

REPORT
OF THE
ATTORNEY GENERAL

TO THE
Governor of Virginia

From July 1, 1934, to June 30, 1935

RICHMOND:
DIVISION OF PURCHASE AND PRINTING
1934

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Letter of Transmittal

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 25, 1935.*

HONORABLE GEORGE C. PEERY,
*Governor of Virginia,
Richmond, Virginia.*

MY DEAR GOVERNOR:

As provided by Section 377 of the Code of Virginia, I herewith transmit to you my annual report. This gives the "state and condition," as is required by this section, of the causes pending in courts in which the Commonwealth is a party. I have also added a number of written opinions rendered by this office on questions of public interest.

The General Assembly of 1934, by amendment of section 375 of the Code, provided that all legal work of the State should be conducted by this office, and prohibited the employment of regular or special counsel by governmental departments, a practice that had existed until that time. The past is the first complete year of operation under this reorganization of the Department of Law.

The budget for the current biennium provided for an Attorney General and eight assistants. I am glad to be able to report that so far I have found it necessary to appoint only five of the assistants allowed. Of these five, one is assigned to the Alcoholic Beverage Control Board and one to the Division of Motor Vehicles, and the entire time of each is devoted to his assignment.

It is manifest, therefore, that the opinions included in this report and statement of suits pending and disposed of by no means represent all the work of this office. In a great many cases arising in lower courts, and frequently in trial justice and police courts, an assistant from this office appears alone or with the attorney for the Commonwealth, notably in cases involving violations of the alcoholic beverage control law, the motor vehicle laws and the revenue laws. The work of the Department of Highways also occupies the entire time of one assistant. There has been much work in connection with the drafting of regulations, administrative orders, contracts and leases for the Alcoholic Beverage Control Board, as well as the preparation of opinions on the control law itself. Many important and frequently difficult questions have arisen in connection with the compulsory, statewide trial justice system first established in 1934. Every department of our State government, every agency of the State and each of the State institutions have all been confronted during the emergency with perplexing and unusual questions which have reached this office for determination. Legislation enacted by the Federal Congress for the relief of the existing emergency has brought to this office new and complicated legal problems that are difficult of solution.

The inauguration of the Alcoholic Beverage Control Board has raised a number of questions involving a conflict of jurisdiction over Federal Governmental Reservations, requiring the attention of the Attorney General. Likewise a very important dispute as to the liability of the Commonwealth of Virginia to pay a United States income tax on the profits derived from the State liquor stores arose, and required the attention of the Attorney General before Congress and with the Secretary of the Treasury and his General Counsel. This was finally settled in accordance with the contentions of Virginia. Another controversy with the United States is now pending before the Virginia-District of Columbia Boundary Commission involving the establishment of a correct boundary line.

The past year has witnessed the beginning of some, and the conclusion of other, vigorously contested cases of state-wide importance. The constitutionality of the milk control act of 1934 was unsuccessfully attacked. A provision of our State income tax law involving a large amount of revenue, and possibly affecting a vital prin-

ciple of our whole tax system, is being challenged. Important features of the administrative bill of 1934 have been assailed. There is a case now pending in the Supreme Court of the United States involving the validity of the proceedings whereby the State Commission on Conservation and Development has acquired lands for the formation and establishment of the great Shenandoah National Park. Another suit in the Federal Court involves the right of the State to control and regulate through the State Corporation Commission the construction and operation of dams in and across the rivers and streams of the State for the generation of hydroelectric power. In this suit (*United States v. Appalachian Power Company*) the State has been permitted to appear as *amicus curiae*.

The foregoing is a brief summary covering some of the important matters handled by this office. There are many other miscellaneous matters which it is not deemed necessary to mention in detail.

Respectfully submitted,

ABRAM P. STAPLES,

Attorney General.

Personnel of the Office

(Postoffice address Richmond)

NAME	COUNTY	OFFICIAL TITLE
ABRAM P. STAPLES.....	Roanoke city.....	Attorney General
EDWIN H. GIBSON.....	Culpeper.....	Assistant
W. W. MARTIN.....	Charlotte.....	Assistant
S. W. SHELTON.....	Fluvanna.....	Assistant
G. STANLEY CLARKE.....	Henrico.....	Assistant
D. GARDINER TYLER, JR.....	Charles City.....	Assistant
JOS. L. KELLY, JR.....	Bristol City.....	Law Clerk
NERHEA S. EVANS.....	Charlotte.....	Secretary
EVA E. KIBLER.....	Augusta.....	Secretary
LOUISE W. POORE.....	Richmond city.....	Secretary
MARIE LOW.....	Roanoke city.....	Secretary

Attorneys General of Virginia

From 1776 to 1933

EDMUND RANDOLPH.....	1776-1786
JAMES INNES.....	1786-1796
ROBERT BROOKE.....	1796-1799
PHILIP NORBORNE NICHOLAS.....	1799-1819
JAMES ROBERTSON.....	1819-1834
SIDNEY S. BAXTER.....	1834-1852
WILLIS P. BOCKOCK.....	1852-1857
JOHN RANDOLPH TUCKER.....	1857-1865
THOMAS RUSSELL BOWDEN.....	1865-1869
CHARLES WHITTLESEY (military appointee).....	1869-1870
JAMES C. TAYLOR.....	1870-1874
RALEIGH T. DANIEL.....	1874-1877
JAMES G. FIELD.....	1877-1882
FRANK S. BLAIR.....	1882-1886
RUFUS A. AYRES.....	1886-1890
R. TAYLOR SCOTT.....	1890-1897
R. CARTER SCOTT.....	1897-1898
A. J. MONTAGUE.....	1898-1902
WILLIAM A. ANDERSON.....	1902-1910
SAMUEL W. WILLIAMS.....	1910-1914
JOHN GARLAND POLLARD.....	1914-1918
*J. D. HANK, JR.....	1918
JOHN R. SAUNDERS.....	1918-1934
**ABRAM P. STAPLES.....	1934

*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, who died March 17, 1934.

Cases Decided in the Supreme Court of Appeals of Virginia

1. *Adams, Melvin W. v. Commonwealth.* From Corporation Court of city of Lynchburg. Murder. Affirmed.
2. *Alexandria Water Company v. City Council of Alexandria, Intervenor.* From State Corporation Commission. Reargument—Jurisdictional function of the Court of Appeals on a public utility rate appeal from the State Corporation Commission. Affirmed.
3. *Calloway, Howard v. Commonwealth.* From Corporation Court of city of Lynchburg. Assault and battery. Error confessed.
4. *Commonwealth v. L. E. Conner, et al.* From the Circuit Court of Appomattox County. Truck "For Hire" license. Dismissed.
5. *Compton, Garland and Reuben v. Commonwealth.* From Circuit Court of Scott County. Murder. Reversed and remanded.
6. *Coward, Walter C. v. Commonwealth.* From Corporation Court, Part Two, of city of Norfolk. Prohibition. Reversed and remanded.
7. *Davis, Sheldon G. v. Honorable H. W. Bertram, Judge, and State Highway Commission.* Petition for mandamus. Mandamus denied.
8. *Diggs, G. T. v. Commonwealth.* From Circuit Court of Nansemond County. Housebreaking. Affirmed.
9. *Dolan, Frank and Ernest Wilkerson v. Commonwealth.* From Circuit Court of Nelson County. Larceny. Error confessed.
10. *Drinkard, Harry L.—W. E. Hicks v. Commonwealth.* From Corporation Court of city of Lynchburg. Housebreaking. Affirmed as to Hicks. Reversed as to Drinkard.
11. *Federal Land Bank of Baltimore v. Carrie S. Hubbard, Clerk.* Recordation tax on deeds. Petition for mandamus. Mandamus awarded.
12. *Fisher, W. E. v. Commonwealth.* From Circuit Court of Frederick County. Prohibition. Dismissed.
13. *Fletcher, W. A. v. Commonwealth.* From Circuit Court of Wythe County. Grand larceny. Reversed and remanded.
14. *Fry, John R. v. Commonwealth.* From Circuit Court of Amelia County. Rape. Reversed and remanded.
15. *Funk, Fred v. Commonwealth.* From Circuit Court of Wise County. Murder. Affirmed.
16. *Gwynn, Joe v. Commonwealth.* From Circuit Court of Patrick County. Murder. Reversed and remanded.
17. *Hamilton, T. J. v. Commonwealth.* From Hustings Court of city of Petersburg. Murder. Affirmed.
18. *Hendricks, L. F. v. Commonwealth.* From Corporation Court of city of Norfolk. Murder. Affirmed.
19. *Hensley, Layton v. Commonwealth.* From Circuit Court of Rockingham County. Malicious assault. Reversed and remanded.
20. *Hudson, E. L. v. Commonwealth.* From Circuit Court of Pulaski County, Alcoholic Beverage Control Act. Error confessed.
21. *Klingstein, E. L. v. Commonwealth.* From Circuit Court of Rockingham County. Prohibition. Remanded to lower court with directions to dismiss.
22. *Little, Mary v. Commonwealth.* From Circuit Court of Wise County. Murder. Affirmed.
23. *Merritt, Lewis v. Commonwealth.* From Circuit Court of city of Hopewell. Attempt to murder. Reversed and remanded.
24. *McNutt, Verland v. Commonwealth.* From Circuit Court of Scott County. Murder. Error confessed.
25. *Oliver, Bill and Jones T. v. Commonwealth.* From Hustings Court of City of Roanoke. Prohibition. Dismissed.
26. *Reynolds, R. J., et als. v. Milk Commission of Virginia.* From Law and Equity Court, Part Two, of the city of Richmond. Milk Act, 1934—constitutionality tested. Reversed.
27. *Reynolds, R. J., et als v. Milk Commission of Virginia.* Petition to rehear. Milk Act, 1934—constitutionality tested. Rehearing Granted. Affirmed.

28. *Salyer, Richard v. Commonwealth*. From Circuit Court of Wise county. Rape. Affirmed.
29. *Stacy, Adam v. Commonwealth*. From Circuit Court of Buchanan County. Grand Larceny. Reversed.
30. *Stine, George O. v. Commonwealth*. From Circuit Court of Louisa County. Petition for rehearing. Arson. Rehearing.
31. *Wlastaris, Phillip v. Commonwealth*. From Corporation Court of city of Norfolk. Murder. Affirmed.
32. *Wessells, Paul v. Commonwealth*. From Circuit Court of Accomac County. Murder. Reversed and remanded.
33. *Wood, W. P. v. Commonwealth*. From Circuit Court of Buckingham County. Larceny. Affirmed.

Cases Pending in the Supreme Court of Appeals of Virginia

1. *Atlantic Refining Company v. Commonwealth*. From State Corporation Commission. Entrance fee of foreign corporations.
2. *Bausell, Bernace v. Commonwealth*. From the Circuit Court of Wythe County. Murder.
3. *Bausell, Henry F. v. Commonwealth*. From Circuit Court of Wythe County. Murder.
4. *Cleek, Buck v. Commonwealth*. From Circuit Court of Scott County. Prohibition.
5. *Commonwealth v. Imperial Coal Sales Co.* From Circuit Court of city of Lynchburg. Tax on capital.
6. *Eppa Hunton, IV, Executor of Estate of Eppa Hunton, Jr., v. Commonwealth*. From Hustings Court of city of Richmond. Income tax. On rehearing.
7. *Holbrook C. J. v. Commonwealth*. From Circuit Court of Wise County. Embezzlement.
8. *Keith, Bascom and Reda Keith v. Commonwealth*. From Circuit Court of Russell County. Miscegenation.
9. *Moses, Ellis v. Commonwealth*. From Hustings Court of city of Roanoke. Receiving Stolen goods.
10. *McDaniell, Clark v. Commonwealth*. From Circuit Court of Wise County. Housebreaking.
11. *McWilliams, Sam v. Commonwealth*. From Circuit Court of Wise County. Contributing to delinquency of minor.
12. *Patterson, Burman v. Commonwealth*. From Circuit Court of Roanoke County. Grand larceny.
13. *Peninsula Transit Corporation v. Commonwealth*. From State Corporation Commission. Gross receipts tax on motor vehicle carriers.
14. *Quillen, Ervin v. Commonwealth*. From Circuit Court of Scott County. Murder.
15. *Rosenberg, Charles v. Commonwealth*. From Hustings Court of city of Radford. Violation of section 4693 of Code. Lottery.
16. *Salyer, Carnell v. Commonwealth*. From Circuit Court of Wise County. Involuntary manslaughter.
17. *Shackleford, George Condon v. Commonwealth*. From Corporation Court, Part Two, of city of Norfolk. Contempt of court.
18. *Williamson, Harry v. Commonwealth*. From Corporation Court of city of Bristol. Malicious assault.

Cases Decided by the Supreme Court of the United States

1. *Commonwealth v. Imperial Coal Sales Co.* Tax on capital. Decided for the Commonwealth.

Cases Pending in the Supreme Court of the United States

1. *Via, Robert H. v. The State Commission on Conservation and Development of the State of Virginia*. Validity of Shenandoah National Park Act.

Cases Decided in the United States District Court for Eastern District of Virginia

1. *Greyvan Lines v. John Q. Rhodes*. On petition for an injunction. Petition denied.

Cases Pending in United States District Courts

1. *Chase Nat'l Bank of New York v. Richmond Cedar Works, et al* (Eastern District) Exceptions to report of Special Master in re claim of Commonwealth for taxes.
2. *The United States of America v. Appalachian Electric Power Company*. (Western District.) Since this case involves the power of the State to regulate construction and operation of dams in and across rivers and streams for general of hydroelectric power, the Attorney General petitioned for leave to appear as *amicus curiae*. Petition granted.

Cases Pending or Tried in the Circuit and Corporation Courts of the State

1. *Commonwealth v. Richard E. Roberts*. Circuit Court of the city of Richmond.
2. *Commonwealth v. F. C. Lenz, Jr.* Circuit Court of the city of Richmond.
3. *Commonwealth v. Hampton Roads Fire & Marine Insurance Company*. Circuit Court of the city of Richmond.
4. *Commonwealth v. Sam'l and Louis Miller*. Circuit Court of the city of Richmond.
5. *State Corporation Commission v. Title Ins. Co. and A. B. Gathright, Treas.* Circuit Court of the city of Richmond.
6. *State Corporation Commission v. Missouri State Life Ins. and A. B. Gathright, Treas.* Circuit Court of the city of Richmond.
7. *State Corporation Commission v. Lloyds Insurance Company and A. B. Gathright, Treas.* Circuit Court of the city of Richmond.
8. *State Corporation Commission v. American Bank and Trust Company*. Circuit Court of the city of Richmond.
9. *State Corporation Commission v. National Surety Company and A. B. Gathright, Treas.* Circuit Court of the city of Richmond.
10. *State Corporation Commission v. Inter-Southern Life Ins. Co. and A. B. Gathright, Treas.* Circuit Court of the city of Richmond.
11. *State Corporation Commission v. National Benefit Life Ins. Co. and A. B. Gathright, Treas.* Circuit Court of city of Richmond.
12. *State Corporation Commission v. Federal Surety Company and A. B. Gathright, Treas.* Circuit Court of the city of Richmond.
13. *State Corporation Commission v. Our Home Life Ins. Co. and A. B. Gathright, Treas.* Circuit Court of the city of Richmond.
14. *Commonwealth v. Edward T. Haynes, Committee of H. Stewart Jones and American Surety Company of New York*. Circuit Court of the city of Richmond.
15. *C. P. Daniel v. Commonwealth*. Corporation Court of Bristol. Income tax. Decided for Commonwealth.
16. *Hunton, Williams, Anderson, Gay & Moore v. Commonwealth*. Hustings Court of Richmond. Tax on open accounts. Decided for plaintiff.
17. *Mable Meuse v. Virginia Emergency Relief Administration*. State Industrial Commission. Decided for defendant.
18. *Mighty Sheeley Midway, Inc. v. Commonwealth*. Circuit Court of Lynchburg. License tax on carnival. Decided for plaintiff.
19. *Virginia Gas Distribution Corp. v. Commonwealth*. State Corporation Commission. Franchise tax. Decided for Commonwealth.
20. *Appalachian Electric Power Co. v. Commonwealth*. State Corporation Commission. Franchise tax.
21. *Branch, Blythe W. v. Commonwealth*. Chancery Court of city of Richmond. Income tax.
22. *Branch, Phyllis v. Commonwealth*. Chancery Court of city of Richmond. Income tax.

23. *Flynn, Nora Langhorne v. Commonwealth.* Chancery Court of city of Richmond. Income tax.
24. *Gibson, Irene L. v. Commonwealth.* Chancery Court of city of Richmond. Income tax.
25. *Loudoun Light & Power Co. v. Commonwealth.* State Corporation Commission. Franchise tax.
26. *Lynchburg Gas Co. v. Commonwealth.* State Corporation Commission Franchise tax.
27. *Page Power Company v. Commonwealth.* State Corporation Commission. Franchise tax.
28. *Pearl, Joseph, et al v. Commonwealth.* Circuit Court of city of Richmond. License tax on slot machines.
29. *Roanoke Gas-Light Company v. Commonwealth.* State Corporation Commission. Franchise tax.
30. *State-Planters Bank & Trust Company v. Commonwealth.* Circuit Court of the city of Richmond. Tax on bank stock.
31. *Suffolk Gas-Electric Company v. Commonwealth.* State Corporation Commission. Franchise tax.
32. *Virginia East Coast Utilities, Inc. v. Commonwealth.* State Corporation Commission. Franchise tax.
33. *Virginia Electric & Power Company v. Commonwealth.* State Corporation Commission. Franchise tax on motor bus receipts.
34. *Virginia Electric & Power Company v. Commonwealth.* State Corporation Commission. Franchise tax.
35. *Virginia Gas Transmission Corp. v. Commonwealth.* State Corporation Commission. Franchise tax on pipe line companies.
36. *Virginia Public Service Company v. Commonwealth.* State Corporation Commission. Franchise tax.
37. *Willard, Belle L., Ex. of Estate of Jos. E. Willard v. Commonwealth.* Circuit Court of Fairfax county. Inheritance tax.
38. *Wilkins, Julia C. v. Commonwealth,* Circuit Court of city of Richmond. Income tax.
39. *Barco v. Commonwealth.* Circuit Court of Princess Anne County. Revocation of driver's license.
40. *Beal, M. H., et al v. Commonwealth.* Circuit Court of Appomattox County. Violation Motor vehicle license law.
41. *Commonwealth v. First National Bank.* Circuit Court of the city of Richmond. Motor vehicle law.
42. *Greyvan Lines v. John Q. Rhodes.* Circuit Court of Henrico County. Petition for injunction. Petition denied.
43. *Commonwealth v. J. C. Vinson.* Corporation Court of the city of Lynchburg. Validity of regulation of Alcoholic Beverage Control Board. Defendant acquitted.
44. *Commonwealth v. Vincent Carleo.* Corporation Court No. II of the city of Norfolk. Validity of regulation of Alcoholic Beverage Control Board. Convicted.
45. *Commonwealth v. L. C. Doughty.* Circuit Court of Southampton County. Validity of regulation of Alcoholic Beverage Control Board. Defendant acquitted.
46. *Commonwealth v. Thomas Quesenberry.* Circuit Court of Loudoun county. Murder of police officer. Defendant entered a plea of guilty and was sentenced by the Court to twenty years in the penitentiary.
47. *Van Pelt & Brown, Inc., v. Glenmore Distilleries Co. Inc., Principal defendant and R. Mc. C. Bullington, Heth Tyler and T. McCall Frazier, Commissioners constituting the Virginia A. B. C. Board.* Circuit Court of the city of Richmond. Dismissed as to the Commonwealth.
48. *Department of Highways v. W. W. Mallory.* Circuit Court of Hanover county. Suit for damages to bridge. Verdict for Commonwealth.

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OPINIONS

ADVERTISING—Foot Specialist must be duly licensed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 15, 1934.*

DR. J. W. PRESTON,
*Secretary-Treasurer,
Virginia State Board of Medical Examiners,
Roanoke, Virginia.*

DEAR DR. PRESTON :

I have your letter of the 9th instant, enclosing a letter received by you from Dr. Arthur Wanderer, secretary-treasurer of the Virginia Pedic Association, in which you request an official opinion from this office upon the question of whether or not the use by the People's Service Drug Stores of the advertisement attached to Dr. Wanderer's letter is a violation of the Medical Practice Act.

Section 1619 of the Code defines the word "chiropody" to be the medical, mechanical or surgical treatment of the local ailments of the human hand or foot, except the correction of deformities through the use of the knife, amputation of the foot, hand, toes, fingers, or incisions involving deep structures, or the use of anaesthetics other than local.

Section 1621 requires all persons desiring to practice chiropody to be examined by the State Board of Medical Examiners, and also provides as follows :

"It shall be unlawful for any person to designate himself or his occupation by the use of any words or letters or trade diplomas calculated to lead others to believe that he is chiropodist or foot specialist unless he is duly licensed as provided by law."

The advertisement attached to Dr. Wanderer's letter contains the following language :

"Let our Dr. Scholl's foot specialist show you how you can obtain relief from painful foot troubles you may have, with the proper Dr. Scholl Remedy or Appliance. All guess work eliminated by our scientific methods and expert foot specialists."

You will note that the advertisement uses the words "foot specialist" which Section 1621 prohibits being used except by one duly licensed as provided by law.

Although Dr. Wanderer's letter does not state that the foot specialist referred to in the advertisement is not a duly licensed chiropodist, I assume that he desires the opinion of this office upon the question whether or not a person not so licensed may perform the services pursuant to the advertisement above referred to.

It is my opinion that, if the person referred to in said advertisement is not licensed as required by law, then it is in violation of the above quoted section for the Peoples Service Drug Stores to hold him out to the public as a foot specialist, and it is also a violation for such person to act in that capacity.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

APPROPRIATION—Conservation and Development Commission—no lapse.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 10, 1934.*

HON. R. A. GILLIAM,

*Executive Secretary,**State Commission on Conservation and Development,**Richmond, Virginia.*

DEAR MR. GILLIAM:

This is in reply to your letter of the 5th instant, requesting the opinion of this office upon the question whether or not the appropriation made by the 1933 Special Session of the General Assembly of \$50,000 to your Commission, for the purpose of purchasing lands for State Park developments, is still in force, or whether same has lapsed under the provisions of the Appropriation Bill of 1934.

The appropriation above referred to is contained in a special act and is what is usually known as a special appropriation. It is not made payable out of the "general fund" of the treasury, but is made payable out of money in the treasury not otherwise appropriated. Section 36 of the Appropriation Act, 1934, provides as follows:

"* * * , and the balance of the appropriations payable out of the *general fund* of the State treasury, made by previous acts of the General Assembly unexpended at the close of business on the thirtieth day of June, 1934, which unexpended balances, except as herein otherwise provided, are hereby declared to be lapsed into the State treasury * * *."

You will observe that the legislation last quoted covered only appropriations payable out of the "general fund" of the State treasury. Since the appropriation you refer to is not, by its express terms, made so payable, and since it is an appropriation made by a special act of the General Assembly otherwise payable, it is the opinion of this office that the same has not lapsed and is still in force.

Sincerely yours,

ABRAM P. STAPLES,

*Attorney General.***APPROPRIATIONS—Mother's Aid.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *November 19, 1934.*

HONORABLE ARTHUR W. JAMES,

*Commissioner of Public Welfare,**State Office Building,**Richmond, Virginia.*

DEAR MR. JAMES:

I have read your letter of November 16.

You inquire, first, whether it is proper for the State to reimburse a political subdivision for the continual care of children in a case formerly approved for mothers' aid, in which the mother has died during the period of the grant.

Your inquiry is prompted by the language of the Appropriation Act of 1934 (Acts 1934, page 626) reading as follows:

"For care of children in homes to avoid separation from their mothers."

I am of opinion that it is reasonable to hold that the Legislature used this language to make operative the general Mothers' Aid Act (sections 1935-1 to

1935-aa of the Code), and that, therefore, it must be construed in the light of section 1935-t to the effect that the act may also be extended for the benefit of orphan children who are dependent on some female relative unable to support them. In other words, if the other conditions laid down by the act exist, I do not think that the fact of the mother's death necessarily shuts off the aid.

Your second question is whether an allowance would be proper to a grandmother, for example, if the grandfather is living.

Assuming that the other conditions laid down by the act exist, I am of opinion that such an allowance would be proper, in view of section 1935-t.

When I refer to the existence of the other conditions laid down in the act, I have in mind particularly section 1935-o. Among other things, if the mother is dead, the child or children must be living with and in the home of the female relative to whom the allowance is made, and the allowance shall be granted only when in its absence the female relative would have to work regularly away from her home and the child.

I am of the opinion that in the administration of this act, like many others of the same general nature, your Department has broad discretion to the end that its real purpose may be effected. I do not think that the administration of the act should assume characteristics of a child-placing and boarding program because it is certainly contemplated that the child should be in, and have the advantage of, the home of its mother or a near female relative.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

APPROPRIATIONS—Deduction in salaries of Commonwealth's Attorneys

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 21, 1934.*

HON. E. R. COMBS,

Comptroller of Virginia,

Richmond, Virginia.

DEAR MR. COMBS:

This is in reply to your letter of the 13th instant, requesting the opinion of this office upon the question whether or not the five per cent cut, which the Governor was authorized to and did make in all appropriations, should be reflected in a like reduction in the State's contribution to the payment of the salaries of Commonwealth's Attorneys in the State.

It is the opinion of this office that under the provisions of the Appropriation Bill it is mandatory that said five per cent cut shall be applied to all appropriations. The effect of the appropriation for the payment of salaries to enforce the criminal laws of the State is in law the same as though the appropriation was a combined total of the various items which go to make up the whole. Each item, therefore, should be reduced in accordance with the Governor's order.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

APPROPRIATIONS—Trial Justice funds subject to general cut.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 12, 1934.*

HONORABLE E. R. COMBS, *Comptroller,*
Commonwealth of Virginia,
Richmond, Virginia.

DEAR MR. COMBS:

Attention Mr. A. B. Gathright

I am in receipt of your letter of September 11, asking whether the appropriation made by section 4988-o of the Code (Acts 1934, page 473) to each county of the State in order to assist the said counties in carrying out the provisions of the Trial Justice Act is subject to the executive order of the Governor made under section 39 of the General Appropriation Act of 1934, ordering a five per cent reduction in all appropriations payable out of the general fund of the Commonwealth for the fiscal year to end June 30, 1935.

I assume that the order of the Governor to which you refer is so worded as to apply to all appropriations which the Governor is authorized to cut under the provisions of section 39 of the General Appropriation Act of 1934. The said section 39 provides in effect that the order of the Governor reducing the appropriation shall be applicable to "all appropriations now or hereafter made payable out of the general fund of the State treasury."

I do not think that it could have been the intention of the General Assembly to distinguish between appropriations payable out of the general fund made prior to the passage of the Appropriation Act and those made subsequent to the passage of the Act.

My conclusion is, therefore, that the payments to the counties about which you inquire are subject to the order of the Governor.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ATTORNEY FOR THE COMMONWEALTH—Fees in Trial, Police justice and circuit courts.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 22, 1934.*

HON. G. C. ALDERSON, *Clerk,*
Circuit Court,
Hopewell, Virginia.

MY DEAR MR. ALDERSON:

I am in receipt of your letter of October 17, in which you state:

"On July 16, 1934, Clyde Crocker was tried, in the civil and police court of the city of Hopewell, Virginia, for a misdemeanor, and convicted and fined \$100.00 and \$9.25 costs assessed. In the item of costs of \$9.25, there was assessed a fee of \$5 for the attorney for the Commonwealth. This case was appealed from the civil and police court of the city of Hopewell to the circuit court of the city of Hopewell, and was tried in the said circuit court today, and resulted in a conviction and a fine of \$25.00 and costs imposed upon the defendant. "The point on which I am asking your advice is whether or not a fee of \$5 for the attorney for the Commonwealth should be taxed in the costs for his appearance in the civil and police court, and also \$5 for his services in the circuit court of Hopewell, or should there be only one fee taxed?"

Section 3505 of the Code provides in part, relating to fees of attorneys for the Commonwealth, as follows:

"For each person tried for a misdemeanor in his circuit or corporation court five dollars, and for each person prosecuted by him before any court or justice of his county or city for a misdemeanor, which he is required by law to prosecute, or upon an indictment found by a grand jury, he shall be paid five dollars, unless the costs, including such fee, are paid by the defendant; and in every misdemeanor case so prosecuted the court or justice shall tax in the costs and enter judgment for such misdemeanor fees."

Upon the facts you present, and assuming that the Commonwealth's attorney was required by law to prosecute the case, I am of opinion that the fee of \$5 for that officer should be taxed as a part of the costs for his appearance not only in the civil and police court, but also in the circuit court of the city of Hopewell. I do not think it material that the same person is prosecuted in each court.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

AUDITOR OF PUBLIC ACCOUNTS—Authority in matter of audits.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 6, 1934.

HONORABLE L. MCCARTHY DOWNS,
Auditor of Public Accounts,
Richmond, Virginia.

MY DEAR MR. DOWNS:

The Attorney General has handed me for attention your letter of the 5th instant, with the request that I reply to the same. For such purpose I am quoting your letter in full:

"We are engaged in auditing the accounts and records of the several officers of the City of Roanoke and, in view of the fact that the Auditor of Public Accounts was unable at the time the audit was commenced to place on that examination more than a small number of auditors, the council of the City of Roanoke engaged the accounting firm of T. Coleman Andrews & Company to also assist in the auditing of the accounts and records of the various offices and officials. Mr. Andrews, who has been actively in charge of the engagement, has informed me that he has completed the major portion of the audit and that he is now engaged in recording the results of the examination. He has informed me that in order to do this satisfactorily it is necessary that we obtain from the Attorney General the opinion of the Attorney General with respect to the three following questions:

"1. Has a public official who is required, among other things, to collect revenue or charges of any kind and pay the same into the treasury of the Commonwealth or any political subdivision thereof, any authority to do anything with any such amount collected other than hold it and turn it into the treasury of the Commonwealth or political subdivision, as the case may be, when required to do so by the statutes?

"2. In making an audit of the accounts and records of a collecting official, does the authority of the Auditor of Public Accounts include the authority to determine whether the collecting official has in hand the amount represented by those collections which he has not paid into the treasury of the Commonwealth or political subdivision thereof, as the case may be, on the date the audit is made?

"3. In making an audit of the accounts and records of a collecting official, does the authority of the Auditor of Public Accounts include the authority to determine whether the collecting official had in hand the funds repre-

senting collections made but not paid in to the treasury of the Commonwealth or political subdivision thereof, as the case may be, at any date or dates prior to the date on which the audit is made?

1. Section 4452 of the Code makes it a felony for a public official of the State or of any city, town or county, having custody of public funds, knowingly to misuse or misappropriate the same, or knowingly dispose of such funds otherwise than in accordance with the law authorizing the disbursement thereof.

This statute was construed in *Robinson v. Commonwealth*, 104 Va. 888. Until the passage of the county finance board act, there was no law providing how or in what manner public funds were to have been held or handled by public officials. The act referred to is in terms limited to county treasurers, so it cannot be definitely stated just how public officials must hold public funds until they have been legally disposed of.

In *Mecklenburg v. Beals*, 111 Va. 691, the court held the treasurer of Mecklenburg county and his sureties liable for the loss of public monies through the failure of a bank in which these funds had been deposited. In that case it held the treasurer and his sureties liable as insurers of public monies, without in any way indicating the manner in which the treasurer's collections should be handled.

In *Camp v. Birchett*, 143 Va. 686, the treasurer of the city of Hopewell deposited \$5,000 of earmarked money in the Virginia State Bank of Hopewell, by virtue of the authority of certain ordinances adopted by the city council directing Camp to deposit city money in certain banks doing business in Hopewell. The Special Court of Appeals of Virginia, in an opinion by Judge Christian, held that the funds so deposited by the treasurer were improperly deposited; that the city council had no authority to authorize the treasurer to make the deposit in a particular bank; that he was an insurer of the funds and was accountable to the city for the loss occasioned by the failure of the bank of deposit.

From the statute and authorities quoted, I am of the opinion that no officer can dispose of public funds collected by him or entrusted to his care otherwise than pursuant to the provisions of the law. There is no provision by statute except in the case of county treasurers as to how monies are to be held by public officials.

2 and 3. The second and third questions you ask may be combined for purposes of reply.

The authority of the Auditor of Public Accounts is contained in section 565 of the Code, as amended by chapter 406, page 844, of the Acts of 1934 and/or section 565-a of the Code. Section 565, as amended, provides that the Auditor of Public Accounts, when requested, and whether requested or not, "may, at any time, examine the books and accounts of such officers (city and county treasurers, clerks of courts and school boards of counties and cities) and to report to said supervisors or councils the findings of his investigation, if it relates to the affairs of such county or city."

Section 565-a provides for a biennial audit of "all accounts and records of every city and county official and agency in this State handling State funds, making a detailed written report thereof to the Governor within thirty days after each audit."

The authority conferred upon the Auditor, while in general terms, is very broad as to his authority in making his audits and as to items to be included in his reports. The statutes, however, do not, in my judgment, authorize or empower the Auditor to demand that officers other than county treasurers show the actual cash funds on hand to balance their accounts or to account for places of deposit. The report of an audit shows the receipts and disbursements of all officials handling public funds as of their respective dates, and the report will show upon its face, when taken in connection with the statutes providing for the disbursement of public monies, the status of the official account as of the date of the audit or at any prior time. It may not show, should receipts exceed disbursements, that the officer had on hand actual cash or a checking credit to balance his account. Except as it may be shown otherwise, an officer cannot be held as in default if he complies with the law requiring periodic settlement. Section 4452 of the Code, already cited, makes a default in the payment of money as required by law prima facie the crime of embezzlement.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

AUDITOR OF PUBLIC ACCOUNTS—Authority to determine amount of money in hands of public officer at time of audit and prior to audit.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., August 20, 1934.

HON. L. MCCARTHY DOWNS,
Auditor of Public Accounts,
Richmond, Virginia.

DEAR MR. DOWNS:

Referring to a statement from you which appeared in the press some days ago to the effect that the opinion expressed by this office in a letter to you, under date of July 6th, concerning the powers of the Auditor of Public Accounts, very seriously hampers your work in auditing public offices, I have given the matter further study and consideration and desire to clarify the opinion as to the second inquiry contained in your letter to me of July 5, 1934, and to revise it as your first inquiry.

These two inquiries relate to the authority of the Auditor of Public Accounts to determine, (a) the amount of money in the hands of a public officer at the time the auditor is making his examination, and (b) the amount such officer had on hand on some date prior to the date of the examination.

The former opinion should be construed in the light of the problem which this office was advised was then actually confronting you and your employees. This problem did not involve the authority to determine the amount of money actually on hand *at the time of the examination*. This office had been advised that the only difficulty being experienced was in the office of the City Sergeant of Roanoke, and that on April 18, 1934, the date of your examination of his said office, you had already determined that this officer had on hand in cash which you actually counted, and on deposit in his official bank account about \$250.00 more than was required to pay all his liabilities. Therefore, the only question which really required a decision, and the only question as to your authority involved in the Roanoke audit related solely to your authority to determine the amount of money which the officer had had on hand at some date prior to the date of your actual examination.

Upon analysis of this question it is clear that the answer depends, not upon the authority to examine which the law confers on the auditor, but upon the duty the law imposes on the officer with respect to the accounts of his office and the method of handling his collections. If the law requires the funds in his custody to be kept in such a manner that there will be a daily record preserved from which the amount on hand at any day in the past may be ascertained by your examination, then unquestionably you, as auditor, have the authority to examine said records and determine whether the officer had the required amounts on hand at any time in the past. This condition is true in the case of county treasurers who are required by law to deposit all collections in official bank accounts. This provides a continuing record of the handling of the funds, and enables you to determine whether the county treasurer had the required funds on hand at any time, even a year or more prior to the date of your actual examination. On the other hand, if an officer is not required to and does not deposit all of his collections in an official bank account, but is authorized to and does keep same, or a part thereof, on hand in cash, or in bank accounts other than an official one, obviously there is no record which can possibly show the amount of actual cash he had on hand at some day in the past,—say six months or a year prior to your actual examination. His records, if properly kept will show the amount he should have had on hand in cash, but whether he actually had the correct amount at that time it is impossible for you to determine from any examination you may make even though your authority be *unlimited*. It is equally obvious also that it is impossible for the officer himself to prove how much cash he had on hand at some day in the past prior to your examination, and the law does not require proof of that which by its very nature is not capable of being proved. It was for this reason that in the former letter to you this office called your attention to the decisions of the Supreme Court of Appeals of Virginia which deny to a public officer the right or authority to deposit public money in an official bank account and relieve himself and his surety

from liability for its loss if the bank fails. This rule was first established in Virginia in 1911, in the case of *Mecklenburg v. Beales*, III Va. 691, in which a county treasurer was held responsible for the loss of official funds deposited in a bank which failed. In the opinion in this case the Court said:

"The deposit was his voluntary act, made for his own convenience in caring for and disbursing the fund, *not required or authorized by law*. Neither the custom of his predecessors in office, however long continued, nor the approval of the county authorities, however formal, could have any effect upon his liability. He was made the custodian of the fund, and his accountability is to be determined by law, and not by the practice or opinions of others."

Your attention was also directed to a case decided in 1925, *Camp v. Birchett*, reported in 143 Va. Reports, at page 686, in which the council of the City of Hopewell, by ordinances and resolutions, undertook to require the treasurer of that city to deposit the monies and securities of that city in certain designated banks. This the treasurer did, and when the bank failed the Hopewell city council undertook to release the treasurer from liability for the loss. But our highest court held the city council had no authority to do this; that there prevails in Virginia "the rule of strict liability, which requires a public officer to assume all risks of loss, and imposes upon him the duty to account for the public funds which go into his hands." Said the Court:

"It was the duty of Camp to safely keep the money of the City of Hopewell; the responsibility and duty were his alone, and if he deposited or left money in an insolvent bank, he and his surety are liable for its loss."

And the Court, in deciding against the officer said further:

"Upon careful examination of the law of the whole case, it does not appear that a city or county can contravene the fixed public policy of the State, and relieve a treasurer of his duties and liabilities and shift the responsibility for the safety of public funds to some other custodian, however meritorious, without express enactment of the legislature.

"The contention of the defendants in this case is that the city treasurer was subject to the direction and control of the city council. This is not true in law. City treasurers are constitutional officers elected by the people and their duties are prescribed by law. They could not surrender any of their powers to any other officers or escape their responsibilities by acting under the advice or direction of the city councils."

As before stated, the rule applied in the Hopewell case was first established in Virginia in the year 1911, in the case of *Mecklenburg v. Beales*, III Va. 691, over twenty years ago, and has never since been questioned in the courts, so far as the records show.

Moreover, in the *Mecklenburg* case the Court cited in support of the rule five decisions of the Supreme Court of the United States and also decisions of the highest courts of seventeen states, including Massachusetts, New Jersey, Ohio, Illinois and Pennsylvania. Therefore, it can be said there is nothing either new, novel or unusual in the rule.

From the foregoing, and from the self evident truth that an auditor cannot determine nor can the officer prove the amount of cash in his hands on a day prior to the examination, it follows that the Auditor of Public Accounts cannot require such officer to produce evidence of the cash in his hands on any such prior date. He may, however, examine the officer's official bank account, if he maintains one, and report the facts appearing from such examination. The failure of the officer, however, to have on deposit in such account, or in any bank account, an amount sufficient to satisfy his liabilities on such prior date, will not justify an inference or conclusion that said officer is short in his accounts, or that there is any irregularity in the conduct of his office, because it is impossible to ascertain how much he had on hand in cash.

As before stated, it was to the consideration of the foregoing question, which

alone was involved in the Roanoke audit, that the attention of this office was principally devoted.

Coming now to the first question propounded in your said letter of July 5th, it is clearly within the power of a public officer to produce before the auditor, to be counted, the money he has on hand at the time of the examination. While the legal question presents difficulties, in that there are persuasive arguments in favor of the view entertained by many lawyers, that an officer who is not authorized or required by law to keep an official bank account occupies the relation of debtor to the government and is not in default until he fails to pay money on the due date, yet this office is constrained to and does hold that it is the duty of such an officer to produce before the Auditor of Public Accounts and his assistants, to be counted, all cash on hand at the time the audit examination is made.

I may add that this office has no power to change the rules of law as decided by the Supreme Court of Appeals. Only the general assembly possesses this power. The writer, however, is of the opinion that all public officers collecting public moneys should be required by law to deposit same in an official bank account, that the bank should be required to give security against its loss, and that having performed this duty the officer should be relieved of liability in the event there should be a loss through a bank failure. I shall be glad to unite in advocating the enactment by the next general assembly of a statute so providing.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

AUDITOR OF PUBLIC ACCOUNTS—Payments of audits by cities and counties.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 13, 1934.*

HONORABLE L. MCCARTHY DOWNS,

Auditor of Public Accounts,

Richmond, Virginia.

Dear Mr. Downs :

Pursuant to your request over the telephone this morning for an opinion from this office upon the question of whether or not a county or city would be relieved of the obligation of paying the cost of the services of the Auditor of Public Accounts, as provided in section 565 of the Code of Virginia, as amended by the Acts of 1934, in the event that such county or city has its accounts audited annually by a registered public accountant, I will advise you as follows :

The section of the Code above referred to, as amended (Acts of 1934, page 845), contains the following provision :

“Provided, however, no part of the cost and expense of any such audit shall be paid by any county or city whose board of supervisors or city council has its accounts audited annually by a certified public accountant according to specifications furnished by the State auditor and furnishes the Auditor of Public Accounts with a copy of such audit.”

It will be observed that the foregoing language relieving the county of the obligation to pay the cost of an audit made by the Auditor of Public Accounts refer only to cases in which the accounts are audited annually by a certified public accountant. Furthermore, the audit must be made according to specifications furnished by the State auditor, and the county or city is required to furnish the Auditor of Public Accounts with a copy of such audit.

Section 567 of the Code defines the qualifications of a certified public accountant, and requires the taking of an examination under the State Board of Accountancy.

Entirely different qualifications are prescribed for a registered public accountant. The said section 567 provides that for a period of eight months prior to October 1, 1928, he shall have maintained an office in the State as a public accountant, and held himself out to the public generally as a practicing public accountant for compensation, and shall have devoted his time during the regular business hours of the day to the practice of public accountancy.

Any such person who applied prior to October 1, 1928, to the board for registration as a public accountant, was entitled as a matter of right to be registered as a public accountant provided he possessed the requisites of citizenship, age, moral character, and education prescribed in the Act for a certified public accountant. Such registration confers on such persons the right to practice public accounting in the State, but the Act provides that such registration shall not be construed in any way as indicating that the State Board of Accountancy has assumed any responsibility for the professional experience and qualifications of the registrant.

Since the qualifications of the two classes of practitioners of public accounting are entirely different, and since section 565 of the Code, as amended, relieves the county or city of liability only where the services of a certified public accountant have been employed, it is my opinion that no city or county will be relieved of the obligation to pay the cost of an audit or examination conducted by the Auditor of Public Accounts by virtue of having employed a registered public accountant to make an annual audit of the offices referred to in the said section.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

AUTOMOBILES—Dealers required to display inspection sticker.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 13, 1935.

MR. W. FRANCIS BINFORD,
Trial Justice,
PRINCE GEORGE, Virginia.

MY DEAR MR. BINFORD:

I am in receipt of your letter of June 11, in which you ask for a ruling on whether a new automobile being driven from a distribution branch to a dealer's show room under a dealer's tag should have an inspection ticket displayed. I assume that you have in mind the transfer of an automobile from a dealer to one of his agents.

Section 2154 (156) of the Code authorizes the Director of the Division of Motor Vehicles to compel the owner of any motor vehicle being operated upon a highway to submit such vehicle to an inspection of its mechanism and equipment by an official adjusting station.

I am informed that the Director of the Division of Motor Vehicles requires the inspection of cars being operated under the circumstances you describe, and I am of opinion that under the statute he has authority to require such inspection.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Application of A. B. C. Law to interstate commerce.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 2, 1935.*

VIRGINIA ALCOHOLIC BEVERAGE CONTROL BOARD,
Richmond, Virginia.

GENTLEMEN :

Attn: Mr. G. Stanley Clarke.

Referring to your request for an opinion upon the authority of the board to adopt a regulation authorizing wholesale wine and beer licenses to sell and deliver beer and wine to ships temporarily stopping at the port of Norfolk for the purpose of taking on a cargo or supplies, I am of the opinion that such a regulation is not forbidden by the provisions of the alcoholic beverage control act, where such ship is engaged in foreign commerce and the wine or beer desired to be sold is to be used as rations for the crew, which in my opinion would be equivalent to a resale, and where the beer or wine is to be resold and consumed solely on board of said ship. It is my opinion that such a sale is, to all practical intents and purposes, a transaction in interstate commerce and is not to be considered as a sale inside of the State of Virginia.

Ships engaged in such foreign commerce, stopping temporarily for the purpose of taking on a cargo or ship supplies, are usually considered to be in transit under the general laws relating to foreign and interstate commerce.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Authority of town to impose license tax for sale of wine and beer.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 27, 1934.*

HONORABLE E. PEYTON TURNER,
Attorney at Law,
Emporia, Virginia.

MY DEAR MR. TURNER :

Your letters of November 23 and 24 were duly received.

I agree with you that the Virginia Alcoholic Beverage Control Act confers no authority upon counties to impose a county license tax for engaging in the business of selling beer and wines having in alcoholic content of more than 3.2 per cent by weight. I do not think that this authority is given by section 2743 of the Code, as, in my opinion, that section does not confer upon the board of supervisors the power to impose county revenue licenses.

You will observe from section 296 of the Tax Code of Virginia that, whereas cities and towns are authorized to impose revenue licenses, no such authority is given to the counties.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Authority with reference to advertising.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 19, 1934.*

ALCOHOL BEVERAGE CONTROL BOARD,
Richmond, Va.

GENTLEMEN :

This is in reply to your request for an opinion from this office upon the question of the powers conferred upon the Board by Section 48 of the Alcoholic Beverage Control Act relating to advertising, Section 5 with respect to general powers to make regulations, and Section 53 which prohibits manufacturers, bottlers and wholesalers from selling, renting, lending, buying for or giving to any person who holds a retail license under the provisions of said Act any money, equipment, furniture, fixtures or property with which the business of such retailer is, or may be conducted.

It is the opinion of this office that, in construing these three sections together, the Board is empowered to permit advertising signs to be displayed upon the premises of the retailer by a manufacturer or wholesaler within such limitations, and subject to such restrictions as the Board may provide for in its regulations.

