel W. Swanson, Clerk of the Circuit Court of Pittsylvania County, in response to his inquiry concerning the charges for filing a cross-claim in actions at law. In our opinion to Mr. Swanson, we called attention to the provisions of Rules 3:9 and 3:3 of the Rules of the Supreme Court of Virginia and expressed the view that the usual writ tax and clerk's fees should be paid in such instances.

In this connection, Rule 3:9 provides that a cross-claim is a new action and that all provisions of the Rules applicable to notices of motion for judgment shall apply to cross-claims. The writ tax and clerk's fees required to be paid before a notice of motion for judgment is issued are specifically stated by Rule 3:3 to be the "statutory" writ tax and clerk's fees, and I am of the opinion that it is the design of Rule 3:3 to make payable, in the instance of cross-claims at law, such writ tax and clerk's fees as are prescribed by §§ 58-71 and 14.1-112, respectively, of the Virginia Code.

As you were good enough to point out in your communications, § 14.1-112(17) of the Virginia Code—which prescribes the clerk's fees chargeable to the plaintiff in all actions at law—was amended during the 1966 regular session of the General Assembly by the addition of the following italicized language:

"In all actions at law the clerk's fee chargeable to the plaintiff shall be five dollars in cases not exceeding five hundred dollars, ten dollars in cases not exceeding five thousand dollars, fifteen dollars in cases not exceeding fifty thousand dollars, and twenty dollars in cases exceeding fifty thousand dollars, to be paid by the plaintiff at the time of instituting the action, this fee to be in lieu of any other fees; provided, however, there shall be no fee charged for the filing of a
cross-claim, counterclaim, or setoff in any pending action.” (Italics supplied.)

In light of the concluding proviso to § 14.1-112(17), it appears that no statutory clerk's fee is now prescribed for the filing of a cross-claim in a pending action, and consistent with the view herein expressed with respect to the design of Rule 3:3, I am of the opinion that no clerk's fee should be charged when a cross-claim is filed in an action at law. However, the statutory writ tax prescribed by § 58-71 of the Virginia Code must still be paid in such instances.

CLERKS—Issuance of Garnishment Summons—Not required to compute interest on judgment.

GARNISHMENT—Issuance of Summons—Clerk not required to compute interest on judgment.

INTEREST—Judgment—Clerk not required to compute on garnishment summons.

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

January 2, 1968

This will acknowledge receipt of your letter of December 18, 1967, in which you inquire whether or not it is the duty of the clerk of a court of record “to compute and add interest to judgments upon which a garnishment summons has been requested to issue.”

Pursuant to § 8-399 of the Code of Virginia (1950) it is the duty of a clerk to issue a writ of fieri facias when a judgment for money becomes final. The writ must follow in every material respect the judgment upon which it is founded. Grizzle v. Fletcher, 127 Va. 663, 665. This would include the amount of the judgment, the time from which it bears interest and the names of the parties. Burks Pleading and Practice, Fourth Edition, Section 358. As the existence of a lien created by a writ of fieri facias is the basis upon which a summons in garnishment is issued (§ 8-441 of the Code as amended) the summons must follow the writ of fieri facias in every material respect, including the time from which the judgment bears interest. Hence, in a garnishment proceeding the clerk upon issuing the summons must indicate whether the judgment bears interest and from what time. This information is sufficient to apprise the garnishee of the amount to be withheld from the wages or other monies due the judgment debtor.

An examination of the statutes, however, does not disclose that there is any specific duty on the part of the clerk to compute the interest on a judgment. I understand it is customary and proper for the plaintiff or his attorney to furnish the clerk with a memorandum indicating the interest due on the judgment at the time the suggestion is made for the summons to be issued in the garnishment proceedings.

I am, therefore, of the opinion that there is no duty under the statutes which requires the clerk of a court to compute the interest which is due on a judgment in a garnishment proceeding.
HONORABLE MARGARET B. BROWN, Clerk
Circuit Court of Culpeper County

This is in reply to your letter of April 4, 1968, in which you requested my opinion if you should allow the receipt books covering real estate transactions filed in your office to be inspected by representatives of the Culpeper Star-Exponent for the purpose of publishing information concerning prices paid for real estate in the area.

Inasmuch as the real estate records in your office are public records, I am aware of no reason why they may not be inspected by the newspaper representatives for the intended purpose.

HONORABLE EDWARD MCC. WILLIAMS
Commonwealth's Attorney for Clarke County

This is in reply to your letter of April 30, 1968, in which you inquire as follows:

"The Clerk of the Circuit Court of Clarke County has been requested to record a petition under Chapter 10 of the Bankruptcy Act for corporate reorganization, and it will be appreciated very much if you will advise whether or not this paper, when properly acknowledged, should be admitted to record in the office of the Clerk of the Circuit Court of Clarke County.

"The argument is presented to the Clerk that under the provisions of Section 17-60 of the 1950 Code of Virginia as amended, this instrument affects real estate situated in the County of Clarke and therefore should be admitted to record."

Under the provisions of § 17-59 of the Code, the clerk has a duty to record only those documents which are authorized by law to be recorded. You will note that § 17-60 of the Code likewise states that "writings relating to or affecting real estate which are authorized to be recorded" shall be recorded in the deed book.

You will note that §§ 55-141 and 55-142 of the Code provide for the recording of a decree in bankruptcy or of the order approving the bond of the trustee in bankruptcy. However, I am unable to find any provision of law which authorizes a clerk to record a petition in bankruptcy.

In view of the foregoing, I am of the opinion that there is no duty on the part of the clerk to record a petition in bankruptcy.
Clerks—Recordation—Power of attorney of surety company recorded under § 55-113—Use of seal.

Recordation—Power of Attorney—Company seal not necessary for force and effect.

Honorable Edith H. Paxton, Clerk
Circuit Court of the City of Staunton

October 20, 1967

This is in reply to your letter of October 9, 1967, in which you raise two questions relative to an enclosed Power of Attorney executed by Western Surety Company. Your questions will be quoted and considered in the order presented as follows:

"1. Would this instrument meet the requirements of Section 38.1-653 since it does not contain any description or identify in any way the specific bond to be executed?"

The Power of Attorney in question appoints the named agent "with full power and authority hereby conferred, to sign, execute, acknowledge and deliver for and on its behalf as Surety," one of the named type bonds with maximum penalty as therein indicated. In executing this power the facsimile signature of Joe Kirby, President of Western Surety Company, is used. This is attested, however, by an Assistant Secretary and acknowledged before a Notary Public for the State of South Dakota.

It is apparent that this power will be attached to any bond which it authorizes executed as by its own terms it is not valid or in effect unless so attached. On the other hand, it appears that this power is neither limited to one transaction nor to definitely stated transactions, so as to come within the exception stated in § 38.1-653. Otherwise this section requires every power of attorney from a fidelity and surety company to an agent constituting such agent an attorney in fact to execute any bond or other obligation in the name and on behalf of the company as surety to be recorded in the clerk's office of the county or corporation in which the powers delegated by it are to be exercised.

Under § 55-106 of the Code of Virginia, except where otherwise provided, the clerk of the court is required to record any writing when it shall have been acknowledged by the person whose name is signed thereto. Section 55-113 of the Code of Virginia provides that the clerk shall admit any such writing to record as to any person whose name is signed thereto, upon certificate of a notary public within the United States that such writing had been acknowledged before him by such person. Inasmuch as this Power of Attorney is so acknowledged, I am of the opinion it is a recordable instrument. A similar view was expressed in regard to recording another type instrument, though under the same statute, in an opinion found in Report of the Attorney General (1964-1965), p. 283.

"2. The company does not plan to have a seal to be impressed on the bond but want to use the type seal which I am also enclosing. Do you feel that this type seal, glued to the original bond, will be sufficient?"

Specific provision for any such situation is made in § 38.1-657 of the Code of Virginia. That section provides that any bond or obligation executed in the name and on behalf of the company or surety under the authority of such power of attorney, shall, whether the seal of the company be thereto affixed or not, have the same force and effect as if executed by the company itself through its proper officers in due and formal manner under its common seal. Accordingly, I shall answer this question in the affirmative.
CLERKS—Records—Adoption cases—Separate and exclusive file required.

ADOPTION—Records—Must be kept in separate and exclusive file.

April 24, 1968

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

This is in reply to your letter of April 18, 1968, in which you refer to § 63-359.1 of the Code of Virginia, as amended in 1968, and present the following, which I quote:

"My question now is, in view of the fact that I do not have too many adoption cases, if I buy one book with an index in the front of the book and record adoption orders in that book and keep the same in a separate file, will this substantially comply with this law as amended?"

Section 63-359.1, as amended by Chapter 35 of the Acts of Assembly of 1968, now reads as follows:

"The clerk of any court having jurisdiction in adoption cases shall, with the approval of the judge of said court entered of record, establish and maintain a separate and exclusive order book, file and index of adoption cases, none of which shall be exposed to public view but which shall be made available by such clerk to persons and attorneys having an interest in the subject matter and to welfare officials and court officials and to such other persons as the court shall direct in specific cases." (Italics added.)

I do not find in this language an intent to separate the order book, file and index, to the extent that each be in a separate book or location from the others related to adoption cases. The intent, as I interpret it, is that the order book, file and index of adoption cases be separate and exclusive from all other type cases. So long as separate and exclusive provisions are made for any order book, file and index established and maintained in adoption cases, the number of books utilized for such purpose appears immaterial. I am of the opinion, therefore, that one book could be used for indexing and recording orders in the manner which you describe and that this arrangement would comply with the statute, as amended. Any papers connected with adoption cases, of course, must be kept in a separate and exclusive file so long as they are lodged in the clerk's office.

COMMISSIONERS OF REVENUE—Land Maps—New city may use county's for reference.

COUNTIES, CITIES AND TOWNS—Land Maps—County map may be used for reference by commissioner of revenue of new city.

TAXATION—County Land Maps—New city commissioner of revenue may use for reference.

May 3, 1968

HONORABLE JOE H. RYALS
Commissioner of the Revenue City of Emporia

This is in reply to your telegram of April 25, 1968, in which you present the following inquiry:

"I respectfully solicit your opinion concerning whether the reference
REPORT OF THE ATTORNEY GENERAL

numbers for maps in the Commissioner of Revenue's office in the County of Greensville are a public record. I am preparing the maps for the new City of Emporia and need the reference numbers to locate parcels in the city."

It is my understanding that the reference numbers to which you refer are used in cross-indexing the maps in the county map room with the card files from which the land book is made up. It is also my understanding that the county map room is open to the public as a source of information as to the ownership of the parcels of land recorded there. Preparation of the maps was undertaken and financed jointly by the county and the Division of Real Estate Appraisal and Mapping of the State Department of Taxation pursuant to § 58-794 of the Code.

It is generally recognized that one entitled to access to public records may make memoranda from them subject to such reasonable restrictions as the official in charge may impose to avoid disruption of the efficiency of his office. For example, see Keller v. Stone, 96 Va. 667, 32 S.E. 454 (1899); Gleaves v. Terry, 93 Va. 491, 25 S.E. 552 (1896). This office has ruled previously that the assessment books of a commissioner of the revenue are records open to public inspection. See, Report of the Attorney General (1951-1952), p. 158. While the records which you seek would seem to be of similar classification, it is my opinion that, regardless of whether the public has a right to copy the references, your office has an interest sufficient to entitle you to access to them.

Needless to say, copies should also be furnished to the Division of Real Estate Appraisal and Mapping, State Department of Taxation, upon its request. If, of course, the references are normally part of the information composing the transcript of assessment described in § 15.1-1000 of the Code, the county would be required to furnish them to you pursuant to your application under that section.

COMMISSIONERS OF REVENUE—Preclusion From Divulging Tax Information—Does not extend to statistical data.

TAXATION—Divulging of Tax Information—Preclusion does not extend to statistical data.

HONORABLE GEORGE D. FISCHER
Commissioner of the Revenue for Arlington County

This is in reply to your letter of February 5, 1968, to which you attached a license classification report, Form CR-L5, which by Sec. 11-5 of the "Business Privilege License Ordinance" of Arlington County is required to be submitted by you to the county manager, along with a copy of the form which you have been submitting to the Planning Commission of Arlington County showing the various types of businesses in the shopping districts located in Arlington County and the total gross receipts for each type of business.

You ask to be advised if, in my opinion, the furnishing of this data by you to the county manager and the Planning Commission is prohibited by § 58-46 of the Code.

In my opinion, § 58-46 does not preclude you from issuing statistical data such as that you enclosed so long as such data does not divulge transactions,
property, income or business information about a specific person, firm or corporation.

COMMONWEALTH ATTORNEYS—Assistant—City of Waynesboro—Appointment subject to § 15.1-9.

HONORABLE CARTER R. ALLEN
Commonwealth's Attorney for the City of Waynesboro

August 21, 1967

This is in reply to your letter of August 7, 1967, which I quote, in part, as follows:

"In recent months I have considered asking the City of Waynesboro under the provisions of § 15.1-9 to authorize me to appoint my office partner as an Assistant Commonwealth's Attorney so as to relieve me of some of the court work of the lower courts. However, in examining the Code I found § 15.1-821 seems to be somewhat of a contradiction of the previously cited section, and I am a little concerned as to whether I could with the concurrence of the City Council and the Compensation Board make an appointment under the provisions of 15.1-9 for this purpose.

"Your kindness in clarifying the relationship of these two statutes would be much appreciated."

In respect to the employment of assistants to Commonwealth's attorneys, § 15.1-9 of the Code is as follows:

"Every county and city may, with the approval of the Compensation Board, provide for employing such assistant or assistants to the Commonwealth's attorney as in the opinion of the governing body may be required. Such assistant or assistants shall be appointed by the Commonwealth's attorney. The compensation for such assistants to the Commonwealth's attorneys shall be as provided for assistants to Commonwealth's attorneys under § 14.1-53."

This section authorizes the appointment of an assistant to the Commonwealth's attorney by the Commonwealth's attorney in any county or city in which the governing body, with approval of the Compensation Board, has provided for employing such an assistant. The appointment powers of the attorney for the Commonwealth, set forth in § 15.1-821, have reference to "cities having a population of more than two hundred thousand." The latter section abolishes the office of assistant attorney for the Commonwealth heretofore created and provided for in the charters of such cities, namely, cities of more than two hundred thousand population, thus, placing the appointment of such assistants under statute.

There appears no conflict between these sections when considered in this light. Since § 15.1-821 is limited to cities of a certain class, which does not include the City of Waynesboro, however, I am of the opinion that any appointment which you may make must be in accordance with the provisions of § 15.1-9, as herein quoted.
REPORT OF THE ATTORNEY GENERAL

COMMONWEALTH ATTORNEYS—City of Salem—No authority for appointment.

CLERKS—Fees—May charge for making copies of papers or records under § 14.1-112(10).

January 18, 1968

HONORABLE JOHN W. HAGEN
Member, House of Delegates

This is in reply to your letter of January 6, 1968.

You indicate that the new City of Salem became a city of the second class on December 31, 1967, and a city of the first class on January 1, 1968. You further indicate that on January 4, 1968, by order of court, the Judge of the Circuit Court of Roanoke County appointed an Attorney for the Commonwealth for the City of Salem. It is my understanding that no charter has been enacted for the City of Salem and that it has no corporation court or separate circuit court. You ask whether the appointment of the Commonwealth's Attorney in this instance is authorized by law.

The answer is in the negative. I am unable to find any provision of law authorizing the appointment of a Commonwealth's Attorney for the City of Salem in the circumstances which you describe.

You also ask whether the Clerk of the Circuit Court of Roanoke County should charge officials of the new City of Salem for "copies of material" requested by them from the clerk's office. I assume your reference is to § 14.1-112(10) of the Code of Virginia. I know of no provision of law exempting the new City of Salem from payment of fees for copies made available in accordance with that section.

COMMONWEALTH ATTORNEYS—Duties—Not required by law to represent local departments of health or welfare.

February 19, 1968

HONORABLE ANDRE EVANS
Commonwealth's Attorney for the City of Virginia Beach

This will reply to your letter of February 15, 1968, in which you inquire whether or not it is your responsibility as Commonwealth's Attorney for the City of Virginia Beach to represent the Department of Public Health or the Department of Public Welfare for the City of Virginia Beach.

I have been unable to discover any provision of Virginia law which imposes upon you, as Commonwealth's Attorney, the responsibilities under consideration, and in the absence of some provision of your city charter which imposes such a duty, I am of the opinion that you are not required, by virtue of your office, to represent either of the local departments mentioned in your communication.

In this connection, I am forwarding to you a copy of a previous opinion of this office, dated April 28, 1965, to the Honorable Stirling M. Harrison, Commonwealth's Attorney for Loudoun County, in which it was ruled that a Commonwealth's Attorney was not required by law to represent a local board of health. See, Report of the Attorney General (1964-1965), p. 52. I am constrained to believe that the view expressed in the enclosed opinion would be
equally applicable with respect to representation of the local board of public
government.

COMMONWEALTH ATTORNEYS—Duties—Not required by statute to advise
sanitary district, but required to advise board of supervisors on all questions
arising before board.

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

This is in reply to your letter of October 9, 1967, which I quote, in part,
as follows:

"The Dahlgren Sanitary District has been created in King George
County with the guidance, advice and the services of specially employed
counsel.

"The operating policy for that district has been established by a
County Ordinance, copy of which is enclosed. Under such operating
policy the affairs of the District are conducted by an 'Administrator', appointed by the County Board
of Supervisors, who processes and acts upon applications for service,
reviews and approves plans for *** developing, extending, and/or
constructing water mains and sanitary sewage lines *** and generally
runs the water and sewage business of the district.

"Opinion is respectfully requested as to whether the Commonwealth
Attorney is obligated, as a part of his duties as such, to serve as
counsel for the Sanitary District, the Administrator of the District,
and/or the Board of Supervisors of King George County in that
Board's actions in the operation, management, and maintenance of
District's water and sewage business."

The statutory provisions for the creation of sanitary districts in any county
of this State and the powers and duties of the governing body of any county
in which such sanitary district is established are contained in Chapter 2, Title
21 of the Code of Virginia. This chapter contains no provision relative to the
(1963-1964), p. 48, I expressed the opinion, though not free from doubt, that
the general duties of the Commonwealth's attorney did not require him to
conduct eminent domain proceedings, draft deeds, easements and other papers
of a similar nature for a sanitary district under this chapter. Consistent with
this view, I am of the opinion that the Commonwealth's Attorney is not
obligated to serve as counsel for the operation of the Dahlgren Sanitary
District and your query is answered in the negative.

It has been the opinion of this office for many years, however, that it is the
duty of the Commonwealth's attorney to give legal advice and opinions to all
public officials and boards of his county. See, Report of the Attorney General
(1962-1963), p. 22. The Commonwealth's attorney represents the county and,
pursuant to § 15.1-550, gives his legal opinion when required by the board of
supervisors on all questions arising before the board. In the care of the county
property and the management of the business and concerns of the county,
§ 15.1-507 of the Code of Virginia states that the board of supervisors may
employ counsel to assist the Commonwealth's attorney in any suit against the county or in any matter affecting county property, when in its opinion such counsel is needed.

CONSTITUTION—State—General Assembly may not authorize any lottery.

GENERAL ASSEMBLY—Lotteries—Authorization of unconstitutional.

LOTTERIES—Operation of "Game or Wheel" by Amusement Park Operator—Authorization by General Assembly unconstitutional where prize consists solely of fruit, candy, toys, etc.

HONORABLE ROBERT F. BALDWIN
Member, Senate of Virginia

August 2, 1967

I am in receipt of your letter of July 28, 1967, in which you forwarded to me a copy of Senate Bill No. 250 which you and Senator Breeden introduced at the regular session of the General Assembly in 1952. You request my opinion upon the constitutionality of this bill, which purports to amend and reenact § 58-268 of the Virginia Code to permit the owner or operator of certain amusement parks to keep and operate any game or wheel where the prize consists solely of fruit, candy, toys or other novelties.

In Maughs v. Porter, 157 Va. 415, the Supreme Court of Appeals of Virginia held that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine, and it is clear that all of the constituent elements of a lottery would be present in the operation of the "game or wheel" mentioned in the bill under consideration. The fact that the prizes to be awarded would be limited solely to certain specified items of merchandise rather than money or other thing of value would not alter this conclusion. Since Section 60 of the Constitution of Virginia forbids the General Assembly to authorize any lottery by law, I am of the opinion that the bill concerning which you inquire would conflict with the above-mentioned constitutional prohibition and would be invalid.

COUNTIES—Ambulance Service—Not obligated to provide, but may contribute to non-profit organizations for service.

HONORABLE JOHN L. JEFFRIES, III
Commonwealth's Attorney for Culpeper County

May 27, 1968

I am in receipt of your letter of May 16, 1968, in which you present certain questions relating to a county's providing ambulance service, which questions will be stated and answered seriatim.

"1. Is the county under any legal obligation to provide or insure the existence of an ambulance service in the county?"

Answer: I know of no provision of law which imposes a duty to provide such services.
"2. Can the county subsidize a small company or group of individuals to the extent of insuring a reasonable profit?

"3. If the county can subsidize a private group, can this be operated under the same state and federal laws governing localities, or must it operate under the more stringent laws under which the funeral homes must operate?"

Answer: I call your attention to the enclosed copy of an opinion of March 15, 1968, to the Honorable Virgil H. Goode, Commonwealth's Attorney for Franklin County. Therein it was ruled that in the absence of a statute permitting a county to contract with private parties to furnish ambulance service, the county could contribute to non-profit organizations to provide such service pursuant to § 15.1-25 of the Code.

"4. If the county must go into the ambulance business, is it possible to prohibit the continued operation of ambulances for select clientel, leaving the transportation of the indigent to the county?"

Answer: I know of no provision of law which would authorize such a prohibition.

COUNTIES—Authority—Water pollution control—May adopt ordinances not inconsistent with general law.

WATER POLLUTION CONTROL—Counties—May adopt ordinances not inconsistent with general law.

ORDINANCES—Counties—Water pollution control—May adopt if consistent with general law.

Honorable Edward H. Cann
Executive Secretary
Stafford County Board of Supervisors

August 28, 1967

This is in reply to your letter of August 11, 1967, from which I quote the following:

"Will you please advise the power of Virginia counties to enact ordinances to govern pollution of county waters by discharges from boats?"

The State exercises general control over all State waters, through the State Water Control Board, as stated in Chapter 2, Title 62 of the Virginia Code. In respect to the authority granted counties, § 15.1-510 of the Code gives authority for any county to 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 "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."

From the foregoing, I conclude that the Virginia counties are authorized to enact ordinances, not inconsistent with the general laws of this State, governing
the pollution of county waters. This may include discharges from boats, whenever such discharges would render the waters of such county dangerous to the health or lives of its residents.

COUNTIES—Borrowing of Funds for School Construction—When referendum required.

SCHOOLS—County—Borrowing of funds for school construction—When referendum required.

HONORABLE ELRIDGE C. HUFFMAN
Commonwealth's Attorney for Craig County

March 5, 1968

I am in receipt of your letter of February 23, 1968, in which you present the following situation and inquiry:

"I understand that if a county borrows over a certain amount for school construction, they have to put it to a referendum.

"If I am correct what is the amount of money above which if a county borrows for school construction that it has to go to a referendum."

I am not aware of any provision of Virginia law which authorizes counties to borrow certain amounts for school construction without a referendum, but which requires a referendum if additional sums are borrowed for this purpose. Of course, counties may borrow funds for school construction from the Literary Fund or the Virginia Supplemental Retirement System without a referendum. On the other hand, a referendum is required to authorize the issuance of bonds in any amount to be sold on the market generally. It would thus appear that a referendum is required to authorize a county to borrow funds for school construction beyond such amounts as may be available to the county from the Literary Fund or the Virginia Supplemental Retirement System.

COUNTIES—Essex—Courthouse restoration—May use Glebe Fund to defray expense.

BOARDS OF SUPERVISORS—Glebe Funds—Use of.

HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth's Attorney for the County of Essex

January 12, 1968

This is to acknowledge receipt of your letter of January 2, 1968, in which you state in part:

"Specifically, I would like your opinion as to whether funds expended from our general revenue fund solely in connection with the restoration of our Court House can be at some future time reimbursed from our Glebe Fund."

Attention is invited to § 57-3 of the Code which reads as follows:
“The glebe lands and church property, or the proceeds thereof held by the authorities of any county under the act of the twelfth of January, eighteen hundred and two, or under any other act, which may not have been applied to some particular object under a local statute passed for the purpose, shall be appropriated to such object or objects, other than for a religious purpose, as may be voted for in such county (at such time and place as the circuit court may prescribe) by a majority of the persons entitled to vote in the county for a delegate therefrom to the General Assembly, and, if no such object be so voted for, shall remain vested in such authorities and be appropriated by them for the benefit of the poor of such county; provided that the counties of Essex, Middlesex and Lancaster may use the ‘Glebe Fund,’ together with other funds, for improvements to the courthouse and related facilities.”

The apparent purpose of the provisos added to this section by Chapter 101, Acts of 1962, and by Chapters 33 and 601, Acts of 1964, was to admit the use of glebe funds of the counties therein indicated for improvements to the courthouse or related facilities upon the authorization of the board of supervisors without the approval by the voters of the respective counties.

I am of the opinion that the glebe fund of Essex County can be used towards the restoration expenses of the courthouse by reimbursing the general revenue fund of the county as outlined in your letter.

COUNTIES—Establishment of State-operated Community College—May expend public funds for costs of meals incident to meeting to determine feasibility.

BOARDS OF SUPERVISORS—Establishment of State-operated Community College—May expend public funds for costs of meals incident to meeting to determine feasibility.

September 1, 1967

HONORABLE EDWARD MCC. WILLIAMS
Commonwealth’s Attorney for Clarke County

This will reply to your letter of August 18, 1967, in which you present the following situation and inquiry:

“At a recent meeting of the Board of Supervisors of Clarke County a steering committee was appointed to represent the County of Clarke in perfecting organization in furtherance of the recent legislation in regard to the establishment of a State Operated Community College for the Northwestern Virginia area. Thereafter a dinner meeting was held at Front Royal in Warren County on July 6, 1967, and attended by the steering committees from the political subdivisions involved.

Subsequent meetings of these committees have been found to be necessary for the purpose of working out the rather complicated details, one a dinner meeting on July 20, 1967, at Berryville, in Clarke County for which expense in the amount of $100.66 was incurred for dinners served the representatives from the various political subdivisions in attendance. A statement for this expense in proper form
has been presented to the Board of Supervisors of Clarke County for payment.

"It was the feeling of the Board of Supervisors that the dinner hour was the most convenient and practical time for this meeting since those in attendance were business men, some coming from considerable distance, and it seemed necessary for the county to incur the expense involved in order that it obtain proper recognition in the selection of a site for the college and the other questions involved.

"Kindly advise if, under the circumstances outlined above, it is proper for the statement referred to be paid by the county."

In response to your inquiry, I am forwarding to you a copy of a previous opinion of this office in which a substantially identical question was considered and the view expressed that payment of such expenses was within the scope of the authority of a board of supervisors. See, Report of the Attorney General (1958-1959), page 49. In light of the position taken in the enclosed ruling, I am of the opinion that the expenses concerning which you inquire may properly be paid by the Board of Supervisors of Clarke County.

Further in this connection, I call your attention to § 15.1-20 of the Virginia Code which authorizes the governing body of two or more political subdivisions to form and maintain, as an instrumentality of the participating political subdivisions, associations for the purpose of promoting, through investigation, discussion and co-operative effort the interest and welfare of the several political subdivisions of the State. With respect to the above-mentioned statute, I am also enclosing copy of an opinion of this office dated June 13, 1966, approving appropriations made by the board of supervisors of a county in support of such an association. See, Report of the Attorney General (1965-1966), page 58.

COUNTIES—Leasing of County-owned Land—Authorized by § 15.1-262.

HONORABLE E. EUGENE GUNTER
Commonwealth's Attorney for Frederick County

This is in reply to your letter of February 12, 1968, in which you inquire whether the Frederick County Board of Supervisors may lease county-owned land to the city of Winchester to be used as a pedestrian mall. You also state that the land in question is now used as a street and for the parking of the cars of the sheriff's department.

I am of the opinion that the county may enter into such a lease agreement by complying with § 15.1-262 of the Code. This section states that a county has the authority to "sell," "exchange" or "convey" county property upon the approval of the judge of the court of record. I refer you to a previous opinion of this office in which it was stated that, although § 15.1-262 does not specifically grant a county the authority to lease property, such authority exists because a lease is a sale or conveyance of an interest in property. See, Report of the Attorney General (1957-1958), p. 70. We have also ruled that a power to sell absolutely would confer the power to convey a lesser interest by lease. See, Report of the Attorney General (1958-1959), p. 59.

However, § 15.1-262 would be inapplicable to your situation should you determine that the property in question is such a street as to be subject to the
abandonment requirements of §§ 33-76.1 through 33-76.24 of the Code. If it is a street within the State highway system or the secondary system, the requirements of §§ 33-76.1 through 33-76.12 would be applicable. If it is a street such as § 33-76.13 defines as being in neither of the above systems, then it must be abandoned pursuant to §§ 33-76.14, et seq., and then conveyed under § 33-76.22 of the Virginia Code.

COUNTIES—Ordinances—Fireworks—Extent to which may regulate advertising, sale and use.

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

HONORABLE ALBERT M. SHELTON
Commonwealth's Attorney for Scott County

January 24, 1968

This is in reply to your letter of January 19, 1968, in which you inquire as to the authority of a county to "pass an ordinance outlawing the sale, advertising and possession of any and all fireworks or materials in similar categories in Scott County."

In this regard I am enclosing a copy of a previous opinion on this subject contained in the Report of the Attorney General (1963-1964), p. 66. This office concluded therein that § 59-219 of the Code of Virginia, as limited by § 59-215, permits counties to exercise essentially such power as you describe. Section 59-219 reads as follows:

"Nothing contained in this chapter shall apply to any ordinance prohibiting the sale, storage, use, possession or manufacture of fireworks heretofore or hereafter adopted by any county, city or town."

You will note that § 59-219 of the Code does not specifically include the advertising of fireworks within its prohibitions. Therefore, I am of the opinion that the Scott County Board of Supervisors may prohibit only such advertising as may be properly an incident of a sale, or calculated to induce a sale, of fireworks within Scott County.

COUNTIES, CITIES AND TOWNS—Consolidation of County and All Towns Within County—Will be permissible under Chapter 694, Acts of 1968.

HONORABLE H. WOODROW CROCK, JR.
Commonwealth's Attorney for Isle of Wight County

April 10, 1968

This is in reply to your letter of March 21, 1968, in which you inquire as follows:

"Pursuant to Article 4 of Chapter 26, Title 15.1 of the Code of Virginia of 1950, as amended, may a county consolidate with one or more incorporated towns which said towns are located entirely within the geographical boundaries of the county?"
A previous opinion of this office, Report of the Attorney General (1960-1961), p. 74, ruled that while the language of § 15.1-1130 (then § 15-220) could be read to permit a county and a town to consolidate, § 15.1-1131 (then § 15-221) provided for consolidation of counties and towns only with cities.

However, I call your attention to the enclosed copy of H. B. 1004, as passed by the General Assembly during the past session, which will become effective on June 28, 1968, and will appear as Chapter 694, Acts of 1968. This bill specifically amends the above sections to permit a county and all towns entirely within the county to consolidate.

COUNTIES, CITIES AND TOWNS—Contractors’ Licenses—May be required for electrical, plumbing and other work.

TAXATION—Local Licenses—Contractors—May be required for electrical, plumbing and other work.

August 14, 1967

HONORABLE JAMES R. SIPE
Commonwealth’s Attorney for Rockingham County and City of Harrisonburg

This is in reply to your letter of July 25, 1967, which reads as follows:

"Under § 54-145.2 counties, cities and towns are allowed to provide by ordinances that persons contracting for electrical, plumbing, and other work in the respective localities must obtain a license from the locality. The statute exempts, however, 'such contractors examined and currently licensed under ... § 54-129.'

"I am aware of your previous opinions holding that localities may not require examination of those contractors licensed under § 54-129. Since the exception under § 54-145.2, however, pertains to the license itself and seems to prohibit the localities from requiring any local license for the state registered contractors, do these localities have the power to require any license from such contractors or are they free to operate in the localities without payment of local license fees?"

In my opinion, counties, cities and towns may require persons contracting for electrical, plumbing and other work in the locality to obtain a local license under Article 5, Chapter 7, Title 58 of the Virginia Code.

The opinions to which you have reference have all been confined to provisions under Title 54 of the Virginia Code. This title is designed to promote and protect the health, safety and welfare of the general public by placing regulations upon certain businesses and professions.

On the other hand, Title 58 of the Virginia Code relates to taxation and contains various statutes the common purpose of which is the collection of revenue.

The Supreme Court of Appeals has held that statutes under these two titles are not mutually exclusive. See, Bowen Elec. Co. v. Foley, 194 Va. 92. Accordingly, contractors registered under either § 54-145.2 or § 54-129 are still subject to a local revenue license, authorized under Title 58, Chapter 7, Article 5.
COUNTIES, CITIES AND TOWNS—Establishment of Joint Schools—Not compulsory.

SCHOOLS—Joint—Compulsory establishment not required.

April 8, 1968

HONORABLE PHILIP P. BURKS
Treasurer of Bedford County

I have your letter of March 27, 1968, in which you discuss the school situation in the Town and County of Bedford, and you ask the following question:

"If the Town of Bedford does at a later time become a city of the Second Class, can the County of Bedford, under the law of Virginia, be forced against its will to educate the high school and elementary school pupils who reside in the Town of Bedford upon payment of tuition costs by the Town of Bedford to the County of Bedford?"

I am of the opinion that your inquiry should be answered in the negative. Section 22-7 of the Code of Virginia reads as follows:

"The school boards of counties or of counties and cities, or of counties and towns operating as separate special school districts, may, with the consent of the State Board, establish joint schools for the use of such counties or of such counties and cities or of counties and towns operating as separate special school districts, and may purchase, take hold, lease, convey and condemn, jointly, property, both real and personal, for such joint schools. Such school boards, acting jointly, shall have the same power of condemnation as county school boards except that such land so condemned shall not be in excess of thirty acres in a county or city for the use of any one joint school. The title of all such property acquired for such purposes shall vest jointly in such school boards of the counties or counties and cities or counties and towns operating as separate special school districts in such respective proportions as such school boards may determine, and such schools shall be managed and controlled by the boards jointly, in accordance with such rules and regulations as are promulgated by the State Board. However, such rules and regulations in force at the time of the adoption of a plan for the operation of a joint school shall not be changed for such joint school by the State Board without the approval of the local school boards." (Emphasis supplied)

This section provides for the voluntary operation of joint schools and there are several illustrations or examples of this now in effect in Virginia.

It does not appear from your communication that the question you present was made a subject of agreement in the compromise settlement you mention. I am not familiar with any statute that provides for the compulsory establishment of joint schools, or the compulsory acceptance of pupils from another school district upon the payment of tuition. Section 22-219 of the Code is on a voluntary basis.
COURTS—Corporation Court of the City of Norfolk—Authority to appoint substitute civil justice to fill vacancy.

JUDGES—Substitute Civil Justice for Civil Justice Court of Norfolk—How appointed.

March 22, 1968

HONORABLE BERNARD LEVIN
Member, House of Delegates

I am in receipt of your letter of March 13, 1968, in which you present the following situation and inquiry:

"The Civil Justice Court of the City of Norfolk was created pursuant to Chapter 24, of the Acts of Assembly of 1910. Section 5, Chapter 24, Acts of Assembly of 1910, provides for the appointment of a substitute Civil Justice by the Judge of the Corporation Court. Our present substitute Civil Justice was appointed by the judge of the Corporation Court of the City of Norfolk in 1954.

"Chapter 555 of the Acts of Assembly of 1956 made numerous changes with reference to courts not of record. This chapter appears as Title 16.1 in the Code of Virginia of 1950, as amended. It has been suggested that certain of the provisions of Chapter 555 of the Acts of Assembly of 1956, specifically that provision codified in Title 16.1, Section 20, placed the power of a new appointment of a substitute Civil Justice in the hands of the General Assembly, or in the hands of the Governor for an interim appointment.

"Nevertheless, the provisions contained in Title 16.1, Section 7, seem clear in setting forth that the appointment of the Civil Justice of the City of Norfolk and his substitute remain unchanged. To my knowledge, the Charter of the City of Norfolk makes no prescription with reference to the term or manner of appointment of such Civil Justice and substitute. Title 16.1, Section 7, Paragraph (2) states that the term and manner of appointment shall be as was prescribed by general law immediately prior to July 1, 1956, where the city Charter is without such provision.

"In view of the questions which have arisen in this connection, I respectfully request your opinion as to the term and manner of appointment of a substitute judge for the Civil Justice Court of the City of Norfolk."

As you point out and as the previous opinions of this office confirm, Chapter 555 of the Acts of Assembly of 1956—which repealed Title 16 of the Virginia Code and enacted new Title 16.1 in its stead—undertook a fundamental re-organization of the courts not of record in the Commonwealth. See, Report of the Attorney General (1956-1957), pp. 73, 194. However, the then existing system of courts below the jurisdictional level of circuit and corporation courts was continued by § 16.1-6 of the Virginia Code, and provision was made for the continuance in office of every "judge or justice and every associate, assistant and substitute judge or justice" of a court not of record in office on July 1, 1956, by § 16.1-7 of the Virginia Code, which in pertinent part prescribes:

"Every judge or justice and every associate, assistant and substitute judge or justice of a court not of record in office on July 1, 1956, shall continue in office as the judge, associate judge, assistant or substitute
judge of such court under its designation as a county court, juvenile and domestic relations court, or a municipal court until the expiration of the term for which he was appointed or elected, and upon the expiration of his term and of each successive term thereafter a successor shall be appointed or elected for the term and in the manner following:

* * * * *

"(2) In cities and towns each such judge, associate judge, assistant or substitute judge shall be appointed or elected for such term and in such manner as is prescribed by the charter of the city or town in which he serves; but, in the event such charter does not prescribe the term and manner of appointment or election, then for such term and in such manner as was prescribed by general law immediately prior to the effective date of this title."

"Any vacancy in the office of any such judge shall be filled for the unexpired term in the manner prescribed herein for original appointments or elections to such office." (Italics supplied.)

Since it appears from your communication that the charter of the City of Norfolk does not prescribe the manner in which or the term for which the substitute civil justice in question shall be appointed or elected, I am of the opinion that such substitute civil justice would be appointed or elected for such term and in such manner as was prescribed by general law immediately prior to the effective date (July 1, 1956) of Title 16.1 of the Virginia Code. In this connection, I am forwarding to you a copy of a previous opinion of this office dated February 12, 1957, to the Honorable C. E. Moran, Clerk of the Corporation Court of the City of Charlottesville, in which a situation substantially identical to that which you present was considered and discussed at length and a similar conclusion reached. See, Report of the Attorney General (1956-1957), p. 147.

Further in this connection, I do not believe that the appointment in question would be governed by § 16.1-20 of the Virginia Code. That statute undertakes to provide a substitute judge for each court not of record in the State, whether a substitute judge existed before the enactment of Title 16.1 of the Code, or not. By contrast, § 16.1-7 of the Virginia Code specifically embraces and makes provision for all judges or justices—regular, associate, assistant or substitute—in office on July 1, 1956. Moreover, § 16.1-20 provides that substitute judges thereunder shall be appointed in the same manner as the judge of the court not of record, except in those instances in which the judge is elected by popular vote. Neither of these provisions would apply to the situation you present since the judge of the civil justice court concerning whom you inquire is neither appointed to that position nor elected by popular vote, but is elected thereto by the joint vote of the two houses of the General Assembly.

Under the general law relating to civil justices in effect immediately prior to the effective date of Title 16.1 of the Code, it appears that the substitute civil justice of the City of Norfolk was appointed by the judge of the Corporation Court of the City of Norfolk. See, §§ 16-119, 16-88 of the Code of Virginia. I am of the opinion that a vacancy in the office in question would be filled for the unexpired term by appointment of a substitute civil justice by the judge of the Corporation Court of the City of Norfolk.
REPORT OF THE ATTORNEY GENERAL

COURTS—County—No jurisdiction to try cases involving title to real property.

March 21, 1968

HONORABLE HARRY G. LAWSON
Commonwealth's Attorney for Appomattox County

This is in reply to your letter of February 21, 1968, from which I quote the following:

"Does the County Court have jurisdiction to try a criminal case in which the accused is charged with trespassing on the real estate of the prosecuting witness? The defense of the accused is that he owns the property on which he is charged with committing a trespass. The County Court will have to pass on the question of a title to the proper real estate involved, the accused claims that he in fact owns the property on which he is charged with trespassing, or that he in good faith claims ownership thereof.

"My question is does Code Section 16.1-77 give the County Court jurisdiction of this case, or does the case of Martin vs. City of Richmond, 108 Va. 765, and the case of Addison vs. Sayler, 185 Va. 644, control?"

Section 16.1-77 of the Code of Virginia refers to civil jurisdiction of courts not of record. Section 18.1-173 of the Code deals with the criminal offense of trespass and is designed to protect the rights of the owner or those in lawful control of private property. Any person who violates the provisions of this section shall be guilty of a misdemeanor. In regard to the jurisdiction of county courts in criminal matters, § 16.1-123 of the Code states, in part, as follows:

"Each county court shall have:

"(1) Exclusive original jurisdiction of all offenses against the ordinances, laws and by-laws of the county for which it is established and, except as otherwise provided herein, of the towns therein:

"(2) Except as herein otherwise provided, exclusive original jurisdiction within such county and the towns therein for the trial of all other misdemeanors arising therein . . . ."

It seems clear that the quoted language gives the county court jurisdiction for the trial of the criminal offense of trespass. It has been held over a period of more than a century, however, that a trial justice has no jurisdiction in cases involving title to real property. It was so held in both of the cases you cited, as well as in a number of others, the only exception found being the case of Richmond v. Sutherland, 114 Va. 688.

The exception in the Sutherland case was based on an amendment to former § 4106 of the Code, approved March 10, 1910, which gave police justices original jurisdiction for the trial of all offenses of whatever nature, against the ordinances of their respective cities. The Supreme Court of Appeals held that the term "of whatever nature" added by the amendment qualified as express language granting jurisdiction to police justices to try any offense against a city ordinance, although there was involved a bona fide claim of title to real estate. This language did not appear in the statute granting jurisdiction to trial justices when the Addison case was decided in 1946 and it is not found in the present statute granting jurisdiction to county courts. Accordingly, I am of
the opinion that the county court does not have jurisdiction in cases involving title to real property.

COURTS NOT OF RECORD—Municipal—Fees—Paid into city treasury, unless otherwise provided.

FEES—Municipal Courts—Under Title 16.1, Chapter 3—Paid into city treasury, unless otherwise provided.

JUDGES—Courts Not of Record—Municipal—Salaries—Fixed and paid by governing body of municipality.

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

This will reply to your letter of September 15, 1967, in which you present the following inquiry:

"Is the substitute civil and police justice entitled to keep the $2.00 fee when he issues criminal warrants and bail persons charged with felonies and misdemeanors?"

With your communication you submitted a copy of Chapter IX, Section 2, of the charter of the city of Hopewell from which it appears that the substitute civil and police justice to whom you refer is now designated as the substitute municipal judge or substitute judge of the municipal court of the city of Hopewell. See, Acts of Assembly (1962), Chapter 462, p. 754; §§ 16.1-52 et seq., Code of Virginia (1950), as amended. From the language of Chapter IX, Section 2 of the charter, it also appears that the substitute judge or justice in question acts for the municipal judge or civil and police justice when the latter is unable to perform the duties of his office. This provision of the charter also provides:

"He shall have authority to issue warrants, search warrants and summonses in criminal and civil cases and to bail persons charged with felonies and misdemeanors or violations of city ordinances whether acting as substitute civil and police justice at the time or not."

Although the above-quoted provision of the charter authorizes the substitute judge or justice to exercise the specified powers whether he is actually acting as substitute judge or justice at the particular time, I am of the opinion that the authority thus conferred upon him is conferred by virtue of his office as such judge or justice. In this connection, §§ 16.1-62 and 16.1-63 of the Virginia Code provide:

"§ 16.1-62.—Except as otherwise provided herein the salaries of all judges, associate judges, substitute judges, clerks, deputy clerks, clerical assistants and bailiffs of each municipal court shall be fixed and paid by the governing body of the city in which such court is held."

"§ 16.1-63.—The council of any city may provide by ordinance that the salaries paid the judge, clerk and other officers and employees of its municipal court or courts shall be in full compensation for all services rendered by them. Unless otherwise provided all fees charged
and collected by them shall be accounted for and paid into the city treasury." (Italics supplied).

Since it does not appear from your communication that other provision has been made therefor, I am of the opinion that the language of § 16.1-63 italicized above requires the fees you mention to be accounted for and paid in to the city treasury and precludes their retention by the substitute judge or justice.

CRIMES—Carrying Concealed Weapons—Tear gas pens not included in statute.

WEAPONS—Tear Gas Pens—Carrying concealed on person—Not included in statute.

January 15, 1968

HONORABLE JOSEPH L. LYLE, JR.
Assistant Commonwealth's Attorney for Virginia Beach

This is to acknowledge receipt of your letter of January 5, 1968, in which you state in part:

"We received a request for an opinion as to whether the provisions of Code Section 18.1-269, relating to carrying concealed weapons, would apply to the relatively new device known as a tear gas pen which is used primarily for defensive purposes."

Attention is invited to the first sentence of § 18.1-269, Code of Virginia (1950), as amended, which reads as follows:

"If any person carry about his person, hid from common observation, any pistol, dirk, bowie knife, switchblade knife, razor, slungshot, metal knucks, or any weapon of like kind, he shall upon conviction thereof be fined not less than twenty dollars nor more than five hundred dollars and, in the discretion of the jury or the court trying the case without a jury, may, in addition thereto, be committed to jail for not more than twelve months. . . ."

Initially, it should be noted that the above-quoted statute is penal in character and must be strictly construed. Moreover, the general phrase "any weapon of like kind" must be restricted in interpretation to objects of the same class as those specifically enumerated in the statute. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated August 24, 1960, in which these principles of construction were considered at length and subsequently applied in a substantially identical situation. See, Report of the Attorney General (1960-1961), p. 278.

Applying these rules to the situation you present, it is clear that a tear gas pen is not specifically named in the statute in question, and I am constrained to believe that the device you describe is not of the same class as the weapons therein specified. Since statutes of the type under consideration must be limited in their application to cases clearly described by the language employed and may not properly be extended by implication, I am of the opinion that § 18.1-269 of the Virginia Code would not embrace the device concerning which you inquire.
CRIMES—Larceny Under § 6.1-115—Purpose for which check given no defense for violation of section.

CRIMES—Larceny Under § 6.1-115—Majority stockholder in corporation may be guilty of violation of section.

CRIMES—Larceny Under § 6.1-115—Suspension or revocation of corporation charter no defense to violation of section.

March 8, 1968

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

This is in reply to your letter of February 16, 1968, from which I quote the following:

“With reference to § 6.1-116, I would very much appreciate your opinion as to the following:

1. In a prosecution under § 6.1-115, assuming that notice is given as provided in § 6.1-117, does the fact that the check of a corporation is not given for the purpose of paying wages to an employee of such corporation, preclude a successful prosecution?

2. Does the fact that X, who owns 90% of the stock of the corporation and who is the President, Manager, and for all practical purposes the sole proprietor of the business, and who made, signed and delivered the corporation’s check, take the prosecution thereon out of the limitations imposed by § 6.1-116?

3. Does the fact that the corporation’s charter stands suspended or revoked for the nonpayment of franchise taxes preclude the defenses that might otherwise be asserted because of the corporate entity?”

A violation of § 6.1-115 of the Code of Virginia includes an intent to defraud. Such intent is the gravamen of the offense under this section, which provides that a person who violates same shall be guilty of larceny. Any person guilty of grand larceny under the provisions of this section is subject to possible confinement in the penitentiary. There are no restrictions under this section as to the purpose for which the check, draft, or order for the payment of money may be given. Accordingly, I shall answer question numbered 1 in the negative.

With respect to your question numbered 2, § 6.1-116 of the Code makes it a misdemeanor for any person to make, draw, utter or deliver a check “on behalf of any business firm or corporation, for the purpose of paying wages to any employee of such firm or corporation, or for the purpose of paying for any labor performed,” knowing that there are not sufficient funds at the drawee bank to cover such check. It is frequently an officer of a firm or corporation who draws a check for the payment of salaries or wages. Since the statute makes no reference to officers or stockholders but applies to “any person” who acts as therein indicated, I do not believe the fact that X is the majority stockholder, president and manager would be significant in a prosecution under this section and, therefore, I shall answer this question in the negative.

Considering question numbered 3, I assume you have reference to a prosecution under § 6.1-116. As indicated in the answer to your second question, a person who makes, draws, utters or delivers a check “on behalf of any . . .
corporation" in violation of the statute in question is guilty of a misdemeanor, and I am of the opinion the fact that a corporation's charter has been suspended or revoked for the nonpayment of franchise taxes would have no effect upon a prosecution under this statute.

CRIMES—Solicitations—In absence of specific statute making such solicitations a crime, may be tried as a common law crime.

CRIMES—Common Law—In effect in this State.

June 27, 1968

HONORABLE ANDRE EVANS Commonwealth's Attorney for the City of Virginia Beach

This is in reply to your letter of June 18, 1968, in which you inquire:

"Whether or not it is a crime for a male adult to solicit another male adult to engage in a homosexual act with him. Is it a crime at the common law to solicit such activity? Is it proper in Virginia to charge a person with a common law crime that is not prohibited by statute? If so, what is the punishment for common law crimes and would they ever be felonies?"

Generally speaking, to solicit another to commit a felony is indictable at common law and punishable as a misdemeanor. See, 2 M.J. Attempts and Solicitations, § 9. And, depending on the circumstances of each case, homosexual acts may be prosecuted as felonies pursuant to the provisions of § 18.1-212 of the Code.

While I know of no instances in which it has been attempted, in my opinion, the solicitation of another to commit an act prohibited by § 18.1-212 might be prosecuted as a common law misdemeanor, punishable as provided in § 18.1-9 of the Code. In the absence of a specific statute making such solicitation a crime, the only course of action known to me would be to treat it as a common law crime.

As you know, the common law is in effect in Virginia. See, e.g., Womack v. Circle, 70 Va. (29 Grat.) 192 (1877); Wiseman v. Commonwealth, 143 Va. 631, 130 S.E. 249 (1925).

CRIMINAL PROCEDURE—Arrest Without Warrant—May be made where misdemeanor committed in presence of officer.

ARREST—Without Warrant—Can be made where misdemeanor committed in presence of officer.

July 7, 1967

HONORABLE GEORGE B. DILLARD, Judge Municipal Court of the City of Roanoke

I am in receipt of your letter of June 29, 1967, in which you present the following situation and inquiry:
“Your opinion is respectfully sought whether a peace officer, armed with a Search Warrant to search specified premises for specific articles of clothing, reportedly stolen in a burglary, may arrest persons on the specified premises and in the presence of the officer such as; Breach of the Peace, Using Vile Obscene and derogatory language toward the officer, or threatening to do physical harm to said officer and by such conduct and behavior and interfered with the officers function of conducting the search as directed by the Search Warrant.”

It is firmly settled law in Virginia that a peace officer may legally make an arrest, without a warrant, for a misdemeanor committed in his presence. Montgomery Ward and Co. v. Wickline, 188 Va. 485, 489. It is clear from your communication that the offenses you describe are misdemeanors which were committed in the presence of a peace officer. Equally clear is it from a previous opinion of this office that cause to arrest a person without a warrant for a misdemeanor may occur in the presence of a peace officer who is in the process of searching premises pursuant to a valid search warrant. See, Report of the Attorney General (1962-1963), p. 61. I am, therefore, of the opinion that your inquiry should be answered in the affirmative.

CRIMINAL PROCEDURE—Conviction of Misdemeanor Not Bar to Conviction of Felony.

CRIMES—Involuntary Manslaughter—Person may also be convicted of reckless driving if evidence shows more than one act.

MOTOR VEHICLES—Reckless Driving and Involuntary Manslaughter—Two separate offenses where evidence shows more than one act.

October 16, 1967

HONORABLE L. VICTOR MCFAHLL
Commonwealth’s Attorney for Dickenson County

This is in answer to your letter of September 30, 1967, in which you requested my opinion as to whether a person may be convicted of both reckless driving and involuntary manslaughter arising out of an automobile accident.

Reckless driving and involuntary manslaughter are two separate and distinct offenses. Dykeman v. Commonwealth, 201 Va. 807, 809.

Section 19.1-259 of the Code of Virginia (1950), as amended, reads:

“If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the State statute.”

(Emphasis supplied.)

Under this section a person may be convicted of two offenses where the
evidence shows more than one act. A test of the identity of acts or offenses is whether the same evidence is required to sustain them; if not, then the fact that several charges relate to and grow out of one transaction or occurrence does not make a single act or offense where two separate acts or offenses are defined by statute such as reckless driving and involuntary manslaughter. *Hundley v. Commonwealth*, 193 Va. 450, 451.

The same facts required to convict one of reckless driving are not always necessarily those required to convict the person of involuntary manslaughter or vice versa, while in some cases they may be, as was the case set forth in the opinion of this office to the Honorable G. Garland Wilson, Commonwealth's Attorney for the City of Radford, February 1, 1961, Report of the Attorney General (1960-1961), page 95. Therefore, I am of the opinion that a person *may* be convicted of both reckless driving and involuntary manslaughter where the evidence shows more than one act.

Moreover, the conviction of a person for reckless driving, a misdemeanor under § 46.1-192 of the Code, and for involuntary manslaughter, a felony under § 18.1-25, does not involve double jeopardy in violation of Section 8 of the Constitution of Virginia.

Where a person has been convicted of a misdemeanor, and is afterwards indicted for a felony, the two offenses are considered so essentially distinct that a conviction of one is deemed no legal bar to an indictment of the other. *See, Burford v. Commonwealth*, 179 Va. 752, 757. See, also, opinion of former Attorney General J. Lindsay Almond, Jr., dated December 31, 1952, to Honorable Mark D. Woodward, Commonwealth's Attorney for Page County, Report of the Attorney General (1952-1953), page 66.

**CRIMINAL PROCEDURE—Costs—Accused if acquitted not liable.**

**WITNESSES—Fees for Summoning—Accused if acquitted not liable.**

January 8, 1968

**HONORABLE S. PAGE HIGINBOTHAM**
Commonwealth's Attorney for Orange County

This is in response to your recent letter in which you inquire as to whether or not an accused who is acquitted is required to pay the costs of the prosecution and other fees.

You call my attention to an opinion to Honorable W. Carrington Thompson of April 22, 1954, Report of the Attorney General (1953-1954), at page 89, wherein the following statement is made:

"It is my opinion that defendants in criminal cases are liable for the above prescribed fees for the issuance and execution of witness summonses, regardless of whether they are convicted or acquitted unless they come within the poverty exception set out in Section 14-180 of the Code."

You also call my attention to an opinion of April 24, 1963, to Honorable Marshall E. Hanger, Report of the Attorney General (1962-1963), at page 246, wherein it is stated:

"A defendant who has been acquitted of a criminal offense cannot
be compelled to pay the costs of summoning witnesses represented by fees and allowances for sheriffs and sergeants under the provisions of Section 14-122 of the Code of Virginia."

You also direct my attention to an opinion to Honorable J. Gordon Bennett of July 6, 1966, Report of the Attorney General (1966-1967), at page 108, wherein the language from the opinion to Honorable W. Carrington Thompson, as set forth above, is quoted and relied upon.

You ask which of the opinions mentioned is controlling.

Section 19.1-320 of the Code provides that the Clerk of Court when an accused is convicted shall make up a statement of all the expenses incident to the prosecution. I find no provision of law which provides that the Clerk shall prepare such a statement of expenses when the accused is acquitted. Indeed, in Childers v. Commonwealth, 171 Va. 456, 198 S.E. 2d 487, the Supreme Court of Appeals pointed out that when the accused is found not guilty, he should not be made to pay the costs of the prosecution.

In view of the foregoing, I am of the opinion that the views expressed in my opinion to Honorable Marshall G. Hanger of April 24, 1963, are controlling herein; and, that if the accused is acquitted, he is not liable for the fees and costs incurred in connection with the criminal proceeding.

CRIMINAL PROCEDURE—Costs—Fees for witnesses for indigent defendants.

WITNESSES—Fees—How paid for indigent defendant.

HONORABLE AUSTIN EMBREY, Clerk
Circuit Court of Nelson County

September 29, 1967

This is in response to your letter of September 8, 1967, which reads as follows:

"When a defendant charged with a felony is indigent to the extent that the Court appoints an attorney to defend him, does the Commonwealth pay the allowances to witnesses summoned on behalf of the indigent defendant to testify in his defense at his trial or at his preliminary hearing?"

A person attending as a witness under a summons for a defendant in a criminal proceeding is allowed the fees prescribed by § 14.1-190 of the Code. There is, however, no specific provision of law providing the manner by which a witness summoned on behalf of an indigent defendant may be paid the above-mentioned fees and mileage.

It is possible, however, that the court-appointed attorney representing the indigent defendant may pay the fees prescribed by statute and be reimbursed pursuant to the provisions of § 14.1-184 of the Code. The attorney would then have to submit a statement of his expenses to the court, who may direct that the same be allowed and enter an order in connection therewith. It might seem proper under the circumstances for the court-appointed attorney to secure the approval of the court prior to incurring such expenses.
HONORABLE WADE S. COATES
Commonwealth's Attorney for Tazewell County
HONORABLE HARRIS HART, II
Attorney for Town of Tazewell

May 13, 1968

I am in receipt of your joint letter of May 1, 1968, in which you present the following situation and inquiries:

"A question has arisen concerning the jurisdiction of the County Court of Tazewell County, Virginia, to try a defendant charged with drunk driving who was arrested by a State Trooper within the corporate limits of the Town of Tazewell, Virginia. The warrant in this case charges the defendant with operating a motor vehicle over the public highway while under the influence of intoxicants without specifying that the alleged offense occurred within the Town. Both the Town of Tazewell and Tazewell County have adopted ordinances similar to Section 18.1-54 of the Code of Virginia of 1950, as amended, and the Town of Tazewell has adopted an ordinance conforming to the provision of Section 18.1-55 of the Code.

"The warrant in the instant case was issued by a Justice of the Peace of Tazewell County and was made returnable to the County Court of Tazewell County. . . The question presented, therefore, concerns the proper forum for the trial of a defendant arrested by a State officer within the Town of Tazewell, and charged with operating a motor vehicle over a public highway while under the influence of intoxicants.

"Also, in the instant case the defendant refused to take the blood test as required by Section 18.1-55.1 of the Code of Virginia, and a second warrant was issued charging this refusal. The question has also arisen as to the proper forum for the trial of the second charge involving the refusal to take the blood test."

I have subsequently been advised by Mr. Coates that the accused in this instance was charged on a State warrant with driving under the influence of intoxicants in violation of § 18.1-54 of the Virginia Code and that the court of the Town of Tazewell is not a municipal court exercising general civil and criminal jurisdiction, but is a court of limited jurisdiction within the purview of §§ 16.1-70, et seq. of the Virginia Code.

I am of the opinion that the proper forum for the trial of the accused in this case is the County Court of Tazewell County. In this connection, I call your attention to two previous opinions of this office dated August 18, 1959, and July 27, 1962, to the Honorable Ernest W. Goodrich, Commonwealth's Attorney for Surry County, and the Honorable W. W. Fields, Sr., Mayor of the Town of Richlands, respectively, in which situations substantially similar to that which you present were considered and discussed. See, Report of the Attorney General (1959-1960), p. 113; (1962-1963), p. 185. In both of these opinions, the view was expressed that courts of limited jurisdiction are not
authorized to try cases involving alleged violations of State laws, and in the
latter opinion, it was specifically ruled:

"Under Sections 16.1-37 and 16.1-123 of the Code of Virginia, the
county court has territorial jurisdiction over the entire county and
exclusive original jurisdiction within any city lying within the county,
when such city does not have a municipal court with general civil and
criminal jurisdiction, for the trial of all misdemeanors arising therein
except offenses against the ordinances of the city. This includes juris-
diction for the trial of traffic cases and certainly those involving the
violation of any State law, even though the violation may have occurred
within the town." (Italics partially supplied.)

With respect to your concluding inquiry, I am further of the opinion that
the County Court of Tazewell County would also be the proper forum for trial
of the offense of refusing to submit to a blood test. In this connection, I call your
attention to a previous opinion of this office, dated July 17, 1962, in which an
identical question was considered and discussed at length. See, Report of the

CRIMINAL PROCEDURE—Issuance of ‘Capias Pro Fine’—Courts not of
record.

COURTS NOT OF RECORD—Issuance of ‘Capias Pro Fine’—Recommended
procedure to be followed.

HONORABLE W. FRANCIS BINFORD, Judge
Prince George County Court

October 6, 1967

I am writing in further reference to your letter of September 12, 1967,
and our subsequent discussion earlier this week concerning the authority of
judges or clerks of courts not of record to issue a capias pro fine.

In this connection I am forwarding to you a copy of a letter, dated January
7, 1965, written by the late Colonel Kenneth C. Patty, First Assistant Attorney
General of Virginia, to the Honorable J. Gordon Bennett, Auditor of Public
Accounts, in which this general subject was considered and discussed at length.
As you will note from the enclosed opinion, the authority of a judge or clerk
of a court not of record to issue a capias pro fine is subject to grave doubt,
and it was recommended that in cases of the type here under consideration
all courts not of record should comply with the provisions of Article 3,
Chapter 14 of Title 19.1 (§§ 19.1-335, et seq.) of the Virginia Code, with subsequent
proceedings to be taken by the judge or clerk of the court of record.

The recommended procedure contemplates that the county court shall make
return of the warrants in criminal cases to the clerk of the circuit court pursuant
to the provisions of § 19.1-335, itemizing on such returns the amount of the
fine and costs—or costs alone if no fine is imposed—in each case. Upon
receipt of such warrants the clerk of the circuit court is directed by § 19.1-336
to "issue execution or other proper process upon those fines and costs, or costs,
remaining unpaid as though such fines and costs had been imposed in his
court." In this connection, § 19.1-339 declares that the judge of the circuit
court may direct the clerk thereof to issue a capias pro fine, either before or
after the return of a writ of fieri facias, and § 19.1-340 directs the clerk to issue a capias pro fine if a writ of fieri facias is returned to the clerk’s office unsatisfied, unless the court for good cause forbids the issuance of such capias pro fine.

I concur in the recommendation made by Colonel Patty in the enclosed letter that, in situations such as you present, compliance should be had with the procedure specified in §§ 19.1-335, et seq. of the Virginia Code outlined above.

CRIMINAL PROCEDURE—Medical Examinations of Juveniles—Compensation pursuant to § 19.1-315.

JUVENILES—Rape and Molesting Cases—Medical examination payments under § 19.1-315.

HONORABLE SIDNEY C. DAY, JR.
Comptroller

This is in response to your letter of June 5, 1968, in which you enclose a copy of a letter from Honorable Willard M. Robinson, Jr., Commonwealth’s Attorney for the City of Newport News, which reads in part as follows:

“Many times in the course of investigating a rape or molesting complaint on a juvenile, we have difficulties getting the doctors and hospitals to examine these children. The first problem is their reluctance to come to court and testify in these cases, but this problem I will work out myself. The second problem in which I need your help is the payment of the doctors and hospitals for these examinations. It is necessary to have a medical examination in order to properly prosecute a rape or child molesting complaint both to assist in proving the crime and to make sure they are not false complaints. Most of the doctors and hospitals will not make these examinations unless someone guarantees payment.

“My question is how can I have these examinations paid for when they are necessary for the prosecution of State criminal charges and the parents of the children either are not able or will not guarantee payment of these fees. Often the parents are indigent. I will appreciate your consideration of this problem and any assistance you can give me.”

Inasmuch as the examinations are made in connection with a criminal case, I am of opinion that the doctors may be compensated pursuant to the provisions of § 19.1-315 of the Code of Virginia.
CRIMINAL PROCEDURE—Misdemeanants—Trials—County or circuit court.

COURTS—Misdemeanants—Jurisdiction—County or circuit court.

HONORABLE ROBERT E. GILLETTE
Commonwealth's Attorney for Nansemond County

May 15, 1968

This is in response to your letter of April 24, 1968, in which you inquire if a misdemeanor charge may originate in the Circuit Court by way of indictment, and, if the answer is in the affirmative, in what court should the accused be tried.

The grand jury may return an indictment for a misdemeanor in accordance with the provisions of § 19.1-155 of the Code of Virginia. The accused may then be tried in the Circuit Court, or the Circuit Court may certify the indictment to the County Court in accordance with the provisions of § 16.1-126 of the Code of Virginia.

In view of the foregoing, I am of the opinion that a misdemeanor charge may originate in the Circuit Court by way of indictment and that the accused may be tried in the Circuit Court, or if the indictment is certified to the County Court, he shall be tried there.

DOG LAWS—Licenses—Not to be issued where inoculation certificate dated more than three years prior to application.

HONORABLE ERNEST C. VAUGHAN, Treasurer
King and Queen County

February 12, 1968

This is in reply to your letter of February 8, 1968, in which you request my interpretation of § 29-188.1 of the Code of Virginia as it relates to your question, which I quote as follows:

"Am I the undersigned, as an issuing officer, required to issue a dog license when the applicant presents a rabies vaccination certificate from a currently licensed veterinarian dated more than three (3) years prior to the date of application?"

Section 29-184 of the Code of Virginia makes it unlawful to own a dog six months old or over in this State unless such dog is licensed. Section 29-213 imposes a penalty for any person convicted of failure to pay the license tax on any dog owned by him. The applicable part of § 29-188.1, to which you refer, is as follows:

"(a) No license tag shall be issued for any dog unless there is presented, to the treasurer or other officer of the county, city or town charged by law with the duty of issuing license tags for dogs at the time application for license is made, evidence satisfactory to him showing that such dog has been inoculated or vaccinated against rabies by a currently licensed veterinarian."

Considering the quoted section in conjunction with the sections cited herein, which require a license, it is apparent that the law places a burden on the
owner of a dog required to be licensed to have his dog inoculated or vaccinated against rabies by a currently licensed veterinarian. It is further apparent that such owner must present satisfactory evidence of such inoculation or vaccination to the treasurer or other officer charged with the duty of issuing license tags for dogs.

In my opinion, the treasurer or other officer charged with the duty of issuing license tags for dogs should require a certificate from a currently licensed veterinarian showing that the inoculation or vaccination is applicable to the full period for which the license is requested. I am informed by representatives of the State Health Department and the State Veterinarian's office that there are two types of vaccine, one of which immunizes the dog for a period of one year and the other for a period of three years from the date the vaccine is administered. On the basis of this information, the vaccine would in no case be considered effective more than three years from the date administered and, therefore, I shall answer your question in the negative.

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DOG LAWS—Military Reservations—Jurisdiction of game wardens and liability of county for injury caused by dogs.

MILITARY RESERVATIONS—Dog Laws Related Thereto.

Honorable George S. Cummins
Commonwealth's Attorney for Nottoway County

August 2, 1967

I am in receipt of your letter of July 25, 1967, in which you present the following situation and inquiries:

"Nottoway County lies contiguous to Camp Pickett, a part of the 45,000 acres of which Camp were deeded to the United States when the Camp was built around 1942.

"The County Dog Warden has raised a question with our Board of Supervisors in connection with his authority to enter the Camp property of the United States in pursuit of dogs or to enter the said property to pick up a dog upon a complaint by a resident within the Camp confines. Involved in this question is the liability of the County for payments to the owners of sheep or other animals that may be killed by dogs roaming from Nottoway County onto the military reservation and committing such depredations on the military reservation.

"Would you please let me have your views on the following questions:

"(a) Does the Nottoway County Dog Warden have authority to enter Camp Pickett and pick up a dog that has run into Camp Pickett from Nottoway County for killing an animal in Nottoway County?

"(b) If a dog from Nottoway County should enter the property of Camp Pickett and kill sheep while in Camp Pickett, which sheep are grazing in Camp Pickett with the permission of the Pickett authorities, would the Board of Supervisors be liable from the dog fund for any sheep killed in Camp Pickett by such dog, assuming the dog to be identified and the killing to be verified?"
With respect to your initial inquiry I am writing to advise that this office has previously had occasion to consider the question of the jurisdiction of game wardens within the area comprising Camp Pickett. See, Report of Attorney General (1954-1955), p. 118. While I am constrained to believe that the dog warden of Nottoway County may enter Camp Pickett to pick up a dog that has killed animals in Nottoway County, I would recommend that the suggestion contained in the above mentioned opinion be adopted and that you confer with the Camp Pickett authorities to obtain their concurrence in the action of the dog warden in such instances.

In regard to your second question, this office has previously ruled that the county or city in which a sheep is killed or injured constitutes the political subdivision which is liable for the payment of compensation therefor pursuant to §§ 29-202 and 29-209 of the Virginia Code. See, Reports of Attorney General (1958-1959), p. 101; (1951-1952), p. 82. Further in this connection I am of the opinion that sheep grazing within the confines of Camp Pickett with the permission of the Camp Pickett authorities would be deemed to be in Nottoway County for the purpose of the payment of such compensation, and that claims for such payment may properly be presented to the Board of Supervisors of Nottoway County.

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**DOG LAWS—Vicious Dogs—Running at large—Regulation by local authorities.**

**COUNTIES—Vicious Dogs—May regulate the running at large.**

January 25, 1968

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

This is to acknowledge receipt of your letter of January 10, 1968, in which you state:

"The Code of Virginia contains procedures and penalties concerning dogs which injure or molest livestock and poultry, and concerning dogs which have rabies, but I can find no provisions in the Code setting forth any steps which may be taken against a dog or against its owner, in a case where it can be proved that the dog is known to be vicious because of its attacks on other dogs or because of its attacks on people.

"I will appreciate your advising me your opinion as to whether or not there is any criminal procedure which can be taken under the laws of the State of Virginia against the owner of such a vicious dog or against the dog."

As you point out, Virginia law establishes procedures for the regulation, control and disposition of rabid dogs and those which kill or injure sheep, livestock or poultry. See, §§ 29-195, 29-197, 29-197.1, Code of Virginia (1950). However, I have been unable to discover any provision of Virginia law which establishes similar procedures with respect to dogs known to be vicious because of attacks on people or other dogs, if such animals are licensed and are not running at large.

Further in this connection, I call your attention to § 29-196 of the Virginia Code which provides:
"The governing body of any county, city or town may adopt such ordinances, regulations or other measures as may reasonably be deemed necessary to prevent the spread within its boundaries of the disease of rabies, and to regulate and control the running at large within its boundaries of vicious or destructive dogs, and may provide penalties for the violation of any such ordinances. Any such ordinance may declare the existence of an emergency whereupon it shall be in force upon passage." (Italics supplied.)

In light of the language italicized above, it would appear (1) that ordinances preventing the running at large of dogs known to be vicious because of attacks on people or other dogs may be enacted by local governing bodies, and (2) that penal sanctions may be imposed upon the owners of such dogs for violation of any ordinance enacted pursuant to § 29-196 of the Virginia Code.

DOMESTIC RELATIONS—Desertion and Nonsupport—Venue for action prescribed by § 20-83.

DESIDRTION AND NONSUPPORT—Venue for Action Prescribed by § 20-83.

HONORABLE RICHARD C. COTTER, Judge
County Court of Mathews County

December 12, 1967

I am in receipt of your letter of December 6, 1967, in which you present the following situation and inquiry:

"I am advised that a proceeding is about to be instituted in my Court under the Domestic Relations statute which involves the question of venue, provided for under Section 20-83 of the Code of Virginia. It appears that the wife, and I am advised that no children are involved, was living with her husband in Lancaster County when he deserted her and had her removed from the premises. She then took her residence up in Mathews County, where she is now about to file the Complaint, and the question has been raised as to whether the desertion, being a continuing one, gives the Mathews Domestic Relations Court jurisdiction under this question of venue.

"At the time he deserted her, which seems to be the reading of the statute, they resided in Lancaster. Will you please let me have your advices as to whether you believe my Court has, or has not, jurisdiction."

Pertinent to the resolution of your inquiry, as you point out, is § 20-83 of the Virginia Code which provides:

"Any offense under this chapter shall be held to have been committed in any county or city in which such wife, child or children may be at the time of desertion, or in which such child or children may be or remain, with the knowledge and acquiescence of the accused, in destitute or necessitous condition, or where the accused shall be found in this State." (Italics supplied).

Since no children are involved in the situation you describe, venue in this instance would be limited by the language of the statute italicized above to (1)
REPORT OF THE ATTORNEY GENERAL

the county or city in which the wife was at the time of desertion or (2) the county or city in which the accused is found in this State. From your communication, it appears that the wife was living with her husband in Lancaster County when the desertion took place. I am therefore of the opinion that the venue prescribed by the statute in question does not embrace Mathews County where the wife now resides, and I concur in your view that venue of the offense under consideration is limited to Lancaster County or to such other county or city in which the accused may be found in the State.

EDUCATION—Local Community College Board—Not a State institution—Acts only as advisor to State Board for Community Colleges.

STATE INSTITUTIONS—Local Community College Board—Not a State institution within meaning of § 25-232.

EMINENT DOMAIN—Local Community College Board—No authority to condemn land for educational purposes.

HONORABLE E. BRUCE HARVEY
Commonwealth's Attorney for Campbell County

This will reply to your letter of February 1, 1968, in which you call my attention to § 25-232 of the Virginia Code and inquire "whether or not a local community college board is a state institution that can condemn land for its educational purposes."

So far as is pertinent to your inquiry, § 25-232 of the Virginia Code authorizes State institutions to institute condemnation proceedings in certain instances. In this connection, § 23-14 of the Virginia Code specifies "the State Board for Community Colleges, at Richmond" as an educational institution which is declared to be a public body and constituted as a governmental instrumentality for the dissemination of education. Moreover, § 23-214(b) of the Virginia Code defines the State Board for Community Colleges as "the State agency responsible for the establishment, control and administration of all comprehensive community colleges," while § 23-215 declares that:

"The State Board shall be responsible, through the exercise of the powers and performance of the duties set forth in this chapter, for the establishment, control, and administration of a state-wide system of publicly supported comprehensive community colleges."

Consistent with the above-quoted provisions of Virginia law, this office has previously taken the position that the State Board for Community Colleges is authorized by § 25-232 to institute condemnation proceedings.

By contrast, local community college boards are boards established to act in an advisory capacity to the State Board for Community Colleges, to assist in ascertaining educational needs and enlisting community involvement and support and to perform such other duties with respect to the operation of a single comprehensive community college as may be delegated to it by the State Board. See, §§ 23-214(c) and 23-220, Code of Virginia (1950), as amended. In light of the foregoing provisions of Virginia law limiting the scope of activities of a local community college board, I am of the opinion that such
a local board is not a "State institution" within the meaning of § 25-232 of the 
Virginia Code and, therefore, is not authorized to institute condemnation pro-
ceedings to acquire land for educational purposes.

ELECTIONS—Absentee Ballots—May be personally delivered to electorate board 
or mailed by registered or certified mail.

ELECTIONS—Absentee Ballots—Vote cast by mail—No requirement that en-
velopes be kept.

October 25, 1967

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

I am in receipt of your letter of October 17, 1967, in which you present 
two questions involving the absent voter laws of Virginia embodied in Chapter 
13, Title 24, of the Virginia Code. These questions will be stated and answered 
seriatim.

"No. 1. If a voter votes in person as an absentee voter, will his 
envelope and ballot have to go through the post office. In other words, 
will the ballot and envelope go through the post office and be post-
marked as other mail must?"

Answer: No. Section 24-334 of the Virginia Code provides that absentee 
ballots "shall be registered or certified and mailed, with return receipt re-
quested, to the electoral board, or delivered personally by the voter to the 
electoral board." If an absentee ballot is delivered personally by the voter to 
the electoral board, the envelope containing it will not be postmarked.

"No. 2. Will the envelope containing the address of the mail voter 
be kept as a record? This envelope containing the return address of the 
voter. Will it have to be kept as part of the record?"

Answer: Section 24-338 of the Virginia Code does not specifically require 
that the envelope containing the return address of the absent voter be kept as 
one of the papers to be attached to the unopened voucher envelope containing 
the absentee ballot. However, I am advised that, as a matter of practice, a 
number of electoral boards do retain this envelope with the other papers 
mentioned in § 24-338.

