

OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT

TO THE
Governor of Virginia

From July 1, 1935, to June 30, 1936

RICHMOND:
DIVISION OF PURCHASE AND PRINTING
1936

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Letter of Transmittal

COMMONWEALTH OF VIRGINIA,
OFFICE OF ATTORNEY GENERAL,
RICHMOND, VA., *November 15, 1937.*

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

MY DEAR GOVERNOR:

In accordance with the provisions of section 374a of the Code of Virginia, I herewith transmit to you my annual report. Pursuant to the statute, I have included in my report such official opinions rendered by me as would seem to be of general interest, or helpful in promoting uniformity in the construction of the laws of the State.

The opinions included in this report and statements of suits pending and disposed of by no means represent all of the work of this office, the records of which show that the Attorney General has received a large and ever-increasing number of inquiries concerning public business. Many of these inquiries require considerable time and research to answer, but it is not deemed necessary to preserve all such opinions in printed form.

Yours very truly,

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.....	Henrico.....	Assistant
G. STANLEY CLARKE.....	Henrico.....	Assistant
D. GARDINER TYLER, JR.....	Charles city.....	Assistant
S. W. SHELTON.....	Fluvanna.....	Assistant
JOS. L. KELLY, JR.....	Bristol city.....	Law Clerk
RALPH H. FERRELL, JR.....	Richmond 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. BOCOCK.....	1852-1857
JOHN RANDOLPH TUCKER.....	1857-1865
THOMAS RUSSELL BOWDEN.....	1865-1869
CHARLES WHITTLESEY (military appointee).....	1869-1870
JAMES C. TAYLOR.....	1870-1874
RALEIGH T. DANIEL.....	1874-1877
JAMES G. FIELD.....	1877-1882
FRANK S. BLAIR.....	1882-1886
RUFAS 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. *Atlantic Refining Company v. Commonwealth.* From State Corporation Commission. Entrance fee of foreign corporation. Affirmed.
2. *Bausell, Bernace v. Commonwealth.* From Circuit Court of Wythe County. Murder. Reversed and remanded.
3. *Bausell, Henry F. v. Commonwealth.* From Circuit Court of Wythe County. Murder. Reversed and remanded.
4. *Blair, James v. Commonwealth.* From Corporation Court, Part Two, of City of Norfolk. Attempt to rape. Reversed.
5. *Boaze, Garland Lee v. Commonwealth.* From Circuit Court of Campbell County. Desertion and non-support. Reversed.
6. *Boaze, Garland Lee v. Commonwealth.* Petition to rehear. Desertion and non-support. Rehearing denied.
7. *Booth, Charlie v. Commonwealth.* From Corporation Court of City of Lynchburg. Robbery. Affirmed.
8. *Carter, Roy v. Commonwealth.* From Circuit Court of Mecklenburg County. A. B. C. Act. Prohibition. Affirmed.
9. *Cleek, Buck v. Commonwealth.* From Circuit Court of Scott County. Prohibition. Affirmed.
10. *Commonwealth v. Firemen's Mutual Aid Association of the City of Richmond.* From Circuit Court of the City of Richmond. Tax on intangible property. Affirmed in part. Reversed in part.
11. *Commonwealth v. Imperial Coal Sales Company.* From Circuit Court of City of Lynchburg. Tax on capital. Reversed.
12. *Creasy, Paul v. Commonwealth.* From Corporation Court of City of Lynchburg. Robbery.
13. *Drinkard, Harry v. Commonwealth.* From Corporation Court of City of Lynchburg. Malicious wounding. Affirmed.
14. *Eppa Hunton IV, Executor of Estate of Eppa Hunton, Jr., v. Commonwealth.* From Hustings Court of City of Richmond. Income tax. Reversed. Rehearing granted. Affirmed.
15. *Hale, Garland v. Commonwealth.* From Hustings Court of City of Portsmouth. Murder. Reversed and remanded.
16. *Hamilton, T. J. v. Commonwealth.* From Hustings Court of City of Petersburg. Murder. Affirmed.
17. *Harper, Paul v. Commonwealth.* From Corporation Court of City of Lynchburg. Voluntary manslaughter. Reversed.
18. *Hendricks, L. F. v. Commonwealth.* From Corporation Court of City of Norfolk. Murder. Affirmed.
19. *Henson, Jack H. v. Commonwealth.* From Corporation Court of City of Lynchburg. Involuntary manslaughter. Affirmed.
20. *Henson, Jack H. v. Commonwealth.* From Corporation Court of City of Lynchburg. Violation of Section 2154 (104) of Code of Virginia. Affirmed.
21. *Holbrook, C. J. v. Commonwealth.* From Circuit Court of Wise County. Embezzlement. Reversed and remanded.
22. *Hoy, John v. Commonwealth.* From Circuit Court of Rockingham County. Seduction. Error confessed.
23. *Hudson, E. L. v. Commonwealth.* From Circuit Court of Pulaski County. Alcoholic Beverage Control Act. Error confessed.
24. *Jackson, Joe and John Shell v. Commonwealth.* From Circuit Court of Spotsylvania County. Murder. Writ dismissed.
25. *Johnson, Haywood v. Commonwealth.* From Circuit Court of Princess Anne County. Murder. Affirmed.
26. *Keith, Bascom and Reda Keith v. Commonwealth.* From Circuit Court of Russell County. Miscegenation. Reversed and remanded.
27. *Keith, Bascom and Reda Keith v. Commonwealth.* Petition to rehear. Miscegenation. Rehearing refused.
28. *Kent, Robert C. v. Commonwealth.* From Circuit Court of Botetourt County. Kidnapping. Affirmed.

29. *King, James v. Commonwealth.* From Corporation Court of City of Norfolk. Rape. Affirmed.
30. *King, Stanley F. v. Commonwealth.* From Corporation Court of City of Norfolk. Rape. Affirmed.
31. *Kline, G. D. v. Commonwealth.* From Circuit Court of Alleghany County. Forgery. Affirmed.
32. *Loving, E. N., L. L. Zechini and W. H. Trent v. Commonwealth.* From Circuit Court of Amherst County. Rape. Reversed and remanded.
33. *McDaniell, Clark v. Commonwealth.* From Circuit Court of Wise County. Housebreaking. Affirmed.
34. *McWilliams, Sam v. Commonwealth.* From Circuit Court of Wise County. Contributing to delinquency of minor. Affirmed.
35. *Maxwell, Vera v. Commonwealth.* From Corporation Court, Part Two, of City of Norfolk. Robbery. Affirmed.
36. *O'Brien, Pat v. Commonwealth.* From Corporation Court of City of Norfolk. Violation of Section 4675 (50) of Code of Virginia. Reversed and remanded.
37. *Patterson, Burman v. Commonwealth.* From Circuit Court of Roanoke County. Grand larceny. Reversed and remanded.
38. *Peninsular Transit Corporation v. Commonwealth.* From State Corporation Commission. Gross receipts tax on motor vehicle carriers. Affirmed.
39. *Pinn, Dora v. Commonwealth.* From Corporation Court of City of Lynchburg. Grand larceny. Reversed.
40. *Quillin, Ervin v. Commonwealth.* From Circuit Court of Scott County. Murder. Affirmed.
41. *Robinson, Paul and Elmo Payne v. Commonwealth.* From Corporation Court of City of Lynchburg. Perjury. Dismissed as to Payne—Affirmed as to Robinson.
42. *Rosenberg, Charles v. Commonwealth.* From Hustings Court of City of Radford. Violation of Section 4693 of Code—lottery. Affirmed.
43. *Salzer, Carnell v. Commonwealth.* From Circuit Court of Wise County. Involuntary manslaughter. Affirmed.
44. *Shackleford, George Condon v. Commonwealth.* From Corporation Court, Part Two, of City of Norfolk. Contempt of court. Affirmed by equally divided Court.
45. *Smith, James A. v. Commonwealth.* From Circuit Court of Shenandoah County. Murder. Affirmed.
46. *South East Public Service Corporation of Virginia v. Commonwealth of Virginia, ex rel State Corporation Commission.* From State Corporation Commission. Application for amendment or charter. Order affirmed.
47. *Williamson, Harry v. Commonwealth.* From Corporation Court of City of Bristol. Malicious assault. Reversed and remanded.

Cases Pending in the Supreme Court of Appeals of Virginia

1. *Campbell, Carl v. Commonwealth.* From Corporation Court of City of Bristol. A. B. C. Act.
2. *Commonwealth v. Whiting Oil Company, Inc.* From Hustings Court of City of Roanoke. Garage license.
3. *Davidson, G. C. v. Commonwealth.* From Circuit Court of Wythe County. Murder.
4. *Ingle, Glenn v. Commonwealth.* From Circuit Court of Washington County. Larceny.
5. *Maxwell, Edith v. Commonwealth.* From Circuit Court of Wise County. Murder.
6. *A. M. Prichard v. State Highway Commissioner of Virginia.* From Circuit Court of Augusta County. Petition for mandamus.

Cases Decided by 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. Affirmed.

Cases Pending in the Supreme Court of the United States

1. *Atlantic Refining Company v. Commonwealth.* Entrance fee of foreign corporation.

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 to 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 generation 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. F. C. Lenz, Jr.* Circuit Court of the City of Richmond.
2. *Commonwealth v. Sam'l and Louis Miller.* Circuit Court of the City of Richmond.
3. *State Corporation Commission v. Lloyds Insurance Company and A. B. Gathright, Treasurer.* Circuit Court of the City of Richmond.
4. *State Corporation Commission v. American Bank and Trust Company.* Circuit Court of the City of Richmond.
5. *State Corporation Commission v. National Surety Company and A. B. Gathright, Treasurer.* Circuit Court of the City of Richmond.
6. *State Corporation Commission v. National Benefit Life Ins. Co. and A. B. Gathright, Treas.* Circuit Court of City of Richmond.
7. *Commonwealth v. Edward T. Haynes, Committee of H. Stewart Jones and American Surety Company of New York.* Circuit Court of the City of Richmond.
8. *Appalachian Electric Power Co. v. Commonwealth.* State Corporation Commission. Franchise tax. Settled.
9. *Branch, Blythe W. v. Commonwealth.* Chancery Court of City of Richmond. Income tax.
10. *Branch, Phyllis v. Commonwealth.* Chancery Court of City of Richmond. Income tax.
11. *Flynn, Nora Langhorne v. Commonwealth.* Chancery Court of City of Richmond. Income tax.
12. *Gibson, Irene L. v. Commonwealth.* Chancery Court of City of Richmond. Income tax.
13. *Loudoun Light and Power Company v. Commonwealth.* State Corporation Commission. Franchise tax. Settled—Commonwealth substantially prevailing.
14. *Lynchburg Gas Co. v. Commonwealth.* State Corporation Commission. Franchise tax. Settled—Commonwealth substantially prevailing.
15. *Page Power Company v. Commonwealth.* State Corporation Commission. Franchise tax. Settled—Commonwealth substantially prevailing.
16. *Pearl, Joseph, et al v. Commonwealth.* Circuit Court of City of Richmond. License tax on slot machines. Decided for Commonwealth.
17. *Roanoke Gas-Light Company v. Commonwealth.* State Corporation Commission. Franchise tax. Settled—Commonwealth substantially prevailing.
18. *State-Planters Bank and Trust Company v. Commonwealth.* Circuit Court of the City of Richmond. Tax on bank stock.
19. *Suffolk Gas-Electric Company v. Commonwealth.* State Corporation Commission. Franchise tax. Settled—Commonwealth substantially prevailing.
20. *Virginia East Coast Utilities, Inc. v. Commonwealth.* State Corporation Commission. Franchise tax. Settled—Commonwealth substantially prevailing.
21. *Virginia Electric and Power Company v. Commonwealth.* State Corporation Commission. Franchise tax on motor bus receipts.
22. *Virginia Electric and Power Company v. Commonwealth.* State Corporation Commission. Franchise tax. Settled—Commonwealth substantially prevailing.
23. *Virginia Gas Transmission Corp. v. Commonwealth.* State Corporation Commission. Franchise tax on pipe line companies. Decided for plaintiff—afterwards compromised.
24. *Virginia Public Service Company v. Commonwealth.* State Corporation Commission. Franchise tax.
25. *Willard, Belle L., Ex. of Estate of Jos. E. Willard v. Commonwealth.* Circuit Court of Fairfax County. Inheritance tax.
26. *Wilkins, Julia C. v. Commonwealth.* Circuit Court of City of Richmond. Income tax.
27. *Barco v. Commonwealth.* Circuit Court of Princess Anne County. Revocation of driver's license. Dismissed.
28. *Beal, M. H., et al v. Commonwealth.* Circuit Court of Appomattox County. Violation motor vehicle license law. Dismissed from docket.

29. *Commonwealth v. Continental Oil Company*. Circuit Court of City of Richmond. Motor fuel tax.
30. *Commonwealth v. First National Bank*. Circuit Court of the City of Richmond. Motor vehicle law.
31. *Commonwealth v. Pure Oil Company*. Circuit Court of the City of Richmond. Motor fuel tax.
32. *C. E. Starkweather v. Commonwealth*. Circuit Court of the City of Richmond. Action by contractor for alleged breach of contract.
33. *A. A. Hyman v. H. G. Shirley, Highway Commissioner*. Circuit Court of the City of Richmond. Suit in equity.
34. *J. M. LaPrad v. Commonwealth*. Circuit Court of the City of Richmond. An action for damages.
35. *J. E. Trinkle v. Commonwealth*. Circuit Court of the City of Richmond. An action for alleged breach of contract.
36. *New Amsterdam Casualty Company v. Jim Frank, et al.* Circuit Court of the City of Richmond. Chancery suit involving distribution of funds due insolvent road contractor.
37. *Commonwealth of Virginia v. Edward A. Meehan*. Circuit Court of the City of Richmond. Notice of motion for judgment.
38. *C. A. Ragland v. Department of Highways*. Circuit Court of the City of Richmond. Action for alleged breach of contract.
39. *Commonwealth, at the relation of State Highway Commissioner v. Claude Ralliff*. Circuit Court of Buchanan County. Suit for mandatory injunction to require landowner to remove obstructions from highway.
40. *Commonwealth, at the relation of State Highway Commissioner v. C. G. Herring, et als.* Circuit Court of Rockingham County. Suit for the recapture of toll house properties once owned by the Warm Springs-Harrisonburg Turnpike Company.
41. *Leslie Clarke, Infant v. R. E. Duval and Wilbur Davis*. Circuit Court of Elizabeth City County. Action against Resident Engineer, Department of Highways, for alleged damages. Judgment for defendants.
42. *Helen K. Rippeloe v. State Highway Commission and others*. Circuit Court of Augusta County. Notice of motion for judgment. Dismissed as to State Highway Commission.
43. *Standard Parts Corporation v. Commonwealth of Virginia*. Circuit Court of the City of Richmond. Attachment suit to embrace funds due contractor under contract to build roads. Judgment for plaintiff.
44. *Commonwealth of Virginia v. W. H. Wingfield*. Circuit Court of the City of Richmond. Notice of motion for judgment. Judgment for plaintiff.
45. *Bank of Chincoteague v. Commonwealth*. Circuit Court of Accomac County. Tax on bank stock.
46. *Farmers and Merchants Bank of New Church v. Commonwealth*. Circuit Court of Accomac County. Tax on bank stock.
47. *Mary T. Ryan v. Commonwealth*. Circuit Court of Nelson County. Income tax.
48. *Oriental Restaurant v. Commonwealth*. Corporation Court, Number One, of the City of Norfolk. Merchant's license.

OPINIONS

AGRICULTURE AND IMMIGRATION—Cattle—Control of Bang's Disease.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 20, 1936.*

HONORABLE WILLIAM B. LOGAN,
Commonwealth's Attorney,
Woodstock, Virginia.

DEAR MR. LOGAN:

Re: Bang's Disease Test—Cooperative Ordinance.

I am in receipt of your letter of the 24th instant, which for purposes of reply I quote:

"The above question has been agitated to a considerable extent in this county, and the Board of Supervisors of Shenandoah County in their regular April meeting held April 6, 1936, passed an appropriate resolution adopting the local option as set out in Section 1224 of the 1934 Supplement of the Virginia Code. When requested by the Board for an opinion as to whether notice of their intention to adopt such resolution must necessarily be published as provided in Section 2743, I submitted a holding, stating that I was of the opinion that the provisions of Section 2743 must be complied with before the proposed resolution could be acted upon and further that the ordinance should be published for two successive weeks after its passage in order to become effective.

"I would appreciate first, your opinion as to whether or not such notice is essential, and since the resolution has not been published since its passage whether or not it would really be effective."

In my opinion, the adoption of a resolution by a Board of Supervisors providing for the cooperation of the county under the provisions of section 1224 of the Code of Virginia, as amended by chapter 53 of the Acts of 1934, comes within the provisions of section 2743 of the Code, giving a Board of Supervisors authority to adopt necessary regulations to prevent the spread of contagious diseases among persons and animals, and that such a resolution can only be adopted after the intention to propose the same for passage shall have been published two weeks prior to its passage, and that upon its adoption it does not become effective until after notice of its adoption shall have been published in full for two successive weeks.

Further on in your letter you ask my opinion of the construction of the second paragraph of section 1224 of the Code in which it is provided:

"In every county cooperating with the state in its work and efforts to eradicate such disease, owners of cattle shall be compelled to submit them to tuberculin testing and to tests for Bang's Disease at such time or times as the Board of Supervisors of any such county and the State Board of Agriculture and Immigration may deem the same necessary and expedient."

The paragraph you quote in your letter and which I have repeated in mine is, in my opinion, self-constructive.

I think you are mistaken when you say in your letter that there is no penalty provided in case an owner refuses to submit his cattle to tests as,

in my opinion, sub-sections (a) and (b) of section 1227, as amended by chapter 53 of the Acts of 1934, gives, in sub-section (a), to the State Board of Agriculture and Immigration full authority to adopt reasonable rules and regulations for carrying into effect the provisions of section 1224, and sub-section (b) makes it a misdemeanor for any person to violate, disregard, evade, or attempt to violate, disregard or evade any of the provisions of section 1224 or section 1225, or the rules, regulations or orders of the State Board of Agriculture and Immigration, made and adopted for the purpose of carrying the provisions of such sections into effect, and any agent, officer or inspector who shall wilfully fail to comply with such rules and regulations, or with any of the provisions of either of said sections, shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than ten dollars nor more than one hundred dollars for each offense.

You may have had in mind that sub-section (b) limits the provisions as to crimes for violating rules and regulations of the State Board of Agriculture and Immigration by agents, officers or inspectors. I do not think that the sub-section is subject to such a construction, and I am of the opinion that not only officers, agents or inspectors who fail to comply with the rules and regulations or the provisions of said sections are guilty of a misdemeanor, but that all persons who violate, disregard or evade any of the provisions of section 1224, or the rules and regulations of the State Board of Agriculture and Immigration are likewise guilty of a misdemeanor and punishable as provided in the sub-section.

You ask my opinion as to the handling of cattle under quarantine.

If quarantine is established under rules and regulations by virtue of the authority conferred by section 1224, the questions as to violations and of guilt will necessarily be controlled by the provisions of the regulations. Quarantine, however, may be established in any county whether such county is cooperating or not under the provisions of sections 909 and 914 of the Code, which you will see confers authority upon a Board of Supervisors upon notice of contagious or infectious diseases among cattle to immediately investigate the same and if found to exist the Board has authority to immediately establish temporary quarantine and to report the facts to the State Board of Agriculture and Immigration, and that the State Board not only has authority, but section 909 of the Code imposes a duty upon the State Board to send its veterinarian to the situs of the reported disease and if a disease of malignant, contagious or infectious character is found the State Board is required to enforce necessary quarantine lines and sanitary regulations to prevent the spread of disease and no animal infected with the disease or capable of communicating the disease is permitted to enter or leave the district, premises or ground so quarantined, except by authority of the State Board, or its veterinarian.

So much depends upon the local situation that I cannot answer as to the transfer of cattle from one part of a farm to another, but, as the statute is unequivocal and its purpose is to prevent the spread of disease, I am of the opinion that the Board has authority to establish quarantine lines even within a single farm and prevent the transfer of the infected cattle from one part to another and that it has the undoubted authority to prevent moving cattle from any grounds which are quarantined and this applies to moving them over public roads and delivering them to market.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

AGRICULTURE AND IMMIGRATION—Division of Markets—Apportionment of appropriation for expenses of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 26, 1936.*

HONORABLE GEORGE W. KOINER, *Commissioner,*
Department of Agriculture and Immigration,
Richmond, Virginia.

DEAR MR. KOINER:

This is in reply to your letter of June 25, in which you request the opinion of this office upon the several questions as hereinafter set out.

You refer to the provisions of chapter 149 of the 1936 Acts of the General Assembly transferring the duties formerly exercised by the Director of the Division of Markets to the State Board of Agriculture, in so far as the same relates to the inspection, grading, marking, packing, storing, and marketing, of apples and peaches. This chapter also provides that the payment of the salaries and expenses of performing the duties so transferred shall be paid "out of the amounts appropriated to the Division of Markets for administration and for inspection and grading of agricultural and other commodities and such other funds as the said State Board of Agriculture and Immigration shall have available for such purpose, not in excess of the proportion which the revenue derived from the fees for inspection and grading of apples and peaches bears to the total revenue derived from the fees for inspection and grading of all commodities."

You then refer to the appropriation contained in the Appropriation Act for the fiscal year 1936-1937, appearing on page 860 of the Acts of 1936, which appropriates the sum of \$39,760 to the Division of Markets for performance of the general duties imposed by sections 1250 to 1256, inclusive, of the Code, and other acts relating thereto, and also the sum of \$81,470 "For inspection of agricultural and other commodities." You also refer to the provisions of section 7 of the Appropriation Act empowering the Governor to increase the amount of the inspection appropriation in the event that the fees derived from this work shall exceed the amount thereof.

You then ask the following questions:

"Does chapter 149, Acts of 1936 make it mandatory that the funds appropriated to the Division of Markets 'for collecting and disseminating market information and for carrying out the provisions of sections 1250 to 1256 of the Code of Virginia (1919),' be used for the inspection and grading of apples, in the proportion that the revenue derived from the fees for inspection of apples and peaches bears to the total revenue derived from the fees for inspection and grading of all commodities?"