It is my opinion that it was the intention of the Act to give the Board full and complete authority with reference to advertising, and that this power is not restricted by the above-referred to provision of Section 53 of the Act.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Beer, Sale of by wholesale dealers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 26, 1935.*

ALCOHOLIC BEVERAGE CONTROL BOARD,
*Central National Bank Building,
Richmond, Virginia.*

GENTLEMEN :

This is in reply to your letter of January 25, requesting an official opinion from this office upon the question whether or not a person holding a wholesale beer license in Virginia may sell beer to another person holding a similar license.

Section 18(e) of the Alcoholic Beverage Control Act provides that wholesale beer licenses "shall authorize the licensees to acquire and receive deliveries and shipments of beer and to sell and deliver or ship the same, in accordance with regulations of the Board, in barrels, bottles, or other closed containers, to persons licensed under the provisions of this act to sell the same at retail for the purpose of resale, and to persons outside of Virginia for resale outside of Virginia, except that no deliveries or shipments shall be made into any State the laws of which prohibit the consignee from receiving or selling the same."

It will be observed from the foregoing that the above section, in so far as sales to persons outside of the State of Virginia are concerned, does not confine the sale to such persons as hold retail licenses in other states. In other words, the language of the act will permit a wholesaler in Virginia to sell to a wholesaler in any other state, where the laws of such other state permit.

It further seems to be the intention of the language used in section 18, in dealing with the privileges conferred by the various licenses, to prescribe minimum privileges. While there is no express prohibition against sale to persons other than those speci-

fied in the language of the section, it is my opinion that the language of the act standing alone will not permit one wholesale licensee to sell beer to another wholesale licensee.

Section 5 of the act confers upon the Board power and authority to make such regulations not inconsistent with the act as the Board shall deem necessary for carrying out the provisions of the act. Since there is no prohibition upon the Board making a regulation enlarging the minimum privileges defined in section 18 as those privileges which shall be incident to the granting of a license to the respective licensees therein designated, it is my opinion that it will be consistent with the said act for the Board, by virtue of this authority and power conferred upon it by section 5, to enlarge and add to the minimum privileges provided for in section 18 of the Act.

The attention of the Board is called to the provision of section 41(d), which provides that any person shall be guilty of a misdemeanor who "shall sell alcoholic beverages of a kind which such license or this act authorizes him to sell, but to any person other than to those to whom such license or this act authorizes him to sell."

It is my opinion that the meaning of the foregoing language is broad enough to eliminate from the classification of a misdemeanor a sale by a licensee to any person allowed under the express language in the act, or by any regulation of the Board made pursuant to the authority of the act. In other words, when the privileges of the license are enlarged by regulations of the Board, then such license will authorize the licensee to sell in accordance with such enlarged privileges.

It is my opinion, therefore, that, as the act stands at present without any regulation of the Board enlarging the privileges conferred by section 18(e), it is unlawful for a wholesale beer licensee to sell beer to another wholesale licensee. I am further of the opinion, however, that it is within the power of the Board to promulgate a regulation in the manner prescribed by law which will permit such sales to be legally conducted.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Wholesale Beer license for warehouse not required.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 21, 1934.*

VIRGINIA ALCOHOLIC BEVERAGE CONTROL BOARD,

Central National Bank Building,

Richmond, Virginia.

GENTLEMEN :

Further replying to your letter of December 8, transmitting a brief submitted by Messrs. Oast, Oast and Oast, Attorneys at Law, Portsmouth, Virginia, in behalf of the Virginia Beverage Company, Incorporated, a wholesale beer licensee of Norfolk, Virginia, and your subsequent letter of December 18, requesting an opinion from this office upon the question whether or not, under the facts stated in said brief, the Virginia Beverage Company, Incorporated, should be required to obtain a State wholesale beer license for the city of Portsmouth, Virginia, the facts briefly are as follows :

The Virginia Beverage Company, Incorporated, has secured a wholesale beer license from the State of Virginia for the city of Norfolk and for the city of Portsmouth. The only business office of the company is in the city of Norfolk. Its salesmen solicit orders in the city of Portsmouth. All original shipments of beer are received at Norfolk, but, for convenience and to save ferry charges, the beer is from

time to time stored in two public warehouses in the city of Portsmouth. Deliveries in the city of Portsmouth and in the county of Norfolk are made from both the storage warehouses at Portsmouth and from the company's main establishment at Norfolk.

Subsection (a) of section 24 of the Alcoholic Beverage Control Act requires a separate license for each separate place of business. The question, therefore, which is presented, is whether, under the facts above outlined, the Virginia Beverage Company, Incorporated, maintains a place of business in the city of Portsmouth. The public warehouses referred to are licensed as such by the State and the city, and are not operated in any sense by the licensee. In the case of *Planer Company v. Flournoy, Secretary*, 88 Va. 1029, it was held that, where the provisions of the statute requiring a license were doubtful, the doubt should be resolved in favor of the taxpayer.

Applying this rule, I am of the opinion that, under the facts presented and briefly outlined as above, the Virginia Beverage Company, Incorporated, does not maintain or operate a place of business within the city of Portsmouth within the meaning of the provisions of the Act, and should not be required to obtain a separate State license by reason of the fact that it stores beer in public warehouses in the city of Portsmouth and delivers therefrom.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Board may adopt regulations covering importation into Virginia.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 3, 1934.

HONORABLE G. STANLEY CLARKE,

Assistant Attorney General,

Alcoholic Beverage Control Board,

Richmond, Va.

DEAR MR. CLARKE:

This will acknowledge yours of June 29, enclosing a copy of the regulations of the Board concerning the importation into Virginia, through United States Customs bonded warehouses, of distilled spirits.

You are no doubt familiar with the information received by this office from the United States Customs Office at Washington, in which it was stated that spirits brought into Virginia under United States Customs bond will not be released in Virginia except in compliance with the regulations of the Alcoholic Beverage Control Board. In view of this letter, it is my opinion that the Board is acting within its authority in promulgating the said regulations.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Election of Treasurers—Effect on local option election.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 14, 1934.

HONORABLE S. HETH TYLER, CHAIRMAN,
Virginia Alcoholic Beverage Control Board,
Richmond, Virginia.

DEAR MR. TYLER:

This is in response to your request for an opinion upon the several questions asked of you by Hon. J. F. Wysor, Treasurer of Pulaski County.

Mr. Wysor states that Pulaski County has a population of about 20,000 which includes the population of about 7,500 of the incorporated town of Pulaski located therein. He states that the treasurer of the Town of Pulaski is an elected officer and was elected during the year 1934. He asks the question whether under the provisions of the Alcoholic Beverage Control Act a local option election under said Act can be held in the Town of Pulaski during the year 1934.

This question is determined by the provisions of Section 30(b) of the Act which provides that no election shall be held in any town in any year in which there is in such town a general election for a treasurer. Inasmuch as it appears from Mr. Wysor's letter that there was a general election in June of this year for the town treasurer, it is the opinion of this office that no local option election under the Alcoholic Beverage Control Act can be held in the Town of Pulaski during the calendar year 1934.

Mr. Wysor also inquires whether or not a referendum election can be called before a dispensary is actually established.

There is no provision to the contrary contained in the Act and it is the opinion of this office that such an election can be held prior to the establishment of a State Dispensary in such town. In fact such an election has been held in the City of Danville prior to the establishment of a State store in that city.

Mr. Wysor also inquires whether in the event an election should be requested by the people of the Town of Pulaski and also by the people of the County which request would be granted.

It is the opinion of this office, except for the prohibition upon a referendum in the Town of Pulaski due to the election of a treasurer therein during this year, if a referendum should be requested by the people of the town and also by the people of the county, separate elections would be held in both the town and the county. Under a former opinion of this office the town is an entirely separate local option district from the county. The qualified voters in the town might vote against the sale of alcoholic beverages therein in which event no such sales could be permitted in said town. On the other hand people in the county might vote in favor of permitting said sales and State stores might be established at some place in the county outside of the town, and also licenses might be granted for the sale of wine and beer.

It further appears from Mr. Wysor's letter that county officers would be elected in the year 1935 and he inquires whether or not a referendum can be had in the Town of Pulaski during said year.

Inasmuch as the county officers include a commonwealth's attorney and commissioner of the revenue and both of said general elections will be held in the town during the year 1935, it is the opinion of this office that under the provisions of said Section 30(b), above referred to, no local option referendum can be had in the Town of Pulaski during the year 1935.

Mr. Wysor further inquires whether or not voters who are residents of Pulaski County, but who vote at a precinct located in the Town of Pulaski, would be entitled to vote at a referendum election held for the Town of Pulaski.

It is the opinion of this office that only the residents of the Town of Pulaski who are entitled to vote at the election of town officers would be entitled to vote at such a referendum.

Mr. Wysor also inquires whether or not a referendum election could be held for the entire county including the town.

It is the opinion of this office that, inasmuch as the town and the county constitute separate local option districts or areas, no joint election could be held, but each, constituting a separate unit, would have to hold a separate election based upon separate petitions calling same.

Mr. Wysor further inquires whether or not all persons entitled to vote in general elections in November would be entitled to vote in such a referendum election.

It is the opinion of this office that a referendum election is a special election within the meaning of Section 83 of the Code and that if said election is held before the second Tuesday in June in any year any person is qualified to vote therein 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, the requisite poll tax, and if the referendum election is held after the second Tuesday in June, any person may vote who is qualified to vote at the regular election held or to be held on the Tuesday after the first Monday in November.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Jurisdiction of the Commonwealth of Virginia over the sale of alcoholic beverages on U. S. Government Reservations.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 17, 1934.*

THE ALCOHOLIC BEVERAGE CONTROL BOARD,
Richmond, Virginia.

Re: The matter of the Chamberlin Hotel at Old Point Comfort, Virginia.

GENTLEMEN :

This is in reply to your request for an opinion upon the question of the jurisdiction of the Alcoholic Beverage Control Board to issue licenses to the manager and operator of the Chamberlin Hotel at Old Point Comfort, and further, upon the question of the jurisdiction of the Commonwealth of Virginia over the sale at said hotel of alcoholic beverages.

The foregoing involves solely the question of what general jurisdiction, if any, the Commonwealth of Virginia has reserved over the land upon which the hotel in question has been constructed. In the report made by Honorable G. Stanley Clarke, Assistant Attorney General in charge of the work of the Alcoholic Beverage Control Board, the history of the legislation, conveyances, and leases involving the cession of this property to the United States, and the right of the United States to lease the same to the Old Point Comfort Hotel Corporation, the owner of the hotel, has been very fully covered. From this report, the following facts in brief appear :

That the General Assembly of Virginia, in 1821, (Acts of 1821, chapter 73) ceded to the United States, for the purpose of fortification, and other objects of National Defense, the present government reservation at Old Point, and authorized the Governor of Virginia to execute a deed conveying said property pursuant to the provisions of the Act.

The Act above referred to, as well as the deed executed pursuant thereto, contained a reservation to the effect that, should the United States at any time abandon said land or appropriate the same to any other purpose than authorized in the Act, the same shall revert to and revest in the Commonwealth of Virginia.

By an Act of the General Assembly, appearing in chapter 11 of the acts of the Extra Session of 1887, consent of the Commonwealth was given to the erection and operation of a hotel on the reservation at Old Point Comfort, reserving to the right to levy taxes and licenses as upon any other business operated in the State.

It further appears that, after this hotel had been constructed and operated for a number of years, it was destroyed by fire, and that in the year 1922 many citizens of Virginia desired the construction of a new hotel at the same site. The United States War Department refused to permit same except upon the condition that the Commonwealth of Virginia waive its reversionary right, as provided in the original deed above referred to. Accordingly, by an Act appearing in chapter 16 of the Acts of 1922, the General Assembly of Virginia gave its permission and consent to the erection of a new hotel on said site, and expressly waived all rights of reversion contained in the original cession and grant. This Act provided, however, that property located on said site shall be liable to such taxes, State and local, as other property in the county of Elizabeth City.

Pursuant thereto, and in accordance with a joint resolution of Congress, the United States Secretary of War, on April 26, 1926, executed a lease giving the Old Point Hotel Corporation the right to construct and operate a hotel on said site, providing, however, that the lessee should observe all reasonable rules and regulations then established or thereafter to be established by the Commanding Office at Fort Monroe, for its government generally in so far as the same may apply to or affect the leased premises.

In the report of Mr. Clarke above referred to reference is made to quite a number of decisions of the Federal Courts upon the question of the respective powers of the governments of the States and the United States over lands acquired by the United States from the several states. It appears from said decisions that, where land is acquired by the United States by purchase with the consent of the state for the erection of Forts, magazines, arsenals, dock-yards, and other needful buildings, regardless of any express cession of power by the state in connection with the purchase of said land, the Federal Government acquires exclusive legislative jurisdiction over said lands by virtue of the provision of Article I, Section 8, Clause 17, of the Constitution of the United States. In other cases, however, where the land is not purchased, but is ceded by a state to the United States, the extent of the respective jurisdictions of the governments of the state and the United States over said lands is dependant upon the terms and provisions of the instrument ceding the same to the Federal Government. The same distinction is likewise recognized in the more recent decisions hereinafter referred to, but it is not regarded as material to this inquiry, because it is apparent that Virginia has ceded to the United States exclusive legislative jurisdiction over the lands here involved.

Returning, therefore, to the original Act of cession from the Commonwealth of Virginia to the government of the United States, the terms of same are such as to transfer, assign, and make over unto the United States the right of property and title, as well as all of the jurisdiction which the Commonwealth of Virginia possessed over the lands in question, subject, however, to the reservation above referred to in the event of abandonment of use for the purposes enumerated in the Act of cession.

As has been heretofore pointed out, the right of reversion has since been waived, and it is my opinion that, by virtue of the several legislative acts of the General Assembly of Virginia and the deed of conveyance from the Commonwealth of Virginia to the United States, the government of the United States is now vested with sole and exclusive legislative jurisdiction over the lands which were ceded to the United States, including the land upon which the present Chamberlin Hotel is situated.

This being the status of the various transactions between the Virginia State Government and the Federal Government, it is in my opinion very clear that the State of Virginia has no authority to impose any license tax upon the operator of the Chamberlin Hotel for the privilege of conducting any business, including the sale of alcoholic beverages, and that the Commonwealth of Virginia has no power to regulate in any way or prohibit the sale of alcoholic beverages upon the premises of said Chamberlin Hotel. This appears very clearly from recent decisions of the Supreme Court of the United States in the following cases:

Standard Oil Company of California vs. People of California, decided February 5, 1934, 78 L. ed. U. S. Supreme Court Decisions, page 525.

Arlington Hotel Co. vs. Fant, 278 U. S. 439, 73 L. ed. 447 *United States vs. Unzueta*, 281 U. S. 138.

Surplus Trading Co. vs. Cook, 281 U. S. 647.

For the reasons heretofore above stated, I am of the opinion that neither the State of Virginia nor the Alcoholic Beverage Control Board has any jurisdiction whatsoever with reference to the licensing or regulating of sales of alcoholic beverages upon the premises of the Chamberlin Hotel, situated on the United States Government Reservation at Old Point Comfort.

Respectfully yours,

ABRAM P. STAPLES,

Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Legally acquired liquors not subject to confiscation.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., February 5, 1935.

HONORABLE W. TERRELL SHEEHAN,

Trial Justice,

Staunton, Virginia.

DEAR MR. SHEEHAN :

I have your letter of February 4, in which you request the opinion of this office upon the question whether alcoholic beverages lawfully acquired may be confiscated by the State, where the person in possession of same is convicted of drunkenness; such beverages being in his possession at the time of said drunkenness and at the time of his arrest. You state that there is some difference of opinion as to whether or not such alcoholic beverages are subject to confiscation under the provisions of section 36 of the Alcoholic Beverage Control Act.

Section 36 of said Act provides that all alcoholic beverages which are kept stored, possessed, or in any manner used in violation of the provisions of said Act, shall be deemed contraband and shall be forfeited to the Commonwealth. This raises the question whether or not there is any provision in the said Act which makes it unlawful for a person to use alcoholic beverages to excess so as to produce drunkenness. An examination discloses that it contains no such provision. While there was such an Act passed at the 1934 session of the General Assembly (Acts of 1934, page 464), said Act is not a part of the Alcoholic Beverage Control Act.

It is my opinion, therefore, that the possession of alcoholic beverages lawfully acquired, on which all Federal taxes have been paid, is not in violation of any provision of the Alcoholic Beverage Control Act, even though the person in possession of same be intoxicated, and that such alcoholic beverages are not liable to confiscation under the provisions of said section 36 above referred to.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Liquors legally acquired not subject to forfeiture.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 20, 1935.*

HONORABLE PIERCE C. KEGLEY,

*Trial Justice,**Bland, Virginia.*

DEAR MR. KEGLEY:

I have your letter of February 18, inquiring whether or not liquor purchased lawfully from one of the State stores is subject to confiscation by reason of the fact that the possessor thereof also had in his possession liquor unlawfully acquired since the passage of the alcoholic beverage control act.

The alcoholic beverage control act does not contain any restrictions upon the possession of liquors acquired through the State stores, and it is my opinion that the owner of the liquor to which you refer does not forfeit its ownership by reason of the fact that he was also in possession of other unlawfully acquired liquor. It is my opinion it should be returned to its lawful owner.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,

*Attorney General.***ALCOHOLIC BEVERAGE CONTROL—Mayors without jurisdiction to try offenses.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 23, 1935.*

HONORABLE L. A. GAY,

*Town Clerk,**Franklin, Virginia.*

DEAR MR. GAY:

I have your letter of February 22, inquiring whether or not in the opinion of this office the mayor of the town of Franklin has jurisdiction to try criminal cases involving a violation of the alcoholic beverage control act.

This office has already rendered several opinions, in which the view has been expressed that, under the provisions of section 4988-g, clauses 3 and 7, the trial justice, where one has been appointed for a county and town, has exclusive jurisdiction to try cases involving a violation of State laws. The mayor, where the appropriate resolution has been passed by the town council, has jurisdiction to try cases involving the violation of a town ordinance.

As you state in your letter, section 65 of the alcoholic beverage control act prohibits any county, city or town, from passing or adopting any ordinance or resolution regulating or prohibiting the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in Virginia. The only exception to this is contained in the provisions of section 26 of the act, authorizing the councils or other governing bodies of cities and towns to provide by ordinances for the issuance of city and town licenses, and to charge and collect license taxes therefor, to persons licensed by the Board.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

**ALCOHOLIC BEVERAGE CONTROL—Ordinance paralleling A. B. C. Law—
Fees of attorneys for the commonwealth.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 17, 1934.

HONORABLE E. R. COMBS,
State Comptroller,
Richmond, Virginia.

DEAR MR. COMBS:

This is to acknowledge receipt of your letter of November 15, in which you request me to express an opinion on the questions raised by Mr. Charles L. Hutchins, Clerk of the Circuit Court of the City of Suffolk, in his letter to you of November 10, which are as follows:

1. Whether the city of Suffolk can pass an ordinance which is identical with the State law and which provides for the punishment of a person operating an automobile while under the influence of intoxicating liquor.

2. Whether or not a fee for the Commonwealth's attorney can be taxed as a part of the costs, there being no fee provided in the ordinance for the Commonwealth's attorney.

Mr. Hutchins is mistaken when he states that the ordinance under consideration is similar to any provision of the Alcoholic Beverage Control Act. This ordinance is practically identical with an Act passed by the 1934 General Assembly (Acts 1934, chapter 144, page 220) which has been designated in the Michie Code as section 4722. You will notice that that Act expressly provides that a city or town can pass an ordinance similar to the Act.

A further examination of this Act discloses that there is no provision therein requiring the presence of the Commonwealth's attorney at a prosecution before the Trial Justice Court. In my opinion, therefore, no fee for the attorney for the Commonwealth can be taxed as costs in such court, though such fee should be taxed in cases in the Circuit or Corporation Courts.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

**ALCOHOLIC BEVERAGE CONTROL—Previous convictions—Driving while
intoxicated, etc.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 17, 1934

HON A. D. WATKINS,
Attorney for the Commonwealth,
Farmville, Virginia.

MY DEAR JUDGE:

I am in receipt of your letter of yesterday, in which you state that a man, who has been twice previously convicted of violations of the Layman prohibition law, was arrested in your county for the unlawful possession of ardent spirits. You then ask several questions, which I will answer seriatim.

1. I do not think that previous convictions of the Layman law should be charged in a warrant for the unlawful possession of ardent spirits. The Layman Act was repealed by the present Alcoholic Beverage Control Act.

2. Section 50 of the latter act makes it a misdemeanor for any person to have in possession ardent spirits acquired by him in violation of the provisions of that act. Punishment for violations of the Alcoholic Beverage Control Act is provided

in section 62 of the act. Such violations are punishable by a fine not exceeding \$500 or confinement in jail not exceeding twelve months, or by both fine and imprisonment. In addition to the fine and imprisonment, the court may require the defendant to execute a bond in a penalty not exceeding \$1,000, upon condition that the defendant will not violate the provisions of the Alcoholic Beverage Control Act for a term of one year. Should such a bond not be given, he may be committed to jail until the bond is given or until he is discharged, his confinement for not having given bond being limited to a period not exceeding six months.

3. There is no provision in the present law for the addition of punishment because of prior convictions.

4. There is no provision in the present law covering fees of officers. Consequently, officers are paid under the provisions of the general law allowing fees in criminal cases.

5. In your postscript you ask whether possession of a quart and a half of ardent spirits contained in a fruit jar is *prima facie* evidence of violating the law covering unlawful possession.

There is no provision in law making possession *prima facie* guilt, but I understand from the Alcoholic Beverage Control Board that that Board has adopted regulations making it *prima facie* unlawful, unless the container has a stamp or State seal on it.

I have asked the Alcoholic Beverage Control Board to forward you copies of their regulations.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Repeal of Layman Act—Effect of on town ordinances

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 3, 1934

HONORABLE W. M. ABBITT,

Attorney for the Commonwealth,

Appomattox, Virginia.

DEAR MR. ABBITT:

I am in receipt of your letter of yesterday, in which you enclose a copy of your town ordinance, cite a case of a violation of one of the provisions thereof for punishment for driving while under the influence of ardent spirits, and ask my opinion as to the effect of the repeal of the Layman Prohibition Law upon the said ordinance.

I understand that the town of Appomattox received its charter from the circuit court of the county. As I do not have that charter before me, I cannot speak as to the legality of the ordinance to which you refer. If, however, the ordinance was duly passed, pursuant to authority granted by the charter of the town, this office is of the opinion that the repeal of the Layman Prohibition Law does not in any way affect your town ordinance.

I may call your attention to the fact that, while the first and second paragraphs of sub-section b of the second part of chapter 94 of the Acts of 1934 repeal Acts of the General Assembly popularly known as the Mapp Act and the Layman Law, sub-section c, providing that all acts and parts of acts, general, special, private and local, including charter provisions and ordinances of cities and towns, which are inconsistent with the provisions of the Alcoholic Beverage Control Act are specifically repealed by that act, indicates that chapter 94 was not intended to repeal and does not repeal town ordinances which are not inconsistent with the provisions of the Alcoholic Beverage Control Act.

Chapter 144 of the Acts of 1934, page 220, should also be taken into consideration. Chapter 94 was approved March 7, 1934, while chapter 144 was approved March 22, 1934. The latter act, because of certain technical omissions, while intended to go into effect on the 22nd day of March, the day upon which the Beverage Act took

effect, did not become effective until the 19th day of June. Chapter 144 supplied an omission in the Beverage Act and practically reenacted section 25 of the Layman Prohibition Law, making it a criminal offense for a person to drive or operate a motor vehicle while under the influence of intoxicants or drugs. The last phrase of the last sentence of the third section of chapter 144, providing that nothing in the act shall be construed as conflicting with or repealing any ordinance or resolution of any city, town or county heretofore or hereafter adopted, restricting still further the right of persons to drive or operate motor vehicles, is a repetition of the purpose of the Legislature to continue in effect and not to repeal town ordinances punishing for the operation of motor vehicles by persons under the influence of ardent spirits or drugs.

I am of the opinion, therefore, that, if your town charter confers the power upon your council to pass the ordinance in question, its validity will be sustained.

I am further of the opinion that the repeal of the Layman Act did not have the effect of repealing town ordinances which were enacted to parallel the provisions of said act relating to the operation of a car under the influence of intoxicants and that said ordinances are still valid and effective, whether expressly authorized by the charter or not.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

**ALCOHOLIC BEVERAGE CONTROL—Right of search under Section 822-d
not repealed by A. B. C. Act.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 11, 1935.*

HONORABLE R. S. SMITH,

*Attorney for the Commonwealth,
Roanoke, Virginia.*

DEAR SIR:

I have your letter of February 8, in which you inquire whether or not the last paragraph of section 4822d is, in the opinion of this office, repealed by virtue of the repeal of the Layman Act and the enactment of the Alcoholic Beverage Control Act.

The paragraph to which you refer authorizes any officer empowered to enforce the game laws and the laws with reference to intoxicating liquors to enter an automobile for the purposes of police inspection without a search warrant. There is also embraced in this section freight yards or rooms, passenger depots, baggage rooms or warehouses, storage rooms or warehouses, trains, baggage cars, passenger cars, express cars, Pullman cars, freight cars, boats, and other vehicles of any common carriers.

I do not understand from this section that the officer is authorized to do anything more than inspect the premises referred to, and the powers to search which are conferred by this section would seem to me to be extremely limited. However, the nature of the power is not very clear and would doubtless depend upon the circumstances of each particular case.

In view of the limited powers conferred, and since the statute refers to the enforcement of game laws as well as laws with reference to intoxicating liquors, it is my opinion that the section is not repealed by the acts above referred to.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,

Attorney General.

A. B. C. Validity of notices of liens of fieri facias.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., August 27, 1934.

HON. G. STANLEY CLARKE, *Counsel,*
Alcoholic Beverage Control Board,
Richmond, Virginia.

DEAR MR. CLARKE:

This is to acknowledge receipt of your letter of August 24, in which you write:

"From time to time the Virginia Alcoholic Beverage Control Board is in receipt of notices of liens of fieri facias, directed solely to the Board.

"It is my opinion, in which Major Tyler agrees, that as this Board is not subject to any suit, except upon contracts, the service of a notice of lien of fieri facias upon the Board is of no force and effect and that the failure of the Board to respond thereto could not subject it to a suit.

"I would like to advise the accounting department of the Virginia Alcoholic Beverage Control Board to disregard such notices, but before doing so, request that you concur in this opinion."

The question of the validity of notices of liens of fieri facias would arise under the following circumstances:

(1) Where the Alcoholic Beverage Control Board is indebted to the employees or wage earner and a judgment creditor has proceeded to have notice of lien served in accordance with section 6501 of the Code.

(2) Where the said Board, through some business transaction, has become indebted to a person, firm or corporation that in turn is indebted to the judgment creditor, and a notice of lien has been served upon the Board in accordance with section 6501 of the Code.

I am quoting from section 6559 of the Code:

"Unless otherwise exempted, the wages and salaries of all employees of this State, other than State officers, shall be subject to garnishment or execution upon any judgment rendered against them. Whenever the salary or wages of such employees as above mentioned shall be garnisheed under this section, the process shall be such as is usual in other cases of garnishment, and *shall be served on the judgment debtor and on the Auditor of Public Accounts, or other officer through whom the judgment debtor's salary or wages is paid,* and upon such service the Auditor or other such officer shall, on or before the return day of process, transmit to the clerk of the court or justice issuing the process a certificate showing the amount due from the State to such judgment debtor, up to the return day of the process, which amount said Auditor shall hold subject to the order of the court or justice issuing the process. * * *"
(Italics ours)

This section, as you will see, permits the salaries or wages of State employees, other than State officers, to be garnisheed. I do not believe that section 4975, subsection 6, is broad enough to prohibit garnishment proceedings against the Alcoholic Beverage Control Board instituted for the purpose of garnisheeing the wages of those State employees who happen to be connected with the said Board. Subsection (b) of said subsection 6 states the amount for which the Board can be sued. This is a mere reiteration of the law which is contained in section 2578 of the Code, specifically applied to the Alcoholic Beverage Control Board.

Your attention is invited to section 6501, which was amended by the 1934 Legislature. See chapter 143, Acts of 1934, page 219. The following portion of that section is new:

"* * * and unless said notice shall be personally signed by the plaintiff or his attorney and shall have been duly *served* upon such assignee or person making payment and judgment debtor *by an officer authorized to serve civil process.*"
(Italics ours)

It is my opinion that, if a notice of lien is served upon any member of the Alcoholic Beverage Control Board, or upon the Auditor of said Board, such service is good. Such service would be in accordance with the provisions of section 6559, in which it is stated that such garnishment "shall be served on the judgment debtor and on the Auditor of Public Accounts, or any other officer through whom the judgment debtor's salary or wages is paid." (Italics ours). I think that the term "other officer" is broad enough to cover any department, board or commission of the State that happens to be the agency through whom the judgment debtor is employed.

The general purpose of enacting section 6559 was to enable State employees to get credit, when otherwise they could not have secured it. I believe that the State should not stand on technicalities which would defeat the purpose of this Act, such as the alleged improper service upon the department, board or commission of the State through whom the judgment debtor is employed. Such alleged defective service should be raised by the judgment debtor, and not by the State, in the garnishment proceedings subsequently instituted.

Your attention is further invited to that portion of section 6559 making it mandatory upon the Auditor or such other officer to transmit to the clerk of the court or justice issuing the process a certificate showing the amount due from the State to such judgment debtor.

Considering the question raised in paragraph (2), I would like to state that I find no express statute which permits a garnishment against the State under such circumstances. However, I am of the opinion that the departments of the State government should not disregard such service in garnishments or notices of liens. Such a disregard would be unfair to the persons, firms or corporations entering into contractual relationship with the State, and often times would work a hardship upon innocent persons.

In the case of *Stuart, Governor, v. Smith-Courtney Co.*, 123 Va. 231, the court stated (p. 235) :

"The demurrer then was properly overruled, for *the Commonwealth will not be astute to escape inquiry into its liability for its alleged contracts, or to take advantage of technical defenses which are permissible to other litigants.*" (Italics ours.)

When one considers this language together with section 2578 of the Code, which gives a person the right to recover a judgment against the Commonwealth on contractual obligations, he is led to the conclusion that the Commonwealth should not raise any technical defenses in matters of this kind, but answer legal processes in the State courts wherein the proceedings are pending, or withhold payment until the courts determine to whom the funds are due.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BAKERS—Allowing credit for stale products.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 25, 1934.

HONORABLE F. C. BREAZEAL, *Director,*
Dairy and Food Division,
Department of Agriculture and Immigration,
Richmond, Virginia.

DEAR MR. BREAZEAL :

This is in reply to your letter of July 25, in which you request the opinion of this office upon the question of whether it is a violation of section 2 of the Bakery Products Law for a bakery to deduct from the bill of a retailer stale products on hand at the place of business of the retailer. I am informed by you that the retailer does

not actually return the stale products, but that it is the practice among some bakers to allow credit for stale products on hand.

Section 2 of the Bakery Products Law, so far as here applicable, is quoted at length in your letter and is as follows:

"No bread or other bakery products except as hereinafter provided shall be returned from any consumer or other purchaser to the dealer or baker, nor from any dealer to the baker, and no baker or dealer shall *directly or indirectly accept any returns* or make any exchange of bread or other bakery products * * *."

It is my opinion that the purpose of this act is not to undertake to control any business practice, but to prevent, in so far as possible, the sale of stale products. Allowing a credit for stale products would not seem to me to have any bearing upon the question of the sale of such products, and it is my opinion that such credit is not prohibited by the provisions of section 2 of the law.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

BOARD OF ACCOUNTANCY—Records confidential.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 1, 1934.

MR. J. A. LEACH, JR., *Secretary-Treasurer,*
Virginia State Board of Accountancy,
506 State-Planters Bank Building,
Richmond, Virginia.

MY DEAR MR. LEACH:

I refer to your two communications of October 15 and 30, in which you ask my opinion as to whether or not the records of the Virginia State Board of Accountancy are open to public inspection. You state that you have a specific request from Dr. John J. Corson III, Director of the Evening School of Business Administration in the University of Richmond, for a list of the individuals who took the last examination for the certificate of Certified Public Accountant.

I note that the Board denied Dr. Corson's request on the ground that it would be against public policy to make public the information he desires. In your letter of October 30 you set out some of the reasons which caused the Board to consider it against public policy to give out this information. You say in part:

"It has always been the practice of the Board to publish the names of the successful candidates. Hence, if I give out a list of all candidates who took the examination, it would for all practical purposes be the equivalent of divulging the names of the unsuccessful ones, and would have the effect of embarrassing and humiliating them by publicly branding them as failures.

Also, if I should give such a list to one college, I would have to give one to every other college, business school and individual who requested it.

"Finally, the Board considers its records, of necessity, to be confidential. If it should be held that its records are public records, every candidate would have the right to see his examination papers, and possibly the other candidates' papers also, which would result in endless argument as to the correctness of the answers and the fairness of the markings."

The rule seems to be well settled that not all public records are open to unlimited public inspection, one of the classes of cases being where such inspection would be contrary to public policy. I think it is unquestionably true that the records of

the Virginia State Board of Accountancy are public records. This office in 1928 (Opinions of Attorney General, 1928-29, page 221) held insofar as the records of the Medical College of Virginia were concerned as follows:

"The records of the Medical College of Virginia are public documents and, so far as they are of direct interest to an individual, or of public concern, I am of the opinion that any person individually interested has a right to an inspection of the files directly concerning him, and, that, where it is a matter of serious public concern, a taxpayer and citizen, though not himself personally interested, has a right to access to such of the public files of the College as may reasonably include the subject of public interest about which he desires information.

"No person, however, is entitled to unlimited access to all of the files of your institution. The right to access at all is one spoken of as an absolute right, but the courts have held that there must be a sufficiency of purpose for which the applicant for the files desires the inspection. Not only must there be sufficient purpose, but an institution may impose such reasonable restrictions and regulations as are necessary for the safety of the records, and the inspection must be had in such manner and at such times as not to interfere with the business of the office.

* * * * *

"The case and notes of *Welford v. Williams*, from the Supreme Court of Tennessee, found in 64 L. R. A. 418, may be of interest. I also refer you to 23 R. C. L. 160, 162, 163, 164, and *Gleaves v. Terry*, 93 Va. 491, and *Keller v. Stone*, 96 Va. 667."

I concur in this statement of the law, and applying it to the specific case in which you ask my opinion, giving due consideration to the reasons you give for the Board's action, I am of opinion that, except insofar as the records of your Board may concern Dr. Corson as an individual, the position of the Board is supported by law. Certainly, there is no showing that a list of those who took the examination for the certificate of Certified Public Accountant is a matter of any public concern.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

BOARD OF MEDICAL EXAMINERS—Revocation of license—Stenographic report not required.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 9, 1934.

DR. J. W. PRESTON, *Secretary-Treasurer,*
State Board of Medical Examiners,
Roanoke, Virginia.

DEAR DOCTOR PRESTON:

I have your letter of November 7, inquiring whether or not, in conducting proceedings for the revocation of a certificate to practice medicine under section 1614-a of the Code of Virginia, as amended by chapter 188, page 369, of the Acts of 1932, it is necessary to have a stenographic verbatim report of the evidence or other proceedings of the Board.

While the statute above referred to requires that the proceedings shall be recorded formally, and be certified by the president and secretary of the Board, it is my opinion that it does not require a stenographic report of the evidence, but merely a formal record of the findings of the Board, together with a concise statement of the facts or reasons upon which the same is based.

It is my opinion, however, that, in the event the defendant in the proceedings desires to do so, he has the privilege of employing a stenographer and having a transcript of the evidence prepared.

In the event of an appeal, I would suggest that the Board follow the usual practice in appeals from trial courts to the Supreme Court of Appeals in cases where there are no stenographic reports of the evidence. In these cases the judge certifies a narrative of the substance of the testimony of each of the witnesses appearing.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Authority to make change in County budget.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 17, 1934.*

HON. J. H. BRADFORD,
*Director of the Budget,
Capitol Building,
Richmond, Virginia.*

MY DEAR MR. BRADFORD:

I am in receipt of your letter of September 12, enclosing one addressed to you from Honorable John H. Downing, Attorney for the Commonwealth of Warren County.

The effect of the inquiry made by Mr. Downing is whether or not a board of supervisors may make changes in the county budget adopted for any particular year.

Sections 2577 (1) to 2577 (o) of the Code of Virginia deal with county budgets. Provision is made for the adoption of a county budget and for the publication of the proposed budget, so that any citizen may have the right to attend and state his views. There is no provision in any of the sections for a change in the budget after it has been finally adopted, and I am, therefore, of opinion that the board of supervisors has no power to change it.

Mr. Downing speaks of possible authority to raise the salary of an employee ten per cent by unanimous consent of the board of supervisors. In my investigation I have not noticed such a statute, and I should be glad if Mr. Downing will refer me to it.

I am returning Mr. Downing's letter herein.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Payment of membership fee—Association of County Supervisors.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 15, 1934.*

MRS. ROBBIE D. WARE,
Treasurer of Amherst County.

HONORABLE WALTER H. CARTER,
*Attorney for the Commonwealth,
Amherst, Virginia.*

DEAR SIR AND MADAM:

I have your respective letters, requesting the opinion of this office upon the question whether or not a membership fee of the board of supervisors of Amherst county in the Association of Virginia County Supervisors may properly be paid out of the general county levy, or out of the general county fund.

I have given quite a great deal of thought to this question. The Association referred to is not a governmental agency, nor does it occupy any official legal status as an agency of the State. Similar associations are found, such as the Association of Treasurer, Association of Commissioners of the Revenue, and Association of Commonwealth's Attorneys, all of whom are salaried officers and doubtless are required to pay dues or membership fees in their respective associations. So far as I have been able to learn upon inquiry, the dues or membership fees of these various officers in their respective associations have never been authorized to be paid out of any governmental fund, although the purposes for which they are formed are very similar to the purposes of the Association of Virginia County Supervisors.

Generally speaking, the authority of the board of supervisors to expend county funds is limited to those which are of a governmental character, and while I have no doubt that the Association of Supervisors will be of great benefit to the counties and to the State, nevertheless, I am constrained to the opinion that the payment of a membership fee in this association is not such a governmental purpose as would authorize the board of supervisors to use the public money of the county for such purpose.

Cordially yours,

ABRAM P. STAPLES,

Attorney General.

BOARD OF SUPERVISORS—No authority to use County funds to change roads.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 14, 1934.

HONORABLE J. KENT EARLY,

Attorney for the Commonwealth,

Charlotte Court House, Virginia.

DEAR MR. EARLY:

I have your letter of November 7.

You ask if the board of supervisors in Charlotte county may use an unexpended balance from district road levies made for years prior to 1932, for the purpose of changing the location of one of its district roads. You further state that the district has no bonded road indebtedness.

Section 1975-jj of the Code (Acts 1932, page 874), quoted in part by you, specifically provides how such an unexpended balance may be used. If there is no road indebtedness, the balance is to be used for general county or district purposes.

My conclusion is that the board of supervisors does not have the authority to pay for changing the location of one of the district roads out of this unexpended balance. The statute expressly places upon the Highway Commission the exclusive duty to construct and maintain all roads in the secondary system.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

BOARD OF SUPERVISORS—Right to impose license tax for sale of wine and beer. Power to require dogs to be inoculated against rabies.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 5, 1934.*

HON. R. CROCKETT GWYN, JR.,
*Attorney for the Commonwealth,
Marion, Virginia.*

DEAR MR. GWYN:

I have your letter of September 4, in which you ask first:

"Has the board of supervisors the right under the law to impose a county tax license on wine and beer in excess of 3.2 per cent?"

I can find no authority in general law or in the Alcoholic Beverage Control Act giving counties the right to impose a license tax for the sale of wine and beer containing more than 3.2 per cent of alcohol by weight.

Your second question is:

"Has the board of supervisors the power to require all dogs to be inoculated against rabies?"

I am of opinion that the authority of the board of supervisors in this connection is contained in section 3305 (70) of the Code, particularly the last sentence thereof, reading as follows:

" * * The board of supervisors of any county or the governing body of any city or town shall also have power and authority to pass ordinances restricting the running at large in their respective jurisdiction of dogs which have not been inoculated or vaccinated against rabies and to provide penalties for the violation thereof."

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***BOARD OF SUPERVISORS—Authority to refinance county and school bonds.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 26, 1934.*

HONORABLE L. MCCARTHY DOWNS,
*Auditor of Public Accounts,
Richmond, Virginia.*

DEAR MR. DOWNS:

This is in reply to your letter of December 21, 1934, requesting the opinion of this office upon the plan outlined in your letter for the refinancing of all county and school bonds of Wise County, Virginia.

You do not indicate in your letter whether or not these bonds are past due.

Section 2735 of the Code of 1930 (Acts 1914, page 256) provides:

"Whenever the bonds of any county, whether heretofore or hereafter issued, become payable and it is desired by the board of supervisors of such county to retire them and to issue new bonds for the payment thereof at the same or a lower rate of interest, they are authorized and empowered to do so. Such new bonds shall recite on their faces the date of the act authorizing

the issue of the bonds to be retired or paid thereby, and any other fact preserving the identity of the debt. Such new bonds may be made payable or redeemable at such time or times as the board of supervisors may deem best, but in no event shall such new bonds run for a longer period than fifty years from their date."

This section invests plenary authority in the Boards of Supervisors to refund past due bonds by issuing new bonds for the payment thereof at the same or a lower rate of interest.

The proposal outlined in your letter, which provides for the refunding of the bonds, with a reduction of interest for the first five years from 5.61% to 4.75%, and with the original interest rate thereafter, is authorized by the provisions of the above quoted section 2735 of the Code, if the present bonds are past due.

The General Assembly of 1934 (Acts 1934, page 261) passed a general Act, which is apparently applicable only to the county of Wise, which authorizes the Board of Supervisors of a county, having over 50,000 population and which alone constitutes a judicial circuit, to fund or refund, *before maturity*, county and/or district *road* bonds and/or county *home* bonds legally issued prior to June 19, 1928, provided the interest rate of the new bonds is lower than that of those being retired.

The apparent reasons for this last Act are to provide for funding or refunding these bonds *before maturity*, as section 2735 of the Code applies only to past due bonds, and to provide for the exchange of the new bonds for the old "on the basis of dollar for dollar of par value plus accrued interest."

I am of the opinion, therefore, that, under the provisions of the said Act of 1934, the plan outlined in your letter is permitted as to county or district *road* bonds and county *home* bonds legally issued by the board prior to June 19, 1928, and in which the full faith and credit of the county is pledged for their payment.

The plan you outlined also provides for a refunding of the school bonds by new bonds maturing five to ten years later, and a reduction of the interest rate to 4¾% during the five year period.

Chapter 52 of the Acts of 1930 (page 54) authorizes the county school board of any county to issue new bonds for the purpose of refunding outstanding bonds before, at, or after maturity, provided such funding prior to maturity be effectuated at the same or a lower rate of interest.

It is my opinion that the plan to which you refer is authorized by said Act, but your attention is called to the following provision therein contained:

"Said bonds * * * shall be sold at public sale upon sealed proposals to the highest bidder at not less than par and accrued interest to date of delivery. Notice of such sale shall be given by publication at least once in a financial paper and in such other papers as the county school board shall direct, not less than ten days prior to the date fixed for such sale."

I assume that this provision can be taken care of by having the holders of the outstanding bonds bid for the new bonds at par plus accrued interest.

With reference to the provision outlined in your letter, whereby, under the plan of refinancing or refunding, it is proposed that the county enter into an agreement to levy, during the five year period, taxes sufficient to provide double the amount of the interest charges, I can find no authority to sustain the validity of this provision. Generally speaking, one Board of Supervisors has no power to contract for a specific tax levy which is to be imposed by future Boards in future years. The Act of 1934, above referred to herein, provides as follows:

"After any such bonds are issued, the board, or governing body, issuing the same shall annually levy a tax on all property in such county subject to local taxation, sufficient to provide for the payment of the interest on said bonds and the principal thereof at maturity; provided that such levy in the several districts of such county shall be sufficient to so provide for the payment of the principal and interest of such an amount of the new bonds as shall be equal to the amount of the bonds of said districts, respectively, as may be so funded or refunded."

It is, therefore, my opinion that any attempt to bind by contract future levies of the Board is beyond the power of any Board of Supervisors. You can readily appreciate the soundness of this principle, in view of the fact that it is impossible to foretell what conditions will be in future years. Business conditions may improve very materially and render the levy of such a high tax unnecessary. It is a question for each Board of Supervisors to determine, under existing conditions, what rate and amount of tax is necessary to be levied in order to provide the required revenue.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

BOARD OF SUPERVISORS—Legal to make appropriations for school purposes not included in budget estimate.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 24, 1935.*

HONORABLE W. R. SAUNDERS,

*Attorney for the Commonwealth,
Bedford, Virginia.*

MY DEAR MR. SAUNDERS:

Honorable L. McCarthy Downs, Auditor of Public Accounts, has referred to this office your letter of January 16, in which you state:

"At the December meeting of the board of supervisors of Bedford county a resolution was passed authorizing the school board to borrow a sum not to exceed \$100,000 from the literary fund for the purpose of building one new school and making additions to three other schools in our county, and in the same resolution, in order to assist in the financing of said program, the board ordered that \$30,000 be transferred from the general county fund to the school fund.

"Under chapter 119, Acts of the General Assembly, 1932, it is provided: 'In lieu of making such school levy, the board of supervisors in the counties and the councils in the cities may, in their discretion, make a cash appropriation from the county or city levy of an amount not less than the sum required by the county or city school budget, etc.'

"My construction of the above section is that where there is a school levy, if additional funds were needed by the school, a transfer could be made from the general levy.

"The town of Bedford constitutes a separate school district and the town is contending that it is entitled to its pro rata part of any funds transferred from the general county fund to the county school fund, and under section 653 of the Code of Virginia, 4th paragraph, it reads as follows:

"'To such town district operated by a school board of three members, the county school board shall pay over to the town treasurer, if and when properly bonded, the amount derived from the county levy or appropriation for school purposes, a sum equal to the pro rata amount from such levy or an appropriation derived from such town'

"From the above provision, it is my opinion that the town of Bedford would be entitled to its pro rata share in any fund transferred from the general fund to the county school fund.

"I will appreciate it if you will advise me whether or not my conclusions are in accord with yours; that is, can funds be transferred from the general fund to the county school fund, and if such transfer is made, is the town of Bedford entitled to its pro rata part of said funds?"

I assume that the board of supervisors has made the regular appropriation for school purposes pursuant to the county school budget, and that Bedford has received or will receive its pro rata share of this appropriation.