ELECTIONS—Absentee Ballots—Restrictions placed on use.

October 6, 1967

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

I am in receipt of your letter of September 27, 1967, in which you present 
several questions involving the election laws of Virginia. These questions will 
be stated and considered seriatim.
REPORT OF THE ATTORNEY GENERAL

“(1) Is it legal for a voter to vote by absentee ballot who has no intention of being absent on the day of election? We have people who vote by mail who are on the Welfare rolls and other people, but on election day they are at home, or on the election premises, so I am told. Can they legally do this?”

Answer: Section 24-319 of the Virginia Code provides that any duly qualified voter who, for certain specified reasons, will be absent from the city, town or precinct of a county in which he is entitled to vote, or any duly qualified voter who may be physically unable to go in person to the polls on election days, may vote by absentee ballot. Implementing the above-mentioned provision of Virginia law are §§ 24-320 through 24-345 of the Virginia Code. Of these implementing statutes § 24-324 is directly applicable to the situation you present and provides:

“The application shall be accompanied by a statement, made before at least one witness, who shall subscribe it, to the effect that for some one of the reasons set out in § 24-319 he expects to be absent from his city, town or precinct on the day of the election, or that he will be physically unable to go in person to the polls on the day of election. The statement shall further state that the application is made in conformance with the election laws and not in violation thereof. The statement shall also state that the applicant is a resident of the precinct in which he offers to vote, and shall show whether he is exempt from the payment of the poll tax, and if so, the reason therefor. The statement shall also declare under the penalty of perjury that the facts in such application have been examined by the applicant and are true and correct. Any applicant signing an application which is not true and correct shall be guilty of perjury and punished as provided by law. Provided, such a statement is not required in the case of the spouse of a member of the armed forces, as defined in § 24-345.12. No particular form of application shall be required in the case of the spouse of a member of the armed forces, but it shall be sufficient for the applicant to state, as to the applicant’s spouse, the active service of which he is a member and his home address, A.P.O., F.P.O., or other service post-office address, and his legal residence and, as to the applicant, his home address, A.P.O., F.P.O., or other service post-office address, and his legal residence, if any of these are different from that of the applicant’s spouse, and the applicant’s date of birth.”

However, it is clear from the provisions of §§ 24-336 and 24-340.1 that the absent voter laws of Virginia envision that a prospective absent voter who has made proper application to vote by absentee ballot may, because of a change in circumstances, decide not to vote in this manner and may return his unused absentee ballot, or have the same voided at his request, and vote in person on the day of election. These provisions do not require that an absentee ballot must be withdrawn because of such change in circumstances, but it is therefore possible for a voter to file in good faith the statement mentioned in § 24-324 and still vote in person on the day of election pursuant to §§ 24-336 and 24-340.1 of the Virginia Code.

“(2) Is it legal for a member of the Electoral Board or some one else [to] remove the voucher from the envelope, showing postmark in an absentee ballot?”
Answer: I am of the opinion that it is permissible for a member of the electoral board to remove the unopened voucher envelope from the envelope in which the absentee ballot is returned to the electoral board. In this connection, § 24-338 of the Virginia Code provides that, upon receipt of the ballot from the voter, the electoral board shall enroll the full name and address of the voter on a list kept by the board and shall attach to the unopened voucher envelope containing the ballot the coupon which accompanies the sealed ballot. It is therefore manifest that the board must open the envelope by which the sealed ballot is returned in order to attach the coupon to the voucher envelope and correctly ascertain the full name and address of the voter for the purpose of listing.

“(3) Must the absentee ballots be delivered in a sealed or locked metal container?”

Answer: Section 24-340 provides that on the day of election the electoral board shall deliver to the judges of election at the proper precincts the containers mentioned in § 24-338. Section 24-340 also prescribes that the containers “shall be sealed prior to such delivery.” I am therefore of the opinion that the absentee ballots must be delivered in a sealed container, but I find no statutory requirement that this container must be a locked metal container.

“(4) Must all judges sign receipt for absentee ballots?”

Answer: Section 24-340 provides that upon delivering the containers to the judges of election at the proper precincts the electoral board shall take “their receipt therefor.” While this provision does not expressly state that all of the judges of election must sign the receipt, I am of the opinion that all of the judges should do so.

ELECTIONS—Assistant Registrars—Not required to work in the office of the general registrar.

HONORABLE MEREDITH C. DORTCH
Commonwealth’s Attorney for Mecklenburg County

April 19, 1968

I am in receipt of your letter of April 10, 1968, in which you present the following situation and inquiry:

“The County of Mecklenburg has a general registrar appointed under Section 24-118.1 of the Code, who maintains his office and keeps his records in the Town of Chase City. The Board has now been asked to request the appointment of one or more assistant registrars residing in other parts of the county. It is proposed that these assistants register voters in their respective communities with some arrangements being made for records to be carried or sent by mail to the office of the general registrar.

“The Board has asked that I request an opinion from you as to the legality of this arrangement. To state the question specifically, is an assistant registrar required to work in the office of the general registrar, and keep all records in that office at all times?”
REPORT OF THE ATTORNEY GENERAL

In this connection, I call your attention to § 24-118.8 of the Virginia Code which, in pertinent part, provides:

"When the governing body of a county provides for and requests the appointment of assistant registrars the electoral board may appoint the same in such manner as appears proper; . . . Such assistant registrar shall perform such duties as may be required of them by the general registrar and the electoral board, respectively; in all other respects the provisions of §§ 24-118.1 to 24-118.9 and of other statutes applicable to registrars and general registrars shall apply mutatis mutandis to assistant registrars." (Italics supplied.)

This office has previously ruled that assistant registrars appointed pursuant to § 24-118.8 may register persons for the purpose of voting. See, Report of the Attorney General (1966-1967), p. 103. Moreover, it is clear from the language italicized above that the provisions of § 24-118.2 of the Virginia Code apply mutatis mutandis to such assistant registrars. Significant with respect to your inquiry is that provision of § 24-118.2 which prescribes:

"The registrar shall sit at such place or places in the county as may be designated by the electoral board and on such day or days in each month as the electoral board may designate. . . ."

In light of the foregoing, I am of the opinion that assistant registrars are not required to work in the office of the general registrar and keep all records in that office at all times, but that the electoral board may designate the place or places in the county at which such assistant registrars shall sit. However, the general registrar could direct that all applications for registration and other records be sent to the office of the general registrar for processing and filing.

ELECTIONS-Bar From Registering and Voting—Conviction of petit larceny.
CRIMES—Petit Larceny—Conviction acts as bar from registering and voting.

January 24, 1968

HONORABLE SAMUEL A. GARRISON, III
Assistant Commonwealth's Attorney, City of Roanoke

This is in reply to your letter of January 16, 1968, in which you inquire whether the provisions of Section 23 of the Constitution of Virginia (as codified in § 24-18) would bar from registering and voting a person convicted of petit larceny under § 6.1-115 of the Code for negotiating a worthless check with intent to defraud.

The relevant portions of Section 23 of the Constitution state that:

"The following persons shall be excluded from registering and voting:

. . . persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery or perjury. . . ."

Since § 6.1-115 of the Code states that one who negotiates a worthless check
with intent to defraud is guilty of larceny, I conclude that the plain language of the two sections, when read together, would dictate that a person convicted of this offense would fall within those classes of persons barred from registering and voting.

In addition, it would appear that issuing a bad check with intent to defraud would constitute "obtaining money or property under false pretenses," as that term appears in Section 23 of the Constitution. In this connection, I refer you to *Anable v. Commonwealth*, 65 Va. (24 Gratt.) 563, 567-68 (1873), in which case the similarity of the offenses of larceny and obtaining money under false pretenses arising from the negotiation of worthless checks was considered and discussed.

I am, therefore, of the opinion that your question should be answered in the affirmative.

**ELECTIONS—Candidates—Must file expense accounts within thirty days after convention.**

**ELECTIONS—Candidates—Certification of party nominees by party chairman not conditioned on filing statements of expenses.**

**HONORABLE W. FRANKLIN GOODING**
Chief Deputy Clerk, Circuit Court of Fairfax County

July 18, 1967

I am in receipt of your letter of July 14, 1967, in which you present the following situation and inquiry:

"At the Republican Convention held in this County on the 17th day of May, 1967 for the County of Fairfax, City of Falls Church and Fairfax City, one Ned D. Moore was nominated for County Clerk. The results of this convention were certified on the 31st day of May, 1967 and Mr. Moore's name was certified for the office of County Clerk. As of this date he has failed to file his expense account as such a candidate subject to said convention.

"In light of the Statute pertaining to expense accounts I would like your ruling whether or not the Republican Party could certify his name since the said expense account had not and has not yet been filed with this office."

The provisions of the election laws of Virginia governing the filing of expense accounts by various candidates are contained in §§ 24-442, et seq. of the Virginia Code. In this connection, § 24-442 prescribes, *inter alia*, that a candidate before a convention shall file the specified statement of expenses within thirty days after the convention, and §§ 24-444, 24-445, 24-446 and 24-448 enunciate certain penalties and prohibitions which attend a failure to file such statement. No provision is made forbidding the certification of a party nominee who has not filed a statement of expenses. Moreover, the chairman of the party holding the convention is required by § 24-134 of the Virginia Code to certify the names of party nominees not later than ten days after the Tuesday after the second Monday in July, and it is clear that this time limitation in certain instances could expire before the thirty day period for filing statements of expenses under § 24-442. I am therefore of the opinion that the certification of party
nominees by party chairmen is not conditioned under Virginia law upon such nominees having filed their statements of expenses at the time of certification and that your inquiry should be answered in the affirmative.

ELECTIONS—Candidates—Requirements for member of board of supervisors.  
BOARDS OF SUPERVISORS—Member—Eligibility requirements for candidate.

HONORABLE DOUGLAS S. MITCHELL  
Commonwealth's Attorney for King and Queen County

August 25, 1967

I am in receipt of your letter of August 9, 1967, in which you present the following situation and inquiry:

"A gentleman has been a duly registered voter and domiciled in Stevensville District of King and Queen County for many years. On or about June 7, 1967 he established actual residence in Buena Vista District in said County and desires to be a candidate for the Member of Board of Supervisors from Buena Vista District in which he now resides in the general election to be held November 7, 1967. On July 21, 1967 he filed his declaration of candidacy with the Clerk of the Circuit Court of King and Queen County duly accompanied by a petition signed by fifty (50) qualified voters of Buena Vista District which declaration of candidacy and petition of the qualified voters are understood to meet all legal requirements. The Clerk of the Court promptly certified the name of this gentleman as a candidate for the office in question to the Electoral Board. This gentleman did not obtain his transfer as voter from Stevensville District to Buena Vista District until or about July 28, 1967, however such transfer by him has been now properly done.

"Based on the foregoing, you will please advise whether in your opinion the name of this gentleman should be printed on the official ballot for the election to be held November 7, 1967, as a candidate for the Member of Board of Supervisors from Buena Vista District. I have been requested by the Electoral Board of the County to obtain your opinion in this request."

Pertinent to the resolution of your inquiry are the following provisions of §§ 15.1-51 and 24-132 of the Virginia Code:

"§ 15.1-51. Every district officer shall, at the time of his election or appointment, have resided in the district for which he is elected or appointed thirty days next preceding his election or appointment, and residence in any incorporated town within the district shall be regarded."

"§ 24-132. No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for the election, unless he be a party primary nominee." (Italics supplied.)

From your communication, it appears that the individual in question has
met the residence requirement set forth in § 15.1-51 of the Virginia Code and has properly filed the necessary papers in connection with his candidacy as required by law. It also appears that he has properly transferred his voter registration from the Stevensville District to the Buena Vista District of the county and is now qualified to vote in the latter district in the coming general election in which he offers as a candidate. I am therefore of the opinion that his name should be printed on the ballot provided for the election to be held on November 7, 1967.

Since the candidate under discussion is now qualified to vote in the coming election, I do not believe the fact that he did not transfer his voter registration until the time for filing the necessary paper in connection with his candidacy had expired, (July 21, 1967) would affect the above-stated conclusion. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated June 7, 1935, in which the then Attorney General (later Justice) Abram P. Staples considered a substantially similar situation and expressed a view consistent with that stated in this letter. See, Report of the Attorney General (1934-1935), p. 57.

ELECTIONS—Candidates—Timely filing of declaration and petition.

July 28, 1967

HONORABLE ROBERT L. BROWN
Treasurer of Rappahannock County

I have your letter of July 27, 1967, in which you advise that a prospective candidate for the Board of Supervisors of Rappahannock County was out of the county on the 21st of July and did not file a declaration of candidacy with the clerk. However, a petition with fifty qualified voters properly notarized was filed with the clerk on July 21, 1967.

Section 24-130 of the Code of Virginia provides that any person who intends to be a candidate for certain specified offices must notify the State Board of Election in writing, attested by two witnesses, of his intention and designating the office for which he is a candidate.

Section 24-131 of the Code requires that any person who intends to be a candidate for any office not embraced in the foregoing section shall give notice to the county clerk of his intention which notice shall in all respects be in the same form as described in the preceding section.

Section 24-133 of the Code is relative to the petition that must accompany the declaration.

I think it clear, therefore, from the various Code sections that both the declaration properly witnessed and the petition must be filed with the proper official within the time specified and the failure to file either one within that time prevents a candidate's name being placed on the ballot.
ELECTIONS—Constitutional Officers of Cities—No years set for election by Constitution of Virginia.

CITIES—Constitutional Officers—Years for holding elections not set by Virginia Constitution.

HONORABLE JOHN W. HAGEN
Member, House of Delegates

This is in reply to your letter of January 24, 1968, which reads, in part, as follows:

"I would like a ruling as to whether the constitutional officers of the new City of Salem will have to run in this November's general election. The way the Constitution is written, the constitutional officers of a new city apparently have to run at the first opportunity in a general election and cannot be appointed over an extended period of time in this case.

"One section that we are questioning is Section 119 of the Constitution."

I know of no provision of the Constitution of Virginia specifying the years in which the constitutional officers of cities are subject to election. Provisions of Article VIII of the Constitution specify the dates on which election for such officers shall be held, the dates on which their terms shall begin and the length of the terms, but there is no specification of the years in which the elections are to be held.

Unless the charter of the city in question provides otherwise, the years in which constitutional officers are subject to election are determined by the applicable provisions of Title 24, Chapter 10, Article 4, of the Code of Virginia. Sections 3.2 and 3.4 of the proposed charter for the City of Salem, a copy of which you have provided me, indicates that the election of constitutional officers is to be in accordance with the general law, which would mean in accordance with the provisions of Title 24 of the Code to which I have just referred.

ELECTIONS—Electoral Board—Deputy sheriff or deputy treasurer may not be member.

PUBLIC OFFICERS—Compatibility—Electoral board—Deputy sheriff or deputy treasurer may not serve.

HONORABLE RUFUS V. MCCOY, SR.
Member, House of Delegates

I am in receipt of your letter of October 28, 1967, in which you inquired whether or not a deputy sheriff or a deputy treasurer of a county may serve as a member of the county electoral board.

Pertinent to the resolution of your inquiries is the concluding paragraph of Section 31 of the Virginia Constitution which provides:

"No person, nor the deputy of any person, holding any office or post..."
of profit or emolument, under the United States government, or who is
in the employment of such government, or holding any elective office
of profit, or trust in the State, or in any county, city, or town thereof,
shall be appointed a member of the electoral board or registrar or
judge of election.” (Italics supplied.)

The above-quoted constitutional provision is also embodied in § 24-31 of the
Code of Virginia (1950), which was formerly § 84 of the Code of Virginia
(1919).

In this connection, I am forwarding to you copies of two previous opinions
of this office, dated September 23, 1944 and October 1, 1947, in which the then
Attorney General (later Justice) Abram P. Staples ruled that a deputy sheriff
and a deputy commissioner of the revenue came expressly within the scope of
the above-mentioned prohibition and were thus ineligible to hold the office
1948), p. 140. While I have been unable to discover any previous opinion
of this office in which the language of the prohibition in question has been
considered with respect to the eligibility of a deputy sheriff or a deputy
treasurer to serve as a member of a county electoral board, I believe that the
positions taken in the enclosed opinions would be equally applicable to the
questions you present. I am therefore of the opinion that your inquiries should
be answered in the negative.

ELECTIONS—Electoral Board—Member of board of supervisors may not serve.

BOARDS OF SUPERVISORS—Member—May not serve on electoral board.

HONORABLE JAMES P. BABER
Commonwealth’s Attorney for Cumberland County

This is in reply to your letter of May 10, 1968, in which you inquire
whether a member of the board of supervisors may also serve as a member
of the electoral board of the county.

It is my opinion that your question should be answered in the negative.
I refer you to § 24-31 of the Code of Virginia which states 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
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.”

In light of the above quoted statute, I am of the opinion that a person may
not simultaneously hold the two offices in question.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Electoral Board Secretary—May not act as agent for board of supervisors in placing insurance for compensation, directly or indirectly.

PUBLIC OFFICERS—Compatibility—Secretary of electoral board—May not be interested in insurance contracts written for board of supervisors.

FEDERAL EMPLOYEES—May Be Appointed Insurance Agent for Board of Supervisors.

January 29, 1968

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

This is in reply to your letter of January 18, 1968, from which I quote the following:

"Is the secretary of the local electoral board such an officer as mentioned in Section 15.1-67 of the Code of Virginia as is prevented from becoming interested, directly or indirectly, in a contract or in any profits of any agent or person acting on behalf of the Board of Supervisors.

"Can the secretary of the electoral board be named by the Board of Supervisors as a statutory agent for placing insurance on behalf of the Board?

"If the secretary of the electoral board can be named agent for placing insurance on behalf of the Board, can such secretary of the electoral board, who is also an insurance agent, as such agent for the Board of Supervisors, place insurance with companies which he represents as local agent?

"Can an insurance agent, who is a federal commissioner for the Shenandoah National Park and as such an employee of the United States Government, be appointed a statutory agent to represent the Board of Supervisors in placing insurance, and as such agent, place insurance with firms for whom he is acting as local agent?"

The pertinent part of § 15.1-67 is as follows:

"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, judge of the county court, sheriff or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency thereof, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county. . . ." (Emphasis supplied.)

The emphasized words are significant. While the members of the electoral
board occupy the dual positions of officers of the State and officers of the county, they are paid by the latter and, in my opinion, qualify as paid officers of the county within the purview of this section. Accordingly, I shall answer your first question in the affirmative.

My answer to your second question is dependent on whether the secretary receives any compensation, directly or indirectly, for placing insurance on behalf of the board of supervisors. If so, he may not act as agent for the board.

I shall answer your third question in the negative. In a letter dated December 11, 1967, to the Commonwealth's Attorney for Tazewell County, I expressed the view that a member of the board of supervisors would have to disassociate himself from the insurance firm writing insurance on county property. I am of the opinion that the same principles apply in the instant situation.

There appears no law which would act to prevent a federal commissioner from being appointed agent to represent the board of supervisors in placing insurance under the stated circumstances and, therefore, I shall answer your last question in the affirmative.

**ELECTIONS—Eligibility for City Council—Candidate ineligible if convicted of petit larceny.**

April 18, 1968

MR. JAMES G. HARRISON, Secretary
Electoral Board of the City of Hopewell

I have your letter of April 16, 1968, with enclosures, in which you state that Mr. X has filed his notice of candidacy for the City Council for the City of Hopewell, Virginia, and that Mr. X has been convicted of petty larceny. You inquire whether Mr. X

"... may lawfully be qualified as a candidate for the Council for the City of Hopewell, Virginia under these circumstances."

Section 23 of the Constitution of Virginia provides, in part, as follows:

"The following persons shall be excluded from registering and voting: ... persons convicted ... of ... petit larceny ... ."

Section 32 of the Constitution of Virginia provides, in part, as follows:

"Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other subdivision of the State, wherein he resides. . . ."

Unless the civil rights of Mr. X have been restored by the Governor acting under authority of Section 73 of the Constitution of Virginia, I am of the opinion that Mr. X is not eligible to vote and not being eligible to vote is not eligible to hold an elective office. Section 24-132 of the Code of Virginia provides that 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 ballots provided for the election.
ELECTIONS—General—County officers—Costs borne by county where precincts within limits of city of second class.

COUNTIES, CITIES AND TOWNS—County Electoral Board—Has responsibility for election when precincts within limits of city of second class.

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

I am in receipt of your letter of August 4, 1967, in which you present the following situation and inquiry:

"A question has risen as to who is responsible for the cost of the General Election coming up this November as the City of Galax is partly in Grayson County and partly in Carroll County. The Clerk of the Circuit Court, Sheriff, and Commonwealth Attorney are subject to the voters of the County, and that portion of the City of Galax lying and being in Grayson County.

"You will please give your opinion as to the payment of the cost in this election."

In similar situations this office has previously expressed the view that the County Electoral Board has complete responsibility for the conduct of the election of the Sheriff, Commonwealth's Attorney and Clerk of the Circuit Court within the corporate limits of a city of the second class as well as in the county. As the above-mentioned officers are still considered to be county officers, the election should be conducted as though the city were still fully a part of the county, the precincts in the city being treated as precincts in the county. In light of the foregoing, I am of the opinion that the costs of the election concerning which you inquire should be borne by Grayson County.

ELECTIONS—General Registrar—City of Newport News—Required to maintain as his office the permanent office in the City Hall.

HONORABLE ALAN A. DIAMONSTEIN
Member, House of Delegates

This is to acknowledge receipt of your letter of June 12, 1968, in which you request my opinion in the following question. I quote from your letter:

"The specific question is whether the general registrar for the City of Newport News would be prohibited by § 24-59 from setting up temporary offices for the purpose of registering qualified citizens at a location other than the permanent office of the City Hall?"

The question is whether there is any authority granted by statute which would enable the general registrar of Newport News to maintain such temporary offices. Said § 24-59 of the Code of Virginia (1950), as amended, reads as follows:

"It shall be the duty of the general registrar to maintain in the city
hall, or other municipal building, of the city for which he is appointed, an office wherein all qualified voters of such city may be registered. The general registrar in cities containing more than one hundred and ninety thousand population according to the last United States census may maintain such other temporary or permanent offices in other places in such cities, as he may deem necessary or desirable for the convenient registration of voters."

It would seem that there is a mandatory duty of general registrars to maintain an office in the city hall or other municipal building. Likewise, § 24-61 places the mandatory duty on the city to furnish an office for the general registrar in the city hall or municipal building of the city. Unless the city has a population of more than 190,000, according to the last United States census, there is no authority for a general registrar of a city to maintain temporary offices in places other than the city hall or municipal building.

It is apparent that the legislative intent is clear from the language of this statute, to-wit, § 24-59. I cannot find where § 24-59 of the Code has been amended since 1942.

Therefore, it is my opinion that the general registrar for the City of Newport News does not have the authority to maintain temporary offices at a location other than the permanent office in the City Hall.

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ELECTIONS—General Registrar—Remains in office until successor qualifies.

ELECTIONS—General Registrar—Board of supervisors not required to biennially adopt resolution establishing office.

June 10, 1968

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

This is in reply to your letter of May 31, 1968, in which you request my opinion as to the answer of the following two questions:

"If the governing body established the position of general registrar but has not adopted a biennial resolution providing for said office, what is the status of the office of general registrar and what is the status of the general registrar now in office?

"If the governing body has not passed a biennial resolution establishing the office of general registrar and the electoral board has not removed from office the general registrar, what is the effect of action by the county electoral board simply appointing a different person as general registrar for the next two years?"

In answer to your first question, I am enclosing copy of a previous opinion given by this office on April 30, 1964, to the Honorable William F. Watkins, Jr., Commonwealth's Attorney of Prince Edward County, in which the matter you present was considered and discussed at length. This opinion is contained in the Report of the Attorney General (1963-1964), p. 125.

With respect to your second question, I direct your attention to § 24-118.2 of the Virginia Code, which provides in pertinent part:
Any such general registrar so appointed shall hold office at the pleasure of the county electoral board and until his successor is appointed and has qualified. . . “ (Italics Supplied.)

Accordingly, it is my opinion that the general registrar in office when the new appointment is made would remain in office until his successor has qualified.

ELECTIONS—Judges—Penalties provided for failure to perform duties.

ELECTIONS—Challenges—Duty of judges.

February 28, 1968

HONORABLE RUFUS V. MCCOY, SR.
Member, House of Delegates

This is in reply to your letter of February 23, 1968, in which you present the following questions:

"On the morning of election, the elected judge takes an oath that he will do all he can to prevent fraud and see that honest elections are carried out. My question is, in case he fails is there a penalty covered whereby this man could be prosecuted."

"Who may challenge a vote? My understanding is that it shall be the duty of the Judges and the Clerks of the election and any elector may challenge the vote."

In reply to your first question, I refer you to § 24-211 of the Code of Virginia which states:

"If any judge, clerk or commissioner of election fail to attend at the time and place appointed for such election, or to perform any of the duties imposed upon him by law, without good and sufficient reason, he shall be fined not less than ten nor more than one hundred dollars."

A further penalty is provided by § 24-212 of the Code with respect to wilful neglect or corrupt conduct. That statute provides:

"If any officer, messenger, or other person on whom any duty is enjoined by law relative to general, primary or special elections, be guilty of any wilful neglect of such duty, or of any corrupt conduct in the execution of the same, he shall be fined not exceeding five hundred dollars, and confined in jail not exceeding one year; and if any officer be convicted as aforesaid, he shall be removed from office."

In reply to your second question, I refer you to § 24-253 of the Code which states:

"Any elector may, and it shall be the duty of the judges of election to, challenge the vote of any person who may be known or suspected not to be a duly qualified voter."
ELECTIONS—Justice of Peace—Eligibility—Secretary of sheriff not prohibited by § 39-7 to serve.

JUSTICE OF PEACE—County Employee—Eligible where spouse is not law enforcement officer.

HONORABLE MARVIN G. SIGLER, Clerk
Circuit Court of Shenandoah County

November 20, 1967

I am in receipt of your letter of November 13, 1967, in which you present the following situation and inquiry:

"A young lady, who is Secretary to the Sheriff of Shenandoah County, recently ran for, and was elected to, the Office of Justice of the Peace in Stonewall Magisterial District, Shenandoah County, Virginia. She is under supervision of the Sheriff of Shenandoah County and is paid by the county.

"I should like an opinion as to whether or not she falls within the purview of those certain persons ineligible for office under Virginia Code Section 39-7 as amended."

In pertinent part, § 39-7 of the Virginia Code provides that no person "whose spouse is a law enforcement officer or is otherwise charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof" shall be eligible for appointment and election to the office of the justice of the peace. (Emphasis supplied.) Since it does not appear from your communication that the spouse of the secretary in question is a law enforcement officer, I am of the opinion that she would not be rendered ineligible for the office of justice of the peace by § 39-7 of the Virginia Code.

ELECTIONS—Person Elected by Write-in Vote—Entitled to office if qualified when takes oath.

HONORABLE JOHN F. EWELL
Commonwealth's Attorney for Warren County

November 20, 1967

I am in receipt of your letter of November 10, 1967, in which you inquire whether or not a certain individual who received the highest number of write-in votes for the office of justice of the peace of a magisterial district of Warren County can qualify for and hold such office under the circumstances set forth in your communication.

I am of the opinion that the situation you present would fall within the scope of the previous opinion of this office, dated March 13, 1957, to which you refer. See, Report of the Attorney General (1956-1957), p. 103. The views expressed in that opinion have been consistently followed in a number of subsequent opinions of this office. See, Reports of the Attorney General (1957-1958), p. 127; (1959-1960), pp. 151, 152.

With respect to the construction of Section 32 of the Virginia Constitution and § 24-132 of the Virginia Code which you mentioned in your inquiry, I call your attention to the following language of the above-cited opinion to the
Honorable Levin Nock Davis, Secretary of the State Board of Elections, dated July 30, 1959, which is contained in the Report of the Attorney General (1959-1960), at 153:

"This section [Section 32] of the Constitution, in my opinion, does not require a person to be qualified to vote in order to be elected to any of the offices set forth therein. This office has ruled that persons who have been elected to public office by a write-in vote, but were not qualified to vote on the day of the election due to the non-payment of the necessary poll taxes, could qualify and hold the office to which they had been elected, provided they were qualified voters at the time of induction into the office.

* * *

"It will be observed that Sections 24-132 and 24-369 of the Code do not disqualify persons who have failed to meet the requirements set forth from being candidates, but merely denies to them the right to have their names printed on the official ballot. I am of the opinion, therefore, that Mr. Shelton is entitled to be certified as a nominee of his party for the office in question.

"Should Mr. Shelton be elected in the general election, he will, of course, have to be a qualified voter on January 1, 1960, in order to be eligible to hold the office."

ELECTIONS—Political Party Committeemen—May vote for themselves for election or re-election.

ELECTIONS—Voting—Failure of registrant to vote does not affect eligibility.

ELECTIONS—Political Parties—School board member may serve as democratic committee, precinct or district chairman.

HONORABLE RUFUS V. MCCOY, SR.
Member, House of Delegates

I have your letter of July 30, 1967, and will answer your questions in the order in which they are set forth.

"1. In organizing the Democratic county organization, can the old committeemen vote for themselves for reelection?"

I know of nothing to prevent a member of a committee voting for himself for reelection.

"2. Can the county chairman vote for himself? If the result is a tie vote, can he vote again to unite the results?"

There is nothing to prevent the chairman from voting for himself, but he can only vote once and is not entitled to vote twice, by virtue of being the chairman.

"3. If a citizen registered to vote and has voted in the past up to
three or four years ago and has not voted in the general election since
four years ago, does he have to register again to vote this fall? Is there
any law governing it? I am under the impression that if he once
registered this is permanent unless his name has been purged from the
registration books."

If a person is duly registered and has kept his legal residence in the
precinct in which he is registered, the fact that he has not actually voted for
four years would not in any way affect his ability or qualification to vote.
If for any reason his name has been purged from the registration books, he
would then not be able to vote until he had gotten his name back on the
registration books.

"4. Can a member of the school board serve as precinct or district
chairman?"

I know of nothing that prevents a member of a Democratic committee or
precinct or district chairman from serving on the school board of the county.

ELECTIONS—Primary—Cost of second primary should be borne equally by
each of the candidates.

July 31, 1967

MR. HARVEY E. GILES, Secretary
Pittsylvania County Electoral Board

I have your letter of July 28, 1967, in which you ask two questions relative
to a second primary election. I will answer your questions in the order in which
they were asked.

"(1) Who shall pay the expenses of the second primary?"

The Honorable Levin Nock Davis, Secretary of the State Board of Elections,
under date of July 20, 1967, notified all parties, including you, that under the
provisions of § 24-397 of the Code of Virginia, the expenses incidental to a
second primary should be borne equally by each of the candidates running in
the second primary.

I agree with this statement by Mr. Davis, and he had discussed the matter
with me prior to sending the notice of July 20.

"(2) When and how should payment for the expenses of the second
primary be made, or requested, if the candidates themselves are to pay
such, and what procedure should the Electoral Board follow as to the
payment of these expenses?"

The statutes are silent as to when and in what manner the payments in
question are to be made or requested. I suggest that the bills for the second
primary be paid in the usual manner as any other election expenses are paid.
After the exact amount of the same has been ascertained, each candidate should
be notified of the amount thereof and requested to pay one-half. If the amount
is not promptly paid, the county should take proper steps to collect the same
as they would to collect any other debt due the county.
ELECTIONS—Registrar—Must be a resident of county or city in which appointed.

PUBLIC OFFICERS—Registrars—Must be a resident of county or city in which appointed.

March 18, 1968

HONORABLE RAYMOND R. ROBERCHT
Commonwealth's Attorney for Roanoke County

This is in reply to your letter of March 13, 1968, in which you inquire whether the same person may serve as the registrar for Roanoke County and the City of Salem.

I am enclosing a copy of a previous opinion of this office, appearing in Report of the Attorney General (1960-1961), p. 124, in which it was ruled that a registrar is an officer within Section 32 of the Constitution of Virginia and is required by § 15.1-51 (formerly § 15-487) of the Code to reside in the district for which he is appointed.

You will note that § 24-57 of the Code states that, in order to qualify for appointment as a registrar, an individual must reside in the county or city for which he is appointed.

In light of the foregoing, it is my opinion that an individual would be precluded from serving as a registrar in a county or city in which he did not reside.

ELECTIONS—Residence—Requirements—For married woman in order to register and vote in husband's voting residence.

October 25, 1967

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

I am in receipt of your letter of October 13, 1967, in which you inquire whether or not the wife of a registered voter of Dickenson County who had been a resident of the city of Norfolk continuously before her marriage could legally register to vote in Dickenson County.

In this connection, I am forwarding to you copies of two previous opinions of this office, dated April 2, 1964, and May 7, 1951, in which situations substantially similar to that which you present were considered and discussed. See, Report of the Attorney General (1963-1964), p. 132; (1950-1951) p. 119. In light of the views expressed in these opinions, it appears that the wife in question may become a legal resident of Dickenson County by being physically present in the county with the accompanying bona fide intention of establishing residence in that county. After a period of six months has elapsed from the date she establishes her residence in Dickenson County by such physical presence and accompanying bona fide intention, she would be in position to register and vote, assuming she has complied with other voting requirements.
ELECTIONS—Sample Ballots—May be carried into voting booths by voters.

July 21, 1967

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

I have your letter of July 18, 1967, in which you ask the following:

"With respect to primary or general elections, is it lawful for voters to carry upon their persons sample ballots or other information relating to the election into the voting place, not for distribution therein, but for individual use as to how they should vote?"

I know of no statute that would prohibit the voters from carrying the sample ballot with them into the voting booth. So, the answer to your question is in the affirmative.

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ELECTIONS—Violations of Election Laws—Authority of attorneys appointed to investigate under § 24-27.

April 4, 1968

THE HONORABLE MILLS E. GODWIN, JR.
Governor of Virginia

I am in receipt of your letter of March 28, 1968, which reads as follows:

"On March 11, 1968, the State Board of Elections requested me to designate an attorney or attorneys to assist in the investigation of various violations of the election laws of the Commonwealth alleged to have taken place in Lee County. The Board stated that it was of the opinion that the public interest would be served by this action, which was authorized by the provisions of § 24-27 of the Virginia Code. A copy of the Board's letter is enclosed.

In response to this request, I subsequently designated Mr. Beverly A. Davis, III, a former Assistant United States Attorney for the Western District of Virginia, and now a practicing attorney at Rocky Mount, Virginia, and Mr. Alfred W. Whitehurst, Jr., Commonwealth's Attorney for the City of Norfolk. Since it is possible that some question may arise concerning the powers conferred upon these attorneys by § 24-27 of the Virginia Code, I would appreciate it if you would give me your official opinion upon the scope of the authority vested in them by the statute in question."

Section 24-27 of the Virginia Code provides:

"The Board, in any instance in which it is of opinion that the public interest will be served thereby, may request the Attorney General, or other attorney designated by the Governor for the purpose, to assist the attorney for the Commonwealth of any jurisdiction in which election laws have been violated, and the Attorney General, or the other attorney designated by the Governor, shall have full authority to do all things necessary or appropriate to enforce the election laws or prosecute violations thereof." (Italics supplied.)
It is clear from the initial sentence of the above-quoted statute that it is the sole prerogative of the State Board of Elections to make the request contained in its letter of March 11, 1968, without regard to the views of any official in a particular jurisdiction in which the election laws of the Commonwealth are alleged to have been violated. Equally clear is it from the concluding language of the statute italicized above that the attorneys designated by your Excellency in response to such request are empowered to take whatever action may be necessary or appropriate not only to enforce the election laws but to prosecute any violations of such laws. In this connection, it is difficult to conceive of more all embracing language than that which defines the power of the attorneys in question as "full authority to do all things necessary or appropriate to enforce the election laws or prosecute violations thereof."

So far as the matter of alleged violations of the election laws in Lee County is concerned, I am of the opinion that Messrs. Davis and Whitehurst are authorized by the statute in question to conduct whatever investigation they may deem necessary or appropriate to develop as fully as possible all facts relevant to the alleged violations. The authorization to conduct such an investigation would entail the power to interrogate individuals, to obtain and examine documentary or other evidence and to file motions with, or obtain process from, the appropriate court requesting the production of documents, including voting records on file in the clerk’s office.

If such investigation reveals that possible violations of the election laws have occurred, the attorneys designated by you are also authorized to present their findings to a grand jury, together with requests for the indictment of such persons as they conclude should be brought to trial. While the statute contemplates that such action of the designated attorneys could be taken in conjunction with the local attorney for the Commonwealth, I am of the opinion that all such action may be taken by Messrs. Davis and Whitehurst independently. The design of the statute that the attorneys designated by the Governor are to assist the local Commonwealth’s Attorney does not, in my opinion, derogate from the full authority conferred upon such attorneys by the express terms of § 24-27 of the Virginia Code to do all things necessary or appropriate to carry out the purpose of their appointment.

ELECTIONS—Voter Registration—May be delivered by mail.

May 6, 1968

HONORABLE LEE R. GORDON
Commonwealth’s Attorney for Chesterfield County

This is in reply to your letter of April 26, 1968, in which you inquire as to whether § 24-86 of the Code allows a voter to mail the required certificate of registration to the registrar of a county or city to which he wishes to transfer his registration, rather than deliver it in person.

As you indicate in your letter, § 24-86 states only that the certificate be "delivered" to the registrar. I know of no regulation of the State Board of Elections which imposes any requirement that local registrars subscribe to a particular procedure in this regard. Delivery in person or by mail would satisfy the requirement of the statute.

Therefore, I am of the opinion that while a registrar may require that the
certificate of registration be delivered in person, it is also proper to accept
delivery by mail.

ELECTIONS—Voting—Eligibility—Must be domiciliary resident of Virginia and
pay State income tax.

TAXATION—Income Tax—Person voting in Virginia required to pay.

August 25, 1967

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

This is in reply to your letter of August 21, 1967, which reads as follows:

"I understand that the Tax Commissioner has ruled that any one
casting a ballot in an election in Virginia, though he may live in
another state, and may be paying tax in another state, must file and pay
his state income tax in this state if he wishes to vote. I have two children
living and working in Aurora, Illinois. They are registered to vote here.
I want to have your legal opinion on this matter. If they vote here, will
they have to pay state income tax in this state?

"Will people living outside the state of Virginia, and who are voting
in Virginia, be required to file and pay Virginia income tax?"

A domiciliary resident of Virginia who moves out of Virginia but continues
to vote in Virginia is still a domiciliary resident of Virginia (because only a
domiciliary resident of Virginia, who is also a citizen of the United States, is
eligible to vote in Virginia) and accordingly is taxable as a resident on his entire
net income for the entire year. Therefore, I am of the opinion that a person
voting in Virginia is required to pay income taxes in this State.

ELECTIONS—Voting—Residence—County officials previously residing in town
now city of second class may vote in county.

MOTOR VEHICLES—Local License—County official holding office under
§ 15.1-995 not exempt from city ordinance.

May 22, 1968

HONORABLE H. BENJAMIN VINCENT
Commonwealth's Attorney for Greensville County

This is in reply to your letter of May 16, 1968, in which you inquire as to
whether the provisions of § 15.1-995 of the Code are to determine the residence
of persons falling thereunder for purposes of voting and payment of local
automobile license fees as well as the holding of political office.

Section 15.1-995 of the Virginia Code provides:

"Any county officer or judge of a county court, of any county who
resides in the county or in any town therein, and has an established
home therein, which homestead shall have become or hereafter becomes a part
of a city since such officer's election or appointment, shall not vacate
his office by reason of his residence in such city, but shall continue to
hold such office so long as he shall be successively elected or appointed
to the office held by him at the time of such transition. Any such
The purpose of § 15.1-995 is to permit county officials residing in a town which has become a city of the second class to continue to hold the same county office (so long as he shall be successively elected or appointed thereto) by deeming them residents of the county "for such purposes." You will note that § 46.1-66(b) of the Code prohibits a county from imposing a motor vehicle license tax on a resident of a city within the county in instances where the city taxes the vehicle. I am unable to find any authority which would indicate that an individual eligible to hold office by virtue of § 15.1-995 would be exempt from an applicable automobile license ordinance of the city in which he resides. Therefore, it is my opinion that such a person would have to pay the city license fee.

In regard to your second inquiry as to whether the person is entitled to vote in county elections, it is my opinion that it is within the intent of § 15.1-995 that his residence be deemed that of the county for voting purposes. I call to your attention § 24-132 of the Code, which specifies that no person may have his name placed on the ballot who is not a qualified voter in the election. Section 24-369 makes a similar provision in primary elections. Therefore, to effectuate the provisions of § 15.1-995, the official must be deemed a resident of the county for voting purposes.

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ELECTIONS—Voting Machines—Use determined by board of supervisors.

BOARDS OF SUPERVISORS—Use of Voting Machines—Determined by board.

June 6, 1968

HONORABLE L. VICTOR MCFALL
Commonwealth's Attorney for Dickenson County

I am in receipt of your letter of June 4, 1968, in which you present the following situation and inquiry:

"Our Board of Supervisors has agreed to purchase ten voting machines for Dickenson County, but this number will not be sufficient for all the precincts.

"... Our Board has passed a resolution specifying the precincts in which the machines are to be used.

"In view of this situation, please advise whether the electoral board or the Board of Supervisors determines the precincts in which the machines are to be used. . . ."

In this connection, I call your attention to the following provisions of §§ 24-291 and 24-296 of the Virginia Code (1950):

"The governing body of any city, town or county in this State, may adopt for use at elections, any kind or type of voting machine that fulfills the requirements of this chapter and has been approved by the State Board of Elections, and shall have authority to use such voting machine at any and all elections held in such city, town or county, or any part thereof, or in any one or more voting precincts therein for
voting, registering and counting votes cast at such elections. . . .”
(Italics supplied.)
“. . . If it shall be impracticable to supply each and every election precinct with a voting machine at any election following such adoption as many may be supplied as it is practicable to procure, and the same may be used in such election districts or precincts within the city, town or county as the authorities adopting the same may direct.” (Italics supplied.)

In light of the language italicized above, I am of the opinion that the Board of Supervisors of Dickenson County is authorized to determine the precincts in which the voting machines you mention are to be used.

ELECTIONS—Voting Places—Persons precluded from being within 40 feet from ballot box—Failure to comply does not invalidate election.

November 1, 1967

Honorable Roy V. Wolfe, Jr.
Commonwealth's Attorney for Scott County

I am in receipt of your letter of October 19, 1967, in which you present the following inquiry:

"Section 24-186 of the Code of Virginia provides with certain exceptions that no person shall be within 40 feet of the ballot box at a polling place. I would like your opinion as to whether or not failure to comply with this section of the Code would invalidate the returns of an election held at a polling place where it is impossible due to the size of the polling place or other circumstances to comply with the provisions of Section 24-186 due to the failure of the governing body and the electoral board to make provision for an adequate place or building in which the election can be held and conducted as provided by Section 24-197."

I am of the opinion that your inquiry should be answered in the negative. In this connection, I am not aware of any provision of Virginia law which would invalidate the returns of an election held at a polling place under the circumstances you describe.

ESCHEATS—Governor's Order Controlling as to Time and Place of Sale.

ESCHEATS—Sales of Property—Escheator may employ auctioneer to conduct sales.

November 28, 1967

Honorable Randolph W. Church
State Librarian

This is in reply to your letter of November 9, 1967, regarding the disposition of lots under the escheat laws of Virginia in which you present the following questions for my consideration:
"I enclose herewith order of sale of escheated property in Roanoke together with my covering letter to the Governor of October 24, 1967. As authorized by law, the Governor has signed this order and has transmitted it to the State Comptroller who has notified the escheator. "I also attach a query from the escheator sent to the Comptroller's office and forwarded to me.

"If a written opinion seems advisable, would you inform me:

"1. Will the order of sale have to be amended by written order from the Governor in order for the property to be sold under cover as requested by the escheator?

"2. May the escheator employ an auctioneer to conduct this sale in the manner suggested in his letter? As I understand from § 55-192 of the Code, the escheator is paid 10% of the proceeds of the sale as a fee and presumably no additional fees are allowed."

The general law of escheats is covered in Chapter 10, Title 55 of the Code of Virginia. Under § 55-184 of this chapter, the Governor, in issuing his order for sale, states the time and place for such sale "as he may think proper." The escheator proceeds to sell according to such order. The proposition of the escheator under consideration is to change the place of sale to one different from that stated in the Governor's order. Since the Governor's order is controlling, I am of the opinion that it will be necessary to secure an amended written order of the Governor, and your question numbered (1) is answered in the affirmative.

With respect to your second inquiry, it is true, as you point out, that § 55-192 provides that the escheator shall have a commission of 10% on the proceeds of the sales made by him of escheated lands. However, § 55-186 of the Virginia Code relates more specifically to the incidents of such sales and provides:

"When the escheator sells for cash he shall certify the purchase and the price to the State Librarian, who, on receiving a certificate from the State Treasurer that such price, deducting the expenses, has been paid into the State treasury and that the expenses of the inquest and sale have been paid to the escheator, shall have a grant issued and executed for the lands so sold." (Italics supplied.)

In light of the language italicized above, it is clear that the escheat laws envision that expenses will be incurred in making sales of escheated property. While the nature of such expenses is not specified in the statute, I am constrained to believe that the usual expenses incurred in similar sales—such as the costs of advertising the property to be sold and employing an auctioneer to conduct the actual sale—should be deemed legitimate expenses within the meaning of the above-quoted statute. I am therefore of the opinion that the escheator may, in his discretion, employ an auctioneer to conduct sales under the escheat laws of the Commonwealth.
ESCHEATS—Land—Commissioner of the revenue may remove from assessment books.

TAXATION—Delinquent Taxes—Escheated land—Not exonerated.

COMMISSIONERS OF REVENUE—Escheated Land—May be removed from assessment books.

February 8, 1968

HONORABLE JEROME S. HOWARD, JR.
Commissioner of the Revenue, City of Roanoke

This is in reply to your letter of February 5, 1968, which reads as follows:

"The Escheator for the City of Roanoke held an inquest of escheat on November 9, 1967, for a number of lots in the City of Roanoke to which no person is known by the Commissioner of the Revenue to be entitled.

"The finding of the jurors was in favor of the Commonwealth, and these lots were certified to the State Librarian by the Escheator.

"As result of this action, a question has arisen concerning the assessment of real estate taxes against these lots for the year 1968. It is my understanding that the finding of an inquest of escheat in favor of the Commonwealth of Virginia vests possession in the Commonwealth immediately. I would appreciate having your advice on the following questions:

1. Is it correct procedure for the Commissioner of the Revenue to remove these lots from his 1968 land assessment book by transfer of ownership from the person who is unknown to him to be entitled, to the Commonwealth, and thereby treat these lots as exempt property until such time ownership vests through court action or Escheator's sale to a person who does not have tax exempt status?

2. Do the tax liens filed, by the City of Roanoke, against these lots for delinquent taxes remain in effect and become collectible from the person who subsequently acquires ownership because of Court petition or Escheator's sale?"

Your question numbered 1 is answered in the affirmative. Upon the death of the owner of lands, intestate, without heirs capable of inheriting, the title, eo instante and before office found, vests in the Commonwealth. By Section 183 of the Constitution of Virginia and § 58-12(1) of the Code, property owned directly or indirectly by the Commonwealth is exempt from taxation.

The commissioner of the revenue, by § 58-808 of the Code, is required to note in his land book changes as may happen to the land in his county or city. Since an escheat to the Commonwealth involves a change in the ownership of the property, the commissioner of the revenue is required to note such change in his land book prior to delivery of a copy thereof that year to the county or city treasurer as provided by § 58-807.

Your question numbered 2 is also answered in the affirmative. Section 58-762 of the Code provides a lien on real estate for taxes. Section 58-771 provides for the assessment of real estate of an owner dying intestate and provides that such assessment may be made against the decedent's estate; this section makes the lien effective even though there are no heirs available to receive the property.
While § 58-1078 provides for an exoneration of taxes on land purchased by the Commonwealth for delinquent taxes and later sold by it, there is no such exoneration provided for taxes on land escheated to the State and later sold. Therefore, I am of the opinion that the delinquent taxes on escheated property remain in effect and are collectible from a subsequent purchaser.


November 21, 1967

HONORABLE J. H. JOHNSON
Treasurer, City of Roanoke

This is in reply to your letters of October 26 and November 13, 1967, concerning the legal right of a claimant to recover property which has escheated to the State.

In an opinion to the Honorable Randolph W. Church dated December 13, 1966 (see, Report of the Attorney General (1966-1967), p. 148), a copy of which is attached, in a similar case involving land claimed by the City of Roanoke which had escheated to the State, this office opined that if the City of Roanoke desired to recover the property it would be necessary for it to follow the procedure set forth in §§ 55-176 through 55-181 of the Code.

Since you advised that the land in question has escheated to the State, I am of the opinion that if the claimant wishes to recover the property it will be necessary for him to follow the procedure set forth in these same sections.

FEES—Clerks—Allowable under § 14.1-123(1) for issuing warrants and subpoenas.

FEES—Clerks—Under § 14.123(1) only one fee where justice of peace issues warrant and clerk issues subpoenas.

June 21, 1968

HONORABLE FLETCHER B. WATSON, Judge
Second Regional Juvenile and Domestic Relations Court for the Counties of Halifax, Mecklenburg and Pittsylvania

This is in reply to your letter of June 17, 1968, in which you request my opinion in relation to the following:

"Section 14.1-123(1) of the Code of Virginia, as amended in 1968, provides for a fee of $3.00 to be paid the clerk for issuing a warrant, which fee includes the issuance of all subpoenas."
“Section 14.1-128(1), as amended, permits the justice of the peace to collect $3.00 for issuing a warrant. Section 14.1-128(1-a) permits the justice to collect an additional $3.00 for issuing all subpoenas.

“Query: Where the justice issues the warrant and the clerk issues the subpoenas, what amount is the clerk to collect for the issuance of the subpoenas?”

Chapter 639, Acts of Assembly of 1968, amended both § 14.1-123, covering fees for services performed by judges or clerks of courts not of record in criminal cases, and § 14.1-128, covering fees for services performed by justices of the peace in criminal matters.

The amendment changed § 14.1-128 so that it prescribes that a justice of the peace shall charge a fee of $3.00 for issuing a warrant of arrest and a fee of $3.00 for issuing all subpoenas. The amendment made no similar change in § 14.1-123 to provide for an additional fee for issuing subpoenas. The latter section, as amended, prescribes a fee of $3.00 for issuing a warrant of arrest, or a warrant for violation of an ordinance, including the issuing of all subpoenas.

There appears no change in the law in respect to instances in which a justice of the peace issues the criminal warrant and the judge or clerk of the court not of record issues the subpoenas relative to such warrant. Assuming for the sake of your question, therefore, that the $3.00 fee is collected by or for the justice of the peace for his issuance of the warrant, I am of the opinion that the clerk should collect no additional fee for the issuance of the subpoenas.

FEES—Justice of Peace—For issuing warrant—Payable by Commonwealth where defendant acquitted or unable to pay costs.

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

This is in reply to your letter of June 19, 1968, which I quote as follows:

“Section 14.1-128 provides that a justice of the peace shall charge for services rendered as follows:

“(1) For issuing a warrant of arrest, or a warrant for violation of any ordinance, three dollars’ . . .

“If the defendant is dismissed, or if he is convicted but does not pay the fine and costs may he bill the Commonwealth of Virginia for the full three dollars for each warrant?”

Section 14.1-85 of the Code of Virginia provides, among other things, that the fees prescribed by law for services of a justice of the peace, in cases in which the defendant is acquitted, or convicted and unable to pay the costs, shall be paid out of the State treasury, unless otherwise provided by law. Section 14.1-128, as amended by Chapter 639, Acts of Assembly of 1968, prescribes a fee of three dollars for a justice of the peace for issuing a warrant of arrest, or a warrant for violation of any ordinance.

The full three dollars is due the justice of the peace for issuing such warrant. The 1968 amendment deleted the differentiation in amounts to be
chased for such service when collected from the defendant or when collected from other sources including the State treasury. Accordingly, your question is answered in the affirmative.

GAME AND INLAND FISHERIES—Game Wardens—Authority—May inspect open fields without a warrant.

CRIMINAL PROCEDURE—Warrants—Game wardens may inspect open fields without securing.

WARRANTS—Game Wardens—Not required to secure to inspect open fields.

Honorable Kermit L. Racey
Commonwealth's Attorney for Shenandoah County

July 12, 1967

This is in reply to your letter of June 27, 1967, which reads as follows:

"Your opinion is respectfully requested in regard to the following question:

"Is it lawful for a game warden of this state to go upon private property without the consent of the landowner and specifically against his will for the purpose of inspecting the property for possible violations of the Game and Fish Laws of this state?

"There appears to be a number of general laws pertaining to this subject matter, but no specific statute that I can see."

While there is no statutory provision in the Virginia Code for the search of open fields without a warrant, other than incident to an arrest, [§§ 19.1-84, 19.1-88, 29-33], a search warrant is not required at common law or under the Virginia Constitution, Section 10, for the search by an officer of private real estate not consisting of the dwelling house or curtilage or land in the actual custody at the time of some person. See, McClannan v. Chaplain, 136 Va. 1, 12 (1923), from which I quote as follows:

"The office of conservators of the peace is a very ancient one, and their common law authority to make police inspection, without a search warrant, extends throughout the territory for which they are elected or appointed, as the case may be, in private as well as in public places, and upon private as well as public property, unless inhibited from entry for such purpose without a search warrant by some rule of the common law, or by the Constitution, or by statute..."

In connection with the above language, a previous opinion of this office has held that Game Wardens are conservators of the peace for the purpose of enforcing the Game and Fish laws of this State. See, Report of the Attorney General (1955-1956), at p. 93.

Furthermore, it has been expressly held that the Fourth Amendment protection against search and seizure is not applicable to open fields (Hester v. United States, 265 U.S. 57), nor hunting shacks thereupon in certain circumstances (United States v. Greenhead, Inc., 256 F. Supp. 892).

I am of the opinion that a police inspection of open fields without a warrant is valid in Virginia, and this opinion is consistent with that expressed in
GARNISHMENT—Filed Under North Carolina Statute—Virginia not required to honor.

TAXATION—Salary of Commonwealth Employee Not Subject to Garnishment Obtained in North Carolina.

September 14, 1967

MR. T. S. DUNAWAY, JR.
Business Manager, Christopher Newport College

This is in reply to your letter of August 28, 1967, in which you enclosed a garnishment issued to Christopher Newport College by the Department of Revenue of the State of North Carolina against Mrs. Georgia M. Hunter, 4904 Hazelwood Drive, Newport News, Virginia, an employee of the College. You ask to be advised if you are required to accept the garnishment which was issued under Subsection (b) of G. S. 105-242 of the State of North Carolina.

A review of Subsection (b) of G. S. 105-242 discloses that it provides specifically for the garnishment of wages, salaries and other compensation of officials and employees of North Carolina. Article 9, Chapter 20 of Title 58, Code of Virginia (1950), as amended, (§§ 58-1014 through 58-1021.1), provides for the collection of taxes. Section § 58-1021.1 of this Chapter provides for the collection of out-of-state taxes; viz.,

"Any state of the United States, or any political subdivision thereof, shall have the right to sue in the courts of Virginia to recover any tax which may be owing to it when the like right is accorded to the Commonwealth of Virginia and its political subdivisions by such state, whether such right is granted by statutory authority or as a matter of comity."

The garnishment which you enclosed was not obtained within the provisions of this section, therefore, I am of the opinion that the Christopher Newport College is not required to recognize it.

GENERAL ADMINISTRATIVE AGENCIES ACT—Effective Date of Rule Issued—Interpreting § 9-6.7 of the Code.

September 19, 1967

HONORABLE STEVE G. CONERLY
Administrator, State Milk Commission

I am in receipt of your letter of July 26, 1967, and the supplementary information you submitted in connection therewith on September 11, 1967, concerning the following inquiry set out in your initial communication:

"The Virginia State Milk Commission would like an opinion from you interpreting § 9-6.7, Code of Virginia (1950), as amended.
"When the Milk Commission has held a hearing as provided by law and has adopted or promulgated a rule, may the Commission specify a date upon which the rule shall become effective after it has been printed and filed as prescribed by law."

Section 9-6.7 of the Code of Virginia (1950), as amended provides:

"(a) Each agency upon its adoption of any rule shall file forthwith in the office of the Division of Statutory Research and Drafting two certified copies thereof. Within thirty days from June 28, 1952, each agency shall file in said office two certified copies of all rules theretofore lawfully adopted by it and in force.

"(b) Each agency shall publish all its rules in a printed pamphlet (with not more than one supplement), and shall forward a copy thereof to the clerk of each court of record of this State and to the law library of the School of Law of the University of Virginia and to the Marshall-Wythe Law School of the College of William and Mary. A copy thereof shall also be delivered to any person who requests it.

"(c) Except as provided in § 9-6.5, no rule shall become effective until it has been so filed and printed. No rule shall be enforced or enforceable while copies of the pamphlet containing it are not available for distribution to the public at the office of the agency for more than sixty consecutive days.

"(d) The pamphlets and supplements thereto referred to in paragraph (b) of this section shall be approximately six inches wide by nine inches long, and the pages thereof shall be triple-punched four and one-quarter inches center to center. Where provisions of statute law are inserted with rules in a pamphlet, such provisions must be set forth separately.

"If an agency or any division thereof makes rules relating to more than one subject, it may print its rules relating to separate subjects in separate pamphlets, provided all its rules relating to each subject or group of subjects are printed in one pamphlet with not more than one supplement to that pamphlet." (Italics supplied.)

It is clear from the language of § 9-6.7 (a), italicized above, that the Virginia State Milk Commission must file in the office of the Division of Statutory Research and Drafting two certified copies of a rule which it has adopted under the General Administrative Agencies Act and must publish such rule in a printed pamphlet as prescribed in § 9-6.7 (b) and (d) of the Virginia Code. Moreover, § 9-6.7 (c) provides that—with the exception of rules adopted in emergency situations under § 9-6.5—no rule shall become effective until it has been so filed and printed. However, § 9-6.7 contains no language which directs that a rule shall or must become effective immediately upon its being so filed and printed. I am therefore of the opinion that the Virginia State Milk Commission may validly adopt a rule which by its terms becomes effective upon a specified date subsequent to the date upon which it is filed and printed.
GOVERNOR—Removal of Political Disability—May remove where conviction under laws of another state.

CONSTITUTION—Section 73—Governor may remove political disability where conviction under laws of another state.

ELECTIONS—Voting—Governor may remove political disability where person convicted under laws of another state.

April 8, 1968

Miss Martha Bell Conway
Secretary of the Commonwealth

This is in reply to your letter of March 26, 1968, in which you inquire as to whether Section 73 of the Constitution empowers the Governor to remove the political disabilities of a person convicted of an offense committed in another state so as to enable him to register and vote in Virginia.

It is my opinion that, even though the conviction was under the law of another state, the political disability arises under the law of Virginia, and may be properly removed by the Governor pursuant to Section 73 of the Constitution.

October 5, 1967

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

This is in reply to your letter of September 20, 1967, in which you request the views of this office in regard to the questions presented you in a letter, dated September 18, 1967, signed by William C. Hager, Jr., Chief Plumbing Inspector for Loudoun County, a copy of which letter you furnished me. I shall quote the essential portions of that letter, as follows:

"1. Do I as Plumbing Inspector of Loudoun County have the legal authority to swear to warrants for arrest of violators of the Plumbing and Gas Code Ordinance, or would this be my duty?"

"2. Under the laws of the Commonwealth, can I stop work on any Plumbing or Gas Fitting not in accordance with the ordinance? If so, what steps should be taken in case someone refuses to stop work? I will quote to you Section 2.2 of the Loudoun County Plumbing and Gas Code Ordinance, and I think you will understand my problems."

"2.2 AUTHORITY OF PLUMBING INSPECTOR. The Plumbing Inspector shall have full authority to do any and all things necessary to carry into effect all provisions of this ordinance, and all plumbing and gas fitting regulations promulgated pursuant thereto, and may condemn plumbing and gas fitting work not executed in accordance therewith, or plumbing or gas fixtures, fittings, appliances and ma-
materials not complying with the requirements thereof. He or his authorized agent shall have the right of entry to any premises during reasonable hours to inspect, reinspect or test plumbing and gas fitting when in course of construction, alteration or repair, or to inspect plumbing or gas fitting upon the written complaint of any interested citizen. He or his authorized agent, or any officer of the law shall stop any work of excavation for plumbing or gas fitting purposes or any plumbing or gas fitting work under way for which no permit has been issued or which is not proceeding in accordance with the terms of a permit issued therefor.”

The legal guide for establishing plumbing controls in the localities of the State is found in Title 32 of the Code of Virginia. Under chapter 4 thereof, relating to control of communicable diseases, § 32-61 provides that counties, cities and towns may regulate plumbing and sewer connections and may appoint an inspector who shall report to the local board of health any defects which he believes will affect the public health. The authority for establishing standards and adopting regulations dealing with plumbing in general is covered in Chapter 24 of this title, which was enacted under Chapter 639, Acts of Assembly of 1958.

Specifically, § 32-406 authorizes the State Board of Health to establish official standards and adopt regulations dealing with plumbing, plumbing equipment, plumbing fixtures and appurtenances thereto. Section 32-407 provides that: “Counties, cities and towns may establish standards and adopt regulations dealing with the same subject, provided, however, such standards and regulations shall not be below those adopted by the State Board of Health.” Section 32-408 places the responsibility for the enforcement of regulations established under the provisions of this chapter under the local authorities. Section 32-410 provides that any person violating any provision thereof shall be guilty of a misdemeanor.

Section 2.2 of the Loudoun County Plumbing and Gas Ordinance, quoted herein, states, among other things, that the Plumbing Inspector “shall have full authority to do any and all things necessary to carry into effect all provisions of this ordinance.” I am of the opinion this language is broad enough to authorize the Plumbing Inspector of Loudoun County to swear out warrants for the arrest of persons violating the plumbing and gas ordinance of such county. Accordingly, question numbered 1 is answered in the affirmative.

The last sentence of Section 2.2 specifically authorizes the Plumbing Inspector to stop “any plumbing or gas fitting work under way for which no permit has been issued or which is not proceeding in accordance with the terms of a permit issued therefor.” I am of the opinion that the provisions of State law, which I have already cited, legally support this clause and, therefore, I shall answer the first part of question numbered 2 in the affirmative.

The final question presented, under question numbered 2, asks what steps should be taken in case someone who has been ordered by the Plumbing Inspector to stop work on a project, refuses to stop. If any such person who has failed to obtain a permit or has not proceeded in accordance with the terms of a permit issued persists in his refusal to obey a lawful order to stop work, the proper procedure is to seek a court order of injunction for enforcement of the order. In addition, you may wish to review the terms of the ordinance not included in Section 2.2, to determine if a violation of such order to stop work constitutes a misdemeanor.
HIGHWAYS—Condemnation—Filing of certificate under § 33-70.4—Effect upon ownership of property.

May 27, 1968

HONORABLE W. CARRINGTON THOMPSON
Member, Senate of Virginia

This will acknowledge receipt of your letter of May 1, 1968, requesting my opinion on the following:

“A owns Blackacre and the State Highway Department proposes to acquire a portion of it for highway purposes. The parties are unable to agree on a purchase price and the Commissioner, pursuant to § 33-70.3 et seq., issues the certificate which is duly recorded in the Clerk’s office and A, pursuant to § 33-70.6, is paid the funds.

“Thereafter, A dies testate and devises Blackacre to B and bequeaths all of his personal estate to C who is appointed executor and qualifies as such.

“In the subsequent condemnation proceeding who is the defendant, C or B, or both of them?

“Assume that the award exceeds the funds deposited and paid to A, who is entitled to the excess?

“Assuming that the award is less than the funds paid to A, who is liable for the deficiency?”

Section 33-70.4 of the Code of Virginia (1950), as amended, provides that upon the recordation of the Certificate of Deposit the interest or estate of the owner of such property shall terminate and title to the property shall be vested in the Commonwealth. The section further provides that the owner shall have the same interest or estate in the funds covered by the certificate as he previously had in the property which was acquired by the certificate. A review of the case law of Virginia does not reveal any case in which the Supreme Court of Appeals of Virginia has had occasion to construe this section as it applies to the factual situation outlined in your letter. However, the Court has rendered an opinion on a problem similar to this question and considered the matter of funds paid pursuant to a Federal condemnation proceeding.

In the case of E. B. Bryson v. Irby Turnbull, et al, 194 Va. 528, 74 S.E. 2d 180, the Court states at page 534 of the opinion:

“...Where land is purchased or taken under compulsory powers conferred by statute, and the owner is sui juris, a conversion is effected; the purchase money, although not yet actually paid, becomes to all intents personal property; but if the owner is an infant or a lunatic, or the land is in settlement, the purchase money remains land; there is no conversion.”

It would appear from the above quoted language that our Court was applying the usual rule of equitable conversion except in cases involving persons under disability or in cases which were in settlement. I am of the opinion that the Legislature in enacting § 33-70.4 of the Code intended the same rule of equitable conversion to apply and that our Court would reach the same result which it reached in the Bryson case, supra.

Assuming in the cases set forth in your letter that the element of incapacity is not present, I would answer your inquiries as follows:
1. In a subsequent condemnation proceeding B and C should both be made defendants since B would hold the reversionary title to the property acquired and C under the principle of equitable conversion would be entitled to the proceeds as executor and legatee.

2. In the event the award exceeds the funds on deposit, the excess over the funds previously paid to the landowner should be paid to C since under the will of A he is entitled to the personal property.

3. In the event the award is less than the funds covered by the certificate and paid to A, the estate of A would be liable for the repayment of such deficiency and the Commonwealth would become a creditor of the estate of A.

HIGHWAYS—Public Landings Which Are Part of Secondary System of State Highways—No control over or authority to expend public funds for in board of supervisors.

BOARDS OF SUPERVISORS—No Authority Over Public Landings Which Are Part of Secondary System of State Highways.

June 18, 1968

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

This is in reply to your letter of February 8, 1968, in which you asked my opinion on the following two questions: (1) Does a county Board of Supervisors have any power to pass an ordinance controlling the use of a public landing, which landing is a part of the Secondary System of State Highways? (2) Does the county Board of Supervisors have any authority to expend public funds on such a landing?

Section 33-44, Code of Virginia (1950), as amended, provides that the Secondary System of State Highways shall consist of all public roads, causeways, bridges, landings and wharves in the several counties of the State. Section 33-141 permits local road authorities to establish new roads which shall, upon establishment, become a part of the Secondary System of State Highways. By resolution dated July 30, 1948, the Board of Supervisors of Mathews County established a road which is now State Route 689 and the landing known as Davis Creek Public Landing at the end of Route 689. Since the landing in question is therefore a part of the Secondary System of State Highways, the following portion of § 33-46 of the Code is controlling: "The boards of supervisors . . . shall have no control, supervision, management and jurisdiction over such public roads, causeways, bridges, landings and wharves constituting the secondary system of State highways."

I have previously expressed the opinion which I would reaffirm in this instance, that, with the exception of certain criminal type ordinances, the counties may not enforce an ordinance which regulates the use of the Secondary System of State Highways. Report of the Attorney General (1963-1964), page 10.

In answer to your second question, I would refer you to a previous opinion in which I stated that "although the Board of Supervisors may establish new roads under certain circumstances in accordance with the provisions of § 33-141 of the Code, apparently the Board has no authority to maintain the roads, and the authority to expend public (county) funds is limited to the cost of acquiring rights of way for the new roads." Report of the Attorney General
In accord with that opinion, the Board has no authority, in my judgment, to expend public funds on a public landing or wharf which is a part of the Secondary System of State Highways.

HIGHWAYS—Subdivision Streets—Extent to which counties may contribute to cost of improvement.

SUBDIVISIONS—Streets—Extent to which counties may contribute to cost of improvement.

COUNTIES—Subdivision Streets—Extent to which counties may contribute to cost of improvement.

May 16, 1968

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

This is in reply to your letter of May 10, 1968, in which you enclosed a copy of House Bill 714, which was enacted by the 1968 General Assembly, and made inquiry as to whether under this statute or under any other Virginia law the governing body of a county could pay the full cost of improving subdivision streets rather than one-half the cost as set forth in House Bill 714.

Section 33-46 of the Code of Virginia (1950), as amended, places the control and supervision over the secondary system of State highways exclusively in the State Highway Commission. This section was a portion of the original "Byrd Road Law" (Chapter 415, Acts of 1932), and is applicable in all counties except those which exercised the option to continue the county road system (now limited to Arlington and Henrico). The authority of the local governing bodies over the secondary system is limited to the establishment of new roads (§ 33-141), the participation in the costs of right of way (§ 33-141), and the abandonment of such highways as public roads (§§ 33-76.7, et seq.). Except for limited purposes mentioned in § 33-138 of the Code, the governing bodies of the several counties are precluded from laying levies for the construction and maintenance of roads. One such exception is for the purpose of supplementing State highway funds in those counties adjacent to cities of the first class.

In those counties which qualify under the exception mentioned above in § 33-138 of the Code of Virginia (1950), as amended, I am of the opinion that the governing body of the county could expend county funds to pay the full cost of improving the streets for inclusion in the State secondary system. However, the same Code provision prohibits other counties from incurring any such indebtedness.

The above was the situation as it existed prior to the enactment of House Bill 714 which is codified as § 33-47.2 and becomes effective on June 28, 1968. I have reviewed the new statute and am of the opinion that it was the intention of the Legislature to broaden the authority of counties to expend county funds for improving certain subdivision streets and to permit any county to expend the necessary funds to pay one-half of the cost to bring such streets up to minimum standards for acceptance by the State. The last paragraph of this statute expressly states that the governing body may expend general county revenue for such purpose and levy taxes for such purpose notwithstanding any limitation in § 33-138 of the Code. Therefore, considering the two above cited
REPORT OF THE ATTORNEY GENERAL

statutes together, I am of the opinion that any county may expend county funds to pay one-half the cost of improving the streets covered by the new § 33-47.2 of the Code but only those counties which qualify under the exception set forth in § 33-138 of the Code have the authority to pay the entire cost of such improvement.

HOUSING—Open—City resolution on subject—Dependent on enabling legislation.

HONORABLE BERNARD LEVIN
Member, House of Delegates

January 10, 1968

This is in reply to your letter of December 19, 1967, which reads, in part, as follows:

"It is requested that I be advised of the opinion of your office as to whether or not the City Council of the City of Norfolk has the authority without enabling legislation from the General Assembly of Virginia to pass a resolution on open housing."

In my opinion, the answer is in the negative. You enclosed with your letter a copy of an opinion on the same subject from the City Attorney to the Mayor of the City of Norfolk. I concur in the conclusions of the City Attorney.

The Council of the City of Norfolk possesses only those powers assigned to it by the General Assembly. I know of no provision of general law or of the charter of the City of Norfolk from which it could be concluded or implied that the power to pass such a resolution has been granted to the Council of the City of Norfolk.

HOUSING AUTHORITIES—Members—Must be legal resident of political subdivision constituting the Authority

PUBLIC OFFICERS—Residence—Member of Housing Authority must be legal resident of political subdivision constituting Authority.

HONORABLE JOSEPH P. JOHNSON, JR.
Member, House of Delegates

October 12, 1967

I am writing in further connection with your letter of September 13, 1967, and my response thereto of September 25, 1967, concerning the eligibility of a non-resident of the city of Bristol to serve on the Bristol Redevelopment and Housing Authority.

I am now in receipt of the additional documents which I mentioned in my previous letter. From these documents and the collateral information you furnished with your letter, it appears that the individual concerning whom you inquire resided in the city of Bristol when he was initially appointed a commissioner of the Authority, but had moved outside the corporate limits of the city when reappointed for an additional term.
Initially in this connection, I am forwarding to you a copy of a previous opinion of this office, dated October 17, 1960, to the Honorable William B. Spong, Jr., then a member of the Senate of Virginia, in which it was ruled that "a commissioner of a Redevelopment and Housing Authority must reside within the territorial limits of the political subdivision constituting the Authority." See, Report of the Attorney General (1960-1961), p. 165. In light of the view expressed in the enclosed opinion, it would appear that the critical inquiry in the situation you present is whether or not the individual in question is a resident of the city of Bristol for the purpose of holding office as a commissioner of the Bristol Redevelopment and Housing Authority.

Pertinent to the resolution of this inquiry are the decisions of the Supreme Court of Appeals of Virginia in Williams v. Commonwealth, 116 Va. 272, and Dotson v. Commonwealth, 192 Va. 565. Each of these cases involved proceedings of quo warranto to determine the eligibility of an individual to hold public office. In the former case, the question presented was whether or not Williams was a resident of the city of Alexandria for the purpose of serving as a member of the city council of that city; while in the latter case, the issue was whether or not Dotson was a resident of the Kennedy Magisterial District of Buchanan County for the purpose of serving as a member of the board of supervisors of that county. During the course of its opinion in the Williams case, supra at 277, the Court made the following observation which was subsequently quoted with approval in the Dotson case, supra at 571:

"For the purpose of voting and holding office a man cannot have more than one legal residence. A legal residence once acquired by birth or habitancy is not lost by temporary absence for pleasure, health or business, or while attending to the duties of a public office. Where a man has two places of living, which is his legal residence is to be determined largely, where the right to vote or hold office is involved, by his intention. When he acquires a new legal residence he loses the old, but to effect this there must be both act and intention."

Furthermore, in each case the Court articulated the criteria to be utilized in determining the question of residence for the purpose of holding office in the following language in the Dotson case, supra at 571; cf., Williams v. Commonwealth, supra at 279:

"It was said that the true test in cases of this kind is this: If a person leave his original residence with the intention of not returning, and adopt another, for a time however brief, with the intent to remain there, his first residence is lost. But if he left his original residence with the intention of returning, such original residence continues in law, notwithstanding the temporary absence of himself and family." (Italics supplied).

In light of the language of the Supreme Court of Appeals of Virginia italicized above, I am of the opinion that the eligibility of the individual in question to hold office as a commissioner of the Bristol Redevelopment and Housing Authority depends upon his intention when he moved from the city of Bristol to a place outside the corporate limits of the city. If the individual left his original residence in the city with the intention of not returning and moved outside the city with the intent to remain there, he would no longer be a
resident of the political subdivision constituting the Authority within the scope of the above-mentioned decisions and the previous opinion of this office. However, if he left his original residence with the intention of returning and with the intent to remain only temporarily outside the territorial limits of the city, his original residence in the city would continue, and he would still be a resident of the political subdivision constituting the Authority and thus eligible to serve as a commissioner of such Authority.

INTEREST—Legal Rate—Chargeable on FHA and VA loans.

May 20, 1968

HONORABLE HERBERT H. BATEMAN
Member, Virginia State Senate

I am in receipt of your letter of May 9, 1968, in which you call my attention to §§ 6.1-318, 6.1-319 and 6.1-328 of the Virginia Code, as amended at the recent regular session of the General Assembly, and present the following inquiry:

"By virtue of the foregoing, I am respectfully requesting an official opinion as to whether or not section 6.1-328 precludes Virginia lenders from making an FHA or VA loan at a rate in excess of 6% so long as the total interest charged does not exceed 8% as provided in section 6.1-319 as amended in 1968 and which is presently in effect."

Sections 6.1-318 and 6.1-319 of the Virginia Code were amended by House Bill No. 46, which was approved by the Governor on March 1, 1968, and became effective on that date as emergency legislation. As amended, § 6.1-318 fixes the legal rate of interest at 6% per annum, while § 6.1-319, as amended, establishes the contract rate at 8% per annum, including points as therein defined. With certain exceptions not material to your inquiry, no contract for the loan of money may be made at a greater rate of interest than that specified and defined in § 6.1-319 of the Virginia Code. Section 6.1-328 of the Virginia Code was amended by House Bill No. 973, which was approved on April 2, 1968, and will become effective June 28, 1968. As amended, § 6.1-328 provides that if the rate of interest specifically set forth in the bond, note or other evidence of indebtedness does not exceed "the contract rate prescribed in § 6.1-319," no person shall, by way of defense or otherwise, avail himself of any of the provisions of Chapter 7 of Title 6.1 to avoid or defeat the payment of any interest or fee which he shall have contracted to pay on loans insured by the Federal Housing Administration or guaranteed by the Veterans Administration.