It is my opinion that the provisions of chapter 149 should be construed as authorizing the Board of Agriculture and Immigration, in its discretion, to expend, for the performance of the duties provided for by chapter 149 of the Code relating to apples and peaches, that proportionate part of \$121,500 which the amount of fees derived from the performance of said duties with respect to apples and peaches bears to the total amount of revenue derived from the fees for inspection and grading of all commodities. The sum of \$121,500 consists of the sum of the two appropriations above referred to.

It is also my opinion that the appropriation referred to in chapter 149 of the act "for administration" is the \$39,760 appropriation, and that the appropriation referred to in said chapter "for inspection and grading of agricultural and other commodities" is the \$81,740 appropriation.

Whether or not the entire proportionate part which could be expended

in the performance of the duties under chapter 149 should be so expended is, in my opinion, entirely within the discretion of the said Board.

Your second question is as follows:

“Does the act of 1924, chapter 113, contemplate that the services provided for therein should be subsidized by the State in whole or in part by appropriations out of the ‘general fund,’ or that the fees provided for therein shall be sufficient to properly maintain the services for any interested person, firm or commodity group, in the light of the statutes and sections of the appropriation act herein cited.”

While the act referred to seems to contemplate that the fees charged for the services rendered shall be adequate to cover the cost and expenses of such services, nevertheless, the fixing of the amount of these fees is made discretionary and it is not mandatory that the proceeds therefrom should be sufficient to cover the costs of rendering the services provided for.

Your third question is as follows:

“In determining the proportion that the revenue derived from apples and peaches bears to the total revenue derived from the fees for inspection and grading of all commodities, what period of time should be used as a basis for such determination—the current year, previous year, or the average over a period of say four or five years previous to the year the service is to be rendered.”

It is my opinion that the proportionate division of the revenue should be determined by the proportionate receipts from inspection fees for the current fiscal year. Also, it is my opinion that the Board should scrutinize from time to time the amounts being expended in the performance of the duties under chapter 149 of the Acts of 1936, to the end that the amount expended will not exceed the proportionate part which should be allocated for that purpose.

Your fourth question is as follows:

“Would it be proper and legal under the terms of chapter 149 of the acts of 1936, for the Board of Agriculture to set aside in a fund to be held sacred, such maximum proportion that the fees derived from apples and peaches bears to the total revenue derived from the fees of all commodities, out of the appropriation for ‘collecting and disseminating market information and carrying out the provisions of sections 1250 to 1256 of the Code of (1919), and until such time as it may be determined that the revenue derived from the fees for inspection and grading of apples is, or is not sufficient to cover the expense of said service.”

I find no authority for the setting aside of any part of any fund appropriated. It seems to me that the Board should authorize the expenditure of funds for the performance of the duties relating to apples and peaches, estimating as nearly as practicable the probable receipts from the inspection of such fruit.

Your fifth question has already been answered.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

AGRICULTURE AND IMMIGRATION—Power of Commissioner to define “Nursery Stock” under crop pest law.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 29, 1936.

MR. G. T. FRENCH, *State Entomologist,*
Department of Agriculture and Immigration.
State Office Building,
Richmond, Virginia.

DEAR MR. FRENCH:

I am in receipt of your letter of April 25, inquiring as to the power of the Commissioner of Agriculture and Immigration to define “nursery stock” within the meaning of the crop pest law (section 869 (1) to 905 of the Code).

Section 871 authorizes the Commissioner to provide rules and regulations under which the State Entomologist shall proceed to enforce the law. I am of the opinion, therefore, that the Commissioner may define “nursery stock”. However, I am further of the opinion that this definition would be subject to review by the courts if any person should contest it. In other words, the question as to what is “nursery stock” is one of fact, and I do not think the Commissioner could arbitrarily, under the authority given him, say that something is “nursery stock” that is not in fact “nursery stock”. However, I am further of the opinion that the definition of “nursery stock” prescribed by the Commissioner would be very persuasive upon the court.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Authority of Board to purchase confiscated liquor.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 11, 1936.

HONORABLE G. STANLEY CLARKE,
Assistant Attorney General,
Alcoholic Beverage Control Board,
Richmond, Virginia.

DEAR MR. CLARKE:

I have before me your letter of March 3, in which you request an opinion upon the authority of the Alcoholic Beverage Control Board to purchase confiscated liquors at the same prices it pays for same when it purchases from dealers and manufacturers, and account to the Literary Fund at such prices for such confiscated whiskey disposed of through the stores.

I am of the opinion that this practice is not authorized under the statute. I am further of the opinion, however, that the Board may charge against the gross price received for such whiskey sold through its stores the expenses of handling same, including a reasonable charge for the cost of inspection service and overhead expenses of the Board.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Distribution of profits.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 14, 1935.*

HONORABLE MARK H. GREGORY, *Clerk,*
Drakes Branch, Virginia.

DEAR MR. GREGORY:

Honorable John P. McLaughlin, Secretary of the Alcoholic Beverage Control Board, has referred to me your letter of December 7, addressed to the Board, in which you ask the following question:

"Does the law passed by the 1934 General Assembly and which governed the distribution of A. B. C. profits for the year ended last June 30, continue in effect for the current fiscal year ending next June 30, or can the coming General Assembly change the law to govern the distribution for the current fiscal year?"

Mr. McLaughlin has asked me to reply to the above inquiry.

The 1934 session of the General Assembly enacted legislation providing for the distribution of the profits of the Alcoholic Beverage Control Board up to July 1, 1936. This plan will continue in force unless the 1936 General Assembly enacts legislation to the contrary. Of course, it is within the power of the 1936 General Assembly to provide for other disposition for this fund, if it should enact legislation to that effect. In the absence of contrary legislation, the present plan will be carried out up to July 1, 1936.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Distribution of profits where city annexes territory.

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

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

DEAR MR. COMBS:

Your letter of July 24, 1935, requests my opinion upon the effect of the annexation of territory by a city upon the respective shares in the distribution of the profits under section 16 of the Alcoholic Beverage Control Act of the city and the county from which the territory was annexed.

Said section provides for this distribution to the counties, cities, and towns of the State on the basis of their respective populations. The population of each is to be ascertained from "the last preceding United States census." This was the 1930 census.

It is my opinion that the distributive shares of each county, town, and city is determined by the 1930 population of the territory now embraced therein. Thus, if it can be ascertained from the 1930 census what the population of the annexed territory was, it is a simple matter to add this population to the census figures for the city, and subtract same from those of the county which lost the area or territory.

It is my opinion, further, that the present population of the annexed

territory, or the population at the time of annexation does not control, as same may have changed since the census was taken.

I am of opinion, therefore, that for the purpose of distributing the fund in question, the population of the annexed territory, as shown by the 1930 census, should be added to the 1930 census population of the city to which same was annexed, and subtracted from that of the county from which same was taken.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**ALCOHOLIC BEVERAGE CONTROL—Jurisdiction over Federal Reservation
—Licenses.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 14, 1935.*

ALCOHOLIC BEVERAGE CONTROL BOARD,
Richmond, Virginia.

GENTLEMEN:

You request my opinion as to the effect, if any, of the recent passage by the Congress of S. J. Res. 42, upon the authority of the Alcoholic Beverage Control Board to issue wine and beer licenses for the sale of wine and beer at the Chamberlin Hotel, on the Fort Monroe Military Reservation. Prior hereto this office has held that the Board was without jurisdiction on the Reservation.

The Act of Congress above referred to renders it unlawful for any person to do, or omit to do, on said Reservation any act which if committed or omitted in Virginia would be penal under the Virginia laws in force April 1, 1935. The Act further provides that any such person shall be guilty of a like offense and subject to a like punishment as if the act had been committed in Virginia.

The Virginia Alcoholic Beverage Control Act makes it a misdemeanor for any person to sell wine or beer in Virginia without obtaining a license therefor from the Board.

The purpose and effect of the Congressional Act was to extend to the Reservation the operation of Virginia laws carrying a penal provision, and in my opinion the penal provisions of the Virginia Alcoholic Beverage Control Act are effective on said Reservation. If the penal provisions are effective, obviously the provisions of the State law, compliance with which would render the sale of wine and beer not penal, is likewise effective.

In my opinion the Board may issue the license referred to on the Reservation.

Respectfully yours,

ABRAM P. STAPLES,
Attorney General.

**ALCOHOLIC BEVERAGE CONTROL—Importation of certain beverages by
manufacturers for processing and resale.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 13, 1936.*

ALCOHOLIC BEVERAGE CONTROL BOARD,
Richmond, Virginia.

GENTLEMEN:

You have requested an opinion from this office upon the question of the authority of the Board to grant permission to a Virginia distillery to

import gin into this State, for the purpose of reducing or increasing the proof of spirits, and bottling, selling and reshipping the same to persons outside of the State of Virginia.

Section 58 of the Alcoholic Beverage Control Act prohibits the shipment to any person or corporation in Virginia, other than the Board, of any such alcoholic beverages except for industrial purposes, and for manufacturing articles allowed to be manufactured under section 32 of the Act.

Section 32 of the Act relates solely to medicinal, toilet and antiseptic preparations, flavoring extracts and canned heat, not intended for internal use nor to be sold as beverages.

It is my opinion, therefore, that the Board does not have the authority to authorize the importation of gin into this State by licensed Virginia distilleries.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Licensing personal representative of deceased licensee.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 6, 1936.*

ALCOHOLIC BEVERAGE CONTROL BOARD,
Richmond, Virginia.

Attention: Honorable G. Stanley Clarke.

DEAR SIRs:

Referring to the case of the Piedmont Distributing Company, of Lynchburg, which is operating under a wholesale beer license issued to Mrs. M. B. Krantz, now deceased, I beg to advise that it is my opinion that it was not the intention of the Alcoholic Beverage Control Act to require the payment of a license tax by a personal representative of the deceased licensee.

I think the legal effect of the qualifications of a personal representative is that he steps into the shoes of the deceased. It is my opinion, however, that his qualifications to operate the business is a question within the jurisdiction of the Board and, if the Board is of the opinion that the personal representative is a proper person to continue the operation of the business, the original license should be amended so as to permit same.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Local option.

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

HONORABLE ROLAND E. CHASE,
Clintwood, Virginia.

MY DEAR SENATOR:

I am in receipt of your letter of June 27, in which you say:

"In one of the counties of my Senatorial District—Wise County—we have two A. B. C. Stores, one in Norton and the other in Appalachia.

These two towns are both incorporated having a population of over three thousand each. I have been asked by several persons as to when they could get an election to vote on these two stores, and that petitions would be necessary to secure these elections. Neither of these towns had an election prior to the establishing of these stores. Could the whole county vote on the question of any store or stores in the county or would only the towns affected have to vote on this question?"

Sections 30 and 31 of the Alcoholic Beverage Control Act deal with the question of local option. The sections are very long so I shall not attempt to quote them here.

Construing section 30, I am of the opinion that the intent of the act is that a separate election shall be held for each town in a county of a population of nine hundred or more. In other words, an election which may be held by a county only decides the question for the county exclusive of the towns therein of the prescribed population.

The section further provides that the petition for the election shall be signed by not less than thirty per centum of the number of votes (sic) cast by qualified voters of the county, city or town in the last preceding presidential election.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Prohibition against wholesaler's giving retailer property for conduct of business cleaning coils.

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

ALCOHOLIC BEVERAGE CONTROL BOARD,
Richmond, Virginia.

GENTLEMEN:

In your letter of July 24, 1935, you request my opinion upon the question whether breweries and wholesalers of beer, in selling same in kegs to retailers, may lawfully clean the coils of the draught beer dispensing apparatus, either with or without charge therefor.

Section 53 of the Alcoholic Beverage Control Act makes it a misdemeanor for any manufacturer or wholesaler of alcoholic beverages to sell or give to any retailer licensed under said Act any property with which the business of such retailer is or may be conducted. In an opinion from this office under date of April 26, 1934, it was held that the service of cleaning coils is property within the meaning of section 53. This opinion was predicated upon the idea that the service was so dissociated from the sale and delivery of the beer as to require it to be considered an entirely separate transaction. I am now informed that the service is so closely connected with the act of delivery of the beer that it may reasonably be considered to be a part of a complete and effectual delivery.

If the Board is of opinion that this later information given me is in accordance with the facts, it is my opinion that the Board possesses the general regulatory power to promulgate a resolution defining a sale and delivery of draught beer in kegs as including the cleaning of the coils and the connecting of the keg to the dispensing apparatus.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Taxicabs as common carriers under section 50.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 62, 1936.

HONORABLE BENTLEY HITE,
*Attorney for the Commonwealth,
Christiansburg, Virginia.*

MY DEAR MR. HITE:

I have your letter of May 25, in which you refer to section 50 of the Alcoholic Beverage Control Act and ask if a taxicab is a common carrier.

Our Supreme Court of Appeals in the cases of *Carlton v. Boudar*, 118 Va. 521, and *Hogan v. Miller*, 156 Va. 166, has in terms held that a taxicab is a common carrier.

I am advised that section 50 of the Alcoholic Beverage Control Act was amended in some respects by the last session of the Legislature, but I do not think that the amendment affects the rule in the two cases I have cited.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Commission of Fisheries—Duty of Comptroller.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 23, 1935.

MR. S. C. DAY, JR.,
*Assistant Comptroller,
State Library Building,
Richmond, Virginia.*

DEAR MR. DAY:

I am in receipt of your letter of July 22, in which you say:

"The General Assembly of 1934 made an appropriation to the Commission of Fisheries, out of the general fund of the Commonwealth, amounting to \$62,885.00, which, of course, was reduced five per cent, or \$3,144.25. In connection with this appropriation the Appropriation Bill reads as follows:

"It is hereby provided that the aforesaid appropriations amounting to \$62,885.00 and the additional sum of \$15,000.00 hereinafter appropriated for shellfish inspection and sanitation by the State board of health shall be deducted by the comptroller from the net revenues collected and paid into the State treasury by the commissioner of fisheries, his employees, agents and inspectors during the year ending June 30, 1935, and that the commission of fisheries may expend for the following activities the balance of the aforesaid revenues estimated as follows: * * *."

"We have construed the language of this paragraph to mean that we should pay into the general fund, out of special revenues, only the net amount of the general fund appropriation. Kindly advise whether or not, in your opinion, we are correct in the view above expressed."

I concur in the view expressed by you. My information is that revenue collected by the Commission of Fisheries has for years far exceeded the appropriation out of the general fund. It is obvious from the language of the appropriation made to the Commission of Fisheries that the Legislature intended that the Commission should use all of the revenue collected by it with the exception of that provided in chapter 411 of the Acts of 1934 and with the exception of the \$15,000 appropriated to the State Board of Health for shellfish inspection and sanitation. It is not reasonable to suppose, therefore, that the Legislature intended that \$62,885 should be paid into the general fund, and that amount less \$3,114.25, by virtue of the five per cent cut, should be paid back to the Commission.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Expenses of General Assembly.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 20, 1936.*

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

DEAR MR. COMBS:

You request my opinion upon the proper construction of the following appropriation:

The Acts of 1934 provides an appropriation "For legislating for the State.....\$170,285.

"Out of this appropriations shall be paid the salaries of members, clerks, assistant clerks, officers, pages and employees; the mileage of members, officers and employees, including the salaries and mileage of members of legislative committees sitting during recess; and the incidental expenses of the general assembly, not exceeding the sum of five thousand dollars each for the senate and house of delegates; and to pay any deficit in the contingent fund in the two houses, a sum sufficient."

The foregoing appropriation was designed to cover the expenses of the 1936 session of the General Assembly. It seems that said session authorized the expenditure of approximately \$18,000 more than the sum of \$170,285 specifically appropriated. The question has arisen whether or not the appropriation made in 1934 should be construed as providing for the payment of this deficit.

The last two lines of the language above quoted contain these words "and to pay any deficit in the contingent fund in the two houses, a sum sufficient." Nowhere in the act is there any clear definition of what constitutes the contingent fund of the two houses. In the absence of any specific definition, it seems clear that this contingent fund consists of the difference between the sum of \$170,285 and the amount necessary to pay the items expressly provided for in the appropriation act for the Legislative Department for this year. The deficit which has accrued, therefore, of approximately \$18,000, is clearly a deficit in this contingent fund or funds provided to pay the expenditures authorized in addition to those specifically enumerated in the above quoted language.

The question presented, therefore, is whether the appropriation "to pay any deficit in the contingent fund in the two houses, a sum sufficient"—is an appropriation to cover this \$18,000 deficit in the contingent fund.

It is my opinion that this language clearly was intended to appropriate

such sum as might be sufficient to pay any additional expenses which might be authorized by the 1936 session of the General Assembly, and that the Comptroller is thereby authorized to issue the warrants in accordance with such expenditures as have been so authorized.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ATTORNEYS—Right of unlicensed employee to represent his company.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 9, 1935.*

N. T. GRAY, *Esquire,*
Nansemond County Trial Justice,
Suffolk, Virginia.

DEAR MR. GRAY:

In your letter of November 4, you request the opinion of this office as to the right of an employee and representative of a small loan company, not a licensed attorney, to prosecute in your court a claim belonging to his company.

From your letter, I take it that this man is a salaried employee of his company. If this is true, the case is expressly covered by section 3426a of the Virginia Code (Michie, 1930). That section, after prohibiting the prosecution by any person, not an attorney, of claims belonging to another, further provides:

"Nothing in this act shall be construed to prevent any person, firm or corporation from representing his or their claim or cause before any of the courts of this Commonwealth, or from preventing any person, firm or corporation from having his or their regularly employed agent or employee from appearing before any of the courts of this Commonwealth to represent said person, firm or corporation where such agent or employee, so appearing, is regularly employed on a salary basis; * * * ."

It is the opinion of this office, therefore, that the representative referred to in your letter was entitled to handle the case, if, as I assume, he is a salaried employee of his company.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Bond of person convicted under ABC law—for how long bond to run.

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

MR. D. W. McNEIL,
Trial Justice,
Lexington, Virginia.

MY DEAR MR. McNEIL:

I have your letter of September 20, in which you ask for an interpretation of subsection b of section 62 of the Alcoholic Beverage Control Act.

You desire to know whether the time for which the court may require a bond shall run one year from the date of conviction or one year from the expiration of the sentence if the person convicted was given a jail sentence.

I am of opinion that this is a question within the discretion of the Trial Justice, and the order requiring the bond should prescribe the date it is to be executed. It should cover a period of one year from date of execution.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF MEDICAL EXAMINERS—Practice of chiropody—Requirement of examination in cases of persons who practiced before enactment of licensing statute.

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

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

MY DEAR DR. PRESTON:

I have your letter of December 17, in which you enclose one from Dr. Walter E. Ellis, President of the Chiropody Society of the State. You request my opinion "as to whether or not it would be legal for the Board of Examiners to admit to a certificate without examination an applicant upon the basis of having practiced in the State prior to the enactment of about 1916 or 1917."

Section 1621 of the Code provides that those desiring to practice chiropody in Virginia, not now licensed, shall be examined by the State Board of Medical Examiners on certain prescribed subjects. There are certain other provisions in this section which are not pertinent to your question. The section does not authorize the State Board of Medical Examiners to waive the examination, and I am, therefore, of opinion that no person not now licensed in this or any other State can be granted a certificate without taking the examination required by this section. As to persons not already licensed, the Legislature unquestionably has the power to change the requirements for the granting of a certificate to practice chiropody.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARD OF PUBLIC WELFARE—Maternity Hospital—Licenses.

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

HONORABLE ARTHUR W. JAMES,
Commissioner of Public Welfare,
State Office Building,
Richmond, Virginia.

DEAR MR. JAMES:

I am in receipt of your letter of December 12, in which you state that Dr. C. A. Ranson, East Falls Church, Virginia, has applied to you for a

license to conduct a maternity hospital, and that all requirements of the statute in regard to licensing such institutions have been met by Dr. Ransom with the possible exception of the inclusion of a resident registered nurse on the staff of the hospital.

It seems from the facts stated in your letter and in one which you enclose from Dr. Ransom that, as soon as a patient applies for admission or is sent to the hospital, a registered nurse is called and remains on duty until the baby has been delivered and for a minimum of two hours thereafter. Under these circumstances, it is perfectly possible and indeed probable for a number of patients whose children have been delivered to be in the hospital without the presence of a registered nurse at all.

As you state, section 1930a of the Code, regarding maternity hospitals, provides in part as follows:

"No such license shall be issued unless the medical staff of the hospital includes one or more resident registered nurses and one or more licensed physicians, and the premises are in fit sanitary condition, and the application for such license has been approved by the local board of health."

From the facts stated by you and by Dr. Ransom, I agree with you that the arrangements which Dr. Ransom has made for the presence of a nurse do not comply with the requirements of the statute.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Budget hearing—Authority to fix date of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 19, 1936.*

MR. F. B. WATSON.

*Division Superintendent of Schools,
Chatham, Virginia.*

MY DEAR MR. WATSON:

I am in receipt of your letter of March 18.

As I understand your inquiry, it is whether or not the board of supervisors has the right to fix the date for a hearing on the county budget, and whether or not, when the date has been so fixed, the chairman of the board of supervisors has a right to change it.

I am of opinion that the board of supervisors does have a right to fix the date for the hearing, but I know of no authority given the chairman to change it. However, I call your attention to the provisions of section 2577m relating to county budgets, which authorizes the board of supervisors to recess or adjourn from day to day or from time to time, as may be deemed proper, before the final adoption of the budget.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Extra compensation of attorney for the Commonwealth.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 19, 1936.*

HONORABLE S. J. THOMPSON,
Attorney for the Commonwealth,
Rustburg, Virginia.

DEAR MR. THOMPSON:

Replying to your request for an opinion upon the authority of the board of supervisors to pay your expenses in the matter hereinafter set out, I beg to advise you as follows:

It appears that the Works Progress Administration of the United States Government has made, or agreed to make, a grant to the county of Campbell for certain funds for the purpose of building an addition to the county court house. Some difficulty having been experienced in securing workers from the relief rolls, as required under the regulations of the WPA, the board of supervisors requested you, as Commonwealth's attorney, to come to Richmond and confer with the WPA officials.