It is further assumed that the board of supervisors desires now to make an additional special appropriation to assist in financing the buildings mentioned in the first paragraph of your letter. It is further assumed that this additional appropriation is made under that portion of section 698 of the Code of Virginia immediately following the first quotation in your letter, reading as follows:

“ * * In addition to this, the board of supervisors of any county, or the council of any city, may appropriate from any funds available such sums as in the judgment of such board or council or such city may be necessary or expedient for the establishment, maintenance and operation of the public schools in such county or city. * * ”

I am of the opinion that the provision in section 653 of the Code quoted by you was intended to make sure that a town constituting a separate school district should receive its pro rata share of the general levy or appropriation for schools made pursuant to the budget submitted in accordance with section 657. However, it is my belief that the provision I have quoted above from section 698 was intended to allow the board of supervisors, where the funds were available, to make a special appropriation, in addition to the appropriation made to cover the budget, to provide funds for school purposes which were not contemplated in the budget, such as to meet an emergency or for the erection of buildings. It is, therefore, my opinion that it is contemplated that, with respect to appropriations for specific or unusual, isolated purposes, the board of supervisors is vested with full discretion, and is not compelled to appropriate a pro rata amount to such separate school district.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Authority to make appropriation to a tuberculosis association.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 2, 1935.*

HON. C. W. CARTER,
Commonwealth's Attorney,
Warrenton, Virginia.

DEAR MR. CARTER:

This is in reply to your letter of January 30th, inquiring whether or not, in the opinion of this office, the board of supervisors of Fauquier County has authority to make an appropriation to the Fauquier County Tuberculosis Association to be used in caring for the poor tuberculosis patients of the county.

The board of supervisors has general power to provide for the care and maintenance of the poor. Under section 2730b of the Code, the board is given power to make binding contracts with other counties and councils of cities for the maintenance of the poor. Whereas, under section 2743, the board is authorized to adopt the necessary regulations to prevent the spread of contagious diseases among persons, and to adopt such other measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of the county.

It is my opinion that the board may make the appropriation about which you inquire.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Authority to abolish office of overseer of poor.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 12, 1935.*

MR. JOHN W. GILL, *Chairman,*
Board of Supervisors of Campbell County,
Lynchburg, Virginia.

MY DEAR MR. GILL:

I have your letter of February 8, in which you ask if the board of supervisors of Campbell county can abolish the office of overseer of the poor, the same being elected by popular ballot, and install a welfare worker in the place of the overseer of the poor.

The office of overseer of the poor is provided by general law. Section 127 of the Code of Virginia prescribes that in each magisterial district there shall be elected every four years one overseer of the poor. Section 2804 prescribes certain duties with respect to begging, vagrancy, etc.

Since the creation of the office of overseer of the poor, the General Assembly has provided that in counties where superintendents of public welfare have been appointed such superintendents shall have the care and supervision of the poor, and shall administer the funds now administered by overseers of the poor. Section 1902-0 of Virginia.

While it may be said that the effect of this provision is to transfer some of the duties of the overseer of the poor, yet I do not think there is any authority for the abolition of the office itself by the board of supervisors under general law. This can be done only by act of the General Assembly.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***BOARD OF SUPERVISORS—Authority to make expenditures on FERA projects affording relief.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *March 11, 1935.*

HONORABLE EDWARD H. RICHARDSON,
Attorney for the Commonwealth,
Salem, Virginia.

DEAR MR. RICHARDSON:

This is in reply to your letter of February 27, in which you request the opinion of this office with respect to the authority of the board of supervisors of Roanoke county to make expenditures for compensating employees engaged in the supervision of FERA projects on county roads not embraced within the Secondary Highway System, and for supervising the building of sidewalks upon the right of way of roads embraced within the primary and Secondary System—the latter to be also FERA projects.

While the statute does not authorize the board of supervisors to expend money for these purposes as a primary undertaking, nevertheless the board of supervisors does have authority to make expenditure for purposes affording relief to the needy and indigent of the county.

It is impossible for this office to pass upon any particular case, as to do so would involve passing upon the facts involved which this office cannot do. How-

ever, it is my opinion that, as a general rule, where the expenditure is made primarily for relief, and the improvement to the road or sidewalks follows merely as an incident to the relief work carried on for the relief of the needy and indigent of the county, such expenditures are with the authority of the board of supervisors.

I do not believe the mere fact that the person to whom the payment is to be made, and who acts in a supervisory capacity, is not needy or indigent, or subject to relief, will render the payment improper or beyond the boards authority, provided it is necessary that such person be employed in such supervisory capacity in order to provide relief to others who are needy and indigent.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

BOARD OF SUPERVISORS—Members of prohibited from contracting with school board.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *March 27, 1935.*

HONORABLE L. MCCARTHY DOWNS,

Auditor of Public Accounts,

Richmond, Virginia.

DEAR MR. DOWNS:

I have your letter of March 18, enclosing a letter addressed to Mr. J. Gordon Bennett by Honorable A. N. Wellford, Commonwealth's Attorney for Richmond county, Virginia, in which he states that the school board of Richmond county made a request for bids for furnishing wood to certain schools, and also for furnishing and operating buses for the transportation of pupils to certain schools in said county. He further states that Mr. F. C. Booker, who is a member, and also chairman of the board of supervisors, was the lowest bidder in both of these instances, and requests the opinion of this office upon the question whether or not it will be in violation of section 2707 of the Code of Virginia for the contract to be made with him under these circumstances.

While the transactions above referred to do not come within the express provisions of said section of the Code, the purpose of said section seems to be to prohibit supervisors, and the other officers named, from entering into contracts made with any officer, agent or person acting on behalf of the supervisors or superintendents, or overseers of the poor, or in the sale or furnishing of supplies or materials to his county.

While there may be some doubt about the question of whether or not a sale to the school board is a sale to the county, nevertheless, it is unquestionably true that a larger part of the funds provided for such expenditure by the school board are obtained from levies made by the board of supervisors. It, therefore, seems to me that the contracts referred to in your letter are in violation of the general spirit and purpose of section 2707 of the Code of Virginia.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

BOARD OF SUPERVISORS—May contract with VERA.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 17, 1935.*

HONORABLE C. W. CARTER,
*Attorney for the Commonwealth,
Warrenton, Virginia.*

DEAR MR. CARTER:

This is in reply to your letter of April 13, in which you ask the following question:

"Whether or not the board of supervisors of this county would have the power to enter into a contract with the VERA to furnish materials for the installation of water systems in these villages, and at the same time enter into a contract with the citizens who avail themselves of same to repay the county by paying water rent."

Under the general laws of Virginia applicable prior to the Special Session of 1933, it is very doubtful if any such power as above outlined was vested in the board of supervisors.

However, by an act approved September 7, 1933, appearing in chapter 26 of the acts of the Extra Session of said year, the boards of supervisors are given very broad powers to undertake, manage, and contract in reference to projects which may be undertaken in co-operation with the Federal Emergency Relief Administration. In this connection, I call your attention to the provisions of subsection (g), of section 2, appearing on page 49 of said acts, and section 11, appearing on page 54, as printed in the bound volume along with the 1934 acts.

These powers thus conferred for relief purposes are extremely broad and, if in the judgment of the board of supervisors the contracts to which you refer are necessary in order to carry on the relief activities in the county, I am constrained to the opinion that the board would be authorized to make the contracts about which you inquire.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—May require health officer to treat rabies.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 25, 1935.*

DR. I. C. RIGGINS,
*State Health Commissioner, Department of Health,
Richmond, Virginia.*

DEAR DR. RIGGINS:

I am in receipt of your letter of April 24, inquiring if the board of supervisors of a county where there is a health officer can require a person bitten by a rabid dog to take treatment from the health officer and not from the family physician, if any payment for the costs of the treatment is to be made by the county.

I am of opinion that the board of supervisors has this power. See section 1553 and 2743 of the Code.

Section 2323t of the Code expressly provides that any county or city having a health officer may require him to treat persons bitten by a rabid dog.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Proper corporate name.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 20, 1935.

HON. WILLIAM O. FIFE,
*Attorney for the Commonwealth,
Charlottesville, Virginia.*

MY DEAR MR. FIFE:

I am in receipt of your letter of June 19, in which you ask the proper corporate name of the board of supervisors of Albemarle county. You call my attention to the fact that the county adopted the executive form of government provided in chapter 368 of the Acts of Assembly of 1932.

Inasmuch as this chapter throughout refers to the board of supervisors as the "board of county supervisors," it seems that the proper corporate name of the board is "board of county supervisors of Albemarle county."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Authority to appropriate out of general county fund money for purpose of paying interest on bonded indebtedness created for construction of school building.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 2, 1934

HONORABLE J. T. WADDILL, *Chairman,*
Board of Supervisors,
Victoria, Virginia.

DEAR MR. WADDILL:

This is in reply to your letter of June 29, requesting an opinion from this office on the question of whether the board of supervisors has the power to appropriate out of the general fund money for the purpose of paying the interest on the bonded indebtedness of a school district lying within the county where the school building for which said indebtedness was contracted is being used by school children in the county generally, and where no distinction is made as to the residence of the school children, whether the same be within or without said school district.

Under the provisions of section 698 of the Code, as amended by the Acts of 1932, page 127, as well as under the provisions of section 698a of the Code, as found in chapter 372, page 753, of the Acts of 1934, the boards of supervisors in the counties are authorized to make certain levies for the purpose of establishing, maintaining, and operating schools within their counties. Such boards are also authorized to appropriate from any funds available such sums as in their judgment may be necessary or expedient for the establishment, maintenance, and operation of the public schools in their respective counties.

The question raised in your letter is, whether or not, where a school building is used not as a district school building, but as one for the entire county, the

interest on the indebtedness incurred in constructing said building may be treated by the board of supervisors as a part of the cost of operation and maintenance of such school.

It is the opinion of this office that, under the circumstances above stated, the board of supervisors has the power in its discretion to appropriate, as a part of the cost of maintenance and operation, what in its judgment is a reasonable amount for the payment of interest on the indebtedness created for the construction of such a school building.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

BONDS—Posting of—Live stock markets.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 25, 1934.*

HONORABLE GEORGE W. KOINER,

*Commissioner of Agriculture and Immigration,
State Office Building,
Richmond, Virginia.*

DEAR MR. KOINER:

I have your letter of September 21, in which you state in part:

"There have been established in this State about eight live stock markets at which auction sales are operated periodically. It is my understanding that all kinds of live stock are consigned to these markets, to be sold at auction by a duly licensed auctioneer, for the account of the owner; that payment therefor is made to the live stock market, who in turn settles with the owner, deducting certain commissions or charges for services rendered."

In a conversation with Mr. Berry, of your Department, I was also advised that it was the understanding of your Department that corporations and partnerships were operating as live stock markets, and that the auctioneer selling the live stock was a regular employee of the corporation or partnership as the case may be.

You ask whether or not these live stock markets are amenable to the provisions of sections 1257 to 1265 of the Code and thus called upon to post the bond to secure the license provided for by sections 1258 and 1259. The markets contend, you state, that they are exempt by the sentence in section 1257, reading as follows:

"Nor shall it include the sale of farm produce at public auction by a duly licensed auctioneer, acting as the agent of another to whom such produce shall have been consigned."

This office construed exactly the same language in an opinion rendered in 1918 to your office (Report of Attorney General 1918, page 35) in connection with tobacco warehouses. It was then held that the exemption was intended to relieve the auctioneer, and not the warehouse, from the provisions of the act.

I concur in this ruling and, therefore, am of opinion that, from the facts presented, the live stock markets you describe should post the bond and secure the license provided for by sections 1258 and 1259. From what you say, the live stock is consigned to the markets and not to the auctioneer, who is merely an employee of the markets.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

BONDS—Member of Commission of Fisheries.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 22, 1934.*

HONORABLE GEORGE P. DEHARDIT,
Commonwealth's Attorney,
Gloucester, Virginia.

DEAR MR. DEHARDIT:

This is in reply to your request for my opinion as to whether or not it will be necessary for you to provide a corporate surety on your bond as a member of the Commission of Fisheries.

Section 3146 of the Code provides that each member of the Commission shall enter into bond in the penalty of \$500.00, with surety to be approved by the Governor. It contains no requirement that the surety bond shall be a surety company, nor have I been able to find any general provision in the Code requiring any such type of surety.

Section 282 of the Code provides that certain surety companies, complying with the requirements of that section, shall be accepted as surety if tendered by the officer executing the bond. However, said section contains no provision making it obligatory to furnish a surety company as surety. In fact, the implied provision of said section is that a personal surety may be furnished if the officer prefers.

I am, therefore, of the opinion that, if the Governor approve a personal surety offered by you, such bond with such surety will meet the requirements of section 3146 of the Code.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

BOXING AND WRESTLING—Pro-rating of licenses.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 29, 1934.*

STATE BOXING AND WRESTLING COMMISSION,
Richmond, Virginia.

GENTLEMEN:

This is in reply to your letter of December 27, requesting the opinion of this office upon the questions hereinafter set out.

The State Boxing and Wrestling Commission is created, and its duties and powers defined, by chapter 303 of the Acts of 1934 (page 487). This act is carried into the 1934 Supplement to Michie's Code as sections 585(51)b to 585(51)x inclusive.

Section 7 of the act provides for the issuance by the Commission of licenses to any club or organization for wrestling, boxing or sparring exhibition, and provides that the application for a license shall be accompanied by an annual fee, graduated according to the size of the city in which the applicant is located. The act does not expressly provide the duration of each specific license, nor does it contain any provision either permitting or prohibiting the proration of the license fees or taxes provided for.

Shortly after the Commission assumed its duties on June 29, 1934, licenses were issued to applicants in accordance with the sections above referred to. These licenses were issued for the remainder of the calendar year 1934.

Under these circumstances two questions have arisen—first, whether the license should run for a period of one year from the date of issuance, and,

second, if the license does not run for such full year, but expires on December 31, in the year in which it is issued, is the applicant for said license entitled to receive the same upon the payment of an amount prorated in accordance with the provisions of section 134 of the Tax Code.

Section 133 of the Tax Code provides as follows:

"Except where otherwise expressly provided, all licenses shall expire on the thirty-first day of December of each year."

Since the Act providing for the payment of license fees contains no express provision as to when the license issued shall expire, it is my opinion that the provisions of section 133 of the tax Code, above quoted, control the expiration date of the license and that same expires as a matter of law on the 31st day of December of the year in which the license is issued.

Upon the question of the proration of the license fee or tax, section 134 of the Tax Code provides as follows:

"Except where otherwise expressly provided, any license may be granted for less than a year, and the tax thereon shall bear such proportion to the whole annual tax as the space of time between granting the same and the thirty-first of December following bears to the whole year; but no license tax shall be subject to such proration where proration is specifically prohibited; and where proration is specifically prohibited, the annual tax shall always be charged regardless of the date of the issuance of such license."

Section 7 of the Act, providing for the payment of these license fees, does not contain any express provision prohibiting the proration of the license fees or taxes. It is my opinion that, where the license is issued for less than a year, the fee or tax chargeable thereon is to be prorated in accordance with the above quoted provisions of section 134 of the Tax Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—Authority to control truck traffic.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 1, 1935.

HONORABLE JAMES L. McLEMORE,
Judge, Circuit Court,
Suffolk, Virginia.

MY DEAR JUDGE McLEMORE:

I have your letters of April 26 and 27, requesting my opinion as to the authority of the city of Suffolk to enact and enforce regulatory ordinances affecting the movement of trucks traversing its streets, and in reply I would say that in my judgment subsection (a) of section 2154 (99) of the 1932 Supplement to the Code of Virginia, which is section 54 of the Motor Vehicle Code of Virginia, provides warrant for such action by the council of your city as would seem necessary to accomplish the purpose sought.

By reference to the section cited, you will find that cities and towns, "where conditions require," may adopt such ordinances, rules, and regulations not in conflict with the chapter of which the section adverted to is a part as may be deemed advisable and necessary, and such an ordinance as you have in mind would not contravene any provision of Chapter III of the Motor Vehicle Code.

In the concluding sentence of this subsection, cities are authorized, "where conditions require," to enact ordinances or adopt police regulations requiring vehicles to come to a full stop at any street intersection other than a street

which has been designated for service of through traffic in connection with the State Highway System, and in section 2154(101), which is section 54 of the Motor Vehicle Code, cities and towns are authorized to erect appropriate signs designating business and residence sections, grade crossings and such other signs as may be *deemed necessary* to control traffic.

In view of these latter two specific delegations of authority, the language contained in subsection (a), first referred to, authorizing the adoption of such ordinances as may be deemed *advisable and necessary* could have no significance unless constituting additional powers, among which would certainly seem to be the right to designate streets for particular use. All of this, of course, is predicated on the assumption that the city charter of Suffolk contains the usual provisions empowering the city's law making body to adopt regulations affecting its streets.

It is stated, as a general proposition in which many courts of last resort have concurred, in Huddy's Encyclopedia of Automobile Law, Vol. 1-2, p. 211, that "It is the general rule that a municipality, subject to constitutional and statutory limitations, and subject to the requirement that its ordinances be reasonable, has, by virtue of its general police power, the right to regulate the use of its streets by motor vehicles.

The second query which you ask is whether or not the city may adopt an ordinance restricting the use of certain streets to trucks taking on or discharging loads at points along such streets and routing what you refer to as "through trucks" via some other street, and the answer to this question may be found in numerous adjudications of the U. S. Supreme Court to the effect that such regulations, if furnishing reasonable classifications, are non-discriminatory and valid, and the affect of such an ordinance as you contemplate would not appear to be repugnant to that requirement.

It is my opinion that the city council would be acting within its delegated authority to adopt an ordinance limiting the use of certain streets to one class of trucks and designating other streets for use by another class.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General

CITIES AND TOWNS—Liability for costs in town ordinance uses, including per diem at State Farm.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *August 3, 1934.*

HONORABLE C. H. WILSON,
Mayor,

Crewe, Virginia.

DEAR MR. WILSON:

I have your letter of August 1, with reference to the right of the town of Crewe to be relieved of the costs of persons convicted of violating ordinances of the town of Crewe by sending said prisoners to the State Farm.

You are correct in your interpretation of the Trial Justice Act that you, as Mayor, have no jurisdiction to try any cases except such as constitute a violation of ordinances of your town. In such cases, the town receives all fines paid by convicted persons and is required to pay the expense of maintenance of prisoners in jail convicted of such violation, who are sentenced to jail or who do not pay the fine.

Under the provisions of section 5058(13), dealing with the State Farm, it is provided that the State Prison Board shall receive the per diem allowance of prisoners transferred to the farm that would be allowed were they to remain in the several jails from which they are transferred.

It appears clearly from the foregoing that, if the town of Crewe desires to avail itself of the privilege of sending prisoners to the State Farm, the town will have to pay the State Farm the same amount which it would have to pay the jailer if such prisoners were to remain in jail.

There is no provision in the statutes for the State paying for the care or maintenance of prisoners convicted of violating municipal ordinances.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Compensation—Services rendered in connection with county roads.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 23, 1934.

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

DEAR MR. POWELL:

This is in reply to your letter of October 9, in which you request the opinion of this office upon the question of whether the clerk is still entitled to the salary provided for under section 2002 of the Code of Virginia.

Section 2002, which originated in section 34 of chapter 106 of the Acts of the General Assembly of 1904, provided for the compensation of clerks for services rendered the boards of supervisors in relation to the construction, establishment, and operation of the county roads. Section 2002 contains the following language:

"The clerk of each board of supervisors, except as hereinafter provided, shall receive for the duties to be performed by him *under the provisions of this chapter*, compensation to be fixed and allowed to him by the said board, not to exceed one hundred dollars per annum; * * *."

The section further provides that for such services the clerk of the board of supervisors of Nansemond county shall receive a salary not exceeding two hundred and fifty dollars per year.

You will observe from the foregoing that this compensation is solely for duties performed under the provisions of the chapter in which this section appears.

With the adoption of the Byrd Road Laws, and other road legislation, it has come about that all of the sections contained in the chapter of the Acts referred to above, except section 2002, have been repealed. Therefore, since all of the Acts which prescribed the duties have been repealed, there are no duties to perform, and the obvious result is that the abolition of the duties necessarily abolishes the compensation therefor.

Were this not true, I believe that the constitutionality of section 2002 is very doubtful. See the opinion of the Supreme Court of Appeals in the Case of *Smith vs. Board of Supervisors*, 159 Va. 304.

Your attention is directed to section 2039(21) of the Code, providing for the compensation for the clerk for services rendered in connection with county roads.

My opinion is that the clerk is entitled to be compensated under the provisions of this last named section.

Yours sincerely,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Docketing and indexing executions—Book necessary.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND VA., *August 16, 1934.*

HONORABLE GEORGE W. MULLINS,

*Clerk,**Grundy, Virginia.*

DEAR MR. MULLINS:

This is in reply to your letter of August 11, inquiring whether or not section 6031 of the Code of Virginia is still in force and, if so, what book is prescribed for the indexing required of you under said section.

This section of the Code, as it appears in the Michie Code of 1930, is still in force and has not been amended.

There is no express provision in the statute as to any particular type of book in which the clerk shall docket these executions. However, it is usually customary for a clerk to keep a separate execution book for each court in the city, and also a separate book for justices executions. These dockets are required to be indexed in the name of both the plaintiff and the defendant. The information appearing thereon usually consists of the names of the plaintiff and the defendant, the date of the judgment, the amount thereof, whether or not homestead has been waived, and the nature of the officers return on said execution, if any.

This section also requires the clerk to file the executions alphabetically in a separate bundle for each year, and provides a fee therefor of twenty cents.

I trust the foregoing is sufficient information to meet your requirements.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***CLERKS—Duty—Making reports of fines.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 20, 1934.*MR. W. D. CHAPLIN, *Clerk,**Bath County Circuit Court,**Warm Springs, Virginia.*

DEAR MR. CHAPLIN:

This is to acknowledge receipt of your letter of December 18, in which you state:

"Would you kindly advise me at your early convenience just what my duty is concerning Fine Report 'C,' for report of fines imposed by court and justices of the peace and costs, etc., under Code section 2546, as amended, chapter 462, page 792, Acts 1922 and Code section 2563? Since the Trial Justice Act, is the clerk supposed to make this report as before? Also Fine Report 'B'."

Neither section 2546 nor 2563 has been repealed and hence it is your duty to make the reports called for under these sections, just as you have heretofore done.

Your attention is directed to chapter 249 of the Acts of 1934, subsection f (section 4988-f of the Code), which provides in part:

"* * fines assessed for violations of city, town or county ordinances shall be turned into the treasury of the city, town or county whose ordinance has been violated; other fines shall be turned over and accounted for as now provided by law with respect to justices of the peace, but nothing contained in this act shall be so construed as to authorize any trial justice appointed hereunder to collect any fees payable by the State."

You will see, therefore, that the enactment of the Trial Justice Act has not changed your duties in this respect.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Duty as to recordings.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 17, 1935.

HONORABLE H. B. McLEMORE, JR., *Clerk,*
Circuit Court of Southampton County,
Courtland, Virginia.

MY DEAR MR. McLEMORE:

I am in receipt of your letter of April 16, enclosing a type of reservation of title contract which you have been asked to docket. You call my attention to the fact that the contract does not provide for the signature of both the vendor and vendee, and request my opinion as to whether it is your duty to docket same.

I am of opinion that it is not the duty of the clerk to decide the legal question of the sufficiency of an instrument tendered to him for docketing. This question will arise for decision by the court if the validity or legal effect of the instrument is drawn in question thereafter. My advice to you, therefore, is to docket the contract, and to call the attention of the person tendering it to any defects you think appear on the face of the paper.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Entry of orders appointing fiduciaries.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 5, 1935.

HONORABLE J. EDWARD THOMA, *Clerk,*
Circuit Court of Clarke County,
Berryville, Virginia.

DEAR MR. THOMA:

This is in reply to your letter of December 29, 1934, inquiring whether orders relating to the appointment and qualification of trustees, committees, administrators, executors and guardians should still be entered in the chancery order book as heretofore, and also whether the keeping of the clerk's order book has now been disposed with.

The proceedings with reference to the matters above mentioned are statutory and I cannot find that they are definitely classified either as proceedings at law or in equity. It appears from the reports of several cases decided by the Supreme Court of Appeals of Virginia that the practice, prior to the enactment of section

5962a of the Code, was to treat the appointment of personal representatives as a proceeding at law, and the cases were carried to the Supreme Court of Appeals by writ of error rather than by appeal, as in chancery cases. On the other hand, section 5962a, prior to amendment provided that these orders should be kept in a chancery order book, and there is no express repeal of this requirement.

I am informed that the practice in the various courts in the State is somewhat varied at the present time as to whether the proceedings should be treated as legal or equitable. As there is no clear criterion by which to be guided in the matter, my opinion is that the question will have to be determined by the judge of each local court.

When the appointment of a personal representative is made by the clerk of the court, it is my opinion that his order should be entered in the same order book, common law or chancery as the case may be, which is decided upon by the judge of the local court as the appropriate classification of the order. I do not believe these orders should be now entered in the clerk's order book.

I think this question should be clarified, and no doubt a bill will be introduced at the next General Assembly to make the practice uniform throughout the State.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Fees—Entering fines in book and entering executions.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 30, 1935.*

PAUL E. BROWN, *Esquire,*
Trial Justice of Fairfax County,
Fairfax, Virginia.

MY DEAR MR. BROWN:

I am in receipt of your letter of November 26, and must advise that I am of opinion that the 25 cents fee for the clerk of the court provided in section 2552 of the Code should be taxed as a part of the costs. I refer you to sections 4963 and 4964 of the Code, which appear to me to be ample authority for this action. I refer particularly to the provision in section 4964 directing the clerk or justice to "make up a statement of all expenses incident to the prosecution * * and execution for the amount of such expenses shall be issued and proceeded with; * * ."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CLERKS—City courts—Fees taxable.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 29, 1935.*

HONORABLE JAMES R. DUNCAN,
Civil and Police Justice,
Alexandria, Virginia.

DEAR MR. DUNCAN:

This is in reply to your letter of January 28, inquiring whether or not the Civil and Police Justice in the city of Alexandria should tax, as part of the costs in imposing fines in cases before him, the fee of one dollar provided for in

section 2566 of the Code, and the fee of twenty-five cents provided for in section 2552 of the Code.

Section 2566 provides that the fee of one dollar therein provided for shall be for services rendered under sections 2563, 2564 and 2565.

Section 2563 requires the clerk to return to the auditor of public accounts a list of fines imposed by his court, and also a list of fines imposed by a justice and recorded in the clerk's office pursuant to the requirements of chapter 102 of the Code.

The fee provided for by section 2552 is to cover the service of the clerk for entering a certificate of the fine in a suitable book in his office.

It is my opinion that the fines referred to in both of these sections are fines imposed by a justice of the peace, as well as those imposed by the court of which he is clerk. See section 2551 of the Code. You will note that section 2563 expressly refers to fines imposed by justices. Under the general provisions of our statutes, creating civil and police justice courts, the laws applicable to the courts of justices of the peace are likewise applicable to such courts.

I am, therefore, of the opinion that the civil and police justice of the city of Alexandria should tax the fees provided for in sections 2552 and 2566 of the Code, in cases of violations of State laws.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General

CLERKS—City courts—Fees not taxable in ordinance cases.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 23, 1935.*

HONORABLE JAMES R. DUNCAN,

*Civil and Police Justice,
Alexandria, Virginia.*

DEAR MR. DUNCAN:

Referring further to my letter of January 29, 1935, with respect to fees to be collected for services to be performed by the clerk of the court under sections 2563 to 2566, inclusive, I wish to advise that my former letter does not touch upon the question of such fees where the crime committed is a violation of a city ordinance.

I am, therefore, writing to call your attention to the fact that, in my opinion, in these cases of violations of city ordinances the above numbered sections do not apply, and the clerk is not required to perform the duties imposed upon him by such sections. In view of this, I do not believe that the trial justice should collect these fees where the offense is a violation of a city ordinance.

The fees provided for by section 2552 of the Code are payable out of the State Treasury and, in my opinion, are not applicable to violations of city ordinances.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

CLERKS—Civil and Police Courts—Fees for issuance of warrants from State Treasury—Authority to collect.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *November 9, 1934.*

HONORABLE CARL L. BUDWESKY,
City Attorney,
Alexandria, Virginia.

DEAR MR. BUDWESKY:

This is in reply to your letter of November 6, requesting my opinion upon the authority of the clerk of the civil and police court of Alexandria to collect from the State Treasury fees for the issuance of warrants of arrest, search warrants, and so forth.

You suggest in your letter that the right to collect these fees may arise by analogy from the provisions of section 3504 of the Code, authorizing the payment of such fees to justices of the peace. You also refer to section 3109-a (Acts of 1934, page 344), providing for the appointment of a clerk of the civil and police court, and empowering the clerk to issue any processes of the court, whether original, *mesne* or final.

As you imply in your letter, there is no express provision of the statute authorizing the payment out of the State Treasury to such clerk of the usual fees for the issuance of these warrants. Section 3109-a, providing for the appointment of said clerk, as above stated, also provides that his compensation shall be fixed by the city council and paid out of the treasury of the city.

The question then arises whether or not the authority to pay the fees in question is given by implication from the provisions of section 3504 of the Code, which expressly authorizes the payment of similar fees to justices of the peace.

I am of the opinion that this inference cannot be drawn. The justice of the peace was not a salaried officer, and was solely dependent for his compensation upon the fees provided for in the statutes; whereas, the clerk of the civil and police court is a salaried officer, and the law expressly provides that his compensation shall be fixed and paid by the city.

The work and compensation of the clerk of the civil and police court is more nearly analogous to that of a clerk of the trial justice court in counties provided for in chapter 294 of the Acts of the General Assembly of 1934, generally known as the Trial Justice Act. The clerk of the trial justice court in counties is also given authority to issue warrants and processes, original, *mesne* or final, both civil and criminal, and it is provided that all fees for such process shall be turned into the treasury of the county or city, as provided in section 4988-f (See section 4988-h).

Section 4988-f provides for the collection of the fees by the trial justice, and the turning over of same to the treasurer of the county or city. It also contains this provision: "* * * but nothing contained in this act shall be so construed as to authorize any trial justice appointed hereunder to collect any fees payable by the State." It is my opinion that this last quoted provision also applies to the clerk by reason of the provision in section 4988-h that the fees collected by the clerk shall be turned into the local treasury, as provided in section 4988-f, and the provision in the latter section that no fees shall be payable by the State.

I am further of the opinion that, since the effect of the collection by the clerk of the civil and police court from the State Treasury of the fees referred to would operate as a transfer of these funds from the State to the City Treasury, there must be a clear intention appearing in the statute for such transfer before same may be authorized.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Filing fees—Trial Justices papers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 24, 1935.*

HONORABLE M. L. WALTON, JR.,
Trial Justice,
Woodstock, Virginia.

DEAR SIR:

Replying to your inquiry of April 22, I beg to advise that the State Auditor of Public Accounts, Honorable L. McCarthy Downs, in his schedule of fees which in his opinion it is proper to be charged, states that the clerk's filing fee for papers which are to be returned to him by the trial justice is twenty-five cents. I concur with Mr. Downs in this view, as this is the fee fixed by the statute to be paid to the clerk for filing papers of this nature.

It is true that these specific papers were not required to be returned to the office of the clerk of the court prior to the enactment of the new trial justice act; nevertheless, the twenty-five cents fee was the fee fixed for filing papers of like character, and the present act requires that they be returned and filed by the clerk.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Filing fees—Trial Justices papers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 24, 1935.*

HONORABLE W. HOWARD MCCLINTIC,
Trial Justice,
Warm Springs, Virginia.

DEAR MR. MCCLINTIC:

I have your letter of April 23, inquiring whether or not a trial justice should collect a filing fee where a civil action is instituted and set for hearing, but dismissed by the plaintiff before a hearing is had.

It is my opinion that these papers should be returned to the clerk's office, as provided by the Trial Justice Act, and that the clerk is entitled to the filing fee provided for by said act. It is also my opinion that the trial justice, at the time of the issuance of the warrant, should collect the issuing fee as well as the filing fee, and that this fee should be retained and paid to the clerk when the papers are returned to his office.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSION FOR THE BLIND—Authority to sell products of workshop to State institutions.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *August 29, 1934.*

HONORABLE GEORGE C. PEERY,
*Governor of Virginia,
Richmond, Virginia.*

DEAR GOVERNOR:

Replying to your request for an opinion upon the question of whether or not the commission for the blind, and the workshop established by it, is a State institution, and whether said commission is authorized to sell the products of the blind workshop to the State and upon the general market, I beg to advise that the Virginia Commission for the Blind is created by section 978-a of the 1930 Code of Virginia. It consists of seven members who shall be appointed by the Governor. Its duty, among others, is to act as a bureau of information and industrial aid, the object of which shall be to assist the blind in finding employment, and to teach them industries which may be followed in their homes; to inquire into the cause of blindness, and co-operate with the State board of health in the adoption and enforcement of proper preventive measures.

Paragraph 7 of said section provides as follows:

"That the commission may establish, equip and maintain schools for industrial training and workshops for the employment of suitable blind persons, pay the employees suitable wages, and devise means for the sale and distribution of the products thereof; provided, that any expenditures made under this section shall not exceed the annual appropriation, or the amount received by way of bequest or donation during any one year; and provided further, that no part of the funds appropriated by the State shall be used for solely charitable purposes, the object and purpose of this act being to encourage capable blind persons in the pursuit of useful labor, and to provide for the prevention and cure of blindness."

The act further provides that the commission is authorized to receive and use for any purpose enumerated in said act donations and bequests, and to expend the same in such manner as it may deem proper.

The original act, which was enacted in 1922, appropriated the sum of \$10,000 for the purpose of carrying out the provisions of the act.

By the Appropriation Act of the 1934 General Assembly, \$32,760 was appropriated for the expenses of the Virginia Commission for the Blind, and in addition thereto \$15,930 was appropriated for the payment of the bonded indebtedness of the Virginia work shop for the blind at Charlottesville. The foregoing is for the fiscal year 1934-1935. The appropriation for the year 1935-1936 is \$31,960 for the expenses of the commission, and \$17,172.60 for the payment of the bonded indebtedness of the work shop.

Neither in the statutes relating to the Virginia Commission for the Blind, nor in any other provisions of the Code do I find any prohibition against the sale of the products of the blind workshop either to the State or to the public generally.

In view of the foregoing statutory enactments, I am of the opinion (1) that the workshop for the blind created, established, and operated by the Virginia Commission for the Blind is a State institution or agency, and (2) that said workshop for the blind is not prohibited by law, and, therefore, is authorized and has the right to sell the products of said workshop both to the public at large, and to other institutions of the State.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

COMMISSION FOR THE BLIND—Legal status.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 11, 1935.*

HONORABLE L. L. WATTS, *Executive Secretary,*
Virginia Commission for the Blind,
3003 Parkwood Avenue,
Richmond, Virginia.

DEAR MR. WATTS:

This is in reply to your letter of March 5, in which you make certain inquiries with reference to the legal status of the Virginia Commission for the Blind. You refer to chapter 369 of the Acts of 1922, chapter 419 of the Acts of 1924 and chapter 509 of the Acts of 1926 and inquire whether or not the Virginia Commission for the Blind has authority to accept a donation of a parcel of real estate.

Section 6 of the Acts of 1922 authorizes the Commission to receive and use for the purposes enumerated in the Act, or any of them, donations and bequests, and to expend the same in such manner as the Commission may deem proper within the limitations imposed by the donors.

Chapter 419 of the Acts of 1924 provides for the establishment, in Albermarle county, of the Virginia School for the Blind, creates a Board of Visitors for said school and authorizes it to receive gifts and donations, both real and personal, to be distributed and expended in accordance with the general purposes of the Act.

Under the provisions of the last mentioned Act, the Board of Visitors is made a body corporate.

Chapter 509 of the Acts of 1926 abolishes the Board of Visitors created by the last mentioned Act and transfers all of its powers and duties to the Virginia Commission for the Blind. This Act also increases the number of the membership of the Commission.

It is my opinion that the Virginia Commission for the Blind, by reason of the three Acts above mentioned, is now vested with full and complete powers to receive and accept gifts, both real and personal, and to use the same in furtherance of the purposes of chapter 369 of the Acts of 1922 and chapter 419 of the Acts of 1924, provided, of course, that such use of the donation is in accordance with the limitations imposed by the donor in making his gift.

It is also my opinion that the effect of the 1926 Act is to abolish the Board of Visitors, but does not invest the Virginia Commission for the Blind with the status of a corporate body under the Virginia laws.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSIONERS OF THE REVENUE—Transfer fees.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 31, 1934.*

HON. C. T. GUINN, *Clerk,*
Circuit Court of Culpeper County,
Culpeper, Virginia.

DEAR MR. GUINN:

I am in receipt of your letter of October 30.

Section 276 of the Tax Code of Virginia provides in part as follows:

"The transfer fees allowed by law to the commissioner of the revenue of the several counties and cities of the State shall be collected by the clerk of the court of record of said counties and cities at the time of recording the deed or will; but in no case shall more than one fee be charged for all the transfers made during the year terminating on the thirty-first day of December of each year, which fee shall be paid by the first vendee. The clerk at the time the commissioners of the revenue return to the clerk's office the land books, according to law, shall account to them for the fees so collected, deducting therefrom a commission of ten per centum for his services."

In accordance with the above, I am of opinion that only one transfer fee should be charged where more than one transfer of the same real estate is made during any calendar year.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH'S ATTORNEYS—Authority to employ finger-print expert to testify in criminal cases.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 10, 1934.*

HONORABLE JOSEPH D. PARKER,
*Commonwealth's Attorney for Warwick County,
Newport News, Virginia.*

DEAR MR. PARKER:

In reply to your recent telephone inquiry of this office as to whether it is proper for you as Commonwealth's Attorney to employ a finger print expert to testify on behalf of the Commonwealth in a criminal case to be tried in your county and, if so, whether the board of supervisors of the county, or the State, would pay for such services, I would like to make the following comments:

I do not find any section of the Code which deals directly with the subject of employment of a finger print expert, but I find in section 4960 the following language:

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

I believe that this language is broad enough to permit the employment of a person to give expert testimony in a criminal case, such as finger print expert. However, in employing the services of such an expert, it will be advisable under the circumstances to call his attention to this provision of the law before the contract of employment is consummated.

The expenses incurred would be paid by the State.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH'S ATTORNEYS—Duty to appear in Mayor's court and prosecute violations of town ordinances—Town entitled to fees and costs collected in criminal cases—Violation of town ordinances.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 26, 1934.*

HON. WATKINS M. ABBITT,
*Attorney for the Commonwealth,
Appomattox, Virginia.*

DEAR MR. ABBITT:

I have your letter of September 25, in which you state:

"Violations of the ordinances of the town are, of course, tried by the Mayor. Is it my duty as Commonwealth's attorney to appear in the Mayor's court and prosecute violations of the town ordinances? I am attorney for the town of Appomattox and very often the Mayor asks me as such to appear in the Mayor's court and prosecute violations of the ordinances of the town.

"The charter of the town of Appomattox provides that taxation of costs in a criminal case for the violation of its ordinances be the same as that provided in the state law. In that case (when I do prosecute in the Mayor's court) and cost is collected, who is entitled to this fee—the town of Appomattox, said town paying my salary as their attorney, or should it go one-half to the State and one-half to the county, due to the fact that I am Commonwealth's Attorney of the county?"

In my opinion, it is not your duty as Commonwealth's attorney to appear in the Mayor's court and prosecute for violations of town ordinances.

In answer to the question raised in the second paragraph, I am of opinion that the town of Appomattox is entitled to the fees and costs collected in criminal cases for violations of its ordinances. Reference is hereby made to subsection 7 of section 4988-g of the Code, which subsection is found in chapter 294, page 470, of the Acts of 1934. That section states in part:

" * * in which event the said mayor or other trial officer shall collect all fees and fines provided for and pay the same into the treasury of the respective city or town as now provided by law or by ordinances of his said city or town."

It is my opinion that it is improper to tax as a part of the costs in a misdemeanor case in a mayor's court or in a trial justice court a fee for the Commonwealth's attorney unless the presence of the Commonwealth's attorney in that particular case is required by statute.

I am not familiar with the provisions of the charter of the town of Appomattox, so the opinions expressed herein are made in reference to the general law.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

CONSERVATION AND DEVELOPMENT COMMISSION—No authority to reconvey land to syndicate, or to convey land to United States.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 29, 1934.*

HONORABLE WM. E. CARSON, *Chairman,*
State Commission on Conservation and Development,
Richmond, Virginia.

DEAR MR. CARSON :

This is in reply to your letter of December 28, inquiring whether or not the State Commission on Conservation and Development has the authority to reconvey to the Cape Henry Syndicate the tract of land conveyed by such Syndicate to the State Commission on Conservation and Development, and also whether the said Commission has authority to convey said land to the United States Government.

This land was acquired by the Commission by virtue of the authority vested in it by chapter 121 and chapter 149 of the Acts of the General Assembly of 1932. The deed conveying this property to the Commission reserves a vendor's lien for the unpaid purchase money, but expressly provides that there is no corporate obligation upon the Commission or the State of Virginia to pay same, and that the vendor of the lands is restricted in the collection of the deferred purchase money to recourse against the land itself.

Both of the acts above referred to provide that the title to all of the lands and interests in the lands within the areas described, which may be acquired by the Commission under the authority of the acts, shall be held by the Commission in trust for the State of Virginia. The Commission, therefore, holds these lands in the capacity of trustee for the Commonwealth of Virginia. A trustee cannot dispose of trust property except in accordance with such authority, either express or implied, as is conferred upon such trustee.

I can find no authority in the statute authorizing the trustee—the Commission in this case—to convey this property to the United States Government, or to reconvey the same to the vendor in consideration of the cancellation of the deferred purchase money. It is my opinion that such authority can be derived only from some act of the General Assembly so providing.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

CORONERS—Duty to make investigation in case of death due to automobile accident.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 5, 1935.*

DR. J. BURTON NOWLIN, *Coroner,*
Lynchburg, Virginia.

DEAR DR. NOWLIN :

This is in reply to your letter of March 2, 1935, in which you request the opinion of this office upon the question whether or not it is the duty of the coroner for the city of Lynchburg to make an investigation in cases of death due to automobile accidents.

Section 4806 of the Code makes it the duty of the physician, undertaker, or other person in attendance, to notify the coroner of any sudden, violent, unnatural or suspicious death, or death without medical attendance. The coroner is then required, upon receipt of such notice, to view the body and make inquiry into the circumstances of the death. If, after such an inquiry, facts are revealed sufficient

to create in his mind a reasonable belief that the death was due to murder or manslaughter, etc., or other misconduct of any person or persons, he shall fix a time and place for a hearing upon the question.

In view of the foregoing, it is my opinion that in case of a sudden death due to an automobile accident the coroner should be notified and conduct the inquiry required. However, if a person dies after a reasonable lapse of time as the result of an injury received in an automobile accident, and after such person has received the benefit of medical attention, I do not believe that it is necessary for the coroner to act. Even in such case, it is my opinion that the coroner would have authority to act if he is of the opinion that the circumstances are such as to make an inquiry by him advisable.

In its final analysis, if it is not a case of sudden death, the circumstances of each individual case determine whether it comes within the purview of section 4806 of the Code.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

DEEDS—Recordation of Federal Deeds. No fee required.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *April 23, 1935.*

HONORABLE B. D. PEACHY,

Attorney for the Commonwealth,

Williamsburg, Virginia.

DEAR MR. PEACHY:

This is in reply to your letter of April 20, requesting the opinion of this office upon the question whether or not a vendor, who has agreed to record at his own expense a deed conveying property to the United States government, would be required to pay a State recordation tax thereon.

I concur with your view that no such tax is assessable upon the deed. His agreement to record it at his own expense should be construed as an agreement to pay the clerk costs and other proper charges which may be imposed upon the recordation of it. I am of the opinion that the agreement would not change the law which is that the recordation of the deed is not taxable.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

DIVISION OF MOTOR VEHICLES—Legal right to furnish motor police convoy for purpose of transporting funds by Federal Reserve Bank over highways of State.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 11, 1934.*

HONORABLE LESTER HOOKER, *Chairman,*

State Corporation Commission,

Richmond, Virginia.

DEAR MR. HOOKER:

This is in reply to the communication forwarded to this office by you under date of October 3, 1934, from Mr. H. R. Vandenberg, Superintendent of the

Railway Express Agency, to the State Corporation Commission, requesting the opinion of the State Corporation Commission upon the legal right of the Division of Motor Vehicles to furnish a motor police convoy for the purpose of transporting funds by the Federal Reserve Bank over the highways of this State.

I referred this matter to Mr. J. Warren Topping, Assistant Attorney General assigned to the work of the Division of Motor Vehicles, and have received from him a reply from which the following is an excerpt:

"Police officers appointed by the Director of the Division of Motor Vehicles, are, pursuant to sub-section (a) of section 2154 (53) of the 1932 Supplement to the Code, vested with powers of sheriffs for the enforcement of all criminal laws of this State. Although this authority has been variously invoked by these officers, their primary function, unquestionably, is the policing of highways, an important incident to which, of course, is the prevention of felonious interference with users of highways. But in rendering such service, my information is that in no instance have they been assigned as escorts, upon request of private or commercial motor vehicle operators. In response to requests from the Federal Reserve Bank, an agency of the Federal Government, the Director has supplied police escorts for the transportation of money, and while this was done without consulting me, I see no legal or administrative impropriety in it. Had these requests, emanating from the same source, related to transportation of money by the Railway Express Agency over a highway, I am certain it would have been no less promptly complied with.

"The further inquiries submitted as to the rate to which Nagle National Protective Agency rendered transportation service, is one to be answered only by that company or its patrons. Certainly your office has no concern with that matter. With proper evidence, this company may of course be prosecuted for violating section 2154 (80) of the 1932 Supplement, and this remedy is available to the express company.

"The Nagle National Protective Agency's trucks are equipped with license entitling them to transport property for compensation as contract carriers. Whether or not they should apply to the State Corporation Commission for a 'certificate of authority,' is a question for determination by that tribunal, as authorized by section 4097-y (10) of the 1932 Supplement to the Code. My opinion, however, is that under their present operation, they are not subject to the provisions of the Motor Vehicle Carriers Act, chapter 359 of the Acts of 1932."

I have been unable to find a provision in the law which prohibits the Division of Motor Vehicles from furnishing protection of this character at the request of an agency of the Federal Government. It is my understanding that it is customary in such cases to follow this practice.

I am of the opinion that, if the Railway Express Agency has any complaint to make, it should be made to the Federal Reserve Bank or the Federal Reserve Board as to the propriety of the action of the Federal Reserve Bank in consigning its shipments over the highways, and requesting the protection of the State police for same.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

DOG LAWS—Destructions of Quail—Payment for.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 25, 1935.

HONORABLE E. R. CARNER,
*Attorney for the Commonwealth,
Spotsylvania, Virginia.*

DEAR MR. CARNER:

You inquire whether or not it is the opinion of this office that a citizen raising quail for sale, as provided under the Game Laws, has a valid claim against the county for a number of them which have been killed by dogs.

Section 60 of the Game Laws (chapter 247, Acts of 1930) defines the word "poultry" as including all domestic fowls.