It seems clear that when amended § 6.1-328 becomes effective on June 28, 1968, additional interest or fees may lawfully be contracted for on loans insured by the Federal Housing Administration or guaranteed by the Veterans Administration, so long as the rate of interest specified in the note does not exceed the contract rate prescribed in § 6.1-319. Until that date, however, no greater rate of interest may lawfully be charged than that allowed by existing law. Since § 6.1-319 became effective on March 1, 1968, and is now in force, I am of the opinion that § 6.1-328 does not prevent loans insured by the Federal Housing Administration or guaranteed by the Veterans Administra-
tion from being made at a rate in excess of 6% per annum, provided the limitations specified and defined in § 6.1-319 of the Virginia Code are not exceeded.

INTEREST—Real Estate Loans—Banks may charge in advance.

BANKS—Interest—Real estate loans—May charge legal rate in advance.

September 5, 1967

HONORABLE JAMES M. THOMSON
Member, House of Delegates

This is in reply to your letter of August 15, 1967, referring to your letter of November 15, 1966. As you state, this office withheld replying to your November letter because the subject of your inquiry was before the Money and Interest Commission. The chairman of that commission has now indicated no objection to a reply. The inquiry reads as follows:

"I am enclosing herewith a letter from Judge Ralph T. Catterall of the State Corporation Commission concerning interest rates. As a consequence, I would like to ask for an Attorney General's ruling on the following questions:

"1. Does the following portion of 6.1-320 apply to real estate loans payable in weekly, monthly or other periodical installments?

"provided, however, that any bank may charge in advance the legal rate of interest upon the entire amount of any loan payable in weekly, monthly or other periodical installments, and any note . . . ."

"2. Does the following provision from the first section of 6.1-320 apply to real estate loans?

"Any bank . . . may loan money . . . at a rate not exceeding one half of one per centum for thirty days . . . ."

"3. Is the 'legal rate' referred to in the provision quoted from 6.1-320 in my paragraph (1) related back to the one half of one per centum for thirty days quoted from 6.1-320 in my paragraph (2)? If not, to what does the 'legal rate' referred to in the provision quoted from 6.1-320 in my paragraph (1) apply?"

I find nothing restricting the application of the proviso quoted in your first question (see, § 6.1-320) and, therefore, the answer is in the affirmative. In my opinion, the proviso is applicable to loans secured by real property.

I agree with Judge Catterall's letter to you of November 7, 1966, in respect to this question.

I find nothing restricting the application of the provision (§ 6.1-320) quoted in your second question and, therefore, this answer is also in the affirmative. In my opinion, the language quoted is applicable to loans secured by real property.

The answer to your third question was provided by Judge Catterall's letter
to you of November 16, 1966, with which I agree. The "legal rate" referred to is, in my opinion, the rate specified in § 6.1-318 of the Code (6%).

JUDGES—Appointment—Circuit court judge does not have authority to appoint judge of county court as substitute judge in another county.

August 28, 1967

HONORABLE HAROLD H. PURCELL
Judge, Ninth Judicial Circuit

This will reply to your letter of August 4, 1967, in which you outline the difficulties you have encountered in obtaining qualified attorneys for appointment as substitute judges of the courts not of record in certain counties in your circuit and request my advice upon the following question:

"Does the Circuit Court Judge, with the approval of the governing bodies, have the authority to appoint a Judge of the County Court as a Substitute Judge in another County?"

I have reviewed the various provisions of Virginia law relating to the appointment of judges, associate judges and substitute judges of courts not of record as set forth in Title 16.1 of the Virginia Code, with specific reference to those mentioned in your communication. Particularly pertinent to the question you present are those provisions of §§ 16.1-9, 16.1-12, 16.1-20 and 16.1-24 of the Virginia Code which prescribe:

§ 16.1-9—"Whenever the judge or judges charged with the duty of appointing a judge, associate judge or substitute judge of a court not of record shall find that a duly qualified licensed attorney is not available for appointment, or that the best interests of the county will be promoted by appointing a person not licensed as an attorney or an attorney from an adjoining county or city, then there may be appointed to such office a person not licensed to practice law who is otherwise qualified to serve, or a duly qualified licensed attorney from an adjoining county or city. Any attorney appointed from an adjoining county or city shall be exempt from the residence requirements of § 16.1-12.

"Nothing in this section shall be construed to prevent the appointment for one or more additional terms of any judge or associate or substitute judge who is not a person licensed to practice law but who is in office at the time such appointment is to be made.

"Instead of appointing a person not licensed to practice law the judge or judges may recommend to the governing body of the county that the court or courts for which an appointment is to be made be operated jointly with the courts of another political subdivision under a single judge as provided in chapter 4 (§ 16.1-64, et seq.) of this title." (Italics supplied.)

§ 16.1-12—"Every judge, associate judge and substitute judge of a court not of record shall, during his term of office, reside within the boundaries of the area in which he serves, . . . Any such judge who presides over more than one court not of record may qualify under
this section by meeting the residential requirements as to any political subdivision which he serves.” (Italics supplied.)

§ 16.1-20—“For each court not of record there shall be a substitute judge, and, in the discretion of the appointing authority there may be one or more additional substitute judges to serve in the event of the absence or inability to serve of the substitute judge, which substitute judge or judges shall be appointed in the same manner as the judge of the court; except that if the judge of the court is elected by popular vote, such substitute judge shall be appointed by a judge of a court of record to which appeals from such court lie. *The same person may be appointed and serve as the substitute judge of two or more courts not of record.*” (Italics supplied.)

§ 16.1-24—“... When a judge is under any such disability or is absent or for any other cause is unable to hold court and there is no other judge or substitute judge of the court qualified to act, any other judge of a court not of record in the county or city may hear and dispose of the action. *In the event of the disqualification, absence or inability to hold court of all such judges and substitute judges, the judge of the circuit court of the county or the corporation or hustings court of the city, as the case may be, shall appoint a judge of another county or city or a disinterested practicing attorney at law if available, or if not, some other qualified person to hear and dispose of any action or actions properly coming before the court for disposition on the day or days specified in the order of the court of record.*” (Italics supplied.)

From the language of § 16.1-9 italicized above, it would appear that the legislature has made provision for situations such as you describe by authorizing (1) the appointment of a person not licensed as an attorney or (2) the appointment of an attorney from an adjoining county or city or (3) the joint operation of courts not of record in accordance with the provisions of §§ 16.1-64, et seq., of the Virginia Code. Moreover, it would also appear from the language of § 16.1-20 and § 16.1-12 that provision has been made for a substitute judge of a court not of record in one political subdivision to serve as a substitute judge of a court not of record in another political subdivision and qualify under § 16.1-12 by meeting the residence requirement of either political subdivision which he serves.

However, the only provision of Virginia law I have been able to discover which authorizes the appointment of the judge of the county court of one political subdivision to preside over a county court in another political subdivision is § 16.1-24 of the Virginia Code, which makes such provision only in the event of “the disqualification, absence or inability to hold court” of all judges and substitute judges of a particular political subdivision.

In light of the foregoing, I concur in the view expressed in your communication that no statutory authority exists for the appointments concerning which you inquire, and I am, therefore, of the opinion that your question must be answered in the negative.
JUDGES—Circuit—Secretarial assistance—May be provided by counties in circuit.

BOARDS OF SUPERVISORS—Authority to Appropriate Salary for Secretary to Judge.

July 19, 1967

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

I am in receipt of your letters of July 14 and July 17, 1967, in which you state that the board of supervisors of Lancaster County and the boards of supervisors of the other four counties comprising the Twelfth Judicial Circuit are being requested to make provision for a secretary for the Judge of such circuit. In this connection, you present certain inquiries which will be stated and considered seriatim.

"Whether each of the five counties of the Twelfth Judicial Circuit could by appropriate resolutions adopted by their respective Boards of Supervisors appropriate and authorize the expenditure of a sum not to exceed $1,000.00 annually for the purpose of paying the salary of a full-time secretary for the Judge of the Circuit Court of the Twelfth Judicial District."

Answer: Yes. This office has previously ruled that boards of supervisors may make appropriations for the purpose of providing secretarial assistance for the judge of the circuit court. See, Report of the Attorney General (1962-1963), p. 45. I am enclosing a copy of this opinion, together with a copy of the two previous rulings of this office therein mentioned. See, Report of the Attorney General (1939-1940), p. 137; (1945-1946), p. 11.

"If (1) above is answered in the affirmative, what suggestion does your office have as to the mechanics by which the five counties might conveniently employ and compensate such a secretary?"

Answer: I have discussed this matter with the Honorable J. Gordon Bennett, Auditor of Public Accounts, and would suggest that each of the five counties in question separately pay their portion of the salary directly to the secretary in question and designate the payments as being made to provide a secretary for the judge of the circuit court of each individual county.

"Would your office be so good as to furnish me with a copy of the opinions mentioned in the opinion relative to the subject matter contained in the Report of the Attorney General 1939-1940, Page 137, and the Report of the Attorney General 1945-1946, Page 11?"

Answer: See answer to Question 1 above.

"Is this mode of providing a secretary for the Judge outside of the prohibition against diminishing the salary during the term of the office of the Judge as provided in 14.1-38 of the Code and Virginia Constitution Sections 102 and 103?"

Answer: Yes. Payments made for this purpose by the boards of supervisors in the above-suggested manner would not constitute any part of the salary
or allowances prescribed by law for the judge of the circuit court and would not come within the scope of § 14.1-38 of the Virginia Code or Sections 102 or 103 of the Virginia Constitution.

"Does the Board of Supervisors of the several counties have the authority to appropriate county funds directly for the purpose of establishing and maintaining a law library for the Circuit Court Judge?"

Answer: For the reasons stated in the enclosed opinions with respect to providing secretarial assistance for the judge of the circuit court, I am of the opinion that the boards of supervisors may also make appropriations for the purpose of establishing or maintaining a law library for such judge. Here again, I would suggest that payments for this purpose be made directly by the board of supervisors of each county for such items of the law library as the individual counties may purchase.

JUDGES—Retirement—No authority for second retirement.

RETIRED—Judges—No authority for second retirement.

September 6, 1967

HONORABLE L. H. SHRADER
Substitute County Judge, Amherst County Court

I am in receipt of your letter of August 25, 1967, in which you present the following situation and inquiry:

"I served as County Judge of Amherst County for nearly twenty-six years and retired on July 31, 1964. I have since been in retirement until August 1, 1967, at which time the Honorable C. G. Quesenbery appointed me Substitute County Judge.

"The question is, if he should appoint me the County Judge beginning September 1, 1967, to serve full time. And when the Honorable C. G. Quesenbery, Circuit Court Judge, is in a position to appoint another County Judge, to succeed me and I should retire again, will I be entitled to retire and draw my retirement as provided in Section 51-29.9 of the Code of Virginia which will be ¾'s of the salary I will be drawing at the time of my second retirement?"

It is clear from your communication that you retired under the provisions of Chapter 2.2 of Title 51 of the Virginia Code on July 31, 1964. See §§ 51-29.8, et seq., Code of Virginia (1950), as amended. With respect to the compensation to be paid a trial justice or county judge so retiring, § 51-29.9 of the Virginia Code in pertinent part prescribes:

"Any trial justice retiring under the provisions of this chapter shall, after such retirement and for as long as he may live, be paid by the State out of the general fund in the State treasury, or out of such funds as shall be appropriated for the purpose, annual compensation in an amount equal to three fourths of the annual salary being received by him as trial justice immediately prior to his retirement..." (Italics supplied.)
In light of the language of § 51-29.9 of the Virginia Code italicized above, it would appear that the amount of retirement compensation to which you are entitled was fixed at the time of your retirement (July 31, 1964), and I have been unable to discover any provision of the applicable law which authorizes a trial justice or county judge who has once retired to become again a contributing member of the Trial Justice Retirement Fund and thereafter retire a second time. Therefore, I am of the opinion that your inquiry should be answered in the negative.

JUDGMENTS—Issuance of Executions on Abstracts—May not be done in county where abstract of judgment filed.

August 29, 1967

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

This is in reply to your letter of August 15, 1967, which I quote, as follows:

“"It appears to me that § 16-79, Code of Virginia, has been repealed pertaining to execution on judgments.

"Would you give an opinion on the following problem?

"A judgment is obtained in 'A' County and an abstract of such judgment is docketed in 'B' County. Is it permissible for the clerk of 'B' County to issue an execution on the abstract?"

Before former Title 16 was repealed and Title 16.1 enacted in its place by Chapter 555, Acts of Assembly of 1956, § 16-78 and § 16-79 thereof, to which you refer, contained the authorization for the disposition of papers and the issuing of executions and abstracts of judgment resulting from proceedings before trial justices. When this amendment was made, essentially the same law was recodified in §§ 16.1-115 and 16.1-116 of the Code of Virginia. Now, as then, with certain exceptions, the papers connected with the proceedings in the court not of record shall be retained in that court for six months after such proceeding is concluded and at the end of such period delivered to the circuit court of the county or the corporation court of the city in which disposition of the case was made. Thereafter, execution upon and abstracts of the judgment may be issued by the clerk of such circuit or corporation court. For a period of two years from the date of such judgment, the judge or clerk of the court not of record may also issue executions upon and abstracts of the judgment.

Your question has reference to a situation in which a judgment is obtained in one county, county "A," and an abstract of such judgment docketed in another county, county "B." In any such case, an execution may be issued by the circuit or county court of county "A," in which the judgment was obtained, under the limitations specified in § 16.1-116. I am of the opinion, however, that such authority does not attach in another county, county "B," in which a copy of such judgment has been docketed, and, therefore, I shall answer your question in the negative.
REPORT OF THE ATTORNEY GENERAL

JURIES—Compensation of Members—Limited to $5.00 per diem in criminal cases.

June 24, 1968

HONORABLE LESTER E. SCHLITZ
Member, House of Delegates

This is in response to your letter of June 20, 1968, which reads in part as follows:

"I have been approached by several of the Judges in my area in regard to the amendment of Section 8-204 of the Code of Virginia by the last session of the General Assembly. I believe that it was the intention that per diem compensation for jurors be raised to $8.00 in both civil and criminal cases.

"The question now arises as to whether or not this intention was defeated by the failure of the Legislature to amend Section 19.1-218 of the Code which provides $5.00 per diem in criminal cases. I would be pleased if you will give me an opinion as to the scope of Section 8-204 and its effect, if any, on jurors trying criminal cases."

As you point out, § 8-204 of the Code, which relates to the compensation of jurors in civil cases, was amended to increase jurors' compensation to $8.00 a day. Section 19.1-218, which relates to the compensation of jurors in criminal matters, was not amended, and a juror in a criminal case is compensated at the rate of $5.00 per day.

I am of opinion that the provisions of § 8-204 of the Code as amended are limited in application to civil cases, and that jurors in criminal cases will continue to be paid $5.00 per day.

JURIES—Grand Jury—Mileage allowances—Paid by the county and not reimbursed by State.

June 26, 1968

HONORABLE ENOCH M. ROSE
Treasurer of Dickenson County

This is in answer to your June 19, 1968, letter from which I quote:

"I would like to know if the state is supposed to reimburse the county treasurer for claims written for Grand Jurors on criminal cases."

Section 19.1-160, Code of Virginia (1950), as amended, provides what grand jurors shall be paid and who is to pay it. It states:

"Every person who serves upon a grand jury shall receive the same compensation and mileage allowed jurors in civil cases by § 8-204 and the same shall be paid out of the county or corporation levy."

I am, therefore, of the opinion that your question must be answered in the negative.
REPORT OF THE ATTORNEY GENERAL

JURIES—List—Should contain names of twenty-four persons.

September 11, 1967

HONORABLE EDWIN H. HOY, Clerk
Circuit Court of Charlotte County

This is in reply to your letter of September 5, 1967, which reads as follows:

"Some question has been raised in this county as to the number of names to be included on the list of prospective jurors that shall be furnished to the Sheriff under Code § 19.1-196.

"In other words, § 19.1-198 directs the Clerk to draw 24 names for the venire facias, however, § 19.1-196 directs the Sheriff to summons only 20 names.

"Therefore, will you give us your opinion as to whether the above mentioned list furnished to the Sheriff should contain 24 names or just 20 names."

The pertinent portions of the two statutes in question are as follows:

"§ 19.1-196—The writ of venire facias in case of felony shall command the officer to whom it is directed to summon twenty persons of his county or corporation, to be taken from a list furnished him by the clerk issuing the writ. . . ."  

"§ 19.1-198—The list mentioned in § 19.1-196 shall contain the names of twenty-four persons drawn for that purpose by the clerk of the court or his deputy from the names and box provided for by §§ 8-182 and 8-184. . . ." (Italics supplied.)

In light of the language italicized above, I am of the opinion that the list concerning which you inquire should contain the names of twenty-four persons.

JUSTICE OF PEACE—Appointed Under § 24-158—Term of office.

March 19, 1968

HONORABLE DALE W. LARUE
Judge, Carroll County Court

This is in reply to your letter of March 14, 1968, in which you inquire as follows:

"A Justice of the Peace was appointed by the Judge of the Circuit Court, pursuant to the first paragraph of Section 24-158 of the Code on October 2, 1967. The appointee took the oath of office on the same day and posted bond on October 6, 1967. The appointment was for an unspecific term. Did the term of the appointee expire December 31, 1967, since the general election for district officers followed the appointment, or at some other time?"

Section 24-157 of the Code of Virginia provides for the election of three justices of the peace in each magisterial district to serve for a term of four years. Section 24-158 of the Code provides for the appointment of additional justices and reads in pertinent part as follows:
"Whenever a circuit court shall be of opinion that the public service requires a greater number of justices of the peace in any district than those specified in the preceding section (§ 24-157), and shall so enter of record and designate the number of such additional officers, notice thereof shall be published in such district, and at the next succeeding general election for district officers, such additional officers shall be elected in the mode prescribed for the election of district officers, and continue to be elected at each succeeding general election of district officers until otherwise ordered by the court. And it shall be lawful for the court to appoint officers to serve until such additional officers are elected and qualified. Such officers, whether elected or appointed, shall qualify and give bond as prescribed for district officers. The court may, in its discretion, revoke the order requiring such additional officers, such revocation to take effect at the expiration of the terms of such officers."

It is my opinion that a justice of the peace appointed pursuant to this section would hold office until the general election subsequent to his appointment and, if not elected at that time, he would continue in office until his successor qualified for the office. If he stood for election and was reelected, then he would hold office until the commencement of the term for which he was elected, and thereafter for four years.

You will note that the second paragraph of § 24-158 of the Code, providing that a justice of the peace appointed pursuant thereto holds office until December 31st of the year of the next general election, is applicable only to those counties specifically included therein.

JUSTICE OF PEACE—Continuation in Office—Where territory in which elected to serve is annexed.

ANNEXATION—Justice of Peace—Continuation in office where territory elected to serve is annexed.

HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

October 26, 1967

This is in reply to your letter of October 16, 1967, which reads as follows:

"As you are probably aware, a portion of Western Branch Borough in the City of Chesapeake is being annexed by the City of Portsmouth effective January 1, 1968. Our City Charter provides that each of the Boroughs in that part of the City of Chesapeake that was formerly Norfolk County shall have three justices of the peace. There are at present three candidates unopposed for those positions from the Western Branch Borough, two of whom live in the area that will be annexed. It has been requested that I obtain from you your opinion as to whether or not these candidates, if elected in the November election and who are now residents of the City of Chesapeake, are eligible to qualify for office as a justice of the peace in the City of Chesapeake and still maintain their residence which from the effective date of their new terms will be in the City of Portsmouth."
I am informed that the annexation by the City of Portsmouth, to which you refer, was conducted pursuant to the provisions of Article 1, Chapter 25, Title 15.1, §§ 15.1-1032, se seq. (formerly Article 1, Chapter 8, Title 15, §§ 15-152.2, et seq.) of the Code. See *Portsmouth v. Chesapeake*, 205 Va. 259 (1964).


Section 15.1-1053 is the applicable section. It is found in Article 1, Chapter 25, Title 15.1, the article pursuant to which Portsmouth has annexed the referenced portion of the City of Chesapeake.

Assuming that the two candidates to whom you refer are elected in November, 1967, with terms of office to begin January 1, 1968, the same date upon which the referred to annexation becomes effective, it is my opinion that, pursuant to the provisions of the first sentence of § 15.1-1053 (formerly § 15-152.23), and as stated in the opinion to the Honorable C. T. Coates of January 22, 1963, they may reside in the City of Portsmouth and continue in office as Justices of Peace for the City of Chesapeake until the end of the term commencing on January 1, 1968. Following that term, the provisions of § 15.1-995 apply, as provided in the second sentence of § 15.1-1053.

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JUSTICE OF PEACE—Eligibility—May not serve if spouse is law enforcement officer.

PUBLIC OFFICERS—Justice of Peace—May not serve if spouse is law enforcement officer.

SCHOOLS—School Guards—May not be spouse of justice of peace.

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HONORABLE FREDERICK T. GRAY
Member, House of Delegates

This is in reply to your letter of September 18, 1967, in which you request my opinion on the question of whether or not, in view of § 39-7 of the Code of Virginia, the spouse of a female school guard in Chesterfield County is eligible for the office of justice of the peace.

As you know, § 39-7 was enacted by Chapter 402, Acts of Assembly of 1964, and states, in pertinent part, the following:

"No person whose spouse is a law enforcement officer or is otherwise charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof shall be eligible for appointment or election to the office of justice of the peace in any county, city or town in this State... This section shall not apply to incumbents of such office who are in office when this section becomes effective."

In regard to the position of female school guard I am advised by the office of the Chesterfield County School Board and the Chesterfield County
Police Department that such person is a uniformed member of the County Police Department. While her employment is confined to three or four hours a day, she is authorized to make an arrest and is charged with the duty to enforce the State and local laws. I am of the opinion that such employment as school guard falls within the purview of the statute and, therefore, unless the spouse was a justice of the peace when § 39-7 became effective, June 26, 1964, and has continued in office so as to come within the exception contained in the last sentence thereof, I shall answer your question in the negative.

JUSTICE OF PEACE—Fees—Amounts allowable under § 14.1-128(1) for issuing warrants and subpoenas.

FEES—Justice of Peace—Allowable under § 14.1-128(1) for issuing warrants and subpoenas.

HONORABLE J. B. WYCKOFF
Commonwealth’s Attorney for Amherst County

June 14, 1968

This is in answer to your June 8, 1968, letter from which I quote:

“The recent General Assembly enacted a new fee schedule for Justices of the Peace as I see in the summary of the Acts sent to me. I refer to Section 14.1-128, subsection 1a, in which it is stated that the fee for issuing all subpoenas shall be $3.00. I would like to know so as to advise Justices of the Peace in Amherst County whether this includes witness subpoenas where the Justice of the Peace has already issued a warrant at the $3.00 rate, and if this fee is applicable to all witness subpoenas. Is this amount taxed as part of the costs?”

I am of the opinion your question as to whether the $3.00 fee, chargeable (under the newly amended § 14.1-128 (1)) for a warrant, includes witness subpoenas should be answered in the negative. Following, I have quoted the statute—first, as it now reads in § 14.1-128, Code of Virginia, and second, as it will be on June 28, 1968, now found in Acts of Assembly, 1968, Chapter 639, pages 949 and 950:

“A justice of the peace shall charge for services rendered by him in criminal actions and proceedings the following fees only:

“(1) For issuing a warrant of arrest, or a warrant for violation of any ordinance, including the issuing of all subpoenas, one dollar; provided, that when such fee is collected from the defendant or other person for him, such fee shall be two dollars.

“(2) For issuing a search warrant, one dollar.

“(3) For admitting any person to bail, including the taking of the necessary bond, two dollars, which shall, notwithstanding other provisions to the contrary, be collected at the time of admitting the person to bail, but which shall in no case be paid out of the State treasury.”

(§ 14.1-128, Code of Virginia.)

“Fees of justice of peace in criminal matters.—A justice of the peace shall charge for services rendered by him in criminal actions and proceedings the following fees only:
REPORT OF THE ATTORNEY GENERAL

“(1) For issuing a warrant of arrest, or a warrant for violation of any ordinance, *three dollars.*
“(1-a) For issuing all subpoenas, three dollars.
“(2) For an examination for issuing a search warrant, *three dollars.
“(3) For admitting any person to bail or releasing a person on his own recognizance without security, including the taking of the necessary bond, *three dollars*.” (Acts of Assembly, 1968, Chapter 639, pages 949 and 950.)

I think it is clear the 1968 Legislature intended a separate fee of $3.00 be charged for “all subpoenas.” In the case, then, where a warrant issues under this section a $3.00 fee would accrue. If subpoenas are also issued, another single $3.00 fee would accrue for all of them.

I am of the opinion your last question, “Is this amount taxed as part of the costs?” (referring to fees for warrants and subpoenas), is answered in the affirmative. In this regard, see § 19.1-320 of the Code.

JUSTICE OF PEACE—Ineligible to Act as Bondsman.

JUSTICE OF PEACE—May Not Release Person on Summons After Warrant for Arrest Served.

JUSTICE OF PEACE—May Not Hold Office as Town Sergeant at Same Time.

SHERIFFS AND SERGEANTSC—Enforcement Officer (Sergeant) May Not Serve as Judicial Officer (Justice of Peace) at Same Time.

November 2, 1967

HONORABLE C. F. CALLIS
Justice of the Peace, Lunenburg County

This is in reply to your letter of October 17, 1967, which reads, in part, as follows:

“(1) Can a justice of peace legally write a process bond and go the bond himself?
“(2) Can a police officer release a person on a summons after an arrest warrant has been written and served, the officer telling the person at the time of serving said arrest warrant to be in court on a certain date?
“(3) Can an appointed town sergeant be a justice of peace also? According to your ruling a few days ago, I believe this is covered but want a specific ruling on this.”


The answer to your second question is in the negative. I know of no provision of Virginia law which would authorize a police officer to “release a
person on a summons,” telling him “to be in court on a certain date,” after a warrant of arrest has been written and has been served upon that person by the officer.

The answer to your third question is in the negative. Section 15.1-796 provides that sergeants of towns shall have the same powers and discharge the same duties as sheriffs within the corporate limits of the town and one mile beyond. It is clear, therefore, that town sergeants are law enforcement officers, while a justice of the peace is a judicial officer. In an opinion to Honorable Annie B. Payne, dated February 11, 1959 (see, Report of the Attorney General (1958-1959), p. 156), this office ruled that a single individual could not be both an enforcement officer and a judicial officer since it was probable that occasions would arise when he would be required to act in both capacities in connection with the same case. It appears highly probable that occasions would arise when a person holding the two offices of town sergeant and justice of the peace would be required to act both in his capacity as an enforcement officer (sergeant) and in his capacity as a judicial officer (justice of the peace) in connection with the same matter. In my opinion, this cannot be sanctioned as a matter of public policy and, therefore, the two offices are incompatible.

JUSTICE OF PEACE—May Act as Agent to Sell Motor Vehicle Licenses.

PUBLIC OFFICERS—Compatibility—Justice of peace may act as agent to sell motor vehicle licenses.

HONORABLE C. DILLARD SHIELDS
Justice of the Peace for Pittsylvania County

I have your letter of July 19, 1967, in which you advise that you are a Justice of the Peace in one of the counties of the State of Virginia and you want to know whether there would be any conflict under Virginia law if you continued to serve as Justice of the Peace and at the same time acted as agent to sell Division of Motor Vehicles licenses for the county in which you are the Justice of the Peace.

I know of no statutory provision that would prevent a Justice of the Peace from acting as agent to sell Division of Motor Vehicles licenses. I see nothing incompatible with the duties of the agent to sell Division of Motor Vehicles licenses and the position of Justice of the Peace.

JUSTICE OF PEACE—May Not Be Employee of U.S. Post Office Department Except as Fourth- or Third-class Postmaster.

HONORABLE JAMES O. COOPER
Justice of the Peace, Franklin County

I am in receipt of your letter of November 16, 1967, in which you present the following inquiry:

“I am a Justice of the Peace for the County of Franklin, State of
Virginia, and would like to know if it is permissible, as far as State law is concerned, for me to be a temporary substitute employee of the U. S. Post Office Department at the same time I hold the office of Justice of the Peace.

Section 2.1-30 of the Virginia Code provides that no person shall be capable of holding any office of honor, profit or trust under the Constitution of Virginia who is in the employment of the government of the United States or who receives from it in any way any emolument whatever. Although certain exceptions to the above-stated prohibition are contained in § 2.1-33 of the Virginia Code, it does not appear that the situation you present falls within the scope of any of the exceptions therein enunciated. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated December 15, 1939, in which it was ruled that a WPA employee of the United States government could not at the same time hold the office of justice of the peace. This opinion is set out in the Report of the Attorney General (1939-1940), p. 169; §§ 290 and 291 of the Virginia Code mentioned therein are now §§ 2.1-30 and 2.1-33 of the Code of Virginia (1950), as amended. See also, Report of the Attorney General (1949-1950), p. 200; (1950-1951), p. 225.

Further in this connection, § 2.1-33(4) of the Virginia Code expressly exempts “fourth-class or third-class postmasters” from the ban of § 2.1-30, thus specifically permitting persons occupying such positions to act as justices of the peace, and this office has so ruled. See, Report of the Attorney General (1963-1964), p. 247. However, by expressly rendering only “fourth-class or third-class postmasters” eligible to act as justices of the peace, it would appear that the General Assembly has, by implication, excluded all other United States government employees from being eligible to so act. Cf., Report of the Attorney General (1952-1953), p. 103. In light of the foregoing, I am of the opinion that your inquiry must be answered in the negative.

JUSTICE OF PEACE—Should Not Be Employee of Sheriff.

PUBLIC OFFICERS—Justice of Peace—May not be employee of sheriff.

January 15, 1968

HONORABLE NICK E. PERSIN
Commonwealth's Attorney of Buchanan County

I am in receipt of your letter of January 9, 1968, in which you present the following inquiry:

"May a female employee who is working on the staff of the Sheriff's Office, performing secretarial duties, and receiving a salary for same, be appointed by the Court to serve as a Justice of the Peace?"

Although I have been unable to discover any previous ruling of this office in which the precise question you present has been considered, or any provision of the Virginia Code which expressly governs the matter concerning which you inquire, I am of the opinion that a conflict of interests would exist in such a situation. As a member of the sheriff's staff, the employee in question would be expected to acquiesce in the official decisions of the sheriff and it would be difficult, if not impossible, for her—as an employee of the sheriff—to exercise
the required impartial judicial discretion if confronted by her employer with a demand for legal process. As an employee on a sheriff's staff is not a public officer, the situation under discussion does not present a question of "incompatibility of offices" in the strict sense of that phrase. However, for the reasons stated, I am constrained to believe that the employee in question may not with propriety simultaneously serve as a justice of the peace. In this connection, I am forwarding to you a copy of a previous opinion of this office dated July 18, 1956, in which a substantially similar situation was considered and discussed. See, Report of the Attorney General (1956-1957), p. 143.

JUSTICE OF PEACE—Transition of Town to City of Second Class—Authority.

COUNTIES, CITIES AND TOWNS—Justice of Peace—Authority upon transition of town to city of second class.

October 26, 1967

HONORABLE JOE C. EVERETT
Justice of the Peace for Greensville County

This is in reply to your letter of October 13, 1967, which reads as follows:

"Ever since 1954 I have been an elected Justice of the Peace for Greensville County, and I expect to be re-elected to this position in November for another four years.

"I am a resident of the City of Emporia and have been unable to find out what effect the new city status has on my position as Justice of the Peace. I have talked with both the Commonwealth Attorney and County Judge but get varying answers. One says I can continue to perform my duties in both the city and the county while the other feels that I can perform my duties only in the county.

"I will appreciate your advices as to whether I can legally continue performing my Justice of the Peace duties within the City of Emporia as well as in the adjoining County of Greensville. I will appreciate your advices so that I will know what change, if any, I will have to make in my duties.

Your question is answered in an opinion of this office dated December 20, 1965, to the Clerk of Rockbridge County, found in Report of the Attorney General (1965-1966), at page 162, a copy of which is enclosed.

In accordance with that opinion and the provisions of § 15.1-995 of the Code, you may continue to hold office as a Justice of the Peace for Greensville County for the remainder of your present term and for so long as you can be successively elected thereto. You do not have the authority to exercise the powers of your office in the City of Emporia. Your authority extends only to Greensville County.
JUSTICE OF PEACE—Urban County Executive Form of Government—Present justices continue in office until successors appointed.

COUNTIES—Urban County Executive Form—Present justices of peace continue in office until successors appointed.

HONORABLE ROBERT F. HORAN, JR.
Commonwealth's Attorney of Fairfax County

January 19, 1968

This is in reply to your letter of January 5, 1968, in which you refer to Fairfax County's change in form of government from executive to urban county executive on January 1, 1968, and request my opinion as to whether or not, under the provisions of § 15.1-755 of the Code of Virginia, each of the present appointed justices of the peace should continue to hold office until such time as a successor is appointed.

The pertinent part of § 15.1-755 is as follows:

"The following officers shall not, except as herein otherwise provided, be affected by the adoption of either the urban county executive form or the urban county manager form:

* * *

"(6) Justices of the peace; provided, however, that in any county which adopts either the urban county executive form or the urban county manager form there shall be appointed or elected in the manner provided by law not to exceed such number of justices of the peace in each district as the urban county board of supervisors certifies by resolution are necessary to serve the public; in each district the judge of the circuit court of the county shall appoint one or more such justices, who shall hold office until his successor shall be elected or appointed and qualified; the terms of the present justices of the peace in each district shall expire when the appointee takes office."

Under this section, when one of the named forms of government is adopted, the urban county board of supervisors certifies the number of justices of the peace as necessary in each district and the judge of the circuit court appoints one or more such justices in each district, who holds office until his successor is elected or appointed. The last clause in the quoted paragraph makes the time when the appointees take office determinative of the expiration of the term of the present justices. The present justices, in the case of Fairfax County, are those in office when the urban county executive form became effective.

The purpose of having the terms of the present justices expire "when the appointee takes office" is, in my interpretation, to bridge the gap and to assure that the need for such justices is met during the change from one form of government to another. I am of the opinion that the present justices should continue in office until a successor is appointed pursuant to § 15.1-755 and, therefore, I shall answer your question in the affirmative.
HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court for Campbell County

November 17, 1967

I am in receipt of your letter of recent date in which you call my attention to §§ 19.1-90 and 16.1-146 of the Virginia Code and inquire whether or not the clerk of a juvenile and domestic relations court is authorized to issue warrants of arrest.

As you point out in your communication, § 19.1-90 of the Virginia Code prescribes that process for the arrest of a person charged with a criminal offense may be issued by the judge or clerk of a county or municipal court exercising criminal jurisdiction, or by the judge of a juvenile and domestic relations court. Thus, it is clear that § 19.1-90 does not expressly authorize the clerk of a juvenile and domestic relations court to issue process of arrest for a criminal offense. However, the concluding sentence of the statute in question permits the issuance of such process by any "other person so authorized by statute." See, § 19.1-90(6), Code of Virginia (1950), as amended.

In this connection, § 16.1-146 of the Virginia Code in pertinent part provides:

"The clerk of the juvenile court shall be a conservator of the peace within the territory for which the judge of the court is appointed. Such clerk, and each deputy clerk when authorized by the judge, may issue any of the warrants, attachments, petitions, writs or other processes of the court, including warrants of arrest and search warrants in criminal cases, may issue subpoenas for witnesses, take affidavits, and administer oaths and affirmations. When authorized by the judge the clerk may dismiss charges pending against persons before the court." (Italics supplied.)

By statutory definition, the term "the court" means the juvenile and domestic relations court of each county or city. See, § 16.1-141(1), Code of Virginia (1950), as amended. It thus appears that the clerk of a juvenile and domestic relations court is empowered by § 16.1-146 to issue only warrants or other processes of the juvenile and domestic relations court, specifically including warrants of arrest, and, when authorized by the judge, to dismiss charges pending against persons before the juvenile and domestic relations court. This view is consistent with that expressed in a previous opinion of this office, dated January 24, 1958, to the Honorable Russell W. Yowell, a copy of which is enclosed. See, Report of the Attorney General (1957-1958), p. 74. However, though the matter is not entirely free from doubt, I do not believe that the above-quoted statute authorizes the clerk of a juvenile and domestic relations court to issue warrants of arrest in criminal cases generally. In light of the foregoing, I am of the opinion that the clerk of a juvenile and domestic
relations court may issue warrants of arrest, but may do so only in those cases
cognizable by a juvenile and domestic relations court.

JUVENILE AND DOMESTIC RELATIONS COURTS—Court-appointed Atto-

ney—Compensation.

ATTORNEYS—Court-appointed—Compensation allowed by Juvenile and Do-
mestic Relations Court.

HONORABLE KATHERINE V. RESPES
Clerk of Courts, City of Norfolk

June 4, 1968

This is in response to your letter of May 23, 1968, which reads in part as
follows:

"The 1968 session of the General Assembly amended and reenacted
(d) was amended to read as follows:

'(d) Counsel appointed to represent such child or minor shall
be compensated for his services out of the appropriation for
criminal charges in an amount fixed by the court, except that
in no event shall the payment for his services exceed the
sum of fifty dollars.'

"Since the judge of the Corporation Court must approve all
accounts pertaining to payments to court-appointed attorneys allowed
by the Juvenile and Domestic Relations Court, my question is: If a
juvenile is before the court on a number of offenses, may the court-
appointed attorney be allowed a fee not to exceed $50.00 on each
of the cases, if the proceedings on all cases are had at the same time?"

Section 16.1-173(a) of the Code of Virginia, as amended by Chapter 581
(1968 Acts of Assembly) provides in part that "in any case" under the cir-
cumstances set forth therein the Court shall appoint an attorney to represent
the child or minor. I am of opinion that in each case wherein a petition is
filed alleging that the juvenile comes within the purview of the Juvenile and
Domestic Relations Court law, the attorney is entitled to a fee not to exceed
$50.00.

This view was also expressed in a similar situation with reference to the
JUVENILE AND DOMESTIC RELATIONS COURTS—Non.support—Costs assessable against convicted defendant.

NONSUPPORT—Court Costs—Assessable against convicted defendant.

October 12, 1967

HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court of Campbell and Amherst Counties

This is in reply to your letter of September 28, 1967, which I quote, in pertinent part, as follows:

"On September 1, 1967, pursuant to the Orders of Judges C. G. Quesenberry of the Twenty-Ninth Circuit and William W. Sweeney of the Sixth Circuit, I began as Judge of the Fifth Regional Juvenile and Domestic Relations Court for Campbell and Amherst Counties.

"In the pursuit of my work, I have frequent petitions for non-support for cases which are criminal in nature.

"Please advise if I am supposed to order the defendant in these cases to pay court costs."

This situation is covered in Chapter 5, Title 20 of the Code of Virginia, wherein § 20-61 makes a willful neglect or refusal or failure to provide for the support and maintenance of a wife, or child under the age of seventeen years, or child of whatever age who is crippled or otherwise incapacitated, being then and there in necessitous circumstances, a misdemeanor, punishable as therein stated. The proceedings under this section are criminal in character, as has been stated in a prior opinion found in Report of the Attorney General (1955-1956), p. 118. The statute does not exclude other remedies which may be available in such instances of non-support, but provides a quick remedy to punish the guilty. See, McLaugherty v. McLaugherty, 180 Va. 51, 21 S.E. 2d 761.

In the same chapter, § 20-69 states: "The justice and the ministerial officers acting under this chapter shall be entitled to the same fees as are now or hereafter allowed in misdemeanor cases." In my interpretation, this authorizes the assessment of the same costs against a defendant so convicted as would be applicable if such conviction were for some other misdemeanor, except that here the conviction is on petition instead of a warrant.

May 7, 1968

HONORABLE LESLIE L. MASON, JR., Judge
County Court of Powhatan

This is in reply to your letter of April 16, 1968, which reads in part as follows:

"Upon finding a child guilty of a misdemeanor, whether or not related to the Motor Vehicle Code, in the Juvenile and Domestic Relations Court of this County, do you find any legal objection to
imposing a fine and a jail sentence, either or both, upon the child; suspending all or part of the jail sentence or fine upon the condition that he (a) relinquish his Virginia automobile operator's license for a period of time not to exceed one year, (b) attend school diligently and to the satisfaction of the administrators of the school in which he is enrolled, (c) submit to periodic interrogations by the Superintendent of Public Welfare of the county where the offense was committed or of his place of residence, to determine the nature of his conduct, (d) be of general good conduct in the opinion of this Court?"

Pursuant to § 16.1-178(1) of the Code of Virginia, a Juvenile and Domestic Relations Court is given the power to place a juvenile offender on probation subject to such conditions as the court deems proper. However, unless the child is tried as an adult pursuant to § 16.1-177.1, or the offense involved is a traffic violation as prescribed in § 16.1-178(8) of the Virginia Code, a Juvenile and Domestic Relations Court could not impose a jail sentence; however, it could impose a fine within the limits specified in § 16.1-178(9).

With reference to your proposed condition (a), you will note that § 16.1-178(9) also specifies that a Juvenile and Domestic Relations Court may suspend the driving permit of a child or minor who has violated the "traffic laws of this State or a State or federal law or local ordinance . . . ." In the enclosed copy of a previous opinion of this office, Report of the Attorney General (1954-1955), p. 140, the above-quoted portion of this section (then § 16-172.44) was interpreted to mean that the driving permit could be suspended for the violation of any state law, whether or not a "traffic" law.

In my opinion, the proposed conditions (b), (c) and (d) of your letter are reasonable conditions of probation. This office has ruled previously that satisfactory attendance at school as a condition of probation is reasonable and in the best interests of the child, Report of the Attorney General (1959-1960), p. 207. Section 16.1-208(2) of the Code gives a probation officer the authority to supervise, visit, and require reports of juveniles on probation, and § 16.1-205 authorizes the local Superintendent of Public Welfare to serve as probation officer in certain instances. Finally, as previously indicated, § 16.1-178(1) authorizes a Juvenile and Domestic Relations Court to determine the conditions under which a child or minor shall be placed on probation.

JUVENILE AND DOMESTIC RELATIONS COURTS—Preliminary Hearings—When court has jurisdiction to hold.

December 6, 1967

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

I am in receipt of your letter of November 29, 1967, in which you present the following inquiry:

"I would like for you to give me your opinion on the following question.
"It seems to me that Section 16.1-158 regarding the jurisdiction of Juvenile and Domestic Relations Court in paragraphs 7 and 8 is not quite clear."
The question is, does the Juvenile and Domestic Relations Court have jurisdiction to conduct preliminary hearings in a case where an infant is charged with manslaughter where the deceased is no relative of his?

If the “infant” mentioned in your communication is a “child” or “juvenile” as defined in § 16.1-141 of the Virginia Code (i.e., is less than eighteen years of age), I am of the opinion that a Juvenile and Domestic Relations Court would have jurisdiction of the matter under the provisions of § 16.1-158(1)(1) of the Virginia Code. Moreover, if such infant is a “minor” as defined in § 16.1-141 (i.e., is over eighteen but less than twenty-one years of age) who is charged with having committed the offense of manslaughter prior to the time he became eighteen years of age, a Juvenile and Domestic Relations Court would have jurisdiction of the matter under the provisions of § 16.1-158(4) of the Virginia Code. In either case, the Juvenile and Domestic Relations Court in question could find such child or minor to be within the purview of the Juvenile and Domestic Relations Court Law and make disposition of the matter as provided in § 16.1-178, or may conduct a preliminary hearing in a case in which such child is fourteen years of age or over for the purpose of determining whether or not to retain jurisdiction or certify such child for proper criminal proceedings to the appropriate court of record pursuant to § 16.1-176 of the Virginia Code.

However, if the “infant” mentioned in your communication is a “minor” as defined in § 16.1-141 (i.e., is over eighteen but under twenty-one years of age) who is charged with having committed the offense of manslaughter after he became eighteen years of age, I am of the opinion that a Juvenile and Domestic Relations Court would have no jurisdiction in the premises and that the appropriate county or municipal court not of record should conduct the preliminary hearing. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated October 3, 1966, in which a similar conclusion was reached with respect to an adult family situation involving either murder or manslaughter. See, Report of the Attorney General (1966-1967), p. 168.

JUVENILE AND DOMESTIC RELATIONS COURTS—Work Permits—Issued by court having jurisdiction over the child.

JUVENILES—Work Permits—Court having jurisdiction authorized to issue.

HONORABLE JAMES M. BRYANT, Chief Probation Officer
Fourth Regional Juvenile and Domestic Relations Court

July 20, 1967

I am in receipt of your letter of July 13, 1967, in which you call my attention to the language of § 16.1-158(6) of the Virginia Code and present the following inquiries:

“In section 16.1-158, Sub Paragraph 6, does the language ‘where a child over whom the Court has jurisdiction’ mean a child before the Court on petition by Section 16.1-158, Paragraph 1?”

“In the issuance of a Special Work Permit, which Court has the jurisdiction, for example, a child in Augusta County applies for a work
REPORT OF THE ATTORNEY GENERAL

permit for a job in Rockingham County. Does the Court in Augusta County issue the permit, the Court in Rockingham County issue the permit, or either Court have jurisdiction in issuing the permit?"

Section 16.1-158 of the Virginia Code contains that provision of the Juvenile and Domestic Relations Court Law which prescribes the jurisdiction of the various juvenile and domestic relations courts of the Commonwealth. Pertinent to your inquiries, as you point out, is § 16.1-158(6) which provides:

"The judges of the juvenile court elected or appointed under this law shall be conservators of the peace within the corporate limits of the cities and the boundaries of the counties for which they are respectively chosen and within one mile beyond the corporate limits of such cities. Except as hereinafter provided, each juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, and within one mile beyond the corporate limits of said city, concurrent jurisdiction with the juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving:

* * *

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

With respect to your initial question, I am of the opinion that the language of subparagraph (6) italicized above should be construed to mean a child who lives within the territorial jurisdiction of a particular juvenile and domestic relations court, and should not be limited by interpretation to embrace only a child who is, in fact, before the court on petition under the provisions of § 16.1-158(1) of the Virginia Code. Significant in this connection is the fact that the applicable term utilized in subparagraph (6) is "a child over whom the court has jurisdiction" rather than the phrase "a child who is within the purview of this law" which appears in subparagraph (2) of the statute under consideration and has a more restricted application. See, Report of the Attorney General (1959-1960), p. 206.

In light of the view expressed upon your first question, I am of the opinion that a child who lives in Augusta County and wishes to obtain a work permit for a job in Rockingham County would make application for such permit to
the Juvenile and Domestic Relations Court of Augusta County. In this connection, it appears that the juvenile and domestic relations court which has jurisdiction over the child—rather than that court which has jurisdiction in the county where a particular job is located—is designated by § 16.1-158(6) as the appropriate court to issue a work permit.

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**JUVENILES—Counsel—Conditions under which court should appoint.**

**JUVENILE AND DOMESTIC RELATIONS COURT—Appointment of Counsel for Minor.**

_Honoriable G. Garland Wilson_, Judge

Juvenile and Domestic Relations Court, City of Radford

June 17, 1968

This is in response to your letter of May 24, 1968, which reads in part as follows:

"I would appreciate your construing Section 16.1-173 as amended by Chapter 581, April 4, 1968, of the Acts of General Assembly in the following situation:

"Suppose the parents of a minor are not indigent and refuse to employ counsel and likewise refuse to jointly agree in writing that counsel may be waived? What should the Court do in this instance?"


I have also previously ruled that counsel cannot be waived by a juvenile defendant, by his parents, or by his legal guardian in an opinion to Honorable Leo P. Blair of May 29, 1964, Report of the Attorney General (1963-1964), p. 94.

I believe, however, that the Court must act in the situation presented in your letter in conformity with the provisions of § 16.1-173(a) of the Code of Virginia, as amended by Chapter 581, Acts of Assembly, 1968. I do not believe that the provisions of paragraph (c) of the same statute are applicable to the facts recited by you.

In view of the foregoing, I am of the opinion that the Court should appoint counsel to represent the minor in this situation.

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**JUVENILES—Fingerprints—Required to be taken when sentenced to confinement in the Penitentiary.**

**CENTRAL CRIMINAL RECORDS EXCHANGE—Filing of Fingerprint Cards.**

_Mr. Walter A. Evans_, Director

Division of Central Criminal Records Exchange

April 8, 1968

This is in response to your letter of March 15, 1968, in which you make reference to my opinion to you of December 22, 1967, wherein I pointed out
that although juveniles may be fingerprinted under certain circumstances, such records made at the time of arrest may not be released to your Division. You asked if you may receive fingerprints of juveniles received at the Penitentiary.

Once a juvenile has been certified to the Grand Jury pursuant to the provisions of § 16.1-176 of the Code, he is tried as an adult. Moreover, the Bureau of Identification at the State Penitentiary is required by the provisions of § 53-40 of the Code to take photographs and fingerprints of each convict received therein. This would, of course, include fingerprinting of juveniles who are sentenced to confinement in the Penitentiary. In view of the foregoing, I am of opinion that you may, therefore, receive and file records pertaining to juveniles who are convicted and sentenced to the Penitentiary, such records emanating from the Division of Corrections.

You point out that space is provided on your arrest form and on the fingerprint card for the signature of the person arrested and fingerprinted. You state that on several occasions, the Exchange has received records with notes attached stating that the accused has refused to sign his name or refused to be fingerprinted. You ask if there is any provision of law applicable in this situation.

I believe that you should file these records pursuant to the provisions of § 19.1-19.2(a) of the Code.

LABOR—Illegal Picketing—Code § 40-64 applicable.

November 24, 1967

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

This is in reply to your letter of October 20, 1967, which reads, in part, as follows:

"We have in Arlington a situation where the electrical union is picketing a construction job. We have been enforcing Title 40, Section 64 in regard to the so-called 'stranger pickets.' Our attention has been directed to the opinion of the U. S. Supreme Court in Waxman vs. Virginia, 371 U.S. 40. We do not find this decision very definitive. Consequently, we would like to know whether or not your office considers the decision as having declared our 'stranger pickets' provisions as being invalidated."


While it is clear that in Waxman v. Virginia, supra, the Supreme Court of the United States, in a per curiam opinion, reversed the judgments of conviction of the Supreme Court of Appeals of Virginia in Waxman v. Commonwealth, 203
150  REPORT OF THE ATTORNEY GENERAL

Va. 257, I do not consider “the decision as having declared” paragraph 3 of § 40-64 of the Code “as being invalidated.”

There is nothing in the Supreme Court’s per curiam opinion or in Garmon, which the Court cites, declaring any portion of § 40-64 to be invalid. In my opinion, the Supreme Court simply reversed the judgments of conviction, for reasons unexplained, citing Garmon. Garmon is a so-called “preemption” case. In my view the Court, in Waxman, simply held that within the context of the facts in that case, federal legislation, namely, the National Labor Relations Act, had preempted the field. I do not construe this to be a declaration that paragraph 3 of § 40-64 is invalid.

LOTTERIES—Prize Money to Spectators at Baseball Games—Purchase of ticket to attend sufficient consideration to constitute lottery.

HONORABLE JAMES I. MOYER
Judge, Roanoke County Court

I am in receipt of your letter of February 24, 1968, in which you present the following situation and inquiry:

“The Salem Athletic Club, Inc. will make available organized professional baseball for the general public beginning April 14 and extending to Labor Day this year. Purley to increase attendance and for advertising purposes they propose to offer without charge to those attending the games certain prize money.

“Those attending will participate in the winning of such money by 1) Purchasing a program in which there is inserted a card or paper on which there are spaces to be filled in with letters or numbers called out between innings and certain combinations of letters or numbers deciding the winner; 2) By being given through merchants or other business establishments, prior to the games, the same type of card or paper; 3) By being given the same type of card or paper upon entry to the games. It is clearly understood that in no event shall there be any charge made for the cards or papers nor will the regular cost of programs or the regular charge for admission to the games be increased by reason of the plan.

“I will be grateful for your opinion as to whether such plan may be in violation of the Virginia lottery statute, Section 18.1-340 of the Virginia Code.”

In this connection, I am forwarding to you copies of two previous opinions of this office, dated July 31, 1961, and December 28, 1962, in which situations substantially identical to that which you describe were considered and discussed. These opinions are set out in Reports of the Attorney General (1961-1962), p. 146; (1962-1963), p. 119.

Since it appears from your communication that the purchase of a ticket to attend a particular baseball game is required before one can become a participant in the promotional program you outline, I am of the opinion that the venture in question would fall within the scope of the enclosed rulings and would constitute a lottery under Virginia law.
LOTTERIES—Tickets Sold to Local Merchants by Retail Merchants Association—Constitutes lottery though distributed free to persons entering establishments.

May 22, 1968

HONORABLE PAUL X BOLT
Commonwealth’s Attorney for Grayson County

I am in receipt of your letter of recent date in which you present the following situation and inquiries:

“The Retail Merchants Association of a local city wish to conduct a sales promotion program of the local merchants. Tickets will be printed by the Retail Merchants Association and sold to the local merchants. The local merchants will give the tickets free of charge to customers or to persons entering their business establishments desiring such tickets. At the end of a specified period tickets or stubs of tickets will be placed in a container and certain tickets will be drawn by lot. The holders of the tickets drawn will receive prizes of money or merchandise.

Please advise whether or not in your opinion this would be in violation of Section 18.1-340 of the Code of Virginia 1950, as amended. If so, would the fact that the Retail Merchants Association gave the tickets to the merchants cause this not to be in violation of the aforementioned section.”

From your communication and your subsequent telephone conversation with this office, it appears that the Retail Merchants Association would be conducting the sales promotion program in question and that a profit would be realized by that organization upon the proposed venture. Although the local merchants would distribute the tickets without charge to persons entering their business establishments, the Retail Merchants Association would be (1) awarding prizes (2) on the basis of chance (3) for a monetary consideration paid by the local merchants participating in the program. Thus, although no consideration would be given by prospective recipients of the prizes (see, § 18.1-340.1 of the Virginia Code), all the constituent elements of a lottery would appear to exist in the situation you describe. Although the question is not entirely free from doubt, I am constrained to believe that the enterprise would constitute a lottery under Virginia law.

With respect to your second inquiry, I am of the opinion that if the Retail Merchants Association gave the tickets to the local merchants without charge for distribution in the manner specified in your communication, the program would not constitute a lottery under the anti-lottery laws of Virginia. See, Report of the Attorney General (1961-1962), pp. 148, 149.
MARRIAGE—Licenses—Serological test—Signature of physician required.

HEALTH—Marriage Licenses—Serological test statement—Signature of physician required.

January 31, 1968

HONORABLE RUDOLPH L. SHAVER
Clerk of the Circuit Court of Augusta County

I refer to your letter of January 19, 1968, in which you brought to my attention § 20-1 of the Code of Virginia which requires that a serological test statement, "signed by a physician," be furnished precedent to the issuance of a marriage license. You wish to know whether a rubber stamp facsimile signature on the form is a proper signature within the meaning of the statute.

A signature is defined by the Uniform Commercial Code, § 8.1-20(39), as being "any symbol adopted by a party with present intention to authenticate a writing," and several decisions on the validity of wills have recognized that the word "signature" is not restricted by definition to a hand-written name. See, Ferguson v. Ferguson, 187 Va. 581, 590, 47 S.E. 2d 257 (1948); Pilcher v. Pilcher, 117 Va. 256, 84 S.E. 667 (1915).

However, since there is apparently no Virginia decision on the question as it arises in the context presented by you, I am of the opinion that the most prudent policy would be for you to request a handwritten signature on the serological test forms.

MARRIAGE—Miscegenation Statutes—Certain Virginia statutes declared invalid by U.S. Supreme Court.

STATUTES—Miscegenation—Invalidation of certain such statutes by U.S. Supreme Court.

August 2, 1967

HONORABLE WILLIAM R. DURLAND
Member, House of Delegates

I am in receipt of your letter of July 21, 1967, in which you call my attention to the recent decision of the Supreme Court of the United States in Loving v. Virginia, No. 395—October Term, 1966, (decided June 12, 1967), in which that Court invalidated certain of Virginia's anti-miscegenation statutes set out in §§ 20-50, et seq., of the Virginia Code. In this connection, you present certain inquiries which will be stated and answered seriatim.

"1. May Clerks of Court refuse to issue marriage licenses to persons desiring to enter into miscegenetic marriages?"

Answer: No.

"2. May any person performing the ceremony of marriage between a white and colored person be punished under § 20-60 of the Code of Virginia?"

Answer: No.

Answer: While the State Registrar of Vital Statistics may still prepare the forms described in § 20-50 of the Virginia Code for use by local registrars to certify the race of an individual, such a certificate no longer has utility in the administration of the Virginia anti-miscegenetic statutes, and the issuance of a marriage license cannot be conditioned upon the existence of such a certificate. I am therefore of the opinion that the immediately succeeding provisions of the Virginia Code may no longer be validly enforced.

"4. Are the children of miscegenetic marriages legitimate under Virginia law?"

Answer: Since there is now no valid provisions of Virginia law forbidding miscegenetic marriages, it would appear that the children of such a marriage would hereafter be legitimate if such marriage is otherwise valid under Virginia law.

"5. May the Bureau of Vital Records and Health Statistics in cooperation with Virginia Clerks of Court continue to issue a pamphlet entitled 'Virginia Marriage Requirements', which contains statements regarding miscegenetic marriages?"

Answer: While the pamphlet to which you refer may still be issued, the references contained therein to Virginia’s anti-miscegenation requirements should be deleted, or the attention of the recipient drawn to the fact that the Virginia anti-miscegenation statutes have been invalidated by the decision in the Loving case. In future editions of the pamphlet under consideration, any reference to the requirements of the Virginia anti-miscegenation statutes should be deleted.


September 18, 1967

HONORABLE ROBERT L. SIMPSON
Commonwealth’s Attorney for the City of Virginia Beach

This will reply to your letter of September 11, 1967, in which you present the following inquiry:

"On August 27, 1962, ruling was given to two inquiries pertaining to Virginia ‘implied consent’ law, § 18.1-55 of the Code of Virginia (repealed by Acts of 1964), referred to your office by The Honorable John L. Apostolou, Assistant Commonwealth’s Attorney for the City of Roanoke, Virginia.

"A question has arisen as to whether the two rulings would be the same under the new section (§ 18.1-55.1) relating to the similar subject matter of implied consent."

The prior opinion of this office to which you refer involved the interpretation to be accorded certain provisions of the initial Virginia “implied consent” law embodied in § 18.1-55 of the Virginia Code and is set out in the Report of the
REPORT OF THE ATTORNEY GENERAL

Attorney General (1962-1963), p. 164. In that instance it was ruled (1) that a person who orally consents to the taking of a blood sample but refuses to execute a hospital waiver form may not be charged with "unreasonably refusing" to submit to a blood test in violation of § 18.1-55, and (2) that a person who orally consents to submit to a blood test but refuses to execute such a form—with the result that no analysis of a blood sample is made nor the report of such analysis received in evidence at his trial—must be found not guilty of the offense of operating a motor vehicle while under the influence of intoxicants.

With respect to your inquiry, I am of the opinion that the first of the above-stated views would be equally valid under the amended Virginia "implied consent" law embraced in § 18.1-55.1 of the Code of Virginia (1950) as amended. Indeed, the position taken in the opinion of August 27, 1962, would appear to be supported by the precise language of § 18.1-55.1 (q) which prescribes:

"No person arrested for a violation of § 18.1-54 or a similar ordinance of any county, city or town shall be required to execute in favor of any person or corporation a waiver or release of liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of blood as provided for herein."

However, I am of the opinion that the second of the above-stated views would no longer be valid under the amended Virginia "implied consent" law. The position taken on this matter in the opinion of August 27, 1962, was predicated upon the language then contained in § 18.1-55 (f) of the Virginia Code—a provision which is not contained in the existing law. In this connection I call your attention to the subsequent rulings of this office set forth in the Report of the Attorney General (1964-1965), pp. 74, 182, 184, in which the current view on such matters was formulated and stated at length.

MOTOR VEHICLES—Blood Analysis—Implied consent—Sample not taken unless accused agrees to or requests.

Honorable W. Carrington Thompson
Member, House of Delegates

September 5, 1967

I am in receipt of your letter of August 16, 1967, in which you call my attention to certain observations of the Supreme Court of the United States in Schmerber v. California, 384 U.S. 757, 767, 777, concerning the implication of the Fourth Amendment to the Constitution of the United States in situations involving the compulsory administration of blood tests and point out that the Virginia "implied consent" law (§ 18.1-55.1 of the Virginia Code) makes no provision for the issuance of a search warrant. In this context you present the following situation and inquiry:

"For your official opinion I submit the following hypothetical case: A is observed by police officer, apparently intoxicated and operating a motor vehicle. The officer arrests A and takes him immediately before a Justice of the Peace where a warrant for the offense is issued. The police officer complies with the statute as to informing A of the Implied Consent Statute and A refuses to submit to the blood test and repeats his refusal before the Justice of the Peace. The Justice of the
Peace is not requested to issue a search warrant and none is issued. Can A be convicted of the unreasonable refusal to submit to a blood test under these circumstances?

"I also call your attention to the fact that our search warrant statute § 19.1-84 makes no provision for a search warrant in this case."

I am of the opinion that your inquiry should be answered in the affirmative. In Schmerber, the United States Supreme Court sustained a judgment of the Los Angeles Municipal Court convicting the accused of operating a motor vehicle while under the influence of intoxicants. In that case a sample of the accused's blood had been taken at the direction of a police officer without the consent of the accused and despite his refusal, on the advice of counsel, to consent to a blood test. Evidence of the analysis of the accused's blood sample was admitted in evidence at the trial of the accused over his objection. During the course of the opinion announcing its decision, the Court pointed out that—under the circumstances of the case thereunder consideration—the attempt to secure evidence of blood alcohol content was an appropriate incident to the accused's arrest.

It is significant to note that in the Schmerber case (1) a blood sample was in fact taken and (2) the sample was taken without the consent of the accused and, indeed, despite his refusal to consent. By contrast, the Virginia "implied consent" law does not permit an accused's blood sample to be taken under such circumstances. In this connection, this office has ruled that the Virginia "implied consent" law does not "contemplate that a blood sample shall be taken unless an accused expressly agrees or requests that such sample be taken." See, Report of the Attorney General (1962-63), p. 161. Moreover, in Walton v. City of Roanoke, 204 Va. 678, 683, the Supreme Court of Appeals of Virginia—during the course of its opinion sustaining the constitutionality of the Virginia "implied consent" law—pointed out:

"Moreover, the defendant was not compelled under § 18.1-55 [now § 18.1-55.1] to submit to the blood test. He had a choice of either allowing the test to be made or refusing it. His refusal could not be used as evidence in his trial on the charge of driving under the influence of intoxicants but, if found to be unreasonable, constituted grounds for revocation of the privilege of operating his automobile upon the highways of this State. However, defendant is afforded a hearing on this latter issue subsequent to his trial for driving under the influence of intoxicants." (Italics supplied.)

In light of the above-mentioned feature of the statute under discussion, I am of the opinion that the decision in the Schmerber case would not affect the validity of a conviction for unreasonable refusal to submit to a blood test under the circumstances you describe. Rather, I am constrained to believe that the situation you present would fall within the ambit of the following language in the case of Schutt v. MacDuff, 127 N.Y. S.2d 116:

"In any event, the statute, when considered generally, does not stand for any unreasonable search or seizure. This, because it is premised upon the consent of the licensee to submit to the test when demanded. The licensee is expressly given the option of refusal. Whether in another particular case there may be an unreasonable search or seizure or a denial of due process where a test is administered in the
absence of the licensee's consent (see, Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L. Ed. 183) is another matter and is not now being considered." (Italics supplied.)

See, also, Anderson v. MacDuf, 143 N.Y. S.2d 257; Annotation, Automobiles-Driver's License, 88 A.L.R. 2d 1064.

MOTOR VEHICLES—Calibration of Speedometer—Weight given evidence up to court trying case.

HONORABLE RICHARD C. COTTER, Judge
Juvenile and Domestic Relations Court for Gloucester, Mathews and Middlesex Counties

This is in reply to your letter of April 25, 1968, in which you request an opinion of this office as to what effect proof of calibration of the speedometer would have on the determination of the facts in the following situation:

"The defendant was given a summons charging speeding, 45 miles per hour in a 35-mile per hour zone, the trooper having clocked the defendant. The defendant produced testimony showing his car had been calibrated five days thereafter, and the calibration showed that when his car speedometer showed 35 miles per hour, he was actually doing 45 miles per hour. He further testified that he had looked at his speedometer at the time and it showed 35 miles per hour."

Section 46.1-193.1 of the Code of Virginia is as follows:

"In the trial of any person charged with exceeding any maximum speed limit in this State, the court may receive as evidence a sworn report of the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by the defendant or the arresting officer at the time of the alleged offense."

This section authorizes the court to receive as evidence a sworn report of the results of a calibration test of the accuracy of the speedometer in a motor vehicle operated by a defendant charged with exceeding the maximum speed limit. Obviously, the amount of error in the speedometer, if any, as shown by the calibration test, and the amount of excess in speed over the maximum speed limit charged and supported by the evidence, would be important factors for the court's consideration. The weight which should be given a report that is received in evidence under these conditions rests in the sound discretion of the court trying the case.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Chauffeur's License—When required.

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

November 22, 1967

This is to acknowledge receipt of your letter under date of November 15, 1967, in which you pose the following inquiry:

"Factually, hourly wage employees at the Olin Chemical Plant at Saltville, Virginia who are members of District 50, United Mine Workers of America are currently on strike. Several of the striking employees are persons who were employed by the company for the principal purpose of operating a motor vehicle and are properly licensed by the Commonwealth of Virginia as chauffeurs as defined by Section 46.1-1. Since the strike began, on or about November 2, it is alleged that persons employed by said company for other than the principal purpose of operating a motor vehicle and who are not on strike are being used for the purpose of operating motor vehicles.

"At what stage or period of time, if ever, would those employees not originally employed for the principal purpose of operating a motor vehicle, but who have been pressed into service for that principal purpose, be required to obtain a chauffeur's license in order to be in compliance with the Laws of the Commonwealth pertaining thereto."

Section 46.1-1(2) of the Virginia Code, to which you refer in your letter, sets forth the statutory definition of "chauffeur." It reads:

"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."

As you will note from the above-quoted statute, it is the principal purpose for which a person is employed or the use of the motor vehicle involved which determines whether or not an individual falls within the "chauffeur" classification, and there is no specified reference therein with respect to the time a person must be employed principally as a motor vehicle operator to qualify as a "chauffeur" under the definition in question.

I am, therefore, of the opinion that a person who is employed for other principal duties and drives a motor vehicle only occasionally or incidently may do so on his operator's license provided the vehicle involved is not in use as a public or common carrier of persons or property. Since the situation you present does not involve the operation of motor vehicles in use as a public or common carrier of persons or property, I am constrained to believe that the individuals concerning whom you inquire would not be required to obtain a chauffeur's license if they were employed for principal duties other than the operation of a motor vehicle. In the event of a change in the principal purpose of their employment from other duties to that of operating a motor vehicle, the individuals in question would then be required to obtain a chauffeur's license.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Commissioner—Duty to certify abstracts of convictions to Commonwealth Attorneys—What convictions are required to be certified.

June 4, 1968

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This is to acknowledge receipt of your letter of recent date, in which you pose certain questions relative to the newly enacted Virginia Habitual Offender Act, which becomes effective June 28, 1968. For the sake of clarity, I shall set forth your inquiry and consider same thereafter. You relate as follows:

"Will you kindly advise me as to my duty under the provisions of Section 46.1-387.3 in relation to counting of the offenses enumerated in Section 46.1-387.2.

"Section 46.1-387.3 reads in part as follows:

"The Commissioner of the Division of Motor Vehicles shall certify, substantially in the manner provided for in § 46.1-34.1, three transcripts or abstracts of the conviction record as maintained in the office of the Division of Motor Vehicles of any person whose record brings him within the definition of an habitual offender, as defined in § 46.1-387.2 to the attorney for the Commonwealth of the political subdivision in which such person resides according to the records of the Division or the attorney for the Commonwealth of the city of Richmond if such person is not a resident of this State . . . .'

"Section 46.1-387.2(b) reads as follows:

"Twelve or more convictions, or findings of not innocent in the case of a juvenile, of separate and distinct offenses, singularly or in combination, in the operation of a motor vehicle which are required to be reported to the Division of Motor Vehicles and the commission whereof requires the Division of Motor Vehicles or authorizes a court to suspend or revoke the privilege to operate motor vehicles on the highways of this State for a period of thirty days or more and such convictions shall include those offenses enumerated in subsection (a) above when taken with and added to those offenses described herein.'

"Sections 46.1-417(e), 46.1-417(g), 46.1-419 and 46.1-420 of the Code require the Division of Motor Vehicles upon receipt of record of a second conviction of offenses committed within a period of twelve consecutive months to revoke the license or privilege of the offender for a period of time.

"First, shall any offense enumerated in Sections 46.1-417(e), 46.1-417(g), 46.1-419 and 46.1-420 be ignored unless it is a conviction for a second or subsequent offense occurring within a consecutive period of twelve months that has the effect of requiring the Division of Motor Vehicles to suspend or revoke the privilege or license?

"Second, if your opinion is in the affirmative as to the first question; then in the event there is a revocation or suspension issued by the Division of Motor Vehicles under the provisions of the above enumerated Sections, shall the convictions for both offenses be counted in the total of twelve required convictions or shall only the last conviction which triggered the required revocation or suspension be counted?
REPORT OF THE ATTORNEY GENERAL

"Third, Section 46.1-422 authorizes a court to suspend for a period of not less than ten days nor more than six months the license or privilege of an offender convicted of reckless driving. Section 46.1-387.2(b) includes within the enumerated convictions a conviction for an offense which authorizes a court to suspend or revoke the license or privilege for a period of thirty days or more. In light of the language contained in Sections 46.1-422 and 46.1-387.2(b), shall single convictions of reckless driving be counted in the total of twelve or more convictions related to in Section 46.1-387.2?"

The Code sections to which you refer in your letter require a mandatory revocation or suspension by the Division of Motor Vehicles of the license or privilege to drive of any person upon receipt of record of a combination of separate and distinct convictions of two reckless driving offenses [§ 46.1-417 (e)], two hit and run offenses, each with property damage in excess of $100.00 [§ 46.1-417 (g)], two speeding offenses [§ 46.1-419] or one speeding offense and one reckless driving offense [§ 46.1-420], provided such offenses were committed within a twelve-month period. For purposes of the Virginia Habitual Offender Act, Code § 46.1-387.2 (b) contemplates the counting of only those convictions which, either singularly or in combination with other previous offenses, require a revocation or suspension of the license or privilege to drive by the Division or authorize a court to revoke or suspend said license or privilege to drive.

As concerns the combinations of offenses prescribed for in §§ 46.1-417 (g) and 46.1-419, it is my opinion that only the last occurring offense thereof should be counted in the total number of twelve or more convictions referred to in § 46.1-387.2 (b). The first offense of such combinations should not be counted as it would not be in combination with any previous similar offense, and in this relation, would not require or authorize a suspension or revocation.

With reference to the combination of offenses set forth in § 46.1-417 (e), a different situation obtains. There is no question but that Virginia courts have discretion as to whether the driver's license or privilege to drive may be suspended in the event of a single reckless driving conviction. In this connection, see § 46.1-422. Yet, whether or not the court has implemented this statutory discretion is not the criterion by which a reckless driving conviction is or is not to be counted for the purposes of Article 7, Chapter 5 of Title 46.1. Code § 46.1-387.2 (b) includes those convictions which authorize the court to suspend the driver's license, not just those in which the court has elected to suspend the license. Therefore, it is my opinion that every reckless driving conviction, be it in combination with another reckless driving conviction or not, should be counted for the purpose of § 46.1-387.2 (b), the statutory exception of § 46.1-387.2 being that "where more than one included offense shall be committed within a six hour period such multiple offenses shall, on the first such occasion, be treated for the purposes of this article as one offense provided the person charged has no record of prior offenses chargeable under this article...."

There remains for consideration the application of the § 46.1-420 combination of one speeding conviction and one reckless driving conviction in the context of the Habitual Offender Act. Whether one or two offenses of such combination are to be counted for purposes of § 46.1-387.2 (b) will depend on which offense occurred first. If the reckless driving violation is first in point of time, it is my opinion that both convictions should be counted, subject to the same exception referred to in the preceding paragraph. The reckless driving conviction should be counted for the reasons cited above; the speeding offense..."
should also be counted as it is in combination with a previous offense, and in this relation, requires a revocation or suspension by the Division of Motor Vehicles. If, however, the speeding offense occurs first, then only the reckless driving conviction should count, it being the only conviction in such combination which would require or authorize a revocation or suspension. The speeding conviction would not count as it would not be in combination with a previous offense, and would not require or authorize a revocation or suspension.

MOTOR VEHICLES—Drunk Driving Conviction—Person may not operate road machinery over public highway during period of revocation.

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

This is in reply to your letter of inquiry, under date of July 17, 1967, which I shall quote as follows:

"Subsequent to a recent conviction of a party in the County Court of Lee County, Virginia, on the grounds of operating a vehicle while under the influence of intoxicants, the question has risen as to whether or not under Section 46.1-352, et seq., this person would be forbidden to operate road machinery in the course of his employment.

"The aforementioned Section of the Code does not require an operator's or chauffeur's license for the purpose of driving or operating, among other things, road machinery, namely, a motor grader, and Section 46.1-352.1 specifically permits a person convicted of the aforementioned charge to operate a farm tractor. While it is my personal opinion that such revocation or suspension of operator's license would not prevent a person whose privileges have been revoked or suspended from operating road machinery, nevertheless, I would appreciate an opinion from your office on the point in question."

As your inquiry closely parallels a question answered in an opinion expressed in a letter under date of April 26, 1966, from this office to Honorable L. Victor McFall, Commonwealth's Attorney for Dickenson County, Report of the Attorney General (1965-1966) p. 179, a copy of that letter is enclosed for your information.

As you will observe from same, under § 18.1-59, Code of Virginia (1950), as amended, a judgment of conviction under § 18.1-54 "shall of itself operate to deprive the person . . . of the right to drive or operate any such vehicle, conveyance, engine or train in this State" for the period therein prescribed. There is but one statutory exemption from the mandate of § 18.1-59: by the very terms of § 46.1-352.1, a judgment of conviction under § 18.1-54 "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." No other vehicle is exempted.

Therefore, it is my opinion that "road machinery," referred to in § 46.1-352, may not be operated on the highways of Virginia by a person convicted under § 18.1-54 for the period as prescribed in § 18.1-59. However, I am of the
opinion that such a person may operate those vehicles referred to in § 46.1-352 on private property.

MOTOR VEHICLES—Exceeding Lawful Rate of Speed—Evidence as to accuracy of speedometer—Use of in trial.

CRIMES—Speeding—Evidence as to accuracy of speedometer—Use of in trial.

HONORABLE RICHARD C. COTTER, Judge
Juvenile and Domestic Relations Court, Mathews County

August 30, 1967

This is in reply to your letter of August 17, 1967, in which you refer to § 46.1-193.1 of the Code of Virginia relating to evidence admissible in trials of persons charged with violating the lawful rate of speed for motor vehicles, and pose the question which I quote as follows:

"Is this evidence to be considered in determining the main question of guilt or innocence of the defendant and thus implying that intent of the defendant is material, or to be considered in fixing the penalty?"

Chapter 687, Acts of Assembly of 1966, amended the Code by adding § 46.1-193.1 which is as follows:

"In the trial of any person charged with exceeding any maximum speed limit in this State, the court may receive as evidence a sworn report of the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by the defendant or the arresting officer at the time of the alleged offense."

Prior to enactment of this section, evidence as to the accuracy of the speedometer in the motor vehicle operated by the arresting officer had been entertained on the merits, generally, in this State. The section refers to a calibration test as to the accuracy of the speedometer in a motor vehicle operated by the defendant, as well as such test in respect to one operated by the arresting officer. There appears nothing in the language of this statute which would tend to indicate a legislative intent to limit the report of the results of a calibration test to consideration in fixing the penalty only.

In my interpretation, therefore, such evidence may be considered in the determination of the main question of guilt, as well as in fixing the penalty.

MOTOR VEHICLES—Flashing, Red Warning Lights—Justice of peace not authorized to equip private vehicle with such lights.

JUSTICE OF PEACE—Private Vehicle—No authority to equip with flashing, red warning lights.

HONORABLE H. HAMPTON OLIFF
Justice of the Peace for Westmoreland County

February 13, 1968

This is in reply to your letter of February 7, 1968, in which you ask my
opinion as to whether a justice of the peace in a county is permitted to have his private automobile equipped with red warning lights like those used by members of volunteer fire departments and rescue squads.