Your inquiry is directed to the question of whether or not it would be in violation of section 2707 of the Code for the board of supervisors to reimburse you for the actual expenses incurred, in traveling and subsistence, in attending to this work for the county.

It is my opinion that work of this nature is within the scope of the authority of the Commonwealth's attorney to act in representing his county, if he so desires, and that the board of supervisors has authority to reimburse him for such usual expenses as are incident to a trip to Richmond.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Ordinances—Authority to parallel State liquor laws.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 9, 1936.*

HONORABLE EDWARD McC. WILLIAMS,
Attorney for the Commonwealth,
Berryville, Virginia.

MY DEAR MR. WILLIAMS:

I have your letter of March 4.

The effect of your inquiry is whether or not a county may by ordinances parallel the "motor vehicle law" and the "driving while drunk law" in such a way as to secure the fines which would be otherwise paid into the State treasury for violations of these laws.

So far as the motor vehicle laws are concerned, I am assuming that you refer to sections 49 to 116 of the Motor Vehicle Code of Virginia, dealing with the regulation of traffic. Chapter 342 of the Acts of 1932. Section 52 of this Code, paragraph (e) provides that:

"The authorities of counties in this State shall have no authority to adopt any ordinances, rules and regulations concerning matters covered by this chapter of this act. All ordinances, rules and regulations adopted by the authorities of any county in conflict with the provisions of this subsection of this section are hereby repealed."

In view of the above quoted specific provisions of that portion of the Motor Vehicle Code dealing with the regulation of traffic, I am of opinion that Clarke county has no authority to parallel the act.

The so-called "driving while drunk law" is contained in section 2742 of the 1934 Supplement to the Code of 1930. This section does not give to counties the authority to pass parallel ordinances, and I am of opinion that counties do not have this authority under general law.

My view in this respect is strengthened by reference to the Layman Prohibition Act, wherein it was specifically provided that certain described counties should have authority to pass ordinances embracing such provisions of the act as were applicable. See Code of 1930, section 4675 (37). If the General Assembly felt that it was necessary to specifically authorize certain counties to adopt the provisions of the prohibition law, it must have considered that the counties did not have this authority under the general law. I am of opinion that the same reasoning is applicable to the "driving while drunk law."

I, of course, am not familiar with the nature of the ordinances of the other counties to which you refer, and this letter is not to be construed as attempting to pass upon the validity or invalidity of any of those ordinances.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Power to appropriate money for library—Necessity for supervision and management.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 19, 1935.

HONORABLE CHARLES W. CRUSH,
*Attorney for the Commonwealth,
Christiansburg, Virginia.*

DEAR CHARLIE:

I have your letter of November 8, in which you state:

"The board of supervisors of Montgomery county have been urged to make an appropriation to the Montgomery county library. They have asked me to ascertain from you the effect of the act authorizing counties to establish county free libraries and reading rooms approved February 13, 1924; and your opinion as to whether a county can appropriate money for the maintenance of the library without appointing a board of directors and taking complete charge thereof. They are inclined to make an appropriation to the present management if this can be done, but they are not willing to take over and be responsible for the operation and maintenance of a library which has been operated here for the past twenty years through private funds."

Chapter 107a of Michie's Code of 1930 deals with the authority of boards of supervisors to establish and maintain free libraries.

I enclose a copy of an opinion given Honorable Edw. H. Richardson April 2, 1935, to the effect that the board of supervisors is not authorized to appropriate money for any public library unless the same is organized in accordance with said statute.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Power to compromise delinquent tax claim.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., April 7, 1936.

MR. E. FILLMORE IRWIN,

*Deputy Treasurer of Norfolk County,**P. O. Box 487,**Portsmouth, Virginia.*

MY DEAR IRWIN:

I am in receipt of your letter of April 3, in which you ask whether the board of supervisors has authority to effect a compromise settlement of delinquent taxes due by an individual, group or corporation. I assume by this that you mean whether the board has authority to accept less than the amount due.

No such authority is given by statute, and I am of opinion the board possesses no such authority.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***BOARD OF SUPERVISORS—Power to pay for equipment of volunteer firemen's association without taking title thereto.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., January 29, 1936.

HONORABLE PAUL E. BROWN,

*Attorney for the Commonwealth,**Fairfax, Virginia.*

MY DEAR MR. BROWN:

I have your letter of January 21.

You call my attention to chapter 207 of the Acts of Assembly of 1930, authorizing the board of supervisors of certain counties to make a levy for fire protection in counties, out of which levy could be paid "indebtedness on necessary fire equipment heretofore purchased" by volunteer firemen's associations.

While it would appear to me to be probably a better policy for the county to own fire equipment which it had paid for, yet the Act is silent on the subject and seems to contemplate that the board of supervisors may pay indebtedness on such fire equipment purchased by these volunteer associations, without taking the fee simple title thereto.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***BOARDS OF SUPERVISORS—Powers—Fixing compensation of sheriff and clerk under county manager or county executive form of government.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., April 1, 1936.

HONORABLE E. R. COMBS, *Chairman,**Compensation Board,**Richmond, Virginia.*

DEAR MR. COMBS:

I have before me for reply your letter of March 30, 1936, which is as follows:

"We would like to have an opinion as to whether or not it is the duty of the county board of supervisors in counties, which have adopted one or the other of these forms of government, to fix the salary of the Clerk of the Circuit Court of the county, the Sheriff of the county and the Attorney for the Commonwealth, and the expenses of office of these officers, or should the expenses of office of these officers and the salary of the Attorney for the Commonwealth be fixed by the Compensation Board, and the compensation of the Clerk and Sheriff be controlled by Code section 3516 as amended."

While you refer to Code section 3516 as amended, I take it you mean the Act of March 29, 1934 (Acts 1934, p. 73), a part of which is carried in Michie's 1934 Supplement to the Code as section 3516-d and 3516-t, which Act establishes the Compensation Board and authorizes the fixing by the Board of the salaries and expenses of Commonwealth's attorneys, treasurers and commissioners of the revenue.

The county manager and county executive forms of government are provided for by an Act approved March 26, 1932 (Acts 1932, p. 727, et seq.) adding to the Code fifty-six new sections numbered 2773-N-1 to 2773-N-56 inclusive.

COUNTY EXECUTIVE FORM.

Section 2773-N-7 provides, with respect to the County Executive Form, that, subject to limitations, "the board of supervisors shall * * * fix the compensation of all officers and employees of the county * * *."

That the clerk of the court, the sheriff and the attorney for the Commonwealth are embraced within the foregoing quotation is clear from the provisions of section 2773-N-25 which abolishes the fee system as to these officers and identifies them by referring to section 3516 of the 1930 Code, which at the time dealt with the compensation and expenses of these officers under the supervision of the State Fee Commission. Section 2773-N-25 also provides that "all fees and commissions, which *but for this section would be paid to the said officers by the State* for services rendered, shall be paid into the treasury of the county."

This section also goes on to provide that two-thirds of the excess fees over and above the amount to which said officers "would be entitled by general law but for the provisions of this section", as well as his expense allowance, belong to the county and one-third of the excess fees shall be paid into the State Treasury.

The general effect of these provisions is that the county steps into the shoes of the officer and receives all the compensation and expense allowances he would be entitled to, and pays him, and his deputies, in exchange therefor or in lieu thereof, salaries to be fixed by the board of supervisors.

COUNTY MANAGER FORM.

Sections 2773-N-28 to 2773-N-53 deal specifically with the County Manager Form of Government. Section 2773-N-48 provides that "The board of county supervisors shall establish a schedule of compensation for officers and employees which shall provide uniform compensation for like service. The compensation prescribed shall be subject to such limitations as may hereafter be made by general law."

Section 2773-N-51 provides in part: "All officers and employees of the county shall be paid regular compensation, and the fee system as a method of compensation in the said county shall be abolished, * * * ." (There is an exception as to officers not affected by the adoption of the County Manager Form of Government, enumerated in section 2773-N-55, which does not include any of those here under consideration.) This section is identical with section 2773-N-25 above referred to in connection with the County Executive Form.

The effect of these two sections, in my opinion, is to transfer to the county all the fees, commissions and expense allowances of the respective

officers (except the one-third of the excess fees going to the State), in lieu of which the county is to pay the salary and expenses of the officer and his deputies, to be fixed by the board of supervisors.

This interpretation of these statutes is confirmed by the provisions of section 16 of the Compensation Act (Acts 1934, p. 741). This section requires the Compensation Board to proceed to fix salaries for a treasurer, a commissioner of the revenue and the attorney for the Commonwealth, and also expense allowances for the office of each, in such counties, just as though the new form of county government had not been adopted in such county. It further requires that the State pay into the county treasury all amounts it would otherwise have paid to said officers, but "*the actual compensation and expense allowances to be paid the attorney for the Commonwealth, the treasurer and the commissioner of revenue, * * * shall be determined as provided in the said form of county organization and government without regard to the limits provided for in this Act*".

The sheriff and clerk of court are omitted from this Act, as these officers are still compensated by fees and commissions.

I am therefore of opinion that, in counties where either the County Manager or County Executive Form of Government has been adopted, the board of supervisors is authorized and required to fix the compensation of the attorney for the Commonwealth, the clerk of the court, the director of finance and the sheriff, as well as all deputies and employees in their respective offices.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

Board of Supervisors—Powers—Requiring license to sell fertilizer.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 10, 1936.*

HONORABLE GEORGE W. KOINER,
*Commissioner of Agriculture and Immigration,
State Office Building,
Richmond, Virginia.*

DEAR MR. KOINER:

I am in receipt of your letter of April 9, inquiring if a county may impose a license tax on agents of fertilizer companies. I presume that the license tax to which you refer is a revenue measure imposed for the privilege of engaging in the fertilizer business in a particular county.

Counties may not impose a license tax except by specific authority of law, and, inasmuch as I have found no statute authorizing counties to impose license taxes on fertilizer agents, I am of opinion that they have no such authority.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Right to levy district tax to repay loan from Literary Fund.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 18, 1936.*

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

DEAR MR. DOWNS:

I have your letter of the 12th instant, inquiring whether or not the board of supervisors of a county has the right to lay a district levy for the repayment of a loan made from the Literary Fund, or whether the levy should be laid upon all the property in the county. You inquire specifically as to a case where the proceeds of the loan were used for the construction of buildings in a specific magisterial district.

Section 698a, 1934 Supplement to the Code, being Acts 1934, page 753, contains this provision:

" * * * For capital expenditures and for the payment of existing district indebtedness, the board may levy a district tax in the magisterial district in which the money is to be spent, or the debts exist, not exceeding twenty-five cents, * * * on the one hundred dollars of the assessed value of the property in the magisterial district in any one year, to be expended for the purpose for which the tax is laid, but no other district tax for schools for any purpose other than herein expressly authorized shall be laid."

Under the present statutory provisions, this office has ruled that a loan from the Literary Fund is, in its final analysis, an obligation of the entire county. However, it is clear from the foregoing that, while the county is ultimately liable, it is not necessary to levy a tax upon the property in any district except that in which the proceeds of the loan for a capital expenditure is expended.

You refer to Section 673 of the Code, but I am of opinion that this has no bearing on literary fund loans, but refers to ordinary bond issues which must be approved by a referendum to the voters.

You also refer to Section 644. In my opinion, this has application only where the twenty-five cent district levy, authorized by Section 698a, is insufficient to take care of the loan from the Literary Fund.

A case has recently arisen in which a county desires to refinance from the Literary Fund a loan previously made to the county from such fund for capital expenditure in a specific district. At present the loan is being repaid from the twenty-five cent district levy, under Section 698a and former sections containing similar provisions.

I am very doubtful about the authority of the board of supervisors to lay a district levy to pay a loan from the Literary Fund where the proceeds are used to retire a previous loan from said Fund and not for a direct capital expenditure in a specific district. And this doubt, I think, exists even though the proceeds from the former loan which is being retired were used in a specific district and is now being retired from a district levy therein.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Power to fix rate of levy for schools as required in borrowing from Literary Fund.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 20, 1936.

HONORABLE EDWARD P. SIMPKINS, JR.,
*Commonwealth's Attorney of Hanover County,
Mutual Building,
Richmond, Virginia*

DEAR MR. SIMPKINS:

I am in receipt of your letter of June 16, in which you advise me that it is probable that Hanover County will apply for a loan from the Literary Fund. You call my attention to what you state to be a requirement of the State Board of Education that a school board in making application for such a loan shall furnish "a certified copy of a resolution of the Board of Supervisors stating that they would at the proper time lay the necessary levy to cover payment of the loan requested". You ask me whether it would be proper for the board of supervisors to pass such a resolution in the light of the provisions of section 2577(94) of the Code which requires a public hearing before there can be any increase in the rate of taxes on real estate.

For your information I enclose a copy of the form that has been prepared by the State Board of Education in connection with the application of a loan from the Literary Fund. The form, among other things, contains the following:

"The Board of Supervisors for said county or Council for said city will each year during the life of this loan, at the time they fix the regular levies, fix a rate of levy for schools or make a cash appropriation sufficient for operation expenses and to repay this loan in annual installments, and the interest thereon, as required by law regulating loans from the Literary Fund."

You will observe the State Board of Education only asks the board of supervisors to agree, as required by law, that the board will "*at the time they fix the regular levies, fix a rate of levy for schools or make a cash appropriation sufficient*" to repay the loan in annual installments, and the interest thereon. It seems to me that this is a reasonable requirement and I think it would be entirely proper for the board of supervisors to pass the resolution suggested by the State Board of Education.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Right to select treasurer's surety.

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

HONORABLE E. E. HOLLAND,
Suffolk, Virginia.

MY DEAR SENATOR HOLLAND:

I have your letter of November 26, in which you ask the following question:

"Kindly advise me if the board of supervisors of a county has authority to dictate to the treasurer of that county as to what insurance agency shall write his bond as treasurer?"

Section 2696 of the Code provides for the qualification of every county and district officer elected by the people, unless otherwise provided by law, before the circuit or corporation court of the county or city, or before the

judge of such court in vacation, or before the clerk of such court. County and district officers, of course, include county treasurers.

Section 2698 of the Code, relating to bonds of officers, provides that the county treasurer may give as surety on his bond some guaranty or security company doing business in the State of Virginia and deemed sufficient by the court, judge or clerk before whom he qualifies. There are other provisions in section 2698 relating to the bond, but it is clear that the court, judge or clerk before whom the treasurer qualifies has the authority to pass on the sufficiency of the surety or security, and I cannot find that any authority is given to the board of supervisors to dictate who shall be surety on the bond of the treasurer.

My answer to your first question makes unnecessary an opinion on your second inquiry.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Temporary loans.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 18, 1936.*

HONORABLE B. I. BICKERS, *Clerk,*
Board of Supervisors,
Stanardsville, Virginia.

MY DEAR MR. BICKERS:

Your letter of March 9, addressed to Honorable L. McCarthy Downs, Auditor of Public Accounts, has been referred to this office.

You inquire whether the board of supervisors may borrow, without a vote of the people, as much as \$3,000 in anticipation of funds to be derived from the operation of the Alcoholic Beverage Control Act.

Section 2727 of the Code provides that for the purposes of meeting casual deficits in the revenue or creating a debt in anticipation of the collection of the revenue of any county, the board of supervisors may borrow not earlier than June 1 of any year a sum of money not to exceed one-fourth of the amount produced by the county levy. These temporary loans must be repaid not later than December 15 of the year in which they are made, and no extensions of the said loans are valid.

I am of opinion that the board of supervisors of Greene county may borrow money under the provisions of this section for the purposes which you mention. I do not think it would be proper to limit the repayment of the money to funds derived from the operation of the Alcoholic Beverage Control Act, for the board probably does not know how much money the county will get from this source.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Transportation of indigent persons for medical treatment.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 26, 1936.*

HONORABLE S. W. LACY, *Clerk,*
Circuit Court of New Kent County,
New Kent, Virginia.

MY DEAR MR. LACY:

I am in receipt of your letter of November 23, in reply to mine of November 18.

It seems to me that, under the broad general power of a board of supervisors to take care of the poor, the board would have a right to provide out of county funds for the transportation of an indigent person to a place where he might receive medical treatment. I see no reason why the board may not arrange with the sheriff of the county to provide this transportation and allow him reasonable compensation therefor. I do not think that the sheriff is entitled as such officer to any stated mileage, but that his compensation for this transportation should be provided by agreement between him as an individual and the board. I think the board, if it so desires, would have a right to arrange for the transportation of such person by any private individual it might select.

Yours very truly,
ABRAM P. STAPLES,
Attorney General.

BONDS—County refunding loans from literary fund without popular vote.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 27, 1936.*

MR. T. D. FOSTER,
*Superintendent of Schools,
Waverly, Virginia.*

MY DEAR MR. FOSTER:

I have your letter of March 23, in which you ask if the Sussex county school board may issue bonds, without a vote of the people, for the purpose of refunding a loan made from the literary fund. You refer as possible authority for this action to Senate Bill No. 20, which was passed by the General Assembly of 1936, authorizing the issuance of refunding bonds in certain cases.

I have given this matter careful consideration and my conclusion is that the county does not have authority to issue these bonds without a vote of the people. In the case of *Board of Supervisors v. Cox*, 155 Va. 687, our court held that the provisions of section 115a of the Constitution, prohibiting the General Assembly from authorizing a county or a school board of any county—

“to contract any debt except to meet casual deficits in the revenue, a debt created in anticipation of the collection of the revenue of the said county, board or district for the then current year, or to redeem a previous liability, unless in the general law authorizing the same provision be made for the submission to the qualified voters of the proper county or district, for approval or rejection, by a majority vote of the qualified voters voting in an election, on the question of contracting such debt”

did not apply to loans made from the literary fund. The reasoning of the court seems to be that a literary fund loan, being a transaction between the State and one of its political subdivisions, constitutes a separate and distinct class, and that it, therefore, represents an implied exception to the comprehensive language of the Constitution which I have quoted.

I think that the same reasoning would apply to the construction of Senate Bill No. 20. If this were not true, the constitutional inhibition against the contracting of a debt by a county or school board could in effect be negated by the making of a literary fund loan and then promptly refunding it.

My view as to the construction of Senate Bill No. 20 is, I think, supported by the purpose of the Bill. This purpose is expressed in the last paragraph of the Bill, reading as follows:

"An emergency existing by reason of existing and impending defaults in the payment of outstanding bonds of certain of the counties and political subdivisions of the Commonwealth of Virginia herein authorized to be refunded, resulting in the impairment of the credit of such counties and political subdivisions and of the Commonwealth of Virginia, this act shall be in force and shall take effect from and after its passage."

Inasmuch as a loan from the literary fund is, as I have stated, a transaction between the State and one of its political subdivisions, and since the bonds representing the loan cannot be transferred (Report of the Attorney General 1934-35, page 104), I do not think it can be said that the credit of the county and the State would be affected, within the meaning of the act, by a default in payment of the loan.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BONDS—District road bonds issued prior to enactment of Byrd Road Law.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 18, 1936.*

MR. C. I. BRUMBACK, *Chairman,*
Board of Supervisors of Frederick County,
Winchester, Virginia.

MY DEAR MR. BRUMBACK,

I have your letter of January 17, asking whether district road debts incurred prior to the passage of the Byrd road law in 1932 are valid and legal debts, and whether the taxable property of said districts is bound for the payment of these debts.

It is the opinion of this office that, if the debts to which you refer were valid at the time they were created, they are valid now, and the taxable property of the districts is as much bound for the payment of the said debts as it was at the time the debts were created.

The situation seems to be covered by section 3 of the Byrd road law (Acts 1932, page 872), to which I direct your attention.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BONDS—Sinking Fund—Temporary loans out of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 13, 1936.*

HONORABLE W. POTTER STERNE,
Attorney for the Commonwealth,
Dinwiddie, Virginia.

DEAR MR. STERNE:

I have before me your letter of March 11, together with copies of certain correspondence between the Auditor of Public Accounts and Mr. W. A. Scarborough, superintendent of the Dinwiddie County School Board.

From your letter and enclosures, it seems that, pursuant to chapter 81 of the Acts of the Extra Session of the General Assembly of 1923, the school board of Dinwiddie county issued and sold certain bonds for the purpose of

paying off certain existing indebtedness, and for erecting, equipping and repairing school buildings in the county.

Section 7 of the said act requires the board of supervisors to levy annually a special tax on all property in the county subject to local taxation for school purposes sufficient to pay the interest on the bonds, and to create a sinking fund for the payment of the principal at maturity. It seems that these special taxes have been levied as required, and that a sinking fund has been accumulated.

The question now presented to me, and upon which an opinion is asked is, whether or not the county school board of Dinwiddie county, with the approval of the division superintendent of schools, may borrow temporarily the money which has accumulated in said sinking fund.

Section 7 of the act quoted from also provides as follows:

" * * * Such sinking fund shall be used in the retirement of the bonds authorized, or invested in said bonds, or invested in such other securities as the said school board may, with the approval of the division superintendent of schools for said county, select."

It is my opinion that, while the above quoted provision authorizes the school board, with the approval of the superintendent, to make investments in the securities named and other securities selected by them, it does not authorize the school board to borrow the money from the sinking fund. If this were permissible, it would destroy entirely the value and purpose for which the sinking fund is provided. If the obligor of the bonds to be retired by the sinking fund may borrow the money from such fund, there would be no purpose or necessity for creating and establishing such a fund. In my opinion, it would require a very clear and specific provision expressly authorizing such procedure in order to construe the statute as authorizing same.

I do not so construe the act above referred to, and in my opinion the school board has no authority to borrow the money from the sinking fund created and established for the retirement of the above mentioned bonds.

With my best wishes, I am

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

BONDS—State Sinking Fund Commissioner—Authority for effecting exchange.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 12, 1936.*

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

DEAR GOVERNOR PEERY:

You request my opinion concerning the authority conferred by the Act of the recent General Assembly (S. B. 358) upon the State Sinking Fund Commission with reference to the method of exchanging the new bonds to be issued thereunder for the bonds to be retired under its provisions. It is contemplated that the new issue will consist of four series, each maturing at a different time. The precise question presented is whether the said commissioners are authorized to require holders of the old bonds, who desire to exchange them for the new ones, to accept in exchange an equal part of each of the four series into which the new issue will be divided. The exchange value of each series will be definitely fixed by the prices of the bidder to whom all unexchanged new bonds will be sold.