Section 74 of the Act provides for the payment to the owner of poultry killed, or injured, by any dog by the board of supervisors; the compensation to be limited to the fair value of the poultry.

Section 81 of said Act provides for a permit to be used by the Commission of Game and Inland Fisheries to permit the raising of wild birds, wild animals and fish.

The answer to your question would seem to depend upon whether or not the birds raised by the citizen you refer to should be classified as domestic fowls or wild fowls. This is largely a question of fact. If the birds were confined in a pen, and raised and fed much the same as chickens or turkeys, it is my opinion that they would be classified as domestic fowls; whereas, if they were raised by being allowed to use at large in the fields, they would be regarded as wild fowls.

The question is one which I think should be determined by the board of supervisors.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Authority of Democratic County Committee—Levying candidates fees.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 10, 1935.

MR. CHARLES R. FENWICK, *Chairman,*
Democratic Executive Committee,
Woodward Building,
Washington, D. C.

MY DEAR MR. FENWICK:

I am in receipt of your letter of May 8, in which you ask several questions relating to fees of candidates in primaries.

You ask, in the case of a candidate whose compensation is paid in part by fees, if it would be proper for the Democratic Executive Committee to fix the fee in an amount equal to two per centum of the salary and require the candidate to pay an additional amount for the use of the Committee in defraying its expenses equal, say, to the difference between the fee fixed and two per centum of the entire amount derived from the office on the basis of a salary plus fees.

Section 249 provides in part:

"In case of a candidate whose compensation is paid in whole or in part by fees the amount to be paid by such candidate as his contribution for the payment of the expenses of the primary, shall be fixed by the proper committee of the respective parties."

I am of the opinion that the quoted portion of the section gives to the Committee plenary power to fix such fee as it may deem proper, regardless of the portion of the compensation of the officer paid in the form of a salary.

You again inquire if the Committee may refuse to certify the name of the candidate if the fee fixed by the Committee does not accompany the declaration of candidacy and the petition.

Section 249 also provides that:

"A receipt for the payment of said fee must accompany and be attached to said declaration of candidacy; otherwise, the same shall not be received or filed."

It appears to me that this answers your inquiry in this respect.

You also inquire if the fixing of a filing fee of \$12 in connection with the position of clerk of court would comply with the law.

This question is answered by my reply to your second question.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Authority of Democratic Committee—Levying candidates fees.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 6, 1935.

HONORABLE W. R. SAUNDERS,

*Attorney for the Commonwealth,
Bedford, Virginia.*

DEAR MR. SAUNDERS:

I have your letter of May 4, requesting an interpretation of the provisions of section 249 of the Election Laws which requires a candidate to pay to the treasurer two per centum of one year's salary attached to the office for which he is a candidate, in so far as the same relates to the salary of the attorney for the Commonwealth of Bedford County.

I have discussed this matter with Honorable E. R. Combs, Chairman of the Compensation Board, and have examined the order of the Board fixing your compensation and expenses for the year 1935. It appears that instead of the Board fixing a salary, and also fixing an allowance for expenses, the two were combined and one sum was fixed in the amount of \$2,500 to cover both salary and expenses. It also appears that one-half of the salary is subject to a fifteen per centum reduction under the provisions of the Acts of the General Assembly.

Under these circumstances, I am of the opinion that it is the intention of section 249 of the Election Laws to require payment of two per centum of the actual compensation to be received during the current year, and that, in arriving at the amount of the net compensation, there should be deducted therefrom the amount of the said fifteen per centum reduction, and also the legitimate expenses of the office. It is my opinion that you should pay this amount into the office of the county treasurer along with a letter or statement showing in considerable detail the expenses of your office for this year.

I do not believe that the Democratic Committee has any jurisdiction to fix the amount of your payment.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Candidate must be qualified and registered voter.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 7, 1935.

DR. W. C. WEBB, *Chairman,*
Democratic Executive Committee,
Disputanta, Virginia.

MY DEAR DR. WEBB:

I am in receipt of your letter of even date, in which you state that there has been filed with you in proper form a declaration of candidacy of a person for a county office in Prince George county. You state that this person has paid his capitation taxes in the city of Hopewell for the years 1932, 1933 and 1934, and that his name now appears on the registration books of that city. You further state that you are informed that this person has been domiciled in the county of Prince George for more than six months, but that his name does not appear on the registration books of the county.

You ask whether or not, as chairman of the Democratic Executive Committee, you should certify his name to the electoral board for the purpose of having his name printed on the primary ballot.

Section 229 of the Code provides that the name of no candidate shall be printed upon any official ballot used in any primary unless such person is legally qualified to hold the office for which he is a candidate and unless he is eligible to vote in that primary.

In section 100 of the Code it is provided that, when a registered voter changes his place of residence from a city to a county, he may apply to the registrar of his former election district at any time up to and including the regular days of registration for a certificate that he was duly registered and that his name has been erased from the registration books of his former election district, which certificate may be delivered to the registrar at his new election district, and will enable him to be registered in said district on its appearing to the satisfaction of the registrar that he has resided or will have resided in the county to which he has removed for six months prior to the next election. The name of every such person shall be entered at any time up to and including the regular days of registration.

In view of the provisions above referred to, I am of opinion that, if the candidate shall have secured his transfer at any time prior to the time of printing of the official ballot, his name may be printed thereon, and that it will be proper for you to certify his name to the electoral board. This means that it will be the duty of the electoral board at the time the ballots are printed to determine whether or not the candidate has qualified himself to vote in the primary.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidate for Committeeman not required to pay entrance fee.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 25, 1935.

HONORABLE CHARLES R. FENWICK, *Chairman,*
The Democratic Executive Committee of Arlington County,
Woodward Building,
Washington, D. C.

DEAR MR. FENWICK:

I have your letter of May 23, inquiring whether or not it is my opinion that, under the provisions of section 249 of the Code, it is necessary for a candidate

filing for election to the Democratic Executive Committee to deposit with the county treasurer the sum of one dollar in order that the name of such candidate may be printed on a ballot.

It is my opinion that the provisions of the above mentioned section refer only to a person filing as a candidate for nomination to a State, county, or city office, and that such provisions do not apply to elections for the purpose of selecting party authorities. Party authorities are not, in my opinion, public officers within the meaning of the section referred to above.

With my best wishes, I am

Cordially yours,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Candidate for Office—Fees of.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 23, 1935.

MR. R. H. BEALE, *Chairman,*
Electoral Board,
Hague, Virginia.

DEAR MR. BEALE:

I am in receipt of your letter of May 22.

I enclose herewith a copy of an opinion given Mr. Charles R. Fenwick, Chairman of the Democratic Executive Committee, under date of May 10, 1935, which answers some of the questions you ask.

I am further of the opinion that the provision of section 249, requiring a candidate for an office paid by salary to pay a fee of two per centum of one year's salary, is mandatory.

This office has heretofore ruled that the two per centum fee should be based upon the amount of salary actually received.

I am not sure that I understand your last question, which reads as follows:

"Should the question arise as to whether a candidate has paid the full amount of two per centum of salary, and it be found that he or she has not done so, then can the electoral board place such name on the ballot?"

If you have in mind simply a clerical error in the computation of the fee, then I think that this may be corrected by payment of the additional amount due. I am assuming that the declaration of candidacy is accompanied by a receipt of the treasurer for the payment of the fee. If no such receipt accompanies the declaration, the law plainly provides that the declaration shall not be received or filed.

You also ask:

"Should a member of the board of supervisors who is receiving a \$300 salary have to put up only \$1?"

Since section 249 provides that the fee shall be two per centum where the office is paid by a salary, I am of the opinion that in this case the fee should be \$6.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Candidate for Supervisor County Office—Petitions, etc.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 11, 1935.

SENATOR CHARLES E. BURKS,
Lynchburg, Virginia.

DEAR MR. BURKS:

This is in reply to your letter of the 10th instant, in which you request the opinion of this office upon the question whether or not, under the provisions of section 229 of Virginia Election Laws, a candidate for member of the Board of Supervisors is a county officer and is required to accompany his declaration of candidacy with a petition signed by fifty qualified voters of his county.

In a recent opinion from this office it has been held that a member of the Board of Supervisors is a county officer and should file the required petition with the declaration of candidacy.

It was also held in the same opinion that, since the statute requires only that the signers of the petition be qualified voters of the candidate's county, it is not necessary that all of the signers should reside in the magisterial district in which he is a candidate. It was further stated, however, that this point is not entirely free from doubt and it was recommended as the better practice that the candidate obtain the signatures of qualified voters in the magisterial district in which he is running.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation Taxes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 27, 1935.

MR. GEORGE BAILEY, *Registrar,*
Hurley, Virginia.

MY DEAR MR. BAILEY:

Your letter of April 3 addressed to the Secretary of the Commonwealth has been referred to this office.

You state that a number of persons came to Virginia from West Virginia between February 1, 1934, and June 1, 1934, and they desire to know whether they can register and vote in Virginia this year without the payment of any capitation tax.

Section 20 of the Constitution provides in effect that every citizen of the United States having the qualifications of age and residence, who has paid all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to vote, is entitled to register and vote.

In the case you present, since the persons did not come to Virginia until after January 1, 1934, no 1934 capitation taxes were assessable against them. I am of opinion, therefore, that the payment of a capitation tax is not a prerequisite to their right to register and vote this year.

The persons you describe should, of course, be bona fide residents of Virginia and meet the other requirements of the election laws.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation Taxes.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND VA., *April 26, 1935.*

MR. W. A. LAWSON, *Registrar,*
Flint Hill, Virginia.

MY DEAR MR. LAWSON:

I am in receipt of your letter of April 25, in which you ask whether a voter should be registered when a candidate for an elective office or his wife or any person has paid the tax of such voter in order to obtain his vote.

Your question is answered by section 20 of the Constitution, prescribing who may register. This section says in part that an applicant for registration shall have "personally paid to the proper officer all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register."

This section would appear to require no comment, but I may say that it has been heretofore held that this provision is complied with when the capitation tax has been paid by the applicant for registration through his properly designated agent. In the case of *Tilton v. Herman*, 109 Va. 503, 507-8, this was said:

"So, as would seem equally clear, where it appears that a voter was the source of the payment of the poll taxes required of him, and paid them out of his own estate or funds because he wishes to pay them, it is a personal payment by the voter, whether the money was handed by the voter to the treasurer, or to one of his deputies, or sent by check drawn on a bank in which the drawer has funds to meet its payment, or by the hand of the tax-payer's clerk or duly authorized agent; * * *"

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***ELECTIONS—Capitation taxes—Persons coming of age.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *June 4, 1935.*

MR. T. A. ENGLISH, *Registrar,*
Hague, Virginia.

MY DEAR MR. ENGLISH:

Your letter of June 3 has been received.

The person to whom you refer in your letter, possessing all other qualifications, may, upon the payment of his capitation tax for one year, register and vote in the primary. It is not necessary for him to have paid the tax six months prior to the election. If the person becomes of age in August, 1935, the capitation tax is credited for the year 1936. Since this party, if he pays his 1936 capitation tax and registers, will be qualified to vote in the general election in November, he is qualified to vote in the primary to nominate candidates to be voted on in that election.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Capitation taxes—Personal payment.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 31, 1935.

HONORABLE J. R. K. COWAN,
Treasurer of Montgomery County,
Christiansburg, Virginia.

DEAR MR. COWAN:

This is in response to your letter of May 29, which has just been received, and which is as follows:

"Please advise me whether I should embrace on the capitation tax voting list, which I am required to file with the Clerk, the names of persons whose taxes are paid by lists presented to me with checks and cash attached in wholesale numbers, which in my opinion are not personally paid.

"Kindly answer this inquiry by return mail as the law requires me to file this list by June 5th, five months before the election."

In the case of *Tazewell v. Herman*, 108 Va. 416 (pp. 423-4), our court held as follows:

"When all the provisions of article II of the Constitution, referred to above, are considered together, as they should be, in construing section 38, in the light of the evil which was intended to be remedied (Sutherland on Stat. Constr., secs. 292, 300), we think that it is clear that it was intended that the treasurer should embrace in the list the names of only such persons as had personally paid their poll taxes. If this be done, then the list will accomplish the purpose for which it was intended; the courts and judges will not be required to place upon the list, in correcting it, the names of persons who are not entitled to vote; and the judges of election will have before them evidence which shows, *prima facie*, at least, who have paid their poll taxes as required, as a prerequisite to their right to vote.

"This construction, as is argued, does place a power in the hands of the treasurer which may be greatly abused; but his power to say *when* the poll tax of any voter was paid is just as liable to abuse as his power to say *how* it was paid, yet there can be no question that he has the former power. * * *"

Subsequently, in the case of *Tilton v. Herman*, 109 Va. 503, the above holding was reaffirmed, and also the question arose whether, in order to constitute a personal payment of a person's poll tax, it is necessary for him to pay same in bodily person, or whether he could make such payment through an agent. Upon this question the Court said (pp. 507-8):

"So, as would seem equally clear, where it appears that a voter was the source of the payment of the poll-taxes required of him, and paid them out of his own estate or funds because he wished to pay them, it is a personal payment by the voter, whether the money was handed by the voter to the treasurer, or to one of his deputies, or sent by check drawn on a bank in which the drawer has funds to meet its payment, or by the hand of the tax-payer's clerk or duly authorized agent, * * *"

In the light of the foregoing, it seems clear that it is the duty of the Treasurer to include in the list only the names of persons who have personally paid their poll taxes. What constitutes a "personal payment" by any particular voter is a question which the Treasurer must decide in each case and must be determined by the facts and circumstances attending each payment, keeping in view the decision above quoted as to what constitutes "personal payment."

I will add this, that, while the law does not require the Treasurer to do so, in my opinion it will be a fair and proper practice for him to notify by letter every

person whose taxes have been paid for the three last preceding years and whose name has been omitted from the list, of the fact that his name has been so omitted, and to call his attention to the fact that he may within thirty days apply to the circuit court of the county to have his name entered thereon, after first giving five days notice to the Treasurer of his intention so to do, as provided by section 110 of the Code.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Capitation taxes—Payment of

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 29, 1934.

MR. A. B. DUNTON, *Registrar,*
Franktown, Virginia.

DEAR MR. DUNTON:

This is to acknowledge receipt of your letter of November 17, which, on account of the press of official business, I have not heretofore had an opportunity to answer.

In the opinion of this office, section 20 of the Constitution answers your inquiry. That section provides that persons having the qualifications of age and residence required in section 18 shall be entitled to register, provided "That he has personally paid to the proper officer all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register; or, if he came of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him; * * *". Certain other provisions follow which have no bearing upon the subject of your inquiry.

I, therefore, agree with you that you are not authorized to register a person thirty years of age who has never before registered and paid the three years poll taxes; provided, of course, the party to whom you refer has been a legal resident of Virginia and has been assessable with poll taxes for one or more years prior to the year in which he offers to vote.

In addition to the provisions of section 20, I call your attention to section 38 of the Constitution, which makes the same provision as to the duty of a county treasurer. This section, as you will see, provides that the treasurer shall furnish the clerk with a list of all persons in his county who have paid, not later than six months prior to an election, the State poll taxes required by the Constitution during the three years next preceding the year in which the election is held.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Commissioners of election—Compensation and mileage allowed.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 29, 1934.*

MR. G. A. SCRUGGS, *Clerk,*
Roanoke County Electoral Board,
Salem, Virginia.

DEAR MR. SCRUGGS:

Your letter of October 26 has been received.

Section 200 of the Code of Virginia provides that commissioners of election shall receive \$3 each for each day's service rendered. The section further provides that "commissioners of election shall receive the mileage now allowed to jurors for each mile necessarily traveled, to be paid out of the treasury of the county, city or town in which the election is held."

I am of opinion that commissioners of election are, therefore, entitled to compensation of \$3 per day for each day's service plus the mileage now allowed jurors for each mile necessarily traveled, to be paid out of the treasury of the county, city or town in which the election is held.

Yours very truly,

ABRAHAM P. STAPLES,

*Attorney General.***ELECTIONS—Declarations of candidacy by local county officers.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *May 25, 1935.*

HONORABLE WILLIAM RICHARD SAUNDERS,
Attorney for the Commonwealth,
Bedford, Virginia.

DEAR MR. SAUNDERS:

I have your letter of May 20, in which you ask me whether or not it is necessary for district officers, such as supervisors, justices of the peace, etc. to file with their declaration of candidacy in a primary the petition signed by fifty qualified voters required by section 229 of the Code.

This office has recently ruled that a candidate for membership on the board of supervisors is a county officer within the meaning of section 229.

While there has been no official opinion given with reference to other officers referred to in your letter, I am of opinion that they are county officers in view of the fact that the duties performed by them materially affect the county as a whole. The principles applied in the case of *Burch v. Hardwicke*, 30 Gratt. 24, would seem unquestionably to lead to this conclusion. In that case the chief of police of the city of Lynchburg was held to be a State officer by reason of the nature of the duties of his office.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Declaration of candidacy—Amendments to permissible.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 26, 1935.*

HONORABLE LEWIS JONES,
*Attorney for the Commonwealth,
Urbanna, Virginia.*

DEAR MR. JONES:

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

"Two of the candidates for the House of Delegates from this District failed to file in their application a statement conforming to section 229 of the Election Law. They failed to file that part which read, 'If I'm defeated in Primary election, etc.' The other necessary papers were filed by these two men at the proper time.

"I would appreciate your opinion as to whether or not they can now file that part of the statement which was omitted through mistake."

Section 229 of the Code requires primary candidates to file declarations of candidacy sixty days before the primary, and provides that such declaration, in addition to other requirements, shall contain the following language:

" * * * If I am defeated in the primary I hereby direct and irrevocably authorize the election officials charged with the duty of preparing the ballots to be used in the succeeding general election not to print my name on said ballots."

The omission of this language from the declarations in question was, no doubt, due to a clerical error in the preparation of the papers. Chapter 15 of the Code, which provides for conducting primary elections, and which includes section 229, contains this language:

"The provisions of this chapter shall be liberally construed so that the will of the electors may not be defeated by any informality."

Applying this principle of construction to the case you present, I am of opinion that the candidates should be permitted to amend their declarations of candidacy by inserting therein the required language which was omitted.

I am further of opinion, however, that should such a candidate decline to make the amendment as above indicated, his name should not be printed on the ballot.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Election of certain town officers mandatory—Use of blank ballots.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 25, 1935.*

MR. E. C. LACY, *Clerk,*
Circuit Court of Halifax County.
Halifax, Virginia.

DEAR MR. LACY:

I am in receipt of your letter of April 24, in which you raise the following question:

"Please give me your opinion as to what happens if no one files, 60 days prior to an election, notice of candidacy for the regular town election to be held on the second Tuesday in June. Do the incumbents hold over, as is provided by section 3001, or must an election be held?"

I am of opinion that an election must be held for the election of such town officers as are required by general law or by the charter of a particular town to be elected. For example, section 2994 of the Code provides that "in every town there *shall* be elected every two years on the second Tuesday in June" a mayor and councilmen.

As no declaration of candidacy has been filed, it would seem that blank ballots should be prepared for use at the election.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Eligibility to vote—Capitation tax, person coming of age.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *June 17, 1935.*

HONORABLE ROBERT WHITEHEAD,

Attorney for the Commonwealth,

Lovingsston, Virginia.

DEAR MR. WHITEHEAD:

This is in reply to your letter of June 14, in which you ask the following questions:

(1) A person becoming twenty-one years of age March 1, 1934, pays his 1935 poll tax on June 10, 1935. Is he eligible to register and vote in the August Primary and the November election in 1935?

Since the 1935 taxes were not assessable against the person above referred to, it is not necessary that he should pay same six months prior to the election, and it is my opinion that he is entitled both to register and vote in the primary and in the general election. This office has consistently held for years that the taxes be paid six months in advance of the election does not apply to persons becoming twenty-one years of age, where such taxes were not assessed or assessable against him.

(2) This question relates to the eligibility of a person becoming twenty-one years of age March 1, 1935, who pays his 1936 capitation tax on June 10, 1935 to register and vote.

It is my opinion that the sixth provision does not apply to such a person, and he is eligible to register and vote in the 1935 August Primary and the November 1935 election.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Eligibility of clerks—Candidate cannot be required to make political contributions.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *April 18, 1935.*

MR. THOMAS W. BLACKSTONE,

*Secretary of the County Electoral Board,**Accomac, Virginia.*

DEAR MR. BLACKSTONE:

I have your letter of the 11th instant, containing certain inquiries with reference to the election laws.

Your first question is whether clerks of election are required by law to be qualified voters.

The statutes do not impose any such qualification.

Your second question is whether a person employed in relief work and paid a salary may serve as clerk of election.

This office has heretofore held that relief funds, though originating with the Federal Government, are turned over to the Governor of Virginia, and persons employed in administering such work are not deemed to be Federal employees within the meaning of the statute disqualifying such employees from holding certain State offices. It is my opinion, therefore, that such person is competent to act as clerk of election.

Your third question is whether or not the County Democratic Committee has any authority in law to require a candidate to agree in writing to pay a specific contribution to the campaign fund of the Democratic Party.

I can find no authority for any such action by the Committee either in the statutes or in the party plans. Since neither the statutes nor the party plans authorize the Committee to exact the promise or agreement, I am of opinion that the Committee is not authorized to do so by law.

Sincerely yours,

ABRAM P. STAPLES,

*Attorney General.***ELECTIONS—Eligibility to vote.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *March 11, 1935.*

HONORABLE H. L. BYRD,

*Treasurer,**Martinsville, Virginia.*

DEAR MR. BYRD:

This is in reply to your letter of March 8, in which you request the opinion of this office upon two questions with reference to the eligibility of persons to register and vote.

Your first question relates to the procedure necessary to be followed by a person becoming of age during the year 1935 between January 1 and October 5.

Under the Constitution and statutes relating to the election laws, such a person should go to the office of the commissioner of revenue and have his poll tax for the year 1936 assessed against him and pay same at your office. It is not necessary that this tax be paid six months in advance of the election, since no poll tax is assessable against him for the year 1935.

If the procedure above outlined is followed, and the capitation or poll tax is paid, such person is entitled to register and vote in the November 1935 election.

Your second question relates to the procedure applicable to a person becoming

twenty-one years of age during the period between October 5 and November 5, 1935.

It is my opinion that such person may have himself assessed with the 1936 capitation tax, as above indicated, and pay same even though he be not twenty-one years of age at the time of such assessment and payment. After payment of the 1936 capitation tax, since such person will be eligible to vote in the next coming election, he is entitled to register even though he be not actually twenty-one years of age at the time of his registration. The test is whether or not he will be twenty-one years of age at the time the election will be held. If so, he is entitled to register prior to the closing of the registration books, and prior to becoming twenty-one years of age, and he will then be entitled to vote at the election.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Eligibility to vote in mass meetings.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 5, 1935.*

HONORABLE JOHN M. RASNICK, *Treasurer,*

Dickenson County,

Clintwood, Virginia.

DEAR MR. RASNICK:

This is in reply to your request for an opinion from this office upon the question of what persons are entitled to participate and vote in mass meetings called for the purpose of electing delegates to a county convention to nominate party candidates for a general election.

It is my opinion that, under the general spirit and purpose of the primary and general election laws of this State, only qualified voters are entitled to participate in such a mass meeting, or to vote for delegates to the convention.

It follows from the foregoing that no person is eligible to be elected as a delegate to the convention unless such person be likewise a qualified voter.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Electoral Board—Personal liability of members.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *March 7, 1935.*

HONORABLE L. W. SYKES, *Secretary,*

Electoral Board, City of South Norfolk,

1224 Chesapeake Avenue,

South Norfolk, Virginia.

DEAR MR. SYKES:

This is in reply to your letter of March 5, requesting a copy of the opinion heretofore given construing section 5 of the charter of the city of South Norfolk, as amended by chapter 104, Acts of the Assembly 1934, page 148. This opinion was given in a letter to Honorable Q. C. Davis, City Attorney of South Norfolk under date of January 28, and I take pleasure in enclosing you a copy of same.

My opinion, as expressed in said letter, was based upon the provision contained in the amended section that the elections shall be held "on the second Tues-

day in June immediately preceding the expiration of the terms of office of the councilmen in office when this section takes effect." Since the terms of two of the members do not expire until August 31, 1937, it would seem clear that the two members to be elected to succeed them should be elected on the second Tuesday in June, 1937, which is "immediately preceding the expiration of the terms of office" of these two councilmen.

If it had been intended to elect all five members in June 1935, the act would doubtless have so stated in clear express terms. To construe the language actually used as having this meaning would require the election for the successors to two of the councilmen to be held two years "preceding the expiration" of their terms of office.

You also request my opinion upon the question of whether or not the members of the electoral board will be personally liable, in the event that the manner in which they print the ballots should be subsequently held by the court to be erroneous.

It is my opinion that, if the electoral board exercises good faith and reasonable diligence in the performance of its duties, the members are not liable for errors of judgment which may arise in the performance of such duties.

I might suggest to you that, if the board so desires, it can institute proceedings in court for a declaratory judgment and thus obtain a judicial decision as to the proper construction of this section of the charter.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Primary—Calling of

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., June 17, 1935.

HON. E. WALTON BROWN,

*Chairman Democratic Committee,
Danville, Virginia.*

DEAR MR. BROWN:

This is in reply to your letter of the 15th instant, in which you request the opinion of this office upon the question whether, under the circumstances you relate, the Democratic Executive Committee of the City of Danville is now empowered to call a primary election in said city to nominate a candidate for the House of Delegates in the November, 1935, election.

The difficulty with which you are confronted arises from a provision of the Democratic Party Plan, relating to legislative primaries, which is as follows:

"Whenever such a (party) committee determines that a nomination shall be made by primary election, the chairman thereof shall give at least ninety days notice by publication in at least one newspaper in each county and city in said (legislative) district."

The City of Danville is a separate legislative district.

Chapter 15 of the Code of Virginia provides for primary elections. Section 223 thereof fixes the second Tuesday in August as the day on which such primary elections shall be held to nominate candidates for the November election. Section 229 provides that in order for a candidate to have his name printed on the primary ballot, he must file his declaration of candidacy, accompanied by the required petition, with the chairman of his party committee at least sixty days before the primary. Section 247 requires the chairman and secretary of the local committee to notify the Secretary of the Commonwealth of the calling of a primary, at least *thirty days* before the date set by law for the holding thereof.

Your letter discloses the following facts as bearing upon the question involved:

It has for many years been the invariable custom in Danville to hold a primary for the nomination of a Democratic candidate for the House of Delegates. The members of the committee were under the impression that a primary would be held as a matter of course in the absence of any action by the committee. The general public of the City of Danville entertained similar beliefs, and it was generally understood that a primary would be held. This was not refused or denied in any way, either by the committee or by any member thereof, but the committee acquiesced in the general public understanding that a primary would be held. This acquiescence, under the circumstances, I think may reasonably be construed as an implied adoption of the custom to hold a primary. This construction of the committee's action or non-action is, I believe, justified by the following provision contained in the chapter concerning primaries:

"The provisions of this chapter shall be liberally construed so that the will of the voters may not be defeated by any informality."

The duty of the committee chairman to give ninety days notice, it will be observed, is not imposed by statute, but by the plan adopted by the State Democratic Convention.

If a primary could not now be held, it is obvious that the "will of the voters" could not be given the full expression intended by the Virginia primary laws.

Under the circumstances stated in your letter, I am of opinion that the Democratic voters of the City of Danville should not be deprived of the customary primary election for the nomination of their candidate for the House of Delegates by reason of the informality mentioned. If the committee is of opinion so to do, it may, in my opinion, hold a meeting, call the primary and direct the chairman and secretary to certify such action to the Secretary of the Commonwealth thirty days before the primary as required by section 247 of the Code.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Primary—Expenses of—Refund of fee of unopposed candidate.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., June 27, 1935.

HONORABLE WARD SWANK,

*Chairman Democratic Committee,
Harrisonburg, Virginia.*

DEAR MR. SWANK:

This is in reply to your letter of June 25, requesting my opinion upon the two questions therein set out.

Your first question is as follows:

"By whom is the primary to be called and what is latest date same may be called?"

This question, I believe, is answered by a letter I recently addressed to Honorable E. Walton Brown, Chairman of the Democratic Committee of Danville, Virginia, a copy of which I am herewith enclosing.

Your next inquiry is as to how the expenses of the primary are to be borne, and, in the event the candidate has no opposition in the primary, is the amount of his deposit refunded to him.

Section 245 of the Election Laws provides that the cost of holding primary elections shall be paid in the same manner as the costs of holding regular elections, while section 170 provides that the costs of holding elections shall be borne by the counties and cities in which the elections are held.

Section 24-a, subsection (a), provides that in the event a prospective candidate pays the fee and does not become a candidate, same shall be returned to him, and, also, in the event the candidate who has paid the fee is not opposed, such fee shall be returned.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Primary—Local committee without authority to call other than on date fixed by statute.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 2, 1935.*

HONORABLE J. M. RASNICK, *Treasurer,*
Clintwood, Virginia.

DEAR MR. RASNICK:

This is in reply to your letter of December 28, requesting the opinion of this office upon the construction of a question with reference to the holding of party primaries. The question raised is whether or not the provisions of the last paragraph of section 248 of the Code of Virginia authorize local party committees of the major political parties of the State to call a primary at a date other than the date of the general primary fixed by statute.

The Virginia statutes do not vest any express authority in local party committees to call such a primary, nor do I find any such express authority contained in any Party Plan of the Democratic Party; whereas, section 223 of the Code specifically provides the dates on which party primaries shall be held.

The last paragraph of section 248, in my opinion, was not intended to confer any authority, but was intended to provide that, in the event any other statute did confer authority upon party committees to call a primary at a different date than the date of the general primary, then in such event the county and city treasurers should be prohibited from paying the expense of any such primary.

It is, therefore, my opinion that, under our present statutes, the local party committee of a county has no authority to call a primary at a date different from that fixed by section 223 of the Code.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Registrar—Eligibility as candidate for office.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *May 31, 1935.*

DR. W. D. KENDIG,
Chairman of the Lunenburg Democratic Committee,
Kenbridge, Virginia.

DEAR DR. KENDIG:

I have your letter of the 29th instant, in which you ask my advice as to the action which should be taken by the committee, in the event that a person who has been registrar up to about a week or ten days ago, when he resigned, should file

as a candidate in the primary to nominate candidates to be elected at the next election to be held in Lunenburg County.

In an opinion given by Honorable John R. Saunders, late Attorney General, the following appears:

"Section 97 of the Code provides:

"No person who acts as registrar shall be eligible to an office to be filled by election by the people at the election to be held next after he has so acted as registrar."

"You will notice that this section refers to the election of a registrar at an election held following a time at which the registrar *acted*. I underscore *acted*, as I take it to mean that a registrar is certainly eligible to election to an office, even though he may have resigned a short time before an election, provided he has not *acted* since the last election held in his precinct.

"The undoubted purpose of the law is to prevent a registrar padding the registration books, and its effect is to make a person ineligible who has performed the duties of a registrar preceding an election."

The question of whether the proposed candidate has acted registrar since the last election in Lunenburg County is a question which it does not seem to me the Democratic Executive Committee would have authority to pass upon. This raises a legal question of eligibility and should probably be passed upon in the first instance by the electoral board. If the electoral board desires the advice of the court in the matter, it may institute proper proceedings to obtain same. On the other hand, if the electoral board takes action which is displeasing to the proposed candidate or to any of his opponents, any interested person may bring mandamus or injunction proceedings in court to test the correctness of the action of the electoral board.

It is, of course, impossible for this office to undertake to pass upon the merits of any particular case which involves issues of fact as the effect of any such opinion may be ex parte and without any opportunity to all parties in interest to be heard.

I believe that it is the duty of the party authorities to file, as required by law, the names of all qualified voters who comply with the statutory requirements necessary to have their names certified as candidates for nomination.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrar—Eligibility as candidate for committeeman.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 4, 1935.

HON. LAWRENCE W. DOUGLAS,
*Attorney for the Commonwealth,
Clarendon, Virginia.*

MY DEAR MR. DOUGLAS:

I am in receipt of your letter of June 3, in which you ask the following question:

"Is a person who is now a registrar of voters in Arlington county, Virginia, eligible, upon registration of that position at this time, to become a candidate for election to the office of Democratic committeeman, in the Democratic primary election to be held in this county on August 6, 1935?"

As you know, section 97 of the Code provides that no person who acts as registrar shall be eligible to an office to be filled by an election by the people at the election to be held next after he has so acted as registrar.

While there may be some doubt about the matter, I am of opinion that a member of the local Democratic committee is not such an office as is contemplated by this section.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Registrars—Oath of filed with county clerks—No clerk authorized for electoral board.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 6, 1935.

HONORABLE H. B. McLEMORE, JR.,

Clerk,

Courtland, Virginia.

DEAR MR. McLEMORE:

I am in receipt of your letter of May 4, inquiring where the official oath taken by a registrar is to be filed.

You call my attention to sections 88 and 96 of the Code dealing with this question. As you state, there appears to be some conflict between the sections. However, I am of opinion that the official oath should certainly be filed in the clerk's office of the circuit court, as prescribed by section 96.

From my examination, I do not find any statutory provision for a clerk of an electoral board, and I am of the opinion that the provisions of section 88 will have been substantially complied with if the secretary of the electoral board keeps a record of the fact that the official oath has been taken by the registrar appointed, and that the oath has been filed with the clerk of the court.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Registration—Time limit—Name must be on voting list.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., October 26, 1934.

MR. ARTHUR DEEL, *Registrar,*

Murphy,

Virginia.

DEAR MR. DEEL:

Your letter of October 23, has been received. You ask the following question:

"My brother, Bruce Deel, paid his poll taxes six months prior to November 6, of this year. He will not be twenty-one years of age until November 3, three days before the election. His name does not appear on the list of voters. Can he not register November 3, 5, or 6 and cast his vote, if he presents his ticket showing his capitation taxes have been paid six months before the election?"

Section 93 of the Code of Virginia provides that any person under twenty-one years of age, who has paid his first year's poll tax in advance and who will become twenty-one years of age on or before the next preceding election, is eligible to

registration. There is no provision entitling such a person to register at any other time than other persons are entitled to register. This office has held that, under the provisions of our election laws, the registration books must be closed, and no person may be registered, within sixty days prior to any election.

If your brother had applied for registration sixty days or more prior to the November election, he would have been entitled to register. However, I am of the opinion that neither he nor any other person can register after the registration books have been closed.

You also ask whether a lady who votes at your precinct, and who has "registered a number of years ago, whose name isn't shown on the voting list" can vote at the next election. I presume you mean that her name does not appear on the list furnished by the clerk of the circuit court, pursuant to section 109 of the Code of Virginia.

This last mentioned section requires the sergeants and sheriffs to post a copy of the list of all voting places.

Section 110 provides that within thirty days after the list has been posted any person who shall have paid his capitation tax, but whose name is omitted from the certified list, may apply to the court, or the judge thereof in vacation, to have his name entered thereon.

Since the time allowed by law for this correction has expired without same having been made, I am of the opinion that the lady to whom you refer will not be eligible to vote at the November election.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Registration of blind persons.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 3, 1935.*

MR. J. E. CARROLL, *Registrar,*
Bluemont,
Virginia.

DEAR MR. CARROLL:

In your letter of April 1, you request the opinion of this office as to whether or not a person totally blind, but who is educated and was able to read and write prior to his blindness, is eligible for registration as a voter under the Virginia Constitution.

Section 20 of the Constitution provides that an applicant to register shall make application in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officer, stating age, and so forth, unless he is physically unable to do so.

If the registrar is satisfied that the applicant is prevented from complying with these requirements solely by reason of his physical disability due to blindness, then it is my opinion that such applicant should be permitted to register as a qualified voter.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Registration books—Closing of

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 19, 1934.*

MISS MARIA MORRIS, *Registrar*
Berryville, Virginia.

DEAR MISS MORRIS:

I have your letter of November 7, in which you inquire whether the registration books can be opened at any time up to and including the day of election for the purpose of making a transfer.

If the transfer is being made from one election district to another in the same county or city, I am of opinion that the books may be opened at any time up to and including the day of election for this purpose, provided it appears to the satisfaction of the registrar that the person desiring to be registered has resided in the new election district for thirty days prior to the election in which he proposes to vote. See section 100 of the Code of Virginia.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration of voters after sundown.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 9, 1934.*

MR. J. S. WISMAN, *Registrar*,
Toms Brook, Virginia.

DEAR MR. WISMAN:

I have your letter of October 8, in which you inquire whether or not it is proper for you to register a voter after sundown on the last day for registration.

Section 98 of the Code of Virginia simply provides that a voter must register thirty days previous to the November election. If, therefore, he registers on the last day, I do not think the validity of the registration is affected by the fact that it takes place after sundown.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration books—Closing of prior to general election.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 17, 1934.*

MISS ELIZABETH WOODS
Central Registrar,
Roanoke, Virginia.

DEAR MISS WOODS:

I have your letter of the 12th instant, inquiring whether or not, in the opinion of this office, you should close your registration books thirty days prior to the time for the holding of general elections in the City of Roanoke.

As I formerly wrote you in my letter of May 7th, I do not find any express provision in the statute authorizing, or requiring registrars to close the registration books thirty days before general elections. However, Section 98 of the Code provides that the registrar shall complete his registrations for the June election on the third Tuesday in May. It also provides that thirty days previous to the November election each registrar shall sit one day for the purpose of amending and correcting the registration list, at which time any qualified voter applying, and not previously registered, may be added. This section also provides that the registrar shall at any time *previous to the regular days of registration*, register any voter entitled to vote at the next succeeding election who may apply to him to be registered. The inference from the last mentioned provision is that the registrar shall not register voters after the regular day of registration for the next succeeding election.

It is, therefore, my opinion that Section 98 of the Code provides for the closing of the registration books thirty days prior to the November election and on the third Tuesday in May prior to the June election.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Residence.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 6, 1935.

HONORABLE HARRY K. GREEN,

Commissioner of the Revenue,

Clarendon, Virginia.

MY DEAR MR. GREEN:

I have your letter of May 4, in which you ask the following question:

"A person residing in Virginia and having been assessed for head taxes for the years 1932, 1933 and 1934, which said head taxes having been paid by the taxpayer and in the meantime taxpayer having moved to the District of Columbia where he has resided for the last six months, wishes to register and vote in Virginia. Please advise if taxpayer in question can register and vote in Virginia and give his former place of residence for registration."

The question of legal domicile is primarily one of the intent of the person involved. If it is the intention of the person about whom you write to retain his legal domicile in Virginia, he may be allowed to register and vote. If, however, when the person moved to the District of Columbia, he intended to make the District his physical and legal residence, then he may not register and vote in Virginia.

A domicile once acquired remains with a person until he definitely establishes it some where else. However, I may say that a person cannot be domiciled in Virginia for the purpose of voting and in another place for all other purposes; in other words, if the person is retaining his domicile here, it is his legal domicile for purposes of taxation.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Residence—Eligibility of pauper to vote.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 4, 1935.

MR. W. L. DAVENPORT,
Judge of Election,
Gordonsville, Virginia.

MY DEAR MR. DAVENPORT:

I am in receipt of your letter of June 1 and will attempt to answer your questions in the order asked:

1. Has anyone who has been out of the State seven months or county three months, with the intention of making a new home elsewhere, any right to vote in the State, county or precinct from which he moved, even if he still owns real estate there?

The fact that a person owns real estate in this State does not qualify him to vote here. I take it that the person you have in mind has definitely abandoned his residence in Virginia. If this is true, he cannot vote here until he has again established a residence in Virginia, so as to comply with the provisions of law as to time of residence.

2. Is anyone who has real estate in his name, pays his taxes and meets all requirements of a voter, considered a pauper if he receives \$10 a month from the county as support and has the agency of two daily papers?

The question of whether a person is a pauper is entirely dependent upon the facts in any particular case, and I would hesitate to express an opinion without being acquainted with all the facts. From what you state, I should say that the person you describe is not a pauper.

3. Has any married person, widow or widower, living in Washington, and working in or out of Washington, any right to vote in a local town election in the State of Virginia?

A person may be working and temporarily residing in Washington and yet retain his legal residence in Virginia. The question is largely one of the intent of the particular person. If he went to Washington with the intent at some future time to resume his physical residence in Virginia, he may retain his legal residence here.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Residence—temporary and permanent.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 27, 1934.

MR. JNO. F. WAGNER,
Clerk of Election,
Port Republic, Virginia.

DEAR SIR:

A person to be entitled to vote at any particular place must be a resident of that place. The Supreme Court of Appeals of Virginia in *Williams vs. Commonwealth*, 116 Va. 272, said as to the meaning of residence:

"The meaning of the words 'resident' or 'residence' is to be determined from the facts and circumstances taken together in each particular case. 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 inhabitancy is not lost by temporary absence for pleasure, health or business, or while attending to 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."

The ownership of a farm in Rockingham County does not of itself entitle the person to vote in that county. If, however, he was born in the county, or had acquired a legal voting residence in the county and has only removed temporarily to the city of Harrisonburg, he may still return to the county and vote at his precinct.

If, however, he never actually lived in the county, but has always lived in Harrisonburg or, having once lived in the county, moved to the city of Harrisonburg with intention of giving up his residence in the county and establishing a permanent residence in the city of Harrisonburg, I do not think he is entitled to vote in the county, but has become a legal voting resident of the city of Harrisonburg.

The above general principles of law should be applied by the judges of election, who decide the question as to a person's right to vote in a ward or precinct in which such person offers to vote and, as was said in the Williams Case, his right as a voter should be determined by the facts and circumstances of each particular case.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Time for filing notice of candidacy.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, V.A., June 26, 1935.

HONORABLE S. B. BARHAM, JR., *Chairman,*
Fourth District Democratic Committee,
Surry, Virginia.

DEAR MR. BARHAM:

This is in answer to your letter of June 21, in which you submit two inquiries:

First. Whether the time within which candidates in the August Primary were permitted to file their declarations of candidacy as required by section 229 of the election laws expired at midnight June 7, or at the close of business hours on said day.

As you point out in your letter, the late Attorney General Saunders, on April 30, 1931, ruled that the declaration could be filed at any time before midnight of the last day on which same are permitted by law to be filed. I concur in this view, and therefore am of opinion that such declarations could be filed legally at any time before midnight June 7, 1935.

Second. Your second question is thus expressed in your letter:

"If candidates attempted to file at 11:30 p. m. of June 7th by going to the residence of the Chairman, and not finding him at home leaving the declaration at the door and advising him at 12:30 o'clock on the morning of June 8th that notices were left at 11:30, should their names be placed upon the Primary Ballot? In other words, were these declarations legally filed in the time prescribed by law?"

Section 230 of the election laws is as follows:

"Candidates for nomination shall file their declaration with the chairman or chairmen of the several committees of the respective parties, and it shall be the duty of such chairman or chairmen to furnish to the electoral boards charged with the duty of preparing and printing the primary ballots the names of the candidates to be printed thereon."

The word "file" (with reference to the filing of papers) has been frequently defined by the courts to mean the delivery of the paper to the officer with whom it is required to be filed. Merely leaving the paper in the office or at the residence of the officer with whom it is to be filed does not constitute a "filing." This rule is well established by the decisions of the courts which may be found in Words and Phrases giving judicial definitions of the word "File."

I am, therefore, of opinion that, under the facts above quoted from your letter, the declarations of candidacy were not filed within the required time.

Whether or not there existed other peculiar facts and circumstances not stated in your letter which might be held to excuse the prospective candidates from complying with the technical time limit, might present a question concerning which all parties in interest should be heard. The determination of a controversy of this nature is not within the province of this office.

The chapter of the Code providing for primaries, in section 221, contains this language:

"The provisions of this chapter shall be liberally construed so that the will of the electors may not be defeated by any informality."

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Qualified voters names on official lists and exceptions.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *June 17, 1935.*

HONORABLE ROBERT WHITEHEAD,

Attorney for the Commonwealth,

Livingston, Virginia.

DEAR MR. WHITEHEAD:

I have your letter of June 14, and beg to advise that this office has held that, except in cases provided for by section 115 of the Code, no person is eligible to vote in an election in Virginia unless his name appears upon the treasurer's list of persons who have paid all capitation taxes assessed or assessable against them for the three last preceding years, except in cases where no taxes for any one of said three years was assessable.

Under the provisions of section 115 of the Code, where a voter is transferred from one city or county to another and has paid the required taxes, he is permitted to vote upon exhibiting to the judges of election the certificate of the treasurer of the city or county wherein the taxes were paid showing such payment at the time and in the manner provided by law.

You also inquire as to what evidence judges of election should require that persons becoming of age after January 1, 1934, have paid their 1935 or 1936 capitation taxes at the time they offer to vote.

No taxes are assessed or assessable against such a person for the three last preceding years, therefore it is not necessary that his name should appear upon the treasurer's list. This is particularly so, in view of the fact that such taxes are not required to be paid six months before the election.

I am of the opinion, therefore, that a certificate or tax receipt of the treasurer showing that the 1935 or 1936 capitation taxes, as the case may be, have been personally paid should be sufficient evidence to the judges of election in order that such person may be permitted to vote.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Voting lists—Names to be included on

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *April 9, 1935.*

HONORABLE J. ROBERT SWITZER, *Clerk,*
Circuit Court of Rockingham County,
Harrisonburg, Virginia.

DEAR MR. SWITZER:

This is in reply to your letter, in which you request an opinion upon a question relating to the election laws.

Your question is in reference to the case of a voter who has paid his 1932-1933 capitation tax in Augusta county, and his 1934 tax in the city of Harrisonburg. You inquire whether or not the treasurer of Harrisonburg should place him on the list of voters who have paid three years of capitation taxes upon presentation of a certificate or receipt from the treasurer of Augusta county showing that such taxes have been personally paid, or whether such certificate or tax receipt should be produced before the judges of the election.

It is my opinion that any person desiring to have his name entered upon the list of persons whose poll taxes have been paid, as required by law, may present to the treasurer of the city or county in which he desires to vote a tax receipt or certificate of the treasurer of any other city or county in which any one or more of the said three years taxes have been paid, showing that such voter has *personally* paid said taxes in said other county or city.

Such a person, however, even though not on the treasurer's tax list, may vote upon presentation of the treasurer's certificate as provided in section 115 of the Code.

With my best wishes, I am

Cordially yours,

ABRAM P. STAPLES,

Attorney General.

EMPLOYEES—State—May be permitted to teach during vacations.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 17, 1935.*

HONORABLE WILMER L. HALL,
State Librarian,
Richmond, Virginia.

DEAR MR. HALL:

I have your letter of December 27, 1934, in which you enclose me a copy of a letter addressed to you by Mr. Harry Clemons, Librarian at the University of Virginia, with reference to the propriety of permitting Mr. Church, one of the employees of the Virginia State Library, to teach the library science courses at the University during his vacation.