Section 46.1-267 of the Code of Virginia, to which you refer, authorizes the issuance of permits for the use of red warning lights on privately owned vehicles used by members of any volunteer fire company or rescue squad, under certain enumerated conditions. Certain other vehicles are likewise authorized to be equipped with such warning lights. I find no provision in this section or elsewhere in the Code, however, which would authorize the issuance of a permit to so equip a privately owned automobile because of its use by a justice of the peace. Accordingly, I shall answer your question in the negative.


MOTOR VEHICLES—Inspection Sticker—Proper party to be charged for violation.

CRIMES—Improper Use of State Motor Vehicle Inspection Sticker—Party charged.

HONORABLE T. C. ELDER
Commonwealth's Attorney for the City of Staunton

March 19, 1968

I am in receipt of your inquiry letter under date of February 28, 1968, in which you raise two questions pertaining to §§ 46.1-83 and 46.1-326 (b), Code of Virginia (1950), as amended, which, for purposes of clarity, I shall deal with separately below.

As background information, you relate the following:

"We have a problem with a used car dealership here in Staunton. The State Police have discovered that six cars on this particular used car lot have improper state inspection stickers, that is to say stickers originally issued for other automobiles. Moreover, there is a car with a missing identification plate.

"It would appear that the situation constitutes a violation of Section 46.1-326 (b) and of Section 46.1-83."

Your first question relates to the proper meaning of the word "knowing" found in paragraph (b) of § 46.1-326, which reads: "No person shall display or cause or permit to be displayed upon any vehicle any certificate of inspection and approval knowing the same to be fictitious or issued for another vehicle." (Italics supplied.)

Authority for the correct definition of "knowing" is found at 5 M. J. 330, Criminal Procedure, § 6, where it is written that:

"The term 'knowingly' in a prohibitory statute is usually held to import a knowledge of the essential facts from which the law presumes a knowledge of the legal consequences arising therefrom. In statutes making it a crime 'knowingly' to do certain things, the word usually
means a perception of the facts requisite to constitute the crime. The word 'knowingly' is equivalent to the word 'wilfully.' The term 'knowingly' imports a knowledge that the facts exist which constitute the act or omission a crime, and does not require knowledge of the unlawfulness of the act or omission."

You will be interested to know that I am advised that the practice of the State Police has been to charge a violation of § 46.1-325 in the situation of use of an inspection sticker issued for another vehicle and to charge a § 46.1-326 (b) violation for the use of counterfeit inspection stickers exclusively.

Your second question relates to the problem of proper party defendant, and, in this connection, you state the following:

"The lot in Staunton is run by two young men. The business is owned by a man living in Charlottesville. I can see some passing of the buck in any event."

It is well settled the civil doctrine that a principal is bound by the acts of his agent within the scope of the latter's authority does not obtain in criminal law, since in order to hold a person criminally responsible it is essential that he have the requisite criminal intent at the time of the alleged offense. See, 22 C. J. S. 246, Criminal Law, § 84. The principal may nevertheless be criminally responsible as when he authorizes or directs his agent to commit the criminal act or consents to the commission of the act by his agent.

It is, therefore, my opinion that unless it can be shown that the owner of the used car business authorized, directed or otherwise connived in the commission of the §§ 46.1-83 and 46.1-326 (b) offenses, his agents are the only proper parties defendant.

MOTOR VEHICLES—Liability Insurance—No criminal penalty for failure to have in effect.

June 13, 1968

HONORABLE DICK B. ROUSE
Commonwealth’s Attorney for the City of Bristol

This will acknowledge receipt of your letter under date of May 17, 1968, in which you relate:

"'A' is a resident of the state of Tennessee. He is driving his automobile, which is registered and licensed in the state of Tennessee, when involved in an automobile accident in the state of Virginia. He has no liability insurance in effect at the time of the accident nor can he furnish proof of financial responsibility in any manner authorized under the Virginia law. Considering Section 46.1-463 of the Virginia Code or any other applicable statute, can the Court impose a fine for failure to have in effect liability insurance? It is conceded that the Commissioner of Motor Vehicles may suspend 'A'’s privilege to drive in the state of Virginia in the future until such time as he can furnish proof of financial responsibility as required by the Virginia Code."

Please be advised that there is no Virginia Code section which makes
criminal the nonresident's failure to have automobile liability insurance in effect at the time of his accident involvement in Virginia. I shall, therefore, answer your question in the negative.

By way of information, § 46.1-167.3, Code of Virginia (1950), as amended, reads in applicable part:

"Any person owning an uninsured motor vehicle (1) licensed in this State, or (2) subject to registration and license in this State, or (3) 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, to be disposed of as provided by § 46.1-167.6, shall be guilty of a misdemeanor, punishable as set forth in § 46.1-16." (Emphasis supplied.)

If such nonresident is "subject to registration and license in this State" [in this connection, see § 46.1-1 (16)], he may be subject to the penalties provided for in § 46.1-167.3.


CRIMES—Alteration of Temporary Tags Issued for Motor Vehicles—Misdemeanor.

September 20, 1967

HONORABLE DONALD H. SANDIE
Judge, Municipal Court City of Portsmouth

This is to acknowledge receipt of your inquiry letter under date of September 7, 1967, in which you relate the following:

"I have two cases pending in my Court in which motorists are charged with violation of 46.1-112, Virginia Code, for having altered license plates. The plates involved are actually temporary 10 day tags issued by the dealers from whom they purchased the automobiles. Not having received the metal plates, they altered the dates after 10 days had expired so it would appear the temporary tags had not expired.

"Is a charge of violation of Section 46.1-112 of the Virginia Code proper under these circumstances, or does this section only apply to alteration of the permanent type metal plates?

"If these motorists are improperly charged under 46.1-112 of the Virginia Code, what would be the appropriate Code section under which they should be prosecuted for this offense?"

Section 46.1-112, Code of Virginia (1950), as amended, is part and parcel of Article 4, of Chapter 3, Title 46.1 of the Code. It provides that:

"(a) Any person who shall alter, with fraudulent intent, any license plate or plates issued by the Division or by any other state, or forge or counterfeit any license plate or plates purporting to have been
issued by the Division under the provisions of this title or by any other state under a similar law or laws or who shall alter or falsify with fraudulent intent or forge any assignment thereof, or who shall hold or use any such license plate or plates knowing the same to have been altered, forged or falsified, shall be guilty of a felony and upon conviction thereof shall be punished as provided in § 46.1-17.

"(b) The owner of a vehicle if operating the same when such vehicle has altered or forged license plates thereon, used as identification plates, shall be deemed to have knowledge of such alteration or forgery."

I am constrained to believe that the alteration of temporary license plates is not covered by the above quoted statute for the reason that Article 6 of Chapter 3, Title 46.1 of the Virginia Code sets forth with specificity those matters with respect to temporary tags. By the very terms of § 46.1-124, it is made "unlawful for any person to issue any temporary license plates containing any misstatement of fact, or knowingly to insert any false information upon the face thereof." (Italics supplied.) Moreover, § 46.1-127 vests in every person to whom temporary license plates have been issued the positive duty of permanently destroying said plates "on the tenth day after issue or immediately upon receipt of the current license plates from the Division". Violation of either of these sections is made a misdemeanor by § 46.1-130, punishable by either fine not to exceed five hundred dollars or imprisonment for not more than one year or both.

It should be noted that § 46.1-112 is penal in character and must be strictly construed. Said section should not be extended by unwarranted implication and should be confined in its application to the subject matter clearly described by the section's very language. See Gates and Son Co. v. City of Richmond, 103 Va. 702, 49 S. E. 965. The subject matter of § 46.1-112 is "any license plate or plates issued by the Division." Yet, the issuance of temporary plates is under the direct control not of the Division, but of the automobile dealer. (See §§ 46.1-121, et seq.)

Given this distinction, coupled with the aforementioned considerations, it becomes clear that the statutory proscription of § 46.1-112, making it a felony to alter plates issued by the Division, was not meant to include the crime of altering temporary plates not issued by the Division, which is made a misdemeanor by Article 6 of Title 46.1. This view is fortified by application of the rule ejusdem generis. It is written at 17 M.J. 325, Statutes, § 62: "Things exceptional in character are never legally deemed to be included or embraced in general terms of disposition, prohibition or regulation of a class or classes of normal or ordinary subjects mentioned."

It is therefore my opinion that, depending on the facts obtaining in each case, a prosecution for either a § 46.1-124 or § 46.1-127 violation would be proper.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Licenses—Taxicabs not defined as common carrier for purpose of licensing.

TAXATION—Taxicabs—Not defined as common carriers exempted under § 46.1-66 (6).

February 14, 1968

HONORABLE V. A. ETHERIDGE, Treasurer
City of Virginia Beach

I am in receipt of your letter under date of January 31, 1968, in which you present the following:

"Are taxis (for hire vehicles) exempted from levies by virtue of sub-paragraph six (6) of 46.1-66?
"Would taxis be defined as a common carrier?
"Our for-hire vehicles do transport persons between Cities and often times between points in other States."

Paragraph (6) of § 46.1-66 of the Code of Virginia, to which you refer, exempts only vehicles operated by a common carrier of persons or property operating between cities and towns or between cities and towns and points without cities and towns and not in intracity transportation. This section does not exempt from taxation those vehicles operated in intracity transportation, even though they are also operated between cities or other points. In my opinion, therefore, the answer to your first question is in the negative. This view is consistent with the opinions found in Report of the Attorney General (1960-1961), pp. 210 and 211.

With reference to your second question, whether taxicabs would be defined as common carriers, referred to in paragraph (6) of § 46.1-66, my answer is also in the negative. Elsewhere in the Motor Vehicle Code, there appears a policy to deal with taxicabs on a separate ground from common carriers. For example, in § 46.1-149, paragraph (7), which has to do with annual State license fees for taxicabs, the terminal sentence reads: "This subsection does not apply to vehicles used as common carriers." And again, in Chapter 12 of Title 56 of the Code, which constitutes the Motor Vehicle Carriers Act, § 56-291.3 reads: "Nothing in this chapter shall be construed to make or constitute operators of taxicabs or other motor vehicles performing a taxicab service common carriers." It is, therefore, my opinion that a taxicab may not be defined as a common carrier, referred to in § 46.1-66, paragraph (6).

MOTOR VEHICLES—Local License—Taxing authority where owner resides.

December 13, 1967

HONORABLE W. P. PARSONS
Commonwealth's Attorney for Wythe County

This is in reply to your letter of December 6, 1967, which reads:

"I wish you would please advise when a person who owns an automobile and his home and place of residence is Wytheville, Virginia, and is temporarily living in the City of Charlottesville and going to
school at the University of Virginia whether his automobile should be assessed for taxation in Wythe County, or in the City of Charlottesville? "Also whether he should obtain a license tag for the automobile in the Town of Wytheville or in the City of Charlottesville?"

In my opinion the situs for the assessment for personal property taxes on the vehicle in question is the residence of the owner, which is the town of Wytheville. Also, the town of Wytheville, the place of residence of the owner, is the proper taxing authority to require the owner to obtain a license tag for the vehicle.

I am enclosing copies of two opinions of this office in which questions substantially identical to those presented by you were considered and discussed. They are opinion dated March 25, 1964, to the Honorable G. W. Mitchell, Treasurer of Culpeper County (Report of the Attorney General (1963-1964), p. 197), and opinion dated March 2, 1961, to the Honorable Franklin L. Kerns, Commissioner of the Revenue of Gloucester County (Report of the Attorney General (1960-1961), p. 306).

MOTOR VEHICLES—Local Licenses—Fees limited by § 46.1-65.

TAXATION—Local Vehicle License Fees—Subject to limitation provisions of § 46.1-65.

COUNTIES, CITIES AND TOWNS—Local Vehicle License Fees—Subject to limitation provisions of § 46.1-65.

HONORABLE DONALD K. FUNKHOUSER
Member, House of Delegates

This will acknowledge receipt of your letter, of May 14, 1968, in which you relate the following:

"I am requesting an opinion from your office concerning a proposed ordinance which has been presented by the Shenandoah County Board of Supervisors, a copy of which is attached concerning the imposing of a county tax on all vehicles in Shenandoah County. My question concerns whether or not the imposing of a $10 license fee on all vehicles, namely car trailers, motorcycles, boat trailers, etc. is in accordance with Virginia law. It was my interpretation that the $10 fee was too much for these named vehicles. I would appreciate your answer on this matter."

Code §§ 46.1-65 and 46.1-66 grant counties, incorporated cities and towns generally the authority to impose taxes and license fees upon motor vehicles, trailers and semitrailers, subject, however, to certain prescribed limitations. One such limitation appears in § 46.1-65, as follows: "The amount of the license fee or tax imposed by any county, city or town upon any class of motor vehicles, trailers or semitrailers shall not be greater than the amount of the license tax imposed at the time of the annual registration in 1963 by the State on vehicles of like class." The effect of this limitation, which was enacted in 1964, was to provide for a built-in ceiling as concerns local license fees. Please
be advised that the State registration fees in 1963 were $3.00 for motorcycles and $3.50 for car and boat trailers.

In consideration of the foregoing, I agree with you that the proposed ten dollar license fees, as relates to the above specified vehicles, are excessive. Such fees should not exceed the 1963 State registration fee schedule amounts.

MOTOR VEHICLES—Local Licenses—Procedure to be followed by county in adopting and amending proposed ordinance.

ORDINANCES—County—Must be certain and consistent with State law to be valid.

ORDINANCES—County—Must be published and posted prior to adoption.

HONORABLE I. CLINTON MILLER
Commonwealth's Attorney for Shenandoah County

June 12, 1968

This will acknowledge receipt of your May 24, 1968, letter, in which you pose two questions touching upon matters raised in my May 21, 1968, opinion to the Honorable Donald K. Funkhouser, Member of the House of Delegates. For the sake of clarity, I shall state your questions and answer same in the order set forth in your letter.

"Enclosed you will find a copy of the proposed ordinance regarding county motor vehicle tags for Shenandoah County, Virginia.

"As you will note in the heading of the ordinance the ordinance is intended to empower the county to levy, assess, charge and collect license fees upon motor vehicles, trailers and semitrailers to the full extent that such motor vehicles, trailers or semitrailers may be subject to such tax and license fee under Sections 46.1-65 and 46.1-66 of the Code of Virginia, as amended, in accordance with Section 46.1-65 of the Code of Virginia, as amended. Taking into consideration that language, plus the definitions as set forth for motor vehicles and trailers, isn't the ordinance enforceable regarding collection of county tag license fees on motorcycles and car trailers to the full extent that such motorcycles and car trailers were subject to the State license tax imposed at the time of the annual registration in 1963 by the State on vehicles of like class? That is, $3.00 for a motorcycle, $2.00 for a sidecar, etc."

The proposed Shenandoah County vehicle license tax ordinance, to which you refer in your question, is defective for the reasons cited in my opinion of May 21, 1968, previously identified herein, a copy of which I enclose herewith. Although the language appearing in the title of the proposed ordinance would suggest that the Shenandoah County Board of Supervisors is seeking to comply with the enabling statutes of the Code of Virginia (§§ 46.1-65 and 46.1-66), nevertheless it is clear that Section 2 of said proposed ordinance is not written in compliance therewith.

It is well settled that an ordinance must be certain and definite, not vague or uncertain. 13 M.J. 432, § 59. Furthermore, an ordinance must be consistent with State law, and to the extent there is conflict with the State statutes, the ordinance is void and unenforceable. 13 M.J. 434, §61. I am, therefore, of the
opinion that, in its present form, the proposed Shenandoah County vehicle license tax ordinance is unenforceable.

"Further, could you please advise as to whether or not the Board of Supervisors can, at a regular session, adopt an amendment to a proposed ordinance, which ordinance has not yet been formally adopted but is in the process of consideration in accordance with Code Section 15.1-504, said amendment being for the purpose of further defining the language of the ordinance, without re-publishing the ordinance with the amendment and restarting the procedures under 15.1-504."

Since a county vehicle license tax ordinance must be published and posted prior to adoption and may become effective immediately upon passage, it is my opinion that a proposed county vehicle license tax ordinance may not be amended to conform same to the requirements of Code §§ 46.1-65 and 46.1-66 and adopted as amended until it has been published and posted in its amended form in accordance with the procedure set forth in § 15.1-504, Code of Virginia (1950), as amended. This view is consistent with two opinions previously rendered by this office on December 2, 1957, and December 19, 1957. See, Report of the Attorney General (1957-1958), pp. 194 and 197.

MOTOR VEHICLES—Operator's License—Local authorities may adopt parallel ordinances requiring.

COUNTIES, CITIES AND TOWNS—Authorized to Adopt Local Parallel Ordinances—Relating to operation of motor vehicle without permit.

May 21, 1968

HONORABLE HARRY W. GARRETT, JR.
Commonwealth's Attorney for Bedford County

This will acknowledge receipt of your letter of May 15, 1968, in which you relate the following:

"It will be greatly appreciated if you could give me the benefit of your opinion regarding the effect of the 1964 amendment to Section 46.1-353 of the Code of Virginia of 1950, as amended.

"Does this additional proviso change your opinion of 21 February 1963, to the Honorable Vernon D. Hitchings, Jr., Judge, Municipal Court, Part II, City of Norfolk, in that localities, pursuant to a local parallel ordinance, can now impose penalties for the operation of a motor vehicle after the operator's right to do so has been suspended or revoked?"

Section 46.1-353, Code of Virginia (1950), as amended, to which you make reference, provides as follows:

"Counties, cities and towns of this State are hereby expressly prohibited from requiring any other operator's license or local permit to drive, except as herein provided, provided that cities, towns and counties which have now in force or hereafter adopt regulations for the licensing of drivers of taxicabs and other similar for hire passenger
vehicles and for the control of the operation of such for hire vehicles may impose and enforce regulations in addition to the provisions of this chapter; provided, further, that this section shall not preclude any county, city or town from prosecuting, under a warrant issued by such county, city or town, a person charged with violation of an ordinance of such county, city or town prohibiting operation of a motor vehicle without an operator's license or while his operator's license is suspended or revoked."

It should be noted that the second proviso in § 46.1-353 was inserted at a time subsequent to my February 21, 1963, opinion to the Honorable Vernon D. Hitchings, Jr. In that opinion I concluded that although § 46.1-180 did not authorize localities to enforce ordinances of the nature under discussion, it is, nevertheless, the prerogative of the General Assembly to grant express powers of the nature involved if it deems such action to be advisable.

In light of the 1964 amendment, it is my opinion that a locality, pursuant to appropriate local ordinance, may prosecute a person for operating a motor vehicle without a license or operating such vehicle during license revocation or suspension. Accordingly, I shall answer your question in the affirmative.

MOTOR VEHICLES—Operator's License—May be multiple-card type rather than one-card type.

Honorable C. H. Lamb, Commissioner
Division of Motor Vehicles

This will acknowledge receipt of your letter under date of June 10, 1968, from which I quote as follows:

"Will you please advise me in relation to the language of Chapter 642, Acts of Assembly of 1968, and particularly Section 46.1-375 thereof, if there is any statutory prohibition that acts to prohibit the issuance of an operator's or chauffeur's license on two cards which in their entirety would constitute a license if an effective identity between the two parts of such multiple card license is positive one to the other."

"The reason for this request is that in exploring with several possible suppliers the manufacturing of driver license cards carrying all data including the picture required by Section 46.1-375, we have reached the conclusion that it is virtually impossible to place a picture and emboss the required data on one card in a manner that it would be readily legible and in a manner so that an effective transfer of data by the imprinter as referred to in Section 46.1-375.1 could be accomplished."

Please be advised that there appears no statutory language in Chapter 642, Acts of Assembly of 1968, or in any present Virginia Code section for that matter, which would prohibit the contemplated change from the issuance of one card operator's and chauffeur's licenses to the issuance of multiple card operator's and chauffeur's licenses as outlined in your letter. Accordingly, I shall answer your question in the negative.
MOTOR VEHICLES—Radar—Placement of signs by cities and towns.
ORDINANCES—Radar—Placement of signs by cities and towns.
CITIES, COUNTIES AND TOWNS—Radar—Placement of signs by cities and towns.

HONORABLE DABNEY W. WATTS
Commonwealth's Attorney for the City of Winchester

November 29, 1967

This is to acknowledge receipt of your inquiry letter under date of November 14, 1967, relative to § 46.1-198 (d), Code of Virginia (1950), as amended, and § 15-16 (c) of the Winchester City Code. In your letter, you relate the following:

"Pursuant to Section 46.1-180 of the Code of Virginia of 1950, the Common Council for the City of Winchester adopted in 1959 an ordinance permitting the measurement of the speed of motor vehicles by an electrical device known as radar. A photo copy of this ordinance is herewith enclosed. This ordinance was similar to Section 46.1-198 of the Code of Virginia of 1950 in effect in 1959. Both the City ordinance and Virginia Code Section 46.1-198 at that time provided in subsection (d):

"'No operator of a motor vehicle may be arrested . . . unless signs have been placed at the City or Town line on the primary highway system leading into such City or Town, to indicate the legal rate of speed and that the speed of motor vehicles may be measured by radio microwaves or other electrical devices . . . .'"

"In complying with the City ordinance, subsection (d), speed limit signs and signs advising that the speed was measured by radar equipment were posted on the primary highway systems leading into the City. However, such signs were posted on such highways within the corporate limits of the City of Winchester at distances varying from 9 feet to 291 feet from the sign designating the corporate limits of the City.

"In 1966 the legislature by Chapter 585 of the Acts of the General Assembly amended Virginia Code Section 46.1-198. Among the changes made was rewriting the second sentence of subsection (d) thereof to read as follows:

"'No operator of a motor vehicle may be arrested by an ordinance adopted by any City or Town authorizing the use of such devices to measure speed unless signs have been placed at or within 300 feet beyond the limits of the City or Town line on the primary highway system leading into such City or Town . . . .'" (Emphasis added.)

"The Common Council of the City of Winchester, Virginia, has not amended City Code Section 15-65 (c) since the amendment of Virginia Code Section 46.1-198 (d)."

You first ask whether or not § 15-65 (c) of the Winchester City Code is
valid in light of the 1966 amendment of § 46.1-198 (d) of the Virginia Code. It is basic that local ordinances shall not contravene the laws of the State. See, §§ 1-13.17 and 46.1-180 of the Virginia Code. Where there is a conflict between a city ordinance and a later act of the State legislature, the latter prevails; but when no conflict is present, they both stand. See, 13 M. J. 435, Municipal Corporations, § 61. Unless the two provisions are contradictory in the sense that they cannot coexist they are not deemed inconsistent because of lack of uniformity in detail. See, King v. County of Arlington, 195 Va. 1084 at 1091, 81 S. E. 2d 587.

You will please observe that the language of the Winchester City Code § 15-65 (c) limits the placing of radar signs to "at the corporate limits of this city." The language of § 46.1-198 (d) of the Virginia Code is different in that it appears in the disjunctive: the placing of radar signs are to be located "at or within three hundred feet beyond the limits of the city or town line." Because the language of said section is in the disjunctive, it is my opinion that there is no conflict or inconsistency between the Winchester City Code and the Virginia Code sections and, hence, City Code § 15-65 (c) is valid.

Your second inquiry is whether the placing of radar signs within the city limits at distances varying from nine feet to two hundred ninety-one feet from the sign designating the corporate limits of the city is proper compliance with your City Code § 15-65 (c). I shall answer this question in the negative for the reasons set forth below.

It appears that basic to the enactment of the 1966 amendment of § 46.1-198 (d) was the contemplation that the motorist be given sufficient and ample warning of the use of radar by the city or town before his actual arrival or entry within the corporate limits of said city or town. The legislative history of the 1966 amendment is supportive of this interpretation of legislative intent of the 1966 amendment. On February 1, 1966 there was introduced in the House of Delegates House Bill No. 269, "A BILL to amend and reenact §46.1-198 of the Code of Virginia, relating to checking on speed with electrical devices; prima facie evidence in reference to convictions hereunder; and restrictions on arrest for violations." The original language of the bill prescribed the placing of radar signs at "or within three hundred feet of the city or town line." The bill was passed by the House of Delegates on February 11, 1966. It was not until it was considered by the Senate Committee on Roads and Internal Navigation that the original wording of House Bill No. 269 was altered, setting forth the placement of radar signs to be at "or within three hundred feet beyond the limits of the city or town line." The bill, in amended form, passed the Senate March 7, 1966, and was agreed to by the House of Delegates the following day.

It is manifest that the language of § 46.1-198 (d) must be read in light of the legislative intent of its 1966 amendment. Hence, the word "at," preceding the language inserted in 1966, must be taken to mean "on." To construe the word "at" otherwise would be to defeat the 1966 amendment's legislative intent. To be sure, it would render meaningless the following language: "or within three hundred feet beyond the limits of the town or city line." Had the General Assembly intended to allow the placement of radar signs within the corporate limits as well, I am constrained to believe that, at least, it would have enacted H. B. 269 in its original language.

It is the duty of the Virginia courts to harmonize local ordinances and state laws whenever possible. See, King v. County of Arlington, supra, 195 Va. 1091. City Code § 15-65 (c) should accordingly be construed in light of the above construction of § 46.1-198 (d), as amended. In order to harmonize the
two sections, the words appearing in the City Code section, "at the corporate limits of this city," must be taken to mean on "or within three hundred feet beyond the limits of the town or city line." The conclusion then follows that the placing of radar signs within the corporate limits at varying distances from nine feet to two hundred ninety-one feet from the sign designating the city limits does not comply with City Code § 15-65 (c).

My answer in the affirmative to your first question and my answer to your second question dispose of any need to answer your third question.

MOTOR VEHICLES—Reckless Driving—Check required for accuracy of radar in conviction.

CRIMES—Reckless Driving—Check for accuracy of radar required in conviction.

HONORABLE JOHN ALEXANDER
Commonwealth's Attorney for Fauquier County

February 6, 1968

This is in response to your letter of January 24, 1968, in which you make inquiry with reference to a reckless driving prosecution (90 miles per hour in a 55 miles per hour zone) based on radar apprehension. In this connection, you relate the following:

"In the apprehension of speeders by radar and in the prosecution thereof, this office has placed in evidence the checking of the machine at five miles less than the speed limit and five miles and fifteen miles more than the applicable speed limit in the locality in which the machine is operated as a basis for a conviction.

"In order to sustain a reckless driving conviction under circumstances as outlined above, would you advise me whether or not it is your opinion that the accuracy of the machine must be shown to have been demonstrated at the speed of 90 miles per hour or is it only necessary to show in evidence the demonstration of accuracy at five and fifteen miles more than the maximum speed limit."

I am advised that over the years the Department of State Police, by appropriate regulation, has required the accuracy test mentioned in your letter for its own radar equipment. I am further advised that if a given radar apparatus is accurate at the designated speed intervals of said test, the machine is accurate throughout its entire range. It is, therefore, my opinion that it is unnecessary to show in evidence the accuracy of the machine demonstrated at 90 miles per hour, provided its accuracy is shown in accordance with the aforementioned test.
MOTOR VEHICLES—Reckless Driving Charged—Procedure on appeal from conviction of speeding.

CRIMINAL PROCEDURE—Appeal—When convicted of crime other than one charged.

March 8, 1968

HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court for Amherst and Campbell Counties

This is in reply to your letter of February 20, 1968, in which you request my opinion regarding a situation in which a person was charged with reckless driving but convicted of speeding, and later appeals the case to the circuit court. Specifically, you pose the following question:

"When he appeals the case would he be tried for reckless driving or for speeding?"

As you point out, the case on appeal from the court not of record is tried de novo. It is so provided in § 16.1-136 of the Code of Virginia. The court which hears the case so appealed acts not as a court of appeals, but as one exercising original jurisdiction. The judgment appealed from is completely annulled. The question on appeal is not whether the judgment of the justice is correct, but whether the accused is guilty of the offense charged. See, Gravely v. Deeds, 185 Va. 662, 40 S.E. 2d 175.

Under the given facts, the offense charged was that of reckless driving. In respect to your question, therefore, I am of the opinion that when the person convicted appeals, he should be tried on the reckless driving charge. To the extent to which this view is in conflict with the opinion found in Report of the Attorney General (1966-1967), p. 178, the latter is superseded.

MOTOR VEHICLES—Registration—Not required of nonresidents residing at Dahlgren Naval Proving Grounds unless vehicle used for commercial purposes and reciprocity not operable.

MOTOR VEHICLES—Operator's License—Not required of nonresidents where reciprocity extended.

MOTOR VEHICLES—Accidents—State reports not required if accident occurs in area under exclusive federal jurisdiction.

TAXATION—Personal Property—Located on federal reservation with exclusive jurisdiction—When not taxable.

TAXATION—Virginia Motor Vehicle Sales and Use Tax—Not applicable to vehicle not registered in State.

SERVICEMEN—Living on Military Reservation—May maintain divorce suits in State courts.

October 23, 1967

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

This is to acknowledge receipt of your letter of September 29, 1967, in which
you pose ten questions with reference to residents of U. S. Naval Weapons Laboratory, Dahlgren, Virginia.

For the sake of clarity, I shall answer your questions seriatim:

"Inquiry No. 1. Are residents of the U. S. Naval Weapons Laboratory required to register their automobiles in the State of Virginia, or are they governed by Sections 46.1-133 or 46.1-134, or both?"

Basic to the registration and licensing requirements of the motor vehicle laws of Virginia is the residence of the motor vehicle owner and the use of the motor vehicle. Under normal circumstances, if an owner has no residence within Virginia, then, without more, he is not subject to this State's licensing requirements. This office has heretofore ruled that persons residing on the Dahlgren Naval Weapons Laboratory (formerly the Dahlgren Naval Proving Grounds) are nonresidents of this State. See opinion letters to the Honorable J. Cleveland Grigsby, Treasurer of King George County, under dates of January 25, 1956, and March 1, 1956; opinion letters to the Honorable Horace T. Morrison, Commonwealth's Attorney for King George County, under dates of April 10, 1956, and January 7, 1963; copies of which are enclosed herewith.

Section 46.1-134, to which you refer in your letter, spells out the registration requirement for nonresidents' motor vehicles used for purposes other than for pleasure. This section comes into play if the Naval Weapons Laboratory resident is operating or allowing the operation of his motor vehicle for commercial purposes, and then, only if the reciprocity referred to in § 46.1-133 is not operable. These considerations would apply to both civilian and military personnel residing on the base.

With reference to military personnel, the Soldiers' and Sailors' Civil Relief Act expressly excludes from the coverage of its immunity the licensing of motor vehicles "used in or arising from a trade or business, if it (the state) otherwise has jurisdiction." (Title 50 U.S.C.A. § 574.) Furthermore, if the serviceman has not registered his automobile in his home state, he is subject to the Virginia registration and licensing requirements. In the case of California v. Buzard, 15 L. ed. 2d. 436, at 441, the United States Supreme Court, in construing the Soldiers' and Sailors' Civil Relief Act, stated that "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."

Assuming that the operation of the automobile is for purposes of pleasure and there is reciprocity between the home state and Virginia, and the automobile is registered with the home state, it is my opinion that the Dahlgren Naval Weapons Laboratory resident may not be required to register his automobile in Virginia.

"Inquiry No. 2. Are residents of the U. S. Naval Weapons Laboratory required to obtain a Virginia operator's permit to operate in the State of Virginia?"

The fact that such persons are nonresidents entitles them to the reciprocity of § 46.1-355, Code of Virginia (1950), as amended, as to the use of operator's or chauffeur's license issued in their home states. See also § 46.1-354, which spells out the additional exemption from licensing with reference to members of the armed forces operating an official motor vehicle of such service while possessing a military driving license. Should the nonresident not be licensed in his home state or should his home state not have any licensing requirements,
then he must first be examined for and obtain lawful possession of an operator’s or chauffeur’s license before operating a motor vehicle in the State, the exception being that:

". . . any such unlicensed nonresident, who is over the age of sixteen years, may operate any motor vehicle which has been duly registered for the current calendar year in the state or country of which the owner is a resident upon the highways of this State, for a period of not more than thirty days in any one year without making application for or obtaining an operator’s or chauffeur’s license under this chapter, upon condition that such nonresident may be required at any time or place to prove lawful possession of or the right to operate such motor vehicle and establish his proper identity." (§ 46.1-356)

“Inquiry No. 3. If the answer to Inquiry No. 1 is negative, and the resident of the Naval Weapons Laboratory elects to register his car in Virginia, is he required to obtain a Virginia operator’s permit?”

The fact that such a person elects to register his car in Virginia does not strip him of his nonresident status. Section 46.1-1 (16) (c), in pertinent part, reads that “A person . . . who has registered a motor vehicle, listing an address within this State in the application for registration, shall be deemed a resident for the purposes of this title.” Military reservations, over which the United States has assumed exclusive jurisdiction, such as the Dahlgren Naval Weapons Laboratory, are not considered an address within the State. Therefore, I am of the opinion that the residents thereon are entitled to the same reciprocity as any nonresident is granted under § 46.1-355.

“Inquiry No. 4. Are drivers of motor vehicles involved in an accident on the premises of the Naval Weapons Laboratory required to submit reports required by Section 46.1-400?”

“Inquiry No. 5. Are all accidents, as defined by Section 46.1-400, the subject of an accident report, or must the accident have occurred on a highway of the State of Virginia?”

It is true that § 46.1-400, setting forth the accident report requirement, contains no mention as to location of the accident. It merely requires an accident to be reported within five days to the Division of Motor Vehicles by the driver if it results in death, personal injury or total property damage to an apparent extent of one hundred dollars or more.

In an opinion letter, under date of December 6, 1962, to the Honorable Marvin M. Murchison, Commonwealth's Attorney of the City of Newport News, this office ruled that § 46.1-400 has reference to “accidents which arise from or are related to operation upon a highway or way open to the public for vehicular travel.” “Highway” is defined in § 46.1-1 (10) as “The entire width between the boundary lines of every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets, alleys and publicly maintained parking lots in counties, cities and towns.”

In consideration of the foregoing, it is my opinion that only accidents which arise from the operation of a motor vehicle upon a highway in this State fall within the language of § 46.1-400. Because of the exclusive Federal jurisdiction of the Dahlgren Naval Weapons Laboratory, accidents arising from the operation of motor vehicles within the boundaries thereon are not within this State, and, therefore, are not required to be reported.
The Naval Weapons Laboratory has a civilian boat club with berthing facilities located in Machodoc Creek, off the shore of the station. Machodoc Creek is a part of the public waters of the State of Virginia. The Military and Civilian personnel of the Naval Weapons Laboratory are eligible for membership in this Club.

Inquiry No. 6. Are owners of boats which are customarily berthed at this boat dock subject to personal property taxation on such boats?

A portion of this question, as relates to civilian employees, was answered in an opinion letter to the Honorable Warren S. Purks, Commissioner of the Revenue for King George County, under date of February 5, 1964. I am enclosing same herewith. As you will observe therefrom, said boats are not taxable as tangible personal property if they are moored in an area that is under the exclusive jurisdiction of the United States. Conversely, if they are moored in an area not under the exclusive jurisdiction of the United States, then they are taxable. With reference to boats belonging to non-domiciliary servicemen in this State because of military or naval orders, the Soldiers' and Sailors' Civil Relief Act controls. In accordance with that Act, personal property shall not be deemed to be located or present or to have acquired situs for taxation purposes in the state the non-domiciliary serviceman is stationed. However, this immunity does not apply to personal property used in or arising from a trade or business if the State in which it is performed otherwise has jurisdiction.

Inquiry No. 7. If the answer to No. 6 above is affirmative, would the removal of the boats from the dock to the mainland of the Naval Weapons Laboratory on the tax assessment date relieve the owner of tax liability?

Assuming that the area in which the boats are moored is within exclusive Federal jurisdiction, then this question is moot. Assuming that the area on which they are moored is without exclusive Federal jurisdiction on the tax assessment date, it is my opinion that they are nevertheless taxable.

I direct your attention to Hogan v. County of Norfolk, 198 Va. 733, 96 S.E. 2d 744 (1957), which applied § 58-834 to which you make reference. Said the Court at page 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 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."

With reference to question numbered 7, I am enclosing a copy of an opinion letter sent to the Honorable C. B. Covington, Jr., Treasurer, City of Newport News, under date of April 27, 1966.

Inquiry No. 8. Would the answer to either 6 or 7 above be altered by the residence of the owner; i.e. his residing on the premises of the Naval Weapons Laboratory rather than residing in the County of King George?

My answer is in the negative for the reason that the basis for the personal property tax is not the residence of the owner, but the physical location of the property.
Inquiry No. 9. If you rule that residents of the Naval Weapons Laboratory are required to register their automobiles in Virginia, it is obvious the above Act (Virginia Motor Vehicle Sales and Use Tax) would have application. If they are not required to so register, would such owner be required to pay the above tax? If they elected to register in Virginia, would this action invoke the requirement of paying a titling tax?

I have opined above that a resident of Dahlgren Naval Weapons Laboratory is not required to register his automobile in Virginia provided the operations of said vehicle are not for purposes other than pleasure and there is reciprocity between the home state and Virginia, and it is licensed in the home state. Furthermore, I am of the opinion that when the requirement of registration is absent, and the owner does not elect to register his automobile in this State, the motor vehicle sales and use tax is not required and should not be collected.

In the event the non-domiciliary serviceman elects to register his automobile in this State, I am of the opinion that the tax may not be levied and collected because of the Supreme Court's holding in the case of California v. Buzard, supra. I have previously ruled that a revenue raising tax may not be enforced against a nonresident serviceman stationed in Virginia by reason of military or naval orders. See enclosed portion of opinion letter to the Honorable C. H. Lamb, Commissioner, Division of Motor Vehicles, under date of July 21, 1966. In Buzard, the Court concluded that only those taxes which are essential to the host state's licensing and registration laws are applicable to the motor vehicles of nonresident servicemen.

A different situation accrues when the civilian personnel, residing on the base, elects to register his automobile in Virginia. This person does not fall within the purview of the Soldiers' and Sailors' Civil Relief Act. It is set forth in § 58-685.14 that "The tax shall be paid . . . at the time the owner applies . . . for, and obtains, a certificate of title therefor. No tax shall be levied or collected under this chapter upon the sale or use of a motor vehicle for which no certificate of title is required." When a nonresident elects to register his automobile in Virginia, application for a certificate of title is required. It follows, then, that the collection of the tax is required by the mandate of § 58-685.14, quoted herein.

For the reasons set forth above, I am of the opinion that should the civilian resident of Dahlgren Naval Weapons Laboratory elect to register his automobile in this State, the sales and use tax should be collected.

Inquiry No. 10. May military personnel, living on the premises of the Naval Weapons Laboratory the requisite period of time, have access to the Court in King George County to maintain an action for divorce under the special authority quoted above? (§ 20-97)

The second sentence of § 20-97 of the Code, to which you refer in your letter and which constitutes the 1958 amendment of said section, sets forth the domicile and residence requirement for military personnel in a divorce suit in this State. It reads as follows:

"For the purposes of this section only, if a member of the armed forces of the United States has been stationed in this State and has lived with his or her spouse for a period of one year or more in this State next preceding a separation between such parties, and such service person and spouse continue to live in this State until and at the time a suit for divorce or legal separation is commenced, then such..."
person and his or her spouse shall be presumed to be domiciled in and to have been a bona fide resident of this State during such period of time."

It would appear that the purpose of said amendment was to alleviate the problem which so often is manifest when a serviceman is ordered to duty in Virginia and subsequently desires a divorce or legal separation, to wit, difficulty in establishing to the satisfaction of the court the intent or state of mind necessary for the acquisition of a domicile of choice. The solution to this problem was accomplished by making the mere presence in this State for one year under military orders sufficient to create a presumption of domicile and residence.

As you will observe, the language of § 20-97 makes no distinction with reference to living on or off the premises of a military reservation. Because it does not, I am constrained to believe that none was intended. For the purposes of § 20-97, then, the words "in this State," used therein, must be taken to mean both living on and off the military base.

It is, therefore, my opinion that a serviceman, living on the premises of the Dahlgren Naval Weapons Laboratory, in accordance with § 20-97 may maintain a divorce suit in King George County.

MOTOR VEHICLES—Registration and Licensing—Required of person working in State for period exceeding sixty days.

TAXATION—Motor Vehicles—Person working in State for period exceeding sixty days becomes resident for purpose of registering and licensing.

HONORABLE PAUL M. BOOTH
Adjuant General of Virginia

January 12, 1968

This is to acknowledge receipt of your letter under date of January 2, 1968, in which you inquire as to whether or not Lockheed Aircraft Company employees working in Virginia on a temporary tour and performing services under government contract are subject to Virginia's automobile registration laws.

I direct your attention to § 46.1-1 (16) (b) of the Code of Virginia (1950), as amended, which reads as follows: "A person who becomes engaged in a gainful occupation in this State for a period exceeding sixty days shall be deemed a resident for the purposes of this title." Part and parcel of Title 46.1 of the Code are the registration and licensing laws of the Commonwealth.

In the facts set forth in your letter, the Lockheed employee is gainfully employed in Virginia in excess of sixty days. Assuming that the Lockheed employee's motor vehicle is used in the Commonwealth during this employment, it is my opinion that such a person is required to purchase Virginia license plates for such vehicle.

The statutory language of § 46.1-1 (16) (b) is unequivocal on this point: Once a person has been working in this State for a period exceeding sixty days, he becomes a resident for the purposes of registering and licensing his motor vehicle.
MOTOR VEHICLES—Revocation of Operator's License—Person may drive where appeal perfected from judgment of county court.

MOTOR VEHICLES—Suspension of Operator's License—Remains in effect until appeal perfected.

October 17, 1967

HONORABLE WILLIAM R. SHELTON, Judge
Chesterfield County Court

This is to acknowledge receipt of your letter under date of October 3, 1967, in which you pose the following inquiry:

"I respectfully solicit your opinion upon the following matter: 'The defendant was tried and convicted of reckless driving on August 11, 1967, and his driver's license was revoked at that time. The defendant did not note an appeal on this date and subsequent to this conviction day, he was apprehended again in the County of Chesterfield and charged with driving after his right to drive had been revoked or suspended and subsequently prior to trial on the second offense and before the running of the 10 days from the first conviction noted and perfected an appeal on the first conviction.'

"Can the defendant be tried on the subsequent offense of driving on a revoked permit if he perfects his appeal on the first offense which resulted in the revocation of his permit within the 10 day statutory period?

"In the opinions of the Attorney General Volume July 1, 1955 to June 30, 1956, opinion #F149 (206) and opinion #F353 (104) located on pages 140 and 141 seem to be in hopeless conflict, and I therefore solicit, respectfully your opinion on the above stated matter."

As concerns any conflict between the two opinions that you refer to, I direct your attention to a later opinion under date of January 17, 1957, to the Honorable Martin F. Clark, Commonwealth's Attorney of Patrick County, a copy of which I am taking the liberty of enclosing herewith. See, Report of the Attorney General (1956-1957), p. 192.

As you will notice from the language therein, the March 23, 1956, opinion superseded the December 1, 1955, one. The March 23, 1956, and January 17, 1957, opinions, then, correctly reflect the proper guidelines in resolving the issues raised in your letter.

Section 46.1-425, Code of Virginia (1950), as amended, (formerly § 46-195.1), is very pertinent to your inquiry. It provides that:

"(a) In any case in which the accused is convicted of an offense, upon the conviction of which the law requires revocation or suspension of the operator's or chauffeur's license of the person so convicted, the court shall order the surrender of such license, which shall remain in the custody of the court until (1) the time allowed by law for appeal has elapsed, when it shall be forwarded to the Commissioner, or (2) an appeal is effected and proper bond posted, at which time it shall be returned to the accused.

"(b) Provided, however, when the time of suspension or revocation coincides or approximately coincides with the appeal time, the court
may retain the license and return the same to the accused upon the expiration of the suspension or revocation."

In light of the above statutory language, the lower court's suspension of a driver's license remains effective and potent until such time as an appeal is perfected to the circuit or corporation court.

I am of the opinion that while the court's suspension order remains in full force, the person who operates a motor vehicle in violation of said suspension may be tried for a § 46.1-350 offense, even though subsequent to the date of said offense he has perfected an appeal from the conviction which resulted in the suspension. Yet, once the appeal is perfected and where the suspension period does not coincide with the appeal time, thereafter the person may lawfully drive on the highways and a § 46.1-350 trial is improper with reference to the person's operation of a motor vehicle subsequent to the time of perfecting the appeal.

MOTOR VEHICLES—Revocation or Suspension of Operator's License—Person may not operate any self-propelled construction equipment on highway.

HONORABLE JOHN R. THOMPSON
Commonwealth's Attorney for Wythe County

May 20, 1968

This is to acknowledge receipt of your letter of May 2, 1968, in which you relate the following:

"This office has particularly been requested by the 4th Division of the Virginia State Police to advise them whether to make an arrest within a construction zone for those operators of construction equipment who have had their licenses suspended or revoked. I do not know how to advise them, either if the revocation occurred because of reckless driving or driving under the influence or impaired driving, and your advice on this point will be most welcomed by this office and the law enforcement officials of Wythe County."

This office has previously rendered opinions upon the driving of a motor vehicle by one whose license is revoked for a conviction of drunk driving. In this relation, enclosed is copy of opinion under date of July 28, 1967, to the Honorable Emory H. Crockett, Commonwealth's Attorney for Lee County, holding that a person convicted of driving under the influence may not operate road machinery during the period of revocation or suspension. For the reasons expressed in that opinion, I am of the opinion that a person whose license has been revoked or suspended for drunk driving may not operate construction equipment on the highway during the period of said revocation or suspension.

As stated in the enclosed opinion of July 28, 1967, the operation of a farm tractor, subject to the limitations imposed by § 46.1-352.1, is the solitary exception to the mandate of § 18.1-59. There is no such exception concerning any other type of revocation or suspension. Code § 46.1-350, as it now reads, is clear on this point. Except as otherwise provided in § 46.1-352.1, no person whose operator's or chauffeur's license or instruction permit or privilege to drive has been revoked or suspended shall drive any motor vehicle "or any self-propelled machinery or equipment on any highway" in this State until the revocation or suspension period has terminated. The preceding quoted langu-
age from § 46.1-350 was inserted by the 1964 General Assembly. It is noted that this Code section is not confined to the operation of a licensed motor vehicle, but is equally applicable whether or not the vehicle is required to be licensed. It is, therefore, my conclusion that a person driving any self-propelled construction equipment on the highway during the period of revocation or suspension for convictions of reckless driving or impaired driving is subject to the penalties of § 46.1-350.

Any previously rendered opinion which may conflict with the view expressed hereinabove is no longer a correct statement of the law, and accordingly, it is superseded by this opinion.

MOTOR VEHICLES—School Bus—Speed limit 35 miles per hour when carrying children.

SCHOOLS—School Bus—Speed limited to 35 miles per hour when carrying children.

HONORABLE HAROLD B. SINGLETON, Judge
Juvenile and Domestic Relations Court for Campbell County

February 15, 1968

I am in receipt of your letter of inquiry under date of February 6, 1968, in which you relate the following:

"We had a case in our Court the other day involving a sixteen year old boy driving a school bus which was transporting a basketball team from William Campbell High School to Altavista High School in Campbell County.

"This school bus was travelling at a speed of 50 miles per hour. The driver claimed that he was a passenger motor vehicle not transporting students and that he should be tried under Section 46.1-193 (C) instead of 46.1-193 (D).

"I took the position that this was a school bus transporting children and that the speed should not be more than 35 miles per hour. His alleged violation of the statute occurred on U. S. 29 just North of Altavista which is not an interstate highway.

"I would appreciate your advising me as to whether you think my decision was right or wrong under the law."

Section 46.1-193 (d), Code of Virginia (1950), as amended, to which you refer in your letter, sets forth the maximum speed limits for a school bus, as follows: "Thirty-five miles per hour on any highway other than an interstate highway, if the vehicle is being used as a school bus carrying children, and forty-five miles per hour on interstate highways." If the vehicle's use is that of transportation of school children and it is in fact transporting them at the time of the alleged offense, then the provisions of § 46.1-193 (d) would apply.

From the facts presented in your letter, the members of the basketball team transported in the school bus were presumably school children. Clearly, then, a prosecution for a § 46.1-193 (d) violation was proper. I am, therefore, of the opinion that your decision in this matter was correct.
MOTOR VEHICLES—Speeding—Evidence of sworn results of calibration test—Admissibility within discretion of court.

EVIDENCE—Sworn Results of Calibration Test—Admissibility within discretion of the court.

June 12, 1968

HONORABLE HARRY W. GARRETT, JR.
Commonwealth's Attorney for Bedford County

This will acknowledge receipt of your May 24, 1968, inquiry letter, in which you relate the following:

"It will be greatly appreciated if you will give me the benefit of your opinion with regard to an interpretation of Section 46.1-193.1 of the Code of Virginia of 1950, as amended.

"Does the phrase, 'the Court may receive as evidence,' mean that it is within the Trial Court's discretion to admit or not admit such evidence? Is the purpose of this Section to obviate the necessity of an appearance in Court by the individual who made the calibration test or does this Section inject the question of 'intent' into speeding offenses?"

Code § 46.1-193.1, to which you refer in your letter, reads as follows:

"In the trial of any person charged with exceeding any maximum speed limit in this State, the court may receive as evidence a sworn report of the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by the defendant or the arresting officer at the time of the alleged offense."

It is clear that the above Code section envisages the admissibility of a calibration test in a speeding prosecution. It is obvious that the amount of error, if any, in the speedometer as shown by such test results, together with the amount of excess in speed over the maximum speed limit as charged and supported by the evidence, would be important factors for the court to consider. The weight to be given such test results, however, rests in the sound discretion of the court trying the case.

In consideration of the foregoing, I am of the opinion that the above Code section's language, "the court may receive as evidence," means that the determination of admissibility of such evidence rests in the discretion of the trial court. Furthermore, I am of the opinion that the purpose of the above Code section is to obviate the necessity of testimony of the person who performed the calibration test, and does not raise the question of "intent" in such prosecutions.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Taxicabs—Subject to requirements imposed under § 56-304, et seq.

ORDINANCES—Taxicabs—Counties, cities and towns may adopt.

August 10, 1967

HONORABLE KENNETH M. COVINGTON
Commonwealth’s Attorney for the City of Martinsville

This is to acknowledge receipt of your letter of inquiry under date of July 21, 1967, which I quote as follows:

“I have a question that has arisen from the construction of the provisions of Title 56-274 (2) and 56-274.1 of the Code in dealing with the operation of a taxi or for-hire vehicle in Henry County. Henry County has adopted an ordinance which regulates and controls taxicabs within the bounds of Henry County. As you will note from 56-274 (2), the provisions of Chapter 12 of Title 56 of the Code do not apply to or include the regulations of taxicabs in counties that have adopted an ordinance regulating and controlling taxicabs. However, Title 56-274.1 states that the provisions of Title 56-274 shall not be construed to exempt any person or vehicle from the requirements of Article 8 of Chapter 12.

“These two sections seem to me to be in conflict. The question specifically is whether in a county such as Henry County, which has adopted an ordinance regulating and controlling taxicabs, a person could be prosecuted for operating such a vehicle when such person has not applied to the Corporation Commission for a warrant and classification and complied with the other regulations of the Commission by filing proof of insurance, etc.”

As you have indicated in your letter, § 56-274, paragraph (2), Code of Virginia (1950), as amended, sets forth the statutory rule exempting from coverage of the Motor Vehicle Carriers Act:

“Taxicabs, or other motor vehicles performing bona fide taxicab service, having a seating capacity of not more than six passengers, while operating in a city, town or county which has or adopts an ordinance regulating and controlling taxicabs and other vehicles performing a bona fide taxicab service, and not operating on a regular route or between fixed termini; provided, however, that each operator of a motor vehicle performing a bona fide taxicab service shall file insurance as required under § 56-299 unless evidence can be shown the Commission that the operator is a self-insurer under an ordinance of the city or an ordinance of the county where the home office of the operator is located; and failure to keep insurance in force shall subject the operator to cancellation of any authority under this chapter;”

The following section, § 56-274.1, spells out an exception to the statutory rule of § 56-274. It reads as follows:

“The provisions of § 56-274 shall not be construed to exempt any person or any vehicle from the requirements of article 8 (§ 56-304
Insofar as concerns §§ 56-304, et seq., it necessarily follows that the persons and vehicles enumerated in § 56-274 are subject to the provisions thereof. Section 56-304 provides, in part:

"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."

The State Corporation Commission, as a matter of practice, requires the issuance of warrants and classification plates for taxicabs or vehicles performing a taxicab service. Given the event of a person operating a taxicab without the scope of § 56-304, he becomes subject to the penalties of § 56-304.11, which makes it a misdemeanor to operate a motor vehicle on the highways of this State without carrying the warrant or displaying the classification plate that Article 8 requires. Upon conviction thereof, said person "shall be punished by a fine of not less than ten nor more than two hundred dollars." It is, therefore, my opinion that under § 56-304.11, a person could be prosecuted for operating a taxicab or vehicle performing a bona fide taxicab service when such person has not obtained from the State Corporation Commission a warrant and classification plate in accordance with Article 8.

As relates to the second part of your inquiry, i.e., prosecution for failure to file proof of insurance with the State Corporation Commission, it is to be observed that the issuance of warrants and classification plates to taxicabs is required by the State Corporation Commission so as to show compliance with regulations of the Commission relative to the filing of proof of insurance. It is, therefore, my opinion that a prosecution for failing to file insurance with the State Corporation Commission would be tantamount to a prosecution for failure to carry the required warrant or to display the required classification plate, and, as such, would be maintainable under § 56-304.11. Moreover, a prosecution for failing to file insurance with the Commission would lie in the event of a person operating a taxicab with a warrant and classification plate not issued to the particular taxicab involved. The second paragraph of § 56-304.11 reads as follows:

"Any person who knowingly displays or uses on any vehicle operated by him any classification plate, identification marker or assigned number which has not been issued to the owner or operator thereof for such vehicle and any person who knowingly assists him to do so shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five nor more than five hundred dollars."
May 28, 1968

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This will acknowledge receipt of your letter of May 2, 1968, in which you present a series of questions pertaining to Chapter 642, Acts of Assembly of 1968. I shall state your questions and answer same in the order set forth in your letter.

I. "Section 46.1-368(b), as amended, becomes effective July 1, 1968, and reads in part: 'Every application shall state the name, year, month and date of birth, Social Security number . . . .' "The Question—Is this provision mandatory as to all applications or does the Statute waive the requirement in the event the applicant for license does not have a Social Security number?"

The above-quoted provision does not expressly condition the issuance of licenses or permits upon Social Security registration; rather, its enactment was to provide for an additional identification number to enhance the elimination of fraud and misuse of licenses and permits. See page 45, Report of the Virginia Traffic Safety Study Commission to the Governor and General Assembly of Virginia, House Document No. 13, 1967. It is, therefore, my opinion that the Social Security number requirement may be waived when the license applicant does not have a Social Security number.

II. "Section 46.1-368(b) further provides in part: ' . . . The Division may as a condition for the issuance of any operator's or chauffeur's license or temporary or instruction permit require the surrender of any license to operate a motor vehicle issued by another state and held by such applicant upon adoption by Virginia of the Driver License Compact . . .' "The Question—May the Division of Motor Vehicles exercise discretion as to certain applicants for license within the entire class by not requiring the surrender of some licenses issued by other jurisdictions?"

The Driver License Compact referred to above was adopted by the 1968 General Assembly. See, Chapter 166, Acts of Assembly of 1968. Article V of the Compact reads, in applicable part:

"Upon application for a license to drive, the licensing authority in a party state shall ascertain whether the applicant has ever held, or is the holder of a license to drive issued by any other party state. The licensing authority in the state where application is made shall not issue a license to drive to the applicant if:

* * * *

"(3) The applicant is the holder of a license to drive issued by another party state and currently in force unless the applicant surrenders such license." (Emphasis supplied.)

Section 6 of Article IX of the Compact reads:
"For the purpose of enforcing subparagraph (3) of Article V, the Division shall include as part of the form for application for an operator's or chauffeur's license under § 46.1-368 a question whether the applicant is currently licensed in another state and shall, if the applicant is so licensed, require the surrender of such license prior to the granting of such application in accordance with the provisions of Chapter 5 of Title 46.1 of the Code of Virginia." (Emphasis supplied.)

And Article VI reads:

"Except as expressly required by provisions of this Compact, nothing contained herein shall be construed to affect the right of any party state to apply any of its other laws relating to licenses to drive to any person or circumstance, nor to invalidate or prevent any driver license agreement or other cooperative arrangement between a party state and a non-party state." (Emphasis supplied.)

In light of the above, it is manifest that the surrendering of a foreign operator's license issued by a party state upon application for a Virginia operator's license is mandatorily required by the Compact. The language appearing in § 46.1-368 (b), as amended, quoted in your question, must then be read along with Chapter 166 of the 1968 Acts. I shall, therefore, answer your question in the negative.

Applying the foregoing, however, to the example you set forth in relation to this question; i.e., a District of Columbia resident holding a District of Columbia operator's license making application for a Virginia chauffeur's license, the Driver License Compact does not require the chauffeur's license applicant to surrender his District of Columbia operator's license. This view is consistent with the statutory recognition of the difference between operator's and chauffeur's licenses in § 46.1-374.

III. "Section 46.1-368(c) reads: 'Every application for an operator's or chauffeur's license shall, on and after July one, nineteen hundred sixty-nine, include a color photograph, front face view, of the applicant supplied under arrangements made therefor by the Division. Such photograph shall be processed by the Division so that the photograph may be made part of the issued license and so that the year the photograph was taken is indicated thereon.' Section 46.1-375 reads in part: '. . . Every license shall also contain a dated color photograph of the licensee. . . .' It will be noted that in Section 46.1-368(c) the language refers to 'the year' the photograph was taken while Section 46.1-375 uses the language 'dated color photograph.'

"The Question—Will the Statute be satisfied if the color photograph on the license carries only the year of photographing or does the Statute require the month, day and year?"

The above mentioned sections must be read together to enhance a single legislative policy. It is, therefore, my opinion that § 46.1-375, when read in conjunction with § 46.1-368 (c), is satisfied if the color photograph only shows the year it was taken.

IV. "By way of comment, there are approximately twenty thousand motorcycles, as defined, licensed in Virginia. Section 46.1-380.2 (b) provides
that on and after January 1, 1969, that each operator's license issued with an endorsement to operate motorcycles will require a fee of ten dollars and as to chauffeur's license a fee of five dollars.

"The Question—Under all of the related provisions, will it be administratively proper to qualify these approximately twenty thousand licensees prior to January 1, 1969, thereby eliminating the collection of the added fee for the endorsements related to in Section 46.1-380.2?"

New Code § 46.1-370.1, which does not go into effect until January 1, 1969, reads as follows:

"No person shall operate any motorcycle upon a highway in this State unless such person shall have passed a special examination, including written material and a road test, pertaining to the ability of such person to operate a motorcycle with reasonable competence and with safety to other persons using the highways. The Division of Motor Vehicles shall adopt such rules and regulations as may be necessary to provide for the special examination under § 46.1-369 of persons desiring to qualify to operate such motorcycles in this State and for the granting of licenses or permits suitably endorsed for qualified applicants."

Likewise, the following new language added in § 46.1-373 does not go into effect until January 1, 1969:

"Every applicant intending to operate a motorcycle as defined in category (3) above, when applying for a license endorsed to authorize the operation of a motorcycle, shall submit to and pass the examination provided for in § 46.1-370.1. An endorsement on any license to operate such motorcycle shall indicate that such license is endorsed for the purpose of authorizing such licensee to operate only motorcycles; provided, however, that if such applicant has a valid operator's or chauffeur's license at the time of application for an endorsement to operate a motorcycle or if such applicant at the time of such application applies for a regular operator's or chauffeur's license and submits to and passes the examination provided for in § 46.1-369, he shall be granted an endorsement on his operator's or chauffeur's license to operate motorcycles in addition to such other vehicles as his operator's or chauffeur's license may authorize him to operate.

* * *

"Every person issued an operator's or chauffeur's license on or after January one, nineteen hundred sixty-nine, who operates any motor vehicle of the classifications herein described, and whose operator's or chauffeur's license does not carry an endorsement or indication that such licensee is licensed as herein provided shall be guilty of a misdemeanor." (Emphasis supplied.)

As concerns motorcycle endorsement fees, new Code § 46.1-380.2 (b), provides that:

"On and after January one, nineteen hundred sixty-nine, for each operator's license issued with an endorsement to operate motorcycles and other vehicles under the provisions of this chapter, the fee shall be ten dollars, and for each such license renewed under such provisions,
the fee shall be nine dollars. On and after January one, nineteen hundred sixty-nine, for each chauffeur's license issued with an endorsement to operate motorcycles and other vehicles under the provisions of this chapter, the fee shall be five dollars, and for each such license renewed under such provisions the fee shall be four dollars."

I am of the opinion that as a practical matter the twenty thousand motorcyclists in Virginia, referred to in your letter, may be examined prior to January 1, 1969, so that their current licenses may be properly endorsed on January 1, 1969. Under the present law, the holder of either an operator's or chauffeur's license without any endorsement thereon may legally operate a motorcycle. Until January 1, 1969, the Division of Motor Vehicles is without statutory authority to endorse any current or renewed license for purposes of operating "motorcycles in addition to such other vehicles as his operator's or chauffeur's license may authorize him to operate," pursuant to § 46.1-373, as amended. Section 46.1-380.2 (b) prescribes the fees which "shall" be collected for such endorsements on and after January 1, 1969.

V. "The Question—Does the enactment of the provision under Section 46.1-375.1 effective July 1, 1969, have the effect of repealing the presently existing Section 46.1-375.1?"

The title heading of Code § 46.1-375.1 indicates that same relates to the manner of issuing original operator's licenses where the applicants are under the age of eighteen years. On the other hand, § 46.1-375.1, referred to in Chapter 642 of the Acts of 1968, deals with a different subject matter, as follows:

"It shall be the duty of each law enforcement agency, including the Department of State Police, charged with the duty to enforce those provisions of this title or parallel and conforming local ordinances which cover violations reportable to the Division of Motor Vehicles under § 46.1-413 to provide its personnel with imprinting equipment of a type which will permit the transfer, without handwriting, of information embossed on operators' and chauffeurs' licenses to summonses and which shall be approved by and may be made available at cost to other agencies by the Department of State Police."

Ordinarily, the enactment of a law will not be held to have changed a statute that the legislature did not have under consideration at the time of enacting such law. See, 82 C.J.S. 420, Statutes, § 252. It is abundantly clear from a reading of the language of Chapter 642 that an amendment or repeal of the present Code § 46.1-375.1 was not contemplated. I shall, therefore, answer your question in the negative. This office has advised the Virginia Code Commission of the aforementioned discrepancy and has been informed that the Commission will assign a different Code section number to § 46.1-375.1 of Chapter 642.

VI. "In the event an applicant for operator's or chauffeur's license appears before one of our driver license examiners on June 28, 1968, undergoes and passes the required examination and pays to the examiner at that time the license fee of six dollars in the case of an operator's license or three dollars in the case of a chauffeur's license; he is then issued a temporary permit authorizing the operation of a motor
vehicle. Obviously, this transaction cannot be processed and the regular license issued until on or after July 1, 1968. The license when then issued will carry a machine issue date on or subsequent to July 1, 1968.

"The Question—Under this circumstance, will the proper statutory fee have been collected?"

The pertinent part of Chapter 642, Acts of Assembly of 1968, which increases the fees for operator's and chauffeur's licenses is § 46.1-380.2 (a), which reads as follows:

"On and after July one, nineteen hundred sixty-eight, for each operator's license issued under the provisions of this chapter, the fee shall be seven dollars, and for each operator's license renewed under such provisions the fee shall be seven dollars. On and after July one, nineteen hundred sixty-eight, for each chauffeur's license issued under the provisions of this chapter, the fee shall be four dollars, and for each chauffeur's license renewed under such provisions the fee shall be four dollars."

It is clear from the above statutory language that the receipt of the license application or the issuance of a temporary driver's permit have no significance as concerns the fee to be collected for the issuance of the license. The new statute requires the payment of the increased fees for operator's and chauffeur's licenses issued on and after July 1, 1968. On that date and thereafter, you do not have authority to issue operator's and chauffeur's licenses unless the new fees have been received. I am, therefore, of the opinion that if the license cannot be issued before July 1, 1968, and is not actually issued prior to that date, then the proper fee to be collected is seven dollars in the case of an operator's license or four dollars in the case of a chauffeur's license. This view is consistent with the view expressed in an opinion furnished you by this office under date of April 3, 1956, a copy of which I enclose. Report of the Attorney General (1955-1956), p. 142.

VII. "In many cases, the holder of a valid operator's or chauffeur's license expiring on or after July 1, 1968, will apply for a renewal of such license prior to July 1, 1968.

"The Question—Shall the applicant be assessed the increased fees specified in Section 46.1-380.2(a)?"

If it is possible to issue the license before July 1, 1968, and same is actually issued before that date, then the correct fee to be collected is six dollars for an operator's license and three dollars for a chauffeur's license. Otherwise, the views expressed in my answer to question VI only would obtain.

VIII. "In the event the holder of an operator's or chauffeur's license expiring on or prior to June 30, 1968, delays in applying for a renewal of such license until July 1, 1968, or thereafter.

"The Question—Shall the increased fees specified in Section 46.1-380.2(a) be assessed?"

The increased fees set forth in § 46.1-380.2 (a) should be collected.

IX. "The Question—in the event the holder of operator's or chauffeur's license issued prior to or on or after January 1, 1969, that does not expire until some date subsequent to January 1, 1969, such license not
being endorsed for the operation of a motorcycle or other vehicles, desires during the validity period of the license to obtain an endorsement as to the existing license so that he may legally operate a motorcycle or other vehicles, what fee should be charged or does the added fee for the endorsement apply only upon renewal of the existing license?"

Assuming that the licensee, on or after January 1, 1969, but before January 1, 1970, desires to have his license endorsed and reissued with appropriate endorsement so that he may legally operate one of the motor vehicles enumerated in § 46.1-373, as amended, it is my opinion that the Division of Motor Vehicles should collect the difference between the fee paid for the issuance of the current operator's or chauffeur's license and the fee prescribed for in § 46.1-380.2 (b).

X. "The Question—In the event the holder of an operator's or chauffeur's license issued on or after January 1, 1969, such license being endorsed or carrying an indication that the licensee is qualified to operate one of the classes of vehicles mentioned in Section 46.1-373, he then having paid a fee of ten dollars in the case of an operator's or five dollars in the case of a chauffeur's, desires an added endorsement or indication on his license that he is also qualified to operate a vehicle of another class; upon the reissuance of such license, is the applicant assessed any additional fee? If so, in what amount, or is the license to be reissued with the added endorsement or indication without any additional fee?"

No additional fee should be collected. Section 46.1-380.2 (b) contemplates the payment of but one fee for "an endorsement to operate motorcycles and other vehicles."

NOTARIES PUBLIC—Eligibility—Reserve member of Armed Forces—Ineligible to serve while on active duty.

PUBLIC OFFICERS—Compatibility—Reserve members of Armed Forces ineligible to serve as notaries public while on active duty.

June 28, 1968

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

I have your letter of June 20, 1968, in which you advise that a resident of your County had been a member of the reserve branch of the Armed Forces for many years and was holding a commission as a notary public. In January 1967 he was recalled to active duty and his commission as notary expired while he was on active duty; that he is now on a 45-day leave but is still on active duty and expects to be separated from the Armed Forces in January 1969.

Miss Martha Bell Conway, Secretary of the Commonwealth, advises me that heretofore applications for appointment as a notary public from members of the Armed Forces on active duty have been refused. I think this policy is in accordance with the law.
Subsection (1) of § 47-1 of the Code of Virginia provides that the Governor shall appoint for the several counties and cities of the State as many notaries as to him may seem proper. Subsection (6) places certain duties in this regard upon the Secretary of the Commonwealth.

Section 2.1-30 of the Code prohibits any person from holding any office of honor, profit or trust under the Constitution of Virginia who is in the employment of the government of the United States or who receives from it in any way any emolument whatever.

Section 2.1-31 provides that no state, county or municipal officer shall forfeit his title to office or position when called to active duty in the Armed Forces of the United States. This refers to one who already holds office and is called to active duty, but does not refer to one who is on active duty when appointed to office.

In my opinion, the position of notary public is an “office of honor, profit or trust” and the provisions of § 2.1-30 of the Code are applicable. The exception provided by § 2.1-31 does not apply to one who does not hold the office at the time of being called into active service.

An opinion of this office to Miss Conway dated December 13, 1961, found in the printed volume of the Report of the Attorney General (1961-1962), at page 192, indicates there is nothing to prevent a person in the reserve forces from being a notary, but a person could not be given a commission while on active duty. I would suggest that the application be filed by the person to whom you refer upon his separation from the Armed Forces.

NOTARIES PUBLIC—Qualifications—Must be a citizen of this State.

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

This is to acknowledge receipt of your letter of August 11, 1967, in which you request advice as to what proof an applicant for a commission of notary public should furnish in order to be appointed. The applicant under consideration is a citizen of the Republic of Cuba, but has been a resident of Arlington County since May 1966. He has filed necessary naturalization papers to become a citizen of the United States.

The question presented is whether a person who is not a citizen of the United States can be appointed a notary public.

A notary public is a state officer appointed by the Governor pursuant to §§ 47-1 and 47-2, Code of Virginia (1950), as amended, and the person so commissioned must be eligible to hold a state (public) office under the State Constitution and the Code.

Section 32 of the Constitution of Virginia provides, in part, as follows:

“Every person qualified to vote shall be eligible to any office of the State, or in any county, city, town or other subdivision of the State, wherein he resides, 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. . .

“Persons eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity.”
Section 18 of the said Constitution provides, in part:

"Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people. . . ."

When Sections 18 and 32 of the Constitution are read together, the conclusion is inescapable; the person must meet all the requirements of Section 18 in order to be appointed a notary public with the exception of age. Furthermore, citizenship in this State is limited to persons who are born therein or born in other states of the Union or naturalized under the laws of the United States and have become residents of Virginia. Section 1-18, Code of Virginia (1950). It would be incongruous for a person not a citizen of the State to hold an office of the State within the meaning of the Virginia Constitution.

The Honorable Harvey P. Apperson, late Attorney General, expressed the opinion in a letter to the Honorable William M. Tuck, Governor, dated January 9, 1948, that a person must possess all qualifications to vote before he is eligible for an office in this State (Report of the Attorney General (1947-1948), p. 125). In this view, I concur.

I am, therefore, of the opinion that a person that is not a citizen of the United States and not a citizen of Virginia is ineligible to be appointed a notary public.

ORDINANCES—Automobile Graveyards—County definitions must conform with State's—Ordinance amended if necessary.

COUNTIES—Ordinances—Automobile graveyards—Definition must be amended, if necessary, to conform to that of State.

November 17, 1967

HONORABLE ANDREW J. ELLIS, JR.
Commonwealth's Attorney for Hanover County

I am writing in further connection with your letter of September 22, 1967, and your subsequent letter of November 13, 1967, following receipt by this office of a copy of the Hanover County ordinance mentioned in your initial communication. You request an opinion as to whether or not Hanover County Code Section 3-1, which defines an automobile graveyard, has been rendered invalid by the 1966 Acts of Assembly which rewrote § 33-279.3, Code of Virginia (1950), as amended.

As you stated, the Hanover County ordinance was enacted pursuant to § 15.1-28, Code of Virginia (1950), as amended. Section 15.1-28 provides that,

"The governing body of each county, city or town in this State may adopt ordinances imposing license taxes upon and otherwise regulating the maintenance and operation of places commonly known as automobile graveyards."
The code section further provides that the term "automobile graveyard shall have the meaning ascribed to it in § 33-279.3."

Section 33-279.3, as enacted in 1958, undertook to regulate "any lot or place which is exposed to the weather and upon which more than five motor vehicles of any kind . . . are found." Section 33-279.3 (as amended in 1966) changes the above definition of automobile graveyard so that now "automobile graveyard shall mean any lot or place which is exposed to the weather and upon which more than ten motor vehicles of any kind . . . are found."

Having been executed January 1, 1959, the Hanover County ordinance conforms to the 1958 version of § 33-279.3.

However, as illustrated above, § 15.1-28 specifically requires that the definition of an automobile graveyard as found in county, city or town ordinances shall conform to the definition of an automobile graveyard as written in § 33-279.3. Thus, as the definition in § 33-279.3 is altered, the county ordinance defining automobile graveyards must also be altered to comply with the definition prescribed in the statute.

ORDINANCES—Land Subdivision—Enforcement when outside limits of town which adopted same.

SUBDIVISIONS—Ordinances—Responsibility for enforcement by adopting governing body.

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

July 21, 1967


Section 8 (paragraph 2) of the county ordinance reads as follows:

"Since the Town of Smithfield on April 17, 1963, adopted a subdivision ordinance which is effective not only within the incorporated area of said Town but also two miles beyond the corporate limits of said Town, and the County of Isle of Wight in adopting its subdivision ordinance, effective as of July 1, 1964, did not notify the Town of Smithfield as required by §§ 15.1-467 and 15.1-468 of the Code of Virginia, as amended, since said County did not want its ordinance to be effective in the two mile wide area of Isle of Wight County in which the subdivision ordinance of said Town was already effective, this ordinance and any amendments thereto shall not apply to any area in the County of Isle of Wight to which the subdivision ordinance of the Town of Smithfield applies."

By its own express terms, it is clear that the county ordinance is inapplicable to the two-mile area outside of and adjacent to the town of Smithfield, and this is consistent with the above-mentioned opinion.

You have also requested my opinion with respect to the questions presented in the following portion of your letter:
"It has been suggested that, in view of § 15.1-474, supra, it may be
the responsibility of the County to administer and enforce the Town
ordinance in the above mentioned two-mile area, but there appears to
be some doubt about this in view of certain provisions of other sections
of Article 7 of Title 15.1 aforesaid and certain provisions of said ordi-
nances. I will, therefore, appreciate your opinion as to whether or not
(1) it is the responsibility of Isle of Wight County or the Town of
Smithfield to administer and enforce the Town ordinance in the afore-
said two-mile area and which of them, the County or Town, may, by
appropriate legal action, compel the land owner and subdivider to cor-
rect any past violations of said Town ordinance by him in said two-mile
area and restrain him from future violations of said Town ordinance
therein, or (2) the County and Town may jointly administer and en-
force the Town ordinance in said two-mile area and may, as co-plaintiffs
in the same legal action, seek to compel such corrections and restraints."

The enforcement provisions of § 15.1-474 of the Code are unambiguous and
comprehensive. This section reads as follows:

"The administration and enforcement of subdivision regulations inso-
far as they pertain to public improvements as authorized in § 15.1-466
shall be vested in the governing body of the political subdivision in
which the improvements are or are to be located.
"Except as provided above, the governing body which adopts sub-
division regulations as authorized in this article shall be responsible for
administering and enforcing the provisions of such subdivision regula-
tions, through its planning commission or otherwise." (Italics supplied.)

Thus, restricting the question of enforcement to the two-mile area outside the
municipality, the governing body of the county would enforce the subdivision
regulation when it pertained to public improvements authorized in § 15.1-466
and the governing body of the town would enforce any other regulation.

With regard to the possibility of joint administration and enforcement of the
town ordinance by the town and the county, I call your attention to § 15.1-21
of the Virginia Code which sets forth the procedure by which two political sub-
divisions, by mutual agreement, may jointly exercise a power of either.

ORDINANCES—Local Paralleling State Statute—Authorized only by express
legislative grant.

COUNTIES, CITIES AND TOWNS—Ordinances Paralleling State Statutes—
Authorized only by express legislative grant.

HONORABLE ROBERT E. GILLETTE
Commonwealth's Attorney of Nansemond County

May 21, 1968

This is in reply to your letter of May 7, 1968, which reads in part as follows:

"Since House Bill Number 365 (Chapter 460, Acts of Assembly of
1968), designated as Sections 18.1-254.1 through 18.1-254.12, was
enacted by the 1968 session of the General Assembly, effective imme-
diately, wherein paragraph 2 repealed Section 18.1-254, is a County Ordinance prohibiting disorderly conduct, enacted pursuant to Section 18.1-254, still valid by virtue of Section 15.1-510 or by any other authority?

"Also I would like to know whether or not a County can enact an ordinance prohibiting the cursing and abuse of a person, paralleling Section 18.1-255 of the 1950 Code of Virginia, pursuant to Sections 15.1-510 and 15.1-522 of the Code."