The recent Act (Sec. 1) imposes as a condition of the exchange that

the holder of the old bonds shall "comply with such requirements as the commissioners of the sinking fund shall prescribe with reference to such exchange". It is my opinion that this provision authorizes the commissioners to require, as a condition of the exchange, that the holder of the old bonds will accept in exchange a like par value of the new issue (with cash adjustment if the price fixed is at a premium), and that the par value of the bonds of the new issue given in exchange will consist of an equal amount in par value of each of the four series.

I am advised that it is proposed to issue no bonds under the Act with a smaller par value than \$100. The further question therefore arises as to the procedure to be followed in case the par value of the old bonds is of such an amount as not to permit of an exactly equal division among the four series of the new issue. To illustrate,—assume a holder desires to exchange \$500 par value of old bonds. He could be given one \$100 bond of each of the four new series, but the odd \$100 of par value would not be susceptible of division.

In such a case, I am of opinion the commissioners are authorized to allot the holder a \$100 bond of any one of the series, and that this will constitute a substantial compliance with the intent, purposes and provisions of the Act. To hold otherwise would be to impose undue restrictions and burdens upon the commissioners in discharging their duties. The Act (sec. 11) expressly provides that the commissioners "are authorized to do any and all things necessary in carrying out the provisions of this act and in the issue, sale and exchange of the bonds". This provision, together with that above quoted from section 1, confers ample power and authority upon the commissioners to allocate the bonds of the new issue in the manner hereinabove indicated in making exchanges under the Act.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—Licenses—Power to license insurance companies.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 12, 1936.*

HONORABLE JOSEPH WHITEHEAD, JR.,
Commonwealth's Attorney,
Chatham, Virginia.

DEAR MR. WHITEHEAD:

This is in reply to your request for an opinion upon the authority of the town Council of Chatham to impose a license tax on insurance agents doing business in said town.

Section 239 of the Tax Code provides that the license tax on gross premiums imposed by section 238 of the Tax Code, together with the tax on real estate and tangible personal property provided for in section 239 "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".

Unless there is some specific charter provision which alters the foregoing, it seems clear that the Council has no authority to levy the license tax you refer to.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—Licenses—Power to license painters and paper-hangers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 21, 1936.

HONORABLE JOSEPH WHITEHEAD, JR.,
*Attorney for the Commonwealth,
Chatham, Virginia.*

DEAR MR. WHITEHEAD:

I am in receipt of your letter of March 21, inquiring as to the validity of an ordinance passed by the council of the town of Chatham imposing a license tax on painters, paper hangers and other skilled workers "who shall receive as much or more than \$3.00 per day".

I do not think that the town has authority to pass such an ordinance under general law, inasmuch as no such State license tax is imposed. See section 296 of the Tax Code. However, it may well be that the charter of the town of Chatham may give the council authority to impose such a tax. I suggest, therefore, that you examine the charter to ascertain whether the authority is contained therein.

As to the general power of a municipal corporation to impose license taxes, I refer you to *Gordon Brothers v. City of Newport News*, 102 Va. 649.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—Police power prohibiting fairs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 6, 1936.

DR. W. H. PERRY,
*Member of the House of Delegates,
Richmond, Virginia.*

MY DEAR DOCTOR PERRY:

I am in receipt of a letter addressed to you under date of February 25, by Mr. H. L. Stallard. Mr. Stallard asks a number of questions in connection with agricultural fairs which you have requested me to answer. The questions and answers are as follows:

"1. Does a Town Council have the right to prohibit an agricultural fair from being held within the corporate limits of the town?"

The general rule is that a business may be prohibited if the public safety or the public morals require its discontinuance. However, a person or corporation may not be prohibited from engaging in a lawful business not injurious to the community. Therefore, the test of the power to prohibit any business or calling is the effect such business or calling has upon the public welfare. (6 R. C. L., pages 221, 222 and 266.)

Whether or not an agricultural fair is inimical to the public welfare is a question of fact and not of law. However, I do not see how it could be held that a bona fide agricultural fair is bad for a community, especially when, in section 153 of the Tax Code, the General Assembly has expressly recognized an agricultural fair and exempted it from a State license tax.

The reply to the second question asked by Mr. Stallard is contained in my answer to his first question.

"(3) Has an agricultural fair ever been definitely defined by court decision of legislative enactment?"

So far as I have been able to find no appellate court has ever defined the term "agricultural fair". This office, in a case arising in Lynchburg about a year ago, unsuccessfully attempted to find where an "agricultural fair" had been defined.

"(4) Has it not been definitely ruled by court decision that a carnival is a legitimate and integral part of an agricultural fair?"

I have not been able to find any such court decision.

"(5) Can a municipality impose a tax on a carnival playing within an agricultural fair or on the fair itself?"

Section 153 of the Tax Code expressly exempts an agricultural fair and the shows exhibited within the grounds of such fair from a State license. Under the provisions of section 296 of the Code, I am of the opinion that a city or town is also prohibited from imposing a license tax on an agricultural fair or the shows in connection therewith, unless the charter of a particular city or town provides to the contrary. It would, therefore, be necessary to examine the charter of any city or town imposing such a license.

My information is that section 153 of the Tax Code, exempting agricultural fairs and the shows in connection therewith from a State license, has been amended at the present session of the General Assembly so as to permit the taxation of shows in connection with agricultural fairs under certain circumstances. I have not seen the Act as passed, and I therefore suggest that it might be well to send Mr. Stallard a copy, when available, for his information.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—Power of council to require inoculation against diphtheria.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 29, 1935.

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

DEAR DOCTOR RIGGIN:

I have your letter of November 27, inquiring as to the authority of the respective councils in the cities of the State to pass an ordinance making it compulsory to immunize every child against diphtheria.

I do not find any general statute conferring this authority on the councils of the cities and the answer to your question would depend upon the powers granted in the cities' charters. It is my opinion that such a power, if granted by the General Assembly, would be within the constitutional powers of the General Assembly to delegate. This seems clear from the case of *Ragsdale v. City of Danville*, 116 Va. 484.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—Power to regulate public utilities.**BOARDS OF SUPERVISORS—Duty to pay share of school superintendent's salary.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 22, 1936.

HONORABLE E. H. RICHMOND,
*Attorney for the Commonwealth,
Gate City, Virginia.*

MY DEAR MR. RICHMOND:

I have your letter of May 20, in which you ask a number of questions. You first question is:

"1. Can the town council of an incorporated town pass an ordinance to prohibit traveling shows and carnivals from exhibiting within the limits of the corporation?"

I recently had occasion to express an opinion in regard to this matter, and I enclose a copy of same.

Your next question is:

"2. Does a town council have any rights to regulate a local power company's rates when the said company is operating under a franchise granted by the town and charges are being made not granted within the franchise granted?"

The State Corporation Commission has held that, unless the charter of a particular town gives it authority to prescribe the rates to be charged by a public utility, the power of the Commission to fix rates upon application is paramount. Of course, I am not familiar with the provisions of the charter of the town which you have in mind.

You next ask if the board of supervisors has the power to refuse to pay the county's shares of the salary of the division superintendent of schools.

Assuming that the salary of this officer is included in the county school budget, approved by the board of supervisors, I am of opinion that the board has no authority to withhold payment of the county's share of the salary of this officer. Once the school budget has been approved, payments therefrom are made upon order of the county school board, and the board of supervisors has no authority to direct or withhold the payment of any funds included in the budget. See sections 655, 656 and 676 of the Code and also the case of *Carroll County School Board vs. Shockley*, 160 Va. 405.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Acknowledgments—Where taken and fees.

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

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

MY DEAR MR. GUINN:

I am in receipt of your letter of July 15, in which you inquire as to the legality of an acknowledgment taken by a clerk of the circuit court in his county outside of his office.

In view of the provisions of section 5205 of the Code, I am of opinion that so long as the acknowledgment is taken within the county of the clerk it is valid.

You also ask if it is legal for a clerk of court to charge a fee of 50 cents for taking acknowledgments.

In answer to this question, I quote from an opinion of my predecessor rendered J. B. Raines, Esq., Clerk of the Circuit Court of Richmond County, under date of September 19, 1923:

"Sub-section 1 of section 3484 of the Code of Virginia 1919, as amended by the Acts of 1920, provides, among other things, that the clerk shall be entitled to charge a fee of fifty cents 'for receiving proof of acknowledgments'. Therefore, the law provides a fee of fifty cents for each acknowledgment received and certified by a clerk. If the clerk has the authority to take the acknowledgment, he has the right to charge for the same, regardless of whether the paper is to be recorded by him or not."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COMMISSION MERCHANTS—Effect of taking goods on consignment without stipulating price.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., *January 29, 1936.*

HONORABLE GEORGE W. KOINER, *Commissioner,*
Department of Agriculture and Immigration,
State Office Building,
Richmond, Virginia.

DEAR MR. KOINER:

I am in receipt of your letter of January 27, enclosing one dated January 16 from Mr. J. Fred Collins, of Richmond, Virginia. Mr. Collins asks you the following questions:

"Has a man a right to operate a produce house, receiving from growers and out of town merchants produce on consignment and allowing the shipper a price net that he, the merchant, considers a fair net value? Can you consider goods bought when no price or quantity is mentioned or no agreement at all is entered into? These are two important questions and I ask that you answer them fully."

You in turn ask me this question:

"Considered in their relationship to section 1257 of the Code of Virginia, would you consider that such person or firm doing the things alleged in this letter, as amenable to and subject to the further provisions of the commission merchants law, sections 1258 to 1265 of the Code of Virginia, as amended by the Acts of 1934?"

A commission merchant is defined by section 1257 of the Code of Virginia as follows:

"The term 'commission merchant' shall include every person, firm, exchange, association or corporation who shall receive farm produce for sale on commission, or contract with the producer thereof for farm products to be sold by him or it on commission, or accept in trust from

the producer thereof for the purpose of resale, or who shall sell or offer for sale on commission or shall solicit consignments of any kind of farm products, or who shall in any way handle for the account of or as an agent of the producer thereof any kind of farm products; *provided that any person, firm or corporation shall be deemed to be an agent of the producer, unless a specific price has been agreed upon by both parties before shipment.*"

In the hypothetical questions asked by Mr. Collins, it appears that no specific price has been agreed upon before shipment by the shipper of the farm produce and the person to whom it is shipped for sale. It seems to me that this brings what Mr. Collins calls the "produce house" squarely within the provisions of the italicized portion of section 1257 of the Code above, which results in such "produce house" being subject to the further provisions of the commission merchants law, as set out in sections 1258 to 1265 of the Code.

It is difficult to express any final opinion on a hypothetical question of this sort without being in possession of the exact facts. The important facts in this case are the contents of the agreement between the shipper and the person to whom the produce is shipped. However, if I understand the assumed facts in Mr. Collins' letter, it seems quite clear that the "produce house" is the agent of the producer and, therefore, subject to the provisions of the commission merchants law.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH'S ATTORNEYS—Duty to prosecute before justice for public drunkenness.

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

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

MY DEAR MR. CARNER:

I am in receipt of your letter of July 19, in which you state:

"Section 4675(62), sub-d, of the Alcoholic Beverage Control Act reads as follows:

"The attorneys for the Commonwealth are hereby directed to appear and represent the Commonwealth before the court, mayor or justice trying any person for any violation of this act in their respective jurisdiction, *except for drinking in public*; and no court, mayor or justice shall hear such a case unless the respective attorney for the Commonwealth or his assistant is present or has been duly notified of such a case pending."

"The trial justice has raised the question of my appearance in cases charging drunkenness in public. It is my opinion, under this section, that I am required to appear in such cases. Will appreciate your ruling on this question."

Drunkenness does not constitute an offense under the Alcoholic Beverage Control Act. Punishment for drunkenness is prescribed in section 4568 of the Code, and I know of no statute which makes it the duty of the Commonwealth's attorney to appear before the trial justice in a prosecution for this misdemeanor.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

**CONSERVATION AND DEVELOPMENT COMMISSION: Disbursements—
How vouchers approved.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 18, 1935.*

HON. WILLIAM R. SHANDS, *Director,*
Division of Statutory Research and Drafting,
Capitol Building,
Richmond, Virginia.

DEAR MR. SHANDS:

I am in receipt of your letter of November 7, in which you say:

"I am advised that in the case of the State Commission on Conservation and Development before the Comptroller will issue any warrant for the disbursement of funds appropriated to the Commission a voucher is required approved by the Chairman and the Executive Secretary of the Commission. In so far as I have been able to ascertain, the foregoing requirement is based on section 3 of the act creating the State Commission on Conservation and Development, the section referred to having been last amended in 1928 (Acts 1928, p. 1155, carried as section 585(36) in Michie's Code).

"I shall appreciate your advising me whether you consider the foregoing approval of the two officers referred to is now required by statute.

"It seems to me that the section referred to has particular reference to specified appropriations which had previously been made to other agencies supplanted by the Commission. It also seems that wide discretion is vested in the Comptroller pursuant to section 10k of the Reorganization Act of 1927, as amended in 1928 (Acts 1928, p. 342), as to what signature he may require on vouchers."

I agree with your view that the statutory requirement in section 585(36) of the Code that the vouchers be approved by the Chairman and the Executive Secretary of the Commission is applicable to the specified appropriations which had previously been made to other agencies supplanted by the Commission. It seems to me that in case of subsequent appropriations to the State Commission on Conservation and Development the Comptroller has discretion under the provisions of section 10k of the Reorganization Act of 1927, as amended in 1928 (Acts 1928, p. 342) to provide how the vouchers may be signed.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CORONERS—Fee.

DRUNKENNESS—Driving while drunk—public or private character of highway.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 15, 1936.*

HONORABLE S. J. THOMPSON,
Attorney for the Commonwealth,
Rustburg, Virginia.

DEAR MR. THOMPSON:

I have your letter of April 13, in which you ask to what fee a physician acting as coroner is entitled for reviewing a body.

Section 4818 of the Code fixes this fee at \$5 and I agree with you that there is no authority for allowing more.

You next ask what fee the coroner is entitled to in case he performs an autopsy.

This is also covered by section 4818, in which it is provided that where an autopsy is made the coroner shall be allowed such additional fee as shall seem reasonable to the circuit court of a county or the corporation court of a city in which the autopsy is held. I know of no authority for the allowance of mileage by the Board of Supervisors.

You also ask whether a person would be guilty of a violation of section 4722 of the Code, if such a person was operating his automobile while intoxicated on a private driveway as distinguished from a public road.

I have examined the statute and find that it is made a misdemeanor for any person to drive an automobile while under the influence of certain named intoxicants. Nowhere in the statute is any distinction made between a private road and a public road. I am, therefore, of the opinion that it would be a violation of the statute to operate an automobile while intoxicated on a private road.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CORONERS—Fees—By whom payable.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA.. April 22, 1936.

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

DEAR DR. NOWLIN:

I have your letter of April 21, in which you request the opinion of this office on the following question:

Where a resident of an adjacent county is injured there and is brought to Lynchburg, where he dies under circumstances requiring a coroner's investigation, should the coroner's fee for such investigation be paid by the county of the decedent's residence or by the city of Lynchburg?

It seems clear that, under section 4806 of the Code (Michie, 1930), the body is to be viewed by the coroner of the county or corporation in which death occurred, and, under section 4814, "the expense of the coroner's proceedings shall be paid * * * out of the treasury of the county or corporation of which he" (the decedent) "was resident at the time of death". It is believed that there is nothing in any of the other sections to which you refer which will affect the provisions of the above two sections.

I might also call your attention to the fact that, under section 4814, your fee in any case, whether payable out of the city treasury or out of the treasury of the Commonwealth or of another county or corporation, must be allowed by the corporation court of the city of Lynchburg.

Under the provisions of law indicated, therefore, it is the opinion of this office that, in the case which you suppose, your fee, when allowed by the corporation court of the city of Lynchburg, should be paid out of the treasury of the county of the decedent's residence.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COSTS—Appeal from Trial Justice's Court without paying costs therein.

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

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

MY DEAR MR. MCCLINTIC:

I have your letter of September 25, in which you ask my opinion on the following question:

"A. B., Plaintiff, sues C. D., Defendant. The case is heard in the Trial Justice Court and judgment is given against the defendant. The defendant notes an appeal and executes bond. Do the costs incurred in the Trial Justice Court have to be paid before certifying the case to the Circuit Court?"

I presume that the condition of the bond is that the appellant will abide the judgment of the court, including costs. Under these circumstances, I do not think that it is necessary that the costs incurred in the Trial Justice Court should be paid before certifying the case to the Circuit Court. In this connection I call your attention to question 45 of the pamphlet containing the opinions of this office relating to trial justices and justices of the peace and the answer thereto.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COSTS—Commonwealth's attorney fees in misdemeanor cases.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *May 20, 1936.*

HONORABLE M. B. COMPTON,
Trial Justice of Scott County,
Gate City, Virginia.

MY DEAR MR. COMPTON:

I am in receipt of your letter of May 14, in which you ask if you should tax the fee of \$5 for the Commonwealth's attorney for his appearance before you in misdemeanor cases where the law does not require him to appear, but he does so at the request of the prosecuting witness or on your invitation.

Section 3505 of the Code, dealing with fees for the attorney for the Commonwealth, provides in part:

" * * * 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 * * * ."

I do not think that this provision is broad enough to authorize the taxing of a fee for the Commonwealth's attorney except in cases where he is required by law to appear before you.

Your attention is called to question and answer No. 20, pp. 9 and 10 of

the Opinions of the Attorney General relating to trial justices, a copy of which is herewith enclosed.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COSTS—Clerk's fee taxed by trial justice in criminal cases.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 21, 1936.

MR. C. F. WHITLEY,
City Attorney,
South Norfolk, Virginia.

MY DEAR MR. WHITLEY:

I am in receipt of your letter of May 18, in which you advise me that the costs in which the clerk of Norfolk county is interested are those amounting to \$1.25 each in criminal cases where there is a conviction. I presume that these are the clerk's fees of 25 cents and \$1 respectively provided for by sections 2552 and 2566 of the Code.

Assuming that my letter of March 16 to Mr. Downs correctly interpreted the law, I am of opinion that it is proper that these fees be taxed for the clerk by the trial justice. I do not think that the amendment of the charter of the city of South Norfolk to which you refer has any bearing on these fees, because that portion of the amendment quoted in your letter of May 11 relates to "all fees allowed the trial justice". The fees that I refer to in this letter are fees for the clerk and not fees allowed the trial justice.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COSTS—Officers' mileage in criminal cases.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 4, 1936.

HONORABLE JOSEPH WHITEHEAD, JR.,
Attorney for the Commonwealth,
Chatham, Virginia.

MY DEAR MR. WHITEHEAD:

Since my letter of April 21, I have received a letter from Mr. C. R. Warren, Trial Justice of Pittsylvania County, in regard to the costs taxed in the cases referred to in our recent correspondence.

I gather from Mr. Warren's letter that the two officers were not summoned as witnesses. In this case, I know of no authority for taxing witnesses' fees or mileage in their behalf.

As to mileage of the officers, I am of opinion that, if the prisoners were arrested under a warrant of a justice of the peace, they are entitled to the mileage provided in section 3508 of the Code, the pertinent portion of which section is "for carrying a prisoner to jail under order of the 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.

COSTS—Reimbursing person who swears out warrant.

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

MR. W. C. COLLINS,
Justice of the Peace,
Madison, Virginia.

MY DEAR MR. COLLINS:

I have your letter of December 13, in which you inquire whether "a party who has a warrant issued in a misdemeanor case and pays me \$1.00 for the issuing of that warrant is entitled to get this \$1.00 back if the party charged in the warrant is convicted and the costs are collected from the party who is convicted".

As bearing on your question, I refer you to question 17 and the answer thereto in the pamphlet "Opinions of the Attorney General Relating to Trial Justices and Justices of the Peace" which I am enclosing herewith.

From what you state, the trial justice has in his hands the costs that have been collected, including \$1 covering fee for issuing the warrant. This fee has also been paid to you direct by the person on whose behalf the warrant was issued. It has, therefore, been collected twice and, in my opinion, the duplicate collection should be returned to the person who paid you the original fee.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COSTS—Taxing statutory attorney's fee in action on notes providing for ten per cent fee.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *May 26, 1936.*

HONORABLE C. W. EASTMAN, *Clerk,*
Circuit Court of Middlesex County,
Saluda, Virginia.

MY DEAR MR. EASTMAN:

I have your letter of May 22, in which you make the following inquiry:

"A notice of motion is brought by Mr. A's attorney, on a promissory note for \$1,000 and 10 per cent attorney fee, provided for in the note. The case goes to trial in the circuit court and judgment is rendered for the plaintiff for \$1,000, interest, attorney fee provided for in the note and costs. Should the clerk, in taxing the costs, tax a \$2.50 attorney fee, or does the attorney fee provided for in the note and for which judgment is given take care of all attorney fees?"

The ten per cent attorney's fee provided for in the note, of course, represents the contract between the parties. I am of opinion, therefore, that, unless the instrument providing for this fee expressly states that it shall be in lieu of the fee taxed under the provisions of section 3533, the latter fee may also be taxed.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CONSTITUTIONAL LAW—Act invalid in part.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 24, 1936.*

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

DEAR GOVERNOR PEERY:

This is in reply to your request for an opinion upon certain questions which have arisen with respect to an Act of the 1936 General Assembly, designated as Senate Bill No. 351.

The title of the bill restricts its purposes to the prohibition of the erection and maintenance along any public highway of "any false or misleading sign purporting to furnish travel information"; to provide for the removal and destruction of such signs; to prescribe penalties for violation, and to repeal inconsistent acts.

The first sentence of the act renders unlawful the erection or maintenance along or in plain view of any public highway of any false or misleading sign purporting to furnish travel information relating to place or direction. This provision is clearly within the object expressed in the title and is conceded to be unobjectionable.

The second sentence, however, provides in part as follows:

"It shall be unlawful for any person to erect or maintain alongside, or in plain view of, any public highway any sign of any kind or character purporting to furnish travel information relating to merchandise or services unless the design of such sign, the information thereon, and the location thereof, be approved in writing by the State Highway Commissioner; * * * ."