There is no statutory provision with reference to vacations of State employees, the matter being controlled by the Governor. Some time ago he issued a communication to the various departments, in which it was stated that it would be the policy of the State to permit each employee to have twelve working days vacation annually.

I have delayed replying to your letter until I could have an opportunity to talk to Governor Peery with reference to the policy of permitting employees to engage in other work during the vacation period. It is Governor Peery's view that this matter should be determined by the various department heads of the State, taking into consideration the health and efficiency of the employee, and whether or not, in the opinion of the department head, engaging in work during vacation would be detrimental to the efficiency of the employee upon his return.

The question, therefore, whether Mr. Church should be permitted to teach at the University of Virginia during his next two weeks vacation is one for you to determine under all of the circumstances applicable.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

EXTRADITION—Affidavit not stating an indictable offense.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., January 14, 1935.

HONORABLE GEORGE C. PEERY,
Governor of Virginia,
Richmond, Virginia.

DEAR GOVERNOR: *In re: Requisition Proceedings—George Anderson.*

As requested, I have examined the affidavit of James P. Jones, attached to the warrant in the above matter, with a view to giving you an official opinion of this office upon the question of whether or not the facts therein stated are sufficient to constitute a crime under the provisions of the 1930 Code of Virginia, Sections 4459, 4459-A, 4440, 4442, and beg to advise you as follows:

The essential facts appearing from the affidavit are that the affiant, James P. Jones was inveigled into a card game by George Anderson, the party for whom the requisition is sought, and another party who gave the name of Jessie Clement, the former stating that he was connected with the Pennsylvania Railroad, and the latter that he was a cotton exporter at Norfolk, Virginia, and that thereafter another stranger appeared who gave his name as David Pines; that the affiant has since learned from the inspection of the rogue's gallery in New York that the pictures of said Clement and Anderson appeared in said rogue's gallery, and that the records of the police show that they were professional gamblers and card sharks; that the affiant lost a considerable sum of money in the said card game amounting to about \$560 which he afterwards compromised by accepting a refund of \$280 thereof.

The affidavit does not allege any facts from which it can be inferred that the card game was not honestly conducted, or that the cards were not honestly turned in the order which they would naturally come from the deck. The only suspicion arising in the mind of the affiant Jones was due to the expression which he states he observed upon the face of one of the players in the game.

It is true the affidavit states that, after affiant had made his bid and placed his money upon the table, he sought to withdraw from the game; but it is not stated that he undertook to repossess the said money prior to the turning of the cards which determined whether or not he won or lost, and, even if he had, his right to do so would be very questionable in so far as the fact enters into the question of whether a crime had been committed.

In the absence of any fact appearing in the affidavit showing any improper

manipulation of the cards, or any action on the part of the said Anderson from which such manipulation can be inferred, it is the opinion of this office that the other facts appearing in the affidavit are not sufficient to constitute the crime of stealing, or the crime of obtaining money by false pretenses. The mere fact that a person has been convicted of stealing, or cheating at cards, on former occasions does not authorize the legal inference that any such conduct occurred on the occasion here referred to. A professional criminal who gambles occupies no different legal status from that of any other person engaging in such unlawful practice.

It is the opinion of this office, therefore, that the facts alleged in the affidavit are not sufficient to constitute a crime under the laws of Virginia.

Respectfully yours,

ABRAM P. STAPLES,

Attorney General.

FEES—Attorneys for the Commonwealth—Misdemeanor cases—Felony cases.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., August 29, 1934.

HONORABLE SAM C. STOWERS,

Attorney for the Commonwealth,

Altavista, Virginia.

DEAR MR. STOWERS:

This is in reply to your letter of August 28, requesting from this office an opinion as to what fee should be collected in the courts of record for attorneys for the Commonwealth.

The law provides that a fee of \$5.00 be taxed for attorneys for the Commonwealth in misdemeanor cases, and for every nolle prosequi entered to an indictment, provided there has been no trial of such indictment,—only one fee to be paid where more than one nolle prosequi is entered against the same person—and for each person prosecuted by him at a preliminary hearing before any court or justice.

In felony cases, where one person is tried at the time, if the punishment prescribed may be death, the fee is \$20; if the punishment prescribed must be less than death, \$10. Where two or more persons are jointly indicted and jointly tried, if the punishment prescribed may be death, for one of the persons, \$20, and for each of the other persons so jointly indicted and jointly tried, \$10.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

FEES—Trial Justices and Justices of the Peace.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., June 12, 1935.

HONORABLE R. W. CHILTON,

Justice of the Peace,

Kilmarnock, Virginia.

DEAR MR. CHILTON:

I am just in receipt of a letter from Honorable L. McCarthy Downs, Auditor of Public Accounts, stating that he and Mr. Combs, the Comptroller, did not undertake to deal with the fees of justices of the peace in their recent study of trial justices' fees.

Referring, therefore, to your letter of June 7, inquiring as to the proper fees to be charged by justices of the peace for issuing warrants in connection with lunacy commissions under section 1017 of the Code, and for his services as sitting as a member of the commission consisting of the justice of the peace and two physicians summoned pursuant to section 1017, you are advised that section 1021 of the Code, which is embraced in the chapter dealing with insane, inebriate, and feeble-minded, provides that the justice of the peace shall receive a fee of two dollars for his services in connection with such proceedings.

You refer in your letter to the fee provided for the issuance of criminal warrants as, perhaps, applying also to the issuance of a warrant under section 1017 of the Code.

The view which this office has taken, which was affirmed by the Supreme Court of Appeals of this State, is that proceedings of this nature are neither civil nor criminal in the sense in which these terms are generally used. I do not believe, therefore, that the provisions of section 3481, or other sections relating to fees in civil and criminal cases, would have any application to lunacy proceedings.

I know of no other fee provided for the justices of the peace in such proceedings except the two dollars provided for in section 1021 of the Code. In the absence of any other provisions for compensation in these proceedings, I am of the opinion that this fee of two dollars should be taken to cover the entire services rendered by the justice of the peace therein.

It is possible that I have overlooked some section which you have in mind and, if so, if you will call it to my attention I will be glad to give the matter further consideration.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

GAME AND INLAND FISHERIES—Authority to pass Sunday fishing laws.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., March 20, 1935.

HON. CARL H. NOLTING, *Chairman,*

Commission of Game and Inland Fisheries,

Richmond, Virginia.

DEAR MR. NOLTING:

This is in reply to your letter of the 19th instant, in which you request the opinion of this office upon the question of the power and authority of the Commission of Game and Inland Fisheries to adopt and issue regulations restricting fishing on Sunday in certain counties of the State.

Section 3305(34) Virginia Code of 1930 empowers the commission "to determine when, to what extent, if at all, and by what means it is desirable to restrict, extend or prohibit in any degree the provisions of law obtaining in any county in this State" for the taking of fish from inland waters.

This same section prescribes the manner in which regulations covering this subject are to be adopted. Before their adoption the regulations proposed are required to be published ten days in a newspaper published in the county, if there is one, and such notice shall state the time and place for hearing those interested in the proposed regulations. If the commission is satisfied that the regulations are advisable, same may be adopted and, if so, shall be likewise published in the manner directed for proposing the same. A copy of any regulation adopted by the commission shall be mailed to the clerk of the circuit court, who shall make a record thereof and cause the same to be posted in front of the courthouse of said county in which the same is to be operative.

It is my opinion that under the section above mentioned the commission may adopt a resolution prohibiting fishing on Sunday in any county in the State whenever it deems the same proper.

Cordially yours,

ABRAM P. STAPLES,

Attorney General.

GAME AND INLAND FISHERIES—Licenses—Land owners.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 23, 1934.

MR. CHARLES P. FERREL, *Clerk,*
Circuit Court of Craig County,
New Castle, Virginia.

DEAR MR. FERREL:

I have your letter of the 21st instant, inquiring whether or not a non-resident of Virginia who owns interest in real estate in Virginia may hunt and trap in the State of Virginia, or may obtain a license under Section 22 of the Game, Inland Fish and Dog Code.

Section 19 of said Game, Inland Fish and Dog Code, Sub-section (a), provides that non-residents, their husbands and wives and children, who own land in this State, may hunt, trap and fish within the boundaries of their own lands without being required to obtain any license. The nature of the ownership, however, must be an individual interest and not as a stockholder in a corporation. If a non-resident desires to hunt on lands other than his own, he must obtain a non-resident hunt, game and fish license, as provided by Section 23, Sub-section (c) of said Code.

You also inquire whether a person has a right to hunt on lands other than his own on County and State licenses. The answer to this is that the license confers the privilege to hunt on any lands within the territory covered by the license regardless of the ownership of said lands, provided the hunter has the permission required by law.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

GASOLINE TAX—Participation of county not operating under Byrd Road Law.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., March 18, 1935.

HONORABLE E. R. COMBS, *Comptroller,*
State Library Building,
Richmond, Virginia.

DEAR MR. COMBS:

I have your letter of February 27, enclosing a communication from W. F. Day, County Manager of Henrico, with reference to the Henrico county's share of the gasoline tax revenue.

I also understand from my conversation with you that you desire to know whether or not this county, which elected not to come within the provisions of the Byrd road law, is to share in the increase in the gasoline tax revenues for the calendar year 1934.

The last part of section 11 of the Byrd road law reads as follows:

"If, as the result of such election, such county shall withdraw from the operation of this act, it shall continue to receive from the motor vehicle fuel tax, for expenditure under existing law, as heretofore the amount of motor vehicle fuel tax to which it was entitled for the calendar year, nineteen hundred and thirty-one, including the normal increase if any but not including any additional amount for equalization as provided by law for that year and shall continue with county and district road levies for the year nineteen hundred and thirty-two and thereafter, and shall continue to operate under the general county road law or as otherwise provided by law."

It seems to me that this provision is plain and that this county should receive its share of the "normal increase," but not "including any additional amount for equalization as provided by law."

Inasmuch as the increase cannot be determined until the end of the year, it would seem that the share of the county in the "normal increase" also cannot be determined until that time.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

HIGHWAY COMMISSION—Appointment of commissioners subject to confirmation by General Assembly.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., January 14, 1935.

HONORABLE GEORGE C. PEERY,

Governor of Virginia,

Richmond, Virginia.

DEAR GOVERNOR:

Complying with your request for an opinion upon the question whether the appointment by the Governor of a member of the State Highway Commission shall be confirmed by the Senate or by the General Assembly, I beg to advise you as follows:

Section 1969a of the Code, which is in its present form by virtue of an Act of the General Assembly of 1922, appearing in the Acts for that year, page 673, provides that the appointment shall be subject to confirmation by the Senate.

In 1927, the General Assembly, by an Act appearing at page 114 of the Acts of that year, provided that such appointment shall be subject to confirmation by the General Assembly instead of by the Senate "as now provided."

At the session of the General Assembly in 1934, House Bill No. 322 was enacted (Acts of 1934, p. 308). The purpose of this Act was to amend sections 1 and 7 of the original act creating the Highway Commission. Section 1 of the said Act is the same as section 1969a of the Code of 1930. In re-enacting this section the following language—"who shall be appointed by the Governor, subject to confirmation by the Senate," as the same appears in the 1922 Act and in section 1969a of the Code, was re-enacted. The question arises whether or not it was the purpose and intention of the General Assembly to repeal the Act of 1927 referred to above, in so far as the same requires confirmation by the General Assembly, and to substitute in lieu thereof the original provisions requiring such confirmation only by the Senate.

The title of the 1934 Act does not indicate any intention to make any change in the method of confirmation of the members of the Highway Commission and, in my opinion, the repetition of this same language was not intended to repeal, and did not have the effect of repealing, the aforesaid provisions in the 1927 Act.

It is my opinion, therefore, that appointments by the Governor of members of the State Highway Commission are now subject to confirmation by the General Assembly, as provided in the said Act of 1927.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

INCOME TAX—Federal exemption of State administrative employees.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *April 23, 1935.*

HON. S. R. BRAME,

Internal Revenue Agent in Charge,

Post Office Building,

Richmond, Virginia.

DEAR SIR:

This will acknowledge receipt of a copy of a letter addressed to you under date of April 16, 1935, by Hon. Guy T. Helvering, upon the subject of the liability to Federal income tax of Virginia State officers and employees in the Department of Alcoholic Beverage Control.

The letter recognizes the well established principle that such incomes are not liable to the tax where the officer or employee is engaged in rendering services in connection with the discharge of an essentially governmental function. But it is not clear as to the taxability of the income of an officer or employee of the State whose duties are divided; who renders some services in connection with the discharge of a governmental function and some in connection with the proprietary activity of operating the State liquor stores. As an illustration, the three members of the Alcoholic Beverage Control Board are vested with, and exercise, governmental legislative powers to prescribe regulations for the conduct by private licensees,—distillers, wineries, breweries, retail wine and beer licensees,—of their respective businesses. The Board members are constantly engaged in conducting hearings as to violations by such licensees of laws and regulations of the Board. The Board may suspend or revoke licenses or decline to grant licenses. In discharging these duties it is rendering an essentially governmental service.

On the other hand, these Board members are charged with supervising the operation of the State liquor stores, a totally different function and one which, under the Supreme Court decisions, is a proprietary activity of the State.

The question arises whether, by reason of the discharge of the last mentioned duties, their entire compensation is impressed with a proprietary character, or whether the fact that they are paid by the State for services essentially governmental renders their total compensation exempt from the Federal tax.

The principle upon which the exemption is upheld by the courts is that neither the State nor Federal Government possesses the power to levy an income tax upon the officers or employees of the other upon compensation paid for services in connection with an essentially governmental function. To do so is an invasion of the independence of such governments within their respective spheres under our constitutional system. To tax the income in such a case is undoubtedly a violation of this rule, if any substantial part of the service for which the State pays the employee is devoted to an essentially governmental service. It cannot be doubted that, under such circumstances, so much of his compensation as is paid for such governmental service is being taxed in violation of the Constitution.

In the recent case of *Helvering v. Powers*, (decided Dec. 3, 1934), the United States Supreme Court held that the compensation paid by the State of Massachusetts to the members of the board of trustees of the Boston Elevated Railway Company was for services rendered in a proprietary activity, and was subject to the Federal Income Tax. The question we are now considering was raised in the

Powers case, *supra*, the trustees contending that a part of their services were essentially governmental in character. In sustaining this contention the Circuit Court of Appeals, (1st Cir.) had this to say (68 F. (2d) 636) :

"* * * But these trustees have much greater power than merely to operate a street railway. They have the power, as has been pointed out, to fix rates, and to declare deficits which upon their decision were collected by taxation. Both these powers are by any standard essentially governmental. If a state officer exercises any powers of that character, his entire salary is, in our opinion, exempt by the regulation. We do not think it is the intention of the regulation that there should be an apportionment of exemption, that a certain part of the salary should be, more or less arbitrarily, allocated to the service of governmental character and exempted, while the rest of the salary is taxed—and no such contention is made. The salaries in question were therefore exempt under the regulations."

The Supreme Court, however, without disagreeing as to the correctness of this legal proposition, nevertheless held that, as a matter of *fact*, the trustees rendered no governmental services, saying upon this point, (55 S. Ct. Rep. Adv. Sh. p. 175) :

"The transportation service is to be rendered, as respondents' counsel say, 'under such a flexible system of rate-making as would allow the fixing of fares equal, as nearly as might be, to the cost of service.' The compensation of the trustees is undoubtedly a part of that cost. 'The main design of the act,' as stated by the Supreme Judicial Court, 'is public operation of the railway company at such rates of fare to be fixed by the trustees from time to time as shall afford revenue sufficient to defray all charges and the dividends established by the act.' *Boston v. Treasurer and Receiver General*, *supra*. The authority given to the trustees 'to regulate and fix fares,' and the further authority to ascertain such losses as may be incurred, which are to be borne by the commonwealth, are both incident to that main purpose."

The main purpose of the Virginia Alcoholic Beverage Control Act is not to engage in the liquor business, but to regulate and control the sale and distribution of intoxicating liquors.

I do not see any escape from the conclusion that where a part of the services for which the State pays compensation is connected with an essentially governmental function, such part is exempt and cannot be liable for an income tax. To attempt to prorate the compensation in proportion to the amount of service which is governmental in character and that which is not would be utterly impractical, and necessarily arbitrary. Therefore, where the service rendered is dual in character, the entire compensation paid by the State therefor must be held exempt.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

INEBRIATES—Commitment to State institution.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 22, 1934.

MR. F. H. FOLEY,

Associate Trial Justice,

Rock Castle, Virginia.

DEAR MR. FOLEY:

I have your letter of November 20.

The effect of your inquiry is whether or not a person who has been duly found to be an inebriate may be placed on probation for thirty days after the

finding and then, without another finding of inebriacy by a properly constituted commission, be committed to an institution.

In the first place, I assume from your letter that the original proceedings were had before a trial justice. This office has ruled that the new Trial Justice Act does not authorize a trial justice to serve on the commission provided for in section 1017 of the Code. It would, therefore, appear that the original proceedings were defective in this respect.

Now, answering your inquiry specifically, assuming that the original commission was properly constituted, I do not think that the statutes contemplate that a person found to be an inebriate may be placed on probation and at the end of the probationary period committed without a proper finding of inebriacy by a duly constituted commission at that time. In other words, I think that, if a commitment is to be made, it should be made when the state of inebriacy is first found to exist, and that, if the person is not committed then, he cannot be later committed without a further finding of inebriacy.

Yours very truly,

W. W. MARTIN,

Assistant Attorney General.

INSURANCE—Authority of governmental agencies and municipal corporations to insure in Mutual Insurance companies.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 20, 1934.*

The Attorney General's Office has received requests from a number of State officials for an opinion upon the question whether the Constitution and laws of this State prohibit governmental agencies and municipal corporations from entering into contracts of insurance with Mutual Insurance Companies.

The late Attorney General, Honorable John R. Saunders, in an opinion, expressed the view that, where the mutual policy limits the liability of the policyholder to assessment to an amount not in excess of the cash premium, governmental agencies are not prohibited from contracting for such policies.

However, this office, having been insistently requested to reconsider the above opinion, invited counsel, representing the opposing views, to give the Attorney General the benefit of a written argument in support of their respective positions. This has been done and the writer wishes to acknowledge and thank Honorable W. P. Hazelgrove (advocating a reversal of the former opinion) and Honorable Wilbur C. Hall and Eugene Quay (in favor of sustaining same) for their thorough examination of the question and their able and exhaustive briefs.

There are three distinct types of Mutual Insurance Companies authorized by the Virginia statutes to engage in business in Virginia, which are, in brief, as follows:

(a) Mutual Insurance Companies organized or qualified to do business in Virginia under the provisions of chapter 172-A of the Code of 1930. These companies are required to maintain reserves upon the same basis as is required of domestic stock insurance companies, and are authorized to issue policies limiting the assessment liability of the policyholder to an additional amount not greater than the cash premium. They are also required to comply with various other provisions prescribed by the statute.

(b) Mutual Assessment and Cooperative Insurance Companies organized under chapter 173 of the Code of 1930. The policies and conduct of the business of these companies differ in many respects from the companies referred to in the preceding paragraph, chief among which is the unlimited assessment liability of the members or policyholders for payment of losses.

(c) Reciprocal and Inter-Insurance Contracts authorized under chapter 173-A of the Code, which are agreements between various persons to indemnify one another against loss from the particular risk covered by the agreement. This form of insurance does not consist of a contract with a corporation, but of numerous persons contracting with one another. The various contracting parties have no entity or corporate existence.

The correctness of the former Attorney General's opinion is challenged on the ground that the contract of a Mutual Insurance policy, if entered into by the State or a public corporation of the State, is in violation of section 185 of the Constitution of Virginia, which prohibits the State and local governments from granting their credit to or in aid of any person, association or corporation. It is argued in support of this contention that, even though the liability for a premium assessment is limited to an amount not in excess of that of the cash premium, still the obligation is in effect a granting of governmental credit. With reference to the Mutual Companies referred to in paragraph (a) above, the statute (Code section 4326-i) expressly authorizes the public corporations of Virginia to enter into agreements for and hold policies in such companies. The validity of this section is attacked on the ground, above stated, that it is in violation of section 185 of the Constitution.

I have examined the policies of insurance issued by such companies and find in each an agreement to pay a definite cash premium, and, in the event of the happening of certain contingencies or losses, an agreement to pay an additional premium or assessment not in excess of the amount of the cash premium.

In its final analysis the legal effect of this contract is to purchase insurance at an indefinite minimum cost, but at an absolutely fixed maximum cost. Since these companies are required to maintain adequate reserves, they are not dependent upon the assessment liability of the policyholders for credit. If the policy required the payment of the maximum premium cost as a cash premium, with a provision for a refund of such part thereof as is not necessary to pay for the cost of the insurance, under the rules applicable, the legal effect would be substantially the same, except that it would be less advantageous to the policyholder. And yet it could hardly be claimed that a stockholder under such a contract would be "granting credit" to the company. If the credit of a public corporation is used in purchasing the policies of companies referred to in paragraph (a) hereof, such credit is not "granted" but is used to purchase insurance protection. It is part of the consideration or premium exacted of the policyholder.

After a careful consideration of the authorities cited on the subject, both pro and con, I am of opinion that it cannot be said that the statutory provision is unconstitutional which authorizes Virginia public corporations to contract for policies of the Mutual Insurance Companies operating under the provisions of chapter 172-A of the Code, and referred to in paragraph (a) hereof.

Considering next the insurance contracts contemplated by companies or reciprocal exchanges operating under the provisions of chapters 173 and 173-A of the Code and heretofore referred to herein in paragraphs (b) and (c), it appears that the value of such contracts depends primarily upon the credit of the members. They do not constitute definite purchases of insurance protection at a maximum fixed cost, but provide for an unlimited assessment liability of each member to pay the losses of other members. Furthermore there is no statutory provision authorizing governmental agencies or public corporations to engage in any such contracts.

It is, therefore, the opinion of this office that governmental agencies are not empowered to enter into contracts of the kind provided for in chapters 173 and 173-A of the Code of 1930, but that they may contract for and hold policies of insurance in Mutual Companies operating under chapter 172-A of the Code where the liability of the policyholders to assessment is limited to the amount of one cash premium.

ABRAM P. STAPLES,

Attorney General.

INSURANCE—Deposit of county bonds by inter-insurance or reciprocal exchange doing business in Virginia.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 18, 1934.*

HONORABLE GEORGE A. BOWLES,
*Superintendent of Insurance,
State Office Building,
Richmond, Virginia.*

MY DEAR MR. BOWLES:

I am in receipt of your letter of September 12, in which you inquire whether or not, within the meaning of section 4340-a of the Code of Virginia (1934 Supplement of Michie's Code of 1930), county bonds may be deposited by an inter-insurance or reciprocal exchange doing business in Virginia with the treasurer or other appropriate State officer of the State in which such inter-insurance or reciprocal exchange is organized and domiciled.

The section provides that such bonds so deposited shall be "bonds of the United States or of any State, city or municipality of the United States."

The question you raise is whether the word "municipality" as used in this section is broad enough to include county bonds. There is conflict of authority on the question of whether a county is a "municipal corporation" or a "municipality" within the technical meaning of those terms. There is respectable authority to the effect that these terms include all political sub-divisions having any of the powers of local self-government. However, I do not think it is necessary to determine this precise question.

The section speaks of bonds of a city or municipality. If it had been the intention of the Legislature to limit investments to bonds of the United States or any State or city, it does not appear that the word "municipality" would have been added, because it is pure surplusage inasmuch as the word "municipality" unquestionably includes a city.

I further note, as you suggest from section 4211 of the Code that a life insurance company is exempt from making a deposit in this State if it deposits with the Insurance Commissioner or appropriate officer of any State or States "bonds of the United States, of any State of the United States, or of the cities, towns or counties thereof * * *."

There appears to be no logical reason why the Legislature should have intended to be any more rigid in its requirements of reciprocal and inter-insurance exchanges than in its requirements of life insurance companies.

In view of what I have written, my opinion is that county bonds may be deposited in the manner provided by the statute by reciprocal or inter-insurance exchanges.

I am returning your file herewith.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

INSURANCE—Liability of surety on bond of company requalifying in Virginia.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 5. 1934.

HONORABLE GEO. A. BOWLES,

Superintendent of Insurance,

Bureau of Insurance and Banking,

Richmond, Virginia.

DEAR MR. BOWLES:

This is in reply to your letter of June 14, in which you request an opinion from this office upon the question of whether or not a fire insurance company formerly doing business in this State, but which has withdrawn from this State and now desires to again qualify to do business in Virginia and file a surety company bond in accordance with the provisions of section 4211, may do so without the surety on the bond being liable for obligations or liabilities which may result on contracts formerly entered into in this State by said insurance company.

Section 4214 of the Code provides that the securities required to be deposited by section 4211 "shall be held as security for liabilities incurred or to be incurred by the companies" and so forth.

Section 4211 provides that in lieu of the deposit of securities with the treasurer, as therein provided, such insurance company may, at its option, enter into a bond with surety, approved by the State Corporation Commission, in such sum as the Commission may fix, provided the same be not less than \$10,000. This bond, of course, is intended to take the place of the securities, and the liability thereunder is obviously intended to be the same as the liability of the securities themselves, if such securities had been deposited.

The form of the bond which has been prescribed by the State Corporation Commission renders the principal and surety liable for "every and all liabilities in the State of Virginia" and so forth. It was evidently the purpose of the Commission to render the principal and surety on the bond liable to the same extent that the securities, if same had been deposited, would have been liable.

It is the opinion of this office, therefore, that, under the provisions of section 4214 of the Code, and under the provisions of the form of bond prescribed by the State Corporation Commission, the surety on a bond of a company requalifying in Virginia would be held liable for all obligations of the company, whether resulting from contracts heretofore entered into, or from those hereafter made.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

INSURANCE—Report of fire insurance premiums by insurance companies.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., February 27, 1935.

HONORABLE GEORGE A. BOWLES,

Superintendent of Insurance,

State Office Building,

Richmond, Virginia.

*Re: Report of Fire Insurance Premium
by Insurance Companies Under Pro-
visions of Chapter 388, Acts 1934,
page 819.*

MY DEAR MR. BOWLES:

I am in receipt of your letter of February 26, enclosing your file in the above matter.

The question presented is whether local mutual insurance companies and associations organized under the laws of this State, conducting business only in this

State and exclusively upon this assessment plan, are required to report to the State Corporation Commission, through the Bureau of Insurance and Banking, their gross premiums, as provided in chapter 388 of the Acts of 1934.

Chapter 388 of the Acts of 1934 adds a new section, section 17, to chapter 433 of the Acts of 1928, known as the "Rating Act." Section 15 of the latter act provides that it shall not apply to local mutual insurance companies and associations organized under the laws of this State, conducting business only in this State and exclusively upon the assessment plan.

Chapter 388 of the Acts of 1934 appears to be a companion act to chapter 387, which authorizes certain cities and towns to impose a license tax on all fire insurance companies to create a fund for the relief of injured and disabled firemen. No companies are exempted from this license tax, so that local mutual insurance companies, to which the Rating Act does not apply, are subject to this license tax which may be imposed by cities and towns.

The effect of the amendment to the Rating Act is simply to enable the State Corporation Commission to secure information from fire insurance companies so that it may be furnished to the cities and towns for the purpose of imposing the license tax. While it might have been better to provide for the securing of this information in the act authorizing the imposition of the license, I am of opinion that chapters 387 and 388 of the Acts of 1934 should be read together, and that it is proper for the State Corporation Commission to require these local mutual insurance companies to furnish information as to gross premiums, in order that this information may be passed on to the cities and towns, as provided in chapter 387 of the Acts of 1934.

This must have been the intention of the General Assembly, as it would have been an idle gesture to authorize cities and towns to impose a license tax, and provide that the information as to gross premiums should be furnished to the cities and towns by the Division of Insurance and Banking of the State Corporation Commission, without furnishing any method for the Division of Insurance and Banking to secure the information.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

INSURANCE—School buildings—Payment of premiums—Out of county levy.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 5, 1934.

MR. C. W. STEELE,

Member of School Board,

Meadowview, Virginia.

DEAR MR. STEELE:

This is in reply to your letter of the 2nd instant, inquiring whether or not it is permissible for fire insurance premiums on school buildings to be paid out of the general county fund or whether same shall be payable out of the funds derived from the special levy by the school district in which the building is located.

It is the opinion of this office that, under the provisions of section 698 of the Code of Virginia as amended by the Acts of the General Assembly, 1932, and also under the provisions of section 698a of the Code enacted at the 1934 session of the General Assembly, the cost of operation and maintenance of all schools is to be paid out of the fund derived from taxes levied in the entire county and not confined to special district levies.

It is further the opinion of this office that fire insurance premiums constitute a part of the cost of maintenance of school buildings and it is permissible for same to be paid out of the fund derived from taxes levied in the whole county.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

INTERSTATE COMMERCE—Only certificate of corporation commission necessary for interstate transportation.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *April 18, 1935.*

HONORABLE P. C. KEGLEY,

Trial Justice,

Bland, Virginia.

DEAR MR. KEGLEY:

I have your letter of recent date, in which you ask an opinion upon the following questions:

"1. (A) is engaged in hauling freight between Wytheville, Virginia, and Bluefield, West Virginia, and holds intrastate charters or franchises in the two states, but does not have an interstate charter or franchise."

The State Corporation Commission has ruled, and its rulings are controlling unless and until reversed by the Supreme Court of Appeals, that the intrastate certificate or franchise is all that is necessary to authorize the transportation of freight for hire from points in Virginia to points outside of Virginia, provided such transportation is conducted over the route specified in the intrastate certificate.

"2. (B) who is engaged in carrying the mail between the two designated places delivers wares for concerns in West Virginia consigned for delivery in Virginia, and vice versa. (B) does not deliver between points in Virginia. (B) has no regular fixed price for his services, but receives remuneration for his services."

The State Corporation Commission has ruled with reference to a case of this kind that, if the carrier operates on a schedule, an interstate certificate or franchise is necessary in order to authorize the transportation of property from points in Virginia to points in West Virginia, and vice versa, if the carrier does not have an intrastate certificate authorizing him so to do.

It is the opinion of this office that these rulings of the State Corporation Commission are proper, and I concur therein.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

JAILS AND PRISONERS—Board of prisoners not part of costs.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 19, 1934.

HON. W. L. PRIEUR, JR.,
Clerk of the Corporation Court,
Norfolk, Virginia.

MY DEAR MR. PRIEUR:

This is in reply to your letter of the 14th instant, requesting an opinion of this office upon the question of whether or not, in view of Section 5019 of the Code, which allows persons convicted of crime credit on any jail sentence or fine that may be imposed on them by law for having been confined in jail awaiting trial, the clerk should tax for his part of the costs, under the provisions of Section 4964 of the Code, the dieting fees for prisoners while so confined awaiting trial.

It is my opinion that the purpose of Section 5019 of the Code is to reduce the actual time of service in jail by the amount of time actually spent in jail awaiting trial. If the dieting fees for such time are added as part of the costs, it would increase the time of confinement in jail for prisoners unable to pay their fine and costs, and it would be contrary to the spirit and purpose of the Act. I am of opinion, therefore, that the dieting fees for said prisoners should not be taxed as part of the costs in such cases.

With my best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

JAILS AND PRISONERS—Finger-printing of person charged with crime.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 29, 1935.

MR. W. TERRELL SHEEHAN,
Trial Justice,
Staunton, Virginia.

DEAR MR. SHEEHAN:

I have your letter of May 27, in which you raise the question of the right to take finger prints of a person charged with crime.

There seems to be no Virginia statute on the subject except an Act of the last session of the General Assembly (Acts 1934, page 64) relating to photographing and finger printing convicts at the penitentiary. Therefore, if the right exists, it must flow from the general police power.

In the recent case of *United States v. Kelly*, 55 Fed. (2d) 67, decided by the Circuit Court of Appeals for the Second Circuit in 1932, the question was squarely presented whether the right to take finger prints of a person charged with crime exists independent of statutory authority. The court upheld the right, saying in part:

"Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification."

* * * * *

"We find no ground in reason or authority for interfering with a method of identifying persons charged with crime which has now become widely known and frequently practiced both in jurisdictions where there are statutory provisions regulating it and where it has no sanction other than the common law.

"The appellee argues that many of the statutes and the decisions in common-law states have allowed finger-printing only in case of felonies. But, as a means of identification, it is just as useful and important where the offense is a misdemeanor, and we can see no valid basis for a differentiation. In neither case does the interference with the person seem sufficient to warrant a court in holding finger printing unjustifiable. It can really be objected to only because it may furnish strong evidence of a man's guilt. It is no more humiliating than other means of identification that have been universally held to infringe neither constitutional nor common-law rights. Finger printing is used in numerous branches of business of civil service, and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit."

* * * * *

"We prefer, however, to rest our decision upon the general right of the authorities charged with the enforcement of the criminal law to employ finger printing as an appropriate means to identify criminals and detect crime."

The reasoning of the court appears to me sound.

I also refer you to an interesting discussion of this question in an annotation to be found in 83 A. L. R. 127, in which a number of cases are cited and discussed. There is some authority to the contrary, but the decided weight of authority seems to uphold the right. I know that the practice is followed in several of the cities and in at least one city, I am informed, there is no specific ordinance on the subject.

I am of opinion, therefore, that the sheriffs and other law enforcement officers, have the authority to take finger prints of persons charged with or convicted of crime and, in the absence of a uniform practice to finger print all such persons, an order may be entered directing the officers to take finger prints in any specific case where the circumstances are such as to justify such action in the exercise of a sound judicial discretion.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

JAILS AND PRISONERS—Formal commitment required to entitle Jailer to fee.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 9, 1934.*

HONORABLE J. HAMILTON HENING,

City Attorney,

Hopewell, Virginia.

DEAR MR. HENING:

This is to acknowledge receipt of your letter of October 3, in which you ask me to construe the word "committed" as used in section 3510 of the Code of Virginia, in reference to the 50 cents fee allowed a jailor for each person committed to his charge.

Your attention is invited to the following definitions of the term "commitment."

"Committing to jail—A phrase which has been interpreted to mean receiving into jail under commitment." 12 C. J. 145.

"Commitment is a warrant, order or process by which court magistrate directs ministerial officer to take person to prison or to detain him there." People ex rel *Wojek v. Henderson*, 235 N. Y. Sup. 173

"A commitment means a judicial order." State ex rel *Mellin v. Allen*, 86 S. W. 144.

"A commitment is a warrant, order or process by which a court or magistrate directs a ministerial officer to take a person to prison or to detain him there." People ex rel *Bidwell v. Pitts*, 97 N. Y. Sup. 503.

"When an officer has one under legal arrest by virtue of either civil or criminal process, or without process where that can be dispensed with, and it is his duty to detain his prisoner until he can have him before some court, or may properly commit him to some reformatory or penal institution, he may in the meantime detain him in any proper and suitable place; and he may use the common jail as a suitable place of detention, and such detention is not deemed a commitment to jail." Re: *Edson*, 82 Atl. 664.

It is my opinion, therefore, that, before a person can be committed to jail, there must be some order issued by a judicial officer authorizing the jailor to receive the prisoner and detain him. Unless there is commitment, then the jailor is not entitled to a fee of 50 cents. A mere detention by a police officer of a person at a city jail would not constitute a commitment. After a person has been legally committed, the length of time he is detained by the jailor is immaterial.

Section 3510 of the Code applies only to State prisoners and fees to be paid out of the State treasury. Therefore, in committing persons charged with violations of city ordinances, it would be improper for a jailor to charge and collect this fee from the State.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

JAILS AND PRISONERS—Good time allowance.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., October 9, 1934.

HONORABLE GEORGE C. PEERY,

Governor of Virginia,

Richmond, Virginia.

MY DEAR GOVERNOR:

I have your letter of October 8, in which you say:

"Under the provisions of section 2075 it appears that male prisoners convicted of misdemeanors and sentenced to confinement in jail may, under certain conditions, be delivered to the superintendent of the penitentiary to work on the State convict road force. I shall appreciate your advising me whether prisoners so delivered and put to work in the State convict road force are entitled to the time off for good behavior provided by section 5017, and, if so, at what time may it be said that such prisoners are awaiting removal to the convict road force as provided in the section referred to."

It is my opinion that such prisoners as you describe are entitled to the time off for good behavior provided by section 5017 of the Code. Inasmuch as the prisoners mentioned in your inquiry were not convicted of a felony and were not sentenced to the convict road force, being a part of that force upon the request of the superintendent of the penitentiary, as provided by section 2075 of the Code, I do not think it can be said that they are "awaiting removal to the convict road force" until such time as the judge shall order them to be delivered to

or upon the order of the superintendent of the penitentiary. Therefore, my view is that these prisoners are entitled to the good behavior allowance as members of the convict road force only from such time as they are so ordered to become members of that force.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

JAILS AND PRISONERS—Good time allowance.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., August 9, 1934.

HONORABLE GEORGE C. PEERY,

*Governor of Virginia,
Richmond, Virginia.*

*In re: Sections 2860 and 5017 of the
Code of Virginia.*

DEAR GOVERNOR:

I am in receipt of your letter of yesterday in which you ask certain questions concerning the good time allowance to prisoners.

In your first question you ask:

"Does the 15 day provision in Section 5017, as amended by Acts of Assembly, 1932, apply to misdemeanants on the convict road force if their respective sentences exceed one year?"

It is the opinion of this office that Section 5017 of the Code applies to misdemeanants on convict road forces in such cases.

Your second question is:

"Does the same provision apply to a misdemeanant who receives sentences aggregating more than a year, if each sentence is less than a year?"

In the opinion of this office, the provision of Section 5017 applies to the aggregate continuous term of service upon two or more convictions where the total sentences are for a period exceeding one year. This question was asked Attorney General Saunders in September, 1932, by Major R. M. Youell, Superintendent of the Penitentiary, Richmond, Virginia, and to whom Colonel Saunders in reply, under date of September 26, 1932, construed the law as giving a good conduct allowance of fifteen days per month where the aggregate of two or more sentences exceed one year confinement. Report of the Attorney General—July 1, 1932, to June 30, 1933, page 117.

Your third question is:

"When may it be said a prisoner is 'awaiting removal to the penitentiary or to the convict road force'?"

In the opinion of this office, the prisoner is awaiting removal to the penitentiary or to the convict road force immediately after he is committed to jail after a sentence to the penitentiary or to the convict road force.

Your fourth question is:

"Is the provision as to good time for jail prisoners applicable to all jails regardless of whether specific rules and requirements have been adopted therefor?"

I do not think that the good time allowance to jail prisoners can be construed as limited to prisoners confined in jails in which regular, specific rules and regulations have been formerly adopted, and it is the opinion of the office that the provision for good behavior applies to all jail prisoners who respect and obey the requirements and commands of their respective jailers.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

JAILS AND PRISONERS—Per diem allowance—Persons confined Industrial Farm for Women.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 15, 1934.*

HONORABLE GEORGE C. PEERY,

*Governor of Virginia,**Richmond, Virginia.*

MY DEAR GOVERNOR PEERY:

I am in receipt of your letter of October 6.

You inquire, first, whether the Industrial Farm for Women at Goochland is entitled to a per diem allowance from the appropriation for criminal charges for the infant children of women confined in that institution.

I can find no authority for such an allowance.

You inquire, next, whether the institution is entitled to a per diem allowance for commitments made from the following sources:

1. Jail sentence, transfers.

An allowance in this class of commitments is proper. See section 5058(15) of the Code, which provides that, where persons are detained at the Industrial Farm for women in lieu of a county or city jail, the institution shall receive the per diem allowance which would be allowed if they were to remain in the several jails from which they were transferred.

2. Indeterminate commitment, State Department of Public Welfare.

Where these commitments are pursuant to the provisions of section 4548f of the Code, I am of the opinion that the per diem allowance provided by that section is proper.

3. Penitentiary, transfers.

If the State penitentiary is entitled to a per diem allowance, then I am of the opinion that the allowance should be made where the prisoner is transferred to the Industrial Farm for Women. There seems to be no provision for an allowance for these transfers if the penitentiary was not entitled to an allowance in the first instance.

4. Western State Hospital, transfers.

Section 5058(9) of the Code provides for an allowance of 60c per diem in such cases.

5. Committed directly by court.

If the court commitment is in lieu of a sentence in a county or city jail, I am of the opinion that the allowance is proper. See section 5058(15) of the Code.

6. On parole, returned.

If the allowance could have been made upon the original commitment, then I am of the opinion that it should be made upon return after violation of parole.

7. Health commitment.

I presume that you refer to the commitments in section 1554f of the Code. This section makes no provision for any per diem allowance. However, if the commitment is ordered by a court in lieu of a jail sentence, then I am of the opinion that the allowance is proper.

8. Industrial School for Girls, transfers.

I know if no provision for an allowance in this class of commitments unless the commitment is made by a court in lieu of a jail sentence.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

JAILS AND PRISONERS—Requisites covering good behavior allowance in commitments.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., April 3, 1935.

HONORABLE W. FRANCIS BINFORD, *Sec'y and Treas.**Association of Trial Justices,**Prince George, Virginia.*

DEAR MR. BINFORD:

I have yours of recent date, enclosing a copy of the letter from Mr. W. Hill Brown, Jr., to Judge Walter T. McCarthy, requesting an opinion upon two questions involving the construction of section 2860 of the Code.

I have incorporated these two questions, and the answers thereto, in the compilation of questions and answers which I am sending to the printer this afternoon for publication in pamphlet form.

It is my opinion that it is not necessary for the order committing a criminal to jail to state that the prisoner shall be entitled to time off for good behavior. Section 2860 provides that such allowance for time off may be made "with the consent of the judge." It does not provide, however, that the consent of the judge shall be given at the time the prisoner is committed to jail, or at any time prior to the actual allowance of good time off.

The other question contained in your letter is whether or not a person confined in jail for nonpayment of fine and costs may be allowed ten days per month time off for good behavior under section 2860 of the Code, as amended by the Acts of 1932, page 815.

The answer to this question is contained in an opinion of the late Attorney General, Honorable John R. Saunders, given under date of August 29, 1932, in which it was held that the time off provided for in said section is applicable to a person confined in jail for nonpayment of fine and costs.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***JAILS AND PRISONERS—Sentences—Second conviction, running of**

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 19, 1934.

MAJOR R. M. YUELL, *Superintendent,**The State Penitentiary,**Richmond, Virginia.*

MY DEAR MAJOR YUELL:

I am in receipt of your letter of yesterday, in which you ask my opinion as to the confinement of James P. Duty, No. 15286, whose status as a prisoner, according to your letter, is as follows:

"This man was on the 5th of September, 1918, tried in Tazewell county and given a sentence of three years in the penitentiary. Before this man was received in the penitentiary he was tried in Pittsylvania county and sentenced to two years in the penitentiary and at the same time was sentenced to four years additional time in the penitentiary for second conviction. He was tried in Pittsylvania county on the 25th day of January, 1919."

In my opinion, the sentences to which you refer in your letter aggregate a total of seven years, three years of which were imposed by virtue of a conviction

in Tazewell county for a felony, and four years by the same court because of the fact that Duty had previous to his trial and conviction in Tazewell county been tried and convicted in Pittsylvania county for a felony.

Duty was convicted in Tazewell county on the 5th day of September, 1918. The law in effect on that day is found in chapter 30, page 35, of the Acts of 1916, said chapter amending section 3905 of the Code of Virginia of 1887, said section as amended reading as follows:

"When any person is convicted of an offense and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found that he had been before sentenced in the United States to a like punishment, he may be sentenced to be confined in the penitentiary for such time not exceeding five years as the court trying the case shall, in its discretion, deem proper, in addition to the time to which he is or would be otherwise sentenced."

The Code of 1919, effective the 13th day of January, 1920, changed the law governing the jurisdiction of sentences upon second conviction.

Section 5054, superseding section 3905 of the Code of 1887, as amended by the Acts of 1916, takes away from the trial court jurisdiction to try and impose additional sentences on account of second convictions and vests jurisdiction for such purposes in the circuit court of the city of Richmond.

Yours very truly,

EDWIN H. GIBSON,

Assistant Attorney General.

JUSTICES OF THE PEACE—Authority to issue garnishee summons.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 21, 1934.

MR. JOHN W. B. DEEDS,
Trial Justice,
Pulaski, Virginia.

DEAR SIR:

In reply to your letter of the 16th instant, I will say that this office is of the opinion that a justice of the peace is not authorized to issue garnishment proceedings on a judgment rendered by a trial justice, even though the process is returnable before such justice.

Paragraph 2 of section 4988-g of the Code of Virginia provides that trial justices shall have the same jurisdiction as civil and police justices of a city, as provided in section 3102 of the Code, and expressly takes away the jurisdiction of justices of the peace, in cases of this kind.

I do not think that the provision in the fourth paragraph of the same section, providing that a justice of the peace shall retain jurisdiction to issue attachments, warrants and subpoenas, includes the issue of garnishment proceedings upon judgments rendered by trial justices.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

JUSTICES OF THE PEACE—Deprived of jurisdiction by trial justice act.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 25, 1935.*HON. JULIAN T. CHRISTIAN,
Justice of the Peace,
Mathews Courthouse, Virginia.

DEAR MR. CHRISTIAN :

This is in reply to your letter of the 21st instant, inquiring whether or not it is constitutional for the General Assembly to enact a statute during your term depriving you, as Justice of the Peace, of the right to try warrants during the remainder of your term.

Section 108 of the Constitution confers upon the General Assembly very full and broad powers with reference to the enactment of laws concerning Justices of the Peace, and it is my opinion that the recent Trial Justice Act is valid and that the effect of same is to deprive you, as Justice of the Peace, of jurisdiction to try warrants.

You inquire also whether or not a resident and citizen of Gloucester County may be appointed by the Judge of the Circuit Court as a Trial Justice of both Gloucester and Mathews counties.

Section 4988-d of the Code provides that two or more counties may, with the approval of the board of supervisors of said counties, in the discretion of the judge or judges of the Circuit Court of such counties, be combined, and one Trial Justice appointed for the two or more counties so combined; the appointment to be made by the judge or judges as aforesaid. In my opinion, this is a valid provision and, if the Trial Justice you refer to was appointed in the manner so described in the section above indicated, he has jurisdiction to issue and try warrants, both civil and criminal, in the County of Mathews.

Your third inquiry is whether or not such Trial Justice can receive claims for collection and issue warrants and try the same.

It is my opinion that the Trial Justice is not authorized to receive claims for collection in the capacity of attorney or collecting agent for the judgment creditor. Certainly, he cannot try any claim where he represents one of the litigants, as he would then occupy the position of a practitioner of the law before himself as the court. He may, however, issue warrants or claims when requested by the creditor, and may try the same, if he is not representing the creditor.

Yours very truly,

ABRAM P. STAPLES,
*Attorney General.***JUSTICES OF THE PEACE—Limitation on jurisdiction as to warrants.**

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 25, 1935.*MR. M. B. COMPTON,
Trial Justice of Scott County,
Gate City, Virginia.