Since the repeal of § 18.1-254 of the Code also repealed the enabling legislation permitting local governing bodies to enact parallel ordinances, some doubt may exist as to the present validity of an ordinance enacted expressly under that authority. However, I direct your attention to § 15.1-137 of the Code, which confers upon cities and towns the general power to "preserve peace and good order therein." Since § 15.1-522 confers the general powers of cities and towns upon counties, it is my opinion that this is sufficient basis to sustain the validity of the present ordinance. As the question is not entirely free from doubt, however, you may wish to reenact the ordinance under consideration pursuant to the power conferred upon counties by the above-mentioned provisions of Virginia law.

In reply to your second question, this office has previously ruled that a county may enact ordinances paralleling statutes only where there is express legislative grant of authority to do so. I refer you to the enclosed opinion, Report of the Attorney General (1955-1956), p. 40, wherein this view was stated and it was also ruled that § 15.1-510 (formerly § 15-8) was not express authority to do so.

In light of the foregoing, I am unable to find any statute which confers upon local governing bodies the authority to pass ordinances paralleling § 18.1-255 of the Code. I am, therefore, of the opinion that the county could not validly enact such an ordinance.

ORDINANCES—Subdivision—May not require approval of deeds as condition precedent to recordation.

RECORDATION—Deeds—Lands in subdivision—Clerk must enter to record if presented.

SUBDIVISIONS—Deeds to Parcels—Recordation—Clerk must record if presented.

November 13, 1967

HONORABLE GRAYSON W. JACOBS, Chairman
Board of Supervisors of Pittsylvania County

This is to acknowledge receipt of your letter of October 26, 1967, in which you state that the County of Pittsylvania has adopted a subdivision ordinance wherein any owner or developer of any tract of land who subdivides the same is required to cause a plat of such subdivision to be recorded in the office of the clerk of the Circuit Court and that such plat shall not be recorded unless and until it shall be approved and certified by an agent or representative of the board of supervisors. You further state that the clerk has been recording deeds of these subdivisions where no plats of the subdivisions are on record. I quote from your letter:
"Our question is whether or not we can prevent the Clerk from recording any such deeds without a properly approved plat, or whether or not we can amend the subdivision ordinance to require the deeds as well as the plats to be approved?"

The questions raised will be answered seriatim.

Section 55-106, of the Code of Virginia (1950), provides in part:

"Except when it is otherwise provided, the circuit court of any county, ... or the clerk of any such court ... shall admit to record any such writing as to any person whose name is signed thereto, when it shall have been acknowledged by him...."

There is no statute which would relieve such a court or clerk from carrying out the duty prescribed in the above-quoted section when a deed, duly acknowledged, conveying a parcel of land in a subdivision, the plat of which has not been admitted to record, is presented to such clerk or court for recordation. It is true that § 15.1-473(c) of the Virginia Code makes it a misdemeanor for a person to sell or transfer land in a subdivision (located in a county which has adopted a subdivision ordinance) by reference to or exhibition of or by use of a plat of a subdivision, before such plat has been duly recorded. However, the concluding sentence of § 15.1-473(c) expressly provides that:

"... nothing herein contained shall be construed as preventing the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument." (Italics supplied.)

In light of the above-quoted language, I am of the opinion that the board of supervisors may not prohibit the recordation of deeds under the circumstances you describe.

The subdivision ordinance, a copy of which you enclosed, was apparently adopted by the board of supervisors in accordance with the provisions of Article 7, Chapter 11, Title 15.1 of the Virginia Code. I have been unable to discover any provision of the above-mentioned statute which would authorize a board of supervisors to require that deeds conveying property in such subdivisions be approved as a condition of their validity. I am, therefore, of the opinion that your concluding inquiry should be answered in the negative; however, I call your attention to those provisions of § 15.1-473(c) and (d) of the Virginia Code which prescribe:

"(c) No person shall sell or transfer any such land by reference to or exhibition of or by other use of a plat of a subdivision, before such plat has been duly recorded as provided herein, unless such subdivision was lawfully created prior to the adoption of a subdivision ordinance applicable thereto. ...."

"(d) Any person violating the foregoing provisions of this section shall be subject to a fine of not more than one hundred dollars for each lot or parcel of land so subdivided or transferred or sold; and the description of such lot or parcel by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from such penalties or from the remedies herein provided."
ORDINANCES—Subdivision—No duty on clerk, in recording parcels, to insure compliance.

CLERKS—Duties—May not refuse to record deeds conveying parcels of real estate in subdivision.

RECORDATION—Deeds to Parcels of Subdivision—No duty on clerk to insure compliance with ordinance.

April 25, 1968

HONORABLE BERTHA G. ABBOTT, Clerk
Circuit Court of Lancaster County

This is in reply to your letter of April 22, 1968, in which you presented two questions relative to your duty and authority under the Subdivision Control Ordinance for Lancaster County, a copy of which you furnished me.

The ordinance purports to establish certain subdivision standards and procedures in Lancaster County. You make reference to Section 2-18 of the ordinance which defines the word "subdivide" as the division of a parcel of land into seven or more lots within any five-year period for the purpose of sale or of commercial land development, with certain exceptions. In this connection, you inquire whether or not you, as Clerk of the Circuit Court, are required "to keep track of the number of deeds recorded conveying portions of a single tract of land, to determine whether or not the tract and its subdivider come within the ordinance."

Under Section 3-1 of the ordinance, the agent appointed by the governing body is designated to administer the ordinance and approval or disapproval by the agent shall constitute approval or disapproval by the governing body. Section 3-4 authorizes such agent to establish administrative procedures necessary for the proper administration of the ordinance. I find nothing which places any duty on you as Clerk, except to record the plat of a subdivision under the conditions stated in the ordinance. Accordingly, I shall answer your first inquiry in the negative.

Secondly, you inquire "whether or not the Clerk would have the authority to reject or refuse to record a deed which was the seventh or subsequent deed conveying parcels from the same tract within five years if the ordinance had not been complied with." Section 4-1 of the ordinance requires an owner or developer of any tract of land who subdivides the same to cause a plat of such subdivision to be made and recorded in the office of the Clerk of the Circuit Court of Lancaster County. This section further states: "No such plat or subdivision shall be recorded unless and until it shall have been submitted, approved and certified by the agent, in accordance with the regulations set forth in this ordinance."

Since no such plat of subdivision shall be recorded until it is approved and certified by the agent, the ordinance places a duty upon the Clerk of the Circuit Court to see that any such plat offered for recordation has been approved and certified by the agent in accordance with the regulations set forth in the ordinance. I find nothing in the ordinance, however, which would authorize the clerk to reject or refuse to record a deed under the conditions you describe and, therefore, your second question is answered in the negative.
ORDINANCES—Town—May not parallel State law without express authority from legislature.

ORDINANCES—Pool Rooms—Frequenting by minors under age of 18—Punishment for misdemeanors determined by special statute if complete; if not, by general misdemeanor statute, § 18.1-9.

November 3, 1967

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

This is in reply to your letter of October 18, 1967, in which you state that the Town of Kilmarnock has a town ordinance that prohibits minors under the age of 16 years from playing in or loitering in any public pool room within the town, and request that I advise you on the following:

"1. Whether the ordinance of the Town of Kilmarnock fixing the age at 16 years is valid.

"2. Whether the punishment provided in § 18.1-349 providing for a fine of not less than $5.00, or by imprisonment in jail for not more than six months is sufficiently definite to be valid or would the fine provided in the statute covering general punishments for misdemeanors be applicable here, that is, up to $500.00?"

Pertinent to the questions raised, § 18.1-349 of the Code of Virginia, to which you refer, makes it a misdemeanor for any minor under 18 years of age to frequent, play in or loiter in any public pool room or billiard room. The last paragraph of this statute contains certain exceptions which, according to the given facts, do not apply to the location under consideration.

This office has consistently ruled over a period of years that local governing bodies are not empowered to enact ordinances paralleling general criminal laws of the State, unless the Legislature has expressly so authorized, and that the usual grant of authority contained in the "general welfare" clause of a town charter does not constitute the required express authorization for such ordinances. See, Report of the Attorney General (1955-1956), p. 40 and references there cited. I find no provision in the charter for the Town of Kilmarnock which would authorize an ordinance paralleling § 18.1-349 of the Code of Virginia or of the nature described. Further, this office has held that the general grant of power to municipal corporations, formerly contained in § 15-77.3, now found in §15.1-839, is not a grant of power to a municipality unless incorporated in its charter. See, Report of the Attorney General (1962-1963), p. 34.

In consideration of the foregoing, in respect to your first question, I am of the opinion that § 18.1-349 applies and the ordinance in question is not valid.

The statute covering general punishments for misdemeanors, namely, § 18.1-9 of the Code of Virginia, controls in any misdemeanor for which no punishment or no maximum punishment is prescribed by statute. This section limits the punishment for any such misdemeanor to a fine not exceeding five hundred dollars 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.

Section 18.1-349 prescribes that a violation of its provisions shall constitute a misdemeanor and shall be punished by a fine of not less than five dollars or by imprisonment in jail not more than six months or by both such fine and imprisonment. Insofar as this statute prescribes the maximum punishment for a violation thereof, I am of the opinion that it is controlling. Thus, the maximum of six
months as to jail sentence would obtain. Since no maximum fine is stated in § 18.1-349, however, I am of the opinion that § 18.1-9 controls on this point so as to limit the maximum fine for such violation to five hundred dollars. As in the case of any criminal statute, these sections must be strictly construed.

PINE TREE SEED LAW—Reserving Eight Seed Trees—Effective date of amendment.  

May 3, 1968  

HONORABLE GEORGE W. DEAN  
State Forester  
Division of Forestry  

This is in reply to your letter of April 22, 1968, which reads in part as follows:

"The 1968 General Assembly amended Title 10, Article 6 beginning with Section 10-74.1 concerning the so-called Seed Tree Law by requiring that eight pine seed trees of the several pine species be left at the time of cutting instead of the four pine seed trees as required in Section 10-76 previous to the 1968 Amendment.  

"The question now arises as to whether an operator who purchased timber previous to June 28, 1968 must leave eight seed trees even though the timber he may have purchased in December 1967 was purchased on the basis of leaving four seed trees."

It is my opinion that timber cut after the effective date of the amendment to § 10-76 of the Code, June 28, 1968, must conform to the requirement that eight seed trees be left standing per acre cut. While you will note that § 10-74.2 exempts timber cutting rights acquired prior to June 30, 1956, from the requirements of § 10-76, I am unable to find any similar provision of the Code which exempts timber cutting rights acquired subsequent to June 30, 1956.

POLICE—Special—Fees and mileage allowances—Paid into treasury of county.  

December 14, 1967  

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

This is in reply to your letter of November 22, 1967, which reads as follows:

"As you know, VEPCO is building a large nuclear plant in this county. They have a security problem on the project, and have hired a number of security officers. They are interested in having one of their security officers appointed a special policeman, so that he may effect arrest, not only on the site but in the vicinity of the project.  

"It would appear to me that such an appointment could be made under Title 15.1-144, 145, 146, 147, and 148. Under the arrangement, the company would bear the entire cost. Since the county would be
bearing no part of the expense, should the fees and mileage, as provided in 148, be paid to the county? In other words, where the entire cost of the salary and mileage of the special policeman is paid by the private company, and under 147 he is not deemed an employee of the State or county, does the county still get the fees and mileage in criminal cases?"

The answer is in the affirmative. Irrespective of the fact that the entire cost of the policeman's salary or wages is to be paid by VEPCO, in my opinion the provisions of § 15.1-148 require that fees and mileage allowances are to be collected by the clerks and paid into the treasury of the county.

PRISONERS—Escape While Confined in State Penitentiary—Tried in the Circuit Court of the City of Richmond.

COURTS—Circuit Court of City of Richmond—Jurisdiction to try escapees from State Penitentiary.

HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

June 17, 1968

This is in response to your letter of June 7, 1968, which reads in part as follows:

"Every so often a prisoner, who is duly released from the Virginia Penal System on the order of a judge of a court of record to return to the locality for trial involving another charge against him, or as a witness, or sometimes in a habeas corpus proceeding, escapes from the custody of the locality holding him.

"When this man is recaptured, is his prosecution for escape the responsibility of the State, under Section 53-295 of the Code of Virginia, with jurisdiction in the Circuit Court of the City of Richmond, or is the responsibility that of the locality holding the prisoner, with the trial to be held in the court wherein the escape occurred? Your opinion clarifying this question will be greatly appreciated."

The applicable provision of law, § 53-295 of the Code of Virginia, reads in part as follows:

"All criminal proceedings against convicts in the penitentiary shall be in the Circuit Court of the City of Richmond; but when convicts are employed upon any work of public or private improvement in any county in the State the criminal proceedings against them may be in the circuit court of the county in which the convict is so employed or in the Circuit Court of the city of Richmond; provided that as to convicts held in the State penal institutions in the counties of Goochland and Powhatan, criminal proceedings against them may be held in the circuit court of the respective county or in the Circuit Court of the city of Richmond. . . ."

In cases where a convict, who has been sentenced to the penitentiary, is released from that institution for the purpose of testifying as a witness or as a
petitioner in a *habeas corpus* proceeding, it is clear that his trial for escape shall be in the Circuit Court of the City of Richmond.

In *Rufin v. Commonwealth*, 62 Va. 790, the Supreme Court of Appeals held that a prisoner remains "in the penitentiary" even though he may not be actually confined therein. The Court relied upon the provisions of the 3rd section of Chapter 158 of the Code of 1860, which statute is similar to the provisions of § 53-295 of the Code of Virginia.

In view of the foregoing, I am of opinion that prisoners who escape under the circumstances set forth in your letter should be tried in the Circuit Court of the City of Richmond.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Accountants—Members of Virginia partnership practicing in Virginia required to obtain C.P.A. certificates.

February 19, 1968

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

This is in reply to your letter of February 9, 1968, from which I quote the following:

"Haskins and Sells is a large accounting firm and has offices in nearly every one of the fifty states of the United States. They are to open an office in this State and practice as certified public accountants as a partnership.

"You will note in reviewing § 54-91 of the Code that this section permits partnership practice and permits a partnership to use a firm name only if all the members who are partners thereof are holders of CPA certificates granted under the laws of this State.

"It appears from the correspondence we have received from George C. Freeman, Jr., Attorney, with Hunton, Williams, Gay, Powell & Gibson, that Haskins and Sells is made up of several partnerships which he explains in the enclosed letter.

"The Board of Accountancy requests that you advise in your opinion if all the partners who constitute the firm of Haskins and Sells are required to obtain a CPA certificate issued by our Board or if only those partners who make up the Virginia partnership are required to obtain a CPA certificate issued by the Virginia Board before they can practice as a firm in this State."

Section 54-91 of the Code of Virginia, to which you refer, states, in pertinent part, 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. . . ."

From the information furnished this office, it appears that the accounting firm of Haskins and Sells operates as a confederation of partnerships, to the effect that only the partnership located in a given state performs any work for its
clients. It is further indicated that separate books are maintained for each partnership, showing its individual results of operations, i.e., fees collected, salaries, expenses, etc., and appropriate charges are made to other firms of accountants, including other firms of Haskins and Sells, for any services rendered to them. Individual state partnership tax returns are filed, although a consolidated federal income tax return is filed. Cooperation and coordination of the several partnerships are obtained through the “executive office” of the New York partnership which disseminates various professional and ethical advice to each of the partnerships comprising the confederation.

In considering the factual situation, it is impressive that only the partnership of Haskins and Sells located in Virginia would perform any work for the clients of such Virginia partnership. The purposes of § 54-91 would be served by treating the Virginia partnership as a separate entity, to the effect that it would occupy a position similar to any other partnership practicing accountancy in this State as certified public accountants. I believe the statute is permissive of such interpretation and this is a more reasonable construction than one which would require all members of the affiliated partnerships in other states to meet the requirements of this State, even though such affiliates perform no work in this State. Accordingly, on the basis of the information submitted relative to Haskins and Sells, it is my opinion that only the members of the Virginia partnership are required to obtain certified public accountants' certificates granted under the laws of this State.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Opticians—Person illegally practicing.

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

February 5, 1968

I am in receipt of your letter of January 17, 1968, in which you call my attention to § 54-398.2 (d) of the Virginia Code, which defines an optician in the following language:

“'Optician' means any person, not exempted by § 54-398.1, who prepares or dispenses eyeglasses, spectacles, lenses, or appurtenances thereto, for the intended wearers or users thereof, on prescriptions from licensed physicians or registered optometrists, or as duplications or reproductions of previously prepared eyeglasses, spectacles, lenses, or appurtenances thereto; or who interprets such prescriptions or such duplications or reproductions, and, in accordance therewith, measures, adapts, fits, and adjusts such eyeglasses, spectacles, lenses, or appurtenances, to the human face.”

In light of the above-quoted definition, you present the following situation and inquiry:

“In your opinion, would a person who is not a holder of a certificate as a registered optician and who does not come within the purview of § 54-398.1 of the Code be in violation of the provisions of Chapter 14.1 of Title 54 if such person repaired a pair of prescription eyeglasses by
replacing a lens, adjusting the frames and then fitting the eyeglasses to a human face.”

In addition to the facts stated in your letter, you also inform me that the activity concerning which you inquire entails use of a millimeter scale in accomplishing the measuring, adjusting and fitting in question. Such activity does not include the manufacture or reproduction of a lens but does include the replacing of an already existing lens in a frame.

I am advised that in order to measure, adapt, fit and adjust eyeglasses to the human face, it is necessary to determine the nature and the original prescription of the particular lens or lenses in the eyeglasses being adapted, fitted and adjusted. This is done by examining the lens, in the absence of the original written prescription. In my opinion, the determination of the nature of a particular lens constitutes an interpretation of “such prescriptions or such duplications or reproductions,” as those terms are used in § 54-398.2 of the Code. I further understand that it is in accordance with this interpretation that the measuring, adapting, fitting and adjusting is performed. For these reasons, my answer to your question is in the affirmative.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Practice of Land Surveying—Principal stockholder of corporation not exempt under § 54-37(8).

November 30, 1967

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

I am writing in further connection with your letter of November 9, 1967, and our subsequent discussions concerning the following situation and inquiry set forth in your communication:

"Mr. A is president of the XYZ Corporation, which owns a tract of land consisting of 800 acres located in the Blue Ridge Mountains of Virginia, which land the corporation is selling to the public in lots which vary in size from one acre to two acres, in order that the public may build summer cottages thereon. Mr. A, being the principal stockholder of the corporation, is surveying the lots being sold to the public and preparing plats and descriptions of the lots so surveyed for the purpose of transferring title to the real property sold by the corporation to the purchasers. The plats prepared by Mr. A are being recorded in the Clerk's Office of the political subdivision in which the property is located.

"In your opinion, is it mandatory for the owner of land in accordance with the provisions of Chapter 3 of Title 54 to employ a certified land surveyor for the purpose of subdividing the land so owned if the owner is to convey the land so surveyed to another person for consideration.

"In other words, can the owner of a large tract of land subdivide it into smaller parcels, survey it, prepare the plats and descriptions himself and convey those parcels of land to another and have those plats
and descriptions recorded in the Clerk's Office without the individual being a holder of a certificate as a certified land surveyor issued by the Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors."

Pertinent to the resolution of your inquiry is § 54-27 of the Virginia Code which provides:

"In order to safeguard life, health and property, any person practicing or offering to practice as an architect, a professional engineer or land surveyor in this State shall hereafter be required to submit reasonable evidence to the Board that he or she is qualified so to practice, and to be certified as herein provided. It shall be unlawful for any person to practice or to offer to practice the profession of engineering, architecture or land surveying, in this State, or to use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is a professional engineer, architect or land surveyor, unless such person has been duly registered or is exempted under the provisions of this chapter." (Italics supplied.)

The term "land surveying" as utilized in § 54-27 is defined in § 54-17(3)(a) of the Virginia Code in the following language:

"'Land surveying' includes surveying of areas for their correction, determination and description, and for the conveyancing, or for the establishment and restablishment of internal and external land boundaries, and the plotting of land and subdivisions thereof. The plotting of land and subdivisions thereof may include the laying out and plotting of roads, streets and sidewalks, topography and contours setting forth road grades and determining drainage on the surface." (Italics supplied.)

In light of the above-quoted provisions of Virginia law, it is manifest that the individual concerning whom you inquire is engaged in land surveying as defined in § 54-17(3)(a) and would clearly be "practicing . . . as [a] . . . land surveyor" or "practicing . . . land surveying" within the meaning of § 54-27 if he had no connection with the corporation in question. Thus, the critical inquiry involved in the question you present is whether or not the fact that the individual under consideration is the principal stockholder of the corporation which owns the land being surveyed is sufficient to remove him from the scope of § 54-27 and the requirement of certification therein prescribed.

In this connection, it should be initially be noted that there is no language in § 54-27 which purports to exclude from the statute an individual engaged in surveying real property which he owns or which is owned by a corporation of which he is the principal stockholder. Moreover, the situation under consideration does not fall within the ambit of any of the numerous exemptions specified in § 54-37 of the Virginia Code. Significant in this respect is § 54-37(8) which expressly exempts the practice of architecture and professional engineering "by an individual, firm or corporation on property owned or leased by such individual, firm or corporation" unless the same involves the public health or safety; however, this exemption does not include the practice of land surveying within the scope of its provisions.

In light of the foregoing, I am constrained to believe that activities conducted under the circumstances you describe would constitute the practice of land survey-
ing within the language of § 54-27 and that the individual in question would not fall within the terms of any of the exemptions from the requirement of certification specified in § 54-37.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Broker’s license—Regulation requiring apprenticeship within authority of Commission.

April 18, 1968

HONORABLE ADELARD L. BRAULT
Member, Senate of Virginia

I am in receipt of your letter of April 8, 1968, in which you present the following situation and inquiry:

“Section 54-750 of the Code, which covers qualifications for license to transact business of a real estate broker provides, among other things, that a license shall not be issued to a person who has not been actively engaged and licensed as a real estate salesman for a period of at least one year. You will find the exact language in subsection 5 of the statute in question. § 54-751 gives the Virginia real Estate Commission the power to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be ‘deemed necessary to administer and enforce the provisions of this chapter’ (Chapter 18 of Title 54).

“Under this general power, the Real Estate Commission has defined ‘actively engaged for a period of not less than one year’ to mean that a real estate applicant for broker or license must devote not less than 60% of his gainfully employed time as a licensed real estate salesman for a period of twelve months and that such experience shall be gained within a fourteen month period immediately prior to the applicant applying for a real estate broker license. . . .

“I would appreciate your opinion as to whether the Real Estate Commission’s interpretation of the statute in question and its regulation carrying out the provisions of the statute are reasonable and proper.”

In addition to the authority conferred upon the Virginia Real Estate Commission by § 54-751 of the Virginia Code to make and enforce reasonable rules and regulations “connected with the application for any license” to be issued by it, the general rule-making power of the Commission is contained in § 54-740 of the Virginia Code, which authorizes the Commission to do all things necessary and convenient for carrying into effect the provisions of Title 54, Chapter 18, and to promulgate necessary rules and regulations.

On March 4, 1957, this office ruled that the Virginia Real Estate Commission was not authorized to promulgate a rule or regulation requiring each applicant for a real estate broker’s license to have served an apprenticeship of one year as a real estate salesman before being granted a license as a real estate broker by the Commission. See, Report of the Attorney General (1956-1957), p. 214. Subsequently, at its regular session of 1960, the General Assembly amended the concluding paragraph of § 54-750 (5), to which you refer, by adding thereto the language italicized below:
"Nor shall any license as a real estate broker be issued hereunder to any person who has not attained the age of twenty-one years and who has not been licensed as a real estate salesman for a period of at least one year, or who has acquired equivalent experience in the opinion of the Commission."

See, Acts of Assembly (1960), Chapter 254, p. 323. Thereafter, in 1966, this provision of Virginia law was again amended to its present form by Chapter 634 of the Acts of Assembly of 1966, and now prescribes:

"Nor shall any license as a real estate broker be issued hereunder to any person who has not attained the age of twenty-one years and who has not been actively engaged and licensed as a real estate salesman for a period of at least one year." (Italics supplied.)

I believe it manifest from the above canvassed legislative history that it is the design of the statute in question to require a period of active apprenticeship in the capacity of a real estate salesman as a prerequisite for one's licensure as a real estate broker. The effect of the Commission's regulation to which you refer is to insure that this period of apprenticeship as a real estate salesman be reasonably current and not distantly removed in time from the issuance of a license for one to act as a real estate broker. As such, I am constrained to believe that the regulation under consideration is consistent with the design of the statute it undertakes to implement and constitutes a reasonable exercise of the rule-making power conferred upon the Commission by Virginia law.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Construction of rule prohibiting licensee from making offer to repurchase.

REAL ESTATE—Virginia Real Estate Commission—Rule prohibits licensee from making offer to repurchase.

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

April 4, 1968

This is in reply to your letter of March 11, 1968. You enclosed a copy of subsection 16 of section II of the Rules and Regulations of the Virginia Real Estate Commission, which reads as follows:

"(16) Offer or Promise to Repurchase.—A licensee shall not, as an inducement to a purchase of real estate, promise or offer, conditionally or unconditionally, to a prospective purchaser, that, if such prospective purchaser purchases such real estate, the licensee, or any other person, firm, or corporation, will repurchase such real estate, or the purchaser's equity or other property rights therein."

You then ask:

"In your opinion, does this particular rule prohibit a licensee of the Commission from making an offer on the behalf of the owner when such licensee negotiates the sales contract between the seller and the purchaser and, at the same time, negotiates the repurchase option."
In my opinion, the answer is in the affirmative. The rule prohibits the licensee from making an offer or promise to repurchase. In my opinion, the licensee is prohibited from making such an offer or promise, both when he acts in his own behalf and when he acts on behalf of an owner.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Construction of rule prohibiting licensees from extending inducements.

REAL ESTATE—Virginia Real Estate Commission—Rule prohibiting licensees from extending inducements construed.

HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration
April 2, 1968

This is in reply to your letter of recent date, which I quote as follows:

"The Virginia Real Estate Commission requests your opinion in the following matter. Subsection (7) of Section II, of the Commission's Rules and Regulations, found on page 16 of the enclosed copy of such Rules and Regulations, sets forth as follows:

"'(7) Inducements.—A licensee shall not pay, or offer to pay, any valuable consideration or rebate to any prospective purchaser or seller of real property, prior to obtaining an offer or listing, as an inducement to purchase or to obtain a listing, contingent upon the purchase or sale of such property.'

'It has recently been called to the attention of the Real Estate Commission that a licensed broker in the Northern part of the State has been advertising free temporary housing for military families when they come into the area to look for a home to purchase. The service rendered by the broker is simply this: they will place the military family in a guest house without charge for a period of five days to one week. The prospective client is not required to purchase a home through this real estate broker but, as I understand it, it is merely a service offered to military families while they are in that area seeking living accommodations.

"In order that you may more clearly understand the services rendered, I am enclosing copies of correspondence received from one of the real estate brokers in northern Virginia which includes copies of advertising material which has been sent out by the broker in question.

"It would be appreciated if you would advise the Real Estate Commission if the foregoing is a violation of subsection (7) of Section II of the Commission's Rules and Regulations."

One of the essentials of a violation under subsection (7) of Section II of the Commission's Rules and Regulations is that the valuable consideration offered or paid by the licensee be contingent upon the purchase or sale of such property. From the information given in your letter and the enclosed papers, the valuable consideration offered does not appear contingent on the purchase or sale. You state that this "is merely a service offered to military families while they are in that area seeking living accommodations." Both the advertisement and the ac-
ceptance form indicate that the free lodging, as well as the other named services, are offered without obligation.

On the basis of the information furnished, I am of the opinion that such offer without obligation does not constitute a violation of subsection (7) of Section II of the Commission’s Rules and Regulations.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Financial statements filed by licensees become public records.

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

August 31, 1967

This is in reply to your letter of August 18, 1967, which I quote, in part, as follows:

"The Virginia Real Estate Commission requests your opinion in the following matter.
"Section 54-750 of the Code as amended sets forth as follows:
"... (7) No broker applicant shall be issued “an original” license until such applicant has first proven financial responsibility to the satisfaction of the Commission, or in lieu thereof filed a bond in the amount of $10,000 as required by § 54-767.’
"Section 54-758 of the Code as amended sets forth as follows:
"... Provided that no renewal license as a real estate broker shall be issued by the Commission until the applicant therefor certifies to the Commission in such form as the Commission may prescribe, that his State revenue license as a real estate broker for the previous year has been paid, and has proven financial responsibility to the satisfaction of the Commission or in lieu thereof filed a bond in the amount of ten thousand dollars as required by § 54-767...
"In view of the foregoing, the Real Estate Commission requires real estate brokers to post either a $10,000 bond or file a financial statement showing a net worth of not less than $5,000 prior to the issuance of an original license, and also prior to the issuance of a new license at the beginning of each license period.
"Will you please advise the Commission if, in your opinion, the financial statements filed by licensees of the Commission are public records and may be reviewed by the public, or whether such financial statements are confidential and should be reviewed by only the members of the Real Estate Commission and its staff."

Sections 54-750 and 54-758, which contain the above-quoted passages, are found in Chapter 18, Title 54 of the Code of Virginia. Therein, § 54-740 authorizes the Virginia Real Estate Commission to “do all things necessary and convenient for carrying into effect the provisions of this chapter,” including the right to “promulgate necessary rules and regulations.” In order to carry out the requirements of this chapter, I believe the keeping of certain records, including those necessary to prove “financial responsibility to the satisfaction of the Commission,” is a necessary corollary.

In the same chapter, § 54-746 states: “All records kept in the office of the Commission under authority of this chapter shall be open to public inspection
under such rules and regulations as shall be prescribed by the Commission.” I am of the opinion, therefore, that the financial statements filed by licensees of the Commission are public records and may be inspected by the public under such rules and regulations as shall be prescribed by the Commission.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—May not revoke a license for failure to maintain bond filed under § 54-758.

April 2, 1968

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

This is in reply to your letter of March 1, 1968, from which I quote the following:

“...In your opinion, does the Virginia Real Estate Commission have the authority to suspend or revoke a license issued in accordance with the provisions of Chapter 18 of Title 54 when a licensee files a $10,000 bond for the purpose of obtaining a broker license in accordance with the provisions of § 54-758 and does not keep the bond in force during the period covered in the license issued as the result of the licensee filing the bond.

“In other words, the licensee files the bond for the purpose of securing a new license for a 2-year period, fails to pay the bond premium, the bonding company, in accordance with the provisions of the bond, cancels the bond prior to the expiration date of the license, the licensee fails to replace the bond with a current bond and takes no action whatsoever to prove financial responsibility to the satisfaction of the Virginia Real Estate Commission.”

Section 54-758 of the Code provides that no renewal license as a real estate broker shall be issued by the Commission until such applicant has proven financial responsibility “or in lieu thereof filed a bond in the amount of ten thousand dollars as required by § 54-767.” Section 54-767 states that the “governing body of any county, city or town may require any person who acts as a real estate salesman to post a bond, etc.” The statute contains a similar clause applicable to persons applying for broker’s license. The language used in this statute indicates that such requirement is discretionary with any county, city or town.

The authority of the Virginia Real Estate Commission to suspend or revoke a license issued pursuant to Chapter 18 of Title 54 of the Code, insofar as this relates to posting any bond and keeping it in force, is found in the following portion of § 54-762 of the Code:

“The Commission . . . shall have the power to suspend or to revoke any license issued under the provisions of this chapter . . . when the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

“(11) Failure to post a bond with the Commission and to keep same in force, when required by the governing body of any county or city; . . .”
In my interpretation, paragraph (11), supra, refers to the filing and keeping in force a bond when same is required by any county or city. I find no authority for such revocation or suspension of license because of failure to maintain a bond when only the filing of a bond is required by § 54-758 of the Code. If the filing in the instant situation is required by § 54-758 but there is no requirement for filing by any county or city pursuant to § 54-767, my answer to your question is in the negative. This is true because the statute, as quoted, makes the authority of the Commission to suspend or revoke contingent upon the requirement of the governing body of any county or city. If it be found that the licensee has by false or fraudulent representation obtained a license, of course, the Commission has the power under § 54-762 to suspend or revoke such license.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Virginia Real Estate Commission—Extent of authority to adopt rules and regulations.

VIRGINIA REAL ESTATE COMMISSION—Rules and Regulations—Extent of authority to adopt.

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

January 31, 1968

This is in reply to your letter of January 18, 1968, in which you quote the last paragraph of § 54-751 of the Code of Virginia, set forth several proposed rules numbered 1 through 7, and ask whether, in my opinion, the provisions of such section authorize the Virginia Real Estate Commission to adopt the proposed rules, which I quote as follows:

"On or after July 1, 1968, no real estate salesman license shall be issued to any person whose employer does not meet the following requirements:

"1. Maintains a place of business as required in § 54-733 of the Code, and which is defined in subsection 10 of Section 1 of these Rules and Regulations;

"2. The employer shall devote at least 60 per cent of his gainfully employed time to the regular transaction of the real estate brokerage business;

"3. The employer shall provide adequate office facilities for each salesman, but no less than 50 square feet per salesman;

"4. The employer shall equip such place of business with adequate communication devices by which he or his employees may receive business calls and direct business calls to be made;

"5. The employer shall properly identify such place of business as required in these Rules and Regulations and the public shall have access to such place of business during reasonable office hours;

"6. No place of business shall be in a residence unless such place of business is separate and distinct from that of the living quarters of such residence and a use permit has been issued by the proper authorities of the political subdivision in which such residence is located;

"7. No salesman license shall be issued until a member of the Real Estate Commission or an authorized representative of the Commission..."
has inspected such place of business of the employer and found such place to meet the foregoing standards."

The paragraph which you quote authorizes the Commission to require such other proof as shall be deemed desirable as to honesty, truthfulness, integrity and competency of the applicant. In addition, it vests the Commission with power and authority to make and enforce all reasonable rules and regulations necessary to administer and enforce the provisions of Chapter 18 of Title 54, §§ 54-730 to 54-775, inclusive.

In my opinion, some of the proposed requirements are unsupported by the provisions of this chapter. Specifically, I do not find statutory support for items numbered 2, 3 and 6, there appearing no requirements in the statutes as to the percentage of time a broker shall devote to his brokerage business nor as to minimum standards for place of business or space for salesmen. Generally, it would be necessary that such specifics be authorized by statute.

The other proposed requirements, namely, 1, 4 and 5, appear reasonably supported by statute or by related rules previously adopted and in effect, and number 7 appears proper as applied to these.

PUBLIC OFFICERS—Compatibility—Chairman of political party not a public officer.

PUBLIC OFFICERS—Compatibility—Member of local school board may not be employed in "poverty program."

SCHOOLS—School Boards—Member may not be employed in "poverty program."

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

This will reply to your letter of July 24, 1967, in which you inquire whether or not the chairman of a political party or a member of a local school board may also be employed in some aspect of the so-called "poverty program" conducted by the Government of the United States.

With respect to your initial inquiry, I am not aware of any provision of Virginia law which would prohibit the chairman of a political party from being employed in a program conducted by the Federal government. Such individuals are not generally deemed to be officers within the scope of constitutional or statutory provisions relating to public officials, 67 C.J.S. 205. Officers: § 48; nor do they fall within the ambit of § 2.1-30 of the Code of Virginia (1950), as amended.

I am further of the opinion, however, that a member of a local school board may not be employed in the operation of the so-called poverty program. In this connection, I am forwarding to you a copy of an opinion of this office, dated March 31, 1966, in which a similar view was expressed with respect to a member of a local electoral board, and copies of two additional opinions of this office, dated March 28, 1951 and May 1, 1961, which make it clear that a member of a school board is a constitutional officer within the prohibitions of § 2-27 (now 2.1-30) of the Virginia Code. See, Reports of the Attorney General (1965-1966), p. 114; (1950-1951), p. 258; (1960-1961), p. 253.
On this subject, generally, I call your attention to § 2.1-30 of the Virginia Code which, *inter alia*, forbids anyone "who is in the employment of" the government of the United States or who receives from such government "in any way any emolument whatever" from holding an *office* under the Constitution of Virginia. Further, in this connection, you will find the exceptions to the general prohibition enunciated in the above-mentioned provision set out at length in § 2.1-33 of the Virginia Code.

PUBLIC OFFICERS—Compatibility—County officials may be agents for sale of motor vehicle license plates.

MOTOR VEHICLES—Agent for Sale of License Plates—County officials may act.

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

February 9, 1968

This is in reply to your letter of February 1, 1968, in which you request my opinion on the following question:

"Would it be legal for a county official or a deputy of a county official to take the agency for the sale of state automobile tags?"

I find no statute which prohibits a county official or a deputy of same from accepting the agency for the sale of State motor vehicle license plates and, therefore, I shall answer your question in the affirmative. In any such instance, the contract is between the Commissioner of the Division of Motor Vehicles and the person accepting such agency. Hence, it is not within the prohibition found in § 15.1-67 of the Code and related sections against any paid officer of the county contracting with the county. Further, I am of the opinion that such agency does not qualify as "any other office" within the purview of § 15.1-50 of the Code, which provides that no person holding one of the named offices shall hold any other office.

Consistent with this view is an opinion found in the Report of the Attorney General (1935-1936), p. 121, which held such agency of the Division of Motor Vehicles for the sale of automobile license tags did not disqualify a person for appointment as a member of the school board.

PUBLIC OFFICERS—Compatibility—Deputy clerk may not serve on town council.

CLERKS—Deputy—May not serve on town council.

HONORABLE JOSEPH P. JOHNSON, JR.
Member, House of Delegates

May 14, 1968

This is in reply to your letter of May 11, 1968, in which you inquire whether a deputy clerk of a circuit court may serve on a local town council and continue to hold his position as deputy clerk.
It is my opinion that your question should be answered in the negative. In this regard I am enclosing a previous opinion of this office in which it was ruled that a deputy treasurer of a county could not serve as mayor of a town. See, Report of the Attorney General (1959-1960), p. 272. This opinion took the position that § 15-486 of the Code (now § 15.1-50) prohibits certain officers and their deputies from holding more than one office.

As a county clerk is one of the officials enumerated therein, it is my opinion that § 15.1-50 would thus prohibit a deputy clerk from serving on a town council.

PUBLIC OFFICERS—Compatibility—Deputy commissioner of the revenue may not be employed by school board as school bus driver.

COMMISSIONERS OF REVENUE—Deputy—May not be employed by school board as school bus driver.

SCHOOLS—School Bus Driver—May not be deputy commissioner of the revenue.

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

This is in reply to your letter of August 9, 1967, in which you inquire whether or not a deputy commissioner of the revenue may be employed by a school board as a school bus driver.

Pertinent in this connection, as you point out, is § 15.1-67 of the Virginia Code which, in part, provides:

“No . . . commissioner of the revenue . . . or any paid officer of the county shall become interested directly or indirectly in any contract made by or with any officer, agent, commission or person acting on behalf of . . . the county school board . . . or in any contract . . . paid in whole or in part by the county. . . .”

In light of the above-quoted language, I am of the opinion that your inquiry must be answered in the negative. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated August 10, 1949, in which it was ruled that a deputy clerk of a county was prohibited by the provisions of § 2707 (now § 15.1-67) of the Virginia Code from contracting with the board of supervisors to perform additional work involving the indexing of deeds. See, Report of the Attorney General (1949-1950), p. 29. The views expressed in the enclosed opinion would be equally applicable to the situation you present.
PUBLIC OFFICERS—Compatibility—Federal employees—May not hold any office under State or local governments.

JUSTICE OF PEACE—Federal Employee May Not Serve.

FEDERAL EMPLOYEES—Compatibility—May not hold any office under State or local governments. January 23, 1968

HONORABLE SIDNEY A. ALLEN
Justice of the Peace for Roanoke County

I am in receipt of your letter of January 17, 1968, in which you state that you were recently elected to the office of Justice of the Peace for Roanoke County and that you are an employee of the Veterans Administration, holding the position of supervisor in medical administration with that agency of the government of the United States. You request to be advised whether or not you are eligible to hold office as a Justice of the Peace for Roanoke County while occupying the above-mentioned position with the Veterans Administration.

Pertinent to the resolution of your inquiry is § 2.1-30 of the Virginia Code, which provides:

“No person shall be capable of holding any office of honor, profit or trust under the Constitution of Virginia, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, ipso facto, vacate any office, or post of profit, trust or emolument under the government of this Commonwealth or under any county, city, or town thereof.” (Italics supplied.)

In light of the language italicized above, I am of the opinion that your inquiry must be answered in the negative. In this connection, I am forwarding to you copies of two previous opinions of this office, dated December 15, 1939, and April 19, 1963, in which it was ruled that employees of the United States government were prohibited from serving as justices of the peace. See, Report of the Attorney General (1939-1940), p. 169; (1962-1963), p. 210. Sections 290 and 291— as well as §§ 2-27 and 2-29— of the Virginia Code, to which reference is made in these prior rulings, are now §§ 2.1-30 and 2.1-33 of the Code of Virginia (1950), as amended. Although § 2.1-33 of the Virginia Code sets forth certain exceptions to the prohibition contained in § 2.1-30, it does not appear from your communication that the situation you present would fall within the scope of any of the exceptions therein specified. I am of the opinion that you would not be eligible to hold office as a Justice of the Peace for Roanoke County under the circumstances you describe.
PUBLIC OFFICERS—Compatibility—Justice of peace may not contract with city.

JUSTICE OF PEACE—Compatibility—May not contract with city.

June 17, 1968

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

This is to acknowledge receipt of your letter of June 8, 1968, in which you state, in part:

"Would there be any conflict of interest if a Chesapeake City employee attended a PUBLIC AUCTION held by the City of Chesapeake, Virginia, to dispose of various items belonging to said City? The person concerned is also an elected Justice of the Peace of this State."

When a person bids on property at an auction sale and the same is knocked down to him by the auctioneer, a contractual relationship comes into being between the bidder and the owner of the property. This office has ruled that a justice of the peace is a municipal officer, and, therefore, is prohibited under the provisions of § 15.1-73 of the Code of Virginia from contracting with the city during the term for which he has been elected or appointed. In this connection, I refer you to an opinion of this office to the Honorable William M. Dunbar, dated November 4, 1965, found in the Report of the Attorney General (1965-1966), p. 240. A copy of this opinion is enclosed.

PUBLIC OFFICERS—Compatibility—Justice of peace may not serve as substitute clerk or as clerical assistant to clerk.

JUSTICE OF PEACE—May Not Serve as Substitute Clerk or as Clerical Assistant to Clerk.

February 20, 1968

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

This will reply to your letter of February 12, 1968, in which you inquire whether or not a justice of the peace may serve as "substitute clerk" of a county court in the absence of the clerk and whether or not a justice of the peace may be employed as a clerical assistant in the office of the clerk of a county court.

With respect to your initial inquiry, I am forwarding to you a copy of a previous opinion of this office, dated January 14, 1964, in which it was ruled that the office of justice of the peace and that of deputy clerk of a county court were not compatible. See, Report of the Attorney General (1963-1964), p. 242. I am of the opinion that the view expressed in the enclosed ruling would be equally applicable to your first question and that a justice of the peace may not act as a substitute clerk of a county court in the absence of the clerk.

While you do not describe the functions of a "clerical assistant" in your communication, I do not understand that such a position would constitute a public office or that your second inquiry presents a question of "incompatibility of offices" in the strict sense of the quoted term. However, if such clerical assistant...
performs any of the duties of the clerk as mentioned in the enclosed ruling, I am of the opinion that a justice of the peace would also be prohibited from occupying the position of a clerical assistant in the office of the clerk of a county court.
of said home. As noted above, § 15.1-67 of the Virginia Code prohibits a member of a board of supervisors from being interested, directly or indirectly, in any contract or the profits of any contract, fee, commission, premium or profit therefrom paid, in whole or in part, by the county. While this provision of Virginia law does not specifically prohibit the employment by a county of the wife of a member of its board of supervisors, it does present the question of whether or not, in a given case, a member of a board of supervisors will be directly or indirectly interested in a contract to which his wife is a party and under which payments will be made, in whole or in part, by the county in question. See, Report of the Attorney General (1959-1960), p. 20. Although I have been unable to discover any decision of the Supreme Court of Appeals of Virginia or of this office in which the precise question you present has been resolved, I am forwarding to you copies of two previous rulings, dated December 7, 1939, and February 6, 1943, in which substantially similar situations were considered. See, Report of the Attorney General (1939-1940), p. 161; (1942-1943), p. 235. Each of these opinions casts grave doubt upon the propriety of the employment of your wife as superintendent of the home in question, and I call your particular attention to the view expressed by Attorney General (later Justice) Abram P. Staples in the concluding paragraph of his opinion to Judge Shrader to the effect that § 2707 (now § 15.1-67) of the Virginia Code would very possibly be "strictly construed against an officer charged with dealing with his county."

PUBLIC OFFICERS—Compatibility—Member of board of supervisors prohibited from submitting bid for construction of water and sewer authority.

WATER AND SEWAGE SYSTEMS—County System—Member of board of supervisors may not become financially interested in contract.

BOARDS OF SUPERVISORS—Water and Sewer Authority—Member may not be interested, directly or indirectly, in contract.

HONORABLE JOHN R. THOMPSON
Commonwealth's Attorney for Wythe County

May 8, 1968

I am in receipt of your letter of April 29, 1968, in which you present the following situation and inquiry:

"Facts: The Wythe County Board of Supervisors appoints the officers of the Wythe-Bland Water and Sewer authority. The said authority is now advertising for contracts on a competitive bid basis for proposed work projected for the summer months. Elmo Davis, Chairman of the Wythe County Board of Supervisors, is a general partner of Davis & Armentrout, Contractors who specialize in this type of work throughout the various areas of Virginia. Davis & Armentrout is one of the few general contractors of this area capable of doing the said work.

"Query: Is Mr. Davis, by virtue of his position of trust as chairman of the Board of Supervisors, prohibited from submitting a competitive bid in view of 15.1-67 and other related statutes?"

I am of the opinion that neither Mr. Davis nor the partnership of which he is a member may contract with the Wythe-Bland Water and Sewer Authority under
the circumstances you describe. You will note that § 15.1-67 of the Virginia Code prohibits any supervisor from becoming interested, directly or indirectly, ". . . in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency there- of . . . ," and I am constrained to believe that a water and sewer authority created by action of a board or boards of supervisors pursuant to §§ 15.1-1239, et seq., of the Virginia Code would come within the scope of the above-quoted language of § 15.1-67 of the Virginia Code.

In a previous opinion of this office, it was ruled that a partnership could not construct a waterworks for a county of which one partner was chairman of the board of supervisors. See, Report of the Attorney General (1961-1962), p. 11. In my opinion, the applicability of this ruling, a copy of which is enclosed, to the situation you present would not be altered by the fact that the contract concerning which you inquire is to be concluded with the Wythe-Bland Water and Sewer Authority.

PUBLIC OFFICERS—Compatibility—Member of city council may not be interested in insurance contract.

HONORABLE GLENN YATES, JR.
Member, House of Delegates

This is in reply to your letter of April 15, 1968, which reads, in part, as follows:

"Mr. Burrell R. Johnson was elected to the City Council of Portsmouth for a four-year term beginning 1 July 1966. He had previously served a portion of an unexpired term of a councilman who had re-signed. The City of Portsmouth purchases its fire and liability insurance through a pool of all insurance agents who wish to participate, located in the city. One agent acts as chairman of this committee for distribution of the insurance coverage. The Commercial Insurance Agency, Inc., is a participating firm. This company also handles real estate matters and Mr. Johnson is a vice president of the firm engaged in the sale of real estate. Mr. Johnson received his license as an insurance agent the first of the year. The question has now arisen as to whether it is legal for the City of Portsmouth to purchase insurance through the Commercial Insurance Agency, Inc., in view of the provisions of Section 79 of Chapter 7 of the Charter of the City of Portsmouth (Chapter 157, Acts of the Assembly, 1908) and Section 15.1-73, Code of Virginia, 1950, as amended."

You also enclosed a memorandum indicating that Mr. Johnson's income from the Commercial Insurance Agency, Inc., is based on a share of the commissions for the insurance policies which he writes. The memorandum indicates that Mr. Johnson does not participate in the commissions from any of the city or school board business. There is no indication as to whether Mr. Johnson is a stockholder in the Commercial Insurance Agency, Inc.

I am enclosing a copy of an opinion to the Honorable Kenneth P. Asbury, dated April 11, 1967 (see, Report of the Attorney General (1966-1967), p. 225), in which a similar question was answered. I am also enclosing copies of opinions

The provisions of the charter of the City of Portsmouth, to which you refer, read as follows:

"It shall not be lawful for any officer or agent of the city, whether elected or appointed, or any commissioner appointed for the opening of streets, or any member of any board of the city or council, or any member of a committee constituted or appointed for the management, regulation or control of corporate property of the city, to be a contractor with the city, or its agents, or with such committee, officer, or board, for any work or labor ordered to be done, or goods, wares and merchandise or supplies of any kind, ordered by the said city or by such officer, board or committee to be purchased, or in any manner, directly or indirectly, to be interested in the profits of any such contract. Every such contract shall be void, and the officer, agent, member of such committee or board making such contract shall forfeit to the city the full amount stipulated for thereby. . . ."

I assume that these provisions of the charter have not been amended since their enactment in 1908.

In my opinion, the prohibitions contained in § 15.1-73 and in the city charter are applicable to the circumstances described in your letter and memorandum. It appears that Mr. Johnson is a member of the City Council of Portsmouth and is also vice president of a corporate insurance agency from which the city and the school board have purchased and contemplate purchasing insurance. In my opinion, Mr. Johnson would be "interested, directly or indirectly" in any insurance contract with the city or the city school board purchased through his agency or through the pool in which his agency participates. The provisions of § 15.1-73 of the Code and Section 79, Chapter 7 of the charter prohibit any such contract.

PUBLIC OFFICERS—Compatibility—Member of county planning board ineligible to serve on county school trustee electoral board.

SCHOOLS—Trustee Electoral Board—Member of county planning commission ineligible to serve.

SCHOOLS—Trustee Electoral Board—Board action, though one member serving incompatibly, valid.

Honorable Robert E. Gillette
Commonwealth's Attorney for Nansemond County

June 5, 1968

This is in answer to your letter of May 17, 1968, from which I quote:

"1. Is a member of the County Planning Commission, appointed by the Board of Supervisors, a County officer as to preclude his serving as a member of the County's School Trustee Electoral Board?"
"2. If question number one is answered in the affirmative, is the action of the School Trustee Electoral Board, one member of which is also a member of the County Planning Commission, in appointing a new member to the School Board to replace a former member whose term had just expired void?

"3. If such appointment by the School Trustee Electoral Board is void, what is the proper procedure for rectifying or correcting this action?"

I am of the opinion that a member of a county planning commission is a county officer and would, therefore, be ineligible to serve on a county school trustee electoral board. See, Report of the Attorney General (1959-1960), p. 279. In light of the view expressed in the cited opinion, it is clear that the individual concerning whom you inquire should relinquish one of the positions in question.

However, with respect to your second inquiry, I am of the opinion that the action of the school trustee electoral board in this instance would be valid. The acts of the individual mentioned in your communication would in any event constitute those of a de facto public officer, whose acts have been repeatedly ruled by this office to be valid. See, Reports of the Attorney General (1953-1954), p. 178; (1959-1960), p. 169.

The views expressed with regard to your second inquiry obviate consideration of your third question.

PUBLIC OFFICERS—Compatibility—Members of Police and Trial Board may not be interested in contract with city of Virginia Beach.

May 21, 1968

HONORABLE EDWARD T. CATON, III
Member, Senate of Virginia

This is to acknowledge receipt of your letter of May 9, 1968, in which you inquire:

"Should, under § 15.1-73, the Chairman of the Virginia Beach Police and Trial Board, who is paid $10 for attendance and $10 mileage for each meeting forfeit to the Commonwealth the amount paid by the City of Virginia Beach to purchase police sirens and red lights from a corporation in which he is interested as an officer and principal stockholder?"

Section 15.1-73 of the Code of Virginia (1950), as amended, prohibits any "officer" or "any other paid officer" of any city from being interested directly or indirectly in any contract for materials to be furnished for the city. The first paragraph of this section concludes in this language:

"Every such contract or subcontract shall be void, and the officer, councilman, agent, or member of such committee making such contract shall forfeit to the Commonwealth the full amount stipulated for thereby."

The powers and duties of the members of the Police and Trial Board are
set forth in Chapter 101, Acts of 1954. The charter of the City of Virginia Beach, Chapter 147, Acts of 1962, expressly provides that:

"The council may continue the Police and Trial Board as authorized for Princess Anne County by Acts of 1954, Chapter 101, as amended by Acts 1960, Chapter 44." (Acts 1962, p. 211.)

I am informed that the City of Virginia Beach did by ordinance adopted in 1963 continue said Police and Trial Board. The said board is empowered, among other things, to appoint and commission policemen; to hear charges brought against any member of the police force; and to suspend or discharge any policeman for the failure to perform his duty or for the commission of any criminal offense. The members of said board are paid a per diem allowance. It would follow that the Police and Trial Board is a constituent part of the government of the city, and the members of the board are officers of the city within the meaning of § 15.1-73 of the Code. Therefore, members of the Police and Trial Board would be prohibited from contracting with the city to supply it with materials and equipment.

In light of the foregoing, I am of the opinion that the situation concerning which you inquire would fall within the prohibition of § 15.1-73 of the Virginia Code.

PUBLIC OFFICERS—Compatibility—United States rural mail carrier may be member of county welfare board.

WELFARE—County Welfare Board Member—May be United States rural mail carrier.

December 29, 1967

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is to acknowledge receipt of your letter of December 21, 1967, in which you state in part:

"Section 2.1-30, Code of Virginia, prohibits the holding of any State Office by a person who holds an office under the Government of the United States. . . May a United States rural mail carrier or Star Route mail carrier be appointed and act as a member of the County Welfare Board?"

Your attention is invited to § 2.1-33 of the Code of Virginia (1950), as amended, which reads in part:

"Section 2.1-30 shall not be construed:

* * *

"5. To prevent any United States rural mail carrier, or star route mail carrier from being appointed and acting as notary public or holding any county or district office."

I am therefore of the opinion that a United States rural mail carrier or Star Route mail carrier may be appointed and act as a member of the County Welfare Board.
PUBLIC OFFICERS—Contracts—School board member may not contract for furnishing garage services for board.

SCHOOLS—School Boards—Member may not contract to furnish garage services for board.

HONORABLE ROBERT E. BURR
Division Superintendent, Orange County Public Schools

This is to acknowledge receipt of your letter of June 15, 1967, in which you state in part:

“One of our board members recently became an associate in a corporation and manager of this corporation which is the Ford Franchise located in our county.

“We would like your opinion as to whether the Orange County School Board would be acting properly in continuing to do business with this firm. In the past the School Board has purchased some parts from this firm and has had some minor body work done that could not be handled in our own garage.”

Two sections of the Virginia Code bear on the question presented. I quote from § 22-213 as follows:

“It shall be unlawful for any member of the State Board, division superintendent of schools, member of the school board or any other school officer, principal or teacher in a public school, except by permission of the State Board evidenced by resolution spread on the minutes of such Board, to have any pecuniary interest, directly or indirectly, in any contract for building a public schoolhouse, or in furnishing material to a contractor for building such schoolhouse, or in supplying books, maps, school furniture or apparatus to the public schools of this State, or to sell or write or solicit insurance on any school building; or act as agent for any other publisher, book seller, or dealer in any such school furniture or apparatus, or directly or indirectly to receive any gift, emolument, reward, or promise of reward, for his influence in recommending, or procuring, the use of any book, map, school furniture, or apparatus of any kind in any public school of this State, nor shall the board or the division superintendent employ any of its members in any capacity. . . But the prohibitions of this section shall not apply to a merchant who, in the regular course of trade and without employing agents to solicit such business, sells either books selected and adopted by the State Board, or supplies used in the schools and by the pupils.”

The other Code section which is concerned here is § 15.1-67 (formerly designated as § 15-504). I quote therefrom:

“No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, judge of the county court, or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county
school board, or superintendent of the poor of the county, or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency thereof, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county. . ." (Italics supplied).

This office has held that a member of a local school board—with the permission of the State Board of Education—may enter into contracts of the types specified in § 22-213 with the local school board of which he is a member without violating § 15.1-67. However, a member of a local school board as a paid officer of the county would be prohibited by the provisions of § 15.1-67 from entering into any contract of a type not specifically permitted by § 22-213 of the Virginia Code. See, Report of the Attorney General (1958-1959), p. 246. The waiver of pay or salary by a member of a school board would not remove him from the prohibitions in §§ 22-213 and 15.1-67 of the Code. See, Report of the Attorney General (1963-1964), p. 249. The arrangement or contract described in your letter is not of a type permitted under § 22-213 of the Code.

Therefore, I am of the opinion that the school board would not be acting properly in doing business with the firm in which the member of the school board is the manager.

PUBLIC OFFICERS—County Officers—in their personal capacity, cannot contract with county and receive compensation.

CLERKS—Clerk of County Court and Juvenile and Domestic Relations Court of Page County—May not serve as bookkeeper for sheriff’s office.

HONORABLE MARK D. WOODWARD, Judge
Juvenile and Domestic Relations Court Page County

December 21, 1967

This is in reply to your letter of December 14, 1967, in which you ask my opinion as to whether the Clerk of the County Court and the Juvenile and Domestic Relations Court of Page County is prohibited by law from serving as bookkeeper for the Sheriff’s Office, the latter being compensated two-thirds by the Commonwealth and one-third by the County.

As you state, § 2.1-30 of the Code of Virginia relates to holding office under the United States and the Commonwealth and is not applicable to this situation. It is provided in § 15.1-67 of the Code of Virginia, however, that no paid officer of the county shall become interested in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county. The emphasized language has been held by this office to prevent a paid officer of a county from being paid, in part, by the county for additional services rendered the county. See, Report of the Attorney General (1948-1949), p. 40. Since the additional employment here under consideration would entail compensation paid, in part, by the County, I am of the opinion that it is prohibited under this section, and I shall answer your question in the affirmative.
PUBLIC SERVICE CORPORATIONS—Railroads—Caboose requirements—
Construing § 56-420.

HONORABLE WILLARD J. MOODY
Member, House of Delegates

This is in reply to your letter of June 28, 1967, which I quote as follows:

"I am interested in obtaining an interpretation, or opinion, from your office regarding the meaning of Sec. 56-420 of the Code of Virginia with reference to the requirement for caboose cars on trains.

"My question is whether or not under the language of this section requiring cabooses when 'in train service' a caboose is required when trains are moving coal cars loaded and unloaded, the approximate distance of twenty miles within a railroad yard. It is my further understanding that during part of such movements the trains are on the main line of the railroad."

The pertinent portion of § 56-420 of the Code is as follows:

"No person or corporation operating a standard gauge railroad as a common carrier in this State shall run or permit to be run over its tracks, outside of yard limits or in transfer service, a train of one or more cars, other than a passenger train, without having attached thereto a caboose car, excepting light engines and cases of emergency occurring on the road which will not permit of a compliance herewith."

In respect to your question, I assume you refer to "in transfer service" rather than "in train service," as the latter term is not found in this section. The statute requires that a caboose car be attached, with stated exceptions, when any such train shall run over its tracks "outside of yard limits or in transfer service."

The operation in question, according to the given facts, is "within a railroad yard" and, therefore, not outside of the yard limits. The facts do not show whether or not the trains are being operated "in transfer service." In my opinion, therefore, the facts do not show such operation as would require a caboose under this section.

PUBLIC WELFARE—Chairman of Local Board—When authorized to sign warrants, advisable to be bonded.

HONORABLE VERNON C. WOMACK, Clerk
Circuit Court of Prince Edward County

This will reply to your letter of May 13, 1968, in which you present the following situation and inquiry:

"The Superintendent of our local board of Public Welfare retired on May 1, 1968 and the senior case worker was designated by the Board as the person in charge until a new superintendent is appointed to take office on or about July 1, 1968. The person designated was not
given the authority to sign warrants, but the Chairman of the local Board of Public Welfare was authorized by the Board to sign, along with the County Treasurer, all warrants issued by the said Board, until the new superintendent qualifies and takes office.

"I discussed the matter with Judge Abbitt today and he suggested that I write requesting your opinion on the question as to whether or not the Chairman of the local Board of Public Welfare is required to execute a bond under Section 63-81.1 during the interim May 1 to July 1, 1968."

Section 63-81.1 of the Virginia Code provides:

"Every employee duly authorized by the local board to draw warrants on the treasurer or other fiscal officer shall before entering upon the discharge of his duties enter into a bond with surety to be approved by the court or judge, in such sum as the court or judge may fix, conditioned upon the faithful discharge of his duties. The provisions of this section shall not apply in localities when provision for bonding such employees has been made by their governing bodies." (Italics supplied.)

I am of the opinion that the chairman of the local board of public welfare would not be an employee of the local board within the purview of the above-quoted statute and would not therefore be required to execute a bond under § 63-81.1 of the Virginia Code. However, since the chairman has been authorized to sign warrants drawn on the treasurer—an act which would require a bond if done by an employee of the board—it may be advisable for the chairman to execute the bond even though it is not expressly required by statute.

PUBLIC WELFARE—Recipients—Foreclosure on deeds of trust given by.

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for Wise County

March 26, 1968

This is to acknowledge receipt of your letter of March 11, 1968, in which you state in part:

"I would appreciate it if you would give me an interpretation of Section 63-127.1.

"This Code section provides for the execution and foreclosure of deeds of trust by recipients of Public Welfare assistance.

"Paragraph 3 provides 'No foreclosure shall be made under the deed of trust herein provided for so long as such recipient is eligible for assistance.' The section further provides for foreclosure within twelve months of the death of the recipient.

"My question is this: May the Trustee under the deed of trust at the direction of the local Board of Public Welfare sell property under one of these deeds of trust where the recipient is still living and is no longer a Welfare recipient?"

From what you state, this property owner is no longer a recipient. Ap-
parently he has fulfilled his duty under § 63-124 by notifying the local welfare board of his change in circumstances and the board has cancelled the assistance. That section concludes in this language: "Any assistance or part thereof previously paid may be recovered as a debt." While § 63-127.1 provides that "no foreclosure shall be made so long as such recipient is eligible for assistance," it would appear from your communication that the individual you mention is no longer eligible for assistance. The last paragraph of § 63-127.1 precludes foreclosure if same affects the operation of § 63-128. That section prohibits the enforcement against any real estate of the recipient while such real estate is occupied by any dependent child, or children or the surviving spouse of the recipient. As this property owner, as former recipient, is still living, the debt could be enforced by sale under the deed of trust provided he has no dependent child or children occupying the real estate encumbered by the deed of trust. The answer is therefore in the affirmative provided the provisions of § 63-128 are not applicable.

RAILROADS—Caboose—Requirements—Section 56-420 requires use only on trains operated outside yard limits or in transfer service.

HONORABLE WILLARD J. MOODY
Member, House of Delegates

This is in reply to your letter of November 17, 1967, in which you ask my opinion on whether or not § 56-420 of the Code of Virginia requires that a caboose be attached in cases in which trains are regularly moving coal cars, averaging 150 cars and some as much as 250 cars, a distance of twenty miles from one railroad yard to another, but all of said distance being within the yard limits of the railroad operating the train.

You refer to Title 45, U.S.C.A., § 9, Railroads, notes 6, 7, 8 and 9 and the supplements thereto, setting forth notes of several cases in which the terms "in train service" as opposed to "switching movement" has been interpreted by the courts. By its own terms, the provisions and requirements of this section "apply to all trains, locomotives, tenders, cars and similar vehicles used, hauled or permitted to be used or hauled, by any railroad engaged in interstate commerce."

The named section of the U.S. Code contains no requirement as to the use of a caboose, but refers to the brakes required on trains used under the stated conditions. In my interpretation, this does not reach the subject here under consideration. Accordingly, I can only reiterate the opinion expressed in my letter of July 5, 1967, that the requirements of § 56-420 as to the use of a caboose has application only to trains operated outside of yard limits or in transfer service. Of course, if the facts in any given case show that any such train is operated "outside of yard limits" or, even though within yard limits, it is operated "in transfer service," then the requirements of § 56-420 would apply and the train must be equipped with a caboose.
REPORT OF THE ATTORNEY GENERAL

RECORDATION—Deeds—Information which may be placed thereon by clerk.

HONORABLE H. BRUCE GREEN, Clerk
Circuit Court of Arlington County

This is in reply to your letter of January 11, 1968, and the enclosure, in which you requested my opinion if the clerk may write upon a deed which has been signed and acknowledged the amount of the State tax paid prior to the recordation of the deed. I am unable to find any provision of law which would prohibit the clerk from placing this information on the instrument. However, I am of the opinion that this information should be placed upon the instrument only upon the request of the property owner having the deed recorded.

RECORDATION—Deeds—Placing thereon amount of consideration by clerk.

HONORABLE GEORGE B. WHITACRE, Clerk
Circuit Court of Frederick County

This is in reply to your letter of February 19, 1968, in which you requested my opinion if you could when recording a deed include on the face thereof the amount of the consideration paid for the real estate. I am unable to find any provision of law which would prohibit you from placing this information on the instrument. However, I am of the opinion that this information should be placed upon the instrument only upon the request of the property owner having the deed recorded.

RECORDATION—Inter Vivos Trust.

CLERKS—Recordation—Inter vivos trust.

HONORABLE KATHERINE V. RESPRESS
Clerk of Courts, City of Norfolk

This is to acknowledge receipt of your letter of May 15, 1968, in which you state:

“I would deeply appreciate it if you would give me a ruling on the question of recording an inter vivos trust conveying property situated in Norfolk to a Trustee, an individual, who is not a resident of the State of Virginia.

“While such an inter vivos trust is not a security trust as defined in § 55-58.1 (1), I can find no authority in the Code which permits me to record a deed of trust in which the Trustee is a nonresident of the State, and I believe that § 55-58.1 (2) applies, inasmuch as property is being conveyed.

“However, I would like to have your opinion on whether or not an inter vivos trust can be recorded with a nonresident Trustee.”
Section 55-58.1 of the Code of Virginia, as amended, is applicable only to a trust which is made to secure the payment of money or the performance of an obligation. Only an examination of the instrument can determine whether it is made for such purposes; however, from what you state, the inter vivos trust agreement which has been presented to you for recordation does not create a trust for a debt or any obligation.

I am not aware of any statute which would prohibit the recordation of an instrument creating such an inter vivos trust provided it meets all the requirements of law for recordation.

REDISTRICTING—Effect Upon School Board Members.

SCHOOLS—School Boards—Appointment of members to fill vacancies created by redistricting.

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

July 13, 1967

I am in receipt of your letter of July 3, 1967, in which you advise that on June 29, 1967, a redistricting commission appointed by the Circuit Court of Bedford County pursuant to § 15.1-577 of the Virginia Code filed its report reducing from eight to six the number of magisterial districts in the county. In this connection, you present the following inquiries:

"(A) What is the status insofar as being members of the County School Board of Bedford County is concerned of those individuals who were members of said School Board immediately prior to the filing of the report of the Redistricting Commission on June 29, 1967 (no legal action of any kind having been taken between the time of the filing of said report and the present time concerning the appointment of School Board Members)?

"(B) In any new Magisterial District in which no one of the old School Board Members lives, will a new School Board Member from this district have to be appointed by the School Trustee Electoral Board?

"(C) In a new Magisterial District in which one of the old School Board Members lives, will this old School Board Member continue to serve on the School Board as the representative of the new Magisterial District in which he now lives? If not, how will the representative on the School Board from this district be designated?

"(D) In the one or more of the newly designated Magisterial Districts in which two of the old School Board Members reside, who is to represent such magisterial district on the County School Board, both of said old School Board Members, or neither of them? If both are to represent said magisterial district, are they to have two votes? If neither is to represent said new Magisterial District, how is the representative on the School Board from said Magisterial District to be designated?"

Under the provisions of Section 133 of the Virginia Constitution, county school boards are composed of trustees selected “in the manner, for the term
and to the number provided by law.” It is thus clear that the term of office of a member of a county school board is specified by the General Assembly and is not fixed by the Virginia Constitution itself. As the authority to prescribe the length of the term of office of a school board member is referable to the power of the General Assembly, so the authority to provide for a change in the length of such term is also within the legislative discretion. In situations involving the rearrangement of the magisterial districts of a county pursuant to the provisions of §§ 15.1-571, et seq., of the Virginia Code, provision is made in the terminal sentence of § 15.1-576 for the court to declare vacancies in office and provide for filling the same in the following language:

“It [the court] may at the same or a succeeding term declare a vacancy in any office and provide for filling the same, whether created by its own order or by act of the commissioners hereinafter mentioned.”

In light of the above-quoted provision, I am of the opinion that the Circuit Court of Bedford County may declare vacancies in the offices of members of the school board and direct that such vacancies be filled by the school trustees electoral board. See, §§ 22-61 and 22-65, Code of Virginia (1950), as amended. The school board members in office immediately prior to the filing of the report on January 29, 1967, would continue in office until their successors have qualified. A school board member may be appointed for any newly designated district in which no present member of the school board resides. A present member of the school board who now resides in a newly designated district may be appointed for such new district, and in a newly designated district in which two of the present school board members reside, one of such members may be appointed to fill the vacancy declared by the court for such district.

REDISTRICTING—Magisterial Districts—Limitations Imposed by § 15.1-576.

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

May 7, 1968

This is in reply to your letter of April 26, 1968, in which you inquire as follows:

“In 1967 a petition for redistricting the magisterial districts of Franklin County was filed in the Circuit Court by certain citizens and the petition was dismissed in September, 1967 by the Judge of the Court because no one appeared to contest a motion to dismiss on certain grounds.

“Section 15.1-576 of the Code of Virginia states that no petition for the same purpose, redistricting, shall be entertained for one year from the date of such dismissal. What effect, if any, would the Supreme Court’s decision have on the Virginia statutory requirement of one year?”

The decision of the Supreme Court to which you refer is Avery v. Midland County, Texas, 88 S. Ct. 1114, 1121 (1968), wherein it is stated:

“Our decision today is only that the Constitution imposes one
REPORT OF THE ATTORNEY GENERAL

ground rule for the development of arrangements of local government; a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population."

I am therefore unable to find any language in Avery which would indicate that § 15.1-576 would not be applicable in proceedings to rearrange magisterial districts pursuant to §§ 15.1-571 to 15.1-581 of the Code. You may wish to consider, however, whether or not the dismissal in the situation you present falls within the scope of the initial sentence of § 15.1-576 of the Virginia Code.

REGISTRAR—General Registrar—Appointed—Authorized to register voters.
ELECTIONS—General Registrar—Appointed—Authorized to register voters.

HONORABLE ALBERT M. SHELTON
Commonwealth's Attorney for Scott County

January 19, 1968

I am in receipt of your letter of January 11, 1968, in which you make the following statement and inquiry:

"As of January 1, 1968, Scott County adopted a new form of government known as the County Board Form. Under said form of government as provided by the Code in 15.1-719 Va Code 1950 which provides for a general registrar of said county and sets up procedures in which the Board of Supervisors may request one be appointed, our Board of Supervisors has requested that the Electoral Board appoint a registrar which has been done.

"Now, the question is: Is this general registrar properly in office at this time or will the Electoral Board be required to wait until their annual meeting before they can properly appoint a general registrar as provided by general law?"

In pertinent part, § 15.1-719 of the Virginia Code, to which you refer, provides:

"The board of county supervisors may by resolution provide for the creation of the office of general registrar for the county. Upon receipt of a certified copy of such resolution by the county electoral board, it shall within thirty days thereafter appoint such general registrar, . . . . Any general registrar appointed shall hold office for two years from the first day of July next following his appointment, and until his successor shall be duly elected and qualified.

"The appointment of a general registrar shall automatically abolish the office of registrar for each and all of the election districts of the county as provided by law, as of the date of qualification of the general registrar, and each and every such district registrar shall thereupon promptly deliver to the general registrar all the books, papers and documents pertaining to their offices." (Italics supplied.)

In this connection, I am forwarding to you a copy of a previous opinion of this office dated December 21, 1966, in which a situation similar to that set
forth in your communication was considered and discussed. See, Report of the
Attorney General (1966-1967), p. 102. Although the provision of law there
under consideration was § 24-118.1 of the Virginia Code, the relevant language
of that statute is almost precisely identical to that of the above-quoted second
paragraph of § 15.1-719 of the Code. On that occasion, as you will note, this
office ruled:

"If such general registrar has been appointed for the county and
has qualified pursuant to this section [24-118.1], I am of the opinion
that no one else has the legal authority to register persons for the
purpose of voting, unless such registrar has one or more assistants duly
appointed as provided in § 24-118.8."

I believe that the view expressed in the enclosed opinion would be equally
applicable to the situation concerning which you inquire. Although § 15.1-719
provides that any general registrar appointed thereunder "shall hold office for
two years from the first day of July next following his appointment," I am
constrained to believe that this provision should not be construed to prevent the
operation of the immediately following paragraph which, in effect, automatically
abolishes the offices of election district registrars as of the date of qualification
of the appointed general registrar. I am therefore of the opinion that the
general registrar concerning whom you inquire may at this time properly
discharge the duties imposed upon him by law.

SCHOOLS—Board Member—Contracts with board—When may enter into with
permission of State Board of Education.

PUBLIC OFFICERS—Contracts—School board member may contract for gravel
with board subject to permission of State Board of Education.

HONORABLE ANDREW J. ELLIS, JR.
Commonwealth's Attorney for Hanover County

October 3, 1967

I am in receipt of your letter of September 19, 1967, in which you present
the following situation and inquiry:

"A recent appointee to the County School Board of Hanover County
is a Division Sales Manager of the General Crushed Stone Company
which has its office in Verdon, Virginia. The School Board member
is not on commission as a salesman, but does own fifty shares of stock
of the corporation which has 60,000 shares of stock outstanding.

"The General Crushed Stone Company has in the past sold gravel
directly to the School Board and to contractors for use on school
building sites.

"In light of the language contained in Section 22-213 and Section
15.1-67 of the 1950 Code of Virginia, as amended, I would appreciate
your advising me whether in your opinion it would be illegal for the
County School Board of Hanover County to continue to purchase
gravel from the General Crushed Stone Company as it has done in the
past and whether it would be illegal for the General Crushed Stone
Company to sell gravel to contractors for use on school building sites."
REPORT OF THE ATTORNEY GENERAL

In response thereto, I am forwarding to you a copy of a previous opinion of this office, dated July 11, 1958, to the Honorable R. H. L. Chinchester, Commonwealth's Attorney for Stafford County, in which the applicability of § 15.1-67 (then § 15-504) and § 22-213 of the Virginia Code to a situation substantially identical to that which you present was considered and discussed. See, Report of the Attorney General (1958-1959), p. 246. From the enclosed opinion, it appears that the member of the local school board mentioned in your communication may—with the permission of the State Board of Education—enter into contracts with the local school board (or with a contractor for the school board) of the type specified in § 22-213, i.e., contracts to furnish gravel to the school board or contractor to be used in connection with the building of a public schoolhouse. However, it also appears from the enclosed opinion that the school board member in question would be prohibited by the provisions of § 15.1-67 from entering into any contract of the type not specifically permitted by § 22-213 of the Virginia Code.

SCHOOLS—Bond Issue—No authority to divert proceeds to purposes not stated in referendum.

COUNTIES—Bond Issue—Proceeds not to be used for any purpose not specified in question submitted in referendum.

HONORABLE WESCOTT B. NORTHAM
Commonwealth's Attorney for Accomack County

January 23, 1968

This is in reply to your letters of December 28, 1967, and January 16, 1968, regarding certain expenditures by the School Board of Accomack County for capital improvements to the Islands District Schools, in which you present the following questions:

"1. Is it proper for a school board to make expenditures from funds derived from a special district levy made pursuant to a referendum for purposes other than that stated in the referendum?"

"2. Is it proper for a school board to make expenditures from funds derived from a special district levy made to repay a loan from the Literary Fund, for purposes other than stated in the loan application?"

In respect to your question numbered 1, this office has consistently held that the board of supervisors of a county has no authority to divert the proceeds of a bond issue to a purpose other than that avowed in the referendum. For obvious reasons, likewise, it has been held that a school board of a county is without authority to so divert such funds. See, Reports of the Attorney General (1950-1951), p. 31; (1956-1957), p. 225; (1960-1961), p. 260 and (1961-1962), p. 218.