It is obvious that the above quoted provision, vesting in the Highway Commissioner absolute powers to regulate the design, location and contents of signs along and in plain view of the highway, is not within the object expressed in the title of the Act as required under the provisions of section 52 of the Constitution of Virginia. For this reason the last quoted provision must be held to be inoperative and void.

The question then is presented whether the invalidity of the provision referred to renders the entire Act unconstitutional, or whether those provisions of the Act which are within the scope of the title constitute a valid enactment, independent of the invalid provisions.

It is clear that, if those provisions which are outside the scope of the title had been omitted entirely from the Act, the residue would constitute a complete act and would effectuate the purposes indicated in the title. Under these circumstances, it is well settled generally and in Virginia that the invalid portion may be disregarded and the balance of the Act will remain effective.

Va. and W. Va. Enc. Dig. Vol. 9, p. 28 and cases cited.

25 Ruling Case Law, p. 840.

In *Commonwealth v. Chesapeake and Ohio Ry. Co.*, 118 Va. 261, where a like question was involved, Judge Whittle said:

" * * * If it be admitted that the title is not broad enough to cover this part of the statute, then it may be treated as surplusage, and does not make void such part of the statute as is fairly included within the title."

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Acquisition of lands for public park.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 16, 1935.*HON. H. J. ECKENRODE, *Director,**Division of History and Archaeology,**State Commission on Conservation and Development,**Richmond, Virginia.*

DEAR MR. ECKENRODE:

In reply to your letter of September 14, Section 3032-b of the Code expressly authorizes the purchase, by a county or by any two or more counties acting together, of lands, etc., for use as a public park.

As to the mode of effecting such a project, the following procedure is described in the statute: Upon the filing of a petition with the clerk of the court in any county thirty days before any election therein, signed by ten per cent of the qualified voters, the authorities shall submit to the voters at such election the question of the establishment of a "system of public recreation and play grounds". Upon the adoption of such proposition by a majority of the qualified voters, the local authorities shall provide for the establishment of the proposed "system".

It does not unequivocally appear from the language of the statute whether this procedure is intended to be exclusive, or whether the board of supervisors may, in their discretion, authorize such a project without the referendum. Therefore, if feasible, the more cautious and safer plan would be to follow the statutory procedure. However, if this is impracticable, it is the opinion of the Attorney General that the statutory procedure is not exclusive and that the board of supervisors has the power to adopt an appropriate resolution without a referendum.

Yours very truly,

ABRAM P. STAPLES,

Attorney General.

COUNTIES—Bonds—Refunding Literary Fund Loan Bonds without referendum.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *June 4, 1936.*

HONORABLE JOSEPH WHITEHEAD, JR.,

*Commonwealth's Attorney,**Chatham, Virginia.*

DEAR MR. WHITEHEAD:

I have your letter of the 2nd instant, inquiring whether or not, in my opinion, a county has authority to issue bonds to retire outstanding literary school bonds under chapter 346 of the 1936 Acts of the General Assembly.

It is my opinion that a county does not possess this authority. In the first place, the act contemplates the issuance of bonds to pay "floating indebtedness" rather than an indebtedness in the form of a bond issue or a literary loan.

Section 115-a of the Constitution prohibits any debt of this nature to be contracted by any county or school district or school board, except by a majority vote pursuant to a referendum submitting the question to qualified voters. This section of the Constitution has been construed by our Supreme Court of Appeals as not applying to loans secured from the Literary Fund for school purposes. The principal distinction is that a loan of this nature

is merely a loan made by the State, and is an indebtedness from one branch of the Government to another. You can readily see that, if the statute undertook to authorize, without a referendum, the issuance of new bonds to be sold to the general public, or to a private banking institution, for the purpose of receiving money to pay off an indebtedness which was not originally authorized by a referendum, the result would be that the county would finally incur a bonded indebtedness without a referendum to the qualified voters, which would come within the express prohibition of section 115-A of the Constitution.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Budgets—Time of hearing, publication of synopsis and notice of increase, and adoption; time of levy.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 4, 1936.*

HON. JAMES M. SETTLE, *Clerk,*
Circuit Court of Rappahannock County,
Washington, Virginia.

MY DEAR MR. SETTLE:

I have your letter of February 28, asking several questions in connection with the preparation and adoption of county budgets. Your first question is:

"1. How many days prior to date of public hearing on budgets does synopsis of same have to be published?"

Section 2577m of the Code provides that a brief synopsis of the budget shall be published "at least fifteen days prior to the date set for hearing".

You next ask:

"2. How many days prior to date of hearing of budgets and fixing of levies for ensuing year does notice of proposed increase and tax rates have to be published?"

Section 2577m(4) provides that "before any local tax levy be increased, the amount and purpose of such increase shall be published in a newspaper having general circulation in the locality affected at least thirty days before the increased levy or assessment is made".

Your third question is:

"3. What is the latest date on which budget may be adopted and levies fixed for the ensuing year?"

Section 2577m of the Code provides that "the final adoption of the county budget by the board of supervisors shall not be later than the date on which the annual levy is made". As to the date of the annual levy, section 288 of the Tax Code states:

"The board of supervisors of each county shall have power, and it shall be their duty, at their regular meeting in the month of January in each year, or as soon thereafter as practicable, not later than their meeting in May, to fix the amount of the county and district levies for the current year; * * * ."

I trust that the above gives you the information you desire.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Designation of depository under county executive form of government.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 13, 1936.*

HONORABLE H. A. HADEN,
County Executive,
Charlottesville, Virginia.

DEAR MR. HADEN:

I have before me your letter of January 4, inquiring whether or not, in my opinion, the designation of a depository for county funds in your county, which has adopted the county executive form of government, is controlled by section 2773-n 11, subsection (e) or by section 350, subsection (c) of the Tax Code.

I am of the opinion that the provisions contained in the former act, imposing upon the board of supervisors the duty of designating a depository, is controlling, inasmuch as this is a part of the same statute which authorizes the establishment of the county executive form of government.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—District road bonds—Retirement of out of funds received for road equipment.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 27, 1936.*

MR. W. H. OVERBEY,
Trial Justice,
Rustburg, Virginia.

DEAR MR. OVERBEY:

I have your letter of February 21, in which you ask my opinion on the following question:

“Pursuant to section 1975mm of the Acts of Assembly, as amended in 1932, the Campbell county board of supervisors sold all their road equipment to the State Highway Department and in due course received payment for the same. This money was placed in the general fund. At that time Campbell county did not have any road bonds, but several of the districts did have road bonds. The question now arises as to whether or not this money received from the State should be applied to these district road bonds, or left in the general fund.”

I am of opinion that these funds should be used for the payment of the road bonds issued by the several districts in Campbell county. I will not elaborate my reasons for this opinion, inasmuch as the question has been specifically determined by our court in *Goddin v. Board of Supervisors*, 161 Va. 494, to which case I refer you.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Finance Board—Necessity for monthly meeting.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 20, 1936.*

HONORABLE W. EARLE CRANK,
Commonwealth's Attorney,
Louisa, Virginia.

DEAR MR. CRANK:

This is in reply to your letter of the 18th instant, with reference to the necessity for the County Finance Board to meet once a month pursuant to the provisions of sub-sections (b) and (h) of section 350 of the Tax Code.

While I believe a reasonable construction would be to reconcile the two sub-sections so as to allow the chairman to accept the report of the treasurer and call a meeting of the board, if the report presented questions making same advisable, yet the question is not entirely free from dispute. It seems to me it would be desirable, if the legislation could be clarified by an amendment at the present session of the General Assembly.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Payment of district indebtedness out of county funds.

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

HONORABLE C. I. BRUMBACK, *Chairman,*
Frederick County Board of Supervisors,
Winchester, Virginia.

DEAR MR. BRUMBACK:

I have before me your letter of December 20, requesting my opinion as to the authority of the board of supervisors to use general county funds to pay any outstanding debts of a magisterial district incurred for the building of roads prior to the enactment of the Byrd Road Law.

It is my opinion that the board of supervisors does not possess such authority. In my conversation with you on the subject, I understood that the district debts were not debts of the entire county, but were obligations only of the district. I can find no authority for the use of county funds by the supervisors for any purpose other than to pay an indebtedness of the county as a whole.

I do not believe that this power would be implied, for the reason that in a county consisting of five magisterial districts, in which three of said districts owe a district indebtedness and the other two are free from any such debt, the three supervisors from the districts owing the indebtedness, constituting a majority of the board, might retire the entire indebtedness of their respective districts from funds levied upon property of the entire county, thus forcing the other two districts to contribute to the payment of their local district debts.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Road Boards—Continuation and compensation of under Byrd Road Law.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 27, 1936.*

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

DEAR MR. DOWNS:

I am in receipt of your letter of February 24, in which you ask if county road boards, and clerks of such boards, as they existed prior to the Byrd Road Law have been abolished by that law.

I am of opinion that the Byrd Road Law does not abolish county road boards. As a matter of fact, it would seem that section 8 of the law (acts of 1932, page 876) expressly contemplates the continuance of local road authorities, although, of course, their powers and duties have been greatly limited.

In view of the above, I see no reason why the compensation provided for by law should not be allowed the members and clerk of a county road board. As you know, under the general county road law (chapter 85a of the Code) the board of supervisors had control of the county roads, and that chapter does not seem to provide for any additional compensation to members of the board of supervisors. However, the last section of the chapter (section 2039(47)) contemplates the continuation of county road boards created by special acts, and you would have to look to those acts to determine the compensation of the members of the respective boards.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Status of county extension worker under Workmen's Compensation Act.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 31, 1935.*

MR. R. B. HUDGINS,
County Agent,
Appomattox, Virginia.

MY DEAR MR. HUDGINS:

I am in receipt of your letter of December 28, asking whether or not a county is liable when a county extension worker is injured or killed when on official duty in the county. I presume you refer to liability under the Workmen's Compensation Act.

Upon inquiry, I am advised by the Industrial Commission that it has been held that the board of supervisors of a county is the employer of the county agent, and I assume that this is likewise true in the case of an assistant working under the county agent in the extension service. Therefore, I am of opinion that in a proper case a county would be liable under the Workmen's Compensation Act on account of injury to a person employed in the extension service. Of course, the liability of the county would have to be determined by the Industrial Commission in a proper proceeding.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Taxation—Power of board of supervisors to remit taxes on real and tangible personal property.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 27, 1935.*

HONORABLE CHARLES F. HARRISON,

*Attorney for the Commonwealth,
Leesburg, Virginia.*

MY DEAR MR. HARRISON:

I am in receipt of your letter of September 24, enclosing a resolution which the board of supervisors of Loudoun county has been asked to adopt. The effect of this resolution is to remit taxes for the years 1931, 1932, 1933 and 1934 on real estate and tangible personal property belonging to the Southern Railway Company. The property is known as the Bluemont Division of the Southern Railway Company, and has been operated for a number of years under a lease from that company to the Washington and Old Dominion Railway Company. I am informed that this line has been operated at a loss for a number of years. There are a number of other facts set out in the proposed resolution, but the fundamental question is: Has the board of supervisors under existing law the power to remit taxes which have been assessed against real estate and tangible personal property?

In view of the fact that I have been informed that the localities involved are very anxious to remit these taxes if it can be legally done, I have considered the question very carefully, and my conclusion is that under existing law the board of supervisors of Loudoun county has no power to remit these taxes.

It has been suggested that section 2743 of the Code, conferring broad powers of a local nature on board of supervisors, might afford the authority. I cannot agree with this suggestion. Such action on the part of the board of supervisors would, in my opinion, amount to an exemption from taxation for the years involved.

Section 168 of the Constitution provides that:

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

Section 183 of the Constitution defines what property shall be exempt from taxation, State and local. This section further provides that the exemptions afforded shall not be extended. It seems to me, therefore, that, when section 2743 of the Code is read in connection with these two sections of the Constitution, it is clear that the board of supervisors has no authority to take this action.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES AND TOWNS—Ordinances—Paralleling or adding to restrictions imposed by State law.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *May 20, 1936.*

MR. GEORGE F. ABBITT, JR.,

*Substitute Trial Justice,**Appomattox, Virginia.*

DEAR MR. ABBITT:

I am in receipt of your letter of May 16, in which you ask if the town of Appomattox by ordinance may impose a heavier penalty on the offense

of drunkenness than is imposed by section 4568 of the Code of Virginia.

Section 4568, dealing with drunkenness in public, provides that towns may pass or adopt ordinances prohibiting and punishing this offense. I further note that paragraph 17 of the Charter of Appomattox authorizes the town, among other things, to punish drunkenness, such ordinance not to be "in conflict with the statute laws of the State of Virginia". In view of the rather broad provision contained in section 4568 of the Code, I do not think that the fact that the punishment provided by the ordinance of the town of Appomattox is heavier than that prescribed by the State law makes the ordinance in conflict with the State law.

I cannot say that I think the question is entirely free from doubt, but I am supported in the view expressed herein by McQuillin on Municipal Corporations, 2nd Edition, Volume 3, Section 924, wherein it is said:

"In many jurisdictions it is held that an ordinance enacted in the exercise of the police power is not necessarily inconsistent with a state law on the same subject because it provides for greater restrictions or prescribes higher standards than is ordained by the statute."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COUNTIES AND TOWNS—Power to impose capitation tax.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 20, 1936.

MR. A. L. DIXON, *Chairman,*
Board of Supervisors,
Hampton, Virginia.

MY DEAR MR. DIXON:

This is in reply to your letter of May 8, from which it appears that you desire to know whether in my opinion, under the Acts of 1932, chapter 69, page 60, the county of Elizabeth City may levy a county capitation tax for relief purposes.

I have carefully considered the Act to which you refer and, in my opinion, it relates to police and regulatory power and not to power of taxation. If, under this Act, the county may impose a capitation tax, of course, also it may impose all sorts of license taxes, such as business and professional licenses and licenses for the operation of automobile. The county would also have power to impose a tax on bank stock. Under general law, counties have no power to impose taxes of the character I have mentioned, and I cannot believe it was the intention of the Legislature in the Act to which you refer to make such a drastic change in the long-standing law relating to taxation by counties.

My conclusion is, therefore, that the county of Elizabeth City, under the statute mentioned by you, does not have power to impose a capitation tax.

My view in this matter is strengthened by the fact that I am advised by the Attorney for the Commonwealth of Henrico County that several years ago that county considered its authority to impose county license taxes generally, and was advised by the Attorney for the Commonwealth that the Act did not relate to the power of taxation.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONVICTS—Rendition of to officers of another State for use as witness in its courts.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 24, 1936.*

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

DEAR GOVERNOR PEERY:

This is in reply to your letter of June 22, in which you request my opinion with respect to the authority of the Governor, or any other State official, to send prisoners outside of the State of Virginia to testify in cases pending in other states.

It is my opinion that the Governor would have this implied authority, provided the laws of the state to which the prisoner is to be sent contain adequate provisions for the custody, safe-keeping and return of the prisoner to the Virginia authorities. I am of opinion that there is no implied authority in the police officer of any other state to take custody and control of a prisoner of Virginia, unless such authority is conferred by the statute of such other state. To send a Virginia prisoner out of the state, in the custody of a person with no authority to retain him in his custody, would amount substantially to the same as releasing the prisoner.

It is also my opinion that the authorities of any state requesting the sending therein of a Virginia prisoner, for the purpose of testifying in a proceeding in such other state, should produce evidence, in the form of statutory enactments, of the authority of the officer into whose care it is sought to have the prisoner committed, to retain the prisoner in his custody and return him to the Virginia authorities.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

DIVISION OF PURCHASE AND PRINTING—Distribution of publications; discretion of director as to retaining copies.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 17, 1933.*

HONORABLE CHARLES A. OSBORNE, *Director,*
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. OSBORNE:

I have your letter of March 16, in which you state that there are in your custody only one or two copies of certain volumes of the Virginia Reports, and request the opinion of this office as to whether you have any authority to refuse to sell these last remaining copies.

Section 11, Acts Extra Session, 1927, chapter 33, at page 111, Virginia Code (Michie, 1930), section 585(70), provides, as to the sale and distribution of State publications by the Director of the Division of Purchase and Printing:

“ * * * A sufficient number of such documents shall be delivered to said director, who shall in his discretion sell or distribute copies thereof, fixing such price per copy as may be reasonable and sufficient to cover the cost of printing, mailing and handling. * * * ”

Under this provision of the statute, it seems clear that you are authorized to retain such copies as you may reasonably deem advisable.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

By JOSEPH L. KELLY, JR.,
Special Assistant.

DIVISION OF PURCHASE AND PRINTING—Distribution of Virginia Reports.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 27, 1936.

HONORABLE CHARLES A. OSBORNE, *Director,*
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. OSBORNE:

This will acknowledge your letter of February 14, requesting the opinion of this office as to what officers, departments, etc., are entitled to receive copies of Virginia Reports free of charge, and calling my attention especially to a letter of Judge Cochran, of the Norfolk Juvenile and Domestic Relations Court, asking that copies be sent to him.

Virginia Code (Michie, 1930), section 347, provides that:

“ * * * One copy of each volume of said” (Virginia) “reports hereafter published shall be furnished to each of the following persons, namely: to the judges and the reporter of the Supreme Court of Appeals, to the judges of each court of record of this State and each civil justice, to the Attorney General (to be kept in his office), to the clerk of each of the district courts of the United States held in this State for the use of said courts and the members of the bar practicing therein. Eight copies of each volume of said reports hereafter published shall be furnished to each university and college in the State in which a law school is established; five copies shall be placed in the law library at Richmond, and two copies each shall be placed in each of the law libraries at Wytheville and Staunton.”

It is the opinion of this office, after a careful examination of the history of this section, that the term “civil justice” as used therein refers only to those special justices of the peace elected by the General Assembly for cities having a population of forty-five thousand or more, as provided in Code section 3112, and the “civil justice number two” elected by the councils of cities having a population of one hundred and seventy thousand or more, under section 4988(30).

To the enumerated officers, etc., in section 347, may be added the director of the division of purchase and printing, who under sections 347 and 585(61), is entitled to receive, without charge, such copies as he may need to effect exchanges for publications of other States and countries.

It is possible that there are provisions specifically entitling other persons or institutions to receive free copies of the reports, and I therefore do not wish to commit this office to the negative proposition that no one not indicated above is entitled to receive such copies. I will say, however, that I have examined the statutes relating to each officer, etc., mentioned on the mailing list now used by the public printer, and find nothing to entitle anyone there named and not mentioned in section 347 to receive free copies of the reports. Also, I have examined the law relative to judges of Juvenile and Domestic Relations Courts, and can find nothing which would authorize you to comply with Judge Cochran's request.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

DIVISION OF PURCHASE AND PRINTING—Qualifications of person in charge of public printing.

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

HONORABLE CHARLES A. OSBORNE, *Director,*
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. OSBORNE:

Complying with your request for information as to the qualifications prescribed by law for the official of your department having charge of the public printing, I find that the only provision is contained in section 585(70) of the Code, which is to the following effect:

“ * * * The officer or individual in charge of the public printing shall be a practical printer and acquainted with the details of the printing business. * * * ”

So far as I have been able to ascertain, there is no law having any reference to the business qualifications of the person in charge of public printing.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.

DOG LAWS—Cities and towns—Authority to enact ordinances regulating rabid and destructive dogs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 14, 1936.*

HONORABLE LEONARD G. MUSE,
Senate Chamber,
Richmond, Virginia.

DEAR MR. MUSE:

I have your letter of February 11, referring to me a letter from Mr. L. D. James, City Clerk of Roanoke, in which the latter requests your advice as to the legality of a proposed ordinance, a copy of which he encloses. The purpose of the ordinance is to regulate and control rabid and destructive dogs and other animals within the city.

Section 68 of the Game, Inland Fish and Dog Code, Va. Code (Michie, 1930), section 3305 (69), provides in part that “ * * * it shall be unlawful for any person except the owner or his authorized agent to * * * kill any such (licensed) dog, except as otherwise provided in this act. * * * .”

Section 69 (Va. Code section 3305 (70)) is as follows:

“Upon proof that a mad dog is at large and has bitten other dogs, an emergency shall exist, and the board of supervisors of any county or the governing body of any city shall have the power to pass an ordinance, which shall become effective immediately upon passage, requiring the owner of all dogs therein to keep the same confined in their premises unless muzzled in such manner that persons or animals will not be subject to the danger of being bitten thereby, but such period shall not exceed forty-five days. Any justice of the peace, on proof that any dog is mad or has been bitten by a mad dog, shall order such dog to be killed. If it is believed that such dog has been bitten by a mad dog but the proof is not sufficient, the justice may order the owner to confine it

for observation. 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."

Section 1 of the ordinance authorizes the health officer to require, unconditionally, the confinement of all dogs, not only "upon proof that a mad dog is at large and has bitten other dogs", but also "whenever rabies shall become unusually prevalent", etc. Again, section 4 of the ordinance authorizes the killing of any dogs suspected of rabies, if this be necessary in order to capture such dogs, and section 5 prescribes a like treatment of vicious or destructive dogs.

Without undertaking to construe fully the rather thoughtlessly drawn statutes quoted, or to give an opinion as to how far and in what particulars the proposed ordinance would conflict with them, suffice it to say that, in my opinion, the validity of much of the ordinance would be open to serious question. It is suggested that there should be enacted a statute authorizing the governing bodies of counties, cities and towns to regulate and control rabid and/or destructive dogs, cats, etc., by such reasonable measures as they see fit.

Section 8 of the ordinance undertakes to add to the duties of game wardens. I know of no provision of law whereby local governments are enabled to prescribe the duties of game wardens as such. I might call your attention, however, to section 15 of the Game, Inland Fish and Dog Code, Virginia Code section 3305 (15), by virtue of which all town sergeants, policemen and other peace officers are constituted *ex officio* wardens, and suggest that the ordinance be amended so as to refer to these local officers only.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

DOG LAWS—Compensation of persons bitten by mad dog—what constitutes "bite".

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 26, 1936.

DR. J. B. PORTERFIELD,
Health Officer,
Christiansburg, Virginia.

DEAR DR. PORTERFIELD:

This is in reply to your letter of March 18.

You state that you have treated persons who have been exposed to rabies by handling rabid dogs and bringing cuts on their hands in contact with the dogs' saliva, and request the opinion of this office as to whether such persons are entitled to receive the costs of such treatment out of the dog fund.