DEAR MR. COMPTON :

I have your letter of February 22.

Section 4988g of the Code provides that :

"Nothing contained herein shall be construed to prevent justices of the peace and mayors, within such territory, from issuing any such attachments, warrants and subpoenas which they are given the right to issue by general law * *."

The general law prescribing the jurisdiction of justices of the peace may be found in section 6015 of the Code, in which the jurisdiction of justices is limited to \$300 in civil matters.

The right of a justice of the peace to issue warrants is limited by the new trial justice act to the right he had under general law to issue these warrants. I am of opinion that a justice of the peace does not now have authority to issue a warrant in cases where more than \$300 is involved. This view is strengthened by section 3103 of the Code, wherein a justice of the peace of a city is expressly given authority to issue warrants in cases coming within the jurisdiction of the civil and police justices of a city, as prescribed by section 3102 of the Code, the jurisdiction of such civil and police justices in civil cases being increased to \$1000. If the Legislature thought it necessary to expressly give justices of the peace of a city authority to issue warrants in cases of more than \$300, it would appear that such justice did not have this authority but for the specific provisions of law.

As to whether a judgment rendered by a trial justice on a warrant issued by a justice of the peace for more than \$300 would be void, I do not think any uniform rule can be given. A judgment by default, where the defendant does not appear, would probably be held void. On the other hand, if the defendant appears and raises no objection to the warrant, but goes to trial on the merits, the court would probably hold that the defendant thereby waives any defect in the warrant.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

LAND OFFICE—Authority of Secretary of Commonwealth to permit removal of ancient records.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *November 14, 1934.*

HON. PETER SAUNDERS,

*Secretary of the Commonwealth,
Richmond, Virginia.*

DEAR MR. SAUNDERS:

In your letter of November 8, 1934, you inquire as to the authority of the Secretary of the Commonwealth with reference to permitting the removal of ancient records in his custody for the purpose of having photostat copies thereof made.

Under the provisions of chapter 230 of the Acts of 1928 (Acts 1928, page 736) every official custodian of any public records in the State is required to deliver to the State Library Board any and all official books, records, documents, original papers and maps of a date prior to and including the year 1800 that he may have in his custody or possession, or under his control. It is further provided, however, that such records shall be so delivered upon the application of the State Librarian, made to the court, under the jurisdiction of which such records are kept, or the judge thereof in vacation, and that pursuant to such application said judge, or court, shall enter an order of record specifying the particular records which shall be delivered. Upon receipt of such records by the State Librarian he is required to make one negative and one positive photostat copy, and when such copies have been made he shall retain the negative copy in the archives department of the State and the positive copy shall be bound and returned to the official having custody of the original records.

It is my opinion that the custodian of these ancient records does not have any authority to allow photostat copies to be made, except in accordance with the provisions of the act above referred to.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

LEGISLATION—Duration of session time limit for approval of bill by Governor.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., March 5, 1935.

HONORABLE EDGAR B. ENGLISH,

*Member of the House of Delegates,
Richmond, Virginia.*

DEAR MR. ENGLISH:

This is in reply to your letter of March 1, 1935, in which you request the opinion of this office upon three questions therein set out.

The first question is as to the duration of a legislative session.

This is controlled by section 46 of the State Constitution, which provides that no session shall continue longer than sixty days, except with the concurrence of three-fifths of the members elected to each house. In the event of concurrence, the session may be extended for a period not exceeding thirty days. Members are not allowed to draw a salary for more than sixty days at any regular session, nor for more than thirty days at any extra session.

Your second question relates to the time within which the Governor may veto or sign a bill which has been passed by the houses of the General Assembly, and as provided for by section 76 of the State Constitution.

Under the provisions of this section, while the Legislature is in session, the Governor, if he desires to veto a bill, must do so within five days (Sunday excepted) after it shall have been presented to him, and, unless he does return the same to the General Assembly within said time, the bill becomes a law as if he had signed it. However, if before the expiration of the said five days, the General Assembly finally adjourns and prevents such return, then, in order for a bill which has been passed to become a law, it must be actually approved by the Governor within ten days after such adjournment. If, however, the Governor fails to approve the bill, it does not become effective, and this is what is usually known as a "pocket veto." The Governor neither vetoes the bill, nor does he approve it, but the effect is the same as though he had vetoed it.

With reference to your third question, section 18 of the State Constitution provides that every person, as a prerequisite to the right to vote, shall pay his State poll taxes as required by section 173 of the Constitution, in which the State poll tax is fixed at the sum of \$1.50. The elimination of the requirement of the payment of this tax as a prerequisite to vote, as provided in section 18, would not, of course, operate to abolish the poll tax itself. The two provisions are clearly separable. As stated in your letter, however, it is impossible in Virginia to abolish the payment of the poll tax as a prerequisite to vote without repealing or amending section 18 of the Constitution.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***LIBRARY BOARD—Authority in exchange of publications.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., June 17, 1935.

MR. WILMER L. HALL, *State Librarian,
Richmond, Virginia.*

DEAR MR. HALL:

I have your letter of June 14, in which you set out the following facts:

"Both lack of space in our building and lack of use for the documents themselves impel us to consider limiting our holdings of the publications of

other States received on exchange. Moreover, the receipts of such documents from most States are unsatisfactory. There is here no demand for documents of any State west of the Mississippi river except California and the use of most documents of many other States is slight. In such rare cases of need as might arise, the request might be satisfied by loan from the Library of Congress."

You state that two courses present themselves to you, one of which is:

"Limit our receipts from each State to what we actually need and can obtain, sending in exchange only an equivalent of Virginia publications; and returning, exchanging with other libraries, or otherwise disposing of the documents on hand which are not wanted. What is your opinion as to the legitimacy of this course?"

I am of opinion that section 352 of the Code is broad enough for the library board to limit the exchanges to be made with other States "as it sees fit." However, once the publications have been received, the statute does not seem to authorize the board to dispose of them except by "placing all exchanges received in the State library, except statutes and law books received, which shall be placed in the law library."

The second course you suggest is:

"Allow the exchange arrangements to remain as at present, transferring the documents which we do not want and for which we have no room (both those on hand and those received in the future) to the library of the University of Virginia, which wants them and has the room to house them. For a number of reasons, this would be the more satisfactory course. Have we the right, in your opinion, to do this?"

I do not think that section 352 authorizes the board to adopt this course, although I feel sure that the General Assembly would be glad to amend the section to enable the board to follow this procedure.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

LICENSES—Insurance agents, brokers and solicitors not subject to local licenses.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., January 21, 1935.

MR. W. W. WHARTON, *Police Justice,*

Harrisonburg, Virginia.

MY DEAR MR. WHARTON:

I have your letter of January 19, enclosing copy of an ordinance of the city of Harrisonburg, relating to agents, brokers and solicitors. The pertinent portion of the ordinance reads as follows:

"Upon all persons, firms or corporations maintaining an office in the City of Harrisonburg, Virginia, for the transaction of the business in which they are occupied, and who, for compensation, solicit or offer for sale or act as agent or solicitor in making such sales, or act as such agent or solicitor in any business not otherwise herein classified and licensed, shall pay a license tax of \$20.00 for the privilege of conducting such business or as acting as such agent or solicitor in the City of Harrisonburg."

You inquire whether or not the local license imposed by this ordinance is applicable to insurance agents or agencies.

I quote below the last paragraph of section 239 of the Tax Code of Virginia:

"The license tax on gross premiums as provided in the preceding sections and the tax on real estate and tangible personal property herein provided to be paid by every person, partnership, company or corporation doing such an insurance business in this State, shall be in lieu of all other license fees, taxes or levies whatsoever for State, county, municipal or local purposes, which as to licenses shall be construed to include their agents, except that the certificate fee of one dollar required to be paid by all such agents to the Bureau of Insurance and Banking shall be paid by them as heretofore."

This paragraph may be found in the Acts of 1915, page 106. However, it was made a part of the Tax Code in the revision of the general tax laws of 1928, and was re-enacted by the General Assembly of 1928.

The quoted paragraph specifically provides that the taxes imposed upon insurance companies by chapter 17 of the Tax Code shall be in lieu of all other license fees or levies whatsoever for State, county, municipal or local purposes, which as to licenses shall be construed to include their agents.

This language seems to be perfectly plain and I am of opinion that, unless the charter of the city of Harrisonburg has been amended subsequent to 1928 so as to give to the city power which is denied by section 239, the ordinance to which you refer is not applicable to insurance companies or their agents.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

LICENSES—Local license on motor vehicle restricted to one city or town.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 15, 1935.

HONORABLE VIVIAN L. PAGE,

*Member of the House of Delegates,
Norfolk, Virginia.*

DEAR MR. PAGE:

Referring to the question raised in our conversation yesterday as to the right of more than one city or town to impose a local license tax upon a motor vehicle, such license tax seems to be prohibited by the provisions of sub-section J, of section 35 of the Motor Vehicle Code, which appears at page 640 of the Acts of 1932.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

LITERARY FUND—Bonds and notes not transferable.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., March 15, 1935.

DR. SIDNEY B. HALL,

*Superintendent of Public Instruction,
Richmond, Virginia.*

DEAR DOCTOR HALL:

I have your letter of March 11, in which you request that this office give you an opinion upon three questions, the first of which is as follows:

Does the State Board of Education have authority to sell and transfer bonds which evidence loans made out of the literary fund to the local school boards of the State?

The statutes of Virginia with reference to loans from the literary fund confer power upon the Board of Education to resort to remedies for the collection of the loans made to local school boards which are essentially different from the remedies given to the holder of an ordinary county or district school bond. If these bonds may be lawfully transferred, it would seem to follow that the transfer of the bonds would transfer to the new holder thereof these same remedies.

While the statute does authorize the State Board of Education to invest and re-invest its funds, there is no express provision authorizing the sale or transfer of the securities evidencing loans made out of the literary fund to local school boards. In the absence of express authority, I am of the opinion that it would be contrary to the general intent and purpose of the statute to give the remedies which the law provides for the collection of these loans to private individuals.

Furthermore, the statutes deny to the local school boards authority to borrow money by bond or note issues, unless the same have been approved by a majority vote in a referendum election. To permit the State Board of Education to make a loan from the literary fund, and then in turn sell this loan to a bank or other investor, would be an obvious evasion of this referendum requirement. The law does not require a referendum in the case of a loan from the literary fund, doubtless because the collection or enforcement of the loan rests with a department of the State Government and remains under State control.

In view of the answer to your first question, it follows that the other two questions are not pertinent.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

LUNACY COMMISSION—Payment for services rendered by physician.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., August 23, 1934.

HONORABLE ARTHUR W. JAMES,

Commissioner of Public Welfare,

State Office Building,

Richmond, Virginia

DEAR MR. JAMES:

I have your letter of August 20, in which you request my opinion on the question whether or not the costs of services rendered by a physician serving on a lunacy commission should be paid by the county or city of which the person under observation was a legal resident at the time of commitment, although the lunacy commission is held outside of that county or city and the members of the commission are not residents of such county or city.

I understand that this question arises from the fact that Dr. R. Finley Gayle, Jr., of Richmond, was unable to secure from the board of supervisors of Wise county the amount due him for serving on a lunacy commission. This commission was held in Richmond on July 5, 1933. A person by the name of Sophie Noonkester was the subject of investigation. It seems that she was at that time an inmate of the State Industrial Farm for Women, having been committed to that institution from Wise county. The lunacy commission adjudged her insane and she was thereafter sent to the Feeble-minded Colony. Some time after that Dr. Gayle made demands on the board of supervisors of Wise county for the payment of his bill for services rendered, and received the following reply from the clerk of that board:

"The board of supervisors of our county before whom such claims are adjusted have refused to pay any claims of this kind unless party was committed by a Wise county physician."

Section 1021 of the Code states in part:

"The two physicians shall receive a fee of five dollars each for their services. * * * All expenses incurred, whether such person be committed to any State hospital, or colony, or not, including the fees, attendance and mileage aforesaid, *shall be paid by the county or city of which such person was a legal resident at the time of such commitment*: provided, that if such person's residence is not established in the State of Virginia, costs shall be paid by the State." (Italics ours).

I am of the opinion that the costs of this lunacy commission should be borne by Wise county, because the person under observation was apparently a legal resident of that county when she was committed to the State Industrial Farm for Women. She did not acquire a legal residence in Richmond nor in the county where such Industrial Farm is located.

A consideration of section 1021, together with sections 2800 and 2802 of the Code, leads to the conclusion that the general purpose of these statutes is to place the costs and expenses in such cases upon the county or city wherein the person under surveillance has residence or legal settlement, and not upon the locality in which such person is sojourning at the time the lunacy commission is held.

The fact that the two physicians and the justice of the peace who compose the lunacy commission are not residents of the county or city in which the person has a legal residence does not relieve such a county or city from paying the costs in such cases.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

LUNACY PROCEEDINGS—Jurisdiction—Substitute trial justice.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., March 11, 1935.

DR. J. S. DEJARNETTE, *Superintendent,*
Western State Hospital,
Staunton, Virginia.

DEAR DOCTOR DEJARNETTE:

Referring to your letter of February 23, inquiring as to the authority of the assistant judge of the Municipal Court in the city of Lynchburg to institute and conduct lunacy proceedings, I wish to advise that my delay in replying to your letter has been due to the fact that I have been corresponding with Mr. T. G. Hobbs, City Attorney of Lynchburg, with reference to the provisions of the city charter on the subject.

It appears that in the last general reenactment of the Lynchburg charter, found in Acts of 1928, page 899, et seq., on page 900, beginning with chapter 5, it deals with the court. Section 25 provides for the election of an officer who shall be called the judge of the municipal court.

Section 26 provides in part as follows:

"The judge of the municipal court shall have all the powers and duties the justice of the peace has in both civil and criminal matters, (and such other powers as may be conferred upon him by law) and in addition to such powers and duties, it shall be his duty etc."

Section 33, found on page 907 of the said Acts, provides:

"In case of the absence from the city or inability to act on the part of either the judge of the municipal court or the judge of the municipal civil court, the council may designate some person to act in the place of said judges, who, when acting, shall possess the same powers and discharge the same duties of such judges, and at all times shall have the same power to issue warrants and admit to bail."

Mr. Henry B. Glass was designated by the city council to act as assistant judge under the provisions of section 23, above quoted, and has been so acting since the enactment of the charter in 1928. I am informed by Mr. Hobbs that during all of that time he has instituted and conducted lunacy proceedings.

Section 1017 of the Code, which provides for the institution and conduct of lunacy proceedings, provides that a justice of the peace, in a proper case, shall *issue a warrant* ordering persons suspected of mental incapacity *to be brought before him*, and that he shall summon two licensed and reputable physicians who, together with the justice of the peace, shall constitute a commission to inquire whether such person be insane, and so forth.

It will be noted that the justice is not empowered to issue a warrant returnable before any other justice, but same must be returnable before the justice actually issuing the warrant. Furthermore, the justice issuing the warrant is designated as a member of the lunacy commission. The last part of section 33 of your charter provides that the assistant judge "at all times shall have the same power *to issue warrants* as the judge of the municipal court or the judge of the municipal civil court."

If this language last quoted be construed to embrace the power *to issue a warrant* under section 1017 of the Code, it would seem to follow necessarily therefrom that the power to issue such a warrant at all times would include the power to summon the two physicians, and to sit as a member of the commission at all times, regardless of the presence or ability to act of the judge of the municipal court.

It appears that for seven years the provisions of the charter of the city of Lynchburg have been construed as authorizing the assistant judge of the municipal court to issue warrants in lunacy proceedings, and to sit as a member of the commission conducting such proceedings.

It is my opinion, therefore, since this language has been construed in this manner for seven years without any objection, and without any amendment to the charter by the General Assembly, that this construction should be adhered to.

I am further of the opinion that the assistant judge of the municipal court of the city of Lynchburg is authorized to institute and conduct lunacy proceedings.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

MAYORS—Jurisdiction to try cases.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 5, 1934.

HONORABLE J. A. MUSGROVE, *Mayor*,

Town of Phenix,
Virginia.

DEAR MR. MUSGROVE:

Your letter addressed to Honorable John R. Saunders has been received at this office. I regret to advise you of the death of Colonel Saunders several months ago.

You ask the opinion of this office as to whether or not in the future you, as mayor, have any jurisdiction to try cases. Under chapter 294 of the Acts of the General Assembly, 1934, known as the Trial Justice Act, the trial justice is vested with exclusive jurisdiction in all civil cases. The trial justice also has the same

jurisdiction of all criminal cases as police justices of cities except, however, as provided in the seventh clause of section 4988-g of said act relating to trials in cities and incorporated towns. In such cities and towns a majority of the members of the council may adopt a resolution to continue in the mayor, or other trial officer thereof, all the jurisdiction now vested in such mayor or other trial officer pertaining to the issuance of warrants and the summoning of witnesses and the trial of cases involving violations of city and town ordinances. You will observe, therefore, that the jurisdiction of the mayor is dependent, first, upon the adoption of a resolution to that effect by a majority of the members of the council, and, second, after such resolution is adopted, he is permitted to try only cases involving the violation of city and town ordinances.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

MAYORS—No jurisdiction to try statutory offenses.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 29, 1935.*

HONORABLE JOHN B. OLIVER,
*Acting Town Attorney,
Bedford, Virginia.*

DEAR MR. OLIVER:

This is in reply to your letter of January 28, requesting the opinion of this office upon the question whether or not the mayor may legally hold preliminary hearings in cases where the accused is charged with the commission of a felony within the town of Bedford.

While you do not so state in your letter, I assume that there has been appointed a trial justice for Bedford County and the town of Bedford pursuant to the recent Trial Justice Act (Acts of 1934, page 466, etc.). Section 4988-g—Third—of that Act provides as follows:

“In criminal cases the jurisdiction of such trial justice within the limits of the territory for which he is appointed shall be the same as that which is now or may hereafter be vested by general law in the police justices of cities. The said trial justice shall have jurisdiction of all misdemeanors arising under all laws of the Commonwealth and under all laws and ordinances of the county, city and town for which he is appointed. There shall be an appeal of right to the circuit court as provided for by the general law with reference to appeals.”

I also call your attention to the provisions of the Seventh clause of the above section, which provides that the mayor or other trial officer shall retain jurisdiction covering the issuance of warrants and the summoning of witnesses and the trial of cases involving violations of city and town ordinances, if the council of the town, by a resolution, has continued such authority in the mayor or other trial officer. This provision, however, is confined to violations of town ordinances.

It is my opinion that, under the above quoted provisions of the Third clause of section 4988-g, the trial justice has exclusive jurisdiction in all cases involving violations of State laws and, therefore, exclusive jurisdiction to conduct preliminary hearings of persons accused of the commission of a felony.

Cordially yours,

ABRAM P. STAPLES,

Attorney General.

MAYORS—No authority to impose fines on foreign diplomats.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL.

RICHMOND, VA., *April 17, 1935.*

HONORABLE GEORGE C. PEERY,
*Governor of Virginia,
Richmond, Virginia.*

DEAR GOVERNOR PEERY:

I have your letter of April 15, with enclosures, in which you request the opinion of this office upon the jurisdiction, authority and power of the mayor of the town of Madison, Virginia, to impose a fine of \$9.75 upon Baron Antoine Beyens, Second Secretary of the Belgium Embassy. It appears that the fine was imposed for violation of the traffic ordinances of the town of Madison.

You enclose with your letter a communication from Honorable Cordell Hull, Secretary of State, asking that the legal status of the matter be called to the attention of the mayor of Madison to the end that the fine may be refunded to Baron Beyens. The Secretary of State calls attention to the provisions of section 251-255, inclusive, of Title 22 of the United States Code.

Section 252 of the Code provides that any writ or process instituted by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, shall be deemed void.

In the case of *Ex parte Cabrera*, decided by the Circuit Court of the United States, in the State of Pennsylvania, Federal Cases No. 2278, it was held that the secretary of a legation is entitled to the protection of the laws of nations against any civil or criminal prosecution. It seems that Baron Beyens occupies the position of Second Secretary of the Belgium Embassy, and is so registered in diplomatic list filed with the Department of State.

Sections 253 of the United States Code subjects every person concerned in executing any writ or process in violation of section 252, above referred to, to the punishment of imprisonment for not more than three years, and a fine at the discretion of the court.

It does not appear from the enclosures with your letter whether any action was taken against Baron Beyens which would constitute a violation of section 253.

In view of the provisions of the Federal statutes above quoted, and the construction which has been placed thereon by courts, it is my opinion that the Second Secretary of the Embassy, Baron Beyens, is protected by the law of the nation, and said statutes, from arrest or prosecution under criminal process by the town of Madison; that the process issued for violation of the ordinance of the town of Madison is void under the provisions of section 252 of the United States Code, and that the judgment imposing a fine upon said Baron Beyens, having been rendered upon a void process, is likewise void. It is my opinion that the town of Madison, Virginia, should refund the fine which has been collected as above set forth.

As requested, I am returning herewith the enclosures which you sent with your letter.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

MEDICAL COLLEGE OF VIRGINIA—Liability of State for debts incurred by—

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *July 25, 1934.*

HONORABLE GEORGE C. PEERY,
Governor of Virginia,
Richmond, Virginia.

DEAR GOVERNOR PEERY :

This is in reply to your letter of July 24, with which you enclosed a copy of a letter from Doctor Sanger, President of the Medical College of Virginia, to you, also copies of certain deeds conveying property to the Medical College of Virginia, in which deeds it is provided that the Medical College of Virginia assumes certain debts secured by deeds of trust or mortgages on said property. In your letter, you request an opinion from this office upon the question whether or not the State of Virginia is liable for two debts incurred by the Medical College of Virginia in the year 1913, one of which is in the sum of \$110,000, secured by a deed of trust upon the University College of Medicine, and the other which is in the sum of \$78,000, secured by a deed of trust upon the property of the Memorial Hospital which is owned by the Medical College of Virginia. It seems that these mortgages were given to secure debts owed by the Memorial Hospital and the University College of Medicine at the time these properties were acquired by the Medical College of Virginia in 1913.

In the year 1913, section 184 of the Constitution provided as follows:

“No debt shall be contracted by the State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war. No scrip, certificate, or other evidence of State indebtedness, shall be issued except for the transfer or redemption of stock previously issued, or for such debts as are expressly authorized in this Constitution.”

It is clear from the foregoing provision that even the General Assembly of Virginia did not have authority to contract any indebtedness on behalf of the State for the purpose of acquiring property for one of the State institutions, nor is there any indication that the General Assembly in any way undertook to obligate the State in connection with the transactions under which these debts of the college arose. The obligations themselves do not purport to be obligations of the State, but are obligations of the Medical College of Virginia, which is a corporation created by special act of the General Assembly. The mere fact that this corporation is a State controlled institution, in view of the foregoing provisions of the Constitution, would not render the State liable upon the obligation.

It is the opinion of this office, therefore, that the State of Virginia is not bound, or in any way obligated to pay the above mentioned debts of the Medical College of Virginia.

I am returning you herewith the enclosures which were sent me from your office.

Sincerely yours,

ABRAM P. STAPLES.

Attorney General.

MEMORIAL HOSPITAL—State Institution.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 11, 1935.*

HONORABLE CHARLES S. SMITH, JR.,
Saluda, Virginia.

DEAR MR. SMITH:

Replying to your letter of March 2, I take pleasure in giving you the following information with reference to the facts bearing upon the question of whether or not the Memorial Hospital is a State institution exempt from suit at the hands of your client.

The Medical College of Virginia was incorporated by the Acts of the General Assembly, 1853-54, page 26. This charter has been amended by the following Acts:

Acts of Assembly, 1878-79, page 34.
Acts of Assembly, 1897-98, page 215.
Acts of Assembly, 1902-3-4, chapter 73.
Acts of Assembly, 1916, page 857.

By the last amendment, the college was authorized to maintain and conduct hospitals, infirmaries and dispensaries, and, by section 2 of the Act, was vested with title to all property at that time belonging to the Medical College of Virginia, including that known as the Memorial Hospital.

The Memorial Hospital was incorporated on March 10, 1904, and dissolved on November 22, 1913; its property in the meantime having been conveyed to the Medical College of Virginia.

The Supreme Court of Appeals, in the case of *Lewis, and others v. Whittle, and others*, 77 Va. 415, held that the Medical College of Virginia is in every sense a public corporation.

In the Acts of 1916, page 857, the General Assembly validated, ratified and approved the amalgamation between the University College of Medicine and the Medical College of Virginia.

I call your attention to the following cases bearing upon this subject:

Sayre v. Northwestern Turnpike Road, 10 Leigh 474, 476.
Maia v. Eastern State Hospital, 97 Va. 507.
Phillips v. University, 97 Va. 472.

If there is any further information I can provide you, I will be glad to do so upon request.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICERS—Compatibility of—Trial Justice cannot serve as a member of Regional Advisory Council—Soil Erosion Service.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 25, 1934.*

HONORABLE J. R. HORSLEY,
Appomattox, Virginia.

DEAR JUDGE HORSLEY:

This is in reply to your letter of July 24, in which you request an opinion from this office upon the question of whether there is any incompatibility in your holding the office of trial justice and also accepting the appointment of the Secretary of the Interior as a member of the Regional Advisory Council in the Soil Erosion Service.

Sections 289 and 290 of the Code, read together, disqualify every person from holding any office of honor, profit, or trust, under the Constitution of Virginia, who holds any office or post of profit, trust or emolument 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.

I regret to have to advise you that it is the opinion of this office that the position to which you have been offered an appointment would come under the definition of the office of trust or emolument within the meaning of section 290 of the Code, and the effect of accepting any such appointment would be to immediately vacate your position as trial justice.

I call your attention to the fact further that the opinion of this office is not in any way conclusive and, even should I be of a different opinion than above stated, if you should act on same and the matter were to be tested in court, if the court took a different view, the opinion of this office would not in any way protect you from the loss of your present office.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICERS—Member of county electoral board serving as member of school trustee electoral board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 25, 1934.

HONORABLE W. D. COX, *Division Superintendent,*
Amherst County Public Schools,
Amherst, Virginia.

DEAR MR. COX:

This is in reply to your letter of July 23, requesting the opinion of this office upon the question, whether a member of a county electoral board is qualified to serve as a member of the school trustee electoral board.

Section 653 of the Code provides that the school trustee electoral board shall be composed of three resident qualified voters, *who are not county or State officers.*

It is the opinion of this office that a member of the county electoral board is a county or State officer and, for that reason, is disqualified from serving as a member of the school trustee electoral board.

With best wishes, I am,

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

OFFICERS—Mileage allowance carrying prisoners to and from jail.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 8, 1935.

HONORABLE E. R. COMBS, *Comptroller,*
Richmond, Virginia.

DEAR MR. COMBS:

I am in receipt of your letter of June 4, which reads as follows:

"The circuit court of Wise county has allowed officers of that county 8c per mile for themselves and 8c per mile for each prisoner in carrying

them to jail after being taken before a Justice of the Peace and are unable to give bond. They are also allowed the same mileage in carrying prisoners from the jail to the place at which the Trial Justice sits, and, if convicted, back to the jail.

"We know of no provision in law for the payment of mileage except to jail after a preliminary hearing and will thank you to advise whether or not, in your opinion, these items should be paid out of the State treasury."

Section 3508 of the Code of Virginia fixes the compensation and mileage of officers serving warrants of arrest and carrying prisoners before justices of the peace, to jail, and from jail before trial justices.

The provision of the section covering the allowance for services mentioned limits mileage to an officer "For carrying a prisoner to jail under the order of a justice, for each mile traveled of himself in going and returning, eight cents; for each mile traveled of the prisoner in carrying him to jail, where the distance is over ten miles, eight cents."

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

OFFICERS—Motor vehicle officers to arrest for violations of city and town ordinances.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *June 26, 1935.*

HONORABLE R. W. WILLIAMS,

Trial Justice of Wythe County,

Wytheville, Virginia.

DEAR MR. WILLIAMS:

I have your letter of June 24, requesting the opinion of this office upon the question of the authority of police officers of the Division of Motor Vehicles to make arrests for violations of city and town ordinances.

Section 6 of the Motor Vehicle Code (Acts 1932, pp. 617-8) provides as follows:

"The directors, his several assistants, and police officers appointed by him are hereby vested with the powers of a sheriff for the purpose of enforcing all the criminal laws of this State, and it shall be the duty of such director, his several assistants and police officers appointed by him to use their best efforts to enforce the same; * * *"

The officers above referred to are special officers and derive their powers solely from the statute. The language quoted confines their activities and powers to "the purpose of enforcing all the criminal laws of this State." It is my opinion that city and town ordinances are local laws and are not "laws of this State," within the meaning of the statute, and, therefore, that the police officers of the Division of Motor Vehicles are not empowered to make arrests for violations of such ordinances.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

OVERSEER OF THE POOR—Special act abolishing office constitutional.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., January 3, 1935.

HONORABLE ARTHUR W. JAMES,
Commissioner of Public Welfare,
State Office Building,
Richmond, Virginia.

DEAR MR. JAMES:

This is to acknowledge receipt of your letter of January 2, enclosing a copy of a letter from Honorable John R. Saunders, then Attorney General, under date of November 26, 1926, to Honorable Frank Bane, then Commissioner of Public Welfare, in reference to the Overseers of the Poor; a memorandum, under date of December 26, 1934, from Mr. James W. Phillips, Director, Bureau of Organization and Supervision, Department of Public Welfare, to you in reference to chapter 188 of the Acts of 1934, page 274, and a copy of a letter to you, under date of December 14, 1934, from Honorable J. Hunton Wood, an Overseer of the Poor of Rappahannock county, Virginia, the entire file in this case concerning the constitutionality of chapter 188 of the Acts of 1934, page 274, being a special Act abolishing the offices of Overseers of the Poor in the county of Rappahannock and transferring the duties thereof to the Board of Supervisors of such county.

I note from Mr. Wood's letter that he questions the constitutionality of the special Act abolishing the offices of Overseers of the Poor in the county of Rappahannock as violating Article IV, section 63, fourteenth paragraph, and Article IV, section 64, both of the Constitution of Virginia.

Section 63, fourteenth paragraph, of the Constitution prohibits the passage of a special law increasing or decreasing the compensation of public officers during their terms of office. It has no reference to the abolition of an office.

Section 64 of the Constitution prohibits the amendment of a general law which has the effect of the enactment of a special, private or local law. This section further provides that, in all cases enumerated in section 63 and in every other case which, *in its judgment*, may be provided for by general laws, the General Assembly shall enact general laws.

Chapter 188 of the Acts of 1934 does not violate either of the provisions of section 64 herein referred to. That chapter is not a repeal or an amendment of a general law, and the object of that chapter, namely, the abolishing of the offices of Overseers of the Poor in the county of Rappahannock, could not have been effectuated by the passage of a general law. In my opinion, the Act is constitutional and, on and after its effective date, the offices of Overseers of the Poor in the county of Rappahannock were abolished.

In *Sinclair v. Young*, 100 Va. 284, 290-291, the court held:

“When an officer is created by statute it is wholly within the control of the Legislature.

“The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away without abolishing the office.” * * *

The case of *Sinclair v. Young*, *supra*, was one in which the General Assembly of Virginia (Acts 1899-1900, page 843) had expressly provided that the terms of office of members of existing electoral boards should terminate on April 1, 1900, or upon the qualification of the members of the electoral boards elected at that session of the General Assembly, and this holding covers the authority of the Legislature to abolish an office.

In *Johnson v. Black*, 103 Va. 477, 489, Judge Harrison says:

“* * Services rendered by public officers do not partake of the nature of contracts and have no affinity thereto. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. * * *

In *Wayt v. Glasgow*, 106 Va. 110, 113, Judge Cardwell, citing the case of *Sinclair v. Young*, 100 Va. 284, says:

"It is settled in this state that an office created by statute is within the control of the Legislature; that the term, mode of appointment, etc., may be altered by the Legislature at pleasure, there being no constitutional limitation on that power. * *"

In the case of *Wayt v. Glasgow*, *supra*, the court upheld an Act of the Legislature taking away from the council of the city of Staunton the power of filling the office of police justice and making such officer elective by the qualified voters of such city.

The Constitution of Virginia does not provide for the election or appointment of Overseers of the Poor. Such an office is a legislative creation and, as such, may be abolished by the power which created it.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

OYSTERS—Tax—Payment of

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 27, 1934.

HON. GEORGE L. DOUGHTY,
Accomac, Virginia.

MY DEAR MR. DOUGHTY:

I am in receipt of your letter of November 23, and agree with you that the Act to which you refer (Acts 1934, page 848) is not as clear as it might have been.

However, as you state, it was unquestionably the intention of the Legislature to tax all oysters taken from the public oyster rocks, beds and shoals of this State or from any oyster grounds leased by the Commonwealth. This is stated in the Act in terms. In some statutes there is doubt as to the levy of a tax and the courts have said that where there is such a doubt, it must be resolved in favor of the taxpayer, but in the statute under review I fail to see how it can be said that any doubt exists as to the levy of the tax.

The Act further provides in section 1 that:

"A strict account of all oysters taken from the waters of the Commonwealth beds and shoals of this State, and from any oyster ground leased by the Commonwealth, by other than by boats, shall be kept by the purchasers and packers and the tax on same shall be paid, by such purchasers and packers, as herein provided, between the first and tenth of each month, immediately following that in which the purchases were made."

You will observe that it is provided that the account shall be kept by the purchasers *and packers* of all oysters *taken*, and that it is further provided that the tax shall be paid by the purchasers *and packers*. It is true, as you say, that the time of payment of the tax is fixed between the first and the tenth of each month immediately following that in which *such purchases* were made, no explicit statement being made as to the time of payment of the tax where the oysters are *taken*.

Here we have a case of the clear imposition of the tax, a provision that the records shall be kept by the *packers* and that the tax shall be paid by the *packers*. With these definite statutory provisions, I do not see how we can escape the conclusion that the tax must be paid by the packers, and that, as to the time of payment of the tax, they should be placed on the same basis as the purchasers and the tax

paid between the first and tenth of each month immediately following that in which the oysters were taken; in other words, that the last line of the quoted provision of the statute should be construed as if it read "following that in which such purchases were made or such oysters were taken."

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

PATENTS—Manufacture of patented articles.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 4, 1934.

MAJOR R. M. YOEUELL, *Superintendent,*
The State Penitentiary,
Richmond, Virginia.

MY DEAR MAJOR YOEUELL:

I have your letter of September 29, in which you say:

"In the third paragraph of my letter to you under date of September 26, 1934, I asked the question, 'is it necessary for an article that is patented to have the information on it?' As you know, most articles have the information marked on the article such as, 'Patented (date) etc.' Would we have to investigate every article that is used and find out for a matter of fact whether or not it is patented, if the information is not on the article?"

An Act of Congress relating to patents provides as follows:

"It shall be the duty of all patentees and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word 'patent', together with the number of the patent, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is enclosed, a label containing the like notice; *Provided, however,* That with respect to any patent issued prior to April 1, 1927, it shall be sufficient to give such notice in the form following, viz: 'Patented', together with the day and year the patent was granted; and in any suit for infringement by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement and continued, after such notice, to make, use, or vend the article so patented." (Section 49 of U.S.C.A. 44 Stat. 1058.)

You will observe from this section that it is necessary that a patented article should be so designated, or, when this cannot be done, the package wherein the article is contained should designate the article as patented.

For your information, however, I will state that it has been held that, even where an article is not marked in accordance with the statute, damages may be recovered from the time *actual notice* that the article is patented is given to the manufacturer.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

PENITENTIARY—Payment for articles purchased from Industrial Department.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 6, 1935.

MR. R. B. CURTIS, *Sheriff,*
Denbigh, Virginia,

DEAR MR. CURTIS:

A short time ago you forwarded to me a bill which you had received from The Penitentiary Industrial Department, Richmond, Virginia, with a request contained thereon that I explain why this bill was sent to you for payment.

By reference to section 4956 of the Code, you will see that a court may, when there is a prisoner in its jail who is unable to provide himself with sufficient clothing, or with necessary medicines, direct the jailor to provide him clothing, and allow therefor, not exceeding \$10.00 in one year for each prisoner.

I assume that you purchased the clothing, for which you were billed, from The Industrial Department of the Penitentiary. If so, you should pay for the clothing and then make out your account, showing separately the items for each prisoner; have the court which ordered the clothing for each prisoner allow the account just as any of your other accounts are allowed, and the same will be paid by the State treasurer upon being audited by the Comptroller.

Your account with the penitentiary should be handled in exactly the same way it would have been handled had you made your purchases from a merchant in your town. There is no provision of law by which a sheriff may make requisition on the penitentiary and receive merchandise free of cost.

I am returning the bill which the penitentiary furnished you, and trust that the explanation I have given will be satisfactory.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

PENSIONS—To continue after admission to Home for Confederate Women.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., April 18, 1935.

HON. E. R. COMBS, *Comptroller,*
Richmond, Virginia.

Attention Mr. S. C. Day, Jr.:

DEAR MR. COMBS:

Replying to your letter of March 28, in which you inquire whether or not a widow of a Confederate soldier, who is on the pension roll of the State, should continue to receive payment of her pension after being admitted to the Home for Needy Confederate Women, I beg to advise that, since there is no provision contained in the statutes which deprives a widow of her right to receive such pension, it is my opinion that she is still entitled to receive payment of same.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

PORT AUTHORITY—Payment of Federal tax on annual membership dues to Traffic Club of New York.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 27, 1935.

HONORABLE J. H. BRADFORD, *Director,*
Division of the Budget,
Richmond, Virginia.

MY DEAR MR. BRADFORD:

I have your letter of May 25, inquiring whether there is any legal reason why the State Port Authority should not pay the Federal tax imposed on club dues on account of the membership in the Traffic Club of New York of two representatives of the State Port Authority.

I observe from the letter of George C. Lucas, Chairman of the Finance Committee of the Club, under date of May 18, to Mr. P. T. Payne, Foreign Freight Representative of the State Port Authority, that the Club, in view of the decision of the Federal court in a case concerning the Chicago Traffic Club, has acquiesced in the ruling of the Treasury Department that it is a social club. I further observe that the memberships in the Club are in the names of private individuals.

Without going into an elaborate legal discussion of the principles involved, in view of the accepted classification of the Club as a social club, I am of opinion that payment of the tax by representatives of the State Port Authority is in order. I presume that the memberships of the individuals in this Club are pursuant to an arrangement between the State Port Authority and its representatives.

I return the correspondence attached to your letter.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PURCHASE AND PRINTING—Furnishing of dockets to Trial Justices.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 20, 1934.

HONORABLE DAVIS BOTTOM, *Assistant in Charge,*
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. BOTTOM:

This is in reply to your letter of July 16, requesting the opinion of this office upon the question whether, under the provisions of section 4988-J of the Acts of the General Assembly of 1934, your Division should furnish trial justices with one docket each at the beginning of their respective terms, and, after said docket has been completely used up and a new docket is necessary, your Division should also furnish such new and additional dockets.

It is the opinion of this office that it is the intention of said section that all dockets used by said justices shall be uniform and shall be furnished by the State, paid for out of the general funds of the treasurer. This provision also applies to future additional dockets, as same may be required.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PURCHASE AND PRINTING—Purchasing for State institutions from State Prison Board mandatory.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 5, 1934.*

HONORABLE CHARLES A. OSBORNE, *Director,*
Division of Purchase and Printing,
State Office Building,
Richmond, Virginia.

MY DEAR MR. OSBORNE:

I am in receipt of your letter of December 4, in which you conclude:

"In the final analysis, what I want to know is whether the law is mandatory for State institutions to purchase from the Industrial Department of the State Penitentiary, or if purchases are to be made when the cost is no more than that at which the article may be purchased elsewhere."

Section 2073a of the Code seems to plainly require that on and after January 1, 1934, all departments, institutions and agencies of this State which are supported in whole or in part by the State *shall* purchase from the State Prison Board all articles required by such departments, institutions and agencies which are produced or manufactured by the State Prison Board, by convicts or misdemeanants.

The only exception from the operation of this mandatory provision is where, in the opinion of the Governor, the Comptroller and the Director of the Division of Purchase and Printing, or a majority of them, any article produced or manufactured by the State Prison Board does not meet the reasonable requirements of the department, institution or agency, or where there is an insufficient supply of the articles or supplies required.

As to the price to be charged by the State Prison Board, it is provided in section 2073 that the Board may charge "the actual cost of the materials used in the manufacture and production of articles furnished them, and in addition thereto an amount sufficient to defray the maintenance cost of the prisoners employed in such State-used industries, and to keep in repair and to replace the machinery, tools, etc. used in the manufacture and production of the various articles furnished."

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***PURCHASE AND PRINTING—Sale of products of State-use printing shop to counties, cities and towns.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *July 19, 1934.*

HONORABLE DAVIS BOTTOM,

Assistant in Charge,
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MAJOR BOTTOM:

This is in reply to your letter of the 16th instant, requesting an official opinion from this office upon the question of whether it is permissible, in view of the provisions of section 2073 of the Code of Virginia, as amended by Acts of 1933, page

118, to sell to the counties, cities, and towns, of the State the products of the State-use printing shop at the penitentiary.

Said section, as amended, expressly provides that such products shall not be sold to officers or agencies of the counties, cities or towns, or in the open markets. The prohibition against such sale is not directed particularly against the sale by the penitentiary authorities themselves, but is specifically directed against the sale of the products of the printing shop whether sold directly or indirectly.

You are advised, therefore, that it is the opinion of this office that section 2073 of the Code, as amended, prohibits the sale, either by the penitentiary authorities or by your division, of any of the products of the State-use printing shop to officers or agencies of the counties, cities and towns of the State.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,

Attorney General.

REAL ESTATE COMMISSION—Clerical help of real estate brokers not subject to licenses.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 29, 1934.*

VIRGINIA REAL ESTATE COMMISSION,

Richmond Trust Building,

Richmond, Virginia.

GENTLEMEN :

This is in reply to your request for an opinion upon the question whether or not an officer of a corporation, whose activities are confined to office work such as book-keeping, stenographic work, and so forth, is required to obtain a license either as a broker or as a salesman, in accordance with the provisions of the Acts of 1924, page 691 (Michie's Code of 1930, section 4359(77)).

The provisions of this section, so far as here pertinent, are in substance as follows:

No corporation shall be granted a license, unless every member or officer of such corporation, who actively participates in the brokerage business of such corporation shall hold a license as a real estate broker, and unless every employee who acts as a salesman for such corporation shall hold a license as a real estate salesman.

The question as to who may be deemed to actively participate in the brokerage business of a corporation is dependent, in my opinion, upon the definition of a real estate broker.

The next following section of the statute provides in substance that a real estate broker within the meaning of the act is any person who, for a compensation or valuable consideration, sells or offers for sale, buys or offers to buy, or negotiates the purchase, sale, or exchange of real estate, or who leases or offers to lease, or rents or offers for rent, any real estate or the improvements thereon for others, as a whole or partial vocation. A real estate salesman is defined as a person who for compensation or valuable consideration is employed by a real estate broker to do the same acts which a broker may perform, as above stated.

From the above referred to provisions of these two sections, it is apparent that, if an officer of a corporation engages personally in the activities above enumerated, he is required to obtain a broker's license; whereas, if he is not an officer of a corporation, but is an employee, he is required to obtain a salesman's license. On the other hand, it seems apparent that it is the intention of the act to require the licensing of an officer of such a corporation only in case the officer personally engages in the acts, or some of them, which constitute a person a broker within the definition given in the act.

It is my opinion, therefore, that an officer of a corporation who confines his or her activities to bookkeeping, and other clerical work in the office, and does not engage in buying, selling, or negotiating the sale or rent of real estate, does not "actively participate in the brokerage business" of the corporation within the meaning of these sections, and is not required to obtain a personal broker's license.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

RELIEF ADMINISTRATION—Not permitted to commit persons to penal institutions.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 30, 1934.*

MISS FLORENCE KIRBY, *Relief Director,*
Emergency Relief Administration,
Radford, Virginia.

DEAR MISS KIRBY:

I am in receipt of your letter of October 29, in which you say:

"On several occasions we have tried to send patients to the State Farm for venereal diseases. The superintendent refused to accept them because they did not have jail sentences, and he says that the institution was a penal institution and it was necessary to have a court commitment. From reading the Code, I thought where it was impossible to give treatment locally in cases of acute gonorrhea and syphilis it was permissible to send the client to the institution so there would be no danger of infecting other people."

I am of opinion that the superintendent of the State Farm for Defective Misdemeanants cannot be compelled to receive persons sent to that institution by your agency.

If you know of any persons whom you think should be committed to the institution, I am sure that Honorable Arthur W. James, Commissioner of Public Welfare, will be glad to advise you how the commitments may be made.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

REQUISITION—Sufficiency of affidavit.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 27, 1934.*

HONORABLE GEORGE C. PEERY,
Governor of Virginia,
Richmond, Virginia.

DEAR GOVERNOR:

Re: Extradition proceedings—John H. Lambeth, Danville, Virginia.

At the hearing in this matter the following were conceded by both sides to be undisputed facts:

Mary Faison Lambeth is the daughter of John H. Lambeth for whom extradition is sought. This daughter, nine years of age, is a child by a former marriage, the

child's mother having died about seven years ago. After the death of the child's mother, the grandmother, Mrs. Tura Burton, took the child and reared her until about September, 1933, when she was brought to the home of her father at Danville and sent to school there until the end of the 1933-1934 school year. During the summer vacation the child was sent back on a visit to her grandmother, with the understanding that she would return to her father's home for the next school year. Just prior to the beginning of the 1934-1935 session the father, John H. Lambeth, received a telegram from the grandmother stating that the child did not wish to return, and that he need not come for her. Some time thereafter the father made a trip to North Carolina for the purpose of bringing his child back to his home at Danville, Virginia, and, seeing the child playing in the yard of her uncle, he obtained possession of her and brought her back in his automobile to his home at Danville.

It is in dispute whether the grandmother consented to the child coming to Virginia on the first occasion, although there would seem to be little doubt of this fact on account of the surrounding circumstances and the fact that the father allowed the child to return to visit her grandmother.

The extradition is sought pursuant to a warrant issued by the clerk of the Recorder's Court of Thomasville, North Carolina, which charges that the father had previously wilfully abandoned the care, custody, nurture and maintenance of the child to her grandmother and thereby had forfeited all of his rights and privileges with respect to the custody of the said child.

No official attorney of North Carolina appeared in behalf of the requisition, but an attorney who represented the grandmother as her private counsel. The contention was made by this attorney that the act of the father in repossessing the child constituted a crime under the provisions of chapter 207 of the Public Laws of North Carolina, Session 1933, which is an amendment of a previously existing statute. The amendments made at the last session are not material to the question here involved.

Chapter 207 of the Public Laws relates to the adoption of minors and is confined to that subject. It provides in considerable detail the procedure under which children may be adopted.