The information which you have furnished shows the Islands School District held a special referendum on September 6, 1955, at which time the voters approved a bond issue of $495,000.00 for the purpose of constructing a new high school building at Chincoteague in Islands School District. The bond issue so
approved never materialized, however, since the bonding companies turned down the issue on the grounds that the full faith and credit of the County of Accomack was pledged, whereas, the election was presented only to the voters of Islands School District. A loan was then sought and obtained from the Literary Fund, as authorized by Chapter 7, Title 22 of the Code of Virginia, for which a referendum is not required. See, Board of Supervisors v. Cox, 155 Va. 687, 150 S.E. 755.

In Report of the Attorney General (1964-1965), p. 30, the question was raised as to whether or not any excess existing from a tax levy for the specific purpose of retiring school debt bonds or a county school debt loan from the Literary Fund could be transferred to any other county operating fund. In replying to this question, it was pointed out, as a well settled principle, that where a levy is made for a specific purpose the funds collected as the result of such levy cannot be diverted to another purpose as long as any part of the debt for which the levy was made remains unpaid. Further, § 22-107.3 of the Code of Virginia, which authorizes a school board of any county, with approval of the governing body of the county, to borrow from the Literary Fund for the purpose of constructing school facilities to serve a portion of such county, appears to support this principle in the following language:

"Taxes on property in the magisterial district served by such facilities shall be levied by the governing body of the county and collected for the purpose of repaying such loan." (Emphasis supplied.)

In the light of the foregoing, my answer to your second question is that it is not proper for a school board to divert funds derived for a special district levy made to repay a loan from the Literary Fund until such indebtedness is repaid in full. From the minutes of the Board of Supervisors, furnished in the copy of your letter of December 20, 1967, addressed to Mr. Paul B. Merritt, Supervisor of The Islands District, however, it appears that the levy made March 21, 1956, fails to show a purpose and the levies made March 27, 1957, and March 26, 1958, each provide for application to "District School expenses." The minutes of the Board for March 11, 1958, and April 25, 1963, are silent as to levy, while the minutes for the other given years prescribe that the taxes collected are to be applied to the district school indebtedness." Under these circumstances, therefore, the propriety of the actual expenditures for each of the years in question should be determined from an analysis of the records, taking into account the purpose for which the levy was made for each of the given years.

SCHOOLS—Contracts—Independent functions for which school board not responsible—Not prohibited by § 15.1-73.

October 26, 1967

HONORABLE JOHN S. HANSEN
Member, House of Delegates

I am in receipt of your letter of October 13, 1967, in which you forwarded to me a copy of a letter from Mr. J. Moody Williams requesting you to obtain the opinion of this office on the following question:

"Can the Principal of the Colonial Heights High School contract
Section 15.1-73 of the Virginia Code provides, *inter alia*, that no member of the council of a city, during the term for which he is elected or appointed, shall be interested directly or indirectly in any contract with the city, and this office has previously ruled that contracts of a city school board fall within the scope of this statutory prohibition. See, Report of the Attorney General (1956-1957), p. 221; (1962-1963), p. 214. However, in the situation your letter describes, it would appear that the purchases in question would be contracted by the principal of a school on behalf of a school athletic fund. Funds of this nature—as well as school cafeteria funds and school book rental funds—may arise from operations conducted directly by the school board as an official function of the board or from operations which are conducted independently of the board and in which the school board has no responsibility. See, Report of the Attorney General (1949-1950), p. 201.

In this connection, I am forwarding to you a copy of a previous opinion of this office, dated September 11, 1950, to the Honorable Joseph A. Massie, Jr., Commonwealth's Attorney for Frederick County, in which a situation substantially similar to that which you present was considered and discussed at length. See, Report of the Attorney General (1950-1951), p. 245. Although the fund under discussion in the enclosed opinion was a school cafeteria fund rather than a school athletic fund and the opinion involved application of the provisions of § 15-504 (now 15.1-67) rather than the substantially identical provisions of § 15.1-73 of the Virginia Code, I am constrained to believe that the views expressed therein would be equally applicable to the instant situation. It would thus appear that if the school athletic fund in question is operated independently of the school board and the school board assumes no direct responsibility for the fund and is not financially obligated to pay for supplies purchased for the school athletic fund, the purchases mentioned in your inquiry would not fall within the prohibition of § 15.1-73 of the Virginia Code. On the other hand, if the school athletic fund in question is maintained by the school board and the school board is directly responsible for its operation and financially obligated for its contracts, the purchases concerning which you inquire would appear to be prohibited by § 15.1-73 of the Virginia Code.

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SCHOOLS—School Board—Appointment of members following adoption of county board form of government.

BOARDS OF SUPERVISORS—Authority—Appointment of school board members following adoption of county board form of government.

October 9, 1967

HONORABLE E. M. CRAFT, Chairman
Scott County School Board

I am in receipt of your letter of September 26, 1967, in which you call my attention to § 15.1-718 of the Virginia Code and inquire whether the members of a school board in a county which adopts the county board form of organization and government provided for in Article 5, Chapter 14, Title 15.1 of the Virginia Code would be appointed (1) in January next following the adoption of the above-mentioned form of county government or (2) after the
expiration of the terms of school board members in office when the county
board form of government became effective.

In this connection, § 15.1-718, to which you refer, provides for the abolition
of certain offices—and the expiration of the terms of the officers holding them—in
counties which adopt the form of government under consideration. This
provision of Virginia law does not in terms embrace the county school board
of such a county; on the contrary, the school board is expressly provided for in
§ 15.1-708, its members to be chosen by the board of supervisors. Pertinent to
the resolution of your inquiry is § 15.1-698(c) of the Virginia Code which
prescribes:

“(c) On and after the first day of January next succeeding the
election at which the county board form of organization and government
is approved for adoption by any county, the form of organization and
government of such county shall be in accordance with the county
board form provided for herein.”

In light of the language of the above-quoted statute, I am of the opinion
that members of the school board in counties adopting the county board form
of organization and government would be appointed on and after the first
day of January next following the adoption of this form of county government.
Further in this connection, I call your attention to the provisions of § 15.1-
700(c) of the Virginia Code which expressly provides that the members of the
board of supervisors of such a county in office immediately prior to the day
upon which the county board form of government becomes effective shall con-
tinue as members of the board of county supervisors until the expiration of their
respective terms, and to the absence of any similar provision with respect to
members of the county school board.

Since the remaining inquiries set forth in your communication are not directly
related to the discharge of the duties of the county school board, I am prohibited
by Virginia law from rendering an opinion on them.

SCHOOLS—School Boards—Authority over school property.

Honorable George C. Rawlings, Jr.
Member, House of Delegates

I am in receipt of your letter of December 13, 1967, in which you inquire
whether or not it is “a violation of State law for the Superintendent of
Schools of a county to live, either free or under lease, in a dwelling house
located on school property.”

I have been unable to discover any provision of Virginia law which would
forbid such an arrangement. In general, the Virginia school laws confer board
discretion upon the local school boards with respect to the control and manage-
ment of school property. Particularly pertinent to the situation you present are
the following provisions of §§ 22-164.1 and 22-164.2 of the Code of Virginia
(1950) as amended:

“§ 22-164.1.—The school board of any county, city or town is
authorized to permit the use of, upon such terms and conditions as it
deems proper, such portions of the school property under their control
REPORT OF THE ATTORNEY GENERAL

as will not impair the efficiency of the schools. Such permits shall be made under rules and regulations of the school board and the board may authorize the division superintendent to permit use of the school property under such conditions as it deems proper. The superintendent shall report to the board at the end of each month his actions under this section."

"§ 22-164.2—Each such permit may contain, among other matters, provisions (1) limiting the use of the property while classes are in session, and (2) an undertaking by the lessee, to return the property so used in as good condition as when leased, normal wear and tear excepted."

SCHOOLS—School Boards—Authority to appoint and supervise teachers and other administrative personnel under county board form of government.

BOARDS OF SUPERVISORS—County Executive Form of Government—Authority to appoint officers and employees of county.

HONORABLE E. M. CRAFT, Chairman
Scott County School Board

September 19, 1967

I am in receipt of your letter of September 12, 1967, in which you present the following situation and inquiry:

"Under Section 15.1-702 of County Board Form of Government 'Appointment and Compensation of Officers and Employees of County' — 1(a) The board of county supervisors shall, except as otherwise provided in Section 15.1-706 and except as the board may authorize any officer or the head of any office to appoint employees under such officer or in such office, appoint all officers and employees, including deputies and assistants in the administrative service of the county.'

"Please refer to the above underlined sentences of Section 15.1-702. We have been advised that the underlined lines above are to be construed to mean that all employees in the School Board Office, such as clerks, secretaries, etc., and all principals and all teachers in the public schools are the administrative staff of the schools and in the administrative service of the county and, so, would be appointed by the County Board of Supervisors unless the County Board of Supervisors delegates this authority to some officer or office head, as Superintendent of Schools, or the school board, which it appoints.

"Will you please kindly give us your opinion on the lines we have underlined in the above quoted Section 15.1-702?"

While § 15.1-702 of the Virginia Code is a general provision of law relating to the appointment of officers and employees in the administrative service of a county which has adopted the county board form of organization and government, I call your attention to § 15.1-708 which also appears in Article 5, Chapter 14, Title 15.1 of the Virginia Code, establishing the county board form of organization and government. Section 15.1-708(a) expressly provides:

"The county school board and the division superintendent of schools
shall exercise all the powers conferred and perform all the duties imposed upon them by general law."

As you will note, the above-quoted provision of Virginia law relates specifically to county school boards and division superintendents of schools in counties which have adopted the county board form of organization and government and expressly confers upon them all the powers, and imposes upon them all the duties, prescribed by general law. In this connection, § 22-203 of the Virginia Code directs that the school boards, on recommendation of the division superintendents, "shall employ teachers and place them in appropriate schools," while the powers and duties prescribed for county school boards by § 22-72 are sufficiently broad to confer upon the school board the power to employ clerks, secretaries and other administrative personnel involved in the operation of the public schools under the school board's control.

Since § 15.1-708 relates specifically to the county school board and division superintendent of schools of a county which has adopted the county board form of organization and government and expressly confers upon such school board all the powers and duties prescribed by general law, I am of the opinion that the general provisions of § 15.1-702 should not be construed to include the appointment by the board of supervisors of teachers or other administrative personnel of the school board.

Further in this connection I am forwarding to you a copy of a previous opinion of this office dated January 27, 1937, to Dr. Sidney B. Hall, Superintendent of Public Instruction, in which the then Attorney General (later Justice) Abram P. Staples considered a situation substantially similar to that which you present involving the county executive form of government and expressed a view consistent with that stated in this opinion. See, Report of the Attorney General (1936-1937), p. 148; see, also, Board of Supervisors v. County School Board, 182 Va. 266, 275. Both the position taken by Justice Staples and that here expressed are consistent with the provisions of Section 133 of the Virginia Constitution which prescribes that:

"The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. . . ."


May 27, 1968

DR. WOODROW W. WILKERSON
Superintendent of Public Instruction

This is to acknowledge receipt of your letter of May 15, 1968, in which you state in part:

"Under the new form of government, 'County Board Form of Government,' Section 15.1-708 (c) provides for the payment of school board members at the rate of $20 per month. Scott County has adopted this form of government.

"The General Assembly at its 1968 session amended Section 22-67.2 relating to salary of school board members and this Act permits Scott
REPORT OF THE ATTORNEY GENERAL

County to pay school board members an amount not exceeding $960 a year.

"Is compensation of school board members governed by Section 22-67.2 or is a school board operating under the County Form of Government limited to the rate of compensation specified in Section 15.1-708 (c) of the Code?"

School boards of counties which have adopted the county board form of government as prescribed in Article 5, Chapter 14, Title 15.1 of the Code of Virginia, as amended, are bound by the provisions of that article including § 15.1-708. That section of the Code dealing with the compensation of the county school board concluded in this language:

"(c) Each trustee or member shall receive as compensation for his services an annual salary of not to exceed two hundred and forty dollars, payable in equal monthly installments, and mileage at a rate not to exceed five cents per mile for each mile of travel by the most direct route going to and returning from the place of meeting."

I am, therefore, of the opinion that the compensation of school board members in counties which have adopted the county form of government (§§ 15.1-697—15.1-721 of the Code) is governed by the provisions of § 15.1-708 of the Code and not by § 22-67.2 as amended.

SCHOOLS—School Boards—Disposition of real estate no longer needed for school purposes—Boards in three counties each owning one third interest.

HONORABLE J. PATRICK GRAYBEAL
Commonwealth’s Attorney for Montgomery County

August 24, 1967

This is in reply to your letter of August 10, 1967, from which I quote the following:

"County School Board of Montgomery County, County School Board of Pulaski County, and the School Board of the City of Radford are, together, the owners of a tract of land in the Town of Christiansburg, Montgomery County, Virginia. Each of the school boards owns an undivided ⅓ interest in the land. For a number of years the three school boards have used the property for the operation of a joint regional school for Negro children, known as Christiansburg Institute. Section 22-7 of the Code provides for the ownership of property by school boards for the operation of joint schools.

"Christiansburg Institute has been permanently closed and the property is no longer used, nor is it needed by the three school boards for school purposes. The three school boards, acting together, propose to sell the property later this month.

"The question upon which I would like to have your opinion is that of the venue for the proceedings by the Pulaski Board and the Radford Board to obtain the approval and ratification of the sales of their respective interests in the land.

"Since the land lines in Montgomery County, should the three school
boards conduct a joint proceeding in the Circuit Court of Montgomery County, or would it be necessary that the Pulaski Board conduct a proceeding in the Circuit Court of Pulaski County, and the Radford Board a proceeding in the Circuit Court of the City of Radford, and, of course, the Montgomery Board in the Circuit Court of Montgomery County?"

As you have indicated, the authorization for the establishment of joint schools by counties or by counties and cities or certain towns is founded in § 22-7 of the Virginia Code. In the absence of any special provision for the disposition of property no longer needed for the purposes for which it was held jointly by the school boards of two or more counties or a combination of counties and cities, we must look to those general statutes which authorize the disposition of property by a school board. Section 22-161, which you cite, gives the school board the same power to sell and convey the real and personal school property of the county as the governing body of the county has with reference to the power of sale and conveyance of other county property under § 15-692 (now § 15.1-262) of the Code, and this provision is made applicable to city school boards by § 22-166. In pertinent part, § 15.1-262 of the Code provides:

"The governing body of the county shall have power to sell, at public or private sale, or exchange and convey the corporate property of the county; . . . provided, that no sale or exchange of such property shall be made without the approval and ratification of such sale and exchange by an order of the circuit Court of the county or by the judge thereof in vacation, entered of record." (Emphasis supplied.)

The property under consideration is owned by the school boards of the three named jurisdictions, each of which owns an undivided one-third interest. I am of the opinion that "the circuit court of the county" to which reference is made in the above-quoted statute means the circuit court of the county over which the board of supervisors exercises jurisdiction and in which the school board proposing to sell an interest in property exercises jurisdiction. In this connection I am enclosing a copy of a previous opinion of this office in which a substantially similar situation was considered and discussed. See, Report of the Attorney General (1938-1939), p. 229. I concur in the view expressed by Judge Staples in the enclosed opinion and conclude that each of the school boards to which you refer should obtain the approval and ratification of the proposed sale of its interest in the subject property by the appropriate court of the county or city in which each such school board exercises jurisdiction.

SCHOOLS—School Boards—Loans negotiated with approval of board of supervisors.

BOARDS OF SUPERVISORS—Loans for School Construction—May approve.

HONORABLE ELDRIDGE C. HUFFMAN Commonwealth's Attorney for Craig County

May 13, 1968

I am in receipt of your letter of May 7, 1968, in which you present the following situation and inquiry:

"Sometime ago the Craig County Board of Supervisors authorized the Craig County School Board to secure a Literary Loan for construc-
tion of an elementary school, alterations plus an addition to the present high school. These were in the form of two separate applications on which approval for both was given depending upon availability of funds.

"At present it appears that the funds for one project will be available after the June meeting of the State Board of Education. However funds for the second project probably will not be available until December, 1968. We had planned to submit both of these jobs for bids at the same time in order that we might receive more favorable bidding. We have been told by building authorities that the cost will be considerably increased if we attempt to take these projects one at a time.

"In view of the above information the School Board appeared before the Craig County Board of Supervisors and requested that permission be granted for the School Board to borrow up to $250,000 during the period of August 15 through December 15, 1968, for the purpose of carrying out both projects at one time. The Board of Supervisors was receptive to the proposal if it could be legally done and I was requested to secure a ruling from you in this regard."

I am of the opinion that the loan in question may be negotiated in accordance with the provisions of § 22-120 of the Virginia Code, as restricted by §§ 15.1-545 and 15.1-546 of the Virginia Code.

In this connection, I am forwarding to you copies of two recent opinions of this office dated September 6 and September 22, 1966, in which a situation substantially similar to that which you present was considered and discussed, and the views of this office with respect to the interrelationship of the above-cited provisions of Virginia law were stated. See, Report of the Attorney General (1966-1967), pp. 250-251.

SCHOOLS—School Boards—May not expend State funds for construction of building on property owned by federal government.

SCHOOLS—School Boards—May accept title to buildings owned by federal government.

SCHOOLS—School Boards—Sublease of property by federal government depends on term of original lease with State of Virginia.

Honorable Woodrow W. Wilkerson
State Superintendent of Public Instruction

May 13, 1968

I am in receipt of your letter of April 23, 1968, in which you present several questions which will be stated and considered seriatim.

One: "Several school boards maintain and operate schools on military installations under a 'building use permit.' The buildings and land on which such buildings are located are titled in the name of the United States Government.

"Question: Can local school boards expend local or State funds for the construction of additions to existing buildings which are owned by the Federal Government and located on Federally-owned land?"
Answer: No. In this connection, I am forwarding to you a copy of a previous opinion of this office dated May 16, 1956, to the Honorable Robert S. Wahab, Jr., Commonwealth's Attorney for Princess Anne County, in which the question you present was considered and discussed. See, Report of the Attorney General (1955-1956), p. 175.

Two: "Several school boards operate schools in buildings and on sites owned by the Federal Government. Under the provisions of recent Federal legislation, the U. S. Office of Education is willing to transfer title to the building to county or city school boards, but the sites are subject to a 25-year lease, with a renewal clause.

Questions:
1. Is it legal for school boards to accept title to such buildings when title to the land on which such buildings are located is retained by the Federal Government?
2. If the answer to Question 1 is in the affirmative, can local school boards expend local or State funds for additions and/or major repairs to such buildings?"

2. No. See answer to Question One above.

Three: "The property occupied by Fort Monroe is leased to the Federal Government by the State of Virginia.

Questions:
1. Can the Federal Government sublease a portion of such property to a local school board for the construction of school facilities?
2. If the answer to Question 1 is in the affirmative, can local school boards expend local or State funds for the construction of new school buildings, or additions to existing buildings, on such subleased property?"

Answer: 1. Resolution of this question would depend upon the authority of the Federal Government to sublease the premises in question under the terms of the Federal Government's lease with the State of Virginia.
2. This inquiry would also be controlled by the response to Question One above unless the property in question comes within the provisions of § 22-107.1 of the Virginia Code.

SCHOOLS—School Boards—No authority to use public school buses for private school pupils.

March 4, 1968

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

This is in reply to your letter of February 29, 1968, in which you inquire whether county school buses may transport parochial school pupils over established bus routes to the public school, there to be picked up by a bus from the parochial school.

I am unable to find any authority which would permit county school boards to transport private school pupils on the school buses of the public school system. This office has previously ruled that § 22-72.1 of the Code, which

For the foregoing reasons, I am of the opinion that a county has no authority to transport private school pupils and that therefore your question must be answered in the negative.

SCHOOLS—School Boards—Not required to pay for physical examinations of personnel.

June 18, 1968

HONORABLE JOHN E. DODSON
Assistant Commonwealth’s Attorney for Chesterfield County

Your letter of June 13, 1968, calls attention to § 22-249 of the Code of Virginia, as amended by the 1968 General Assembly [ch. 445], requiring all school personnel to furnish a certificate from a reputable physician certifying that such personnel “have been examined, x-rayed and tested for the existence in such personnel of tuberculosis and that the results of such examination are negative.” You then inquire if “the local school board will be required to pay the cost of these examinations.”

The 1962 General Assembly enacted Chapter 544, now § 22-276.1 of the Code. This required that school bus drivers “furnish a certificate signed by a physician licensed by this State attesting that such physician has examined the applicant within thirty days preceding the date of the application for such employment . . . .” The State Department of Education released a memorandum to the Division Superintendents of Schools to the general effect that the school boards were not required to pay the cost of these examinations.

This office, without formal opinion, acquiesced in this interpretation and this has remained in force to date. I am of the opinion that the costs of the examination required by § 22-249 are in a similar status.

Although this matter is not entirely free from doubt, the effect of this is that the local school board is not covered by § 40-22.1, as amended in 1962.

SCHOOLS—Teachers—Who marry within prohibited degree of relationships—If regularly employed prior thereto, employment not prohibited.

May 6, 1968

HONORABLE PAUL X BOLT
Commonwealth’s Attorney for Grayson County

I am in receipt of your letter of April 26, 1968, in which you present the following situation and inquiry:
"A person who was first employed in 1946 by a Virginia School Division and later in about 1956 was employed by a second Virginia School Division. Later the person was employed in a third Virginia School Division and after approximately one year was married to a person within the prohibited degree of relationship as provided by Section 22-206 Code of Virginia 1950, as amended.

"Please advise whether it is lawful for this person to continue her employment by the said School Division after said marriage or would this be prohibited under the aforementioned Code section?"


Said § 22-206 of the Code is as follows:

"It shall not be lawful for the school board of any county, city or of any town constituting a separate school district to employ or pay any teacher or other school board employee from the public funds if such teacher or other employee is the father, mother, brother, sister, wife, son, daughter, son-in-law or daughter-in-law, sister-in-law or brother-in-law of the superintendent, or of any member of the school board. This provision shall not apply to any such relative employed by any school board at any time prior to June twenty-first, nineteen hundred thirty-eight. This provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board or division superintendent of schools, or who has been regularly employed by any school board prior to the inception of such relationship or relationships..." (Emphasis supplied.)

From what you state, I understand that this person had been regularly employed by various school boards before her marriage to a person within the prohibited degree of relationship of the statute; hence, she is within the exception to the statute.

I am, therefore, of the opinion that the employment of this person by a school board would not be prohibited by § 22-206 of the Code.

SCHOOLS—Trustee Electoral Board—No authority to remove a member of the school board.

HONORABLE ROBERT E. GILLETTE
Commonwealth's Attorney for Nansemond County

June 17, 1968

I have your letter of June 13, 1968, which reads, in part, as follows:

"The Chairman of the Nansemond County School Trustee Electoral Board has been requested by a group of Nansemond County citizens to call a meeting of the Nansemond County Electoral Board to consider
a petition and request of said citizens concerning the removal of a newly appointed member of the School Board and the reappointment of a former member of the School Board should the present member be, in fact, removed.

"The Chairman of the Nansemond County School Trustee Electoral Board has asked me to write to you to ascertain

"1. if the school Trustee Electoral Board has any authority to call a meeting for such purpose, and
"2. whether or not the School Trustee Electoral Board has any power to remove a member of the School Board."

Section 22-60 of the Code of Virginia provides for a school trustee electoral board in each county. Section 22-61 provides, in part, that the county school board shall consist of one member appointed for each school district in the county by the school trustee electoral board. Section 22-62 of the Code provides what notice shall be given by the school trustee electoral board prior to the meetings for the purpose of appointment of the members of the county school board. Section 22-65 provides that vacancies in the membership of the county school board shall be filled for the unexpired term by the school trustee electoral board.

I find no statute that gives any powers or duties to the county school trustee electoral board after the appointment by it of a member or members of a county school board.

Therefore, I would answer both questions (1) and (2) in the negative.

SCHOOLS—Tuition—Students of one locality attending school in another—May be agreed upon by locals boards concerned.

HONORABLE CLARENCE E. MAJOR
Division Superintendent of Schools, King William County

This will reply to your letter of August 16, 1967, in which you request my opinion upon the legality of the procedure followed in the distribution of Basic State School Aid Funds between King William County and the Town of West Point under the following circumstances:

1. West Point is a separate school district in King William County and operates its own schools.
2. Some pupils from the county attend schools in West Point under an arrangement between the respective school boards. Pupils from that area of the county adjacent to the Town of West Point have been attending school in West Point for a number of years.
3. King William School Board pays to the West Point School Board $3,750.00 per year at the present time for the privilege of county pupils to attend the town's schools. The county pays all transportation costs.
4. Pupils attending West Point schools do not pay any tuition.
5. West Point receives the basic appropriation from the State based on the average daily attendance of all pupils enrolled in West Point schools. King William County does not claim nor receive
basic appropriation for the county pupils attending school in West Point.

6. A delegation of county citizens appeared at the July meeting of the School Board to protest that this procedure for distribution of the basic appropriation is illegal according to section 22-146.4 of the State Code.

7. The King William School Board assumes that the basic appropriation should be paid to the school district where the children are enrolled. West Point levies its own taxes and operates a completely separate school system. County residents pay no taxes to West Point. The payment of $3,750.00 to the town from the county partially defrays the local cost of operation in the town.

Initially, I am of the opinion that § 22-146.4 of the Virginia Code, to which reference is made in paragraph (6) of your communication, has no applicability to the situation you present. This statute is a portion of Chapter 8.1 of Title 22 of the Virginia Code and relates to State aid for the construction of school buildings. I am advised by the State Board of Education that no funds are allocated—or are available to be allocated—under this chapter, and its provisions would not be relevant to the distribution of the funds concerning which you inquire.

The basic statutory authorization for arrangements such as you describe in your communication is § 22-219 of the Virginia Code which provides:

"The school board of each county, city or town operating as a separate school district shall have the power to make regulations whereby persons other than those defined in § 22-218 who are residents of the State of Virginia may attend school in such county, city or town, and may charge tuition for the attendance of such persons in such schools, provided, however, that the tuition charge for any such person shall not exceed the total per capita cost of education, exclusive of capital outlay and debt service, for high school or elementary pupils, as the case may be, of such county, city or town, except in cases where the tuition charge is payable by the school board of the county, city or town of the pupil's residence pursuant to a contract entered into between the school board of the two localities, in which case the tuition charge shall be that fixed by such contract."

Pursuant to the authority of the above quoted statute, a school board of one locality (King William County) may contract with the school board of another locality (Town of West Point) for its residents to attend the public schools in the latter locality. The terms of such agreement may provide for the county school board to pay the total tuition costs to the town school board and claim Basic State School Aid Funds on account of such pupils, or the terms of such an agreement may provide for the county school board to pay only the locality's share of the total tuition costs and permit the town school board to claim Basic State School Aid Funds on account of such pupils. From your communication, it would appear that the latter of the above outlined alternatives was adopted in the agreement between the school boards of King William County and the Town of West Point and I am of the opinion that this procedure is entirely consistent with Virginia law.
SHERIFFS AND SERGEANTS—City Sergeant—May not serve as chief of police.

PUBLIC OFFICERS—Compatibility—City sergeant may not serve as chief of police.

January 19, 1968

HONORABLE A. E. RHODENIZER
City Sergeant for the City of Lexington

This is in reply to your letter of January 3, 1968, which reads as follows:

“The charter of the City of Lexington made no provision for the election of a city sergeant. It was to be an appointive job at the pleasure of city council. Subsequently, your office rendered an opinion that Lexington must have a city sergeant elected by the citizens.

“No candidate was proposed or filed for city sergeant for the 1967 general election. Space was provided on the ballot for a write-in candidate. Having acted in this capacity when Lexington was a town and after it became a city, I was elected to this office as a write-in candidate.

“I am the Chief of Police of Lexington and, as such, an official appointed by the city council. It is my desire to avoid anything that would endanger or conflict with my job as Chief of Police. Is there any restriction against serving the City of Lexington in both capacities?”

In my opinion, you may not serve as both Chief of Police and City Sergeant. Section 15.1-824 of the Code provides that a city sergeant shall exercise the same powers and perform the same duties in his city as a sheriff exercises and performs in his county.

Section 15.1-50 of the Code prohibits sheriffs from holding any other office, elective or appointive, at the same time. In my opinion, this same provision would apply to city sergeants. Thus, you may not serve as Chief of Police and City Sergeant at the same time.

SHERIFFS AND SERGEANTS—City Sergeant—Must be resident of city in which elected or appointed.

March 29, 1968

HONORABLE JOHN W. HAGEN
Member, House of Delegates

This is in reply to your letter of March 13, 1968, which reads as follows:

“I am requesting an opinion as to the qualifications for a City Sergeant for the City of Salem. The main question that has arisen is that a nonresident of the City of Salem has been appointed to this constitutional office. He is a resident of Roanoke County, a voter in Roanoke County, and has not qualified, apparently, under the Code.”

In my opinion, a city sergeant must be a resident of the city in which he is elected or appointed. See, Section 32 of the Constitution of Virginia and
§ 15.1-51 of the Code. The last sentence of § 15.1-51 is applicable. It reads as follows:

"Every city and town officer except members of the police and fire departments and town attorney shall, at the time of his election or appointment, have resided one year next preceding his election or appointment in such city or town unless otherwise specifically provided by charter."

SHERIFFS AND SERGEANTS—City Sergeant—Residence requirements.

HONORABLE JOHN W. HAGEN
Member, House of Delegates

This is in reply to your letter of May 3, 1968, in which you refer to my earlier opinion of March 29, 1968, concerning the appointment of the sergeant for the City of Salem. You indicate that the individual in question moved from Roanoke County to the City of Salem on or about March 1, 1968, and that he was appointed to the position of City Sergeant at about that same date. You further indicate that he had not previously resided in the City of Salem nor had he resided in the Town of Salem prior to its becoming the City of Salem on or about January 1, 1968.

You ask whether this person was eligible to be appointed sergeant of the City of Salem. In my opinion, the answer is in the negative. In my letter of March 29, 1968, you were referred to § 15.1-51 and the applicable provision therefrom was quoted. See, also, Report of the Attorney General (1954-1955), p. 211.

SHERIFFS AND SERGEANTS—City Sergeant of Lexington—Is an elected official, not appointed.

HONORABLE HENRY J. FORESMAN, Secretary
Electoral Board, City of Lexington

This is in reply to your letter of September 12, 1967, and in confirmation of our telephone conversation of September 27, 1967. Your letter reads, in part, as follows:

"Section 44 of the Charter of the City of Lexington (Chapter 662, Acts of the General Assembly—1966, approved 6 April 1966) provides that the Council of the City of Lexington shall fill any vacancy in the office of City Sergeant. This provision appears to be in conflict with the mandate of Section 120 of the Constitution of Virginia and Section 24-161, Code of Virginia, 1950, as amended.

"No candidate has qualified to have his name appear on the ballot to be used in the general election to be held on 7 November 1967 for election to the office of City Sergeant. The present holder of such office by virtue of appointment by the Council of the City of Lexington
is Chief of Police A. E. Rhodenizer, and such incumbent has been advised that such office is appointive, rather than elective. Therefore, Chief of Police A. E. Rhodenizer did not qualify as a candidate for the office of City Sergeant at such general election.

"The Electoral Board of the City of Lexington has been advised that no salary attaches to the office of the City Sergeant nor is the appropriation of any such salary contemplated by the Council of the City of Lexington.

"Under these circumstances, may the Electoral Board of the City of Lexington rely upon the provisions of the foregoing Section 44 of the Charter of the City of Lexington and omit any reference to the election of a city sergeant from the ballot to be used at such general election, or must such Electoral Board provide space for a 'write-in' election of a city sergeant on the ballot to be used therein because of the conflict between such Section 44 and the foregoing Section 120 of the Constitution of Virginia?"

Section 44 of the charter of the City of Lexington, to which you refer, provides for the appointment of a city sergeant by the City Council. Applicable portions of Section 117(b) of the Constitution of Virginia provide as follows:

"(b) The General Assembly may, by general law or by special act (passed in the manner provided in article four of this Constitution) provide for the organization and government of cities and towns without regard to, and unaffected by any of the provisions of this article, except those of sections one hundred and twenty-four, one hundred and twenty-five (except so far as the provisions of section one hundred and twenty-five recognized the office of mayor and the power of veto), one hundred twenty-six and one hundred and twenty-seven of this article, and except those mentioned in subsection (d) of this section. . . ." (Italics supplied)

Subsection (d) of Section 117 provides:

"(d) Any laws or charters enacted pursuant to the provisions of this section shall be subject to the provisions of this Constitution relating expressly to judges and clerks of courts, attorneys for the Commonwealth, commissioners of revenue, city treasurers and city sergeants."

Applicable portions of Section 120 of the Constitution of Virginia, to which you refer, provide 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; and a mayor for a term of four years, who shall be the chief executive officer of such city. . . ." (Italics supplied.)

It is clear that Section 117(d) requires the charter of the City of Lexington to be subject to those provisions of Section 120 which relate expressly to city sergeants. It is also clear that Section 120 requires that the city sergeant be an elected and not an appointed official. Therefore, in my opinion, Section 44 of the city charter, to which you refer, providing for the appointment of a city sergeant is invalid, as violative of the referenced portions of Sections 117 and 120.
of the Constitution. It goes without saying that any appointment made by the city council pursuant to Section 44 of the charter is likewise invalid.

Section 51 of the city charter provides for the continuance in office of officials and officers elected or appointed and qualified prior to the effective date of the charter. I am informed that pursuant to the provisions of Section 44 of the charter of the Town of Lexington, a town sergeant had been appointed and was serving prior to the effective date of the new city charter (see, Acts of Assembly of 1932, Chapter 321, page 573). In my opinion, on the effective date of the new charter, the town sergeant became the city sergeant and presently continues in that office.

Section 15.1-991 of the Code, found in Chapter 22 of Title 15.1, requires that:

"At the next general election of State officers after the municipality is declared to be a city of the second class, and succeeding the expiration of the regular term of office of the existing municipal officers, to be held on Tuesday after the first Monday in November, when similar officers are elected for other cities, there shall be elected in such city a city treasurer, commissioner of the revenue, if elected by the general law, a justice of the peace for each ward, a city sergeant and other officers elective by the qualified voters, whose election is not otherwise provided for by law, whose term of office shall begin on the first day of January next succeeding their election and continue for four years and until their respective successors have been elected and qualify; provided, however, that the commissioner of revenue shall be elected or appointed as the general law may direct."

In view of the invalidity of Section 44 of the city charter, § 15.1-991 is directly applicable. The next general election "of State officers after the municipality is declared to be a city of the second class" is Tuesday after the first Monday in November, 1967, Lexington having become a city of the second class on December 31, 1965.

Therefore, it is my opinion that pursuant to § 15.1-991, the City of Lexington is required to elect a city sergeant during the general election to be held on the Tuesday after the first Monday in November, 1967. You have indicated that no candidates have qualified for the office and that a "write-in" election will be necessary.

SHERIFFS AND SERGEANTS—Deputy's Wife—May not serve as justice of the peace.

JUSTICE OF PEACE—Deputy Sheriff's Wife—May have name listed on ballot but may not serve if elected if husband is deputy.

ELECTIONS—Candidates—Wife of deputy sheriff may have name listed on ballot.

August 22, 1967

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

This is in reply to your letter of August 8, 1967, in which you request my opinion in regard to the questions which I quote as follows:
"(1) Can the wife of a deputy sheriff in one of our counties serve as a justice of the peace?

"(2) Can the wife of a deputy sheriff stand for election and have her name listed on the ballot to the office of county justice of the peace, even though your answer to Question #1 is no?"

In respect to the questions presented, Chapter 402, Acts of Assembly of 1964, amended the Code by adding in Title 39 a section numbered 39-7 which is as follows:

"No person whose spouse is a law enforcement officer or is otherwise charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof shall be eligible for appointment or election to the office of justice of the peace in any county, city or town in this State, nor shall any person whose spouse is a clerk, deputy clerk, assistant clerk, or employee of any such clerk, of the court of record of a county, city or town be eligible for election or appointment to the office of justice of the peace of such county, city or town. This section shall not apply to incumbents of such office who are in office when this section becomes effective."

Since a deputy sheriff is a law enforcement officer or is otherwise charged with the duty of enforcing the laws of this State, this section undoubtedly applies to the spouse of a deputy sheriff. The last sentence in the section excepts from the operation thereof a spouse who was an incumbent of the office of justice of the peace when the section became effective. By reference to the Act itself and a notation found at page 1137 of the Acts of Assembly of 1964, it is noted that this Act became effective June 26, 1964.

In consideration of the foregoing, unless such spouse was an incumbent of the office of justice of the peace on the date the Act became effective, so as to entitle her to the saving clause thereof, she could not be elected or appointed to such office thereafter. Based on the given facts, therefore, I am of the opinion that your question numbered (1) must be answered in the negative.

In reference to your question numbered (2), I know of no law to prevent such person from standing for election or having her name listed on the ballot, provided she has complied with the necessary legal requirements. Her status could change so as to leave her eligible under § 39-7 at election time. Otherwise, however, this section would prevent her election to the office of justice of the peace.

There is enclosed a copy of an opinion found in Report of the Attorney General (1964-1965), p. 152, which may be of interest to you.

SHERIFFS AND SERGEANTS—Duties—Required to serve summons from traffic court.

SHERIFFS AND SERGEANTS—Compensation for Serving Traffic Summons—Fee of $1.00 plus mileage.

HONORABLE CHARLES B. ENGLISH
Sheriff of Westmoreland County

This is in response to your letter of January 17, 1968, in which you stated
that you have received a summons from the Traffic Court of the City of Richmond to be served upon a resident of Westmoreland County. You point out that you are required to travel twenty to thirty miles on some occasions to serve process of this sort and inquire if you are required to serve the same.

The summons is directed to you pursuant to the provisions of § 8-44 of the Code, which is made applicable to process in both civil and criminal cases by § 19.1-179 of the Code. You are required by the provisions of § 15.1-79 of the Code to execute the summons.

In view of the foregoing, I am of the opinion that you are required to serve the summons.

You next inquire if you are entitled to a fee for the service of the same. I am of the opinion that you are entitled to a fee of $1.00 as prescribed by § 14.1-111 of the Code of Virginia.

You should, of course, report your mileage in connection with serving such a summons on the usual form to the Compensation Board.

SHERIFFS AND SERGEANTS—Medical and Hospital Service for Prisoners—City sergeant’s responsibility.

JAILS AND PRISONERS—Medical and Hospital Service—City sergeant’s responsibility.

MR. CHARLES H. LEAVITT
Sergeant, City of Norfolk

November 24, 1967

This is in response to your recent letter, which reads as follows:

"A prisoner having been committed to the custody of the Norfolk City Jail in May 1967, charged with a felony, and still awaiting trial, was found unconscious in his cell on November 8th, 1967, at 2:00 P.M. The jail physician could not be located, therefore, police assistance was requested to transport the prisoner to the hospital for emergency treatment. By the time the police arrived the prisoner had regained consciousness and informed the jail officer that he did not want to go to the hospital. The police officers overheard the prisoner say that he did not want to go to the hospital, and, therefore, refused to comply with the City Sergeant’s request to remove the prisoner to the hospital for medical examination.

"Query:
"(1) Who is required to assist in such matters?
"(2) Are the police not required to follow directions of the City Sergeant?"

Section 53-175 of the Code of Virginia provides that you shall purchase all provisions and medicines for the prisoners in your jail. It is your responsibility to see to the care of prisoners committed to your institution. Section 53-184 provides for the employment of a regular jail physician and for the employment of other physicians under certain circumstances. Section 53-185 provides that the City Sergeant, with the approval of the jail physician, may make arrangements for any unusual medical, hospital, or dental service for a prisoner.

In view of the foregoing, I am of opinion that you may authorize, with the
approval of the jail physician, such medical care as is necessary and that the 
actual transfer of a prisoner to the hospital is the responsibility of you and your 
staff.

I find no provision contained in the charter of the City of Norfolk or in the 
Code of Virginia which would require the assistance of personnel outside your 
department nor authorizing you to give directions to the police department 
under the factual situation set forth above.

SHERIFFS AND SERGEANTS—Use of Privately Owned Vehicle on State 
Business—Subject to approval of Compensation Board and board of super-
visors.

June 13, 1968

HONORABLE G. L. FORRESTER
Sheriff of Lancaster County

This is to acknowledge receipt of your letter of June 3, 1968, in which you 
state, in part:

"I have two deputies other than myself and the county has purchased 
two police cars but has refused to buy a third. I plan to give one of the 
cars to one of the deputies and drive my personal car. . . . 
"The question I would like answered is can the Board of Supervisors 
withhold or refuse to pay me mileage on my personal car?"

In response to your inquiry, I call your attention to § 14.1-77 of the Code 
which deals specifically with traveling expenses of sheriffs and sergeants. That 
section reads in part as follows:

"Notwithstanding the provisions of the foregoing section (§ 14.1-76), 
the governing body of any county or city may, with the approval of the 
Compensation Board, enter into such agreement with the sheriff or 
sergeant of such county or city with respect to the traveling expenses, 
including the use of privately owned vehicles, of such sheriff or sergeant 
and his deputies as the governing body may deem proper. . . ." (Italics 
Supplied.)

In light of the above-quoted statute, I am of the opinion that in the absence 
of an agreement approved by the Compensation Board, the board of supervisors 
would not be required to pay mileage on your personal car in the situation you 
present.

STATE INSTITUTIONS—Longwood College—Prohibited from providing resi-
dent facilities for male students.

January 19, 1968

HONORABLE HENRY I. WILLET, JR.
President, Longwood College

This is in reply to your letter of January 8, 1968, in which you outline 
a recommendation to admit male students to the Longwood College summer
school of 1968 on either a day student or boarding student basis, and request my legal opinion of the provisions of § 32, Chapter 719, Acts of Assembly of 1966, as regards male boarding students at your summer school.

Section 32, which is included under the heading "Restricted Expenditures" in the named appropriation act, is as follows:

"No public funds or money shall be expended to provide resident facilities, or for plans to provide resident facilities, for male students at the following institutions of higher education: Longwood College, at Farmville; Mary Washington College, at Fredericksburg; Radford College, at Radford."

In my opinion, the quoted section prohibits the admission of male boarding students at the named colleges, including Longwood College. In respect to your reference to amendatory legislation affecting Longwood College, the matter could be resolved by an amendment deleting the latter from the section.

STATE INSTITUTIONS—Mary Washington College—Not subject to ordinances of City of Fredericksburg—Police officers of city have jurisdiction on grounds of college—Limitations of authority of special police of college.

ORDINANCES—City of Fredericksburg—Traffic—Do not apply to Mary Washington College.

ARREST—Special Police of Mary Washington College—Limitation of authority.

September 12, 1967

HONORABLE J. M. H. WILLIS, JR.
Commonwealth's Attorney for the City of Fredericksburg

I am in receipt of your letter of August 25, 1967, in which you present the following situation and inquiries:

"As you know, Mary Washington College is a branch of the University of Virginia. The main body of the college is included in the boundaries of the City of Fredericksburg, although I believe the College does own a tract of woodland which extends out into Spotsylvania County.

"The College has its own police force which I understand exists upon appointment by the Circuit Court under the provisions of Section 19.1-28 and/or Section 19.1-30 of the Code.

"The following questions have been raised:

1. Are City Ordinances applicable to, and enforceable upon, the grounds of the College? Can the City regulate traffic upon the College grounds? In this connection, I refer you to Section 15.1-516 which provides that upon request of the appropriate authorities of the College the City may enact the ordinance governing parking.

2. Do Fredericksburg police officers have jurisdiction on the College grounds? I can find nothing denying them such authority, unless the University's charter provides that its grounds shall not be considered a part of the localities in which they are.
3. Do the college police have authority to enforce City Ordinances?

It would seem that they would have authority to enforce the parking ordinances provided for in Section 15.1-516 of the Code, but the question has been raised whether they can enforce City Ordinances generally on the College grounds, or on the adjacent streets and sidewalks.

The questions you present will be considered in the order stated.

In the absence of a provision in the charter of the City of Fredericksburg expressly conferring upon the City Council jurisdiction of Mary Washington College, I am of the opinion that city ordinances generally would not be applicable to, or enforceable upon, the grounds of the college. See, Report of the Attorney General (1938-1939), p. 180. So far as the regulation of traffic upon the college grounds is concerned, I am forwarding to you a copy of an opinion of this office, dated January 10, 1966, in which it was ruled that cities and towns are not authorized to enact traffic ordinances with respect to private property, and I am of the opinion that the view expressed in the enclosed ruling would be equally applicable to the situation you present. See, Report of the Attorney General (1965-1966), p. 229.

True it is, as you point out, that § 15.1-516 of the Virginia Code authorizes counties and cities, upon request of the governing body of certain State-supported institutions, to regulate the parking of motor vehicles upon those portions of the grounds of such institutions as may lie within the county or city. In this connection I am forwarding to you a copy of an opinion of this office dated April 16, 1965, in which the applicability of the above-mentioned statute to the grounds of Western State Hospital in the City of Staunton was considered and discussed at length. See, Report of the Attorney General (1964-1965), p. 315. See, also, § 15.1-139, Code of Virginia (1950), as amended.

With respect to your second inquiry, I have been unable to discover any provision of Virginia law which would deprive police officers of the City of Fredericksburg of jurisdiction on the grounds of Mary Washington College.

With regard to your concluding question, § 19.1-28 of the Virginia Code authorizes certain courts of any city in which a University or College is located to appoint one or more citizens as conservator or conservators of the peace. This statute also provides:

"The jurisdiction of such conservators of the peace shall extend over the grounds attached to such place, university, college, institution, hospital or colony within such limits as shall be prescribed in the order appointing any such conservator; provided, however, that the jurisdiction of any conservator appointed for a university or college located within a city may also extend to the streets and sidewalks adjacent to the grounds thereof..." (Italics supplied.)

In view of the position taken in response to your initial inquiry concerning the non-applicability of city ordinances generally to the grounds of the college, I am constrained to believe that the "college police" would not have authority to enforce such ordinances upon the grounds of Mary Washington College. However, in light of the language of § 19.1-28 italicized above it would appear that the jurisdiction of such police may extend to the streets and sidewalks adjacent to the grounds of the college and that city ordinances applicable to such streets and sidewalks could therefore be enforced by the college police. The existence of such authority would depend upon the limits prescribed by the
court in its appointing order. In this connection, I am forwarding to you a copy of a previous opinion of this office dated August 9, 1963, in which the order of the court there under consideration was limited in applicability to the campus of Virginia Polytechnic Institute and precluded the special police officers in that instance from making arrests outside the jurisdiction conferred upon them by the court. See, Report of the Attorney General (1963-1964), p. 279.

STATE INSTITUTIONS—Tuition—Free to children of War Veterans.
EDUCATION—Tuition—State colleges—Free to children of War Veterans.

January 29, 1968

MR. JAMES B. CEPHAS
Treasurer-Comptroller, Virginia State College

This is in reply to your letter of January 18, 1968, which reads as follows:

"We are confronted with a problem of determining the amount of tuition allowance to be granted a student who has been certified to us by the Director of the Division of War Veterans' Claims as provided in the Acts of the General Assembly under Section 23-7.1.

"The student involved (Deborah M. Edley) whose home address is Washington, D. C., is making claim for the non-resident portion of the tuition cost. That is, in the tuition and fee item of our catalogue $534.00 is required of Virginia students for the 1967-68 school year. This same fee for non-Virginia students is $744.00. Included in each of these figures is an item of $164.00 for liquidation of bonded indebtedness and other fees required of all students; therefore, the net cost of tuition alone is $370.00 for Virginians and $580.00 for non-Virginians.

"The specific question is whether it is permissible or mandatory under the above referenced statute for the college to make an award of $580.00 to a non-Virginia student or should the award be limited to $370.00 the maximum tuition cost of a Virginia student?"

Enclosed is a copy of an opinion of this office to the Bursar of the University of Virginia, dated September 10, 1962, (see, Report of the Attorney General (1962-1963), p. 240), which answers your question. Under § 23-7.1 (2), the non-resident student is entitled to free tuition, regardless of the difference between resident and non-resident tuition. The fact that as a non-resident she would otherwise pay more tuition than a resident in no way limits her statutory right to be admitted completely "free of tuition."
STATE INSTITUTIONS—Tuition—Reduced for domiciliaries and residents of Virginia.

EDUCATION—Tuition—Reduced for domiciliaries and residents of Virginia.

February 2, 1968

MR. ADOLPH H. PHILLIPS
Business Manager, Madison College

This is in reply to your letter of January 30, 1968, in which you inquire as to the eligibility of the children of military personnel to receive the benefit of the reduced tuition paid by Virginia residents.

Section 23-7 of the Code of Virginia provides that no person shall be entitled to the reduced tuition charges or other privileges accorded by law only to residents of the State of Virginia in the State institutions of higher learning "unless such person has been domiciled in and has been an actual bona fide resident of Virginia for a period of at least one year prior to the commencement of the term. . . ."

The reduced tuition for Virginia residents would be available only to those children who satisfy both the domicile and residence requirements of § 23-7 of the Code. Whether or not these requirements have been met would, of course, depend upon the facts and circumstances of each case, and additional information concerning the status of the individual concerning whom you inquire would be necessary before such a determination can be made in this instance.

TAXATION—Assessment—No authority for a town to impose minimum tax on real estate.

TOWNS—Taxation—Assessment—No authority to impose minimum tax on real estate.

April 19, 1968

HONORABLE JULIEN J. MASON
Member, House of Delegates

This is in reply to your letter of April 15, 1968, which reads as follows:

"Can an incorporated town have a minimum real estate tax on unimproved property, consisting of vacant lots, which would be in excess of the tax rate set by the town, multiplied by the assessed value of said unimproved property or lots?

"For example, a vacant lot may be assessed at $100.00 for tax purposes and if the tax rate is 60¢ per $100.00 assessed valuation, the town tax on the lot would be 60¢. Can the town have a minimum tax on all vacant lots of $1.00 per vacant lot, or piece of real estate, on the ground that it costs at least $1.00 to send out and collect taxes on any parcel of real estate, no matter what the tax would be?"

I am not aware of any provision of Virginia law which authorizes a town to impose a minimum tax of one dollar upon real estate, which tax would be at variance with that which would result from the application of the existing
tax rate to the assessed value of the property in question. In this connection, I call your attention to that provision of § 58-839 which permits the governing bodies of counties to make no assessment upon tangible personal property which is of such small value that the local levy for the year would result in a tax of less than one dollar; however, no similar provision is made by Virginia law with respect to disregarding de minimis taxes on real property.

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TAXATION—Collection by Installments—All cities and towns authorized—Certain counties have authority.

COUNTIES, CITIES AND TOWNS—Collection of Taxes in Installments—All cities and towns authorized, only certain counties.

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

February 1, 1968

This is in reply to your letter of January 25, 1968, which reads as follows:

"Would you be kind enough to give me your opinion if counties in Virginia have the authority to collect real estate taxes in two installments each year.

"Cities and town have this authority and I am told there is a statute that gives all counties general authority which may now be conferred on cities and towns by statute."

By § 58-847 of the Code of Virginia, counties in certain population brackets and all cities and towns are authorized to collect property taxes in installments. By virtue of § 15.1-522 of the Code, the General Assembly has classified certain other counties and conferred upon them the same powers which it has conferred generally upon cities and towns. See, Board of Supervisors v. Corbett, 206 Va. 167, 169. Section 58-847 of the Code is a general grant of power to all cities and towns to provide for the collection of taxes on property by installments.

I am, therefore, of the opinion that the counties in the population brackets set forth in § 15.1-522, as well as those in the population brackets set forth in § 58-847, are authorized to provide for the collection of property taxes in installments.

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TAXATION—Contractor's License Tax—May be imposed upon contractor where Commonwealth is party to contract.

TAXATION—Contractor's License Tax—Not exempt under Section 183 of Virginia Constitution or Code § 58-12.

March 12, 1968

HONORABLE J. PATRICK GRAYBEAL
Commonwealth's Attorney for Montgomery County

This is in reply to your letter of March 7, 1968, requesting my opinion on the following two questions:
"(1) Can the County impose a contractor's license tax on a contractor performing work for the Commonwealth?

"(2) Can such license tax be imposed on a contractor doing work for any tax exempt organization?"

A contractor's license tax is a privilege tax and not affected by the provisions of Section 183 of the Constitution or § 58-12 of the Code which exempts property owned directly or indirectly by the Commonwealth from taxation.

Exemptions from taxation are strictly construed. The words "rights, privileges and franchises" are not to be construed to include an exemption from taxation unless all doubt of the intention of the legislature to include it is removed by other provisions.

I am aware of no provision of the Constitution of Virginia or of the statutory law of the State whereby a contractor is exempted from the payment of the contractor's license tax solely because the Commonwealth is a party to the contract. I therefore answer your first question in the affirmative.

Your second question is also answered in the affirmative. The tax exempt organizations to which you refer are those found in Section 183 of the Constitution and § 58-12 of the Code. The tax exemptions provided for in these sections do not extend to a contractor's license tax.

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**TAXATION—Credit to Taxpayer—When land acquired by State, county, municipality or church or religious body**

**EMINENT DOMAIN—Taxation—Credit allowed taxpayer where land acquired by State.**

October 16, 1967

HONORABLE JACK P. BLANKENSHIP

Commissioner of the Revenue of Campbell County

This is in reply to your letter of October 6, 1967, in which you present the following question:

"Does highway condemnation, religious organizations, and/or any similar acquiring of real estate after the taxable year has begun constitute any abatement or proration of taxes for the ensuing year?"

Section 58-822 of the Code of Virginia (1950), as amended, provides for the relief from the payment of taxes and levies on property taken in any manner by the State or any county or municipality thereof or any church or religious body after the taxable year has begun. The pertinent portion of this section reads:

"§ 58-822. All taxpayers of this State whose property, or any portion thereof, shall have been or may be given to, sold to or taken in any manner whatsoever by this State or any county or municipality thereof or any church or religious body, which is exempt from taxation by § 183 of the Constitution, shall be relieved from the payment of taxes and levies on such property as shall be so taken or acquired for that portion of the year in which the property was or shall be so taken"
REPORT OF THE ATTORNEY GENERAL

or acquired, from and after the date upon which the title was or shall be vested in this State or any county or municipality thereof or any such church or religious body..."

TAXATION—Delinquent—Collection by deputy county treasurer for additional compensation—Incompatible with duties as deputy treasurer.

June 14, 1968

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for Wise County

This is in reply to your letter of June 11, 1968, which reads as follows:

"The Board of Supervisors of Wise County proposes to employ the Deputy Treasurers of Wise County as delinquent personal property tax collectors and pay them 25% commission on the collection of delinquent personal property tax. Would you please advise if there is any statute prohibiting the same?"

While I cannot advise you that there is any statute expressly prohibiting a deputy treasurer from acting in the capacity of collector of delinquent personal property taxes, I am of the opinion that for him to do so for additional compensation would be incompatible with his duties as deputy county treasurer.

In an opinion of this office February 28, 1941, to the Honorable G. M. Weems, Treasurer of Hanover County, published in the Report of the Attorney General (1940-1941), p. 194, the reasons why this would be incompatible with the duties of the office of county treasurer, of which the deputy treasurer is a part, were pointed out. A copy of this opinion is enclosed.

In another opinion of this office February 19, 1953, to the Honorable William J. Hassan, Commonwealth's Attorney for Arlington County, published in the Report of the Attorney General (1952-1953), p. 228, the impropriety of paying additional compensation to a county deputy treasurer for collection of delinquent taxes was pointed out. A copy of this opinion is enclosed.

TAXATION—Delinquent—Portion of acreage sold within year on which taxes paid not delinquent.

April 23, 1968

HONORABLE GEORGE W. TITUS
Treasurer of Loudoun County

This is in reply to your letter of April 19, 1968, which reads as follows:

"On January 1, 1967, the Commissioner of Revenue's office certified an assessment to me on 200 acres of land. During the year of 1967, the owner sold 13 acres and paid the taxes in full for 1967 on the 13 acres. If the balance of the taxes are not paid and the property becomes delinquent, is the 13 acres released from being delinquent?"

In my opinion, your question is answered in the affirmative. The taxes as-
sessed on the thirteen acres were paid in full for the year 1967. Therefore, this portion of the full 200 acres is not delinquent for the nonpayment of taxes and should not appear on the Treasurer's annual delinquent list required by § 58-978(2) of the Code of Virginia (1950), as amended.

TAXATION—Delinquent Real Estate—Section 58-767 releasing liens applicable to sales to individuals.

HONORABLE EMELINE A. HALL, Clerk
Circuit Court of Northumberland County

This is in reply to your recent request for an opinion whether § 58-767 of the Code of Virginia (1950), as amended, is applicable to delinquent sales of land made to individuals as well as to the Commonwealth.

The purpose of § 58-767 is to release liens for taxes and levies due the Commonwealth and its political subdivisions when such taxes and levies have been delinquent for twenty years or more. See, opinion to the Honorable Furman Whitescarver, dated February 4, 1946, Report of the Attorney General (1945-1946), p. 162.

I am of the opinion that the section is equally applicable to sales of real estate for delinquent taxes whether made to individuals or to the Commonwealth.

TAXATION—Delinquent Taxes—No authorization to collect by lien and demand on funds held by Commonwealth.

HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

This is in reply to your letter of February 8, 1968, which reads in part as follows:

"The above named owes Rockingham County $2,379.47 for personal property taxes which were levied while he was working for the Commonwealth on Interstate 81 in Rockingham County. No judgment has been entered against him for the amount and he is not now within the Commonwealth.

"It is our understanding that due to certain claims for additional work, etc., the Commonwealth is holding certain funds which will, in all likelihood, be turned over to Foster. There is a possibility that he will be doing other work in this State.

"We would like to know the procedure whereby the Treasurer of Rockingham County can obtain the delinquent taxes out of the funds being held by the Commonwealth of Virginia."

I am aware of no procedure whereby you may obtain the delinquent taxes out of the funds being held by the Commonwealth of Virginia. Section 58-1010 of the Code of Virginia which provides for a lien and demand against third parties for funds due delinquent taxpayers applies only to persons. Since
the Commonwealth of Virginia is not a person, see § 1-13.19 of the Code, I am of the opinion that a lien and demand against the Commonwealth would not lie.

This, however, does not preclude you from obtaining a judgment against the delinquent taxpayer and having an execution thereon issued to the sheriff for attachment of any other property which he might own in the Commonwealth.

TAXATION—Dogs Owned and Bred by Corporation for Research—Taxable as inventory of stock on hand under §§ 58-410 and 58-411.


October 30, 1967

HONORABLE WILLIAM C. CARTER
Commonwealth's Attorney for Cumberland County

This is in reply to your letter of October 23, 1967, which reads as follows:

"The Cumberland County Board of Supervisors has requested that I ask your office for an opinion regarding the following:

"There is presently located in Cumberland County an out of state corporation which raises and breeds pure bred beagle hounds for experimental and research purposes. It is my understanding that these dogs are owned and bred by this corporation and are then sold to certain drug companies and other commercial research laboratories. At present there are approximately 3,000 dogs, and they contemplate increasing the size of the kennels to handle between 15,000 and 20,000 dogs.

"For the year 1967 the company purchased ten (10) kennel tags in accordance with Section 29-184, Code of Virginia, on whose suggestion or advise the Board of Supervisors does not know.

"In your opinion should these dogs be considered for taxation under Sections 29-183 or 29-184, or assessed for taxation under Sections 58-410 or 58-411, 1950 Code of Virginia, as amended?"

I am of the opinion that the dogs which you described should be considered as comprising the inventory of stock on hand owned by the business and, therefore, taxable under §§ 58-410 and 58-411 of the Code.

TAXATION—Exemptions—Property of Izaak Walton League of America, Inc., not exempt.

HONORABLE MARION G. GALLAND
Member, House of Delegates

This is in reply to your letter of January 23, 1968, in which you ask my opinion on the constitutionality of exempting the Izaak Walton League of
America, Inc., and its affiliated chapters from taxation under § 58-12 of the Code.

Any exemption of this corporation from taxation would have to be accomplished under Section 183 of the Constitution of Virginia. Under this section the corporation would have to qualify under clause (d) as an "incorporated college or other institution of learning."

While the attachment to your letter indicates that the corporation participates in educational programs, I am of the opinion that this would not qualify it as an institution of learning, and, therefore, it may not be exempted from taxation and an attempt to include it in the provisions of § 58-12 of the Code of Virginia would be unconstitutional.

TAXATION—Exemptions—Property owned by county and leased to others taxable by city.

COUNTIES, CITIES AND TOWNS—Property Owned by County and Leased to Others Subject to Taxation by City.

June 7, 1968

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

This is in reply to your letter of June 5, 1968, which reads as follows:

"On or about July 1, 1968, the County of Rockingham will conclude the purchase of a six story office building in the City of Harrisonburg from a local bank.

"Information received from the bank indicates that there are fifty (50) offices in the building of which forty-one (41) are presently under lease to various tenants. All but one of the leases expire on March 31, 1969, and the one exception has recently renewed a three year lease. The County of Rockingham will no doubt honor the current leases until they expire, thereby creating the situation on which I would appreciate an opinion.

"Paragraph (1) of Section 58-12 of the Code of Virginia exempts property owned directly or indirectly by the Commonwealth, or any political subdivision thereof. . . . However, Section 58-14 states 'Whenever any building or land, or part thereof, mentioned in 58-12, and not belonging to the State, shall be leased, or shall otherwise be a source of revenue or profit, all of such building and land shall be liable for taxation; provided that when a part but not all of any such building or land shall be leased or otherwise be a source of revenue or profit . . . only such portion thereof shall be liable to taxation as is so leased or is otherwise a source of profit or revenue.' (Emphasis supplied.)

"The problem is whether Section 58-14 is applicable to a county by implication since the section mentions only the 'State' as having total tax exemption.

"Under the above circumstances and facts, does the City of Harrisonburg have the authority to tax a portion of the building they are buying which is under lease and a source of revenue or profit; or
is the County to be granted immediate exemption from taxes upon
taking title to the property in question?"

I am of the opinion that the portion of the property owned by the county
and leased would cease to be tax free during the time it is leased and, there-
fore, subject to taxation by the city. This is in accord with an opinion of this
office to the Honorable Otis B. Crowder, dated July 2, 1965 (see, Report
of the Attorney General (1965-1966), pp. 276-77), a copy of which is enclosed.

TAXATION—Exemptions—Real estate owned by Historic Fredericksburg, Inc.,
not exempt.

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

This is in reply to your letter of December 14, 1967, which reads:

"Historic Fredericksburg, a non-profit corporation organized in the
City of Fredericksburg for the preservation of historic sites and build-
ings, including among its activities the establishment and maintenance
of a museum of historical artifacts, has during the past few years
acquired certain parcels of real estate upon which are located old
buildings. Its purpose is to restore the buildings and then sell them
to someone who will maintain them in their original condition, or
sell them to someone who will restore and maintain them.

"In 1966 the Legislature appropriated $10,000 for the purchase and
restoration of an old building which will be used as a museum once
it is restored.

"Please let me have your opinion as to whether the real estate
owned by this corporation is subject to real estate taxes in the City of
Fredericksburg. The group is exempt from federal income taxes as a
non-profit corporation.

"If you determine that the real estate of the corporation is subject
to Fredericksburg real estate taxes, please advise me the proper word-
ing of a change in the statutes to exempt this real estate from local
taxation."

Section 183 of the Constitution of Virginia contains the exemptions from
taxation, State and local. Clause (g) of this section which contains several
exemptions germane to your first inquiry reads:

"(g) Property of the Association for the Preservation of Virginia
Antiquities, the Confederate Memorial Literary Society, the Mount
Vernon Ladies' Association of the Union, The Virginia Historical
Society, The Thomas Jefferson Memorial Foundation, Incorporated,
the posts of the American Legion and such other similar organizations
or societies as may be prescribed by law." (Emphasis supplied.)

Since the corporation does not appear in this clause nor in § 58-12(7) of the
Code of Virginia (1950), as amended, I am of the opinion that it is not
exempt from real estate taxation by the City of Fredericksburg.
With reference to your second inquiry, if the principal purpose of the corporation is to preserve patriotic and historical antiquities so as to qualify it as a similar organization or society to those which appear in clause (g) of Section 183 of the Constitution, I am of the opinion that the General Assembly could add it to those which appear in § 58-12(7) by amendment of this section of the Code. However, if the purpose of the corporation is to sell the real estate involved, it would not be proper to include it in this section.

TAXATION—Exemptions—Real estate owned by Salvation Army—Land used for parking mobile campers not exempt.

HONORABLE JOHN A. B. DAVIES
Commissioner of the Revenue of Culpeper County

This is in answer to your letter of October 12, 1967, to which you attached a letter dated October 10, 1967, from Captain J. B. Matthews, Divisional Secretary of the Salvation Army, in which he requested exemption from taxation an entire tract of 187 acres of land which the Salvation Army has purchased for a camp program.

While the Salvation Army is a charitable association and exempt within the purview of clause (f) of Section 183 of the Constitution of Virginia from the payment of certain State and local taxes, it is also a religious body and included within the exemptions under clause (b) of this section. These clauses read:

"(b) Buildings with land they actually occupy and the furniture and furnishings therein and endowment funds lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building."

"(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."

Unless there are buildings on the land there can be no exemption of any kind. If there are buildings on the land and these buildings are used for lodge or religious purposes, or for meeting rooms, these buildings with the land they actually occupy, and the furniture and furnishings therein, together with such adjacent land as may be necessary for the use of the buildings for such purposes, may be exempted from taxation.

In Captain Matthews' letter, he indicates that the Salvation Army will not construct buildings on most of the acreage but plans to use it for mobile campers. In my opinion, the parking of mobile campers on the property would not qualify the tract for the exemptions provided for in clauses (b) and (f), and therefore the property is subject to State and local taxation.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Exemptions—Real estate owned by Salvation Army—Residence for ordained minister exempt.

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

October 18, 1967

This is in reply to your letter of October 13, 1967, which reads, in part, as follows:

"Recently the Salvation Army has purchased a home for the permanent residence of its Captain assigned to Harrisonburg. The local attorney handling the real estate transaction has requested tax exemption for the property in question.

* * *

"Any information you could supply the undersigned to assist in making a determination as to the tax status of the property outlined above will be greatly appreciated."

While the Salvation Army is a charitable association and exempt within the purview of clause (f) of Section 183 of the Constitution of Virginia from the payment of certain State and local taxes, it is also a religious body and included within the exemptions under clause (b) of this section. Clause (b) reads as follows:

"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."

In view of the language of this clause, I am of the opinion that should the Captain of the Salvation Army be in fact an ordained minister the residence which he occupies would qualify as that of a minister of a religious body. The property purchased as his residence therefore would be exempt from local taxes.

TAXATION—Exemptions—Residence of music director of church doubtful.

HONORABLE HERBERT H. BATEMAN
Member, Senate of Virginia

July 11, 1968

This is in reply to your letter of June 3, 1968, in which you request my advice as to whether the property of a church used as a residence by the music director, a full-time employee of the church and its related day school, is exempt from taxation.

The extent to which property owned by churches is held exempt from taxation is found in Section 183 of the Constitution of Virginia. Clause (b) of this section, relating to churches, reads as follows:
“(b) Buildings with land they actually occupy, and the furniture and furnishings therein and endowment funds lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.”

(Emphasis supplied.)

This same language is found in § 58-12(2) of the Code.

On a strict interpretation of this language, it would seem the property used as a residence for the music director of the church would not be exempt. However, in an opinion of this office to the Honorable C. H. Davidson, Jr., December 14, 1962, (see, Report of the Attorney General (1962-1963), p. 263), a copy of which is enclosed, this office pointed out the construction placed upon another provision of Section 183 of the Constitution in the case of County of Hanover v. Trustees of Randolph-Macon College, 203 Va. 613.

I concur in the conclusion reached in the enclosed opinion and think there is grave doubt as to whether or not the property in question is subject to taxation.

TAXATION—Income—Deductions—Teaching expenses—Applies only to teachers in public free schools.

SCHOOLS—Teachers—Income Tax—Deduction of teaching expenses—Must be teacher in public free school.

April 4, 1968

MR. JOHN T. FLOYD
Business Manager and Secretary
to the Board of Visitors
The Virginia School for the Deaf and the Blind

This is in answer to your letter of April 2, 1968, in which you asked to be advised if the teachers of the Virginia School for the Deaf and the Blind, who are members of the Virginia Supplemental Retirement System, are eligible for the deduction from the State income taxes provided by subsection (r) of § 58-81, which reads as follows:

§ 58-81.—Taxpayers reporting income as prescribed by this chapter shall be allowed the following deductions:

* * *

“(r) Teaching expenses.—In the case of teachers in the public free schools who are members of the Virginia Supplemental Retirement System, all reasonable and necessary expenses paid or incurred by the teacher during the taxable year by virtue of any college, university or extension work undertaken by the teacher for the improvement of his or her professional qualifications or standing as a teacher. The amount of the deduction shall not exceed twelve hundred dollars.”

The establishment of the system of free public schools is provided for in Section 129 of the Constitution of Virginia. In my opinion the teachers under
consideration are not employed in the system of free public schools included in this section and therefore are not eligible for this deduction.

TAXATION—Inheritance—Levied on share of beneficiary of real estate upon extinction of life estate.

HONORABLE KATHERINE V. RESPRESS
Clerk of Courts, City of Norfolk

March 27, 1968

This is in reply to your letter of March 25, 1968, which reads in part as follows:

"A and B own a piece of property which is free and clear of any encumbrances. They wish to convey this property to C, reserving unto themselves a life estate for each of them. At the time of recordation of this conveyance, tax will be paid on the full value of the property. The question is: At the time of the death of both A and B will an inheritance tax have to be paid on this property?"

The answer to your question is in the affirmative. The inheritance tax imposed is a succession tax, laid upon the right to succeed to the property or to an interest therein as distinguished from an estate tax laid on the right to transmit property. Commonwealth v. Morris, 196 Va. 868, 86 S. E. (2d) 135.

By § 58-152 of the Code of Virginia (1950), as amended, a State inheritance tax is levied upon the shares of the beneficiaries of real property which passes by a transfer under which the transferrer has retained a life estate.

TAXATION—Land Books—Limitations upon removal of real estate.

COMMISSIONERS OF REVENUE—Land Books—Limitations upon removal of real estate.

HONORABLE BLAIR ZIRKLE
Commissioner of the Revenue
of Shenandoah County

February 27, 1968

This is in reply to your letter of February 13, 1968, in which you asked to be advised whether you were authorized to remove land owned by the Town of Woodstock from the land books of Shenandoah County.

The authority upon which you would rely to remove the land is a resolution of the Board of Supervisors which appeared in its current minute book, viz.:

"Now therefore be it resolved, that the Board of Supervisors does mutually covenant that they will concur with the Town Council of the Town of Woodstock to eliminate from the tax records all real property owned by both governing bodies."

Section 58-19 of the Code provides for the taxation of certain property owned
by political subdivisions of the State which is not used exclusively for the purposes named in Section 183 of the Constitution of Virginia. Since the resolution which you enclosed does not differentiate between the properties of the political subdivisions used for different purposes, I am of the opinion that it must be viewed as an agreement by the two bodies not to tax and therefore unconstitutional. The resolution being unconstitutional, I am of the opinion that you are not authorized to remove the lands mentioned therein from the land books of Shenandoah County.

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**TAXATION—Licenses—Contractors—When city may require.**

**CONTRACTORS—Licenses—City may require.**

December 6, 1967

HONORABLE W. C. ANDREWS, JR.
Commissioner of the Revenue, City of Newport News

This is in reply to your letter of December 4, 1967, in which you state:

"Section 58-299, Code of Virginia, sets forth that no license is required of a contractor except where his principal office is located, with certain exceptions. The question has arisen among various contractors whose principal offices are located in nearby political subdivisions which have no local license on contractors. Under this condition, I would like your opinion as to whether or not such a contractor, who is not required to have license, should be required to obtain a local license on his entire contracts being executed in the City of Newport News. It is understood that a contractor locally licensed in another political subdivision cannot be required to be licensed in the City of Newport News until such time that he exceeds $25,000.00 in contracts."

Your question involves an interpretation of § 58-299 of the Code of Virginia (1950), as amended. This section was considered in an opinion issued by this office on July 11, 1956, to Honorable William F. Stone of Martinsville, Virginia. I am enclosing a copy of that opinion, which was published in the Report of the Attorney General (1956-1957), p. 255.

Consistent with the prior ruling of this office in the opinion to Senator Stone, I am of the opinion that if the contractors in question have not paid local licenses to the political subdivisions in which their places of business are located they do not come within the purview of the exemption from licenses imposed by other localities in which they are doing business, and the exemption provision based upon an amount of business in excess of $25,000 a year would be inapplicable. Therefore, the contractors in question are properly subject to the City of Newport News for contractors’ license taxes on business done by such contractors in that city.
HONORABLE JOSEPH MOTLEY WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of May 14, 1968, which reads as follows:

"The Town of Chatham purchased, in August of 1961, a lot and building thereon for a price of $15,000.00. The premises were used at that time as a public service station and the purchase was subject to the terms of an existing lease with renewal options.

"During the past two years the Town has actively sought to purchase the property surrounding the station on both Main and Center Streets. It acquired another service station on Main Street adjoining the subject lot, for $18,500.00, in April of last year. The intention of the Town is to convert the entire corner, as it is enlarged by purchase, to public parking or other municipal purposes. A current lease to American Oil Company expires February, 1969, subject to several one year renewal options on this lot and building.

"The subject property was first assessed by the County in 1965 under the provisions of Section 58-758 of the Code. The taxes were assessed in the name of American Oil Company, but, due to some provision of the lease, the Town had several years ago agreed to pay any assessments against the property if and when they arose, even though none were assessed at that time.

"The Town has not been financially able lately to convert and improve the property according to its long range plans. The rents derived go into the general town treasury.

"I am enclosing herewith a letter from Robert L. Neal, III, a C.P.A., together with his work sheet regarding the return on the rental arrangement.

"I am writing to you since, if the Town undertakes to petition the Circuit Court for removal of an erroneous assessment, this office would, of course, be involved. With the hope that advice from you might facilitate the matter and avoid litigation, I would specifically request your opinion as follows:

"(1) Under the facts stated, is the property exempt from taxation under Section 183 (g) of the Constitution of Virginia?

"(2) Does the fact that the Town receives revenue from the property, computed on an investment basis as set forth in the enclosure, bring it within the meaning of the case of City of Norfolk v. Board of Supervisors in 168 Va. 606, where revenue and profit are distinguished? I would refer also the recent case of County of Hanover v. Trustees of Randolph-Macon College in 203 Va. 613, and the case of Shaia v. City of Richmond, 207 [Va.] page 885."

In answer to your first question, I am of the opinion that the leasehold interest is not exempt from taxation under Section 183 (g) of the Constitution of Virginia. The tax levied by the county is not a tax on the land and building owned by
REPORT OF THE ATTORNEY GENERAL

the town of Chatham, but on the American Oil Company's leasehold interest. See, Shaia v. City of Richmond, 207 Va. 885, 889.

In view of the answer to your first question, I am of the opinion that of the three cases cited by you in your second question only Shaia v. City of Richmond, supra, is relative. In that case, at page 896, it was pointed out that the value of the leasehold interest should be appraised for tax purposes in relation to the potential income a buyer would derive for his right to use and occupy the premises.

TAXATION—Local Licenses—Regulation of trailer parks and camps—Proposed ordinance of Isle of Wight County.

ORDINANCES—License Tax on Trailer Parks and Camps—Ordinance must comply with Article 1.1 of Chapter 6, Title 35 of the Code.

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

August 10, 1967

This is in reply to your letter of August 7, 1967, in which you enclosed a copy of proposed ordinance to be adopted by the Board of Supervisors of Isle of Wight County regulating and levying a license tax on trailer camps or parks.

Your letter reads in part:

"I will appreciate your opinion as to whether or not the trailer ordinance may (1) provide for no license tax, (2) provide for any type of one-time permit fee or charge other than the annual license tax provided for in sections 35-64.1 to 35-64.5 of the Code, inclusive, and (3) contain the exemptions in section VIII thereof, supra, and the proposed substitute exemption for the exemption in subsection (5) of section VIII, supra, referred to in the first paragraph hereof, or if the ordinance can contain only those exemptions authorized by sections 35-64.1 et seq., supra, of the Code."

I will endeavor to answer these questions seriatim.