Section 74 of the Game, Inland Fish and Dog Code provides that "Any person bitten by a rabid dog shall be paid the costs of necessary treatment", etc. While the letter of the law does not expressly cover such a case, the clear purpose of the Act is to allot a portion of the dog tax receipts to the relief of persons contracting this very common canine disease, and it seems clear that the Legislature intended to provide for such compensation in every case in which a taxpayer should be infected by a rabid dog.

It is, therefore, the opinion of this office that the claims in question ought to be paid.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

DOG LAWS—Compensation for stock damage—effect of failure to list stock for taxation.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 20, 1936.*

HONORABLE A. DUNSTON JOHNSON,
*Attorney for the Commonwealth,
Windsor. Virginia.*

MY DEAR MR. JOHNSON:

I am in receipt of your letter of April 17, in which you ask several questions.

It seems that a resident of your county had a hog injured by a dog to such an extent that it became necessary to kill the hog. The hog was not reported for taxation by the owner. The question is whether or not the owner is entitled to any compensation for the injury done to the hog by the dog.

I am of opinion that section 2323t of the Code contemplates that, before a county shall be liable for injury done to a hog, the owner thereof must show that it was listed for taxation.

Your next question is:

“Will you kindly advise me further as to who is responsible for the costs of summoning witnesses for the defendant in a criminal case?”

If you will advise me of the facts in the particular case in which you desire a ruling, I shall be glad to write you.

You next make this inquiry:

“We have a man in the county who is physically incapacitated. He has no means of support. He is, however, living with a brother who is able to care for him in every respect, but who is attempting to get him out of his home, and, therefore, be relieved of further responsibility. A request has been made to the county for help. Please advise me whether or not, in your opinion, there is any legal responsibility upon the county to care for this man, other than through and by its alms-house.”

It seems to me that the county will have complied with its duty by taking care of this man at the poor house. In this connection, I call your attention to section 2805 of the Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

DOG LAW—Compensation for destruction by claimant's dog.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 20, 1936.*

HONORABLE A. D. WATKINS,
*Commonwealth's Attorney,
Farmville, Virginia.*

DEAR MR. WATKINS:

I have your letter of March 17, requesting the opinion of this office as to whether a taxpayer may be compensated out of the dog fund for the loss

of poultry killed by his own dog, calling attention to the following provisions of section 74 of the Game, Inland Fish and Dog Code:

"Any person taxed by the State who shall have any livestock or poultry killed or injured by any dog shall be entitled to receive compensation therefor at the assessed value of such livestock and fair value of unassessed lambs or poultry and in addition thereto may recover from the owner or custodian of such dog, in an appropriate action at law, the difference between the assessed value and the full value of such livestock or poultry; * * * Nothing herein shall be construed as limiting the common law liability of an owner of a dog for damages committed by it."

While the language of the statute does not positively exclude the case of loss through depredations of the claimant's own dog, we think it may be more reasonably construed to contemplate only those cases in which one man's stock is injured by another's dog. This is clearly indicated by the provision for additional recovery in some cases "from the owner or custodian of such dog". Also, it seems clear that the policy of the act was simply to afford additional security to taxpayers whose stock is destroyed by dogs through no fault of their own.

It is therefore the opinion of this office that the claim in question should not be paid.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent voters—Time for making application.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 4, 1936.*

Mr. C. L. BOOTH, *Registrar,*
Danville, Virginia.

DEAR MR. BOOTH:

I am in receipt of your letter of June 3, in which you ask my opinion as to the construction of section 203 of the Virginia Election Laws covering the application for a mail ballot, and especially with reference to the provision that such application must be made not less than five nor more than sixty days prior to a primary or general election.

In my opinion, application for a mail ballot for the election to be held on June 9, 1936, can be made at any time within sixty days prior to and up to including June 4, 1936.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent voters ballot—Legality of providing registrar with postage for mailing ballots.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 20, 1936.*

HONORABLE K. K. JONES,
General Registrar,
Newport News, Virginia.

DEAR MR. JONES:

I have your letter of the 18th instant, in which you request my opinion as to the permissibility of a candidate providing the registrar with postage to be sent out with the mail ballots to absent voters.

The absent voters statute provides in some detail as to the procedure to be followed by the registrar and does not in any way provide for any such practice. While the statute does not expressly prohibit it, it is my opinion that the practice is improper and probably would be held to be illegal if tested in court.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent voters—Time for issuing ballot.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 24, 1936.*

HONORABLE KENNETH K. JONES, *Registrar,*
Newport News, Virginia.

DEAR MR. JONES:

I am in receipt of your letter of March 23, in which you say:

“When is the final date for issuing mail ballots for the primary election to be held on April 7, 1936?”

Section 203 of the Code provides that, if a duly qualified voter anywhere in the United States desires to vote by mail, he must make application in writing to the registrar of his precinct for a ballot not less than five nor more than sixty days prior to the primary, special or general election in which he desires to vote.

Subsection 8 of section 5 of the Code of Virginia provides certain rules for the computation of time, reading as follows:

“Where a statute requires a notice to be given, or any other act to be done, a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion or proceeding, but the day on which such notice is given or such act is done, may be counted as part of the time.”

While the issuance of an absent voter's ballot may not strictly come within the definition of a motion or proceeding, the Attorney General's office has, by analogy, construed the provision, requiring an application to be filed not less than five days prior to a primary, special or general election, as authorizing a registrar to issue an absent voter's ballot on the fifth day before such election.

Thus, to authorize a registrar to issue an absent voter's ballot for a primary election to be held on April 7, 1936, he must have received the application for such ballot not later than mid-night April 2, 1936.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent voters—Affidavit—Necessity for where application made in person.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 8, 1936.*

MR. GEORGE E. CARY, *Registrar,*
Washington, Virginia.

MY DEAR MR. CARY:

I am in receipt of your letter of April 6, asking if a person making an application to vote by mail, pursuant to section 203 of the Code, is required

to accompany the application by the affidavit called for when the application for the ballot is made in person.

The requirement of the affidavit is by the section confined to cases where the application is made by the voter in person when he is in his city, town or precinct.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent voters—Criminal responsibility for making false affidavit—Right to apply for mail ballot.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 19, 1935.*

SENATOR W. WORTH SMITH,
Travelers Building,
Richmond, Virginia.

DEAR SIR:

Replying to your letter of the 19th instant, you are advised with respect to your first question that I have been unable to find in the election laws any provision concerning the criminality of a person making an affidavit that he expects to be absent from his county, city, or precinct, on election day, if he, in reality, does not expect to be absent. I think your question is largely theoretical for the reason that "expectation" is a state of mind which it is difficult to prove or disprove.

With respect to your second question, the statute provides that absentees and persons "physically unable to go in person to the polls on the day of election" may vote by mail. This language is so plain that I do not think I can clarify it by undertaking to interpret it.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent voters—Right to second ballot where first ballot returned unopened—Duty of registrar in making out list.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 31, 1935.*

MR. E. RALPH JAMES, *Registrar,*
Hampton, Virginia.

MY DEAR MR. JAMES:

I have your letter of July 30, in which you set out the following case:

"A qualified voter, in accordance with section 202 et seq. of the Virginia election laws, applied for a mail ballot which was mailed to him at his address in this county, he being here at the time. Under the provision of the second paragraph of section 208, the ballot, unopened and unvoted, was returned to the registrar and the proper records made as provided by paragraph three of section 208.

"Subsequently the same voter filed a second application for a mail ballot, the same being in proper order and accompanied by affidavit that he would be away on the date of election, application being based upon same grounds as the former application. Will you please advise me whether this voter should be given the second mail ballot in this case, not having voted the first ballot?"

Inasmuch as the first ballot was returned unopened and unvoted, in accordance with law, I see no reason why the second application for a ballot cannot be treated as an original application and the ballot furnished. Certainly there is nothing in the statutes which prohibits this, and section 218 states that the provisions of the absent voters' law shall be liberally construed in favor of the absent voter.

In making out the list required of you by section 205 of the Code, I think it would be wise for you to show that the first ballot sent to this voter was returned to you unopened and unvoted.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent voters—Death of before elections; disposition of surplus ballots.

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

HONORABLE KENNETH K. JONES,
General Registrar,
Newport News, Virginia.

DEAR MR. JONES:

I have your letter of July 31, in which you inquire whether or not the vote of a person who voted by mail, but who has since died, should be counted in the August primary election.

While a vote may be delivered to the registrar prior to election day, it is not deemed to be actually cast until the day of election. It is obvious, therefore, that a person who has died cannot vote on election day and the mail vote of any such person should not be counted.

You inquire whether or not the judges of election should return unused ballots to the clerk or the court, or whether same should be destroyed.

Section 159 of the Code provides as follows:

"All ballots remaining unused at the close of the polls shall be carefully destroyed before the box is opened."

It is my opinion that the above provision is applicable to the primary elections as well as general elections, and that all unused ballots should be destroyed by the election judges prior to the opening of the poll boxes.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent voters—Right of registrar to deliver and call for mail ballot; validity of mail ballot where voter not actually absent.

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

HON. LEE STANLEY,
Clerk of the Court,
Clintwood, Virginia.

DEAR MR. STANLEY:

This is in reply to your letter of the 27th instant, in which you request my opinion upon questions, which will be answered in the order therein set out.

First: You ask whether a registrar is authorized to go out and deliver mail ballots and receive the same from the voter after he has marked same.

The answer to this question is found in sections 205 and 208 of the election laws in the Virginia Code. Section 205 contains this provision:

" * * * no registrar shall go in person beyond the limits of his city, town, or of the voting precinct of which he is registrar, if in a county, for the purpose of delivering any such ballot to any voter, nor shall he go in person to any voter within the limits of his city, town, or voting precinct, if in a county, for the purpose of *delivering* any such ballot, unless the application therefor be accompanied with the certificate of a reputable physician that such voter will be physically unable to go in person to the polls on the day of the election in which he desires to vote such ballot."

Section 208 contains a similar provision with respect to *receiving* a voted ballot, which is as follows:

" * * * no registrar shall go in person to any voters for the purpose of *receiving* such ballot from him, except it be such person to whom he is authorized to go in person to deliver a ballot, as provided in section two hundred and five, as amended by this act."

Second: Your second question relates to the validity of a mail ballot where the voter is not absent on election day.

I am of opinion that the fact that the voter is present does not affect the validity of the vote he previously cast under the absent voter's law. If such voter made the application for ballot on the ground that he expected to be absent and made affidavit to that fact as required by section 203 of the Code, the registrar is not vested with authority to question the truthfulness of his affidavit, and must deliver him a ballot. The fact that, due to a change of plan, he is not actually absent would not indicate that the affidavit that he *expected* to be absent was not true when made.

Under the provisions of section 208 it seems that a person to whom a mail ballot has been sent or delivered is not permitted to vote in person at the polls on election day, even though he has not voted by mail, unless at least three days before election day he has returned same to the registrar.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent voters—Secrecy.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 18, 1935.*

HONORABLE JAS. M. SETTLE,
Clerk,
Washington, Virginia.

DEAR MR. SETTLE:

I have your inquiry of October 17, which is as follows:

"Please advise, if in your opinion, a person who applies in person to a Registrar for a ballot to be voted by mail, may vote at the time the application is made for the ballot, in the presence of the Registrar, a candidate for office, or any other person. My understanding of Sec. 208 of the Election law is that the ballot can only be voted in the presence of the officer who signs the coupon under Sec. 206."

It is clear intention of the election laws that a person voting by mail shall not disclose to anyone, even the notary, how he votes. The fact that a number of other persons are present at the time his ballot is marked, acknowledged, and placed in the envelope, as required, would not in my opinion invalidate the ballot where care is taken to preserve the secrecy thereof.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent voters—Applicant deciding to vote in person; power of registrar to pass on bona fides of application; residence.

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

MR. JAMES E. QUESENBERRY, *Judge of Election,*
Box 272,
Coeburn, Virginia.

DEAR MR. QUESENBERRY:

I have your letter of October 23, in which you request my opinion upon several questions relative to the absent voters' law.

Your first question is as follows:

"What should be done when a person who has voted by mail comes and wants to vote in person?"

Section 208 of the Code provides that "If for any reason a person, who has applied for and received a ballot, should decide not to vote the same, it shall be his duty to return such ballot unopened, in the sealed envelope in which it was received, to the registrar from whom he received the same at least three days before the day of election in which such ballot was intended to be used.

"The registrar shall note on the list required by section two hundred and five, to be kept by him, opposite the name of the person returning such ballot, the fact that the same was returned unused, with the date of the return thereof, and he shall carefully preserve all such ballots so returned and deliver them, together with the other unused ballots in his hands, to the judges of election on election day, as provided in section two hundred and ten. Then if said voter shall return to his precinct, after having returned his unused ballot as provided herein, and presents himself to personally cast his vote on election day he shall be entitled to cast his ballot."

Your next question is:

"What should be done when persons who have voted by mail are still in the election precinct and the application for the ballot does not seem to be bona fide?"

In my opinion, the judge of election has no jurisdiction to determine whether or not a person making application for an absent voter's ballot is, or is not, acting bona fide in the matter. The statute requires the registrar to deliver or mail to the voter the absent voter's ballot upon his compliance with the requirements of the statute and, when this is done, I am of opinion that the vote should be counted.

Your third question is:

"When should a person be considered to have lost his residence in your county when he has moved to another state or county?"

This office has repeatedly ruled that residence for the purpose of voting is entirely one of intention. Where a person has acquired a residence in a city or county of Virginia, he retains that residence until he forms an intention to permanently change the same. The mere fact that he is temporarily absent in another county, city, or state, does not operate to remove his legal voting residence unless such absence is coupled with an intention to permanently change his residence to the place which he has moved. Since the matter is one of intention, I do not see how it would be practical for an election judge to undertake to pass upon the intention of the voter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Requirements for having name put on ballot.

OFFICERS—Compatibility of—Commissioner of accounts and clerk of school board as county treasurer.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., *September 16, 1935.*

HONORABLE WILLIAM A. TUCK,
South Boston, Virginia.

DEAR SENATOR TUCK:

This is in reply to your request for an opinion upon questions hereafter set out.

Your first question is whether or not, where a person who has been nominated as a party candidate dies between the time of his nomination and the day of the general election, and within sixty days of the election day, any provision is made in the law for a subsequent nominee of the same party, who may be nominated in accordance with the manner determined upon by the county executive committee, to have his name printed upon the official ballot for the general election.

The Virginia Election Laws (Section 154) provides for the printing on the ballots of names only of primary nominees and of persons who signed a written notice at least sixty days before the election. There seems to be no provision whatever authorizing a person nominated to fill a nomination made vacant by death to have his name so printed.

Your second question is whether or not a person holding the position of commissioner of accounts and also the position of clerk of the school board, and at the same time receives an appointment or election as county treasurer, can qualify for such office.

I am of the opinion that the provisions of Section 2702 of the Code are controlling upon this question. This section expressly provides that a treasurer may also hold the office of commissioner of accounts, but it also expressly provides that he may hold no other office, either elective or appointive. It further provides that, if he holds any such other office and then qualifies as county treasurer, such qualification shall ipso facto vacate the other office he then holds.

Section 655 of the Code provides for the election or appointment by the school board of a competent person as clerk of the school board, and for the fixing of the compensation of the clerk by the school board. The section further provides that the clerk shall be selected annually. While there may be some doubt about the matter, it would seem that the clerk of the school board is an officer within the meaning of Section 2702 above referred to, and, if any one should raise the question by proceedings in court, the clerk of the school board would run the risk of having his position declared vacant.

The whole question would seem to depend upon whether or not the clerk of a school board is an officer within the meaning of Section 2702 of the Code.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballots—Printing certain instructions on.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 22, 1936.

HONORABLE W. H. DUKE, *Chairman,*
Norfolk County Electoral Board,
R. F. D. 1, Box 96,
Portsmouth, Virginia.

DEAR MR. DUKE:

This is in reply to your letter of June 19, in which you request my opinion upon the authority of the electoral board to place an addendum to the written instructions in forwarding mail ballots, consisting of the addition of the last sentence of the first paragraph of section 162 of the Code, as amended by the Acts of 1936, page 278.

While our Constitution prohibits the giving of aid to persons intending to vote, I do not believe that your proposed action constitutes "giving aid" within the meaning of the Constitution. Section 155 of the Code, as amended by the Acts of 1936, page 277, last paragraph, imposes upon electoral boards the duty of causing to be printed in small type upon the ballots for use in any election, immediately below the title of any officer and the names of candidates therefor, a note stating the number of candidates who may be voted for for that office.

It seems to me that the action you propose is of a very similar nature, and that it is within the authority of the electoral board to add the language to which you refer to the instructions which you send out with mail ballots, although section 205 (c) of the Code prohibits placing upon the slip enclosed with such ballot "any instructions with regard to the manner of marking the ballot or any information which will give aid to the prospective voter on the preparation of his ballot in contravention of the Constitution of Virginia".

As stated above, it is my opinion that this is not such aid as is prohibited either by the Constitution or by the above statutory provision.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballots—How marked—Mutilation.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 26, 1936.

MR. C. E. PETTIS, *Chairman.*
MR. WAILES HANK, *Secretary,*
Electoral Board of the City of Norfolk,
Norfolk, Virginia.

GENTLEMEN:

I am in receipt of your letter of June 23, in which you ask two questions in connection with the method of voting as prescribed by section 162 of the Code of Virginia, as amended in 1936 (Acts 1936, page 278).

You ask whether a ballot is void, if "the voter should attempt to vote (a) in the old manner, i. e. by scratching out the name of the candidate he wishes to vote against and should fail to check in the square opposite the name of the candidate he wishes to vote for".

Section 162, as amended, is the section prescribing the method of voting. It now provides in part as follows:

" * * * The said elector shall then take the said official ballot and retire to said voting booth. He shall then mark immediately preceding the name of each candidate he wishes to vote for a check (V) or a cross (X or +) mark or a line (—) in the square provided for such purpose, leaving the square preceding the name of each candidate he does not wish to vote for unmarked."

The quoted language manifestly represents a complete change in the requirements that have heretofore prevailed in this State for the marking of a ballot. It may be said to represent an affirmative system of marking a ballot as distinguished from the negative system which has existed in the past.

While it is true that courts are strongly inclined to uphold the legality of ballots, if the intention of the voter can be ascertained, yet, if the voter absolutely ignores the method prescribed for marking a ballot, as set out in your question, I am of the opinion that the ballot is void. To hold otherwise would absolutely nullify the change in the method of voting deliberately adopted at the last session of the General Assembly.

You next ask if the ballot is void, if "(b) should scratch out the name of the candidate he wishes to vote against and should then check in the square opposite the name of the candidate he wishes to vote for".

The situation present in your second question is that the voter has complied with the provisions of the statute as to the marking of his ballot, but has done something else, namely, drawn a line through the name of the candidate he wishes to vote against. So far as I have been able to find there is no statute in Virginia prohibiting the mutilation of a ballot or defining what mutilates a ballot. I have been able to find no reported cases discussing this question. Section 165 of the Code provides that when a ballot is unintentionally or accidentally defaced, the elector may receive another ballot upon taking an oath that the defacement of the first ballot "was not done for the purpose of defacing said official ballot".

In the absence of any statute declaring void a mutilated or defaced ballot, it becomes pertinent to inquire whether the ballot marked as you describe is in violation of section 27 of the Constitution, providing that "so far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained".

If a distinguishing mark is placed on a ballot so as to make it readily ascertainable who cast the particular ballot, I should say that this would be unquestionably in violation of the constitutional provisions to which I refer. If it appears, however, from the face of the ballot that the additional marks were placed thereon as the results of an honest effort on the part of the elector to indicate his choice of a candidate and that the voter did not thereby attempt to indicate who voted the ballot, the ballot should not be rejected. When it is considered that it has long been the practice in Virginia to vote by drawing a line through the names of the candidates who are not the choice of the voter, I am of the opinion that the drawing of such a line in addition to correctly marking the ballot as prescribed by the statute, does not constitute such a distinguishing mark as to violate the secrecy of the ballot. Certainly there can be no question as to the choice of the elector, nor any mark which would serve to identify the person casting the vote.

Bearing in mind the fundamental principle that a citizen is not to be disfranchised except by a clear expression of legislative intent, my conclusion is that a ballot marked as indicated in your second question should not be rejected. This principle has been definitely recognized by our legislature in

the chapters of the Code dealing with absent voters and with primary elections, wherein it is provided in effect that the chapters shall be liberally construed so that the will of the electors shall not be defeated by any informality. See sections 218 and 221 of the Code. Inasmuch as the method prescribed for the marking of ballots applies both to primary elections and other elections, it would appear plain that the legislature did not intend for a citizen casting an otherwise valid ballot to be disfranchised by such an informality.

For an excellent discussion of distinguishing marks on ballots, I refer you to 9 R. C. L. 1135-1140.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballots in primaries—including names of unopposed candidates.

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

MR. H. W. GILLS, *Secretary,*
Electoral Board of Henrico County,
Harvie Road,
Henrico County, Virginia.

DEAR MR. GILLS:

You request the opinion of this office upon the question whether the Democratic Executive Committee of a county has the authority to certify to the electoral board, to be printed on the ballots in a primary election in which some of the candidates are being opposed, the names of unopposed candidates who have already been declared the nominees of the party for the respective offices for which they are candidates.

This precise question was answered in an official opinion from this office given June 23, 1923, by Hon. J. D. Hank, Jr., Assistant Attorney General, to the Secretary of the Electoral Board of Spotsylvania County, which appears at page 147 of the Report of the Attorney General for 1923. This opinion is as follows:

"Acknowledgment is made of your letter addressed to the Attorney General and referred to me for attention, in which you ask if there is any law prohibiting the placing upon the official primary ballot of the name of a person who has no opposition in the primary about to be held.

"Section 246 of the primary law provides that, whenever, within the time prescribed by that law there is only one declaration of candidacy in a political party for the nomination for any office, the name of the person filing such declaration shall be declared the nominee of such party for the office for which he has announced his candidacy.

"Under this provision, the person who has filed this declaration and has no opposition, must be declared the nominee of the party for which he has announced his candidacy.