Subsection (9) of section 1 of chapter 207 is as follows:

"In all cases where the parent or parents of any child has wilfully abandoned the care, custody, nurture and maintenance of the child to kindred, relatives or other persons, and in all cases where a Court of competent jurisdiction has declared the parent or parents or guardians unfit to have the care and custody of such child, such parent or parents or guardian shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of such child, and upon finding of such fact by the Court, shall not be necessary parties to any action or proceeding under this chapter."

Subsection (11) of section 1 provides as follows:

"Any parent whose rights and privileges have been forfeited as provided by the second preceding section who shall procure the possession and custody of such child, with respect to whom his rights and privileges are forfeited, otherwise than by law provided, shall be guilty of a crime, and shall be punished as for abduction."

It will be observed in subsection (9) the provision is that, before any adoption proceedings may be had without the parent being a necessary party thereto, there must be a finding of fact by the court that the parent has wilfully abandoned the care, custody, nurture and maintenance of the child.

It was conceded as a fact that no proceedings were ever taken under the provisions of chapter 207 of the Public Laws of North Carolina by the grandmother to adopt the child, nor was there an adjudication by any court of the fact that the father had wilfully abandoned her.

Construing the provisions of subsection (11) of section 1 of chapter 207, which has been quoted above, in connection with subsection (9) thereof, and with the general provisions of the whole chapter, it is my opinion that, before any person

can be held to be guilty of the crime as provided in subsection (11), there must have first been a judicial determination of the fact that the parent had wilfully abandoned the child.

No such fact is alleged in the warrant attached to the requisition papers, and it was conceded by counsel representing the grandmother that there had been no such judicial determination of abandonment.

It will also be observed that the affidavit upon which the issuance of the requisition papers were based fails to disclose the fact that the child, a short time before the commission of the alleged crime, had been living with her father in Virginia, although the attorney representing the grandmother admitted this to be a fact.

For the reason, therefore, that the warrant attached to the requisition does not charge a crime under the statutes of North Carolina, and for the further reason that the affidavit upon which the requisition was based suppressed, or did not disclose, all the material facts, it is my opinion that the extradition should be refused.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

ROADS—Department of Highways vested with authority to determine what roads in secondary system.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., June 21, 1935.

HON. M. A. COGBILL,

*Attorney for the Commonwealth,
Chesterfield C. H., Virginia.*

DEAR MR. COGBILL:

I have your letter of June 20, in which you ask the following question:

"In whom is the authority vested to determine what roads in the secondary system will be improved (surfaced treated), and who determines the expenditure of funds on such roads?"

Your attention is directed to section 2 of chapter 415 of the Acts of 1932, which states in part:

" * * and the maintenance and improvement, including construction and reconstruction of such secondary system of State highways shall be by the State under the supervision of the State highway commissioner. * * * "

"At least twice in each calendar year after January first, nineteen hundred and thirty-three, the representative of the department of highways in charge of such secondary system of State highways in each county or some representative of said department designated by the State highway commissioner shall meet with the board of supervisors of each such county at regular or special meetings of said board, notice of which meetings shall be posted by the county clerk at the front door of the courthouse of such county ten days before such meeting, and there discuss and advise with said board of supervisors and the citizens present plans and proposals for the maintenance and improvement, including construction and reconstruction, of such secondary system of State highways in such county. After which discussion each such board of supervisors shall make written recommendations to the department of highways as to the expenditure of funds for such work in such county; and the department of highways shall observe and follow such recommendations in so far as they are compatible with the department's general plans and available funds will permit, having due regard to the maintenance and improvement of all existing roads in said county in said secondary system."

I am, therefore, of opinion that such authority is vested in the Department of Highways under the supervision of the State Highway Commissioner.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

ROADS—On grounds of State Institutions are part of State Highway System.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *August 10, 1934.*

CHARLES W. CRUSH, *Esq.*,
Attorney for the Commonwealth,
Christiansburg, Virginia.

MY DEAR MR. CRUSH:

I am in receipt of your letter of August 4.

It appears to me that roads on the grounds of State institutions are a part of the State Highway System and not a part of the Secondary System. See section 5 of the act creating the State Highway Commission, as amended in 1932 (Acts of 1932, p. 468). By the act referred to roads on the grounds of State institutions were taken over for maintenance and construction as of July 1, 1932. I am of opinion that additional roads on the grounds of State institutions may be taken into the State Highway System under the provision in the aforesaid section 5, permitting the State Highway Commission to add during each calendar year mileage not exceeding two and one-half per centum of the total mileage of the system.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

SALARIES—Employees of the State—Not assignable.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *July 18, 1934.*

HONORABLE HENRY G. SHIRLEY, *Commissioner,*
State Highway Commission,
Richmond, Virginia.

Attn: Mr. C. J. Allard, Auditor.

DEAR MR. SHIRLEY:

This is in reply to your letter of July 14, in which you request an opinion from this office as to whether or not the salary or wages of an employee of the Highway Department of the Commonwealth of Virginia are legally assignable.

While there is no statute in Virginia which prohibits the assignment of such salary or wages, the law applicable is as thus stated in Williston on Contracts, Vol. 1, section 417:

"Without the prohibition of a statute the salary or pay of a public officer not yet due, cannot be assigned. This principle has been applied to assignments by legal officers, as prosecuting attorneys, a master to whom a case had been referred, a clerk of court, a sheriff, a police officer, a fireman, and to political officers like a county treasurer. It is equally applicable to minor public officials, like clerks and copyists, to assessors, to a retired army officer, and generally to all public employees."

You are, therefore, advised that it is the opinion of this office that the salary and wages of employees of the State are not legally assignable and that the State Highway Commissioner has no authority to recognize any assignment of any such wages or salary, or to pay any such wages or salary to any person except the employee earning same.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SALARIES—Special agent for collection of delinquent taxes.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 29, 1934.*

HON. GEDDES H. WINSTON,

Counsellor at Law,

Travelers Building,

Richmond, Virginia.

DEAR MR. WINSTON:

I have received and have given careful consideration to your letter of the 6th instant, upon the question of whether or not the compensation paid you as special agent for the collection of delinquent taxes due the State is subject to reduction provided for by the Appropriation Acts of 1932-1933 and 1934-1935, respectively.

It is my opinion that your compensation does come within the provision of the language of these acts requiring the reduction therein provided for. The payments paid to you by the Comptroller for special services, it seems to me, are unquestionably special payments within the meaning of the 1932-1933 Acts.

I am also of opinion that they would clearly come within the language "all fees, charges and commissions, including all allowances to local officers and employees, the amount of which is fixed by or under general law paid out of the general fund."

The compensation paid to you comes out of the general fund of the treasury and a special appropriation appears in the 1934-1935 Acts for that purpose. The total amount of this appropriation is \$18,000.00, and it further provides "no person shall receive annual compensation out of this appropriation in excess of \$5000.00."

For the above reasons I am unable to agree with you as to the proper construction of these two acts.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

SECONDARY ROAD SYSTEM—Disposition of county and district road balances.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 5, 1935.*

HONORABLE N. B. EARLY, JR.,

Attorney for the Commonwealth,

Stanardsville, Virginia.

DEAR MR. EARLY:

I am in receipt of your letter of January 3, in which you state that, after liquidation of the indebtedness of certain of your districts created in connection with road works, there are small balances in several of the district funds. You ask whether this surplus may be used in the respective districts for further road work, such as the purchase of rights of ways, building of bridges, etc.

In my opinion, the subject of your inquiry comes within the provision of the last sentence of section 3 of chapter 415 of the Acts of 1932, commonly known as the Byrd Road Plan, in which it is provided:

"All balances in the hands of the local authorities for county or district road purposes and any taxes heretofore levied for years prior to nineteen hundred and thirty-two for county or district road purposes and not collected, shall, when collected, and to the extent necessary, be disbursed in payment of obligations heretofore contracted for county or district road purposes and remaining unpaid, and the balance, if any, for general county or district purposes."

In my opinion, the surplus in each district road fund may be used for the purpose of acquiring rights of ways, building of bridges, etc., and/or for any other local district purposes.

This opinion is based upon the assumption that the building of bridges and the other purposes for which the funds are to be used, as well as the acquisition of rights of ways, apply to the opening of new roads and the building of bridges on new roads, and does not apply to the building of bridges on roads in the Highway System.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SHERIFFS—Fees—Arrests transporting—Public intoxication.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 21, 1934.

HONORABLE M. B. COMPTON,

Trial Justice,

Wood, Virginia.

DEAR MR. COMPTON:

This is in reply to your inquiry of the 19th instant, concerning the fees to which a sheriff or arresting officer is entitled for making arrests for public drunkenness or possessing or transporting illegal intoxicating liquors.

I note your statement that there is a difference of opinion as to whether the fee shall be \$1.50 or \$1.00. Under the provisions of the prohibition law a fee of \$1.50 was provided for this service. However, since the repeal of prohibition, the offense would be in violation of the Alcoholic Beverage Control Act passed at the 1934 session of the General Assembly. In this Act no different fee is provided for arrests for violation thereof than in any other criminal cases, and you are advised that it is the opinion of this office that \$1.00 is the proper fee to be allowed sheriffs or other arresting officers in making an arrest for the crime referred to in your letter.

Your attention is called, however, to the fact that, if the particular offense committed happens to be a felony, the arrest fee is \$1.50.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SLOT MACHINES—Licenses.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 31, 1934.*

HONORABLE A. E. S. STEPHENS,
*Member House of Delegates,
Smithfield, Virginia.*

MY DEAR MR. STEPHENS:

I am in receipt of your letter of October 17, in which you inquire whether or not a slot machine operator who handles only penny amusement machines is subject to the slot machine operator's license of \$1,000 imposed by section 198 of the Tax Code of Virginia. This license is provided for in the fifth paragraph of section 198, reading as follows:

"Every person, firm or corporation selling, leasing, renting or otherwise furnishing a slot machine or slot machines to others, or placing a slot machine or slot machines with others, shall be deemed to be a slot machine operator. Every slot machine operator, as herein defined, shall pay for the privilege an annual State license tax of one thousand dollars. The license tax imposed by this paragraph is not in lieu of, but is in addition to, the other license taxes imposed by this section; provided, however, that the slot machine operator's license tax levied by this paragraph shall not be applicable to operators of weighing machines, automatic baggage or parcel checking machines, or receptacle, nor to machines vending shoestrings, chewing gum, or postage stamps, which machines are so constructed as to do nothing but vend such merchandise, or postage stamps, or provide service only. Nor to operators of coin operated musical machines or musical devices that operate on the coin-in-the-slot principle."

In my opinion, the only operators exempt from this license are those operating such machines as are specifically mentioned in the quoted paragraph. I must advise, therefore, that operators of penny slot machines operated purely for amusement purposes, unless the machines are such as are declared to be exempt in the paragraph, are subject to the operator's license. In other words, unless the machines operated are musical machines or musical devices that operate on the coin-in-the-slot principle, I think a license is necessary.

Yours very truly,
ABRAM P. STAPLES,
Attorney General.

STERILIZATION—Authority of physician to perform operations.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 28, 1934.*

DR. H. H. WARE,
*Memorial Hospital,
Richmond, Virginia.*

MY DEAR DOCTOR WARE:

After our telephone conversation of yesterday, I examined chapter 46b of the Code of 1930, and can find no authority for the sterilization of any person except those confined in certain State Institutions enumerated in section 1095h of the Code, and proceedings for such sterilizations must be done pursuant to the provisions of section 1095i. I do not think, therefore, that you would be safe in performing an operation outside of an Institution, and after strict compliance with section 1095i.

You also ask as to the authority to perform an operation of this character upon a married woman, with her consent and that of her husband.

I do not think that a physician can legally perform such an operation. The only authority for an operation upon a person outside of a State Institution is found in section 1095m of the Code, which provides:

"Nothing in this act shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this State, by a physician or surgeon licensed by this State, which treatment may incidentally involve the nullification or destruction of the reproductive functions."

It would seem, therefore, that a physician may only perform such an operation for therapeutic reasons. The diagnosis preceding any such operation is, of course, within the discretion of the medical profession.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

SUBSISTENCE HOMESTEADS—Status of citizens.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 23, 1934.*

HONORABLE GEORGE C. PEERY,
Governor of Virginia,
Richmond, Virginia.

DEAR GOVERNOR PEERY:

This is in reply to your recent letter requesting my opinion upon the question of whether or not persons, now citizens of Virginia and occupying lands which are a part of the Shenandoah Park Area, who hereafter purchase subsistence farms to which title will be retained by the Federal Subsistence Homesteads Corporation will thereby lose their status as citizens of the State of Virginia and their rights to attend the public schools of this State.

It appears from your letter that you are under the impression that the title in the Homesteads Subsistence lands is, or would be, vested in the government of the United States.

There has been furnished to this office a copy of an opinion prepared by the Attorney General of the United States at the request of the Secretary of the Interior under date of July 18, 1934. It appears from this opinion that, pursuant to the provisions of section 208 of the National Industrial Recovery Act, appropriating \$25,000,000 to be used by the President through such agencies as he may establish and under such regulations as he may make for aiding in the purchase of subsistence homesteads, the President designated the Secretary of the Interior to exercise the functions conferred upon him by said section.

The Secretary of the Interior caused the Federal Subsistence Homesteads Corporation to be formed under the laws of Delaware, and the Secretary of the Interior and his successors in office are to hold the entire capital stock in trust for the United States of America.

It further appears from said opinion that the Federal Subsistence Homesteads Corporation will acquire and own the real estate, and will in turn sell the same to homestead purchasers.

There has been no Act of the General Assembly of Virginia which cedes to the government of the United States any powers of government over any lands which may be purchased by such Homesteads Corporation, or which would change the legal status of any person residing on lands owned by said Corporation or purchased from it. While it might be true that a court might construe such lands

as indirectly owned by the government of the United States and, therefore, free from local or State taxation, it is my opinion,—under the well settled decisions of the Supreme Court of the United States which were referred to by me a few days ago in a letter to you upon the subject of the State's jurisdiction over the Chamberlin Hotel at Old Point,—that, in the absence of a cession of legislative powers by the State to the Federal government, purchase by the Federal government of lands for purposes of subsistence homesteads, even if purchased directly in the name of the United States, would not operate to deprive the State of Virginia of governmental and legislative jurisdiction over said lands; nor would it, under the laws of the State of Virginia, deprive residents on said lands of their citizenship or rights of citizenship in Virginia.

It follows from the foregoing, therefore, that persons purchasing lands from said Homesteads Corporation for the purpose of homesteads, and who reside thereon for the period, if any, required by law to constitute them citizens of Virginia, will be such citizens and will be entitled to attend the public schools of this State just as other citizens of the same county in which they reside.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

SCHOOLS—Children in orphanages or other charitable institutions are entitled to attend public schools.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 30, 1934.

HONORABLE SIDNEY B. HALL,

*Superintendent of Public Instruction,
Richmond, Virginia.*

DEAR DOCTOR HALL:

This is in reply to your letter of July 24, in which you request an official opinion from this office upon the question whether children in orphanages or other charitable institutions are entitled to attend the public schools of the counties or cities in which such institutions are located.

An opinion upon this same question was requested of Honorable John R. Saunders, the late Attorney General, on September 29, 1925, as appears on page 179 of the annual report of the Attorney General made in 1926. In that opinion the conclusion was reached that the provision of section 719 of the Code, as amended and as existing at that time, which is as follows:

“The public free schools shall be free to all persons between the ages of seven and twenty years residing within the school district * * .”

and the provisions of 720 of the Code, as then existing, which are as follows:

“* * * Children living with and entirely supported by residents of said district shall be admitted to the public free schools of said district as if they were children of said residents.”

entitled the children in the Boys' Home near Covington, Virginia, which was a similar institution to those referred to in your letter, to attend the public schools of Alleghany county free of charge.

The sections of the Code referred to in the above mentioned opinion have been repealed, but similar provisions are now contained in sections 682 and 683 of the Code of Virginia. Section 682 provides as follows:

“The public schools, except as otherwise provided, shall be free to all persons between the ages of seven and twenty years residing within the county, or city, * * .”

There is no provision excluding children in orphanages or other similar institutions. Section 683 contains this provision:

"Every parent, guardian, or other person in the Commonwealth, having control or charge of any child, or children, who have reached the seventh birthday and have not passed the fifteenth birthday, shall send such child, or children to a public school, or to a private, denominational or parochial school, or have such child or children taught by a tutor or teacher of qualification prescribed by the State board of education * * *."

I find no provision in the statutes expressly covering inmates of orphanages or other charitable institutions, but, in view of the fact that no material change has been made in the statutes since the foregoing opinion was given in 1925, it must be presumed that the Legislature has acquiesced in that construction of the law and that no change was desired to be made.

It is, therefore, the opinion of this office that children in the institutions referred to in your letter are entitled to attend the public schools free of charge in the respective counties or cities in which such institutions are situated.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Compulsory attendance—Age limits.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 22, 1935.

DR. SIDNEY B. HALL,
*Superintendent of Public Instruction,
State Office Building,
Richmond, Virginia.*

DEAR DR. HALL:

I have your letter of January 19, enclosing one dated January 18 from Mr. W. K. Barnett, Superintendent of Radford City Schools. Mr. Barnett's letter states:

"The judge of our juvenile and domestic relations court has ruled in several cases referred to him recently that a child may drop out of school as soon as he passes his 15th birthday. I have contended that under provisions of section 683 Virginia School Laws the pupil must remain in school for the entire school year in which his 15th birthday occurs. In other words, I contend that the school age is taken as of September 1 and that the age on that date is the one with which we deal in enforcing the compulsory attendance law. Will you kindly ask the Attorney General for a ruling in order that I may submit it to our judge?"

I note that you agree with Mr. Barnett's view.
Section 683 of the Code provides in part as follows:

"Every parent, guardian, or other person in the Commonwealth, having control or charge of any child, or children, who have reached the seventh birthday and have not passed the fifteenth birthday, shall send such child, or children, to a public school, or to a private, denominational or parochial school, or have such child or children taught by a tutor or teacher of qualification prescribed by the State Board of Education and approved by the division superintendent in a home, and such child, or children, shall regularly attend such school during the period of each year the public schools are in session and for the same number of days and hours per day as in the public

schools. The period of compulsory attendance shall commence at the opening of the first term of the school which the pupil attends and shall continue until the close of such school for the school year. * * *

I am of opinion that it is reasonable to say that one of the purposes of the last sentence quoted was to make the age of the child as of the beginning of the first term of the school controlling. That is to say, if the child has not attained the age of 15 prior to the opening of the first term, then he must continue in school until the close of the school year. In the same way, if the child has not attained the age of 7 at the opening of the first term of the school, then he would not be required to attend school until the beginning of the next school year.

I am of the opinion that the statute should be so construed as to result in a sensible and practical operation and that the view I have expressed above attains this result. It would be most absurd to say, in view of the last sentence I have quoted, that the Legislature intended that, if a child became 15 in the middle of a term, he could immediately discontinue his attendance, just as it would be equally absurd to say that, if a child became 7 in the middle of a term, he would be required to begin attending school.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SCHOOLS—Compulsory attendance—Duties of officials relating to enforcement of.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., August 28, 1934.

HON. H. M. McMANAWAY, *Superintendent,*
The Virginia School for the Deaf and the Blind,
Staunton, Virginia.

DEAR MR. McMANAWAY:

This is in reply to your letter of August 25th, requesting the opinion of this office as to your duties and the duties of other officials relating to the enforcement of the compulsory attendance provisions of our State statute relating to public schools, and particularly with reference to the attendance of children who are deaf or blind.

These provisions are contained in Sections 683, 684, 685 and 686 of the Code. It is made the duty of each principal teacher in each school to report to the division superintendent a list of children of school age, including those blind, or partially blind or deaf, living within the boundaries of his or her school district who is not attending school. It is thereupon the duty of the division superintendent, or the attendance officer, if one be employed, to investigate all cases of non-enrollment and when no valid reason is found therefor, to notify the parent, guardian or other person having control of the child, to require the attendance of such child at school within five days. If such custodian of the child does not comply with this notice, then it is made the duty of the division superintendent or the chief attendance officer, if there be one, to make complaint in the name of the Commonwealth before the Juvenile and Domestic Relations Court of his city or town. Since the enactment of the recent Trial Justice Act, the trial justice is judge of the Juvenile and Domestic Relations Court in counties.

The local school boards are given power to appoint, with the approval of the division superintendent, one or more attendance officers who are primarily charged with the enforcement of the attendance statutes. If no such attendance officer is appointed, the division superintendent shall act as attendance officer.

Under the provisions of Section 686 it is made the duty of the attorneys for the Commonwealth of the several counties and cities to prosecute all cases of non-attendance.

I do not find in the law any provision imposing upon the superintendent of the Virginia School for the Deaf and Blind any duties with reference to compelling attendance of the children. However, where cases come to your attention and you desire action taken, you should report the situation to the division superintendent of schools or the attendance officer, if there be one, and request that proper action be taken to compel the attendance of the child.

As requested by you, I am sending a copy of this letter to Dr. Hall, Superintendent of Public Instruction.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

SCHOOLS—Cost of erection of school building.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 17, 1934.

MR. G. E. MITCHELL, *Trustee,*
Halifax County School Board,
Nathalie, Virginia.

DEAR MR. MITCHELL:

I have your letter of November 15, in which you inquire whether or not the expense of the erection of a school building in a magisterial district shall be borne by the county or the district.

Section 653 of the Code provides in effect that in the administration of school affairs the county shall be the unit. However, the section further provides that it is not to be construed to prohibit the levy of a district tax to provide interest and sinking fund for a district bond issue.

Section 673 of the Code provides that a county school board may contract a loan for the erection of a school house on the credit of the county. This section also contemplates that the erection of a school house may be at the expense of the district.

My conclusion is, therefore, that it is within the discretion of the county school board as to whether or not the expense of a school building in a district shall be borne by the county as a whole or by the district in which the proposed building is to be erected.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SCHOOLS—County and/or School levies—Limit of

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., October 26, 1934.

HON. W. R. BROADDUS, JR.,
Attorney for the Commonwealth,
Martinsville, Virginia.

DEAR MR. BROADDUS:

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

"At the request of the school board, the board of supervisors have passed the following resolution:

“‘An application of the county school board for a loan of \$15,000 from the literary fund of Virginia, to make addition to and improve school building at Fieldale was this day filed with the board approved and said county school board is authorized to secure said loan and it is ordered that a sufficient levy be made to provide for the payment of said loan as the same may become due and payable.’

* * * * *

“The board of supervisors is now levying the full \$1.25 levy in each of the districts of the county and, as stated above, all of the twenty-five cents district levy is required for present district obligations. The question presents itself, as I see it, whether or not the present board of supervisors has a right by passing the above resolution to obligate future boards of supervisors to make a cash appropriation in addition to the necessary twenty-five cents district levy and the one dollar county levy for school purposes, for the purpose of meeting the payments of interest and principal on the proposed literary loan, if the same is consummated.”

In the case of *School Board v. Shockley*, 160 Va. 405, one of the questions which the court was asked to determine was the validity of a tax of twenty-five cents on the hundred dollars of assessed value of property, being part of a tax of *one dollar and twenty-five cents levied by the board of supervisors* for the years 1929-30 for county school purposes. In passing on this point, the court said (pp. 415-16) :

“The validity of this tax is controlled entirely by section 698 of the Code, and by the Constitution. By reference to that section it will be seen that the maximum tax authorized to be levied by a county under section 136 of the Constitution for county school purposes is fixed by the general provisions of the statute at one dollar on the one hundred dollars of assessed value of the property. In addition to this, the board of supervisors, for purposes therein specified, is authorized to levy a district tax in the magisterial district in which the money is to be spent, not exceeding twenty-five cents on the one hundred dollars of assessed value of the property in the magisterial district in any one year. Under the revised school laws, a magisterial district is not a separate school district, and by the plain provisions of the statute this district tax is entirely separate from the county school tax, and can only be used in the magisterial district in which it is levied.

“It appears that the Board of Supervisors of Carroll county added the twenty-five cents, authorized by the statute to be levied as a district tax, to the tax of one dollar fixed by the statute, under the Constitution, as the maximum rate of taxation for county school purposes, thereby levying a county or district school tax of twenty-five cents on the one hundred dollars in excess of the rate of levy fixed by law for such purposes. We, therefore, think that in holding this excess of twenty-five cents to be invalid the trial court was plainly right.”

I conclude from that language that the maximum amount which the board of supervisors could levy for county school purposes would be one dollar on the one hundred dollars of assessed value of the property, the maximum provided in section 698a of the Code.

I do not think that section 644 of the Code gives the board of supervisors the authority to make a levy for a greater amount than the maximum provided in section 698a. I fail to see any distinction between a loan secured from the literary fund by a school board and any other loan contracted by a school board or board of supervisors for school purposes.

I am, therefore, of the opinion that your board of supervisors could not at this time make a levy for this purpose in excess of \$1.25 per hundred dollars of assessed value.

I call your attention to the fact that section 698 of the Code has been repealed and superseded by section 698a, which, however, is very similar in its provisions.

Under the provisions of the statutes relating to literary fund loans, the duty is

imposed upon the board of supervisors to appropriate a sufficient sum of money to take care of any such loan. If the loan is obtained, it would seem to me to be the duty of the board of supervisors to appropriate such money out of the general fund, if there is a sufficient sum in the general fund, or else out of the money derived from the \$1.25 levy; although the effect of the appropriation out of the \$1.25 levy might be to necessitate a curtailment of some of the other county school expenditures.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SCHOOLS—Literary fund—Limit on amount of loans.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., June 8, 1935.

DR. SIDNEY B. HALL,

Superintendent of Public Instruction,

Richmond, Virginia.

DEAR DR. HALL:

This is in reply to your letter of June 7, relating to the authority of the State Board of Education to supplement loans originally in excess of \$25,000, which original loans were approved prior to July 1, 1934. Since said date, it appears from your letter that a number of applications have been received from local school boards requesting that the amount of the loan, as originally approved, be increased.

Under the provisions of Chapter 53 of the Acts of the Extra Session, 1933, the maximum amount of a loan, which the State Board of Education was authorized to make from the Literary Fund, was increased from \$25,000 on any one project to \$50,000. The purpose of this increase in the amount authorized under any one loan was stated in the act to be to enable the local school boards to take advantage of the provisions of the National Recovery Act under which grants were being made to the localities for the purpose of encouraging the construction of new school buildings and aiding in the unemployment situation. It appears from your letter that the loans you refer to, and in which increases are now desired, were approved by the State Board of Education pursuant to the provisions of said Act of 1933.

By the provisions of Chapter 36 of the Acts of 1934, the authority given to the State Board of Education to grant loans in excess of \$25,000 on any one project was limited to July 1, 1934. The following language is used in the 1934 Act:

“* * * provided, however, that on and after July first, nineteen hundred and thirty-four, no such loan shall exceed the sum of twenty-five thousand dollars, unless it be a loan applied for, and approved by the State Board of Education, prior to that date.”

It very clearly appears from this last mentioned act that it was the policy of the General Assembly to limit all loans not approved before July 1, 1934, to the sum of \$25,000 on any one project and that the State Board of Education does not now possess the authority to approve any loan in excess of that amount. For the State Board of Education, at this time, to increase the amount of a loan in excess of \$25,000 would be, in effect, the granting of a new loan under this date.

In my opinion, the State Board of Education does not now possess the authority to approve loans in excess of \$25,000. The authority of the Board to approve loans in excess of this amount expired July 1, 1934, under the express provisions of the act last above referred to.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

SCHOOLS—Special levy and general fund contribution.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 18, 1935.*

HONORABLE W. P. PARSONS,
*Attorney for the Commonwealth,
Wytheville, Virginia.*

MY DEAR MR. PARSONS:

I am in receipt of your letter of March 13.

You state that the school board of Wythe county has borrowed \$15,000 from the literary fund for the erection of a school building in one district, and contemplates borrowing an additional \$15,000 from the same fund for the erection of a school building in another district. You further state that the regular school levy will not yield sufficient to operate the schools in the county and to create a sinking fund and pay the interest on these loans. You ask a number of questions, but I take it that the purport of all of your inquiries is summed up in the paragraph of your letter which I quote below:

"It seems from the budget which the school board is filing with the board of supervisors for its approval that the \$1.00 school levy is not sufficient to operate the schools for the usual period and take care of building program, and if you have any suggestions by which funds, in addition to the amount raised by the \$1.00 school levy, can be raised and used for these purposes, I will appreciate it very much if you will give me the benefit of your suggestions."

Section 644 of the Code makes it mandatory upon the board of supervisors to include in the county levy a fund sufficient to create a sinking fund and to pay the interest on loans from the literary fund, or to make an appropriation for this purpose.

Section 698 of the Code, among other things, authorizes the board of supervisors, in addition to making the county school levy, to make an appropriation from any funds available for the establishment, maintenance and operation of the public schools. I have heretofore ruled that the words "establishment, maintenance and operation" in section 698 include the construction of a new building, as well as paying current operating expenses.

I am, therefore, of opinion that your problem may be solved by making the general county levy, as distinguished from the school levy, sufficient to enable you to make an appropriation therefrom to create a sinking fund and to pay the interest on these loans from the literary fund.

The above suggestion makes it unnecessary to answer in detail all of the questions asked by you, but for your general information I enclose copy of a letter written by me under date of April 30, 1934, to Mr. W. N. Hannah, Attorney for the Commonwealth, Palmyra, Virginia.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Tax levies—Amherst County.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 18, 1935.*

HONORABLE W. D. COX,
*Division Superintendent,
Amherst, Virginia.*

DEAR MR. COX:

I am in receipt of your letter of January 17, in which you desire to be informed as to whether or not the board of supervisors of Amherst County may impose a county school levy in excess of \$1, but not more than \$1.75, on each \$100 assessed value of property subject to the school tax in Amherst County.

Section 136 of the Constitution of Virginia specifically gives authority for each county, city or town to raise additional sums by a tax on property, subject to local taxation, not to exceed in the aggregate in any one year "a rate of levy to be fixed by law" to be expended for school purposes. As you state in your letter, section 698 of the School Code authorizes certain counties, including the county of Amherst, to levy a tax of not less than 50 cents nor more than \$1.75 upon county property for school purposes.

It is, therefore, my opinion that the board of supervisors of Amherst County may, in their discretion, levy a tax of not less than 50 cents nor more than \$1.75 for school purposes on property subject to local taxation in Amherst County.

I am not informed as to the levy in other counties.

Yours very truly,
ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Tuition—Persons of school age—Post graduate work.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 14, 1934.*

DR. SIDNEY B. HALL,
*Superintendent of Public Instruction,
Richmond, Virginia.*

DEAR DR. HALL:

I am in receipt of your letter of August 7, enclosing one of August 4 from Mr. F. F. Jenkins, Division Superintendent of Schools of Southampton county. Mr. Jenkins makes this inquiry:

"I note that the 1934 Acts of the General Assembly amends section 672, page 230 (1934 Acts) so as to provide that no tuition charge should be made for pupils attending high school, etc., except from one county to another, from a county to a separate school district, or in certain counties designated in said Acts.

"I also note that section 682, Virginia School Laws, Acts of the General Assembly of 1930, which has not been amended or repealed, provides that the School Board, in its discretion, may admit as pupils into any of the public schools, persons between the ages of 20 and 25 years on the prepayment of tuition fees, under regulations to be prescribed by the State Board of Education, etc.

"It appears that the two sections above referred to are somewhat in conflict where a pupil has reached the age of 20 years and has not finished high school. I shall be glad for you to give me your opinion as to which one of the two sections should be followed in this case."

I am of opinion that there is no conflict between the two sections mentioned, as suggested by Mr. Jenkins. Section 672 of the Code, as amended in 1934, (Acts 1934, page 229) deals with children of school age, that is to say between the ages of 7 and 20 years. Section 682 of the Code is concerned not only with children of school age, but carries a special provision for charging tuition to persons between the ages of 20 and 25 years. Since the two sections must be construed together and so far as possible effect given to every part of each section, I think that tuition may still be charged, in accordance with the statute, persons between the ages of 20 and 25 years.

Mr. Jenkins then asks for an opinion on the following:

"The Southampton County School Board for some years has had a regulation which makes a small tuition fee for pupils who have graduated from high school and wish to return for post graduate work. This regulation being based on the assumption that when a pupil has been given four years of high school work and graduated and then desires to return for additional work that a small tuition should be paid. I should like to know whether the continuation of such regulation, in your opinion, is a violation of section 672 as amended by the 1934 General Assembly."

Section 672 of the Code, as amended, provides that no tuition shall be charged to pupils attending high school, with certain designated exceptions. Southampton county does not come within the exceptions noted.

I am, therefore, of opinion that Southampton County School Board may not charge tuition to any person of school age and who is otherwise qualified to attend any particular high school. I imagine it would be within the discretion of the school authorities to allow graduates to return to high school to take up any particular subjects, but, if they are so allowed to attend, it seems to me that the statute prohibits the charging of any tuition if they are of school age.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SCHOOLS—Tuition—Pupils between ages of 20 and 25.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *August 16, 1934.*

- DR. SIDNEY B. HALL,
*Superintendent of Public Instruction,
Richmond, Virginia.*

DEAR DOCTOR HALL:

Under date of May 25, 1934, in response to your request that this office furnish you an opinion upon certain inquiries contained in a letter addressed to you by Mr. W. P. Hazlegrove, a member of the school board of Roanoke City, a letter was addressed to you in which it was stated that this office was of the opinion that, under the provisions of chapter 149 of the Acts of the General Assembly of 1934, amending section 672 of the Code, the school boards are prohibited from charging any tuition whatsoever for any person attending high school, unless such person resides in some other county or city. The opinion was also expressed in said letter that, unless the State Board of Education should promulgate regulations authorizing local school boards to exclude from the schools persons over twenty years of age, the local school board would not have any authority so to do.

At the time said letter was written the writer was not cognizant of the provisions of section 682 of the Code, which contains the following provisions:

"The school board, in its discretion may admit as pupils into any of the public schools, persons between the ages of twenty and twenty-five years on the prepayment of tuition fees, under regulations to be prescribed by the State board of education, provided the admission of such pupils will not in the opinion of the board, impair the usefulness and efficiency of such school."

The said section, while contained in the school laws as applicable to public schools of counties, is also made applicable to the cities by the provisions of section 715 of the Code, which provides as follows:

"All of the statutes, with reference to county schools, shall be applicable to cities in like manner as to the counties of the Commonwealth, except as otherwise expressly provided by law."

I am of the opinion that, under the provisions of section 682 above quoted, persons between the ages of twenty and twenty-five years are not entitled to attend the public schools except in the discretion of the school board and under regulations of the State Board of Education upon the prepayment of tuition fees, and that, when said above quoted provisions are read and construed in connection with the provisions contained in the amendment of section 672 of the Code, the said amendment should be construed as not applicable to the provisions of section 682.

It is the general rule of statutory construction that statutes *in pari materia* must be construed together and, in so far as possible, effect given to every part of each section, and that a repeal by implication will not be held to have been intended unless such intention clearly appears from the provisions of the Act.

It follows from the foregoing that the opinion contained in said letter to you of May 25, 1934, should be amended to conform to what has been stated above in this letter; that school boards in counties and cities may, in their discretion, exclude from the public schools pupils between the ages of twenty and twenty-five years, and that, if pupils between said ages are admitted to said schools, tuition fees may be charged, as provided in section 682 of the Code.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SCHOOL BOARDS—Authority to borrow from literary fund.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 15, 1934.*

DR. SIDNEY B. HALL,

Superintendent of Public Instruction,

State Office Building,

Richmond, Virginia.

MY DEAR DR. HALL:

I refer to your two letters of October 1 and 11, in which you ask whether or not town school boards may borrow money from the literary fund for the erection of new school buildings.

Section 653 of the Code plainly provides that the State Board of Education is authorized to make loans from the literary fund to the school board of a town constituting a separate school district in the same manner as such loans are made to county school boards, as provided in section 636.

Both the Constitution (section 133) and the statutes (section 653 of the Code) seem to contemplate that the county school board shall be the unit of control over schools in counties. However, by section 653 of the Code, certain incorporated towns, under conditions set out in the statutes, may retain their town school boards. While it may be that these town school boards have only limited powers, I cannot see any inconsistency in their continuance as a part of the county school system,

with such powers as they may have by statute or as may be delegated to them by the county school board.

My conclusion is, therefore, that the State Board of Education may in its discretion make loans from the literary fund to town school boards.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARD—Authority of member to make contract with board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 2, 1935.*

HONORABLE SIDNEY B. HALL,
*Superintendent of Public Instruction,
Richmond, Virginia.*

DEAR DOCTOR HALL:

I have your letter of March 1, in which you quote a resolution approved by the School Board of the City of Danville on February 18, 1935, recommending that the State Board of Education give its consent to Messrs. C. M. Riddle and J. H. Winiker submitting bids for materials, and so forth, in connection with the construction of school buildings in the City of Danville, the parties above named being members of the School Board.

Section 708 of the Code prohibits members of the School Board from entering into such contracts except by permission of the State board of education evidenced by resolution spread on the minutes of said board.

I am informed by your letter that the State board of education is willing to give its permission for Messrs. Riddle and Winiker to enter into contracts for furnishing supplies and material for the erection of the proposed school buildings, provided, however, that any such contract so entered into shall be only pursuant to public bidding.

It is my opinion that the State board of education is fully authorized to grant such permission as above indicated, provided the permission be granted in the form of a resolution spread on the minutes of the board.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARD—Authority in re appropriations for buildings.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 18, 1935.*

MR. E. CLAUDE STONE, *Chairman,
Local School Board,
Elk Creek, Virginia.*

DEAR SIR:

I am in receipt of your letter of January 17, in which you state that in December, 1933, a request was made by the school board of Grayson county for money to build a school building at Independence at a cost of \$47,500, and another

at Elk Creek at a cost of \$37,500, both contemplated buildings being in the same magisterial district. You also state that there was to be a P.W.A. grant for one-third of this amount, and the other two-thirds was to be borrowed from the Virginia State Literary Fund; that the State Board of Education approved the loans some time this year, all necessary papers have been executed, and the plans are being prepared by the State Architect for both buildings.

Thereafter, you refer to rumors that the county school board has decided to expend most of the money at Independence, and it is proposed to construct only a small building at Elk Creek, and then say that the board of supervisors want to adhere to the original plan as to the money to be spent for the erection of each of the buildings.

After making the foregoing statements, you ask if it is possible for the school board to transfer money borrowed for one project for use on another, and, if so, how.

It is usual for applications for loans from the literary fund to go into some detail as to the reasons for asking the loan—the character of buildings, and the amount to be spent upon each. Where this is done and a loan is granted of a specified amount for a building at a particular place, I do not think that the school board can transfer the money borrowed for one project for use upon some other project.

I do not understand that the board of supervisors, when laying the levy, are required to itemize the amounts levied for each of several buildings. It is usual, I understand, for the budget prepared by the school board to itemize proposed expenditures, and, although the levy is for an aggregate amount for school purposes, in my opinion, the money raised for taxation should be applied for the purposes stated in the budget.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SCHOOL BOARDS—Budget disbursement of levies.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *March 26, 1935.*

DR. SIDNEY B. HALL,

*Superintendent of Public Instruction,
Richmond, Virginia.*

MY DEAR DR. HALL:

You have handed to me a letter dated March 23 from Mr. J. Foster Hollifield, Superintendent of Henry County Public Schools, in which the following question is raised:

"The question was raised recently by a member of the board of supervisors who was examining our budget for next year as to whether or not a school board had the legal authority to overspend any item in the budget without the consent of the board of supervisors, even though there might be a balance in some other item which would more than offset the overdraft. My idea has always been that the school board was within its rights to make transfers of this kind after a budget had been approved by the board of supervisors provided the entire operating budget was not overspent and provided further that no district fund set up for some specific purpose was used in this manner. While no particular trouble has arisen over the matter, I am of the opinion that some of the members of the supervisory board have the feeling that the school board is violating the law to do this. Of course, the board of supervisors wants to stay within the law and so does the school board."

To illustrate the point, Mr. Hollifield further says:

"Should you deem it wise to take this matter up with the Attorney General, you might use the following example: Suppose there is a balance in the item, Transportation by Contract, of \$150.00; in the item, Purchase of Bus Bodies, a balance of \$175.00; in the item, Instruction, a balance of \$800.00, but in the item, Fuel and Water, a deficit of \$300.00; in the item, Rent, a deficit of \$100.00, and in the item, General Supplies, a deficit of \$75.00. If the total balances are greater than the total deficits in the various items and the school board can show a balance in the total budget at the end of the year or can break even, is the school board violating the law to make these transfers without the consent of the board of supervisors after they have approved the budget and laid the levy?"

Section 657 of the Code makes it the duty of the division superintendent of schools, with the advices of the school board, to submit to the board of supervisors a budget of the amount of money necessary for school purposes, the budget to show all necessary details in order that the board of supervisors and taxpayers may be well informed.

Section 656 of the Code provides that warrants of the school board shall be issued signed by the chairman of the board and countersigned by the clerk, and further provides that the acts prohibited by section 2724a of the Code with respect to the ordering of the issuance of warrants by the board of supervisors shall apply to the ordering of the issuance of warrants by the county school board.

Section 2724a provides, among other things, that no board of supervisors shall order issued against any fund at any time any warrant or warrants in excess of the amount available in such fund.

I think the school board should make every effort to literally comply with its budget. I certainly do not think that it would have authority to divert money from one purpose or activity to another purpose or activity not provided for in its budget. However, as a practical matter, I can see how it will be almost impossible to estimate in advance down to the last penny what will have to be spent for any particular purpose or activity. Therefore, for the purpose of making such minor adjustments as set out in Mr. Hollifield's letter, I am of opinion that the school fund may be treated as a whole and the necessary transfers made.

The question is not altogether free from doubt, and I think that the practice of transferring from one item to another should be exercised to a most limited degree and should not be so exercised at any time as not to comply substantially with the budget as adopted.

It is suggested as a possible, practical solution that in adopting the school budget the board of supervisors might by proper resolution indicate that the appropriation for schools is to be treated as one fund, and authorize the school board to make such minor adjustments as may be necessary to take care of such a situation as is described by Mr. Hollifield.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SCHOOL BOARDS—Eight months school term required—Eligibility of teachers.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., April 6, 1935.

MR. W. N. HURLEY, *Principal,*
Glen Lyn High School,
Glen Lyn, Virginia.

DEAR MR. HURLEY:

Your letter of April 2, requesting the opinion of the Attorney General upon the question of the authority of a county school board to reduce the school term

of 1934-1935 in order to carry over a surplus to meet the first month's payroll for the term beginning in the fall of 1935, has been received. It appears from your letter that the school board has sufficient funds on hand to operate the school for the remainder of the present term.

It is my opinion that, under the provisions of the Acts of Assembly, 1934, at page 140, it is the duty of the school board to operate the schools for the full term of eight months. This section provides, among other things, as follows:

"The school board of each and every school division in the State is hereby empowered and required to maintain the public free schools of such division for a period of at least eight months or one hundred and sixty teaching days in each school year."

You will notice the above provision provides that the school board is *required* to maintain the schools for a period of at least eight months or one hundred and sixty teaching days in each school year.

You also inquire whether or not the provision formerly contained in the law prohibiting the employment, as a teacher in the public schools, of the brother, sister, son or daughter of a member of a county school board has been repealed.

You are advised that this provision was formerly contained in section 660 of the school code, as it appeared in the Acts of 1928, page 1205. This provision was eliminated when said section was re-enacted in the Acts of 1930, so that the prohibition is no longer in force.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

SCHOOL BOARDS—May prescribe boundaries of districts.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., June 15, 1935.

MR. E. E. GIVENS, *Superintendent,*
Martinsville Public Schools,
Martinsville, Virginia.

MY DEAR MR. GIVENS:

I am in receipt of your letter of June 15, in which you state:

"Martinsville has grown to the point which necessitates the zoning of the city as to schools. There is some question in the minds of the city officials as to who has the authority to do this zoning. Please advise us at once as to whether this is the duty of the school board or of the city council."

I presume that you intend to proceed under the provisions of section 776 of the Code. This section states:

"The school boards of the respective cities shall have power, subject to the approval of the common councils, to prescribe the number and boundaries of the school districts; but until such provision is made every such city which is not divided into wards shall constitute a single school district, and, in every city which is divided into wards, each ward shall be a school district. The number and boundaries of districts shall be duly reported to the Superintendent of Public Instruction and recorded in his office, and also in that of the clerk of the corporation court, or in that of the circuit court if there be no corporation court."

You will observe that the school board prescribes the number and boundaries of the school districts, subject to the approval of the common council.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

**SCHOOL BOARDS—Member of town school board member of county board;
Commissioner in Chancery tie-breaker of—Member county school board
can act as insurance agent.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., June 27, 1935.

MR. B. D. FRENCH,
*Superintendent of Schools,
Abingdon, Virginia.*

MY DEAR MR. FRENCH:

I have your letter of June 25, and will attempt to answer your questions in the order asked. The questions and answers follow:

"1. In a town which has been constituted by law as a separate school district, is one of its members who has been chosen by the town school board to become a member of the county school board eligible to sit with the members of the county school board at all of its meetings, to have a vote on questions requiring same, and to receive a regular per diem as do the other members of the county school board; or, is such member supposed to attend only such meetings of the county school board and have a vote only on matters pertaining jointly to both boards?"

In view of the provisions of section 653 of the Code, I am of opinion that a member designated by a town school board to be a member of a county school board is entitled to serve as a member of such county board and to vote on all matters coming before the board, just as any other member.

"2. Section 655 of the 1934 Acts of the Assembly states that in case of a tie vote of the school board the commissioner in chancery shall be called in by the school board for the purpose of untieing the vote. In view of this authority which has been delegated to him, is it your opinion that the commissioner in chancery can likewise be a member of the county school board?"

I am of opinion that the particular commissioner in chancery appointed by the court as tie breaker cannot be a regular member of the county school board. This would seem to conclusively follow from the duty imposed upon him as tie breaker. I do not know of any statute that disqualifies any other commissioner in chancery from being a member of a county school board.

"3. Can a member of the county school board act as an agent for insurance companies and insure public school buildings?"

This question is covered by section 708 of the Virginia School Code, in which, after providing that no member of the State Board of Education or member of a school board may have a pecuniary interest, directly or indirectly, in contracts for school buildings, etc., provides:

"* * But the prohibitions of this section shall not apply to * * * nor shall they apply to the writing of standard or mutual insurance policies at the regular rate on any school buildings, or other school property; provided such mutual insurance carries no assessment liability."

You will see from this section that a member of a school board may legally write standard insurance, but cannot write insurance in companies carrying assessment provisions.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

**SCHOOL BOARDS—Member of cannot contract with—Keeping of minutes—
Division Superintendent cannot act as clerk.
Funds to be used only for purpose for which levied.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., October 11, 1934.