(1) The authority granted the governing bodies of any political subdivision in the State in Article 1.1 of Chapter 6 of Title 35 of the Code (§§ 35-64.1 through 35-64.6) is to impose license taxes upon the operation of trailer camps and trailer parks and the parking of trailers. Wherever this authority is exercised by a political subdivision, I am of the opinion that a tax for the license must be levied. However, an ordinance adopted under Article 1 of Chapter 6 of Title 35 of the Code (§§ 35-61 through 35-64) would not require a license tax.

(2) The authority to impose a license tax in § 35-64.5 is limited to the imposition of an annual license of not less than five dollars nor more than fifty dollars. Therefore, I am of the opinion that the license or tax must be levied annually.

(3) The only exemption from the imposition of the license tax appears in § 35-64.4. Therefore, I am of the opinion that any other exemptions proposed in Section VIII of the ordinance are invalid.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Local Tax on Consumers of Utility Services—When may be levied by locality.

June 28, 1968

HONORABLE PHILIP P. BURKS
Treasurer of Bedford County

This is in reply to your letter of June 25, 1968, which reads as follows:

"Section 58-617.2 of the Code of Virginia provides for local taxes on consumers of certain utility services.

"The Town of Bedford, a municipal corporation, owns its hydro-electric power plant and its distribution lines in providing electric utility service to the people of the Town of Bedford and to many consumers who reside outside of the Town limits. A considerable amount of the electric current sold by the Town of Bedford is purchased from the Appalachian Power Company.

"Is the Town of Bedford authorized to impose a tax on the consumers of electric utility services under the provisions of Section 58-617.2 of the Code?

"Is the Town of Bedford authorized to impose a tax on the consumers of the utility services mentioned in Section 58-587.1 of the Code?"

The tax on the consumers of electric utility services under the provisions of § 58-617.2 of the Code may be imposed by a city, town or county where the utility service is provided by a public service corporation supplying water or heat, light and power as defined in Article 10 of Title 58. Since the Town of Bedford, which is supplying the electrical utility services, is not a public service corporation, I am of the opinion that the tax provided for by this section may not be imposed by the Town.

Section 58-587.1 of the Code authorizes a city, town or county to impose a tax on the consumers of telegraph and telephone services provided by a public service corporation authorized to supply such services. Since these services are provided by public service corporations and not the Town of Bedford, I am of the opinion that the tax may be imposed upon the consumers of the telegraph and telephone services.

TAXATION—Merchants’ Licenses—Local—Imposition of tax on distributors of oil and petroleum products.

ORDINANCES—Licenses—Authority of towns to impose tax on distributors of oil and petroleum products.

TOWNS—Merchants’ Licenses—Authority to impose tax on distributors of oil and petroleum products.

May 22, 1968

HONORABLE MEREDITH C. DORTCH
Commonwealth’s Attorney for Mecklenburg County

This is in reply to your letter of May 11, 1968, in which you requested my opinion as to the validity of a license tax imposed by several towns in Mecklenburg County under ordinances containing the following language:
"Gasoline, Fuel & Heating Oils, Butane & Propane distributed by vehicles to persons other than licensed dealers or retailers: THE LICENSE TAX on each person or firm conducting a business of dealing in gasoline, fuel oil, kerosene, butane or propane gas or other combustible gas or fluids by selling or delivering same from trucks or other vehicles to persons other than licensed dealers or retailers, shall be $50.00; provided, however, this section shall not apply to any licensed merchant of the town operating a regular established business or place of business within the town, and paying a merchant's license tax."

I am of the opinion that the license tax imposed by the ordinances is valid. In this connection I refer you to a former opinion rendered to the Honorable A. Dunston Johnson, August 17, 1964, published in Report of the Attorney General (1964-1965), p. 249, in which an ordinance containing almost identical language was found to be valid.

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TAXATION—Motor Fuel—No refund provided for private nonprofit school.

MOTOR VEHICLES—Fuel Tax—No provision for refund to private nonprofit school.

HONORABLE GEORGE S. CUMMINS
Commonwealth's Attorney for Nottoway County

July 31, 1967

I am in receipt of your letter of July 24, 1967, in which you present the following situation and inquiry:

"The Headmaster of Kenston Forest School, Blackstone, Virginia, a private nonprofit nonsectarian school, has asked me about the possibility of a motor fuel tax refund for the school in connection with the Driver Education Program.

"The school has on loan to it a motor vehicle which it uses for driver education and would like to have the tax refund on fuel used for that purpose in that vehicle. Section 58-715 of the Code does appear to apply for motor fuel tax refund on buses owned and operated by a private nonprofit nonsectarian school but so far as I can determine no reference is made to a refund for use in a Driver Education Program vehicle.

"Could you inform me as to whether or not you know of any provision in Virginia whereby such refund would be available to a private nonprofit nonsectarian school."

In this connection, I concur in your view that § 58-715 of the Virginia Code makes no provision for a refund of taxes in the situation concerning which you inquire, and I am not aware of any other provision of Virginia law which would make such refund available under the circumstances you describe.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Motor Vehicles—Leased—Personal property tax assessed against owner.

MOTOR VEHICLES—Taxation—Leased Vehicle—Personal property tax assessed against owner.

HONORABLE CHARLES AUBREY CALLAHAN
Commissioner of the Revenue
for the City of Alexandria

October 16, 1967

This is in reply to your letter of October 5, 1967, which reads as follows:

"The Car City Leasing Company, Incorporated, of 2025 I Street, N.W., Washington, D. C., contends that a member of the armed forces, whose legal residence is in a state other than Virginia, should not pay the personal property tax on a leased car, while residing in Virginia on military orders.

"My contention is 'the assessment made by this office is against the Avis Executive Lease Plan owner of the car and is correct whether the tax was included in the lease or the lease required the lessee to pay the tax.' Therefore the personal property bill, as indicated by the enclosed photostatic copy of paid bill is correct and no refund should be allowed as it does not violate the terms of the Soldiers' and Sailors' Civil Relief Act.

"The question is 'am I right in taking this stand?'"

I am of the opinion that the position which you take is correct.

By § 46.1-1(18) of the Code, the lessor, the Avis Executive Lease Plan is deemed to be the owner of the vehicle in question and liable for the payment of personal property tax thereon. Since the lessor (owner) is not a member of the armed forces, there is no violation of the Soldiers and Sailors' Civil Relief Act. The refund should properly be refused.

TAXATION—Motor Vehicles—Sales and Use Tax—Transfer of assets in return for stock is taxable sale for consideration.

MOTOR VEHICLES—Sales and Use Tax—Applies to transfer of motor vehicles in return for capital stock of corporation.

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

August 1, 1967

On May 4, 1967, you requested my opinion with respect to the following question pertaining to Chapter 12.1, Title 58 of the Code of Virginia, relating to "Virginia Motor Vehicle Sales and Use Tax Act": Mr. A. was the sole proprietor of an unincorporated trucking business. On October 1, 1966, Mr. A. incorporated the business. He received all of the capital stock of the corporation in exchange for all of the net assets of the proprietorship. The assets were transferred to the corporation at net book value as of September 30, 1966. Included in these assets were the trucks, tractors, and trailers. Is the corpora-
REPORT OF THE ATTORNEY GENERAL

tion responsible for the payment of the Virginia Motor Vehicle Sales and Use Tax under Title 58, Chapter 12.1 of the Code of Virginia?

In an opinion to the Honorable C. H. Lamb, Commissioner, Division of Motor Vehicles, dated July 21, 1966, I answered a series of questions pertaining to the Virginia Motor Vehicle Sales and Use Tax Act. I was asked several questions covering situations in which there was a change in ownership or title of a motor vehicle and I held that in these situations there was no liability for payment of the tax unless there was a sale for consideration. Examples of no liability for tax are where the vehicle owner makes a gift of a motor vehicle to another person, and where there is a change of name of a corporation, company, partnership, or individual trading as a specific name, which results in titling a motor vehicle in the new name.

Therefore, the only question is whether there is consideration in this case.

In my opinion there is liability for the payment of the tax in the instant situation, because there is a sale for consideration. Section 13.1-17 of the Code of Virginia states in part that “The consideration for the issuance of shares or bonds may be paid in whole or in part, in money, in other property, tangible or intangible, or in labor or in services. . . .” This provision of the Code of Virginia is a part of Title 13.1 of the Code, “The Virginia Stock Corporation Act,” under which undoubtedly Mr. A. incorporated. By using the word “consideration” in § 13.1-17 the Legislature apparently intended that there be consideration given for the issuance of shares. Thus, when Mr. A. transferred all of the assets of his sole proprietorship, including all trucks, tractors, and trailers, and received back all of the capital stock of the corporation, there was consideration.

TAXATION—Motor Vehicles—Situs for personal property taxes—Determined by length of time physical presence in locality.

HONORABLE ORA A. MAUPIN
Commissioner of the Revenue for the City of Charlottesville

This is in reply to your letter of May 8, 1968, which reads as follows:

“There are certain students attending the University of Virginia in Charlottesville who own and operate motor vehicles within the city during the nine month school year and who frequently return to their respective homes located in Virginia for the summer and Christmas holidays. Often their automobiles are not physically within the Charlottesville city limits on January 1st because this date is usually a part of the Christmas holiday period and the students are away temporarily. These students have refused to file appropriate personal property returns with my office in Charlottesville, contending that their automobiles should not be assessed and taxed in this city. Some of the vehicles carry tags from other Virginia localities. At least one of these students has indicated that the Commissioner of Revenue of the county in which his parents reside, and to which he returns when not attending the University of Virginia, has assessed his automobile in that county.

“Based on Section 58-834, Code of Virginia of 1950, an opinion
written in 1954 by the State Tax Commissioner, the many opinions written by your office concerning this provision and the Supreme Court of Appeals in Hogan v. Norfolk Co., 198 Va. 733, I have decided that the automobiles in question should be taxed and assessed by the City of Charlottesville.

"I respectfully request an opinion stating whether or not my decision is correct."

The tangible personal property of a domiciliary resident of Virginia is assessable in the county or city of such domiciliary resident as of January 1 each year, except to the extent that any or all such tangible personal property may have acquired a taxable situs elsewhere.

You refer to § 58-834 of the Code of Virginia, the text of which reads as follows:

"The situs for the assessment and taxation of tangible personal property, merchants' capital and machinery and tools shall in all cases be the county, district or city in which such property may be physically located on the first day of the tax year."

This section declares the situs to be the locality in which such property may be "physically located on the first day of the tax year." Thus a taxable situs may be established separate and apart from one's domicile in this State. The words "physically located," however, mean more than mere physical presence in a locality on January 1; they mean more than mere transitory presence. At the same time, the words do not mean that the location must be permanent.

In the cases given by you, the automobiles of the students have acquired a taxable situs, in my opinion, in the City of Charlottesville because they are actually there during and by far the greater part of the year. The fact that the automobiles were not physically present in Charlottesville on January 1 is by no means conclusive. The automobiles acquired a taxable situs in Charlottesville by reason of physical location there which by no means is transitory and yet not entirely permanent, but such physical location is so substantial in length of time in any year as to effect a change in situs to Charlottesville from the locations the students return to during the Christmas holidays and the summer.

Therefore, I am of the opinion that your decision is correct and the automobiles in question should be taxed as tangible personal property by the City of Charlottesville.


TAXATION—Personal Property—Liability of member of Armed Services.

SERVICEMEN—Taxation—Personal Property—Not exempt from assessment by Soldiers' and Sailors' Civil Relief Act.

HONORABLE GUY R. PADGETT
Treasurer of Carroll County

This is in answer to your letter of February 13, 1968, which reads as follows:
"Would you please rule on the following: 'Is it proper to assess and collect personal property taxes on a house trailer parked in this county, and occupied by his wife while the owner is in the Armed Services and serving in Vietnam?'"

In adopting § 58-829.3 of the Code, the 1960 General Assembly of Virginia placed all mobile homes in the same classification for taxation and classified all such vehicles as tangible personal property. Therefore, the house trailer parked in the county is assessable as tangible personal property.

In my opinion, these taxes are due and collectible whether or not the owner is in the Armed Services and serving overseas. The provisions of the Soldiers' and Sailors' Civil Relief Act (U.S.C.A., 50 APP., §§ 574 through 590) do not preclude the collection of these taxes.

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TAXATION—Personal Property—Motor vehicles—Assessable at permanent place of abode of owner.

MOTOR VEHICLES—Taxable at Permanent Place of Abode of Owner.

HONORABLE JOHN W. FERGUSON
Supervisor of Assessments, County of Fairfax

August 14, 1967

This is in reply to your letter of August 3, 1967, which reads as follows:

"In recent months we have had a number of cases arise in connection with the assessment of motor vehicles in the proper jurisdiction, in the case of students who are attending college in other jurisdictions in this State.

"I have one particular case at hand where the student is a legal resident of Fairfax County, registered to vote in this jurisdiction, but operates an automobile in the jurisdiction where he is attending school. The automobile is owned by his father, a resident of Fairfax County, and displays a Fairfax County license tag. Should the vehicle be assessed in the locality where it is physically located or in the jurisdiction where the operator or owner is legally domiciled and where the vehicle is licensed?

"There is another similar case of a student whose home is in Fairfax County and the vehicle is registered in the student's name at his Fairfax County address and the vehicle is licensed in this jurisdiction. Should this vehicle be assessed in the jurisdiction where he is attending school, or here in Fairfax County where he maintains his legal domicile and licenses the vehicle?

"In both of these cases, the student returns to his home in Fairfax County during school holidays and summer vacations."

In my opinion, the situs for the assessment for the two vehicles is in the County of Fairfax, the permanent place of abode of the owners. In this connection I am forwarding to you copies of two previous opinions of this office, dated March 2, 1961, and August 21, 1963, in which substantially similar situations were considered and discussed. See, Reports of the Attorney General (1960-1961), p. 306; (1963-1964), p. 290.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Real Estate—Correction of assessment where building moved after January first.

October 2, 1967

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

This is in reply to your letter of September 27, 1967, which reads, in part, as follows:

“A land owner voluntarily moved from his land a dwelling house which was on the land on January 1, 1967, and had been thereon for many years prior thereto. The owner moved the dwelling house from the land the latter part of February, 1967. The dwelling was not destroyed or reduced in value from natural decay or other such causes and was not razed or destroyed by any fortuitous happening beyond the control of the owner. The owner has made application for a reduction or some abatement or proration of his real estate assessment for the year 1967 because of his voluntary removal of the dwelling house from his land in February. The Board of Supervisors of Isle of Wight County adopted a resolution pursuant to Section 58-811.1 of the Code relating to the assessment of new buildings, but has taken no action pursuant to Section 58-811.2 of the Code to provide for the abatement of levies on buildings assessed under 58-811.1, supra, and razed or destroyed or damaged by fortuitous happenings beyond the control of the owner.

* * *

“I will appreciate your opinion as to whether or not (1) the Commissioner of Revenue is authorized to make reductions, abatements, prorations and changes in real estate tax assessments for current tax years where buildings which are on land on January 1 are removed therefrom or razed, destroyed or damaged during current tax years, except under Sections 58-811.2 and 58-813, supra, or if such relief is authorized under Section 58-763, supra, or some other statute, for such current tax year or if such relief is authorized for the year next succeeding the one in which the loss or removal occurs only, and (2) such relief, under the above facts, is authorized in the instant case for year 1967 or is only authorized for the year beginning January 1, 1968.”

I am of the opinion that § 58-813 of the Code of Virginia (1950) and not § 58-811.2 is applicable to the facts presented by you and that the commissioner of the revenue may change the real estate assessment on the property for the year 1968.

Real estate tax liability is determined as of January one of each year, although the tax is not due and payable until much later. Section 58-813 provides for the correction of the assessment for the next year succeeding the one in which the building was removed and the reduction in the value occurred. The approximate adjustment may be made for the 1968 taxes, but not for the taxes for 1967.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Real Estate—Erroneous assessment—Reimbursement.

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

November 29, 1967

This is in reply to your letter of November 21, 1967, which reads as follows:

"In the 1961 assessment, a tract of land was appraised at $1,390.00. The assessed value should have been 30% of this figure, or $420.00 in round figures. By clerical error, the assessed value was recorded as $4,170.00. The taxpayer has been paying his taxes based upon this erroneous assessment from 1962 through 1966.

"Even though the Commissioner of Revenue did not make the initial error, would it be proper for me to advise my Board of Supervisors to reimburse the taxpayer for the overpayment without limitation as to time pursuant to 58-1142 of the 1950 Code of Virginia? If the taxpayer cannot proceed under this section, what would be his recourse?"

Sections 58-1141 through 58-1144 are applicable to erroneous assessments of real estate only if the error sought to be corrected was made by the Commissioner of Revenue or such other official to whom the application is made.

Inasmuch as the error in this case was not made by the commissioner of the revenue, I am of the opinion that § 58-1142 is inapplicable.

In view of the holding of the Supreme Court of Appeals of Virginia in Hoffman v. Augusta County, 206 Va. 799, I am of the opinion that the taxpayer's recourse lies in proceeding under § 58-1145 of the Code for such relief as he may obtain thereunder.

TAXATION—Real Estate—Exemption of Salvation Army.

TAXATION—Real Estate—Charitable associations—Extent to which exempt.

HONORABLE JOHN A. B. DAVIES
Commissioner of the Revenue of Culpeper County

September 29, 1967

This is in reply to your letter of September 25, 1967, in which you request my advice as to whether the Salvation Army is exempt from taxation on its property, also the extent to which the tax exemption applies to property owned by this organization as well as to that owned by churches.

The Salvation Army is a charitable association and exempt from State and local property taxation under Section 183(f) of the Constitution of Virginia and § 58-12(6) of the Code of Virginia.

The extent to which property owned by this organization and by churches is held exempt from taxation is found in Section 183 of the Constitution of Virginia. Clause (b) of this section, relating to churches, reads as follows:

"(b) Buildings with land they actually occupy, and the furniture and furnishings therein and endowment funds lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church
or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building."

Clause (f) of the section, relating to benevolent or charitable associations, reads as follows:

"(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."

If there are no buildings on the land, there can be no exemption of any kind. If there are buildings on the land and these buildings are used for lodge or religious purposes, or for meeting rooms, these buildings with the land they actually occupy, and the furniture and furnishings therein, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes, may be exempted from taxation.

The foregoing does not mean that the entire acreage owned can be held to be exempt, but only the buildings thereon and the furniture and furnishings therein, together with such additional adjacent land as may be necessary for the convenient use of the buildings. This adjacent land may include a reasonable area at the buildings set aside for parking. A liberal estimate would be about one acre for parking, and perhaps another acre for other convenient use of the buildings.

TAXATION—Real Estate—Includes standing trees on land.

December 13, 1967

HONORABLE I. L. HARDING
Commissioner of the Revenue of Halifax County

This is in reply to your letter of December 7, 1967, in which you inquire whether or not standing timber is considered real estate. Real estate, both at common law and in its generally accepted meaning, is synonymous with real property. It is settled law that standing trees are part and parcel of the land in which they are rooted and, therefore, are a part of the real estate.

In some instances the land may be owned by one person and the standing timber owned by another. In such event your attention is invited to §§ 58-803 and 58-804(f) of the Code which provide for the assessment of such standing timber where it has been conveyed to someone else by the landowner.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Conveyance of property to trustee for benefit of children subject to tax.

RECORDATION—Conveyance of Property to Trustee for Benefit of Children—Subject to tax.

February 12, 1968

HONORABLE MARGARET B. BROWN, Clerk
Circuit Court of Culpeper County

This is in reply to your letter of February 8, 1968, which reads as follows:

"A Mr. A recently purchased a farm in Culpeper County, had the deed recorded and paid the recordation taxes. After doing this, he advised that at some future time, possibly this year, he expected to transfer this real estate to a trustee to be held for the benefit of his children, and did not see why another recordation tax should be charged. "I told Mr. A I thought such a tax would have to be paid, but I would write for your opinion."

In my opinion, if and when the real estate is transferred to a trustee for the benefit of his children, the deed will be subject to the recordation tax under § 58-54.

In this connection, I am enclosing a copy of a previous opinion of this office dated April 10, 1950, to the Honorable J. Edward Wiltshire, Clerk of the Circuit Court of Orange County, in which a situation similar to that set forth in your communication was considered and discussed (Report of the Attorney General (1949-1950), p. 229).

TAXATION—Recordation—Deed conveying property to Salvation Army subject to.

RECORDATION—Deed to Salvation Amy—Subject to.

September 28, 1967

HONORABLE MARGARET B. BROWN, Clerk
Circuit Court of Culpeper County

This is in reply to your letter of September 23, 1967, in which you asked my opinion as to whether a deed conveying property to the Salvation Army is subject to the State recordation tax.

On March 19, 1957, this office held that, "A recordation tax is not a tax on property and, as such, does not come within the provisions of Section 183 of the Constitution." See, Report of the Attorney General (1956-1957), p. 262. It follows, therefore, that it does not come within the provisions of § 58-12 of the Code of Virginia. Section 58-64 of the Code gives the exemptions from the State recordation tax. This list of exemptions does not include the Salvation Army or similar organizations.

I am of the opinion, therefore, that a deed conveying property to the Salvation Army is subject to the usual recordation tax.
TAXATION—Recordation—Exemptions—Deeds of trust securing loans made by United States or its agencies.

RECORDATION—Exemptions—Deeds of trust of United States and its agencies.

November 20, 1967

HONORABLE MARGARET B. BROWN, Clerk
Circuit Court of Culpeper County

This is in reply to your letter of November 6, 1967, which reads as follows:

"You will probably recall that there has been some discussion relative to tax on Bolling Air Force Base property in this county. "They sold their real estate to Parkwood, Inc., which has gone into the hands of the Receiver, and is now being sold to another party, who is giving a deed of trust, borrowing from Bolling Air Force Base. Please advise me if I should charge recordation taxes on this deed of trust, as the Air Force Base considers itself an agency of the United States."


As I understand your letter, the Bolling Air Force Base, an agency of the federal government, has made a direct loan which has been secured by a deed of trust recorded in your office. As pointed out in the enclosed opinion, the recordation tax cannot be collected upon deeds of trust securing loans made by the United States Government or one of its agencies unless the act creating the agency or some other federal act permits the imposition of such recordation tax. I have been unable to find any federal act authorizing the tax in this case and I am, therefore, of the opinion that the recordation tax is not chargeable.

TAXATION—Recordation—Lease—Fee based on rental of one year where option to extend included.

RECORDATION—Lease—Fee based on rental of one year where option to extend included.

April 11, 1968

HONORABLE MARION K. RIDLEY, Clerk
Circuit Court of Sussex County

This is in reply to your letter of April 8, 1968, which reads as follows:

"I would like to have you advise me with reference to the proper tax to be collected for recording a lease. "If a lease is signed by two parties at $500.00 per year for five (5) years, we normally charge recordation tax on $2500.00. "However, if a lease is signed for one (1) year for $500.00, with the option to extend the same for five (5) additional years, how do I arrive at the taxable figure? This lease may be terminated by the Lessee at any time by giving at least 60 days notice to the Lessor prior to the expiration of the then current term."

I am of the opinion that the recordation tax for the lease signed for one year, with option to extend, described in the third paragraph of your letter, should be based on $500.00, the amount of the rental for one year.

This office has opined similarly in an opinion to the Honorable John Henry Powell, Clerk of the Circuit Court of Nansemond County, dated February 10, 1939, published in the Report of the Attorney General (1938-1939), p. 275, copy of which I am enclosing.

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TAXATION—Recordation—Option to purchase real estate—Tax based on consideration paid.

RECORDATION—Option to Purchase Real Estate—Recordable instrument and subject to tax.

May 21, 1968

HONORABLE GEORGE B. WHITEACRE, Clerk
Circuit Court of Frederick County

This is in reply to your letter of May 9, 1968, in which you enclosed a copy of an agreement which reads, in part, as follows:

“That for valuable consideration and the mutual covenants hereinafter set forth, the said parties of the first part do hereby grant unto the said party of the second part the right of first refusal to purchase all of that certain tract of land . . . .

* * *

“The term of this agreement shall be for a period of forty (40) years from the date first above written.”

You advised on May 16, 1968, that the consideration for the agreement was $100.00. You request my opinion if the agreement is a recordable instrument.

Section 58-58 of the Code provides, in part, as follows:

“On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for . . . .”

In my opinion, the agreement is an option to purchase real estate and unquestionably a contract relating to real property. It is, therefore, a recordable instrument and subject to the tax provided in this Code section. See, opinion to the Honorable J. Fulton Ayres, February 4, 1963, Report of the Attorney General (1962-1963), p. 282.

The proper basis for the determination of the recordation tax on this option is the consideration paid for the option. If the person should exercise his rights under the option and purchase the property, then the recordation tax on the deed would be based on the consideration recited therein or the actual value of the property conveyed, whichever is the greater. See, opinion to the Honorable H. C. DeFarnette, May 12, 1964, Report of the Attorney General (1963-1964), p. 297.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Required on deeds of executor to heirs under a will.

TAXATION—Qualification of Executor—Exemption—Does not extend to recordation tax required on deed of executor conveying property to heirs under a will.

RECORDATION—Deeds of Executor to Heirs Under a Will—Tax required.

HONORABLE ARNOLD MOTLEY, Clerk
Circuit Court of Essex County

This is in reply to your letter of December 15, 1967, which reads in pertinent part:

"A person died testate and by his last will and testament directed his executor to divide his estate, real and personal, by assigning one-half to his widow and one-half to his three children. This will be done by the executor executing the proper deeds for the real estate.

"My question is that since a qualification tax has been paid on the entire estate, including the real estate, will a recordation tax be assessable on the deeds when the executor presents them for recordation?"

Section 58-54 of the Code provides for the assessment of a recordation tax on all deeds except those exempted from taxation by law. The deeds in this case are not exempted.

Section 58-66 of the Code provides for a qualification tax on the probate of every will or grant of administration not exempted by law. I am aware of no exemption provided the taxpayer in this case.

Since the taxes provided for by these two sections are independent of each other and both are assessable against a taxpayer where the facts do not bring him within the exceptions, I am of the opinion that a recordation tax is properly assessable on the deeds when they are presented for recordation.

TAXATION—Recordation—Second deed of trust taxable in full amount.

RECORDATION—Second Deed of Trust—Taxable in full amount.

HONORABLE KATHERINE V. RESFESS
Clerk of Courts
City of Norfolk

This is in reply to your letter of March 8, 1968, which reads in part as follows:

"A borrows from B $810,000.00 and records a deed of trust securing 105 notes and pays the appropriate recording tax on this amount. Now he wishes to mark this deed of trust satisfied and release it of record and record a new deed putting the 105 notes in one note and increasing the indebtedness to $1,000,000.00. The question is: does he pay the recording tax on the $190,000.00 by which the indebtedness was increased; or does he pay the recording tax on the full amount secured, since the original deed of trust has been released?"
In my opinion, you should base the recordation tax for the second deed of trust on the amount of $1,000,000.00. The deed of trust previously recorded and released is a separate contract from the deed of trust now sought to be recorded. The second deed of trust does not, in my opinion, come within the provisions of § 58-60 due to the fact that the first deed of trust has been released. This opinion reaffirms an opinion of this office rendered to the Honororable Austin Embrey, Clerk of the Circuit Court of Nelson County, December 8, 1955, a copy of which is enclosed. See, Report of the Attorney General (1955-1956), p. 217.

June 3, 1968

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

This is in reply to your letter of May 24, 1968, which reads as follows:

"We wish to pose certain questions relative to new Code Section 58-54(b) to be effective June 28, 1968:

1) The first paragraph mentions the assessing of the tax, thus: '...at the rate of fifty cents for each five hundred dollars or fraction thereof, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale. ...' Does this mean that in a deed for a consideration of say $20,000.00 in which $1,000.00 is cash in hand paid, and the remaining $19,000.00 is secured either by deed of trust or vendor's lien, then that this additional tax would be collected only on the $1,000.00 cash or on the entire $20,000.00? From the wording of the code section, it appears to us on the cash only, but we wish your opinion in this matter.

2) The second paragraph states, '...shall be admitted to record without certification of the clerk of the court wherein first recorded having been affixed thereto that the tax imposed by this subsection has been paid.' Our present Clerk's certificate which we append to the deed reads: 'VIRGINIA: In the Clerk's Office of Tazewell Circuit Court ................. 19... This deed was presented and upon the annexed certificate of acknowledgement admitted to record at ...... M. Teste: .................. Deputy Clerk.' Will this second paragraph require us to modify this certificate so as to certify the fact that the tax has been paid; if so, please advise the proper verbage to be added to comply with the statute. If you do rule such is the case, then I take it we could continue to use the present Clerk's certificate on deeds of trust, leases, etc."

In answer to your Question 1, I am of the opinion that the tax should be assessed on the full consideration of $20,000.00. In determining the amount of the net consideration for, or net value of, the realty conveyed, only the amount of the liens and encumbrances on the property existing before the sale and not re-
moved thereby may be deducted. No deduction shall be made on account of any lien or encumbrance placed upon the property in connection with the sale, or by reason of deferred payments of the purchase price whether represented by notes or otherwise.

In answer to your Question 2, I am of the opinion that the clerk of the court to whom the deed of conveyance is first offered for recordation must affix thereto a certificate to the effect that the tax imposed by § 58-54(b) has been paid. Therefore, the certificate which you are now using for the recordation of deeds must include therein the following language, "The taxes imposed by § 58-54, (a) and (b), of the Code have been paid."

TAXATION—Revenue Licenses—Not required of practitioner of medicine employed exclusively by government.

MEDICINE—Revenue Licenses—Not required of practitioner of medicine employed exclusively by government.

HONORABLE W. R. MOORE
Commissioner of the Revenue for the City of Norfolk

July 7, 1967

This is in reply to your letter of June 13, 1967, in which you request my opinion as to whether a practitioner of the medical profession who is employed on a salary basis by the Norfolk Area Medical Center Authority, and who engages in no other practice whatsoever, is liable to pay state revenue license taxes under § 58-387.1, or city license taxes as provided for under § 58-266.1, of the Code of Virginia (1950), as amended.

Section 3 of Chapter 471 of the Acts of Assembly 1964, which created the Norfolk Area Medical Center Authority, established the Authority as a public instrumentality exercising public and essential governmental functions to provide for the public health and welfare. Under this language the Authority was established as an agency of the government, carrying out governmental functions.

In my opinion, a practitioner of the medical profession who is employed on a salary basis by the Authority, and who engages in no other practice whatsoever, is not liable for state revenue license taxes under § 58-387.1, or for city license taxes under § 58-266.1, of the Code because he is an employee of government.

TAXATION—Sale of Delinquent Real Estate—Bidder first recognized by treasurer regarded as successful bidder—Agreement suggested when two bid at same time.

TREASURERS—Sale of Delinquent Real Estate—Recognition of first bidder—Agreement suggested when two bid at same time.

HONORABLE J. B. FRAY
Treasurer of Madison County

October 17, 1967

This is in reply to your letter of October 9, 1967, which reads as follows:
"On the second Monday in December, 1967, I am required to sell all lands on which the 1965 real estate tax has not been paid. Section 58-1030 does not make it clear as to how I shall dispose of a parcel of land when two persons wish to buy it. 

"This is my problem; and I will appreciate it if you can interpret this Section for me."

The delinquent real estate is sold at a treasurer’s sale “to satisfy the levies, penalties, interest and charges due thereon, unless the same shall have been previously paid to such treasurer,” and the published list gives “the amount for the satisfaction of which each such parcel will be sold.” (Code of Virginia, § 58-1030.)

The law contains no provision to the effect that if one person bids higher than another (assuming that both bid at least the amount for the satisfaction of which the real estate is sold), then the sale shall be made to the higher bidder. Therefore, I am of the opinion that if two persons bid the amount for the satisfaction of which the real estate is sold, the bidder first recognized by the treasurer will be regarded as the successful bidder. If both bidders cry out at the same time, the treasurer must use his best judgment in recognizing one or the other first. If the foregoing results in any controversy, you may suggest to the two bidders that, so far as you are concerned, they may agree to settle the matter between themselves by drawing lots and that if they so agree, you will regard the winner in the drawing as the successful bidder.

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TAXATION—Sales and Use Tax—Distribution on basis of school age population—No special census authorized other than state-wide.

SCHOOLS—Special School Age Population Census—Authorized only on state-wide basis for distribution of sales tax revenue.

COUNTIES, CITIES AND TOWNS—Special School Age Population Census—Authorized only on state-wide basis for sales tax revenue distribution.

August 8, 1967

HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This is in reply to your letter of August 2, 1967, which reads as follows:

"I have been asked by the town of Amherst to contact you in reference to taking a special school census. It appears that they have been unable to get the correct number of school age children that live within the town limits for purpose of sales tax distribution on the 1% collected locally.

"If they take the school census, would these figures be acceptable in reference to that portion of the sales tax money that is due the town?"

Your attention is directed to Section 58-441.48(d) of the Code which reads in part as follows:

"The net revenue so distributable among the counties and cities shall be apportioned and distributed upon the basis of the school age population..."
of the respective counties and cities, as certified to the Comptroller by the Department of Education, that is to say, upon the basis of the number of children between the ages of seven and twenty years in each county and city according to the most recent state-wide census of such population as has been, or may be, caused to be taken by the Department of Education, as adjusted in the manner hereinafter provided. No special school population census, other than a state-wide census, shall be used as the basis of apportionment and distribution except that in any calendar year in which a state-wide census is not reported, the Department of Education shall adjust such school age population figures by the same per centum of annual change in total population estimated for each locality by the Bureau of Population and Economic Research of the University of Virginia. . . ."

You will note that under this section a special school age population census is prohibited. While an exception to this prohibition is made, this does not authorize a locality to take and use a special school population census.

In light of the foregoing, I am of the opinion that the town of Amherst may not take and use a special school census as the basis for distribution of the State sales and use tax revenue.

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TAXATION—Sales and Use Tax—Hopewell Emergency Crew not exempt.

October 30, 1967

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

This is in reply to your letter of October 24, 1967, in which you ask if the Hopewell Emergency Crew is exempt from the Virginia Retail Sales and Use Tax Act.

The exemptions from the sales and use taxes are found in § 58-441.6 of the Code of Virginia (1950), as amended. For there to be an exemption of the Hopewell Emergency Crew it would have to qualify under paragraph (p) which reads:

"Tangible personal property for use or consumption by this State, any political subdivision of the State, or the United States; but this exclusion shall not apply to sales and leases to privately owned financial and other privately owned corporations chartered by the United States."

In my opinion the Hopewell Emergency Crew is not the State nor a political subdivision thereof and, therefore, does not qualify for an exemption from the payment of the sales and use tax.

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REPORT OF THE ATTORNEY GENERAL

TAXATION—Sales and Use Tax—Local share for towns—Dependent upon compliance with § 58-441.49(h).

TOWNS—Eligibility for Local Share of Sales Taxes—Dependent upon compliance with § 58-441.49(h).

HONORABLE DOROTHY V. HANMER, Clerk
Town of Keysville

This is in reply to your letter of August 9, 1967, which reads as follows:

"The Treasurer of Charlotte County has requested that we show proof of compliance with Code Section 58-441.49, Sub-section H, relative to Sales Tax distribution before the Town's share can be delivered to us.

"In 1964 town elections were held according to law. In 1966 the Council was held over after which two councilmen resigned and two new ones were elected by the council. All councilmen were duly appointed and sworn in by the Clerk of the Circuit Court of Charlotte County, copy of which I quote:

""VIRGINIA:
In the Circuit Court of Charlotte County December 5, 1966.
A. W. Thompson, Leland A. Claybrook, J. D. Ramsey, Jr., James G. Neale, Arthur V. Sullard and F. I. Hanmer, Jr., who have been duly appointed members of the Town Council of the Town of Keysville, by an order of the Circuit Court of Charlotte County, Virginia entered on the 17th day of November, 1966, this day appeared before me and took and subscribed the several oaths prescribed by law.
Teste: Edwin H. Hoy, Clerk
Recorded in Common Law Order Book #17, at page 406."

"After the above councilmen were sworn in, they elected Mr. H. H. Hanmer, Jr., Mayor.
"I shall appreciate your opinion as to whether our town is qualified to receive a portion of the Sales Tax."

Section 3 of the charter of the town of Keysville, Chapter 561, Acts of Assembly (1952), bearing on this question reads:

"The councilmen and the mayor shall be elected by the qualified voters of the town on the second Tuesday in June, nineteen hundred fifty-two, and every two years thereafter, in the manner prescribed by law. The present mayor and councilmen shall continue in office until the expiration of the terms for which they were respectively elected."

You will note that this section of the charter provides for the election of the councilmen and mayor by the qualified voters of the town. You state that this was not accomplished in 1962, but instead the councilmen were held over.

In my opinion, the town of Keysville has not complied with the charter provisions providing for the election of its councilmen and mayor for the last
This is in reply to your letter of August 17, 1967, in which you requested my opinion as to whether the Town of Phenix qualifies under § 58-441.49(h) of the Code of Virginia (1950), as amended, for a proportionate part of the local sales taxes levied.

Section 58-441.49(h) reads:

"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 county treasurer shall pay into the town treasury of each such town for general governmental purposes the proper proportionate amount received by him in the ratio that the school age population of each such town bears to the school age population of the entire county, based on the latest state-wide school census."
If the school age population of any such town not constituting a separate special school district is increased by the annexation of territory since the last preceding school age population census, such increase shall, for the purposes of this section, be added to the school age population of such town as shown by the last such census and a proper reduction made in the school age population of the county or counties from which the annexed territory was acquired."

You state that the Town of Phenix has no legislative charter but was incorporated under the general law and the last election held was on June 14, 1960, and since that time the mayor and all councilmen have held over.

In the absence of a legislative charter, the general law on the election of the mayor and councilmen is controlling.

Section 24-168 of the Code concerning town elections provides:

"In every town there shall be elected every two years, on the second Tuesday in June, one elector of the town, who shall be denominated the mayor, and not less than three nor more than nine other electors who shall be denominated the councilmen of the town. The mayor and councilmen shall constitute the council of the town."

Section 24-169 provides that:

"The persons so elected shall enter upon the duties of their office on the first day of September next succeeding their election, and shall continue in office until their successors are qualified."

The language of § 24-168 makes an election of the mayor and councilmen mandatory every two years. Since no election has been held by the Town since 1960, I am of the opinion that the Town has not complied with the law in effect providing for the election of the council and mayor and, therefore, is not eligible to receive a portion of the sales tax under § 58-441.49(h).

*Identical opinion written to David C. Watkins, Mayor, Town of Charlotte Court House, September 11, 1967.

TAXATION—Trailers or Mobile Homes—Classified as tangible personal property

MOTOR VEHICLES—Trailers or Mobile Homes—Taxation—Classified as tangible personal property.

October 17, 1967

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

This is in reply to your letter of October 10, 1967, the pertinent portion of which reads as follows:

"I will appreciate your opinion (1) as to whether or not a trailer loses its identity as personal property and becomes part of the realty if it possesses all or a part and, if so, which parts, of the above mentioned physical characteristics or if it must possess still others and, if so, what they should be, and as to when, under what circumstances
and at what point a trailer loses its identity as personal property and becomes a part of the realty, (2) as to whether or not the local Board of Assessors are authorized to determine when, under what circumstances and at what point a trailer loses its identity as personal property and becomes a part of the realty, and (3) as to who, the Commissioner of Revenue or some other local authority, is authorized to make such determination during the years between general reassessments."

In adopting § 58-829.3 of the Code, the 1960 General Assembly of Virginia placed all mobile homes in the same classification for local taxation and classified all such vehicles as tangible personal property. See opinion of this office to the Honorable Jack P. Blankenship, Commissioner of the Revenue for Campbell County, dated June 6, 1966, Report of the Attorney General (1965-1966), page 281.

In view of this action by the legislature, I am of the opinion that the answer to your Question No. 1 is that the vehicles do not lose their identity as personal property and become real property. This precludes the necessity of answering your Questions Nos. 2 and 3.

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TAXATION—Writ Tax—Compromise settlement.

TAXATION—Writ Tax—Attaches upon filing of motion for judgment.

December 7, 1967

HONORABLE MARGARET B. BROWN, Clerk
Circuit Court of Culpeper County

This is in reply to your letter of December 2, 1967, which I quote as follows:

"A motion for judgment was filed in this office yesterday afternoon and while that was being done, the case was settled in the attorney's office with his partner. I am being asked if I can refund the writ tax and clerk's fee.

"I have no objection to making the refund, but would like to know if I will be doing the right thing.

"Several days ago a divorce suit was sent here in the mail, but a telephone call came through, asking that we hold everything, as the parties had become reconciled. While I was taking the telephone message, one of my deputies was starting the receipt, as she had taken the papers from the mail, and I did not know they had ever been received. I told her not to complete the receipt, and to return the papers. Was I correct in doing that?"

In regard to all actions at law paragraph (17) of § 14.1-112 of the Code of Virginia, in prescribing the clerk's fees, provides that such fee is to be paid by the plaintiff at the time of instituting the action. Concerning writ taxes, § 58-71 of the Code requires that when a suit is commenced in a court of record, there shall be a tax thereon. In a proceeding by motion for judgment, Rule 3:3 (a) of Rules of Court states that an action shall be commenced by filing in the clerk's office a motion for judgment and that the action is then instituted and pending.
In my interpretation of these statutes, the clerk's fee and the writ tax attach upon filing motion for judgment in the clerk's office. Under the conditions indicated, I find no authority for the refund of such fees applicable to a motion for judgment previously filed and, accordingly, I shall answer your first question in the negative.

In respect to the divorce suit, it appears that the notification by telephone was timely received and, under such circumstances, I am of the opinion that you were correct in returning the papers to the proper party.

TOWNS—Bluefield—Council may authorize debts within constitutional limit of eighteen percent valuation—Bond issue not necessary.

August 10, 1967

HONORABLE GRADY W. DALTON
Member, House of Delegates

I am in receipt of your letter of July 25, 1967, in which you present the following situation and inquire:

"The town of Bluefield, Virginia, has had a flood problem for many years. It appears that they are now eligible for an EDA loan, which provides for a grant of 50 to 60% and a low rate loan to cover the remainder of the cost of a non-revenue flood control project.

"The question is: Can the town council, under the authority granted by its charter, and in conformity with state law, enter into a contract of this nature by a resolution of the town council, or would there have to be a bond issue voted by the citizens of the town?"

In response to your inquiry I am forwarding to you a copy of an opinion of this office dated January 2, 1962, to the Honorable James B. Fugate, Member of the House of Delegates, in which a similar situation involving the authority of the Town of Weber City to contract indebtedness was considered and discussed at length. See, Report of the Attorney General (1961-1962), p. 129. It would appear from an examination of the charter of the town of Bluefield that the authority conferred by Section 3 of Chapter 150 of the Acts of Assembly of 1930 upon the town of Bluefield to contract debts, borrow money and issue evidence of indebtedness is substantially similar to that conferred upon the Town of Weber City by Section 3 of Chapter 583 of the Acts of Assembly of 1954, mentioned in the opinion to Delegate Fugate. As you will note, the enclosed opinion also contains a discussion of the effect of Section 127 of the Virginia Constitution upon the authority of towns to borrow money and concludes with the declaration:

"A resolution of council authorizing a debt within the limits of the eighteen per cent valuation, upon such terms as may be concurred in by the lender, will satisfy the requirements of this section of the Constitution."

I am of the opinion that the above-quoted statement would be equally applicable to the situation you present.
REPORT OF THE ATTORNEY GENERAL


HONORABLE E. BRUCE HARVEY
Commonwealth's Attorney for Campbell County

June 24, 1968

I have your letter of June 20, 1968, in which you advise that the Town of Altavista held its councilmanic election on June 11, 1968, and that one of the incumbent members was reelected for a new term beginning September 1, 1968, but died on June 14, 1968; that the charter of Altavista provides for the filling of vacancies on the council by a majority vote of the remaining members.

It is clear that a vacancy presently exists on the council and the council may fill this vacancy by the selection of someone to fill the term of the deceased member expiring September 1, 1968. When the new council elected June 11, 1968, takes office on September 1, 1968, there will then be a vacancy because of the death on June 14, 1968, of one of the persons elected to that body for the term beginning September 1, 1968. The council so taking office on September 1, 1968, after duly qualifying for the new term, may then fill the then existing vacancy in the same manner as heretofore.

I call your attention to § 24-147.1 of the Code of Virginia which applies specifically to boards of supervisors. I find no similar provision relative to town councils.

TREASURERS—Bonds—Treasurer has right to select surety on his personal bond.

BONDS—Treasurers—Right to select surety on personal bond.

HONORABLE PAUL X BOLT
Commonwealth's Attorney for Grayson County

February 12, 1968

I am in receipt of your letter of February 7, 1968, in which you present the following situation and inquiry:

"At the beginning of his four-year term as Treasurer of Grayson County, the Treasurer obtained a bond as required by Section 15.1-41, Code of Virginia, for a period of four years. At the January meeting of the Grayson County Board of Supervisors, it was the desire of the Supervisors to obtain bids for the premium on the surety bonds. Considering Section 15.1-46, Code of Virginia, may the Board of Supervisors request bids from bonding companies' representatives and authorize the low bidder to write the required bond; after which has been executed, cancel the existing bond if the premium on the bond presently in force is not the low bid?"

In this connection, I am forwarding to you copies of two previous opinions of this office, dated June 17, 1959, and December 8, 1955, in which situations substantially identical to that which you present were considered and discussed. These opinions are contained in the Reports of the Attorney General (1958-1959), p. 303; (1955-1956), p. 220.

As you will note from the enclosed rulings, we have previously taken the
position that a county treasurer has the right to select his surety, subject to the approval of the court, judge or clerk before whom he qualifies; however, if a treasurer agrees to an arrangement of the type mentioned in your communication, the proposal of the board of supervisors would not violate any provision of Virginia law, provided the bond covering the treasurer is executed in compliance with §§ 15.1-41 and 15.1-43 (formerly § 15-478 and § 15-480) of the Virginia Code.

REPORT OF THE ATTORNEY GENERAL

TREASURERS—Capitation Tax Tickets—Preparation required by § 58-959.
TREASURERS—Discretionary Mailing of Bills for Less Than Two Dollars.
TAXATION—Mailing of Bills by Treasurers—Discretionary if less than two dollars.

June 4, 1968

HONORABLE WALLACE G. DICKSON
Member, House of Delegates

This is in reply to your letter of May 27, 1968, in which you ask my opinion whether the amendment to § 58-960 of the Code adopted by the 1968 General Assembly of Virginia, by House Bill 246, relieves the treasurers from the responsibility of processing capitation tax tickets.

The amendment to § 58-960 only eliminated the compulsory feature as to the mailing of tax bills of less than two dollars. Therefore, the mailing of state capitation tax bills will be discretionary on the part of the treasurers where no other tax brings the tax liability of the taxpayer up to two dollars as shown on the assessment book on which the capitation tax is assessed.

Section 58-959, however, requires the treasurers to prepare tax tickets for the one dollar and fifty cents State head tax assessed by the commissioners of the revenue. This section has not been amended. Under it capitation tax tickets must be prepared in the future the same as in the past. I am, therefore, of the opinion that House Bill 246 does not relieve the treasurers from the responsibility of processing capitation tax tickets.

TREASURERS—Office Hours.

BOARDS OF SUPERVISORS—May Not Prescribe Office Hours for Elected or Appointed Officials.

November 21, 1967

HONORABLE ELSIE W. FARIS
Treasurer-elect of Fluvanna County

This is in reply to your request of November 14, 1967, for my opinion as to your authority to establish and maintain the working hours of the office of the Treasurer of Fluvanna County when you take that office on January 1, 1968.

In an opinion of this office of June 6, 1949, to the Honorable Hugh B. Marsh, Commonwealth’s Attorney for Fairfax County (see, Report of the
WARRANTS—Issued by Mayor Serving as Presiding Officer of Court of Limited Jurisdiction—May not be returnable before Regional Juvenile and Domestic Relations Court.

COURTS—Of Limited Jurisdiction—Mayor of town may not issue warrant returnable before regional juvenile and domestic relations court.

November 15, 1967

HONORABLE HAROLD B. SINGLETON, Judge
Regional Juvenile and Domestic Relations Court Amherst and Campbell Counties

In response to your inquiry of October 27, 1967, concerning the power of a mayor to issue warrants returnable before the Regional Juvenile and Domestic Relations Court for Amherst and Campbell Counties, I call your attention to § 16.1-75 of the Virginia Code which provides:

"No mayor, except when serving as the presiding officer of a court of limited jurisdiction therein, shall, within any incorporated town, or in any city in which a county court has jurisdiction under the provisions of chapter 4 (§ 16.1-64 et seq.) of this title, exercise any civil or criminal jurisdiction conferred upon such county court. Any mayor or other trial officer authorized to preside over a court of limited jurisdiction under this chapter shall, however, have within his territorial jurisdiction, the same power to issue attachments, warrants and subpoenas within the jurisdiction of such county court as is conferred upon the judge of the court, and he shall also have power to grant bail in any case in which he is authorized by general law to grant bail, and to receive his fee therefor. But any such attachment, warrant or subpoena shall be made returnable before the county court for action thereon." (Italics supplied.)

Further in this connection, I am forwarding to you a copy of a previous opinion of this office dated September 20, 1961, to the Honorable L. John Denney, Mayor of the Town of Amherst, in which the view was expressed that a mayor, acting as a trial officer of a court of limited jurisdiction in accordance with the provisions of §§ 16.1-70, et seq., of the Virginia Code, has the authority to issue warrants within the jurisdiction of the county court, which warrants "must be made returnable before the county court." See, Report of the Attorney General (1961-1962), p. 151; see also, Report of the Attorney General (1960-1961), p. 188.

In light of the language of the statute italicized above and the view ex-
pressed in the enclosed ruling, I am of the opinion that a mayor who acts in the above-mentioned capacity is not authorized to issue warrants returnable before the Regional Juvenile and Domestic Relations Court.

WARRANTS—Search—Should be obtained in locality where search is to be made.

SEARCHES AND SEIZURES—Warrants—Should be obtained in locality where search is to be made.

HONORABLE S. PAGE HIGGINbothAM
Commonwealth's Attorney for Orange County

October 18, 1967

This is in response to your recent letter in which you pose the following question:

“If property stolen in Orange County and is believed to be concealed in a house in Louisa County, in which County should a search warrant be secured?”

Search warrants are, of course, issued pursuant to the provisions of §§ 19.1-83, et seq., of the Code. There is no provision of Virginia law which specifically directs that a search warrant must be issued by a judicial officer of the county or corporation wherein the same is to be executed. While it would appear that the warrant could be issued in Orange County, it would seem more appropriate to cause the same to be issued in Louisa County. Under the circumstances set forth in your letter, it is quite clear that a judicial officer in Louisa County could issue the search warrant. Dellastatious v. Boyce, 152 Va. 368.

In view of the foregoing, I am of opinion that the better procedure would be to have the search warrant issued in Louisa County.

WATER—Riparian Rights—City may use water from land purchased by it.

HONORABLE STUART B. CARTER, Chairman
Botetourt County Board of Supervisors

October 18, 1967

This is in reply to your letter of October 4, 1967, in which you request my opinion on the following:

“If an adjoining city purchased land containing a stream in the adjoining county, can the adjoining county prevent the city from using the water from the property it purchased?”

In response to my letter of October 12, 1967, you have further informed me that the situation involves the use of only the excess water, which is diverted from a creek at a location at which the creek flows through land owned by the city; that the amount of water diverted is controlled to the
extent that the flow of the creek is not reduced and lower riparian owners are not adversely affected, nor have such owners raised any complaint. You further state that private owners only are concerned and the county owns no land on this creek.

In respect to the situation described I find no law which would authorize the county to prevent the city from using the water under such circumstances and, therefore, I shall answer your question in the negative.

WATER AND SEWERAGE SYSTEMS—Establishment Under Water and Sewer Authorities Act—Procedure followed to expand projects not initially specified.

April 10, 1968

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

This is in reply to your letter of March 28, 1968, in which you inquire as to the proper procedure which the Henry County Public Service Authority should follow in providing for a garbage collection service to be added to the present project of the Authority specified in the original charter granted by the State Corporation Commission.

Since the Virginia Water and Sewer Authorities Act contains no express provision for amendment of the original charter, I am of the opinion that § 15.1-1247 of the Code would permit the establishment of a garbage collection project by ordinance or resolution of the Board of Supervisors. The section reads as follows:

“Having specified the initial purpose or purposes and/or project to be undertaken by the authority, the governing bodies of any of the political subdivisions organizing such authority may, from time to time by subsequent ordinance or resolution, after public hearing, and with or without referendum specify further projects to be undertaken by the authority, and no other projects shall be undertaken by the authority than those so specified. If the governing bodies of the political subdivisions organizing the authority fail to specify any project or projects to be undertaken, then the authority shall be deemed to have all the powers granted by this chapter.”

You will note that substantially similar language appears in § 15.1-1251 (a).

Since you state in your communication that the governing body of Henry County specified the initial purpose or purposes of the Authority and did not include the establishment of a garbage and refuse collection and disposal system as one of such purposes, it would appear that a subsequent ordinance or resolution specifying such additional purpose would be appropriate under § 15.1-1247 of the Virginia Code. Moreover, since the governing body of Henry County specified the initial purpose or purposes of the Authority, the situation you present would not fall within the scope of the terminal sentence of the above-quoted statute.

Finally in this connection, it does not appear that any provision of the Virginia Water and Sewer Authorities Act requires submission of such supplemental ordinance or resolution to the State Corporation Commission or the issuance by the Commission of an amended certificate of incorporation or
REPORT OF THE ATTORNEY GENERAL

charter, and I am advised by the Commission that no amended certificates of incorporation or charter are issued in situations such as that here under discussion.

WATER AND SEWERAGE SYSTEMS—Henry County Public Service Authority Created Under Chapter 28, Title 15.1—Authority to regulate garbage and refuse collection.

SEWERAGE—Garbage and Refuse Collection by Henry County Public Service Authority.

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

February 26, 1968

I am in receipt of your letter of February 2, 1968, in which you present the following situation and inquiry:

"The Henry County Board of Supervisors has had numerous requests from citizens in highly populated areas of this county, for the county to provide a garbage and refuse collection and disposal service. Several years ago the Henry County Public Service Authority was created for the purpose of providing water and sewer facilities. A possible means of providing a garbage service is being considered by an amendment of the charter of the Henry County Public Service Authority to authorize this Authority to engage in the activity of garbage and refuse collection and disposal. It is my understanding of the Virginia Water and Sewer Authorities Act, that the governing body could thereafter designate garbage and refuse collection and disposal as a project to be undertaken by the Authority in a defined area or areas.

"Within these same areas there are now several persons and corporations engaged in garbage and refuse collection as private enterprises. Some of these have proved unsatisfactory and this is the reason that we are considering a system operated by or through the local county government. A question has arisen as to whether the Henry County Public Service Authority, after having been authorized to engage in this project, would have the power to preclude private individuals and corporations from thereafter engaging in the business of garbage and refuse collection within the jurisdictional and project area of the Authority. It is felt by some that the Authority could not effectively carry on this operation in competition with these private individuals and corporations."

From your communication it appears that the Henry County Public Service Authority was created pursuant to the provisions of the Virginia Water and Sewer Authorities Act, which is embodied in Chapter 28 of Title 15.1 of the Virginia Code and comprises §§ 15.1-1239 through 15.1-1270 of the Code of Virginia (1950), as amended. This enactment authorizes the governing bodies of various political subdivisions of the Commonwealth of Virginia to create Authorities for establishing, maintaining and operating a "water system", a "sewer system", a "sewer disposal system" or a "garbage and refuse collection and disposal system" as the quoted terms are defined in § 15.1-1240 of the
Virginia Code. Such an Authority is deemed to be an instrumentality exercising public and essential governmental functions to provide for the public health and welfare and is vested with the power specified in the provisions of the Virginia Water and Sewer Authorities Act.

Whether or not the Henry County Public Service Authority "would have the power to preclude private individuals and corporations from . . . . . engaging in the business of garbage and refuse collection" within the jurisdiction of the Authority would appear to depend upon whether or not the Authority is empowered by the act in question to require property owners within its jurisdiction to utilize its garbage and refuse collection and disposal system and cease to use any other method of garbage and refuse collection and disposal. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated January 8, 1965, in which a situation substantially similar to that outlined in your communication was considered. See, Report of the Attorney General (1964-1965), p. 355. The question under discussion in the enclosed ruling involved the power of the Board of Supervisors of Chesterfield County to require property owners to utilize the water supply system established by the county in accordance with the provisions of Chapter 175 of the Acts of Assembly of 1946. On that occasion, this office concluded (Report of the Attorney General, supra, at 355):

"Chapter 175 of the Acts of Assembly (1946) does not contain any provision conferring upon the county the power to enforce abutting property owners to connect with any water system which may be established under said Chapter. . . . In the absence of a provision in the Act giving the governing body of the county the power to require property owners to connect with the system, I am of the opinion that this question must be answered in the negative."

During the course of that opinion, we called attention to the existence of an enactment expressly conferring authority of this character upon a sanitary district commission established by the General Assembly. See, Weber City Sanitation Commission v. Craft, 196 Va. 1140. Sustained against constitutional challenge in the Craft case was Section 6(13) of Chapter 523, Acts of Assembly (1946), which specifically conferred upon the Weber City Sanitation Commission the power:

"To require the abutting property owners to connect with any water system which may be owned or operated by the commission." (Italics supplied.)

Moreover, the governing bodies of sanitary districts created in accordance with the provision of Chapter 2 of Title 21 of the Virginia Code are also specifically authorized by § 21-118.4 (d) thereof:

"To require owners or tenants of any property in the district to connect with any such system or systems, and to contract with the owners or tenants for such connections. In order to require owners or tenants of any property in the district to connect with any such system or systems, the board of supervisors shall have power and authority to adopt ordinances so requiring owners or tenants to connect with such systems, and to use the same, and the board of supervisors shall have power to provide for a punishment in the ordinance of not exceeding a fifty dollar fine for each failure and refusal to so connect with such systems, or to use the same." (Italics supplied.)
Similarly, in the instant situation, an Authority created under the Virginia Water and Sewer Authorities Act is expressly empowered by § 15.1-1261 of the Virginia Code to require the owner, tenant or other occupant of a lot or parcel of land served by a sewer system to connect with the Authority's sewer system and discontinue use of any other method of sewerage disposal. In pertinent part, § 15.1-1261 prescribes:

"Upon the acquisition or construction of any sewer system under the provisions of this chapter, the owner, tenant, or occupant of each lot or parcel of land which abuts upon a street or other public way containing a sanitary sewer which is a part of or which is served or may be served by such sewer system and upon which lot or parcel a building shall have been constructed for residential, commercial or industrial use, shall, if so required by the rules and regulations or a resolution of the authority, with concurrence of such local government, municipality, or county that may be involved, connect such building with such sanitary sewer, and shall cease to use any other method for the disposal of sewage, sewage waste or other polluting matter."

( Italics supplied.)

Although the validity of these provisions of the Virginia Water and Sewer Authorities Act were sustained in Farquhar v. Board of Supervisors, 196 Va. 54, I have been unable to discover any similar provisions of that act which expressly empower an Authority to require property owners to connect with or use its water system or its garbage and refuse collection and disposal system. Although an Authority created under the act in question may establish and operate any of the various types of systems defined in § 15.1-1240, there does not appear to be any provision of law specifically delegating to such an Authority the power to require use of any system except a sewer system pursuant to § 15.1-1261 of the Virginia Code. In the absence of such a statute, I am constrained to believe that the views expressed in the enclosed ruling would be equally applicable to the situation you present and that your inquiry would fall within the scope of the following language of that opinion:

"Inasmuch as the legislation involved here does not delegate the power to the board of supervisors to require property owners to connect with the system, I do not feel that the board can enforce such a requirement unless it can be clearly shown that it is necessary in order to protect the public health of the inhabitants, in which event § 15.1-510 of the Code would apply."

WATER AND SEWERAGE SYSTEMS—Sanitation Commission—Not authorized to enter into contract with property owner outside sanitary district for use of sewage lines and sewage plant.

November 2, 1967

HONORABLE ERWIN S. SOLOMON
Commonwealth's Attorney for Bath County

I am in receipt of your letter of October 16, 1967, in which you present the following situation and inquiry:
"The Warm Springs Sanitation Commission which was created under Title 21 Section 21-244 to 21-290 Code of Virginia (1950), as amended, desires your opinion on the following question:

"A sub-division owner whose property lies adjoining the said Commission's boundary desires to contract with the Commission to have the sewage disposal from the sub-division connected to and run through the lines of the Commission to the Commission's sewage disposal plant.

"It should be noted that there is a bond issue for which the residents of the District are liable. The fees for the bond issue are charged on the basis of a proportioned rate assessed on the real property. An additional charge is made for maintenance.

"The Commission desires to know whether it may contract with the sub-division owner for use of the sewage lines and sewage plant?"

I have reviewed the various provisions of Virginia law to which you refer in your communication and others contained in Chapter 4 of Title 21 of the Virginia Code, and I have been unable to discover any statutory authorization for a sanitary commission to enter into contracts of the type in question with the owner of property located outside the district in which such commission exercises jurisdiction. Initially, it should be noted that § 21-260 of the Virginia Code empowers a sanitary commission to charge and collect fees, rents or other charges for the use and services of its sewage disposal system, and § 21-261 prescribes that such fees, rents and charges shall—as nearly as practicable and equitable—be "uniform throughout the district" for the same type, class and amount of such use or service. (Emphasis supplied.)

Moreover, express provision is made by § 21-254(a) for a sanitary commission to enter into contracts with the United States or any department, institution or agency thereof for the treatment and disposal of sewage or industrial waste of or originating in or on any reservation, property, institution, building or structures "within the district," owned or controlled by the United States. Furthermore, § 21-254(b) authorizes such commissions to provide, contract, operate and maintain facilities for the treatment and disposal of industrial waste "originating in the district." Section 21-268 relates to contracts between a sanitary commission and counties, cities or towns "in whole or in part embraced within the district" for the collection of the fees, rents and charges established by a commission. Finally in this connection, express provision is made by § 21-285 for a sanitary commission to contract with counties, cities or towns "in whole or in part outside of the district" for the treatment and disposal of sewage or industrial waste in the contracting counties, cities or towns, but I find no similar provision authorizing a sanitary commission to contract with an individual owner of private property located outside the district. (Emphasis supplied.) I am therefore of the opinion that your inquiry should be answered in the negative.
WATER AND SEWERAGE SYSTEMS—Sewage Disposal—Authorization for financing from county's general fund—Not affected by prior establishment of sanitary districts.

COUNTIES, CITIES AND TOWNS—Sewage Disposal Systems—Establishment and financing.

May 7, 1968

HONORABLE PAUL B. EBERT
Commonwealth's Attorney for Prince William County

This is in reply to your letter of May 1, 1968, from which I quote the following:

"Over the years, Prince William County sewered certain areas by forming sanitary districts in various localities. Here recently, in one locality, where the Board of Supervisors did not feel a sanitary district was feasible, the Board contracted for the installation of a sewage disposal system to be totally financed out of the funds available in the general fund. Since that time, several questions regarding the legality of this action have been raised and the Treasurer of the County has asked that I write you for your opinion concerning the same. The first question is:

"Does the Board under § 15.1-320 or any other authority have the power to establish a sewage disposal system to be financed out of the general fund?

"Does the fact that certain sanitary districts have been established throughout the County, previous to this action, have any bearing on the validity of the Board's action in this case whereby a sanitary district was not formed?"

The authorization for the creation of sanitary districts in a county is contained in Chapter 2, Title 21 of the Code of Virginia. Separate and apart from this, the governing body of any county, city or town is authorized and empowered under Chapter 9 of Title 15.1 of the Code to establish a sewage disposal system, subject to approval of the Water Control Board. In this connection, § 15.1-320 states, in part, as follows:

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

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

This section, in paragraph (8) thereof, authorizes any county, city or town establishing, constructing or improving a sewage disposal system authorized thereunder to fix, charge and collect fees, rents and other charges for the use and services provided. There is nothing in this or the related sections of the
REPORT OF THE ATTORNEY GENERAL

Code, however, which would prevent a county from financing such project out of the funds available in the county's general fund. Accordingly, I shall answer your first question in the affirmative. A similar conclusion was expressed in Report of the Attorney General (1954-1955), p. 24.

A county has a choice under the Code references herein cited to proceed with the establishing of a sanitary district or to act pursuant to § 15.1-320 and related sections to establish a sewage disposal system. Establishing one or more sanitary districts under Chapter 2 of Title 21 does not preclude the county, at some later date, from exercising its prerogative to establish a sewage disposal system pursuant to Chapter 9 of Title 15.1. Therefore, I shall answer your second question in the negative.

WELFARE AND INSTITUTIONS—Detention Home—When eligible for State reimbursement.

COUNTIES, CITIES AND TOWNS—Detention Home Serving Three or More Counties or Cities—Eligibility for State reimbursement.

HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

August 14, 1967

This is in reply to your letter of August 4, 1967, which reads as follows:

"The Superintendent and Board of the Tidewater Detention Home which is situated in the City of Chesapeake have requested that I obtain from you your opinion concerning certain funds that would be payable to the City of Chesapeake under § 16.1-201 of the Code of Virginia and the enlargement and expansion of the Institution's facilities. The Home now serves the Cities of Chesapeake, Virginia Beach, Portsmouth and Nansemond County. It would appear from the provisions of the aforesaid statute that one-half of the construction cost would be borne by the State and the question that has been raised is whether or not it will be necessary for the Board of the Detention Home to enter into new contracts with at least two other political subdivisions to provide services for periods of not less than ten years."

I understand that the present Detention Home was constructed by and is located in the City of Chesapeake. I further understand that the other two cities and one county which you name in your letter presently have agreements with the City of Chesapeake by which they contribute to the maintenance and operation of the Home and utilize its facilities. The contemplated enlargement is to be done at the sole expense of the City of Chesapeake, and you wish to know whether, in order to be entitled to the State reimbursement provided for in § 16.1-201, the City of Chesapeake is required by that section to enter into new agreements with at least two other political subdivisions for periods of at least ten years.

In my opinion, the answer is in the negative. The second sentence of § 16.1-201 provides that in order for the City of Chesapeake to be entitled to the State reimbursement, the facilities must be available for a period of at least ten years for use by three or more counties or cities, upon a basis approved by the Board. The statute does not require contractual arrangements with
other political subdivisions. It merely requires availability for use by other subdivisions. Note, however, the phrase in the second sentence of the section, "upon a basis approved by the Board." It is my understanding that the State Board of Welfare and Institutions usually requires written proof that such homes will be available for use by three or more counties or cities. I would assume that written contracts of the kind about which you inquire would be one way of establishing the fact that the Home will be available for use in accordance with the provisions of the statute.

WITNESSES—Habeas Corpus Proceedings—Costs incurred in summoning paid by Commonwealth under appropriate order of court.

June 14, 1968

HONORABLE THOMAS R. MILLER, Clerk
Hustings Court of the City of Richmond

This is in response to your letter of June 3, 1968, in which you inquire as to the method of payment, if any, for witnesses summoned in a habeas corpus proceeding where the Superintendent of the Penitentiary is respondent and the petitioner is indigent.

I am of opinion that witnesses summoned on behalf of the Superintendent of the Penitentiary are witnesses summoned by the Commonwealth and should be paid pursuant to the provisions of § 14.1-189 of the Code of Virginia.

In cases where the petitioning prisoner is indigent, he is entitled to proceed in forma pauperis. The cost of summoning witnesses in his behalf is an expense incident to his prosecution of his petition for a writ of habeas corpus. The following language has appeared in the Acts of Assembly for some years and will be found in Item 92(g), Chapter 806, Acts of Assembly, 1968:

"The expenses incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner, including the payment of counsel fees as fixed by the court; the expenses shall be paid upon receipt of an appropriate order from a court."

In view of the foregoing, I am of opinion that the Court should direct the payment of the witness fees pursuant to the aforesaid provision of the Appropriation Act, in conformity with the provisions of § 14.1-191 of the Code of Virginia.

WORKMEN'S COMPENSATION ACT—Persons Covered—Judges and clerical staffs of county courts.

COURTS—County—Judges and clerical staff covered by Workmen's Compensation Act.

April 10, 1968

HONORABLE JOSEPH S. JAMES
Secretary, Committee of Judges

This is in reply to your recent letter in which you indicate that the Com-
mittee of Judges, appointed under the provisions of § 14.1-40 of the Code of Virginia to fix the salaries of the judges and other personnel of the county courts, desires an answer to the following question:

"The Committee has asked that I request an opinion from you as to whether the judges and the clerical staff of the County Courts should be covered by Workmen's Compensation Insurance, and, if so, what agency of the State should contract for and pay the premiums on the insurance and from what appropriation should the premiums be paid?"

A copy of § 65-4 of the Code of Virginia is enclosed. This section, defining the word "employee," indicates those persons who are covered by the provisions of the Workmen's Compensation Act of Virginia, contained in Title 65 of the Code. The second sentence thereof provides as follows:

"Policemen and firemen, and sheriffs and their deputies, town and city sergeants and town and city deputy sergeants, county and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth, clerks of courts of record, juvenile and domestic relations courts and county and municipal courts, and their deputies, officers and employees, shall be deemed to be employees of the respective cities, counties or towns in which their services are employed and by whom their salaries are paid or in which their compensation is earnable."

In my opinion, it is clear from this sentence that the clerks, deputies, officers, clerical assistants and other employees of the county courts are covered by the provisions of the workmen's compensation law and are deemed to be employees of the counties in which their services are employed and in which their compensation is earnable. Therefore, in my opinion, any benefits payable to these personnel under the provisions of the workmen's compensation law would be payable by the appropriate county. See, City of Richmond v. Johnson, 202 Va. 33, 36. This of course, would include the payment of premiums for workmen's compensation insurance, in the event that insurance is the method adopted by a county to provide the protection required. (See, §§ 65-100, et seq., of the Code.)