"There is nothing in the law, however, which prevents his having his name printed on the official primary ballot in case the primary is held to ascertain the will of the people with reference to candidates for other offices. The fact is, that very often, though a person has no opposition, at his request his name has been printed upon the official ballot used in a primary in which there has been a contest for the nomination for other offices to be filled, at the same time as that for which there is only one candidate."

At the time this opinion was given the statute was the same as it is now, but the party plan of the Democratic party, then in effect, provided as follows:

"If only one person shall announce his candidacy in accordance with the foregoing provision, the chairman shall make known that fact, and declare the said person the nominee, and give notice that no one will be voted for for that office."

The next year after this opinion was given, apparently in recognition of same, the provision of the party plan was changed so as to read in these words:

"Whenever within the time prescribed by law for filing declarations only one candidate shall qualify for any office, the name of such candidate shall be declared the nominee by the chairman of the committee under whose direction the primary would have been held, and no primary shall be held for that office."

Ever since that time it has been customary to print on the ballot the names of unopposed candidates whenever, in the discretion of the executive committee, it has been considered wise to do so.

Under the Democratic party plan persons voting in a Democratic primary are deemed to pledge themselves to support all of the party nominees of the party at the following general election, whether such candidates are nominated in the primary or otherwise. The Democratic party plan now in effect provides that the Democratic Executive Committee of any county may, by resolution, require all persons voting in a primary election to sign a written pledge to support all such nominees. The appearance of the names of unopposed candidates on the primary ballot, although not for the purpose of being voted for, is informative and discloses to persons voting the names of those candidates they are pledging themselves to support if they vote in the primary.

A primary is essentially a party affair, and in that respect is different from a general election. In the primary, candidates are nominated, in the general election, officers are elected.

Section 227 of the Code confers very broad powers upon the party authorities. Neither the statute nor the party plan prohibit the printing of the names of unopposed candidates on the ballots, and, in my opinion, the County Democratic Executive Committee is authorized to certify names of unopposed candidates to the electoral boards, and when so certified such names should be printed on the ballot by the Electoral Board.

The party plan and statutes applicable, having been officially construed in this manner for more than twelve years, as above indicated, and neither the party authorities nor the general assembly having made any amendments thereto, under the well known rules of statutory construction, they are considered to have acquiesced in and approved the interpretation placed on them.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballots—Printing name of deceased candidate thereon—use of rubber stamp.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 24, 1935.*

HONORABLE M. B. BOOKER,

*Attorney for the Commonwealth,**Halifax, Virginia.*

MY DEAR MR. BOOKER:

I refer to our telephone conversation of today, in which you advised me that the candidate for the office of treasurer of Halifax county has recently died, and that there is not sufficient time for any other candidate to comply with the provisions of section 154 of the Code. You stated that the ballots have not yet been printed and you asked whether the name of the deceased candidate should be printed on the ballots.

Section 154 of the Code also provides that "no person * * * who is not qualified to vote in the election in which he offers as a candidate shall have his name printed on the ballots provided for such election".

Inasmuch as the deceased candidate is not qualified to vote in the coming election, I am of opinion that, if the ballots have not already been printed, his name should not be printed thereon. Even if this provision were not in the law, it would, of course, be futile to print the name of a dead person on any ballot.

You further inquire if rubber stamps may be used in voting for a treasurer in the coming election.

In view of the provisions of section 28 of the Constitution that any voter may erase the name of one candidate and insert another, my predecessor ruled over a period of years that rubber stamps could be provided and used. I concur in this ruling.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***ELECTIONS—Ballots—Requirements for having name put on ballot.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 30, 1935.*

MR. JOHN S. ELDER,

*Chairman of Electoral Board,**Hopewell, Virginia.*

MY DEAR MR. ELDER:

I am in receipt of a letter from Mr. Archer L. Jones, Attorney at Law, of Hopewell, in which he asks me to advise you whether the name of a candidate for the House of Delegates should be printed on the ballot when the declaration of candidacy is not acknowledged and is subscribed by only one witness.

Section 154 of the Code provides that the notice of candidacy shall be written and shall be "attested by two witnesses". It is further provided that the notice must be signed by the candidate, but, if he is incapable of writing, then some mark adopted by him as his signature shall be acknowledged before some officer authorized to take acknowledgments.

The section also contains this provision: "No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for such election, unless he be a party primary nominee."

In view of the provisions of the statute above mentioned, I am of opinion

that the requirement that the notice of candidacy shall be attested by two witnesses is mandatory and that, unless the candidate is a party primary nominee, his name should not be printed on the ballot.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballots—Addition of names by judges.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., *October 18, 1935.*

MR. E. L. MUSICK, *Judge of Election,*
Box 5,
Cleveland, Virginia.

DEAR MR. MUSICK:

Replying to your letter of October 15, in which you inquire as to whether or not it would be permissible, under the election laws of Virginia, for the judges of election to stamp on the official ballot the name of a candidate for a district office who failed to comply with the requirements of the law in order to procure the printing of his name on the ballot, you are advised that it is my opinion that this practice is not permissible.

You say in your letter: "In other words if the three local judges wanted to stamp the name on ballot before delivering it to the voter would this be illegal."

If this practice were permissible, the effect would be the same as if the candidate's name had been printed on the ballot, and would result in allowing the election judges to show favoritism to one candidate who desired to have his name stamped on the ballot in preference to another who might also desire the same privilege, but whose name the judges might refuse to stamp thereon. It is obvious that this practice would be in violation of the election laws.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Defacement of ballots—Mark identifying voter.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., *December 14, 1935.*

HONORABLE V. R. SHACKELFORD,
Attorney-at-law,
Orange, Virginia.

DEAR MR. SHACKELFORD:

I have your letter of the 10th instant, inquiring as to the statutes referred to in my letter of November 13, addressed to Mr. T. H. Lillard, Sheriff of Madison County.

You are correct that there is no statute expressly providing that the writing by a voter of his own name on the ballot shall be deemed a defacement. However, Sections 27 and 28 of the Constitution, construed in conjunction with Section 165 of the Code, I think, clearly lead to this result, and that the placing of any mark on a ballot by which the identity of the voter can be determined constitutes a defacement thereof and destroys the secrecy of the ballot in violation of the constitutional provision.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates—What constitutes “filing” of notice of candidacy.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 15, 1936.*

HONORABLE B. C. GARRETT, JR., *Clerk,*
Circuit Court of King William County,
King William, Virginia.

DEAR MR. GARRETT:

This is in reply to your letter of April 14, in which you request my opinion upon the question whether or not two certain notices of candidacy for the town council of West Point have been properly filed so as to authorize you to certify either or both of said notices to the electoral board, so that the names of the parties filing said notices may be printed on the ballot.

The facts in connection with these two cases are set out by you as follows:

“First: On Saturday morning, April 11th, 1936, when I arrived at the clerk's office at 8:15 o'clock, I found pushed under the front door of the office an envelop addressed as follows: ‘B. C. Garrett, Clerk, April 10th, 1936—8:30 P. M.’, containing the notice of candidacy of Sue T. Martin, a copy of which is herewith enclosed. Later that morning Mrs. Martin called me on the telephone and told me she came up Friday night April 10th, 1936, and placed her notice under the clerk's office door at 8:30 o'clock P. M.

“Second: On the mail of the same day April 11th, 1936, at 10:30 o'clock A. M., I received the notice of candidacy of E. C. Amos, a copy of which is herewith enclosed. The envelope containing the notice was postmarked West Point, Va., Apr. 10, 1936, 4:30 P. M.”

In an opinion rendered by this office on June 26, 1935, a very similar question was considered. In that opinion the following was said:

“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.”

I am of opinion that the same principle should be applied with reference to the second described notice mentioned in your letter, and that the mailing of the notice on April 10, which was not received by the clerk of the court until April 11, was not filed within the meaning of the statutes requiring the filing of the notices of candidacy in elections.

It follows from the foregoing that, in the opinion of this office, neither of the notices referred to in your letter was filed within the time required by law, the last day being April 10, 1936.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates—Qualifications of—Duty of electoral board where candidates qualifications doubtful.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 18, 1936.

HONORABLE THOS. W. BLACKSTONE,
Secretary of the Electoral Board,
Accomac, Virginia.

DEAR MR. BLACKSTONE:

This is in reply to your letter of April 17, inquiring whether a person who is not on the treasurer's list of those who have paid capitation taxes for three years preceding the election, and who has filed a notice of candidacy for the coming election in June, is eligible to have his name printed on the ballot for said election.

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. Section 154 contains similar provisions with respect to general elections.

If the electoral board doubts the eligibility of any person who has filed a declaration of candidacy therein to vote in the coming election, it is my opinion that the board should immediately notify such person that it entertains such doubt and the reason therefor, and request such person to forthwith supply the board with such facts as may remove the reason for the doubt as to his eligibility to vote.

There are quite a number of cases in which persons are eligible to vote, although their names may not appear upon the treasurer's list. Among these are persons who have recently become twenty-one years of age, persons who have recently moved into the State, persons part of whose taxes have been paid in another county or city (see section 115 of the Code), Confederate Veterans, and perhaps others.

Such notice should be given the candidate immediately, so that, if the candidate is able to remove the doubt as to his eligibility to vote, there will still be an opportunity to print his name on the ballot.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTION—Clerks of court—Withdrawal of candidate's name upon his request.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 18, 1936.

HONORABLE J. ROBERT SWITZER, *Clerk,*
Circuit Court of Rockingham County,
Harrisonburg, Virginia.

DEAR MR. SWITZER:

I have your letter of April 17, in which you request my advice as to whether or not it would be your duty, as clerk of the court, to withdraw for certification to the electoral board the name of a candidate for office, where such candidate requests such withdrawal.

The answer to your question is found in an opinion of the late Honorable John R. Saunders, under date of April 30, 1931, as it appears on page 56 of the annual report of the Attorney General for that year, and is as follows:

"I am in receipt of your letter of yesterday, in which you inform me that the names of candidates for the election to be held on June 9 have been furnished you as secretary of the electoral board by the clerk of your county and that following the receipt thereof one of the candidates has written you requesting you not to print his name upon the official ballot. You then ask as to whether or not, after he has once requested you to omit his name, he can again request his name to be printed on the ballot.

"There is no statute covering the question you ask. My advice is for you to require the candidate to notify the clerk of his determination not to become a candidate and request the clerk to officially inform you to this effect. In such an event, I advise you to omit his name from the official ballot."

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation taxes.

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

MR. R. N. LINDSEY,
Election Judge,
Hillsville, Virginia.

DEAR MR. LINDSEY:

I have your letter of the 28th instant, in which you state the following:

"I have been informed that some persons living in the precinct in which I am judge of election, registered about one year ago at the age of 24 but give their age as 21. They have only paid one year capitation tax, their names have been placed on the voters' list. In view of all the facts have they any legal right to vote?"

If the persons referred to in the above letter have lived in Virginia ever since they became twenty-one years of age, they are assessable with taxes prior to the time of their registration. It is impossible for me to state for what year or years any such person is assessable as this would depend upon the time of his arriving at the age of twenty-one. Obviously, a person cannot by misrepresenting his age avoid the obligation to pay the poll tax. The age of the voter, of course, will present a question of fact which will have to be decided by the election judges.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation taxes—New residents.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 16, 1935.*

MR. J. WM. DANCE, *Treasurer,*
Chesterfield Court House, Virginia.

MY DEAR MR. DANCE:

I have your letter of July 12, in which you state:

"In this county are several persons who moved here from other states during the year 1934, after the first day of January of said year, and who

now desire to vote in the coming Democratic primary election which will be held on August 6, 1935.

"These people were not assessable with State capitation tax for the year 1934, having come into the State after January 1st, which is the beginning of the tax year, but have been properly assessed with said tax for the year 1935, which is not due until this fall, or about October 1st.

"Please advise if they can vote without the payment of a State capitation tax, by registering properly with the precinct registrar, and provided they have been in this State for one year preceding the November election, which will be held November 5, 1935."

Inasmuch as these persons came into the State subsequent to January 1, 1934, they are not assessable with the 1934 capitation tax. I am, therefore, of opinion, under the provisions of section 20 of the Constitution, that, if they meet the other requirements of law, they may register and vote this year without the payment of any capitation tax.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation tax—New residents—For what time assessable.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., *April 2, 1936.*

MR. THOMAS J. NOTTINGHAM,
General Registrar,
Norfolk, Virginia.

DEAR MR. NOTTINGHAM:

I have your letter of March 31, in which you ask the following question:

"A resident of Virginia left the State in 1931 or 1932 and took up his residence in the District of Columbia; he now has returned to Virginia and desires to become a registered voter under the one year clause.

"Does he owe for 1933, 1934 and 1935 poll taxes?"

I am of the opinion that the person you describe occupies the status of a new resident and is only assessable for such capitation taxes as became due after he re-established his residence in Virginia. In other words, if he re-established his residence in Virginia after January 1, 1936, the first capitation tax with which he will be assessable is that for the year 1937.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Voters—Capitation tax.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., *June 24, 1936.*

HONORABLE J. H. IRBY,
Clerk,
Nottoway, Virginia.

DEAR MR. IRBY:

This is in reply to your letter of June 22, in which you request my opinion upon the question whether a person moving into Virginia from

another state in June, 1934, and continuing to reside here, who was not assessed with the 1935 capitation tax can now be assessed with the 1936 tax, pay same, and vote in the elections to be held this year.

It is my opinion that a person under the circumstances you refer to was assessable with the capitation tax for the year 1935, in as much as he was a resident of this State on January 1 of that year. Since it is too late for him to pay the 1935 tax six months before the November election, I am further of the opinion that he cannot qualify to vote in said election. In order to vote in elections to be held during the years 1937 and 1938, it will be necessary for him to have his 1935 capitation tax assessed against him and pay same along with the capitation taxes for subsequent years.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation taxes—Age.

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

HON. S. R. CURTIS,
*Treasurer of Warwick County,
Lee Hall, Virginia.*

MY DEAR MR. CURTIS:

I am in receipt of your letter of July 26, in which you ask the following questions:

“Please advise me the last date on which a person becoming of age between the dates of January 2, 1935, and May 5, 1935, can pay capitation taxes and vote in the primary and general election this year.

“Also advise me the last date on which a person becoming of age between May 6, 1935, and November 6, 1935, can pay capitation taxes and vote in this year's elections.”

A person becoming of age at any time between January 1, 1935, and November 5, 1935, (election day) may register and vote in the primary and general election, provided one year's capitation tax is paid and the other requirements of the law are met. If the person becomes of age after January 1, 1935, the capitation tax should be credited for the year 1936. Of course, such person must register on or before the last registration day, which is thirty days before the general election, in accordance with section 98 of the Code.

The above answer to your questions also answers the question in your second letter of July 26 with reference to Mrs. Olive Marie Peters.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation Taxes—Treasurer's duty as to listing persons not assessable for all of three preceding years.

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

MRS. GEORGIE G. HUBBARD,
*Commissioner of the Revenue,
Denbigh, Virginia.*

MY DEAR MRS. HUBBARD:

I have your letter of July 30, in which you inquire as to the eligibility of a person to vote in the coming primary under the following circumstances:

"A person moving into Virginia from another State in the years 1932 and 1933, there being cases where voters moved into the State in each year, having all taxes assessable against them paid, but his name does not appear on the treasurer's paid up list of capitations, what should the taxpayer do at this late date to vote in the primary to be held August 6, 1935?"

Your question is covered by section 38 of the Constitution as well as section 109 of the Code of Virginia. Both of these sections provide that the treasurer shall furnish the clerk "a list of all persons in his county or city who have paid not later than six months prior to such election, the State poll taxes required by this Constitution during the three years next preceding that in which such election is held".

These provisions of the Constitution and the statute have been construed in the case of *Zigler v. Sprinkle*, 131 Va. 408, in which case it is held that the names of all persons should appear on the treasurer's list "who have paid the poll taxes for any or all of three years, unless it appears that such persons have failed to pay the assessed taxes for one or more of the years".

From this holding you will see that, where a person who has been assessable with three years' capitation taxes has paid all of such taxes six months in advance of the election, his or her name must be included in the treasurer's list as well as the name of any person who has only been assessable with one or two years and has paid for such year or years.

Inasmuch as the name of the person you mention does not appear on the treasurer's list, I am of opinion that he is not eligible to vote in the coming primary.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation Taxes—Paying in county of new residence taxes assessable but not assessed in other county.

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

HONORABLE S. B. BARHAM, JR.,
*Clerk of the Circuit Court,
Surry, Virginia.*

DEAR MR. BARHAM:

This is in reply to your letter of July 30, in which you request my opinion upon the question whether a person moving into Surry county in 1934 from another section of the State, who prior to moving to said county had not paid his capitation taxes for the years 1932 and 1933 and had not

been assessed for any capitation taxes, may have such taxes for the said three years assessed against him in Surry county, pay the same six months prior to the November election, and register and vote in the primary election to be held on August 6.

While there may be some irregularity in the assessment of these capitation taxes, nevertheless, the taxes are ultimately paid into the Treasury of the State of Virginia and I do not believe that this technicality is sufficiently material to deprive the voter of his right to vote where same has been actually paid. If this voter's name appears upon the treasurer's list of persons who have paid the required capitation taxes for the three preceding years, it is my opinion that he is eligible to vote in the primary.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation tax—Change of residence.

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

HONORABLE S. L. WALTON,
*Attorney for the Commonwealth,
Luray, Virginia.*

DEAR MR. WALTON:

This is in reply to your letter of November 2, requesting my opinion upon certain questions relating to the election laws.

Your first question is whether a person who formerly acquired a residence in Luray, but some years ago moved to another city where he regularly works, and where he pays taxes on his tangible personal property, but still pays his intangible taxes and poll taxes in Luray, is entitled to vote in Luray.

This office has repeatedly ruled that, within the meaning of the election laws, the place of residence is primarily determined by the voter's intention. A residence, once acquired, is not lost unless there is an intention to change same to another place. Temporarily living and working elsewhere, if coupled with an intention to return, does not constitute a change of residence. The right of such a person as you refer to, to vote in Luray would therefore seem to depend upon whether he still retains an intention to return to Luray as his domicile and still considers that to be his residence.

You inquire as to the effect of such person paying his poll taxes in the city to which he has moved. Generally speaking, poll taxes are payable in the county or city of the voter's residence, in which he proposes to vote. Except in the case of a person moving from one city or county to another, who has paid part of the required three years in another county or city, and except in cases of persons recently becoming 21 years of age or moving into the state, or persons exempt (Confederate soldiers, etc.), no person is eligible to vote unless his name appears upon the treasurer's list of persons who have paid the required taxes. It would seem that, if the capitation tax was paid elsewhere than in your county, it would not appear upon the treasurer's list. However, it is the practice of some treasurers to place the names on the list upon being shown the necessary tax receipts from other county or city treasurers.

Therefore, it is my opinion that, if the names of such persons as you refer to appear on the treasurer's list, they are eligible to vote so far as the poll tax requirement is concerned, and, if not on said list, they cannot vote. This, of course, does not refer to persons who have been transferred

within three years, who may vote upon the treasurers' certificates as provided in section 115 of the Code.

With my best wishes, I am

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Constitutional provisions—Time for holding—Qualifications of voters.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 9, 1936.*

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

DEAR MR. JONES:

I am in receipt of your letter of March 6, in which you advise that the charter of the town of Urbanna, as found in the Acts of Assembly of 1901-2, at page 816, provides that the election for mayor and councilmen shall take place on the fourth Thursday in May, 1904, and on the same day every second year thereafter. You inquire whether this provision and certain other provisions in the charter in regard to the qualification of voters are superseded by general law, among the qualifications prescribed in the charter being the payment of a town capitation tax.

I am of opinion that the general law, providing for the time of holding elections in towns, and the qualifications of voters as contained in sections 2994 and 2997 of the Code, supersede the charter provisions. I refer you to section 117 of the Constitution and to the following from the case of *Campbell v. Bryant*, 104 Va. 509, 513:

"Section 117 of the Constitution provides, that general laws for the organization and government of cities and towns shall be enacted by the General Assembly, and that no special act shall be passed in relation thereto, except in the manner prescribed in article 4 of the Constitution. What special acts may be passed in relation to cities and towns, under art. 4 of the Constitution, need not now be considered, for it is clear that cities and towns not in existence when the Constitution went into effect can only be organized and governed in accordance with the general laws. This provision of our present fundamental law prohibiting special legislation and providing that general laws for the organization of cities and towns shall be enacted, and that no special act shall be passed in relation thereto, is second to no other provision of the Constitution in value and importance, and cannot be too carefully observed or strictly enforced.

"Of course, the Legislature can, as formerly, grant charters creating cities and towns, but when such charters are granted the city or town so chartered must be organized and governed in accordance with the general laws, otherwise, the charter would be obnoxious to the constitutional provision forbidding special legislation.

"The charter of the town of Madison Heights, as set forth in the act of March 14, 1904, is obnoxious in numerous particulars to the constitutional inhibition against special legislation. It is not necessary to point out in this opinion all of the material respects in which the powers sought to be conferred by the act in question differ from the powers conferred upon towns by the existing general law. One or two examples may be mentioned.

"Clause 20 of the act provides, that the election of mayor and councilmen of Madison Heights shall be on the first Tuesday, in June, 1904, and every two years thereafter; whereas, under the general law, town

elections for mayor and councilmen must be held on the second Tuesday in June. Va. Code, 1904, sec. 1021."

If, after reading the section of the Constitution and the case to which I have referred, you disagree with the views expressed herein, I will be glad if you will write me and I will give the matter further consideration.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Duty of commissioners in reporting election returns where reports destroyed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 16, 1935.*

HONORABLE H. B. McLEMORE, JR.,
Clerk,
Courtland, Virginia.

DEAR MR. McLEMORE:

I have your letter of August 14, advising of the advice which you received from this office on the morning of August 8 with respect to the action which should be taken by the canvassers or commissioners of election as to reporting election returns, where certain reports had been burned through mistake by the janitor after having been filed in the clerk's office.

While I was not present at the office when the advice was given you, I beg to advise that, nevertheless, it meets with my approval. It is a general rule of law that, where primary and best evidence of a fact is missing, the next best evidence available must be resorted to. In this case, the next best evidence appears to be the report given by the election judges to the newspapers prior to the return of the ballots in the making of the report.