HONORABLE LEWIS JONES,

*Attorney for the Commonwealth,
Urbanna, Virginia.*

DEAR MR. JONES:

This is to acknowledge receipt of your letter of October 4th, in which you ask a number of questions, which for purposes of my reply I quote *seriatim* with my answer immediately following each question:

"1. Whether or not it is legal for a member of the school board to enter into a contract with the said board to sell trucks to private individuals and to receive warrants issued by the board in payment for the trucks sold. (I imagine they mean whether or not it is legal for a member of the school board to sell trucks to individuals who run the school buses and receive warrants from the board in payment of the truck.)"

Your attention is invited to section 708 of the Code, which states in substance that it is unlawful for a member of a school board or any other school officer to have any pecuniary interest directly or indirectly in any contract for the building of a public school house, furnishing material, or supplying books, maps, school furniture, or apparatus, unless permission is granted by the State Board of Education, evidenced by resolution spread on the minutes of the said board.

It is very difficult, of course, to pass upon the legality of any transaction unless all the facts are clearly before this office. If the contract has already been entered into by the school board with an individual to operate the school busses, I do not see how there can be any legal objection to a member of the Board selling the contractor the truck to be used in the performance of the contract. Furthermore, if the contractor issues an order to the school board, directing the payment to the seller of the truck of his compensation under his contract with the school board, I do not see any objection to the school board honoring this order, or assignment, under the above contract to a member of the school board who sold the truck. However, it would seem to me to be highly improper for a member of the school board to inject the sale of the truck in any way into the granting of the contract for operating the school busses. In order to be free from objection, the two transactions should be entirely free and independent of one another.

"2. The school law requires the minutes of the meetings to be kept in a bound volume. They want to know whether or not a loose leaf ledger, from which pages are taken from time to time, would be construed as a bound volume."

I am of the opinion that such a loose leaf ledger with binding and serially numbered pages is a proper book in which to keep the minutes of the school board and meets the requirements contemplated in the statute.

"3. Can the superintendent of schools be legally clerk of the county school board."

Section 655 of the Code of Virginia provides for the election by the school board of the clerk of the board upon the recommendation of the division superintendent. Under general principles I am of the opinion that it would not be competent for the division superintendent to recommend himself for this position. If it were, he could decline to recommend any other person and practically have the power to name himself as clerk.

"4. When a special levy for taxes is used for a purpose other than that for which it was levied, is it legal? In other words, a special levy was made for one of the school districts for the purpose of paying literary bonds, and it is stated that the revenue derived from the special levy was used for other purposes."

As has been held repeatedly by this office, I am of the opinion that the revenue obtained from a special levy made for one of the school districts for the paying of literary bonds cannot be used for any other purpose.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

SCHOOL BOARD—Not responsible for negligent act of bus driver.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., October 22, 1934.

MR. R. BRUCE MORRISON, *Clerk,*
Rockbridge County Schools,
Lexington, Virginia.

DEAR MR. MORRISON:

Your letter of October 18 has been received.

This office has ruled that a county school board in providing transportation for its pupils is acting pursuant to direct authority conferred upon it by section 656 of the Code, and is exercising a public and governmental function imposed upon it by law; therefore, it is not responsible for any negligent act of the driver of a bus. *Fry v. County of Albemarle*, 86 Va. 195, 9 S. E. 1004, 19 A. S. R. 879; *Maia's Administrator v. Eastern State Hospital*, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 572; *Supervisors v. Manuel*, 118 Va. 716.

I am of the opinion, however, that the driver of a bus or his employer, other than the county school board, would be personally liable for injury occasioned to others by the negligence of the driver.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TAXATION—Delinquent—Time of advertisement and sale of land.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 7, 1934.

HON. H. E. GRIFFIN, *Treasurer,*
Buckingham, Virginia.

DEAR MR. GRIFFIN:

I have your letter of November 5th, in which you inquire as to the time of advertisement and sale of land for delinquent taxes.

The last General Assembly changed the time of selling land for delinquent taxes (Section 2460 of the Code as amended by Acts 1934, page 214). The amended section provides that the sale shall be made on the second Monday in December in the year next after the year in which the treasurers submit their lists of delinquent real estate to the Boards of Supervisors.

I am of opinion, therefore, that land returned delinquent for 1933 taxes is to be sold on the second Monday in December, 1935.

As to the time of advertisement, Section 2460 further provides that:

"Before making any such sale, the treasurer shall give general notice thereof by posting a printed list of the real estate to be sold at the front door of the courthouse of the circuit court of his county, or corporation court of his city, as the case may be, and by publication thereof in one issue of some newspaper published in his county, or city, or having general circulation therein, such list to be so posted and published at least thirty days before the day of the sale."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Delinquent—Collection of—Cost payable by Commonwealth.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 13, 1934.*

HONORABLE E. R. COMBS, *Comptroller,*
Richmond, Virginia.

DEAR MR. COMBS:

This is in reply to your request for an opinion upon the propriety of paying out of the State treasury the costs incurred by the agents of the Comptroller's department in instituting suits and actions in courts for the purpose of collecting delinquent taxes.

It is my opinion that all costs incurred by such agents, payable to the sheriffs and the clerks of the courts, are payable out of the State treasury. The same rule applies to trial justice courts in cities, in the absence of any express provision in the special Acts creating such courts to the contrary.

However, in view of the provisions contained in the recent Trial Justice Act, which are as follows:

" * * but nothing contained in this act shall be so construed as to authorize any trial justice appointed hereunder to collect any fees payable by the State",

and, in view of the further fact that the State makes a contribution of \$400.00 annually towards the payment of the salaries of the trial justices in counties, I am of the opinion that the fees which would otherwise be payable to the trial justices are not payable out of the State treasury.

I am returning herewith the papers which you left with me.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Delinquent tax collectors—Maximum compensation.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 18, 1935.*

HONORABLE E. R. COMBS, *Comptroller,*
State Library Building,
Richmond, Virginia.

DEAR MR. COMBS:

I am in receipt of your letter of March 14, in which you inquire if the compensation of delinquent tax collectors appointed under section 396 of the Code, as well as that of special agents appointed by you to collect old claims, may be paid out of the appropriation made to the Department of Finance for "collecting old claims", etc.

This appropriation may be found in the Acts of 1934, at page 575. You will observe that, while the appropriation is not a new one, the Legislature of 1934 added the words: "and costs of collecting delinquent or past due State taxes. No person shall receive annual compensation out of this appropriation in excess of \$5,000.00."

In view of this change in the appropriation, I am of opinion that the compensation of both special agents of the Comptroller and delinquent tax collectors may be paid out of this appropriation, and that, if any person is acting both as a special agent and as delinquent tax collector, his total compensation should not exceed \$5,000.00 in any one year. Whether or not this compensation should be net, I am of opinion is a matter to be governed by the agreement made with the person rendering the service.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TAXATION—No tax imposed on oysters taken from Potomac River.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *June 21, 1935.*

HON. GEORGE L. DOUGHTY,

c/o Commissioner of Fisheries,

Newport News, Virginia.

DEAR MR. DOUGHTY:

This is in reply to your letter of May 13, in which you request the opinion of this office upon the question whether or not the 1½ cents tax upon oysters provided for by chapter 411 of the Acts of 1934 may be imposed upon oysters taken from the Potomac river.

After reading the various statutes applicable, I am of the opinion that this tax is confined to oysters taken from the public rocks, beds and shoals of the Commonwealth of Virginia and from oyster grounds leased by the Commonwealth. Since the bed of the Potomac is not owned by the State of Virginia and is not leased by the Commonwealth, I concur in the view you expressed in your letter that the Commission does not possess the authority to levy the tax in question upon oysters taken from the said river.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TOWN COUNCIL—Validity of contract made with member of.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *August 9, 1934.*

HON. A. M. AIKEN,

City Attorney,

Danville, Virginia.

DEAR MR. AIKEN:

Since writing you on yesterday with reference to your letter of the 7th instant enclosing a copy of your opinion, under date of February 20, 1934, addressed to the purchasing agent of your city, giving your construction of Section 2708 of the Code of Virginia, I have given consideration to the question involved and upon which you desire my opinion.

I regret that I am unable to agree with your construction of Section 2708 of the Code. If your conclusion is the correct one, that a contract made with a councilman is valid where there is no graft or undue influence connected with it, then the section of the Code is unnecessary and meaningless, as all contracts, however, made which have been procured by fraud or undue influence are void.

I agree with you that in a number of instances it is inconvenient for a town to be limited in matters of contract and that such town could very well do profitable business with members of the council; but, in the opinion, of this office the statute is very plain and prevents a member of the city or town council from having contract business relations with the city or town of whose council he is a member.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TRADE-MARKS—Illegal to copy and use commercially State seal.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 14, 1935.*

HONORABLE PETER SAUNDERS,

*Secretary of the Commonwealth,
Richmond, Virginia.*

DEAR SIR:

I have your letter of February 12, inquiring whether or not, in the opinion of this office, the fact that the seal used by the E. A. Filcher Distilling Company, Incorporated, is not technically the correct seal of Virginia at this time would effect the opinion originally given you under date of February 9, that it is not permissible to use such seal as a trade-mark for whiskey manufactured by said company.

It is my opinion that the mere fact the seal used varies in minor particulars from the correct seal of the State would be immaterial. If the seal used, or attempted to be used, so closely resembles the seal of Virginia as to be mistaken therefor, its use would be prohibited.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

TRADE-MARKS—Illegal to copy and use commercially State seal.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 9, 1935.*

HONORABLE PETER SAUNDERS,

*Secretary of the Commonwealth,
Richmond, Virginia.*

DEAR MR. SAUNDERS:

I have your letter of February 6, in which you ask whether or not the seal of Virginia may be used on trade-marks. You state that you have received applications for the registration of two trade-marks in which appears the seal of Virginia. I presume you refer to the lesser seal.

Chapter 77 of the Acts of 1932, known as the uniform flag law, provides that no person shall in any manner for exhibition or display "expose to public view for sale, manufacture, or otherwise, or to sell, give or have in possession for sale, for gift or for use for any purpose, any substance, being an article of

merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance." The Act relates to the flag, standard, color, ensign or shield of the United States or the State of Virginia.

As you state, the seal of Virginia is an integral part of the flag of Virginia. It seems to me that it is reasonable to hold that the prohibition to use the flag carries with it the prohibition to use an integral part of the flag.

I am constrained to advise you, therefore, that the trade-mark you describe should not be registered with the lesser seal of the State appearing thereon. My view is strengthened by the provision in the Act that it should be so construed as to effectuate its general purpose.

The enclosures contained in your letter are herewith returned.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TREASURERS—Commissions and payment thereof on bond sales.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 25, 1935.*

HON. W. A. BAKER,

City Treasurer,

Winchester, Virginia.

DEAR MR. BAKER:

I acknowledge receipt of your letter of January 18, in reply to my inquiry of the 17th instant, referring to your former letter of January 14.

You inquire whether or not there is any statute, or other law, which would prohibit the council of the City of Winchester from appropriating and paying to you such commissions, if any, as may have been authorized by law by reason of your receiving and disbursing proceeds from the sale of certain bonds of the City of Winchester and, further, whether or not the statutes authorize the payment of such commissions.

Section 2431 of the Code of 1930 provides that the treasurer shall receive a compensation of one-fourth of one per cent of the amount of the proceeds of sale of such bonds, and, in addition, the reasonable costs to him of additional surety bond required to be given by him on account of the sale of such bonds.

Under the provisions of the foregoing section, it is my opinion that the treasurer of the City of Winchester is entitled to receive one-fourth of one per cent of all moneys received and disbursed by him, as well as all moneys received by him up to and including February 19, 1932, the effective date of the new charter of the City of Winchester, appearing in Chapter 39, Acts of 1932.

It is my opinion that as to all such moneys received on or before February 19, 1932, although disbursed thereafter, the rate of compensation to the treasurer should be one-fourth of one per cent. As to all moneys received and disbursed on and after February 20, 1932, the treasurer is entitled to be paid a commission of one per cent from the proceeds of loans negotiated by the city to be paid from the anticipated revenues of the city for that calendar year, but in no event shall the compensation received by the treasurer from the City of Winchester in any calendar year, including 1932, and thereafter, exceed the sum of \$5000 per annum.

As above indicated, the charter provides that these commissions shall be paid from the anticipated revenues for the calendar year during which the same are earned. Your letter advises that no such payments were made by the City of Winchester and the question arises whether the city council has the authority to pay the same to the present treasurer out of the general revenues of the city.

While the charter provides that the said commissions shall be paid from

the anticipated revenues, and while it is, therefore, the duty of the city council to pay same from such revenues, it is further my opinion that the failure of the council to pay same out of the anticipated revenues from the years in which earned would not operate to discharge the obligation of the city to compensate the treasurer, and that the city council now has authority to make the payment out of any funds available for that purpose which it omitted to make at the time the same were due.

I am further of the opinion that, should the said commissions be paid to the treasurer, same should be calculated on an annual basis and that the treasurer should file with the chairman of the compensation board corrected reports of the receipts of his office for the respective calendar years in which any additional payments are made. If the filing of such reports should indicate that there are any excess fees which should be refunded in accordance with the provisions of law, then the obligation will rest upon you, as treasurer, to make such refunds as may be required by the compensation board from the corrected statements.

It may be that I do not clearly apprehend the question about which you desire information. If your inquiry is directed to the question of whether or not the council may pay you any such commissions which were due in prior years, and have the same considered as 1934 income, my opinion is that this cannot be done, as this would in effect be an evasion of the provisions of law which require a refund of all sums over the maximum amount allowed in each calendar year. Any amount which might be paid during this year to you as treasurer for commissions, and earned during prior years, will have to be considered as having the same effect legally as though the same had been paid during the year in which they were earned.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TREASURERS—May receive surety deposits of industrial life insurance companies.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., March 15, 1935.

HONORABLE GEORGE A. BOWLES,

Superintendent of Insurance,

Bureau of Insurance and Banking,

Richmond, Virginia.

DEAR MR. BOWLES:

This is in reply to your letter of March 11, in which you request me to confirm in writing the opinion I expressed in the office of the State Corporation Commission some days ago to the effect that, where authorized so to do by the State Corporation Commission, the Treasurer of Virginia may receive, as a deposit by industrial life insurance companies organized prior to 1920, securities to the extent of \$100,000.

I take pleasure in confirming this opinion.

While the language of the act does not expressly provide for this, it would seem to follow by implication. This deposit frequently constitutes a valuable asset to a life insurance company in creating public confidence in its ability to perform its insurance contracts. To hold that companies organized prior to 1920 may not make this deposit would be to conclude that it was the intention of the General Assembly to discriminate against such old companies in favor of those more recently organized.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

TRUST FUNDS—Investment of.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 10, 1934.*

JOHN L. GODWIN, *Esquire,*
Chief Attorney,
Veterans Administration,
Richmond, Virginia.

DEAR MR. GODWIN:

Re: File R 14.1

Your letter of September 17 has been received.

The question you present is whether or not a court in which a fiduciary has qualified, in directing investments of funds held by such a fiduciary, is limited to the securities listed in section 5431 of the Code of Virginia and to such other securities as the General Assembly of Virginia has prescribed as lawful investments.

Section 5430 of the Code reads as follows:

"When it appears by a report made as aforesaid or a special report of the commissioner, that money is in the hands of any fiduciary, the court, in the clerk's office of which said report is filed, may order the same to be invested or loaned out, or make such other order respecting the same as may seem to it proper."

It is plain that this section gives to the court unlimited discretion in directing investments of fiduciary funds, and to hold that the court is limited to the investments set out in section 5431, it must be said that section 5431 is in conflict with section 5430.

I do not think that this is the proper construction of the two sections. The two sections should be construed together and, in my opinion, the power given to the court by section 5430 is not taken away by section 5431, unless the latter section plainly so indicates, and I can find no evidence of any such intention.

It seems to me that the effect of section 5431 is simply to declare that certain securities are lawful investments and that a fiduciary having funds under his control may invest in such securities without first securing the approval of the court. However, I cannot think it was the intention of the General Assembly to deprive the court of all discretion.

I am strengthened in my view by the fact that section 5430 has been in our Code for a much longer period than section 5431, the latter section being the result of an act which was first passed in 1897 (Acts 1897-8, page 280). The original act of 1897-8 only declared Riddleberger bonds to be lawful investments, and I do not think that, with section 5430 in the Code, it could reasonably be said that the General Assembly intended to limit investments of all fiduciary funds to Riddleberger bonds.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***TRIAL JUSTICES—Attorney's fees not taxable in courts of—**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 24, 1934.*

HONORABLE W. HOWARD McCLINTIC,
Trial Justice,
Warm Springs, Virginia.

DEAR JUDGE McCLINTIC:

This is in reply to your letter of October 23, in which you request the opinion of this office upon the question of whether or not the taxed attorney's

fees, as provided for in section 3533 of the Code of Virginia, apply in the trial justice courts of the respective counties and cities.

It is my opinion that the provisions of section 3533 do not apply to trials in trial justice courts.

This section of the Code originated in the Acts of 1902-3-4, page 783, about thirty years ago. It provides that the *clerk* of the court wherein any party recovers costs shall tax the same, and that he shall include therein the fee of such party's attorney, if he have one, in accordance with the schedule of fees contained in said section.

There has never been provided for by law a clerk of courts of justices of the peace or trial justices of the counties until legislation recently adopted, and particularly the recent trial justice act, which provides for a clerk of such court. It has never been customary, nor has there been any authority, to tax an attorney's fee in any proceedings except in a court of record, which, at the time of the enactment of section 3533, was provided with a clerk as all courts of record were at that time.

It is my opinion that the mere facts the General Assembly has enacted a statute providing for a clerk of a trial justice court would not operate to change the schedule of fees to be taxed by the court.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TRIAL JUSTICES—Authority to issue subpoenas and warrants in civil and criminal cases.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 18, 1934.*

MR. J. E. SCLATER,

Justice of the Peace,

Culpeper, Virginia.

DEAR MR. SCLATER:

I am in receipt of your letter of yesterday, in which you desire my opinion as to the authority of the Trial Justice to issue subpoenas and warrants in criminal cases, and in which you call my attention to sub-section 7 of section 4988 of the Code of Virginia. I note that you have talked to several lawyers and that they have been unable to construe the law relating to the authority of Trial Justices.

In my opinion, Trial Justices have concurrent authority with Justices of the Peace in issuing subpoenas and warrants in criminal cases. The Code of Virginia of 1930 contains the old Trial Justice law. There is nothing in section 4988(7) which can be construed as depriving Justices of the Peace of the authority to issue warrants and subpoenas in civil and criminal cases, the provision in that section expressly providing that nothing therein shall be construed to *interfere with*, or abridge, the rights of Justices of the Peace to issue warrants and subpoenas in both civil and criminal cases. (*Italics mine*).

Without undertaking to construe the authority of Trial Justices under the old act, I call your attention to chapter 294 of the Acts of 1934.

Under the fourth paragraph of section 4988-g of chapter 294, it is provided:

"The trial justice, in addition to his other powers, shall have power to issue and jurisdiction to try attachments, and warrants and subpoenas, including subpoenas *duces tecum*, in civil and criminal cases * * *."

In the second paragraph of section 4988-h of the same chapter, after providing for the appointment of clerks, it is further provided:

"Such clerk may within the jurisdiction of the trial justice for which he is clerk, issue warrants and processes original, mesne and final, both civil and criminal * * * "

Yours very truly,

EDWIN H. GIBSON,

Assistant Attorney General.

TRIAL JUSTICES—Clerk of Trial Justice court must be an adult.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *April 30, 1935.*

MR. EMERSON D. BAUGH,

*Trial Justice for Brunswick County,
Lawrenceville, Virginia.*

DEAR MR. BAUGH:

I am in receipt of your letter of April 19.

I am of opinion that the clerk of a trial justice court holds an office within the meaning of section 32 of the Constitution, and that, therefore, a person under twenty-one years of age cannot qualify as such clerk. You will observe that section 4988-h of the Code gives quite broad powers to the clerk of a trial justice court.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TRIAL JUSTICES—Concurrent jurisdiction to issue and try attachments.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 6, 1934.*

HONORABLE JOHN GALLEHER,

*Attorney for the Commonwealth,
Leesburg, Virginia.*

DEAR MR. GALLEHER:

Reply to your letter of August 22 has been delayed on account of absence from my office and the press of other matters.

I can find nothing in the statutes which gives to trial justices exclusive jurisdiction to issue and try attachments for amounts less than \$300.

My conclusion is, therefore, that courts of record still have the concurrent jurisdiction in such matters which they had prior to the Trial Justice Act of 1934.

With my best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

**TRIAL JUSTICES—Disposition of criminal warrants after trial of case—
Fee of clerk—Filing papers.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 3, 1934.

HONORABLE W. CLYDE DENNIS,
Trial Justice,
Grundy, Virginia.

DEAR MR. DENNIS:

This is in reply to your letter of August 1, in which you inquire whether or not, under the provisions of section 4988-k, criminal warrants, after a case has been tried by the trial justice, should be retained in the office of the Trial Justice, or should be returned to the office of the clerk of the Circuit Court of the County.

Section 4988-k provides that "All papers connected with any of the proceedings before the trial justice, except such as may relate to cases appealed or removed, or which by general law are required to be sooner returned to the clerk's office of the circuit court, shall remain in the office of the trial justice, or of the clerk appointed by him hereunder, for three years after final disposition by judgment or otherwise by the trial justice, * * *."

The general law with reference to criminal warrants is contained in section 4989 of the Code of 1930, which provides that all criminal warrants and other papers in connection with the trial of a person convicted by a justice of the peace shall be returned by the justice forthwith to the clerk of the court, whether an appeal be applied for or not. I do not find any provision in the general law requiring the return of warrants to the clerk's office where the accused is acquitted. However, in the event the accused should be sent on to the grand jury, of course, the papers should be returned to the clerk's office for proceedings there.

It is the opinion of this office, therefore, that in criminal cases of conviction, or in cases where the accused is held for the grand jury, the papers should be forthwith returned to the clerk's office. In cases where the accused is acquitted, the warrant and other papers should be either returned to the clerk's office at the end of three years, or sooner if the general laws so provide.

The method of paying the clerk for filing the papers is the same as that now prevailing in cases of conviction and should be taxed as part of the costs and, in cases where such fee is not paid by the accused and where the laws provide for the payment of it by the State or locality, the same rule will prevail under the Trial Justice Act as heretofore prevailed under the law with reference to the justices of the peace.

In civil cases, the Trial Justice should tax with the costs the filing fee which the clerk will be entitled to receive at the end of three years, and should collect the same.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

**TRIAL JUSTICES—Disposition of original warrant, judgment and execution
issued by him in civil cases.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 1, 1934,

HON. C. W. SMITH, *Clerk,*
Circuit Court of Appomattox County,
Appomattox, Virginia.

MY DEAR MR. SMITH:

I am in receipt of your letter of November 22, in which you ask my opinion as to "what a trial justice should do with the original warrant, judgment and execution issued by him in civil cases."

You call my attention to the following from section 4988-k of the Code of Virginia (Acts 1934, page 472) :

"All papers connected with any of the proceedings before the trial justice, except such as may relate to cases appealed or removed, or which by general law are required to be sooner returned to the clerk's office of the circuit court, shall remain in the office of the trial justice, or of the clerk appointed by him hereunder, for three years after final disposition by judgment or otherwise by the trial justice. * * "

If this language stood alone, I would agree with you that section 6030 of the Code would apply and that the papers in the case, including an abstract of the judgment, should be returned to the office of the clerk of the circuit court, as provided in that section. However, the above quoted language is followed by this provision :

" * * and executions and abstracts of judgment and additional executions in such proceedings may be issued by such trial justice or clerk at any time during such period of three years in accordance with the general law in relation to abstracts of judgments and executions. At the end of such period, such papers shall be returned to the clerk's office of the circuit court of the county or of the corporation court of the city in which the case was disposed of, and shall be properly filed, indexed and preserved by the clerk thereof, who shall receive the same fees as are now allowed for receiving, filing and indexing like papers returned by justices of the peace."

The above language gives to the trial justice or his clerk power that justices of the peace have not heretofore had, namely, the issuing of additional executions for a period of three years in accordance with the general law in relation to executions. The section then goes on to very clearly provide that at the end of this three years period the papers shall be returned to the office of the clerk of the appropriate court. It is plain to me that the provisions of this section are inconsistent with those of section 6030 and that, therefore, the latter section cannot control.

I have given this question a good deal of thought and am convinced that it was the intention of the legislature in replacing a number of justices of the peace in each county with one trial justice (and also providing for a clerk) that more should be done in the courts of these officers in civil cases than has heretofore been done by justices of the peace, so that the result will probably be that many more judgments will be collected on executions of the trial justices. While, of course, these courts are not courts of record, I believe it is intended that in their own spheres, so far as the issuance of executions and additional executions are concerned they shall function as such.

It is quite true, as you say, that judgments of a trial justice do not constitute a lien upon real estate until docketed in the clerk's office of the appropriate court. However, the plaintiff can at any time perfect his lien by securing an abstract of the judgment and having it docketed in the clerk's office. See section 4988-k and 6461 of the Code.

The views I am expressing herein are in accord with the interpretation placed upon the new trial justice act in Burk's Pleading and Practice, as you will see from the third edition, page 32, from which I quote as follows :

"* * The papers connected with any proceedings, except such as relate to cases removed or appealed, are retained in the office of the trial justice for three years after the final disposition of the cause by judgment or otherwise. During this time the trial justice, or his clerk, if any, may issue abstracts and executions in accordance with the general law in relation thereto. At the end of such period the papers are returned to the clerk's office of the appropriate circuit or corporation court. * * ."

My conclusion is that during the three years period the papers should not be returned to the office of the clerk of the circuit court subject to the right of an interested party to secure an abstract of the judgment and have it docketed, but that they should be returned at the end of the period as provided by section 4988-k.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TRIAL JUSTICES—Duty of clerk to collect fees.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., August 15, 1934.

HON. L. B. MASON, *Clerk,*
Circuit Court of King George County,
King George, Virginia.

DEAR MR. MASON:

Your letter of August 2, addressed to Mr. E. R. Combs, Comptroller, requesting information concerning your duties under sections 2551 and 2546 of the Code, has been referred to me.

I understand you wish to know whether or not you should continue to perform the duties set forth in these sections and if the said duties are altered by the enactment of chapter 294 of the 1934 Acts of Assembly, commonly known as the Trial Justice Act.

I find that neither section 2551 nor 2546 has been altered or repealed.

Chapter 249 of the Acts of 1934, subsection (f), (section 4988-(f) of the Code) provides in part:

“ * * The trial justice shall charge and collect all fees which justices of the peace for counties are authorized to collect and which have not been paid in advance; all fees in criminal cases and matters, collected by said trial justice, except those fees belonging to the issuing officers, shall be turned into the treasury of the county or city within his jurisdiction in which the offense for which warrant issued was committed; all fees in civil cases and matters shall be turned into the treasury of the county or city in which the case may be tried as provided in section six thousand and twenty of the Code of Virginia; fines assessed for violations of city, town or county ordinances shall be turned into the treasury of the city, town or county whose ordinance has been violated; *other fines shall be turned over and accounted for as now provided by law with respect to justices of the peace*, but nothing contained in this act shall be so construed as to authorize any trial justice appointed hereunder to collect any fee payable by the State.”

From this section you will note that a trial justice will account for fines in the method that has heretofore been followed by a justice of the peace. When the trial justice has fulfilled his duties in this respect, then you are charged with the same duties as you have heretofore performed under sections 2551 and 2546 of the Code.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TRIAL JUSTICES—Fees of

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 25, 1934.

HONORABLE E. HUGH SMITH,
Heathsville, Virginia.

MY DEAR JUDGE:

I am in receipt of your letter of the 18th instant, in which you make a very appropriate suggestion that rulings upon the construction of the recent trial justice act should be uniform throughout the State. You then ask two questions:

The first is as to the fees which a trial justice may charge and in this connection you call my attention to that portion of section 4988-f, providing:

“ * * The trial justice shall charge and collect all fees which justices of the peace for counties are authorized to collect and which have not been paid in advance; all fees in criminal cases and matters, collected by said trial justice, * * *.”

And to section 4988-1, providing:

“At or before the time of hearing on any claim mentioned in subsection (b) or subsection (d) of section thirty-one hundred and two, the plaintiff in such claim shall pay to the trial justice a trial fee of one dollar. The trial fee shall be taxed as part of the costs. * *,”

You then ask my opinion as to the fees which a trial justice may charge and collect.

In my opinion, the fee of \$1.00 provided for in section 4988-1 is the same fee provided for the trial of cases by a justice of the peace under section 3481(6) of the Code, and not an additional trial fee. There is no language in the act which expressly provides for two trial fees, nor do I find any such clear implication as to justify placing this additional burden on the litigants of small claims.

Your second question is directed to the maximum jurisdictional amount for which a justice of the peace may issue a warrant.

It is the opinion of this office that a justice of the peace cannot issue a warrant, though returnable before a trial justice, for an amount exceeding \$300, that being the maximum amount over which he is given jurisdiction by virtue of the provisions of section 6015 of the Code, and no additional jurisdiction being conferred by the recent trial justice act.

The Supreme Court of Appeals, in *Wall v. American Bank & Trust Company*, 159 Va. 871, in an opinion by Mr. Chief Justice Campbell, held that a justice of the peace, who derives his jurisdictional authority from the statute, can only exercise such jurisdiction as is expressly conferred upon him. It follows that, where the amount exceeds \$300 and does not exceed \$1000, the plaintiff must obtain his warrant from the trial justice or his clerk.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TRIAL JUSTICES—Judgment for costs against prosecutor.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 4, 1935.*

MISS LILLIAN FORTUNE,
*Clerk of the Trial Justice Court,
Smyth County,
Marion, Virginia.*

DEAR MISS FORTUNE:

Hon. E. R. Combs has referred to me your letter of February 12, in which you request his advice as to the cases in which you are to tax a prosecution fee.

I infer that the purpose of your inquiry is to ascertain in what cases a judgment for costs shall be rendered against the prosecutor. Section 4991 of the Code provides as follows:

"In every case of acquittal by a justice, if he believes the charge was made maliciously, and without probable cause, he may render judgment for the costs against the procecutor."

It is my opinion that, therefore, in cases where a prosecution is instituted by private individuals and the accused is acquitted, if the justice be of opinion that the warrant was maliciously sworn out and without probable cause to believe the accused actually guilty of the crime charged, then in such cases the trial justice shall render a judgment against the person instituting the proceedings for the costs incident thereto.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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TRIAL JUSTICES—Jurisdiction—Appointment of Justice of the Peace as Trial Justice.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 29, 1934.*

D. W. MCNEIL, *Esquire,
Trial Justice,
Lexington, Virginia.*

DEAR MR. MCNEIL:

I have your letter of September 22.

For convenience, I am setting forth your questions in the order in which they are asked, each question being immediately followed by the answer thereto. All of your questions relate to the Trial Justice Act of 1934 (Acts 1934, page 466).

"1. Does a trial justice, by virtue of his office as trial justice, have the authority to take acknowledgements, administer oaths, take affidavits the same as a justice of the peace?"

Section 5205 of the Code provides that writings may be admitted to record upon the certificate of a clerk or his deputy, or a justice of the peace, or a notary public, etc. No mention is made of a trial justice, and I do not find anything in the Trial Justice Act of 1934 which gives to a trial justice authority to take acknowledgements.

I am of the opinion that a trial justice may administer oaths and take affidavits in matters within his jurisdiction.

"2. If a justice of the peace is appointed trial justice, does the acceptance of the office of trial justice automatically vacate his office as justice of the peace, or may he continue to hold his office as justice of the peace until the expiration of his elected term?"

Section 3093 of the Code provides that if any justice of the peace accepts or holds any other office incompatible with that of justice of the peace, such acceptance or holding shall vacate the office of justice. However, I do not think the two offices are incompatible if the proper interpretation is placed upon the duties of a trial justice who is also a justice of the peace. By this I mean that, if a justice of the peace is appointed a trial justice, in every matter in which the two offices have concurrent jurisdiction, the officer should act as a trial justice and not as a justice of the peace. To illustrate my point, both a trial justice and a justice of the peace have power to issue warrants; in every case where a warrant is issued by an officer holding both offices, I think it should be issued by him as a trial justice and not as a justice of the peace, on the theory that the trial justice is being paid a salary for every thing that can be done by that officer as such trial justice.

"3. On civil judgments that were rendered by justices of the peace before the beginning of the Trial Justice Act, who is the proper official to issue executions on such judgments? May the justice who entered the original judgment issue the execution, or should all such executions be issued by the trial justice? If such executions should be properly issued by the trial justice, how is he to get the record of the justice of the peace before him in order to issue such *fi fa*?"

If the record of the judgment is still in the office of the justice of the peace before whom it was obtained, I am of opinion that that officer may issue abstracts and executions in accordance with the provisions of the general law. In this connection, I call your attention to sections 6024, 6025, 6029, 6039 and 6031 of the Code of Virginia.

"4. Under the trial justice law, do all lunacy commissions have to be held by the trial justice, or may any justice of the peace sit on the commission? My view of the law is that sitting on a lunacy commission is exercising a judicial function, and that all lunacy commissions would have to be held by the trial justice."

Section 1017 of the Code, providing for lunacy commissions, has not been repealed, and I am of opinion that justices of the peace still have the authority given them under that section. The Trial Justice act does not confer on Trial Justices the authority to sit on such commissions and I am of opinion they are not authorized to sit in such proceedings.

"5. In the issuing of criminal warrants, is it proper for the issuing justice to demand of the complainant that he deposit the fee for issuance and service of the warrant in advance, or should no such costs be collected until the case has been tried?"

I know of no provision of law by which a complainant in a criminal matter may be required to pay in advance a fee for the issuing and service of a warrant. As a matter of practice, I am informed that many officers who may issue criminal warrants refuse in some cases to issue the warrants unless the fee therefor is paid in advance, but I know of no authority by which a complainant can be compelled to pay these fees.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TRIAL JUSTICES—Jurisdiction “hit and run” cases—Examine felony—Try misdemeanor.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 25, 1935.*

HONORABLE W. H. CARTER,
*Attorney for the Commonwealth,
 Amherst, Virginia.*

DEAR MR. CARTER:

This is in reply to your letter of February 18, in which you request the opinion of this office upon the question whether a trial justice has jurisdiction to try and find guilty a person for violation of section 2154(104) of the Motor Vehicle Code, as appearing in the 1932 Supplement to Michie's Code, 1930.

As you state in your letter, this is what is commonly known as the “hit and run” section of the automobile laws, and a person convicted of violating said section may be punished by a fine of not less than \$25 nor more than \$5000, or by imprisonment in jail of not less than thirty days, nor more than one year, or in the State penitentiary for not less than one year, nor more than five years, or by both such fine and imprisonment.

Under the provisions of section 4758 of the Code, a felony is defined as any crime which may be punished by death or confinement in the penitentiary. This section has been construed by our highest court to mean that, even though a person be convicted and merely fined, the offense is nevertheless a felony if his conviction is for a violation of a statute which may be punished by confinement in the penitentiary.

It is also provided in the statutes relating to the jurisdiction of trial justices that they may conduct a preliminary hearing of charges amounting to a felony, but the jurisdiction of the trial justice is limited to either dismissing the charge or else sending the accused on to the grand jury.

It seems to me that the law is so plain that, where the warrant actually charges a violation of section 2154(104) of the Motor Vehicle Code, there is no escape from the conclusion that a felony is charged and the trial justice has no authority to convict the accused. He must either dismiss the charge, or else hold the accused for action by the grand jury.

I agree with you that it would probably be better in many cases if the trial justice were authorized to dispose of them. However, the law seems to be quite clear to the contrary.

Sincerely yours,

ABRAM P. STAPLES,

*Attorney General.***TRIAL JUSTICES—Jurisdiction exclusive in felony examinations.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 21, 1935.*

HONORABLE J. R. YEAGER,
*Sergeant,
 Gordonsville, Virginia.*

DEAR MR. YEAGER:

I have your letter of January 18, calling my attention to the amendment of the charter of the town of Gordonsville by the 1932 Acts of Assembly, chapter 226, and inquiring whether or not, in the opinion of this office, the police justice of Gordonsville or the trial justice of Orange county has jurisdiction to conduct a preliminary hearing of persons charged with the commission of a felony.

I assume that the trial justice has been appointed for the county of Orange and the town of Gordonsville. This being true, it is my opinion that, under the provisions of section 4988-g—Third, the trial justice has the jurisdiction to conduct such preliminary hearing.

While clause 14 of the charter of the town of Gordonsville authorizes the council to grant to the police justice for the town jurisdiction and powers similar to the jurisdiction and powers of police justices in cities of the State, it is my opinion that the more recent enactment of the Trial Justice Act would probably be held to supersede the powers of the police justice in this respect. The question is not free from doubt, however, as it might be held that both justices have jurisdiction.

However, it is my opinion that the safest procedure is to have such cases conducted before the trial justice of the county of Orange and the town of Gordonsville.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TRIAL JUSTICES—No authority to act upon lunacy commission.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 5, 1934.

HONORABLE J. G. JEFFERSON, JR.,

Trial Justice,

Amelia, Virginia.

DEAR MR. JEFFERSON:

This is in reply to your letter of July 3, requesting the opinion of this office upon the question whether or not a trial justice, appointed under the provisions of chapter 294 of the Acts of the General Assembly of 1934, is empowered to act upon a commission provided for by section 1017 of the Code of Virginia.

I have been unable to find any provision in the Code of Virginia which authorizes a trial justice to act on or become a member of any such commission. In the absence of any authority in the statutes, it is the opinion of this office that such trial justice does not have such authority.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

TRIAL JUSTICES—Printing and supplying forms for.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 20, 1934.

HON. JAMES W. PHILLIPS, *Director,*

Bureau of Organization & Supervision,

State Department of Public Welfare,

Richmond, Virginia.

DEAR MR. PHILLIPS:

This is in reply to your letter of the 16th instant, inquiring as to the proper construction of certain statutes relative to the furnishing of printed forms to the juvenile and domestic relations courts and the effect thereon, if any, of the recent trial justice act.

The effect of the recent trial justice act is to make the trial justices the judges of the juvenile and domestic relations courts, except where otherwise provided by law.

You also inquire in your letter as to whether or not your Department has the authority to print and furnish the forms for use in such courts, at the cost of the State.

You are advised that this office is of the opinion that your Department does not now have such authority under the provisions of Section 1953-g of the Code. Section 4988-j imposes upon the boards of supervisors and councils the duty to pay for the necessary books, stationery and supplies.

Your next question is whether your Department heretofore had the authority to print and distribute these forms to said judges, at the cost of the State.

You are advised that this office is of the opinion that under the provisions of Section 1953-g such authority was conferred upon your Department, as well as upon councils of cities and boards of supervisors of counties. However, the effect of Section 4988-j is to require the counties and cities to pay for same in the future.

Your next question is whether or not these forms can now be printed by the public printer and sold by him to the various counties at your request.

It is the opinion of this office that the provision of Section 1953-g of the Code, conferring upon your Department the authority to prescribe and provide said forms, is broad enough to confer upon your department the authority to prescribe the form and have same provided through sale to the counties and cities by the Division of Purchase and Printing.

You further inquire whether or not Section 1953-g is in conflict with Section 2073, as amended by the Acts of 1933.

If the Division of Purchase and Printing should, at the request of your Department, sell these forms to the counties and cities, the effect of Section 2073, as amended, would be to prevent the printing of such forms at the State-use printing shop of the penitentiary because of the provision of said section that no products of said shop shall be sold to any officers and agencies of counties, cities and towns. It is my opinion that the offices of a county trial justice is a county office within the meaning of this section.

However, there is nothing in Section 2073 to prevent the Division of Purchase and Printing from having such forms printed elsewhere than at the penitentiary and selling the same pursuant to your direction to the counties and cities for use by the juvenile and domestic relations courts.

Your next question is whether or not the forms referred to are embraced within the language "supplies" as used in Section 4988-j. The language in question is "shall provide necessary books and stationery and supplies." It is the opinion of this office that these forms are embraced within the language, "stationery and supplies", and that it is the duty of the councils of cities and supervisors of counties to pay for same.

As above stated, it is the further opinion of this office that the forms may be prescribed by and furnished, or provided through the sale by the Division of Purchase and Printing to the councils of cities and boards of supervisors of counties.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

TRIAL JUSTICES—Substitute practicing law in trial justice court.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 14, 1934.*

HONORABLE HAROLD F. SNEAD,
Substitute Trial Justice,
Mutual Building,
Richmond, Virginia.

DEAR MR. SNEAD:

This is in reply to your letter of July 10, requesting the official opinion of this office upon the question of whether or not a substitute trial justice appointed under section 4988-c, of the Virginia Code, Acts of 1934, page 466, is prohibited from practicing law in the trial justice court in cases in which he is not acting as trial justice.

The statute expressly prohibits the trial justice from practicing in his own court, but contains no such prohibition as to the substitute trial justice. In view of the fact that there is an express prohibition in one case and none in the other, it is my opinion that a substitute trial justice may practice before the regular trial justice. Obviously, however, he cannot sit in any case in which he is counsel.

The second question is whether or not a substitute trial justice comes within the provisions of section 6019 with reference to the handling of claims for collection.

It is my opinion that such officer does not come within the provisions of said section which relates to the handling of claims for collection by justices of the peace. However, I am of the opinion that a substitute trial justice should not render judgment in connection with any claim which is in his hands for collection, or in which he represents any party in interest.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

WOMEN—Employment in Ferry Restaurant regulated—Ticket selling not regulated.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 8, 1935.*

MISS CARRIE B. FARMER, *Director,*
Women and Children's Division,
Department of Labor and Industry,
Richmond, Virginia.

DEAR MISS FARMER:

I am just in receipt of your letter of April 6, in which you refer to a conversation I had with Mr. Hall on Friday in connection with complaints against the Chesapeake Ferry Company as to long hours women are being employed on the boats of that company operating between Norfolk and Newport News.

In the second paragraph of your letter you say:

"This particular operation has given us considerable trouble for several years. Judge Locke of Newport News Police Court fined the manager of the restaurant concession on the Chesapeake Ferry for violating section 1808 of the Code (the 10-hour law) while Judge Spindle of Norfolk dismissed the case brought to him because ferry boats are not mentioned in the 10-hour law."

You then ask for a ruling as to the applicability of the 10-hour law regulating the work of women employed on the Chesapeake Ferry Company boats, and enclose with your letter your file in connection with complaints against the company dating as far back as December 14, 1928.

In the letter of John Gribben, Chief Factory Inspector, to the Commissioner of Labor, dated Newport News, December 14, 1928, he cites two cases in connection with the enforcement of the law regulating the hours of work for women.

1. The case of a Mr. Herman in connection with the employment of a woman in a restaurant operated on a ferry boat, in which Mr. Gribben states that Mr. Herman was fined by the Police Justice of Newport News for having worked a woman over ten hours in violation of section 1808 of the Code of Virginia.

In my opinion this conviction was entirely proper, and I am further of the opinion that it is a criminal offense for an employee to work a woman longer than ten hours, in any one day of twenty-four hours, in a restaurant, whether the same is conducted on shore or between the cities of Norfolk and Newport News.

As to the jurisdiction of the courts of Newport News, see section 5958 of the Code. At the same time you will note that this section does not apply to the city of Norfolk. While there may be some doubt as to the jurisdiction of the courts of Norfolk, there is no doubt of the jurisdiction of the courts of Newport News.

2. In the paragraph of your letter quoted, you say that Judge Spindle, of Norfolk, dismissed a case against the person brought before him "because ferry boats are not mentioned in the 10-hour law." Evidently this case is the same one to which Mr. Gribben referred to in his letter of December 14, 1928, to the Commissioner of Labor.

Section 1808 of the Code provides that "No female shall be employed * * * in any factory, workshop, laundry, restaurant, mercantile or manufacturing establishment in this State more than ten hours in any one day of twenty-four hours." Mr. Gribben refers to a prosecution based upon the working of a woman selling passage tickets more than sixteen hours a day. You will see from his report that the selling of tickets by a woman in connection with the operation of a ferry is not included in the provisions of section 1808.

The fact that section 1808 of the Code specifies the particular lines of business in which the employment of women for more than ten hours in one day is prohibited may or may not have been intentional. The application of the law cannot be extended to the employment of women generally, and prosecutions under this section, which has not been amended, must be confined to those businesses specifically mentioned in the section.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

WARRANTS—Issuance by substitute Trial Justices and Justices of the Peace.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 6, 1935.

MR. CECIL D. QUILLEN,

Attorney-at-law,

Gate City, Virginia.

DEAR MR. QUILLEN:

In your letter of May 4 you requested an opinion from this office upon the following question:

"Does the fact that a person is justice of the peace render him ineligible to serve as substitute trial justice. If such a person should continue to function as a substitute trial justice only in the absence, etc. of the Trial Justice, is the office of justice of the peace so vacated thereby?"

I am enclosing you herewith a copy of the Attorney General's opinions relating to trial justices and justices of the peace and directing your attention to question and answer No. 21 appearing on page 11. The same answer, I think, is applicable to substitute trial justices, except that a substitute trial justice has authority to issue warrants only in the absence of the trial justice and, therefore, in cases where the regular trial justice is not absent the warrants would be issued in the capacity of justice of the peace. When the trial justice is absent, however, all warrants issued by the official referred to in your question should be issued in the capacity of substitute trial justice.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

WITNESSES—Criminal cases—Expenses payable by State.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 25, 1934.*

HON. L. MCCARTHY DOWNS,

Auditor of Public Accounts,

Richmond, Virginia.

DEAR MR. DOWNS:

I have your letter of October 24, in which you write:

"Our auditors from time to time are called upon to appear as witnesses in cases in the various localities. Recently our auditors were called in the case of *Commonwealth vs. J. H. Frantz* and others in Roanoke, Virginia. We had certain expenses in the nature of salaries and traveling expenses and living expenses of our auditors while testifying in these trials. We have billed the City of Roanoke for the cost to us for such expenses.

"I am in receipt of a communication from the city attorney of Roanoke indicating that the council of that city questions whether or not this expense should be borne by the Commonwealth in view of the fact that the cases were Commonwealth ones.

"I shall appreciate it if you will give me your opinion on the subject as to just who should bear such expenses, so that I may be guided in this instance and in others which may arise."

In view of the fact that the defendant was being prosecuted in the name of the Commonwealth for a violation of a State law, I am of the opinion that there is no liability on the city of Roanoke to pay the traveling and living expenses of your auditors who were summoned as witnesses for the Commonwealth.

Of course, witnesses are entitled to the mileage and attendance fee allowed by law, and if this is demanded, the expenses of your auditors, to be paid out of the appropriation for the Auditor of Public Accounts, would be decreased to this extent.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

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