Additionally, you will note that the word "employee," as defined in § 65-4, includes "the officers and members of the National Guard, the Virginia State Guard and the Virginia Reserve Militia, registered members on duty or in training of the United States Civil Defense Corps of this State, the forest wardens, the judges, clerks and other employees of regional juvenile and domestic relations courts and all other officers and employees of the State..." (Emphasis added.) In my opinion, judges of county courts are State officers. See, City of Richmond v. Johnson, 202 Va. 33, 36; Burch v. Hardwicke, 30 Gratt. (71 Va.) 24, 34, 32 Am. Rep. 640; Lambert v. Barrett, 115 Va. 136, 140, 78 S.E. 586. Therefore, judges of the county courts are protected by the Workmen's Compensation Act. Premiums for workmen's compensation insurance for county court judges should be paid from the appropriation made by the General Assembly from the criminal fund to effectuate the provisions of § 14.1-43 of the Code, in the event that insurance is the method chosen to provide the protection required.
INDEX

OPINIONS
ATTORNEY GENERAL OF VIRGINIA
1967-1968

ADOPTION
Records—Must be kept in separate and exclusive file ........................................ 57

ADVERTISING
“For Sale” Signs Posted on Realty Adjacent to Highways—Language permitted .......... 1

AGRICULTURE AND COMMERCE
Apples—Board may prohibit movement until properly labeled .................................. 2

AGRICULTURE AND INDUSTRY
Cattle Disease Erradication—Diagnosis of mastitis in cattle by association unlawful practice of veterinary medicine .................................................... 1

AIR POLLUTION CONTROL
Local Air Pollution Control Committees—Powers limited ........................................ 3
State Board—May abolish an air pollution control district ....................................... 4

AIRPORTS
Blue Ridge Airport Authority—Leasing portions for operating facilities—Advertisement not required ................................................................. 5

ALCOHOLIC BEVERAGE CONTROL LAWS
Interdiction of Intoxicated Driver or Habitual Drunkard—Initial order limited to one year ................................................................. 6
Local Option—Validity of signatures of qualified voters prior to effective date of act ................................................................. 7
Local Option—Whiskey-by-the-drink—Referendum required in each political subdivision qualifying ................................................................. 8
Remuneration or Gifts for Appearance Before Board—Officers of the Commonwealth may receive as fees for legal services ........................................ 9
Rules and Regulations—Board may adopt to require wholesale licensees to post prices—Also, to regulate operations of nonresident brewers ........................................ 11

ANNEXATION
Justice of Peace—Continuation in office where territory elected to serve is annexed ................................................................. 134

ARREST
Felony—Accused taken before court on first day court sits .................................. 13
Justice of Peace—Authority as “conservator of the peace” .................................. 13
Special Police of Mary Washington College—Limitation of authority . 254
Without Warrant—Can be made where misdemeanor committed in presence of officer ................................................................. 76

ATTACHMENTS
Bond Required Where Principal Debtor Fails to Appear .................................. 48

ATTORNEYS
Court-appointed—Compensation allowed by Juvenile and Domestic Relations Court ......................................................................................................... 143
Entitlement—Indigent entitled to in proceeding for writ of error coram 
vobis .................................................. 14
Exemption from Real Estate Licensing—When performing legal services 
Showing of Realty and Negotiating Sale Therefor—Acts as real estate 
broker not attorney ...................................... 15

BAIL
Justice of Peace—May admit felon to bail only upon authorization of 
judge of court of record ........................................ 16

BAIL AND RECOGNIZANCE
Justice of Peace—Authority to admit to bail .................. 16

BANKS
Interest—Real estate loans—May charge legal rate in advance ........ 126

BOARDS OF SUPERVISORS
Appropriations—May be made to community hospital ................ 18
Appropriations—May make for maintenance of recreational facilities 
of a city .......................................................... 17
Appropriations—May make for nursing home if qualifies as charitable 
institution or association ....................................... 17
Appropriations—May not be made to 4-H Educational Center ....... 18
Appropriations—Schools and welfare—Limitations on reducing specific 
items .................................................................. 19
Authority—Appointment of school board members following adoption 
of county board form of government ............................. 225
Authority—May not adopt ordinance on open housing ............... 19
Authority—May not condemn land for charitable hospital .......... 20
Authority—May not pay office rent for Agricultural Stabilization and 
Conservation Service ............................................. 21
Authority—May provide microwave unit of firefighting equipment upon 
privately owned property ......................................... 22
Authority to Appropriate Salary for Secretary to Judge .............. 129
Bond Referendum—Type of notice required by § 15.1-187 ............ 39
Candidate For Who Resides in Town When Town Becomes City .... 46
County Board Form of Government—Determination of compensation 
22
County Executive Form of Government—Authority to appoint officers 
and employees of county ......................................... 237
County Free Library—May acquire land for construction .......... 23
Employment of Wife of Member of Board—Interpretation of § 15.1-67 217
Establishment of State-operated Community College—May expend 
public funds for costs of meals incident to meeting to determine 
feasibility ............................................................ 65
Exchange and Conveyance of Public Property—Subject to provisions 
of § 15.1-262 .......................................................... 24
Glebe Funds—Use of .............................................. 64
Henry County—Member may serve on board of directors of Fieldale 
Sanitary District ..................................................... 24
Industrial Development—Appropriation of funds to Authority for ac-
quision of site for lease, not donation, to private industry .......... 25
Loans for School Construction—May approve .......................... 240
May Not Prescribe Office Hours for Elected or Appointed Officials 295
May Require Monthly Reports of County School Boards .......... 27
May Require Reports From County School Boards .................. 28
Meetings—Procedure where tie vote cast on question—Conduct of other 
business .................................................................. 29
Member—Eligibility requirements for candidate .......................... 93
**REPORT OF THE ATTORNEY GENERAL**

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>309</td>
</tr>
</tbody>
</table>

Member—May not be employed as superintendent of home operated by county ................................................. 217
Member—May not serve on electoral board ................................................................. 96
Member—May vote upon question of sale of land of county to bank of which he is a director .................................................. 37
Member—Must disassociate himself from insurance firm writing insurance for county .............................................................. 30
Members—Serving when town becomes city .......................................................... 47
No Authority Over Public Landings Which are Part of Secondary System of State Highways ...................................................... 121
Office for Commonwealth’s Attorney—Authority to rent and to furnish equipment .................................................. 30
Ordinances—May amend ordinances, other than license tax ordinances, at meeting at which adopted ........................................... 31
Ordinances—Public dumps—May designate specific areas for abandoned automobiles and impose penalties for violations .................. 32
Ordinances—Publication necessary ................................................................. 33
Ordinances Imposing License Tax on Carnivals, Etc.—Must parallel State statute .................................................. 33
Ordinances Imposing License Tax on Slot Machine Operators—Must conform to definition in enabling act ...................... 35
Referendum—Cannot be rescinded after filing with court ........................................... 36
Russell County—No authority to supplement salaries of deputy clerks ...................... 37
Sale of County Property—Unanimous vote of members required .................................................. 37
School Funds—May appropriate on monthly basis .................................................. 27
Use of Voting Machines—Determined by board .................................................. 109
Water Authority—Referendum mandatory if petition filed at public meeting—Results advisory only .......................... 38
Water and Sewer Authority—Member may not be interested, directly or indirectly, in contract .................................................. 218

**BOND ISSUES**

County—Referendum—Form of notice .................................................. 39
Referendum—School Bonds—Persons qualified to vote .................................................. 40

**BONDS**

State Institutions—Bond Acts of 1968—Meet constitutional requirement of sinking funds .................................................. 41
Treasurers—Right to select surety on personal bond .................................................. 294

**CEMETERIES**

Establishment—Prohibited distances from residences .................................................. 42

**CENTRAL CRIMINAL RECORDS EXCHANGE**

Filing of Fingerprint Cards .................................................. 148
Juveniles—Fingerprints—Record not released to Exchange .................................................. 43

**CHARTERS**

Norfolk—Not subject to objection that it contains special legislation .................................................. 44

**CITIES**

Charter—Not subject to objection that it contains special legislation .................................................. 44
Colonial Heights—Council Meetings—Use of mechanical recording devices—May adopt rules regarding .................................................. 45
Constitutional Officers—Years for holding elections not set by Virginia Constitution .................................................. 95
Transition to From Town—Effective when court order entered under § 15.1-982 .................................................. 46, 47
## CITIES AND TOWNS
Bonded Indebtedness—Limited by Section 127 of Virginia Constitution  47

## CITIES, COUNTIES AND TOWNS
Radar—Placement of signs by cities and towns  171

## CIVIL PROCEDURE
Attachment Proceeding—Bond required where principal debtor fails to appear  48
Cross-claims—Writ tax chargeable  53
Detinue—When defendant has option to pay or surrender the property  48
Material Witness—Justice of peace may not issue warrant for arrest  49

## CLERKS
Clerk of County Court and Juvenile and Domestic Relations Court of Page County—May not serve as bookkeeper for sheriff's office  224
County—Compensation which may be received  50
Deputies—Salaries—No authority for Russell County to supplement  37
Deputy—May not serve on town council  213
Duties—May not refuse to record deeds conveying parcels of real estate in subdivision  198
Fees—Filing suits to obtain perpetual easements  51
Fees—For filing petition for relief of erroneous assessment  51
Fees—May charge for making copies of papers or records under § 14.1-112(10)  60
Fees—Not chargeable against Commonwealth except when allowed by statute  52
Fees—Writ of venditioni exponas—Charge of $1.50 under § 14.1-112(8)  52
Filing of Cross-claim—Writ tax chargeable; no clerk's fees  53
Issuance of Garnishment Summons—Not required to compute interest on judgment  54
Juvenile and Domestic Relations Courts—May issue warrants only in cases cognizable by that court  142
Real Estate Records—May be inspected by public  55
Recordation—Inter vivos trust  228
Recordation—Petition in bankruptcy—No duty to record  55
Recordation—Power of attorney of surety company recorded under § 55-113—Use of seal  56
Records—Adoption cases—Separate and exclusive file required  57

## COMMISSIONERS OF REVENUE
Deputy—May not be employed by school board as school bus driver  214
Escheated Land—May be removed from assessment books  112
Land Books—Limitations upon removal of real estate  268
Land Maps—New city may use county's for reference  57
Preclusion From Divulging Tax Information—Does not extend to statistical data  58

## COMMONWEALTH ATTORNEYS
Assistant—City of Waynesboro—Appointment subject to § 15.1-9  59
City of Salem—No authority for appointment  60
Duties—Not required by law to represent local departments of health or welfare  60
Duties—Not required by statute to advise sanitary district, but required to advise board of supervisors on all questions arising before board  61
Office Space—Authority to governing bodies to supply and furnish equipment  30
REPORT OF THE ATTORNEY GENERAL

CONSTITUTION

Bond Acts of 1968—Meet constitutional requirements of Sec. 187 ........................................ 41
Section 73—Governor may remove political disability where conviction under laws of another state ........................................ 118
State—General Assembly may not authorize any lottery ......................................................... 62

CONTRACTORS

Licenses—City may require .......................................................... 269

COUNTIES

Air Pollution Control—When authorized to adopt ordinances .............................................. 4
Ambulance Service—Not obligated to provide, but may contribute to non-profit organizations for service ........................................ 62
Authority—Water pollution control—May adopt ordinances not inconsistent with general law ........................................ 63
Bond Issue—Proceeds not to be used for any purpose not specified in question submitted in referendum ........................................ 233
Bonded Indebtedness—Not limited by Section 127 of Virginia Constitution ........................................ 47
Borrowing of Funds for School Construction—When referendum required ........................................ 64
Essex—Courthouse restoration—May use Glebe Fund to defray expense ........................................ 64
Establishment of State-operated Community College—May expend public funds for costs of meals incident to meeting to determine feasibility ........................................ 65
Free Library System—May acquire land for establishment ........................................ 23
Joint Exercise of Power—Conditions controlling .............................................................. 4
Leasing of County-owned Land—Authorized by § 15.1-262 ........................................ 66
Ordinances—Automobile graveyards—Definition must be amended, if necessary, to conform to that of State ........................................ 193
Ordinances—Fireworks—Extent to which may regulate advertising, sale and use ........................................ 67
Subdivision Streets—Extent to which counties may contribute to cost of improvement ........................................ 122
Urban County Executive Form—Present justices of peace continue in office until successors appointed ........................................ 141
Vicious Dogs—May regulate the running at large ......................................................... 85

COUNTIES, CITIES AND TOWNS

Authorized to Adopt Local Parallel Ordinances—Relating to operation of motor vehicle without permit ........................................ 169
Collection of Taxes in Installments—All cities and towns authorized, only certain counties ........................................ 258
Consolidation of County and All Towns Within County—Will be permissible under Chapter 694, Acts of 1968 ........................................ 67
Contractors' Licenses—May be required for electrical, plumbing and other work ........................................ 68
County Electoral Board—Has responsibility for election when precincts within limits of city of second class ........................................ 99
Detention Home Serving Three or More Counties or Cities—Eligibility for State reimbursement ........................................ 304
Establishment of Joint Schools—Not compulsory ......................................................... 69
Justice of Peace—Authority upon transition of town to city of second class ........................................ 140
Land Maps—County map may be used for reference by commissioner of revenue of new city ........................................ 57
Local Vehicle License Fees—Subject to limitation provisions of § 46.1-65 ........................................ 167
Ordinances Paralleling State Statutes—Authorized only by express legislative grant ........................................ 195
| Property Owned by County and Leased to Others Subject to Taxation by City | 263 |
| Sewage Disposal Systems—Establishment and financing | 303 |
| Special School Age Population Census—Authorized only on state-wide basis for sales tax revenue distribution | 287 |
| Town of Wytheville—May not condemn land on behalf of charitable institution for hospital | 20 |
| Whiskey-by-the-Drink—Referendum required in each political subdivision constituting separate local option unit | 8 |

**COURTS**

| Circuit Court of City of Richmond—Jurisdiction to try escapees from State Penitentiary | 201 |
| Corporation Court of the City of Norfolk—Authority to appoint substitute civil justice to fill vacancy | 70 |
| County—Judges and clerical staff covered by Workmen's Compensation Act | 305 |
| County—No jurisdiction to try cases involving title to real property | 72 |
| Misdemeanants—Jurisdiction—County or circuit court | 83 |
| Of Limited Jurisdiction—Mayor of town may not issue warrant returnable before regional juvenile and domestic relations court | 296 |

**COURTS NOT OF RECORD**

| Issuance of 'Capias Pro Fine'—Recommended procedure to be followed | 81 |
| Municipal—Fees—Paid into city treasury unless otherwise provided | 73 |

**COURTS OF RECORD**

| Fees—Filing suits to obtain perpetual easements | 51 |

**CRIMES**

| Alteration of Temporary Tags Issued for Motor Vehicles—Misdemeanor | 164 |
| Carrying Concealed Weapons—Tear gas pens not included in statute | 74 |
| Common Law—In effect in this State | 76 |
| Improper Use of State Motor Vehicle Inspection Sticker—Party charged | 162 |
| Involuntary Manslaughter—Person may also be convicted of reckless driving if evidence shows more than one act | 77 |
| Juveniles—Fingerprints—Records not released to Central Criminal Records Exchange | 43 |
| Larceny Under § 6.1-115—Majority stockholder in corporation may be guilty of violation of section | 75 |
| Larceny Under § 6.1-115—Purpose for which check given no defense for violation of section | 75 |
| Larceny Under § 6.1-115—Suspension or revocation of corporation charter no defense to violation of section | 75 |
| Petit Larceny—Conviction acts as bar from registering and voting | 91 |
| Reckless Driving—Check for accuracy of radar required in conviction | 173 |
| Solicitations—in absence of specific statute making such solicitations a crime, may be tried as common law crime | 76 |
| Speeding—Evidence as to accuracy of speedometer—Use of in trial | 161 |

**CRIMINAL PROCEDURE**

| Appeal—When convicted of crime other than one charged | 174 |
| Appearance—Person charged with felony to be brought before court not of record on first day court sits | 13 |
| Arrest Without Warrant—May be made where misdemeanor committed in presence of officer | 76 |
| Attorneys—Indigent entitled to in proceeding for writ of error coram vobis | 14 |
Report of the Attorney General

Conviction of Misdemeanor Not Bar to Conviction of Felony 77
Costs—Accused if acquitted not liable 78
Costs—Fees for witnesses for indigent defendants 79
Driving Under Influence of Intoxicants—Court having jurisdiction 80
Issuance of ‘Capias Pro Fine’—Courts not of record 81
Juveniles—Fingerprint records not released to Central Criminal Records Exchange 43
Medical Examinations of Juveniles—Compensation pursuant to § 19.1-315 82
Misdemeanants—Trials—County or circuit court 83
Warrants—Game wardens may inspect open fields without securing 115

Desertion and Nonsupport
Venue for Action Prescribed by § 20-83 86

Dog Laws
Dogs Owned and Bred by Corporation for Research—Taxable under §§ 58-410 and 58-411 262
Licenses—Not to be issued where inoculation certificate dated more than three years prior to application 83
Military Reservations—Jurisdiction of game wardens and liability of county for injury caused by dogs 84
Vicious Dogs—Running at large—Regulation by local authorities 85

Domestic Relations
Desertion and Nonsupport—Venue for action prescribed by § 20-83 86

Education
Local Community College Board—Not a State institution—Acts only as advisor to State Board for Community Colleges 87
Tuition—Reduced for domiciliaries and residents of Virginia 257
Tuition—State colleges—Free to children of War Veterans 256

Elections
Absentee Ballots—May be personally delivered to electoral board or mailed by registered or certified mail 88
Absentee Ballots—Restrictions placed on use 88
Absentee Ballots—Vote cast by mail—No requirement that envelopes be kept 88
Assistant Registrars—Not required to work in the office of the general registrar 90
Bar From Registering and Voting—Conviction of petit larceny 91
Candidate For Board of Supervisors Residing in Town 46
Candidates—Certification of party nominees by party chairman not conditioned on filing statements of expenses 92
Candidates—Must file expense accounts within thirty days after convention 92
Candidates—Requirements for member of board of supervisors 93
Candidates—Timely filing of declaration and petition 94
Candidates—Wife of deputy sheriff may have name listed on ballot 250
Challenges—Duty of judges 101
Constitutional Officers of Cities—No years set for election by Constitution of Virginia 95
Electoral Board—Deputy sheriff or deputy treasurer may not be member 95
Electoral Board—Member of board of supervisors may not serve 96
Electoral Board Secretary—May not act as agent for board of supervisors in placing insurance for compensation, directly or indirectly 97
<table>
<thead>
<tr>
<th>Eligibility for City Council—Candidate ineligible if convicted of petit larceny</th>
<th>98</th>
</tr>
</thead>
<tbody>
<tr>
<td>General—County officers—Costs borne by county where precincts within limits of city of second class</td>
<td>99</td>
</tr>
<tr>
<td>General Registrar—Appointed—Authorized to register voters</td>
<td>231</td>
</tr>
<tr>
<td>General Registrar—Board of supervisors not required to biennially adopt resolution establishing office</td>
<td>100</td>
</tr>
<tr>
<td>General Registrar—City of Newport News—Required to maintain his office the permanent office in the City Hall</td>
<td>99</td>
</tr>
<tr>
<td>General Registrar—Remains in office until successor qualifies</td>
<td>100</td>
</tr>
<tr>
<td>Judges—Penalties provided for failure to perform duties</td>
<td>101</td>
</tr>
<tr>
<td>Justice of Peace—Eligibility—Secretary of sheriff not prohibited by § 39-7 to serve</td>
<td>102</td>
</tr>
<tr>
<td>Person Elected by Write-in-Vote—Entitled to office if qualified when takes oath</td>
<td>102</td>
</tr>
<tr>
<td>Political Parties—School board member may serve as democratic committee, precinct or district chairman</td>
<td>103</td>
</tr>
<tr>
<td>Political Party Committeemen—May vote for themselves for election or re-election</td>
<td>103</td>
</tr>
<tr>
<td>Primary—Cost of second primary should be borne equally by each of the candidates</td>
<td>104</td>
</tr>
<tr>
<td>Registrars—Must be a resident of county or city in which appointed</td>
<td>105</td>
</tr>
<tr>
<td>Residence—Requirements—For married woman in order to register and vote in husband’s voting residence</td>
<td>105</td>
</tr>
<tr>
<td>Sample Ballots—May be carried into voting booths by voters</td>
<td>106</td>
</tr>
<tr>
<td>School Bond Referendum—Persons qualified to vote</td>
<td>40</td>
</tr>
<tr>
<td>Violations of Election Laws—Authority of attorneys appointed to investigate under § 24-27</td>
<td>106</td>
</tr>
<tr>
<td>Voter Registration—May be delivered by mail</td>
<td>107</td>
</tr>
<tr>
<td>Voting—Eligibility—Must be domiciliary resident of Virginia and pay State income tax</td>
<td>108</td>
</tr>
<tr>
<td>Voting—Failure of registrant to vote does not affect eligibility</td>
<td>103</td>
</tr>
<tr>
<td>Voting—Governor may remove political disability where person convicted under laws of another state</td>
<td>118</td>
</tr>
<tr>
<td>Voting—Residence—County officials previously residing in town now city of second class may vote in county</td>
<td>108</td>
</tr>
<tr>
<td>Voting Machines—Use determined by board of supervisors</td>
<td>109</td>
</tr>
<tr>
<td>Voting Places—Persons precluded from being within 40 feet from ballot box—Failure to comply does not invalidate election</td>
<td>110</td>
</tr>
</tbody>
</table>

**EMINENT DOMAIN**

| Local Community College Board—No authority to condemn land for educational purposes | 87 |
| Taxation—Credit allowed taxpayer where land acquired by State | 259 |

**ESCHEATS**

| Governor’s Order Controlling as to Time and Place of Sale | 110 |
| Land—Commissioner of the revenue may remove from assessment books | 112 |
| Recovery of Property—Procedure set forth in §§ 55-176 through 55-181 | 113 |
| Sales of Property—Escheator may employ auctioneer to conduct sales | 110 |

**EVIDENCE**

| Sworn Results of Calibration Test—Admissibility within discretion of the court | 183 |

**FEDERAL EMPLOYEES**

| Compatibility—May not hold any office under State or local governments | 215 |
| May Be Appointed Insurance Agent for Board of Supervisors | 97 |
REPORT OF THE ATTORNEY GENERAL

FEES

Clerks—Allowable under § 14.1-123(1) for issuing warrants and subpoenas .............................................. 113
Clerks—Not chargeable against Commonwealth except where allowed by statute .................................................. 52
Clerks—Under § 14.1-123(1) only one fee where justice of peace issues warrant and clerk issues subpoenas .................. 113
Clerks—Writ of venditioni exponas—Charge of $1.50 under § 14.1-112(8) ............................................. 52
Justice of Peace—Allowable under § 14.1-128(1) for issuing warrants and subpoenas .............................................. 136
Justice of Peace—For issuing warrant—Payable by Commonwealth where defendant acquitted or unable to pay costs .......... 114
Municipal Courts—Under Title 16.1, Chapter 3—Paid into city treasury, unless otherwise provided ............................. 73
Special Police Fees—Paid into treasury of county .................................................. 200

FIREWORKS

Regulation—Extent to which localities may control advertising, sale or use .................................................. 67

GAME AND INLAND FISHERIES

Game Wardens—Authority—May inspect open fields without a warrant 115

GARNISHMENT

Filed Under North Carolina Statute—Virginia not required to honor .......................................................... 116
Issuance of Summons—Clerk not required to compute interest on judgment .................................................. 54

GENERAL ADMINISTRATIVE AGENCIES ACT

Effective Date of Rule Issued—Interpreting § 9-6.7 of the Code .................................................. 116

GENERAL ASSEMBLY

Lotteries—Authorization of unconstitutional .................................................. 62

GOVERNOR

Removal of Political Disability—May remove where conviction under laws of another State ........................................ 118

HEALTH

Marriage Licenses—Serological test statement—Signature of physician required .................................................. 152
Plumbing Ordinances—Establishment of standards and regulations—Enforcement by local authorities .......................... 118

HIGHWAYS

Condemnation—Filing of certificate under § 33-70.4—Effect upon ownership of property ........................................ 120
“For Sale” Signs Posted on Adjacent Realty—Language permitted 1
Public Landings Which are Part of Secondary System of State Highways—No control over or authority to expend public funds for in board of supervisors .................................................. 121
Subdivision Streets—Extent to which counties may contribute to cost of improvement ........................................ 122

HOUSING

Open—City resolution on subject—Dependent on enabling legislation 123
Open—Ordinances—Counties not authorized to adopt .................................................. 19
HOUSING AUTHORITIES

Members—Must be legal resident of political subdivision constituting the Authority ........................................... 123

INDUSTRIAL DEVELOPMENT

Authorities—May finance and construct facilities to be leased to private industry ........................................... 25

INTEREST

Judgment—Clerk not required to compute on garnishment summons . . . 54
Legal Rate—Chargeable on FHA and VA loans .................. 125
Real Estate Loans—Banks may charge in advance ................ 126

JAILS AND PRISONERS

Medical and Hospital Service—City sergeant's responsibility ........ 252

JUDGES

Appointment—Circuit court judge does not have authority to appoint judge of county court as substitute judge in another county . . . 127
Circuit—Secretarial assistance—May be provided by counties in circuit 129
Courts Not of Record—Municipal—Salaries—Fixed and paid by governing body of municipality .................. 73
Retirement—No authority for second retirement ................... 130
Substitute Civil Justice for Civil Justice Court of Norfolk—How appointed .................. 70

JUDGMENTS

Issuance of Executions on Abstracts—May not be done in county where abstract of judgment filed ................... 131

JURIES

Compensation of Members—Limited to $5.00 per diem in criminal cases 132
Grand Jury—Mileage allowances—Paid by the county and not reimbursed by State .................. 132
List—Should contain names of twenty-four persons ................ 133

JUSTICE OF PEACE

Appointed Under § 24-158—Terms of office ..................... 133
Authority of Arrest as "Conservator of the Peace" ................. 13
Bail—Authority to admit felon to bail dependent upon judge of court of record ..................... 16
Bail—May admit to bail those committed by him .................. 16
Compatibility—May not contract with city ......................... 216
Continuation in Office—Where territory in which elected to serve is annexed .................. 134
County Employee—Eligible where spouse is not law enforcement officer .................. 102
Deputy Sheriff's Wife—May have name listed on ballot but may not serve if elected if husband is deputy ................ 250
Eligibility—May not serve if spouse is law enforcement officer .... 135
Federal Employee May Not Serve .............................. 215
Fees—Amounts allowable under § 14.1-128(1) for issuing warrants and subpoenas .................. 136
Ineligible to Act as Bondsman .................. 137
May Act as Agent to Sell Motor Vehicle Licenses ................ 138
May Not Be Employee of U. S. Post Office Department Except as Fourth- or Third-class Postmaster .................. 138
May Not Hold Office as Town Sergeant at Same Time .......... 137
May Not Release Person on Summons After Warrant for Arrest Served .................. 137
May Not Serve as Substitute Clerk or as Clerical Assistant to Clerk... 216
Private Vehicle—No authority to equip with flashing, red warning lights 161
Should Not Be Employee of Sheriff .................................................. 139
Transition of Town to City of Second Class—Authority ..................... 140
Urban County Executive Form of Government—Present justices con-
tinue in office until successors appointed ................................. 141
Warrant—May not issue for arrest of material witness .................... 49

<table>
<thead>
<tr>
<th>JUVENILE AND DOMESTIC RELATIONS COURT</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointment of Counsel for Minor .......... 148</td>
<td></td>
</tr>
</tbody>
</table>
| Clerks—Issuance of warrants—May issue only in those cases cogniz-
  able by that court .......................................................... 142 |
| Court-appointed Attorneys—Compensation ...... 143 |
| Juvenile Misdemeanant—Sentence and probation ...... 144 |
| Nonsupport—Costs assessable against convicted defendant ............................ 144 |
| Preliminary Hearings—When court has jurisdiction to hold .................. 145 |
| Work Permits—Issued by court having jurisdiction over the child ............ 146 |

<table>
<thead>
<tr>
<th>JUVENILES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Counsel—Conditions under which court should appoint ................... 148</td>
<td></td>
</tr>
<tr>
<td>Fingerprints—Required to be taken when sentenced to confinement in</td>
<td></td>
</tr>
</tbody>
</table>
  the Penitentiary ........................................................................ 148 |
| Rape and Molesting Cases—Medical examination payments under  |
  § 19.1-315 ........................................................................... 82 |
| Work Permits—Court having jurisdiction authorized to issue .......... 146 |

<table>
<thead>
<tr>
<th>LABOR</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal Picketing—Code § 40-64 applicable .................................. 149</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>LAWS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Effective Date—Does not preclude signing of petition for referendum</td>
<td></td>
</tr>
</tbody>
</table>
  prior to .................................................................................. 7 |

<table>
<thead>
<tr>
<th>LOTTERIES</th>
<th></th>
</tr>
</thead>
</table>
| Operation of "Game or Wheel" by Amusement Park Operator—Authori-
  zation by General Assembly unconstitutional where prize consists  |
  solely of fruit, candy, toys, etc. ........................................... 62 |
| Prize Money to Spectators at Baseball Games—Purchase of ticket to  |
  attend sufficient consideration to constitute lottery ................ 150 |
| Tickets Sold to Local Merchants by Retail Merchants Association—  |
  Constitutes lottery though distributed free to persons entering estab-
  lishments ........................................................................... 151 |

<table>
<thead>
<tr>
<th>MARRIAGE</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Licenses—Serological test—Signature of physician required ............ 152</td>
<td></td>
</tr>
<tr>
<td>Miscegenation Statutes—Certain Virginia statutes declared invalid by</td>
<td></td>
</tr>
</tbody>
</table>
  U.S. Supreme Court ................................................................ 152 |

<table>
<thead>
<tr>
<th>MEDICINE</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenue Licenses—Not required of practitioner of medicine employed</td>
<td></td>
</tr>
</tbody>
</table>
  exclusively by government ................................................................ 286 |

<table>
<thead>
<tr>
<th>MILITARY RESERVATIONS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Dog Laws Related Thereto ....................................................... 84</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>MOTOR VEHICLES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Accidents—State reports not required if accident occurs in area under</td>
<td></td>
</tr>
</tbody>
</table>
  exclusive federal jurisdiction .................................................. 174 |
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agent for Sale of License Plates—County officials may act</td>
<td>213</td>
</tr>
<tr>
<td>Blood Analysis—Implied consent—Interpretation of present statute—</td>
<td>153</td>
</tr>
<tr>
<td>Formerly § 18.1-55, now § 18.1-55.1</td>
<td></td>
</tr>
<tr>
<td>Blood Analysis—Implied consent—Sample not taken unless accused</td>
<td>154</td>
</tr>
<tr>
<td>agrees to or requests</td>
<td></td>
</tr>
<tr>
<td>Calibration of Speedometer—Weight given evidence up to court trying</td>
<td>156</td>
</tr>
<tr>
<td>case</td>
<td></td>
</tr>
<tr>
<td>Chauffeur's License—When required</td>
<td>157</td>
</tr>
<tr>
<td>Commissioner—Duty to certify abstracts of convictions to Common-</td>
<td>158</td>
</tr>
<tr>
<td>wealth Attorneys—What convictions are required to be certified</td>
<td></td>
</tr>
<tr>
<td>Driving Under the Influence of Intoxicants—Court having jurisdiction</td>
<td>80</td>
</tr>
<tr>
<td>Drunk Driving Conviction—Person may not operate road machinery</td>
<td>160</td>
</tr>
<tr>
<td>over public highway during period of revocation</td>
<td></td>
</tr>
<tr>
<td>Exceeding Lawful Rate of Speed—Evidence as to accuracy of speed-</td>
<td>161</td>
</tr>
<tr>
<td>ometer—Use of in trial</td>
<td></td>
</tr>
<tr>
<td>Flashing, Red Warning Lights—Justice of peace not authorized to</td>
<td>161</td>
</tr>
<tr>
<td>equip private vehicle with such lights</td>
<td></td>
</tr>
<tr>
<td>Fuel Tax—No provision for refund to private nonprofit school</td>
<td>273</td>
</tr>
<tr>
<td>Inspection Sticker—Proper party to be charged for violation</td>
<td>162</td>
</tr>
<tr>
<td>Interdiction of Intoxicated Driver or Habitual Drunkard—Initial order</td>
<td>6</td>
</tr>
<tr>
<td>limited to one year</td>
<td></td>
</tr>
<tr>
<td>Liability Insurance—No criminal penalty for failure to have in effect</td>
<td>163</td>
</tr>
<tr>
<td>License Plates—Alteration of dates on temporary tags—Violation of</td>
<td>164</td>
</tr>
<tr>
<td>§§ 46.1-124 and 46.1-127 of the Code</td>
<td></td>
</tr>
<tr>
<td>Local License—County official holding office under § 15.1-995 not</td>
<td>108</td>
</tr>
<tr>
<td>exempt from city ordinance</td>
<td></td>
</tr>
<tr>
<td>Local License—Taxing authority where owner resides</td>
<td>166</td>
</tr>
<tr>
<td>Local Licenses—Fees limited by § 46.1-65</td>
<td>167</td>
</tr>
<tr>
<td>Local Licenses—Procedure to be followed by county in adopting and</td>
<td>168</td>
</tr>
<tr>
<td>amending proposed ordinance</td>
<td></td>
</tr>
<tr>
<td>Operator’s License—Local authorities may adopt parallel ordinances</td>
<td>169</td>
</tr>
<tr>
<td>requiring</td>
<td></td>
</tr>
<tr>
<td>Operator’s License—May be multiple-card type rather than one-card</td>
<td>170</td>
</tr>
<tr>
<td>type</td>
<td></td>
</tr>
<tr>
<td>Operator’s License—Not required of non-residents where reciprocity</td>
<td>174</td>
</tr>
<tr>
<td>extended</td>
<td></td>
</tr>
<tr>
<td>Radar—Placement of signs by cities and towns</td>
<td>171</td>
</tr>
<tr>
<td>Reckless Driving—Check required for accuracy of radar in conviction</td>
<td>173</td>
</tr>
<tr>
<td>Reckless Driving and Involuntary Manslaughter—Two separate offenses</td>
<td>77</td>
</tr>
<tr>
<td>where evidence shows more than one act</td>
<td></td>
</tr>
<tr>
<td>Reckless Driving Charged—Procedure on appeal from conviction of</td>
<td>174</td>
</tr>
<tr>
<td>speeding</td>
<td></td>
</tr>
<tr>
<td>Registration—Not required of nonresidents residing at Dahlgren Naval</td>
<td>174</td>
</tr>
<tr>
<td>Proving Grounds unless vehicle used for commercial purposes and</td>
<td></td>
</tr>
<tr>
<td>reciprocity not operable</td>
<td></td>
</tr>
<tr>
<td>Registration and Licensing—Required of person working in State for</td>
<td>179</td>
</tr>
<tr>
<td>period of exceeding sixty days</td>
<td></td>
</tr>
<tr>
<td>Revocation of Operator’s License—Person may drive where appeal</td>
<td>180</td>
</tr>
<tr>
<td>perfected from judgment of county court</td>
<td></td>
</tr>
<tr>
<td>Revocation or Suspension of Operator’s License—Person may not operate</td>
<td>181</td>
</tr>
<tr>
<td>any self-propelled construction equipment on highway</td>
<td></td>
</tr>
<tr>
<td>Sales and Use Tax—Applies to transfer of motor vehicles in return for</td>
<td>274</td>
</tr>
<tr>
<td>capital stock of corporation</td>
<td></td>
</tr>
<tr>
<td>School Bus—Speed limit 35 miles per hour when carrying children</td>
<td>182</td>
</tr>
<tr>
<td>Speeding—Evidence of sworn results of calibration test—Admissibility</td>
<td>183</td>
</tr>
<tr>
<td>within discretion of court</td>
<td></td>
</tr>
</tbody>
</table>
### Report of the Attorney General

**Suspension of Operator's License**—Remains in effect until appeal perfected .......................... 180
**Taxable at Permanent Place of Abode of Owner** ................................................................. 277
**Taxation**—Leased vehicle—Personal property tax assessed against owner ............................ 274
**Taxicabs**—Subject to requirements imposed under §§ 56-304, et seq. .............................. 184
**Trailers or Mobile Homes**—Taxation—Classified as tangible personal property ..................... 291
**Virginia Operators' and Chauffeurs' Licensing Act (Ch. 642, 1968 Acts of Assembly)**—Construction of ................................................................. 186

### Support

Court Costs—Assessable against convicted defendant ............................................................. 144

### Notaries Public

Eligibility—Reserve member of Armed Forces—Ineligible to serve while on active duty ........... 191
Qualifications—Must be a citizen of this State ........................................................................ 192

### Ordinances

Amendment—Board of supervisors may amend at meeting at which adopted ................................. 31
Automobile Graveyards—County definition must conform with State's—Ordinance amended if necessary 193
Cemetery—Must embody statutory requirements as to distance from residences ....................... 42
City of Fredericksburg—Traffic—Do not apply to Mary Washington College .............................. 254
Counties—Water pollution control—May adopt if consistent with general law .......................... 63
Counties Generally—Publication necessary ................................................................................. 33
County—License tax on slot machine operators—Must conform to State enabling act .................. 35
County—Must be certain and consistent with State law to be valid ........................................... 168
County—Must be published and posted prior to adoption ........................................................... 168
County—Requiring licenses for operation of carnivals, etc.—Must parallel State law ................. 33
Land Subdivision—Enforcement when outside limits of town which adopted same ......................... 194
License Tax on Trailer Parks and Camps—Ordinance must comply with Article 1.1 of Chapter 6, Title 35 of the Code ................................................................. 271
License—Authority of towns to impose tax on distributors of oil and petroleum products .......... 272
Local Paralleling State Statute—Authorized only by express legislative grant ........................ 195
Loudoun County—Plumbing—Enforcement by local plumbing inspector ....................................... 118
Open Housing—Counties not authorized to adopt ..................................................................... 19
Pool Rooms—Frequenting by minors under age of 18—Punishment for misdemeanors determined by special statute if complete; if not, by general misdemeanor statute, § 18.1-9 ....................................................... 199
Public Dumps—Abandoned automobiles—Designation of specific areas and imposition of penalties for violations ................................................................. 32
Radar—Placement of signs by cities and towns ........................................................................ 171
Subdivision—May not require approval of deeds as condition precedent to recordation .......... 196
Subdivision—No duty on clerk, in recording parcels, to insure compliance ................................ 198
Taxicabs—Counties, cities and towns may adopt ..................................................................... 184
Town—May not parallel State law without express authority from legislature ......................... 199
PINE TREE SEED LAW  
Reserving Eight Seed Trees—Effective date of amendment .......... 200

POLICE  
Special—Fees and mileage allowances—Paid into treasury of county . 200

PRISONERS  
Escape While Confined in State Penitentiary—Tried in the Circuit Court of the City of Richmond .................. 201

PROFESSIONAL AND OCCUPATIONAL REGISTRATION  
Accountants—Members of Virginia partnership practicing in Virginia required to obtain C.P.A. certificates .................. 202
Opticians—Person illegally practicing ............................ 203
Practice of Land Surveying—Principal stockholder of corporation not exempt under § 54-37(8) .................. 204
Real Estate Commission—Attorney exempt from license when performing legal services .................. 14
Real Estate Commission—Broker's license—Regulation requiring apprenticeship within authority of Commission .......... 206
Real Estate Commission—Construction of rule prohibiting licensee from making offer to repurchase .............. 207
Real Estate Commission—Construction of rule prohibiting licensees from extending inducements .............. 208
Real Estate Commission—Financial statements filed by licensees become public records .................. 209
Real Estate Commission—May not revoke a license for failure to maintain bond filed under § 54-758 .................. 210
Veterinary Medicine—Diagnosis of mastitis in cattle by association unlawful practice .................. 1
Virginia Real Estate Commission—Extent of authority to adopt rules and regulations .................. 211

PUBLIC OFFICERS  
Compatibility—Chairman of political party not a public officer .. 212
Compatibility—City sergeant may not serve as chief of police .... 247
Compatibility—County officials may be agents for sale of motor vehicle license plates .................. 213
Compatibility—Deputy clerk may not serve on town council .. 213
Compatibility—Deputy commissioner of the revenue may not be employed by school board as school bus driver .. 214
Compatibility—Electoral board—Deputy sheriff or deputy treasurer may not serve .................. 95
Compatibility—Federal employees—May not hold any office under State or local governments .................. 215
Compatibility—Justice of peace may act as agent to sell motor vehicle licenses .................. 138
Compatibility—Justice of peace may not contract with city .................. 216
Compatibility—Justice of peace may not serve as substitute clerk or as clerical assistant to clerk .............. 216
Compatibility—Member of board of supervisors may not be employed as superintendent of home operated by county .................. 217
Compatibility—Member of board of supervisors prohibited from submitting bid for construction of water and sewer authority .................. 218
Compatibility—Member of city council may not be interested in insurance contract .................. 219
Compatibility—Member of county planning board ineligible to serve on county school trustee electoral board .................. 220
<table>
<thead>
<tr>
<th>Compatibility</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member of local school board may not be employed in &quot;poverty program&quot;</td>
<td>212</td>
</tr>
<tr>
<td>Member of town council may not be interested in contract with the town</td>
<td>36</td>
</tr>
<tr>
<td>Members of Police and Trial Board may not be interested in contract with city of Virginia Beach</td>
<td>221</td>
</tr>
<tr>
<td>Reserve members of Armed Forces ineligible to serve as notaries public while on active duty</td>
<td>191</td>
</tr>
<tr>
<td>Secretary of electoral board—May not be interested in insurance contracts written for board of supervisors</td>
<td>97</td>
</tr>
<tr>
<td>United States rural mail carrier may be member of county welfare board</td>
<td>222</td>
</tr>
<tr>
<td>Member of board of supervisors must disassociate himself from insurance firm writing insurance for county</td>
<td>30</td>
</tr>
<tr>
<td>School board member may contract for gravel with board subject to permission of State Board of Education</td>
<td>232</td>
</tr>
<tr>
<td>School board member may not contract for furnishing garbage services for board</td>
<td>223</td>
</tr>
<tr>
<td>In their personal capacity, cannot contract with county and receive compensation</td>
<td>224</td>
</tr>
<tr>
<td>May not be employee of sheriff</td>
<td>139</td>
</tr>
<tr>
<td>May not serve if spouse is law enforcement officer</td>
<td>135</td>
</tr>
<tr>
<td>Considered officers of the Commonwealth</td>
<td>9</td>
</tr>
<tr>
<td>Must be a resident of county or city in which appointed</td>
<td>105</td>
</tr>
<tr>
<td>Member of Housing Authority must be legal resident of political subdivision constituting Authority</td>
<td>123</td>
</tr>
</tbody>
</table>

**PUBLIC RECORDS**

Real Estate Records Open to Public Inspection | 55

**PUBLIC SERVICE CORPORATIONS**

Railroads—Caboose requirements—Construing § 56-420 | 225

**PUBLIC WELFARE**

Chairman of Local Board—When authorized to sign warrants, advisable to be bonded | 225

Recipients—Foreclosure on deeds of trust given by | 226

**RAILROADS**

Caboose—Requirements—Section 56-420 requires use only on trains operated outside yard limits or in transfer service | 227

**REAL ESTATE**

Attorney—Showing of realty and negotiating sale therefor—Acts as real estate broker not attorney—Real estate broker's license required | 15

Asheabeled to State for Delinquent Taxes—Recovery procedure set forth in §§ 55-176 through 55-181 | 113

Virginia Real Estate Commission—Rule prohibiting licensees from extending inducements construed | 208

Virginia Real Estate Commission—Rule prohibits licensee from making offer to repurchase | 207

**RECORDATION**

Conveyance of Property to Trustee for Benefit of Children—Subject to tax | 281

Deed to Salvation Army—Subject to | 281

Deeds—Information which may be placed thereon by clerk | 228
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deeds—Lands in subdivision—Clerk must enter to record if presented</td>
<td>196</td>
</tr>
<tr>
<td>Deeds—Placing thereon amount of consideration by clerk.</td>
<td>228</td>
</tr>
<tr>
<td>Deeds of Executor to Heirs Under a Will—Tax required</td>
<td>284</td>
</tr>
<tr>
<td>Deeds to Parcels of Subdivision—No duty on clerk to insure compliance with ordinance</td>
<td>198</td>
</tr>
<tr>
<td>Exemptions—Deeds of trust of United States and its agencies</td>
<td>282</td>
</tr>
<tr>
<td>Inter Vivos Trust</td>
<td>228</td>
</tr>
<tr>
<td>Lease—Fee based on rental of one year where option to extend included</td>
<td>282</td>
</tr>
<tr>
<td>Option to Purchase Real Estate—Recordable instrument and subject to tax</td>
<td>283</td>
</tr>
<tr>
<td>Petition in Bankruptcy—No duty of clerk to record</td>
<td>55</td>
</tr>
<tr>
<td>Power of Attorney—Company seal not necessary for force and effect</td>
<td>56</td>
</tr>
<tr>
<td>Second Deed of Trust—Taxable in full amount</td>
<td>283</td>
</tr>
<tr>
<td>Section 58-54(b)—Tax assessed on full consideration—Clerk’s certificate required as to payment of tax</td>
<td>285</td>
</tr>
</tbody>
</table>

**REDISTRICTING**

| Effect Upon School Board Members | 229 |
| Magisterial Districts—Limitations imposed by § 15.1-576 | 230 |

**REGISTRAR**

| General Registrar—Appointed—Authorized to register voters | 231 |

**RETIREMENT**

| Judges—No authority for second retirement | 130 |

**SCHOOLS**

<p>| Board Member—Contracts with board—When may enter into with permission of State Board of Education | 232 |
| Boards of Supervisors—May require monthly reports of school boards and appropriate school funds on monthly basis | 27 |
| Bond Issue—No authority to divert proceeds to purposes not stated in referendum | 233 |
| Budget Estimates—Board of supervisors may appropriate lump sum or designate major categories | 19 |
| Contracts—Independent functions for which school board not responsible—Not prohibited by § 15.1-73 | 234 |
| County—Borrowing of funds for school construction—When referendum required | 64 |
| Joint—Compulsory establishment not required | 69 |
| School Boards—Appointment of members following adoption of county board form of government | 235 |
| School Boards—Appointment of members to fill vacancies created by redistricting | 229 |
| School Boards—Authority over school property | 236 |
| School Boards—Authority to appoint and supervise teachers and other administrative personnel under county board form of government | 237 |
| School Boards—Compensation under county board form of government—Governed by § 15.1-708 | 238 |
| School Boards—Disposition of real estate no longer needed for school purposes—Boards in three counties each owning one third interest | 239 |
| School Boards—Loans negotiated with approval of board of supervisors | 240 |
| School Boards—May accept title to buildings owned by federal government—May be required to submit reports to boards of supervisors | 241 |
| School Boards—May not expend State funds for construction of building on property owned by federal government | 241 |</p>
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>School Boards—Member may not be employed in “poverty program”</td>
<td>212</td>
</tr>
<tr>
<td>School Boards—Member may not contract to furnish garage services for board</td>
<td>223</td>
</tr>
<tr>
<td>School Boards—No authority to use public school buses for private school pupils</td>
<td>242</td>
</tr>
<tr>
<td>School Boards—Not required to pay for physical examinations of personnel</td>
<td>243</td>
</tr>
<tr>
<td>School Boards—Sublease of property by federal government depends on terms of original lease with State of Virginia</td>
<td>241</td>
</tr>
<tr>
<td>School Bus—Speed limited to 35 miles per hour when carrying children</td>
<td>182</td>
</tr>
<tr>
<td>School Bus Driver—May not be deputy commissioner of the revenue</td>
<td>214</td>
</tr>
<tr>
<td>School Guards—May not be spouse of justice of peace</td>
<td>135</td>
</tr>
<tr>
<td>Special School Age Population Census—Authorized only on state-wide basis for distribution of sales tax revenue</td>
<td>287</td>
</tr>
<tr>
<td>Teachers—Income Tax—Deduction of teaching expenses—Must be teacher in public free school</td>
<td>267</td>
</tr>
<tr>
<td>Teachers—Who marry within prohibited degree of relationships—If regularly employed prior thereto, employment not prohibited</td>
<td>243</td>
</tr>
<tr>
<td>Trustee Electoral Board—Board action, though one member serving incompatibly, valid</td>
<td>220</td>
</tr>
<tr>
<td>Trustee Electoral Board—Member of county planning commission ineligible to serve</td>
<td>220</td>
</tr>
<tr>
<td>Trustee Electoral Board—No authority to remove a member of the school board</td>
<td>244</td>
</tr>
<tr>
<td>Tuition—Students of one locality attending school in another—May be agreed upon by local boards concerned</td>
<td>245</td>
</tr>
</tbody>
</table>

**SEARCHES AND SEIZURES**

Warrants—Should be obtained in locality where search is to be made. 297

**SERVICEMEN**

Living on Military Reservation—May maintain divorce suits in State courts 174
Taxation—Personal Property—Not exempt from assessment by Soldiers' and Sailors' Civil Relief Act 276

**SEWERAGE**

Garbage and Refuse Collection by Henry County Public Service Authority 299

**SHERIFFS AND SERGEANTS**

Arrest—Person charged with felony to be brought before court not of record on first day court sits 13
City Sergeant—May not serve as chief of police 247
City Sergeant—Must be resident of city in which elected or appointed 247
City Sergeant—Residence requirements 248
City Sergeant of Lexington—Is an elected official, not appointed 248
Compensation for Serving Traffic Summons—Fee of $1.00 plus mileage 251
Deputy's Wife—May not serve as justice of the peace 250
Duties—Required to serve summons from traffic court 251
Enforcement Officer (Sergeant) May not Serve as Judicial Officer (Justice of Peace) at Same Time 137
Medical and Hospital Service for Prisoners—City sergeant's responsibility 252
Use of Privately Owned Vehicle on State Business—Subject to approval of Compensation Board and board of supervisors 253
### STATE INSTITUTIONS

<table>
<thead>
<tr>
<th>Institution</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Local Community College Board—Not State institution within meaning of § 25-232</td>
<td>87</td>
</tr>
<tr>
<td>Longwood College—Prohibited from providing resident facilities for male students</td>
<td>253</td>
</tr>
<tr>
<td>Mary Washington College—Not subject to ordinances of City of Fredericksburg—Police officers of city have jurisdiction on grounds of college—Limitations of authority of special police of college</td>
<td>254</td>
</tr>
<tr>
<td>Tuition—Free to children of War Veterans</td>
<td>256</td>
</tr>
<tr>
<td>Tuition—Reduced for domiciliaries and residents of Virginia</td>
<td>257</td>
</tr>
</tbody>
</table>

### STATUTES

<table>
<thead>
<tr>
<th>Statute</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Miscegenation—Invalidation of certain such statutes by U.S. Supreme Court</td>
<td>152</td>
</tr>
</tbody>
</table>

### SUBDIVISIONS

<table>
<thead>
<tr>
<th>Subdivision</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deeds to Parcels—Recordation—Clerk must record if presented</td>
<td>196</td>
</tr>
<tr>
<td>Ordinances—Responsibility for enforcement by adopting governing body</td>
<td>194</td>
</tr>
<tr>
<td>Streets—Extent to which counties may contribute to cost of improvement</td>
<td>122</td>
</tr>
</tbody>
</table>

### TAXATION

<table>
<thead>
<tr>
<th>Taxation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessment—No authority for a town to impose minimum tax on real estate</td>
<td>257</td>
</tr>
<tr>
<td>Clerk’s Fee—For filing petitions for relief of erroneous assessment</td>
<td>51</td>
</tr>
<tr>
<td>Collection by Installments—All cities and towns authorized—Certain counties have authority</td>
<td>258</td>
</tr>
<tr>
<td>Contractor’s License Tax—May be imposed upon contractor where Commonwealth is party to contract</td>
<td>258</td>
</tr>
<tr>
<td>Contractor’s License Tax—Not exempt under Section 183 of Virginia Constitution or Code § 58-12</td>
<td>258</td>
</tr>
<tr>
<td>County Land Maps—New city commissioner of revenue may use for reference</td>
<td>57</td>
</tr>
<tr>
<td>Credit to Taxpayer—When land acquired by State, county, municipality or church or religious body</td>
<td>259</td>
</tr>
<tr>
<td>Delinquent—Collection by deputy county treasurer for additional compens-</td>
<td>260</td>
</tr>
<tr>
<td>ation—Incompatible with duties as deputy treasurer</td>
<td></td>
</tr>
<tr>
<td>Delinquent—Portion of acreage sold within year on which taxes paid not delinquent</td>
<td>260</td>
</tr>
<tr>
<td>Delinquent Real Estate—Escheated to State—Recovery procedure set forth in §§ 55-176 through 55-181</td>
<td>113</td>
</tr>
<tr>
<td>Delinquent Real Estate—Section 58-767 releasing liens applicable to sales to individuals</td>
<td>261</td>
</tr>
<tr>
<td>Delinquent Taxes—Escheated land—Not exonerated</td>
<td>112</td>
</tr>
<tr>
<td>Delinquent Taxes—No authorization to collect by lien and demand on funds held by Commonwealth</td>
<td>261</td>
</tr>
<tr>
<td>Divulging of Tax Information—Preclusion does not extend to statistical data</td>
<td>58</td>
</tr>
<tr>
<td>Dogs Owned and Bred by Corporation for Research—Taxable as inventory of stock on hand under §§ 58-410 and 58-411</td>
<td>262</td>
</tr>
<tr>
<td>Exemptions—Property of Izaak Walton League of America, Inc., not exempt</td>
<td>262</td>
</tr>
<tr>
<td>Exemptions—Property owned by county and leased to others taxable by city</td>
<td>263</td>
</tr>
<tr>
<td>Exemptions—Real estate owned by Historic Fredericksburg, Inc., not exempt</td>
<td>264</td>
</tr>
<tr>
<td>Exemptions—Real estate owned by Salvation Army Land used for parking mobile campers not exempt</td>
<td>265</td>
</tr>
</tbody>
</table>
Exemptions—Real estate owned by Salvation Army—Residence for ordained minister exempt .................................................. 266
Exemptions—Residence of music director of church doubtful ........................................................................................................ 266
Income—Deductions—Teaching expenses—Applies only to teachers in public free schools .......................................................... 267
Income Tax—Person voting in Virginia required to pay ............................................................................................................... 108
Inheritance—Levied on share of beneficiary of real estate upon extinction of life estate ................................................................. 268
Land Books—Limitations upon removal of real estate .................................................................................................................. 268
Leasehold Interest—Value based on potential income for right to use and occupy premises .......................................................... 270
Licenses—Carnivals, etc.—County ordinance must parallel State statute .......................................................... 33
Licenses—Contractors—When city may require ......................................................................................................................... 269
Licenses—County ordinance must conform to enabling act of State ............................................................................................. 35
Local Levy—Leasehold interest may be taxed ............................................................................................................................. 270
Local Licenses—Contractors—May be required for electrical, plumbing and other work .................................................................. 68
Local Licenses—Regulation of trailer parks and camps—Proposed ordinance of Isle of Wight County ........................................ 271
Local Tax on Consumers of Utility Services—When may be levied by locality ........................................................................... 272
Local Vehicle License Fees—Subject to limitation provisions of § 46.1-65 .................................................................................. 167
Mailing of Bills by Treasurers—Discretionary if less than two dollars ............................................................................................ 295
Merchants' Licenses—Local—Imposition of tax on distributors of oil and petroleum products ....................................................... 272
Motor Fuel—No refund provided for private nonprofit school .................................................................................................... 273
Motor Vehicles—Leased—Personal property tax assessed against owner ....................................................................................... 274
Motor Vehicles—Person working in State for period exceeding sixty days becomes resident for purpose of registering and licensing ........................................................................................................ 179
Motor Vehicles—Sales and Use Tax—Transfer of assets in return for stock is taxable sale for consideration .......................................................................................................................... 274
Motor Vehicles—Situs for personal property taxes—Determined by length of time of physical presence in locality ......................... 275
Personal Property—Liability of member of Armed Services ........................................................................................................ 276
Personal Property—Located on federal reservation with exclusive jurisdiction—When not taxable ...................................................... 174
Personal Property—Motor vehicles—Assessable at permanent place of abode of owner ................................................................ 277
Qualification of Executor—Exemption—Does not extend to recordation tax required on deed of executor conveying property to heirs under a will ................................................................................................................................ 284
Real Estate—Charitable associations—Extent to which exempt .................................................................................................. 279
Real Estate—Correction of assessment where building moved after January first ............................................................................ 278
Real Estate—Erroneous assessment—Reimbursement .......................................................................................................................... 279
Real Estate—Exemption of Salvation Army ........................................................................................................................................ 279
Real Estate—Includes standing trees on land .................................................................................................................................... 280
Recordation—Conveyance of property to trustee for benefit of children subject to tax ........................................................................ 281
Recordation—Deed conveying property to Salvation Army subject to .......................................................................................... 281
Recordation—Exemptions—Deeds of trust securing loans made by United States or its agencies ........................................................................ 282
Recordation—Lease—Fee based on rental of one year where option to extend included .................................................................... 282
Recordation—Option to purchase real estate—Tax based on consideration paid .................................................................................. 283
Recordation—Required on deeds of executor to heirs under a will ................................................................................................. 284
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recordation—Second deed of trust taxable in full amount</td>
<td>284</td>
</tr>
<tr>
<td>Recordation—Section 58-54(b)—Tax assessed on full consideration—Clerk's certificate required as to payment of tax</td>
<td>285</td>
</tr>
<tr>
<td>Revenue Licenses—Not required of practitioner of medicine employed exclusively by government</td>
<td>286</td>
</tr>
<tr>
<td>Salary of Commonwealth Employees Not Subject to Garnishment Obtained in North Carolina</td>
<td>116</td>
</tr>
<tr>
<td>Sale of Delinquent Real Estate—Bidder first recognized by treasurer regarded as successful bidder—Agreement suggested when two bid at same time</td>
<td>286</td>
</tr>
<tr>
<td>Sales and Use Tax—Distribution on basis of school age population—No special census authorized other than state-wide</td>
<td>287</td>
</tr>
<tr>
<td>Sales and Use Tax—Hopewell Emergency Crew not exempt</td>
<td>288</td>
</tr>
<tr>
<td>Sales and Use Tax—Local share for towns—Dependent upon compliance with § 58-441.49(h)</td>
<td>289</td>
</tr>
<tr>
<td>Sales and Use Tax—Local share for towns—Dependent upon compliance with § 58-441.49(h) and general law</td>
<td>290</td>
</tr>
<tr>
<td>Sales and Use Tax—Local share of towns—Dependent upon compliance with statutory requirements</td>
<td>290</td>
</tr>
<tr>
<td>Taxicabs—Not defined as common carriers exempted under § 46.1-66(6)</td>
<td>166</td>
</tr>
<tr>
<td>Trailers or Mobile Homes—Classified as tangible personal property</td>
<td>291</td>
</tr>
<tr>
<td>Virginia Motor Vehicle Sales and Use Tax—Not applicable to vehicle not registered in State</td>
<td>174</td>
</tr>
<tr>
<td>Writ Tax—Attaches upon filing of motion for judgment</td>
<td>292</td>
</tr>
<tr>
<td>Writ Tax—Chargeable upon filing of cross-claim</td>
<td>53</td>
</tr>
<tr>
<td>Writ Tax—Compromise settlement</td>
<td>292</td>
</tr>
</tbody>
</table>

**TOWNS**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bluefield—Council may authorize debts within constitutional limit of eighteen percent valuation—Bond issue not necessary</td>
<td>293</td>
</tr>
<tr>
<td>Council—Town of Altavista—Charter provision controlling in filling vacancy</td>
<td>294</td>
</tr>
<tr>
<td>Eligibility for Local Share of Sales Taxes—Dependent upon compliance with § 58-441.49(h)</td>
<td>289</td>
</tr>
<tr>
<td>Eligibility for Local Share of Sales Taxes—Dependent upon compliance with § 58-441.49(h) and general law</td>
<td>290</td>
</tr>
<tr>
<td>Merchants' Licenses—Authority to impose tax on distributors of oil and petroleum products</td>
<td>272</td>
</tr>
<tr>
<td>Purchases and Sales of Equipment—Advertising for bids not required except where town has a purchasing agent</td>
<td>36</td>
</tr>
<tr>
<td>Taxation—Assessment—No authority to impose minimum tax on real estate</td>
<td>257</td>
</tr>
<tr>
<td>Transition to City—Effective when court order entered under § 15.1-982</td>
<td>46, 47</td>
</tr>
</tbody>
</table>

**TREASURERS**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bonds—Treasurer has right to select surety on his personal bond</td>
<td>294</td>
</tr>
<tr>
<td>Capitation Tax Tickets—Preparation required by § 58-959</td>
<td>295</td>
</tr>
<tr>
<td>Discretionary Mailing of Bills for Less Than Two Dollars</td>
<td>295</td>
</tr>
<tr>
<td>Office Hours</td>
<td>295</td>
</tr>
<tr>
<td>Sale of Delinquent Real Estate—Recognition of first bidder—Agreement suggested when two bid at same time</td>
<td>286</td>
</tr>
</tbody>
</table>

**VIRGINIA REAL ESTATE COMMISSION**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rules and Regulations—Extent of authority to adopt</td>
<td>211</td>
</tr>
</tbody>
</table>

**WARRANTS**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clerk of Juvenile and Domestic Relations Court—May issue only in those cases cognizable by that court</td>
<td>142</td>
</tr>
<tr>
<td>Game Wardens—Not required to secure to inspect open fields</td>
<td>115</td>
</tr>
</tbody>
</table>
REPORT OF THE ATTORNEY GENERAL

Issued by Mayor Serving as Presiding Officer of Court of Limited Jurisdiction—May not be returnable before Regional Juvenile and Domestic Relations Court

Search—Should be obtained in locality where search is to be made

WATER
Riparian Rights—City may use water from land purchased by it

WATER AND SEWERAGE SYSTEMS
County System—Member of board of supervisors may not become financially interested in contract
Establishment Under Water and Sewer Authorities Act—Procedure followed to expand projects not initially specified
Henry County Public Service Authority Created Under Chapter 28, Title 15.1—Authority to regulate garbage and refuse collection
Sanitation Commission—Not authorized to enter into contract with property owner outside sanitary district for use of sewage lines and sewage plant
Sewage Disposal—Authorization for financing from county's general fund—Not affected by prior establishment of sanitary districts
Water Authority—Referendum—Mandatory if petition filed at public meeting—Results advisory only

WATER POLLUTION CONTROL
Counties—May adopt ordinance not inconsistent with general law

WEAPONS
Tear Gas Pens—Carrying concealed on person—Not included in statute

WELFARE
County Welfare Board Member—May be United States rural mail carrier
Local Board—Limitation on board of supervisors to vary budget estimates

WELFARE AND INSTITUTIONS
Detention Home—When eligible for State reimbursement

WITNESSES
Fees—How paid for indigent defendant
Fees for Summoning—Accused if acquitted not liable
Habeas Corpus Proceedings—Costs incurred in summoning paid by Commonwealth under appropriate order of court
Material—Justice of peace may not issue warrant for arrest

WORKMEN'S COMPENSATION ACT
Persons Covered—Judges and clerical staffs of county courts
### ACTS OF ASSEMBLY

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### REPORT OF THE ATTORNEY GENERAL

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</tr>
<tr>
<td>15.1-262</td>
<td>24, 38, 66, 240</td>
</tr>
<tr>
<td>15.1-266</td>
<td>23</td>
</tr>
<tr>
<td>15.1-282</td>
<td>32, 33</td>
</tr>
<tr>
<td>15.1-305</td>
<td>303, 304</td>
</tr>
<tr>
<td>15.1-466</td>
<td>195</td>
</tr>
<tr>
<td>15.1-467</td>
<td>194</td>
</tr>
<tr>
<td>15.1-468</td>
<td>194</td>
</tr>
<tr>
<td>15.1-473(c)</td>
<td>197</td>
</tr>
<tr>
<td>15.1-473(d)</td>
<td>197</td>
</tr>
<tr>
<td>15.1-474</td>
<td>195</td>
</tr>
<tr>
<td>15.1-504</td>
<td>31, 32, 33, 169</td>
</tr>
<tr>
<td>15.1-505</td>
<td>32, 33</td>
</tr>
<tr>
<td>15.1-507</td>
<td>61</td>
</tr>
<tr>
<td>15.1-510</td>
<td>17, 32, 63, 196, 301</td>
</tr>
<tr>
<td>15.1-511.1</td>
<td>26</td>
</tr>
<tr>
<td>15.1-516</td>
<td>254, 255</td>
</tr>
<tr>
<td>15.1-522</td>
<td>196, 258</td>
</tr>
<tr>
<td>15.1-533</td>
<td>50</td>
</tr>
<tr>
<td>15.1-540</td>
<td>29</td>
</tr>
<tr>
<td>15.1-540</td>
<td>29</td>
</tr>
<tr>
<td>15.1-542</td>
<td>29</td>
</tr>
<tr>
<td>15.1-545</td>
<td>241</td>
</tr>
<tr>
<td>15.1-546</td>
<td>241</td>
</tr>
<tr>
<td>15.1-550</td>
<td>61</td>
</tr>
<tr>
<td>15.1-571, et seq.</td>
<td>230</td>
</tr>
<tr>
<td>15.1-571 through 15.1-581</td>
<td>231</td>
</tr>
<tr>
<td>15.1-576</td>
<td>230, 231</td>
</tr>
<tr>
<td>15.1-577</td>
<td>229</td>
</tr>
<tr>
<td>15.1-656</td>
<td>38</td>
</tr>
<tr>
<td>15.1-679, et seq.</td>
<td>23</td>
</tr>
<tr>
<td>15.1-697 through 15.1-721</td>
<td>239</td>
</tr>
<tr>
<td>15.1-698(c)</td>
<td>236</td>
</tr>
<tr>
<td>15.1-700(c)</td>
<td>236</td>
</tr>
<tr>
<td>15.1-702</td>
<td>22, 23, 237, 238</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>------------------</td>
<td>-------</td>
</tr>
<tr>
<td>16.1-62</td>
<td>73</td>
</tr>
<tr>
<td>16.1-63</td>
<td>73,74</td>
</tr>
<tr>
<td>16.1-64, et seq.</td>
<td>128,296</td>
</tr>
<tr>
<td>16.1-73, et seq.</td>
<td>80,296</td>
</tr>
<tr>
<td>16.1-75</td>
<td>296</td>
</tr>
<tr>
<td>16.1-77</td>
<td>72</td>
</tr>
<tr>
<td>16.1-98</td>
<td>48,49</td>
</tr>
<tr>
<td>16.1-105</td>
<td>48</td>
</tr>
<tr>
<td>16.1-115</td>
<td>131</td>
</tr>
<tr>
<td>16.1-123</td>
<td>72,81</td>
</tr>
<tr>
<td>16.1-126</td>
<td>83</td>
</tr>
<tr>
<td>16.1-136</td>
<td>174</td>
</tr>
<tr>
<td>16.1-141</td>
<td>146</td>
</tr>
<tr>
<td>16.1-141(1)</td>
<td>142</td>
</tr>
<tr>
<td>16.1-146</td>
<td>142</td>
</tr>
<tr>
<td>16.1-158</td>
<td>145,147</td>
</tr>
<tr>
<td>16.1-158(1)</td>
<td>146,147</td>
</tr>
<tr>
<td>16.1-158(1)(i)</td>
<td>146</td>
</tr>
<tr>
<td>16.1-158(2)</td>
<td>147</td>
</tr>
<tr>
<td>16.1-158(4)</td>
<td>146</td>
</tr>
<tr>
<td>16.1-158(6)</td>
<td>146,147,148</td>
</tr>
<tr>
<td>16.1-163</td>
<td>43</td>
</tr>
<tr>
<td>16.1-173(a)</td>
<td>143,148</td>
</tr>
<tr>
<td>16.1-173(c)</td>
<td>148</td>
</tr>
<tr>
<td>16.1-173(d)</td>
<td>143</td>
</tr>
<tr>
<td>16.1-176(a)</td>
<td>43</td>
</tr>
<tr>
<td>16.1-177.1</td>
<td>145</td>
</tr>
<tr>
<td>16.1-178</td>
<td>146</td>
</tr>
<tr>
<td>16.1-178(1)</td>
<td>145</td>
</tr>
<tr>
<td>16.1-178(3)</td>
<td>145</td>
</tr>
<tr>
<td>16.1-180</td>
<td>304</td>
</tr>
<tr>
<td>16.1-205</td>
<td>145</td>
</tr>
<tr>
<td>16.1-208(2)</td>
<td>145</td>
</tr>
<tr>
<td>Title 16.1</td>
<td>70, 71, 127, 131</td>
</tr>
<tr>
<td>Title 16.1, Ch. 3</td>
<td></td>
</tr>
<tr>
<td>Title 16.1, Ch. 3</td>
<td></td>
</tr>
<tr>
<td>17-59</td>
<td>55</td>
</tr>
<tr>
<td>17-60</td>
<td>55</td>
</tr>
<tr>
<td>18.1-9</td>
<td>76,199</td>
</tr>
<tr>
<td>18.1-25</td>
<td>78</td>
</tr>
<tr>
<td>18.1-54</td>
<td>80,154,160</td>
</tr>
<tr>
<td>18.1-55</td>
<td>80,153,154,155</td>
</tr>
<tr>
<td>18.1-55(f)</td>
<td>154</td>
</tr>
<tr>
<td>18.1-55.1</td>
<td>80,153,154,155</td>
</tr>
<tr>
<td>18.1-55.1(q)</td>
<td>154</td>
</tr>
<tr>
<td>18.1-59</td>
<td>160,181</td>
</tr>
<tr>
<td>18.1-173</td>
<td>72</td>
</tr>
<tr>
<td>18.1-212</td>
<td>76</td>
</tr>
<tr>
<td>18.1-254</td>
<td>196</td>
</tr>
<tr>
<td>18.1-254.1 through 18.1-254.12</td>
<td>195</td>
</tr>
<tr>
<td>18.1-255</td>
<td>196</td>
</tr>
<tr>
<td>18.1-269</td>
<td>74</td>
</tr>
<tr>
<td>18.1-292</td>
<td>50</td>
</tr>
<tr>
<td>18.1-340</td>
<td>150,151</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Section Page | Section Page
--- | ---
21-254(b) | 302 | 24-132 | 93, 98, 102, 103, 109
21-260 | 302 | 24-133 | 94
21-262 | 302 | 24-134 | 92
21-268 | 302 | 24-147.1 | 294
21-285 | 302 | 24-157 | 133, 134
Title 21, Ch. 2 | 61, 300, 303, 304 | 24-158 | 133, 134
Title 21, Ch. 4 | | 24-161 | 248
22-7 | 69, 239, 240 | 24-166 | 291
22-60 | 245 | 24-169 | 291
22-61 | 230, 245 | 24-186 | 110
22-62 | 245 | 24-197 | 110
22-65 | 230, 245 | 24-211 | 101
22-67.2 | 238, 239 | 24-212 | 101
22-72 | 238 | 24-233 | 101
22-72.1 | 242 | 24-291 | 109
22-107.1 | 242 | 24-296 | 109
22-107.3 | 234 | 24-319 | 89
22-120 | 241 | 24-320 through 24-345 | 89
22-120.3 through 22-120.5 | 19 | 24-324 | 89
22-127 | 19 | 24-334 | 88
22-146.4 | 246 | 24-340 | 90
22-148 | 242 | 24-340.1 | 89
22-161 | 240 | 24-369 | 103, 109
22-164.1 | 236 | 24-397 | 104
22-164.2 | 236, 237 | 24-442 | 92
22-166 | 240 | 24-442, et seq. | 92
22-203 | 238 | 24-444 | 92
22-206 | 244 | 24-445 | 92
22-213 | 223, 224, 232, 233 | 24-446 | 92
22-219 | 69, 246 | 24-448 | 92
22-249 | 243 | Title 24, Ch. 10, Art. 4 | 95
22-261.1 | 243 | 24-232 | 87, 88
22-294.1, et seq. | 243 | 24-252 | 87, 88
Title 22, Ch. 7 | 234 | 27-25 | 22
27-7 | 256 | 29-33 | 115
23-7-1 (2) | 256 | 29-183 | 262
23-14 | 87 | 29-184 | 83, 262
23-214(b) | 87 | 29-188.1 | 83
23-214(c) | 87 | 29-195 | 85
23-215 | 234 | 29-196 | 85, 86
23-220 | 87 | 29-197 | 85
24-18 | 91 | 29-197.1 | 85
24-22 | 40 | 29-202 | 85
24-27 | 106 | 29-209 | 85
24-31 | 96 | 29-213 | 83
24-57 | 105 |
24-59 | 99, 100 | 32-61 | 119
24-61 | 100 | 32-131 | 21
24-86 | 107 | 32-134.1 | 21
24-118.1 | 90, 232 | 32-212, et seq. | 21
24-118.1 through 24-118.9 | 91 | 32-258 | 21
24-118.2 | 91, 100 | 32-288 | 21
24-118.8 | 91, 232 | 32-406 | 119
24-130 | 94 | 32-407 | 119
24-131 | 94 | 32-408 | 119
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>32-410</td>
<td>119</td>
<td>46.1-121, et seq.</td>
<td>165</td>
</tr>
<tr>
<td>Title 32, Ch. 4</td>
<td>119</td>
<td>46.1-124</td>
<td>165</td>
</tr>
<tr>
<td>Title 32, Ch. 8, Art. 1</td>
<td>21</td>
<td>46.1-127</td>
<td>165</td>
</tr>
<tr>
<td>Title 32, Ch. 14</td>
<td>21</td>
<td>46.1-130</td>
<td>175</td>
</tr>
<tr>
<td>Title 32, Ch. 24</td>
<td>119</td>
<td>46.1-133</td>
<td>175</td>
</tr>
<tr>
<td>33-34</td>
<td>121</td>
<td>46.1-134</td>
<td>175</td>
</tr>
<tr>
<td>33-46</td>
<td>121, 122</td>
<td>46.1-149(7)</td>
<td>166</td>
</tr>
<tr>
<td>33-47.2</td>
<td>122, 123</td>
<td>46.1-167.3</td>
<td>164</td>
</tr>
<tr>
<td>33-70.3, et seq.</td>
<td>120</td>
<td>46.1-167.6</td>
<td>164</td>
</tr>
<tr>
<td>33-70.4</td>
<td>120</td>
<td>46.1-180</td>
<td>170, 171, 172</td>
</tr>
<tr>
<td>33-70.6</td>
<td>120</td>
<td>46.1-192</td>
<td>78</td>
</tr>
<tr>
<td>33-76.1 through 33-76.12</td>
<td>67</td>
<td>46.1-193(c)</td>
<td>182</td>
</tr>
<tr>
<td>33-76.1 through 33-76.24</td>
<td>67</td>
<td>46.1-193(d)</td>
<td>182</td>
</tr>
<tr>
<td>33-76.7, et seq.</td>
<td>122</td>
<td>46.1-193.1</td>
<td>156, 161, 183</td>
</tr>
<tr>
<td>33-76.13</td>
<td>67</td>
<td>46.1-198</td>
<td>171</td>
</tr>
<tr>
<td>33-76.14, et seq.</td>
<td>67</td>
<td>46.1-198(d)</td>
<td>171, 172</td>
</tr>
<tr>
<td>33-76.22</td>
<td>67</td>
<td>46.1-267</td>
<td>162</td>
</tr>
<tr>
<td>33-138</td>
<td>122</td>
<td>46.1-325</td>
<td>163</td>
</tr>
<tr>
<td>33-141</td>
<td>121, 122, 123</td>
<td>46.1-326(b)</td>
<td>162, 163</td>
</tr>
<tr>
<td>33-160</td>
<td>50</td>
<td>46.1-350</td>
<td>181, 182</td>
</tr>
<tr>
<td>33-279.3</td>
<td>193, 194</td>
<td>46.1-351</td>
<td>52</td>
</tr>
<tr>
<td>33-302</td>
<td>1</td>
<td>46.1-352</td>
<td>160, 161</td>
</tr>
<tr>
<td>Title 33, Ch. 7, Art. 1</td>
<td>1</td>
<td>46.1-352, et seq.</td>
<td>160</td>
</tr>
<tr>
<td>35-61 through 35-64</td>
<td>271</td>
<td>46.1-352.1</td>
<td>160, 181</td>
</tr>
<tr>
<td>35-64.1, et seq.</td>
<td>271</td>
<td>46.1-353</td>
<td>169, 170</td>
</tr>
<tr>
<td>35-64.1 through 35-64.6</td>
<td>271</td>
<td>46.1-354</td>
<td>175</td>
</tr>
<tr>
<td>Title 35, Ch. 6, Art. 1</td>
<td>271</td>
<td>46.1-355</td>
<td>175, 176</td>
</tr>
<tr>
<td>Title 35, Ch. 6, Art. 1.1</td>
<td>271</td>
<td>46.1-356</td>
<td>176</td>
</tr>
<tr>
<td>38.1-653</td>
<td>56</td>
<td>46.1-368(b)</td>
<td>186, 187</td>
</tr>
<tr>
<td>38.1-657</td>
<td>56</td>
<td>46.1-368(c)</td>
<td>187</td>
</tr>
<tr>
<td>39-7</td>
<td>102, 135, 251</td>
<td>46.1-369</td>
<td>188</td>
</tr>
<tr>
<td>40-22.1</td>
<td>243</td>
<td>46.1-370.1</td>
<td>188</td>
</tr>
<tr>
<td>40-64</td>
<td>149, 150</td>
<td>46.1-373</td>
<td>188, 189, 191</td>
</tr>
<tr>
<td>40-64(3)</td>
<td>150</td>
<td>46.1-374</td>
<td>187</td>
</tr>
<tr>
<td>42-4</td>
<td>23</td>
<td>46.1-375</td>
<td>170, 187</td>
</tr>
<tr>
<td>46.1-1</td>
<td>157</td>
<td>46.1-375.1</td>
<td>170, 189</td>
</tr>
<tr>
<td>46.1-1(2)</td>
<td>157</td>
<td>46.1-380.2</td>
<td>188</td>
</tr>
<tr>
<td>46.1-1(10)</td>
<td>176</td>
<td>46.1-380.2(a)</td>
<td>190, 191</td>
</tr>
<tr>
<td>46.1-1(16)</td>
<td>164</td>
<td>46.1-380.2(b)</td>
<td>187, 188, 189</td>
</tr>
<tr>
<td>46.1-1(16)(b)</td>
<td>179</td>
<td>46.1-387.2</td>
<td>158, 159</td>
</tr>
<tr>
<td>46.1-1(16)(c)</td>
<td>176</td>
<td>46.1-387.2(b)</td>
<td>158, 159</td>
</tr>
<tr>
<td>46.1-1(18)</td>
<td>274</td>
<td>46.1-387.3</td>
<td>158</td>
</tr>
<tr>
<td>46.1-16</td>
<td>164</td>
<td>46.1-400</td>
<td>176</td>
</tr>
<tr>
<td>46.1-17</td>
<td>165</td>
<td>46.1-413</td>
<td>189</td>
</tr>
<tr>
<td>46.1-34.1</td>
<td>158</td>
<td>46.1-417(e)</td>
<td>158, 159</td>
</tr>
<tr>
<td>46.1-65</td>
<td>167, 168</td>
<td>46.1-417(g)</td>
<td>158, 159</td>
</tr>
<tr>
<td>46.1-66</td>
<td>167, 168</td>
<td>46.1-419</td>
<td>158, 159</td>
</tr>
<tr>
<td>46.1-66(6)</td>
<td>166</td>
<td>46.1-420</td>
<td>158, 159</td>
</tr>
<tr>
<td>46.1-66(b)</td>
<td>109</td>
<td>46.1-422</td>
<td>159</td>
</tr>
<tr>
<td>46.1-83</td>
<td>162, 163</td>
<td>46.1-425</td>
<td>180</td>
</tr>
<tr>
<td>46.1-112</td>
<td>164, 165</td>
<td>46.1-463</td>
<td>163</td>
</tr>
<tr>
<td>46.1-121</td>
<td>164</td>
<td>Title 46.1, Ch. 3, Art. 4</td>
<td>164</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Title 46.1, Ch. 3, Art. 6</td>
<td>165</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Title 46.1, Ch. 5</td>
<td>187</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Title 46.1, Ch. 5, Art. 7</td>
<td>159</td>
</tr>
<tr>
<td></td>
<td></td>
<td>47-1</td>
<td>192</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------</td>
<td>------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>47-1(1)</td>
<td>192</td>
<td></td>
<td></td>
</tr>
<tr>
<td>47-1(6)</td>
<td>192</td>
<td></td>
<td></td>
</tr>
<tr>
<td>47-2</td>
<td>192</td>
<td></td>
<td></td>
</tr>
<tr>
<td>51-29.8, et seq.</td>
<td>130</td>
<td></td>
<td></td>
</tr>
<tr>
<td>51-29.9</td>
<td>131</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Title 51, Ch. 2.2</td>
<td>130</td>
<td></td>
<td></td>
</tr>
<tr>
<td>53-40</td>
<td>149</td>
<td></td>
<td></td>
</tr>
<tr>
<td>53-175</td>
<td>252</td>
<td></td>
<td></td>
</tr>
<tr>
<td>53-184</td>
<td>252</td>
<td></td>
<td></td>
</tr>
<tr>
<td>53-185</td>
<td>252</td>
<td></td>
<td></td>
</tr>
<tr>
<td>53-295</td>
<td>201, 202</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54-17(3)(a)</td>
<td>205</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54-27</td>
<td>205, 206</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54-37</td>
<td>205, 206</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54-37(8)</td>
<td>205</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54-40</td>
<td>68</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54-104</td>
<td>68</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54-398.1</td>
<td>203</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54-398.2</td>
<td>204</td>
<td></td>
<td></td>
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<td>206, 211</td>
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<td>55-58.1(2)</td>
<td>228</td>
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<td>55-106</td>
<td>56, 197</td>
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<td>56-274</td>
<td>184, 185</td>
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<td>278</td>
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<td>259</td>
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<td>277, 292</td>
<td>58-834</td>
<td>177, 275, 276</td>
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<td>58-839</td>
<td>27, 258</td>
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<td>116</td>
<td>58-1021.1</td>
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<td>58-1141 through 58-1144</td>
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<td>Title 58, Ch. 7, Art. 5</td>
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<td>63-81.1</td>
<td>226</td>
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<td>19</td>
<td>63-124</td>
<td>227</td>
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<td>63-127.1</td>
<td>226, 227</td>
<td>63-128</td>
<td>227</td>
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<td>Title 63, Ch. 13, Art. 1</td>
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<td>102, 105, 192, 193, 247</td>
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<td>73</td>
<td>98, 118</td>
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<td>249</td>
<td>117(d)</td>
<td>249</td>
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<td>119</td>
<td>10, 95</td>
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<td>120</td>
<td>248, 249</td>
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<td>264, 265, 270</td>
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