I may add that this action on the part of the election commissioners or canvassers does not prejudice the right of any candidate to contest the election by appropriate action in the court, if he sees fit to do so. The action of these election officers is largely ministerial, and they can only do the best they can with what information they have available before them.

Section 221, which is the first section of chapter 15 dealing with primary elections, provides that the provisions of the chapter shall be liberally construed so that the will of the electors may not be defeated by any informality.

Applying this principle to the situation with which your county has been confronted, I am of the opinion that the action taken by the election canvassers accords with the spirit of the primary law.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Duties of registrar—Right to vote on showing tax receipts.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 9, 1935.*

HONORABLE W. L. WHITTINGTON,
Registrar,
Woodlawn, Virginia.

DEAR MR. WHITTINGTON:

Replying to your letter of recent date, in which you ask four questions

relative to your duties as registrar in the conduct of elections, I wish to advise as follows:

This office has frequently ruled that, where a person has moved from one precinct to another in the same county and has resided in said precinct thirty days or more prior to the election, the registrar or judges of election may transfer such voter on the registration books on the day of election.

Your second inquiry is directed to the question whether any distinction should be made between a transfer from one precinct to another in the county and a transfer from the precinct in a county to a precinct in the town located in said county.

It is my opinion that the same rule applies, and that no such distinction is to be made.

Your third question relates to the authority of the registrar to permit a copy of the names contained on the registration book to be made.

It is my opinion that it is proper for the registrar to allow any interested person to make such a copy and, if the registrar desires, he may make same himself and give it to any interested person.

Your fourth question relates to the right of a person to vote on tax receipts.

This office has ruled that, in order for a person to be permitted to vote, his name must appear on the treasurer's list of persons who have personally paid their capitation taxes for the three years preceding the election six months prior to the day of election. Exceptions to this rule are as follows: (1) Where a voter has been recently transferred from one city or county to another city or county, and paid part of the required three years capitation taxes in one county or city and part in another. Section 115 of the election laws provides that such person may vote upon certificates of the respective treasurers showing the proper payment of the required taxes. (2) Persons coming twenty-one years of age are not required to pay their taxes six months prior to the date of election, so they may register and vote upon the presentation of a tax receipt. (3) Persons recently moving into the State who were not assessable with a poll tax for any one of the three preceding years.

In cases of Confederate Veterans, their wives and widows, no capitation taxes are required to be paid by them.

The statutes provide an opportunity for persons whose names have been omitted from the treasurer's list to make application within thirty days after the posting of the list to have the omission corrected.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility of voters—Persons becoming of age.

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

MR. PAUL V. DALTON, *Chairman,*
Carroll County Democratic Committee,
Galax, Virginia.

MY DEAR MR. DALTON:

I have your letter of July 23, in which you ask this question:

"Persons becoming of age, and were not assessable on January 1, but will become 21 before November 5, would they be eligible to pay their poll tax, register and vote on their tickets in the November election? If they were to be eligible to vote under the above circumstances, would they be forced to pay their tax and register thirty days prior to November 5 election?"

The persons to whom you refer in your letter, possessing all other qualifications, may, upon the payment of their capitation tax for one year, register and vote in the coming November election. If they became of age after January 1, 1935, this capitation tax should be credited for the year 1936. It is not necessary for them to have paid their capitation taxes six months in advance of the election, as the law only requires persons becoming of age at such time as not to have been assessable with a capitation tax for the year preceding the year in which they offer to vote to pay their capitation tax any time before the election. Of course, this tax must be paid before they register, and they must register thirty days before the election.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Primaries—Qualifications and appointment of judges.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 18, 1935.*

MR. C. T. MOORE, *Secretary,*
Electoral Board of Princess Anne County,
Back Bay, Virginia.

MY DEAR MR. MOORE:

I am in receipt of your letter of July 16, in which you ask if a judge of election can serve in a primary election in which he is not qualified to vote.

Section 148 of the Code, dealing with general and special elections, provides that a judge of election shall be a qualified voter. Section 224 of the Code, relating to primary elections, provides that judges of election shall be appointed by the electoral board. While this latter section does not state in terms that a judge of election shall be a qualified voter, it does state that all the provisions and requirements of the statutes of this State in relation to the holding of an election, the counting of ballots, the making and certifying of returns and other kindred subjects shall apply to all primaries, insofar as they are consistent with the primary law.

In view of these statutory provisions, I am of opinion that a judge of a primary election must be a qualified voter in the primary in which he serves.

You further ask if the electoral board may appoint another judge of election in place of one who is not qualified to vote and, therefore, ineligible to serve.

I am of opinion that the board has this power.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrars—Replacing destroyed records.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *May 22, 1936.*

MR. P. B. EDWARDS, JR., *Registrar,*
Joyner, Virginia.

MY DEAR MR. EDWARDS:

I am in receipt of your letter of May 20, advising that the registration books for your precinct have been destroyed by fire and asking what you should do.

I call your attention to section 108 of the Code of Virginia, which provides in part:

" * * * Whenever any permanent roll or book of any precinct in possession of the registrar shall be destroyed, a copy of the permanent roll or book in the county clerk's office of the county shall be made and certified by the county clerk, and when so made and certified shall be used for all purposes with the same force and effect as the original roll or book."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Duties of registrar—Miscellaneous.

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

MR. KENNETH K. JONES,
General Registrar,
Newport News, Virginia.

DEAR MR. JONES:

I am in receipt of your letter of June 27, and will attempt to answer your questions in the order in which they are asked. In order that my letter may not be unduly long, my answers will be as brief as possible.

"1. Does voter applying in person for absentee ballot have to make affidavit?"

Section 203 of the Code expressly provides that, if the application be made by a voter in person, the same shall be accompanied by an affidavit as prescribed in this section.

"2. If the registrar knows that applicant is sick, but has no physician attending him, is he entitled to absentee ballot without certificate from physician?"

"3. Is a certificate from physician required when applicant is a Christian Scientist?"

There is no provision in the absent voter's law for the certificate of a physician as a prerequisite to the right to vote by mail.

"4. May registrar go to a voter's home and deliver absentee ballot when applicant has sent application with affidavit by a messenger?"

There seems to be nothing in the law that prohibits a registrar from going to a voter's home and delivering to the voter the envelope containing the things prescribed in section 205, provided the application be accompanied by the physician's certificate that the voter will be physically unable to go in person to the polls as required by said section 205. This certificate is necessary in all such cases. I am of the opinion, however, that the application for a ballot should be sent to the registrar by mail or delivered to him in person by the applicant as prescribed in section 203, though the required postage need not be enclosed if the registrar is requested to deliver the ballot in person.

"5. May registrar deliver to husband, wife, or son, absentee ballots for all three, when one of the said persons brings application for all three with affidavits?"

Each applicant for a ballot should apply to the registrar in person or send his application in the mail. The ballot should be delivered to the applicant only in person or by mail.

"6. If voter is leaving city before registrar gets the ballots, and makes application for ballots and requests that same be mailed to future address, is affidavit required?"

Yes, section 203 specifically requires the affidavit, if application for the ballot is made in person.

"7. Please explain the meaning of Section 218."

It is impractical within the compass of a letter to add much to the words of section 218. Generally speaking, the section means that voters shall be allowed the privilege of voting under the absent voter's law, if they have substantially complied with the spirit of the law. However, the section does not mean that the mandatory provisions of the law may be dispensed with.

"8. May registrar receive a late ballot by a messenger?"

I am of the opinion that the ballot must be sent to the registrar by mail or delivered to him in person by a voter as prescribed in section 208.

"9. After a voter has made application for registration as per Section 93, down to the Sixth line on page 23 of the Virginia Election Laws, can a registrar refuse registration because he refuses or does not answer certain written questions correctly, as per the latter part of Section 93?"

I am not sure that I understand the purport of this question. If the applicant for registration shows that he meets the requirements of section 93 he should, of course, be registered. However, for example, if the applicant in answering the questions of the registrar says that he has not been convicted of a crime and the registrar knows that his answer is false, he should not be registered.

"10. What questions may registrar ask in writing?"

The registrar may ask such questions as will show whether or not the applicant for registration meets the requirements laid down in section 93 of the Code.

"11. May he ask applicant the following questions:

- "(a). What is his Congressional District?
- "(b). The name of his Congressman.
- "(c). The names of the Senators from Virginia.
- "(d). What was the first and last Amendment to the Constitution?
- "(e). What is the duty of the Supreme Court?
- "(f). Name any Amendment to the Constitution."

I am of the opinion that the above questions have no bearing on the qualifications of a person as an elector under the present constitution.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrars—Authority to surrender possession of books.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 22, 1936.*

HONORABLE C. C. COLLINS,
*Attorney for the Commonwealth,
Covington, Virginia.*

MY DEAR MR. COLLINS:

I am in receipt of your letter of June 16, in which you ask if it will be proper for a registrar to turn over to a committee representing one of the major parties the original registration books for the purpose of copying the same. You state that the registration books are now being purged.

I certainly do not think it would be proper for these books to be turned over to anyone while they are being purged.

While the registration books are public records, I must say that I do not think it would be proper for the registrar to part with them at any time. It is not necessary for me to elaborate upon the dangers of such a practice. If, however, the registrar chooses to allow the books to be copied under his personal supervision, with the proper safeguard thrown around their copying, I am of opinion that this would be permissible. As you suggest, since there is in the clerk's office a list of all the names of persons appearing on the registration books, I do not see how much can be accomplished by the copying of the original books. I must reiterate that, on account of the peculiar importance of these original records, I think they should be guarded with the greatest care and every precaution taken to see that there is no possible chance of their being altered.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrars—Compensation.**COSTS—When Commonwealth's Attorney's fee for prosecution before Trial Justice.**

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

HONORABLE J. A. PAINTER, *Clerk,*
Corporation Court City of Radford,
Radford, Virginia.

MY DEAR MR. PAINTER:

I am in receipt of your letter of November 25, in which you state, first:

"Sec. 98. In the first paragraph of this section, the registrar is required to certify a copy of the list of all persons admitted to registration, and the third paragraph provides that they shall be allowed 'three cents for each ten words, counting initials as words'. That you may not have a copy of the report made by the registrars, a strip is enclosed showing the form of report made to the clerk, indicated by two asterisks. What they want to know is how many words on this line are they entitled to charge for in the report."

Section 98 of the Code provides that the registrar shall post written or printed lists "of the *names* of all persons so admitted to registration, * * *". The second paragraph of the section makes it the duty of the clerk to record in a suitable book "the *names* of the registered voters so certified,

in alphabetical arrangement". You will observe that the registrar is only required to post lists of the *names*, and I am, therefore, of opinion that his compensation is limited to the words contained in the *names*, counting in each case initials as words.

The extract from the form of report made to the clerk enclosed by you includes only one name, Virginia A. Rader, and in my opinion this is to be considered under the law as three words, and the clerk is only to be compensated for these three words.

You next state:

"Sec. 96 provides compensation of two dollars for each day that he is sitting, and section 200 governing the pay of judges, clerks, registrars and commissioners is fixed at three dollars for each day's service. They want to know under which of these two sections are they entitled to charge."

Inasmuch as section 200 was re-enacted subsequent to section 96, I am of opinion that the registrar is entitled to compensation of \$3 for each day's service rendered.

Your last question is:

"Where a criminal case is tried in the justice court, the attorney for the Commonwealth appears and prosecutes, the defendant is convicted and appeals to the corporation court. The justice, in taxing the costs in his court, taxes \$5 attorney's fee on his trial and conviction. Is there an additional attorney's fee taxable in the costs in the corporation court?"

I am of opinion that the \$5 fee for the attorney for the Commonwealth should be taxed as costs in the trial justice court *only* in such cases as the attorney for the Commonwealth is required by law to prosecute in that court. As you know, now that attorneys for the Commonwealth are on a salary basis, in no case is the fee to be paid by the Commonwealth.

If an appeal is taken from a conviction in the trial justice court in a misdemeanor case which the attorney for the Commonwealth is required by law to prosecute and in which a fee was properly taxed, I am of opinion that, inasmuch as the proceeding in the circuit or corporation court is *de novo*, an additional attorney's fee may be taxed in that court.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrar—Compensation for posting notices.

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

MR. R. L. WALDROP, *Registrar,*
Cardwell, Virginia.

DEAR MR. WALDROP:

I have your letter of November 16, in reply to mine of November 14, and after again reading your communication it seems that I did not understand when I wrote you the exact nature of your inquiry.

Section 96 of the Code provides that a registrar shall receive \$1 for posting notices, and I am of opinion that the notices that he is required to post of the time his sitting under section 98, constitute notices for the posting of which he is to be compensated.

Section 216 of the Code, in the chapter relating to absent voters, provides

that the compensation of the registrar for posting notices shall be governed by the general election laws. Section 212 provides that the registrar shall post a true copy of the list required by sections 205 and 211. In view of the use of the words "posting notices" in section 216, I am of opinion that the registrar shall receive a compensation of \$1 for posting this list.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Application for registration—Form of; registration of and payment of capitation taxes by persons coming of age shortly before election; re-registration as new resident of person whose name has been dropped in another county.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 16, 1935.*

MR. G. B. SANDERS, *Registrar,*
Max Meadows, Virginia.

MY DEAR MR. SANDERS:

I am in receipt of your letter of September 12, enclosing a printed slip for use of persons applying for registration. The use of this slip by a person applying for registration would mean that such person would only have to fill in a few blanks. You inquire whether such a slip may be legally used.

Section 93 of the Code provides that, unless physically unable to do so, the person shall make application to the registrar in his own handwriting, without aid, suggestion or memorandum, in the presence of the registrar, stating therein his name, age, date and place of birth, residence, etc. I am of opinion that the use of such a slip as you enclose would not comply with the provision that the person shall apply "in his own handwriting, without aid, suggestion or memorandum"

You also inquire whether a person becoming of age after the closing of the registration books, but on or before election day, may register before the closing of the books.

This office has uniformly ruled that, if the other requirements of the law have been met, such a person may register before the closing of the books. See section 93 of the Code.

In connection with the matter of the payment of capitation taxes by a young person becoming of age and desiring to register, you are also advised that this office has uniformly ruled that it is only necessary that such taxes be paid at the time such person applies for registration. In other words, it is not necessary in this case that the capitation taxes be paid six months in advance of the election.

You further ask this question:

"If a voter leaves an adjoining county and remains away for fifteen years and goes back for his transfer and the books have been purged and his name dropped, can he come to me and make application as a new voter and register?"

I am of opinion that such a person may be treated as any other new resident and may register as though his name had never been on the registration books, provided he is qualified for registration in other respects.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration of voters—Duty of registrar in doubtful cases.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *July 29, 1935.*

MR. E. G. PEERMAN, *Registrar,*
Rustburg, Virginia.

MY DEAR MR. PEERMAN:

I am in receipt of your letter of July 26.

Section 93 of the Code provides that a registrar shall register only citizens of the United States of his election district who shall apply to be registered in the time and manner required by law, who shall be twenty-one years of age at the next election and who has been a resident of the State one year, of the county, city or town six months and of the precinct in which he offers to register thirty days next preceding the election. This provision is plain, and I am of opinion that it is improper for a registrar to register any person who does not meet these requirements.

Section 100 of the Code provides how a person changing his residence may change his registration. In a normal case, if such a person presents to you the certificate required by this section and it appears to your satisfaction that he has resided in your district for thirty days prior to the election, then I think he should be registered by you without questioning the validity of the original registration. However, if in any case you are positive that the person presenting the certificate has never lived in the district from which he presents the certificate, but has always lived in your district, then I think you would be justified in holding that such a person is not changing his residence and in refusing to register him on the certificate. In this case, however, you could, of course, register the person in your district as an original registration. The question of legal residence is sometimes a difficult one to determine, because it is so largely controlled by the intentions of the person involved, and I think you should be very sure of the facts before refusing a registration on a certificate from another registrar.

Answering your question as to person living near the district line, I am of opinion that he should vote in the election district in which he actually lives, and that, if he will have been living in the election district in which you are acting as registrar for thirty days next preceding the election, you may register him in your district.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***ELECTIONS—Registration—Place of; absent voters—Duty of registrar.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *July 18, 1935.*

HONORABLE W. WORTH SMITH, JR.,

*Louisa,**Virginia.*

DEAR SIR:

I have your letter of July 17, requesting my opinion on the three questions hereinafter set out:

"1. Can a registrar of a precinct in Virginia take his books and go from house to house and register those who are qualified but have not heretofore registered at their respective precincts?"

I find no provision in the statutes prescribing any particular place where a registrar shall register voters, or restricting his authority to register them at any place he may select. I am therefore of opinion that he may register a voter in the voter's home.

"2. Whether or not a registrar may be accompanied by a Notary Public and absent voters ballots and cast the vote of those persons who do not know whether or not they will be in a position to cast their vote in person at the polls on August 6."

Section 203 of the Code provides that a voter making application in person for a ballot shall make affidavit that he expects to be absent from his city, town, or precinct on the day of election. If the voter expects to be absent, and makes the affidavit, the registrar should provide him with the ballot. If he does not expect to be absent, he should not make the affidavit. I am of opinion that the presence of both a notary public and the registrar at the time and place of voting by mail are not prohibited by law.

"3. If votes are cast under the circumstances set forth in either question No. 1 or question No. 2, can such votes be counted?"

The answer to your first two questions is likewise an answer to the third.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration of person whose name has been purged from registration list of another county.

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

MR. E. D. FUGATE, *Registrar,*
Clinchport, Virginia.

DEAR MR. FUGATE:

Replying to your letter of the 27th instant, in which you inquire whether or not it is necessary for a voter whose name was removed from registration books in Wise County in 1935, when said registration books were purged, to have papers showing why he was purged in order to be allowed to register in Scott County to which he has removed his residence, I beg to advise that, in my opinion, it is not necessary for him to have any such papers, but that when he desires to register, the registrar may ask him any reasonable, pertinent questions relating to his qualification and right to register.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence.

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

HONORABLE SAM COMPTON,
Judge of Election,
Amissville, Virginia.

DEAR MR. COMPTON:

In your letter of October 29 you request my opinion upon the question whether a person born and reared in one election district in a county, but

who never registered therein and who afterwards moved to another district in the same county and registered in the latter district, may still continue to live in the latter district and change his place of voting to a precinct located in the district in which he formerly lived.

The laws of Virginia provide that a person can vote only in the precinct in which he maintains his legal residence. This office has repeatedly stated the law to be that where a person has acquired a residence in one locality he may temporarily move into some other city, county, or state and, if he retains the intention of returning, he may retain his legal residence in the original locality. However, where a person moves into a different voting precinct and registers therein this is a legal assertion of the fact that he has changed his legal residence for the purpose of voting and has abandoned his former residence.

It is my opinion that a person cannot change his residence from one place to another without actually moving to the latter place, and where he has acquired a residence in one voting district, in order to change same, it is necessary for him to actually move his physical residence and domicile.

It is my opinion, therefore, that, assuming the facts to be as stated in your letter, the person to whom you refer is not entitled to vote in the district of his former residence.

You also inquire whether or not the person above referred to is entitled to secure a transfer from the registration books back to the county in which he actually resides.

It is my opinion that he is entitled to secure such a transfer but that same cannot be effective within a period of thirty days prior to the date of a general election. Section 173 of the Election Laws provides that where a registered voter has changed his place of residence from one election district to another in the same county and has resided for thirty days in the election district in which he offers to vote he may present his certificate of transfer at any time, even on election day, and have his name entered on the registration books. The person you refer to, however, does not come within this provision since he has not changed his place of residence within thirty days, but has merely improperly transferred himself to a district in which he does not reside. Any transfer by him, therefore, would be subject to the same rules as an original registration and could not be effective within thirty days of the general election.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence; persons coming of age on election day—When such persons may register.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 6, 1935.*

HONORABLE C. C. COLLINS,
Commonwealth's Attorney,
Covington, Virginia.

DEAR MR. COLLINS:

I am in receipt of your letter of September 5, in which you state first:

"A is duly registered in the Clifton Magisterial District and has lived there a number of years. He secures employment in the town of Covington, which is situated in the Covington Magisterial District, and moves his family to the Covington Magisterial District and will be in the Covington Magisterial District more than thirty days prior to November 5. He wishes to keep his voting place in the Clifton Magisterial District which is his home, that is, the home of his parents where he resides when

out of employment, and his intention is to have the Clifton Magisterial District as his place of domicile. Can he, as a matter of intention, fix his domicile, or his actual voting place, in the Clifton Magisterial District, although he and his family now actually reside in the Covington Magisterial District, and he is working at a plant located in the Covington Magisterial District and will have actually resided in the Covington Magisterial District more than thirty days prior to November 5? In other words, can a man actually live in one Magisterial District and have as his voting precinct a place in another Magisterial District, or, conversely, does the matter of intention apply to precincts regardless of actual residence?"

Answering your questions specifically, I may say that I am of the opinion that a person cannot be domiciled in one precinct and vote in another. See section 82 of the Code. However, as you know, the question of domicile is more one of fact than of law. If the voter to whom you refer is temporarily living in one district, with the intention of eventually returning to the district from which he has moved, he may, of course, retain his domicile in the old district. However, if he has no intention of eventually returning to the district from which he has moved, I do not think he can, "as a matter of intention", fix his domicile in the old district.

You then inquire if a person becoming of age on November 5, 1935, is entitled to vote in the election to be held on that day.

I am of the opinion that such person is entitled to vote, provided the other requirements of the law have been complied with.

As to when a person becoming of age on November 5, 1935, must register, I am of the opinion that he must pay his capitation taxes and register by the last registration day before the books are closed, and that he cannot register after this day, which is thirty days before the election.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence—Period of residence at place of voting.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 15, 1935.*

MR. C. H. GARY,
Judge of Election,
West Point, Virginia.

DEAR SIR:

This is in reply to your letter of August 8, in which you ask the following question:

"Can A, who has lived in Amelia County for a number of years, and continuously paid his taxes there, to and including the year 1934, but who moved to this county about two years ago, and has voted in Amelia County continuously, including a vote by mail in the Primary just held, transfer to the Town of West Point now and be eligible to cast his vote in the general election to be held in this Town and County in November?"

It is my opinion that the answer to this question is controlled by the provisions of section 18 of the Constitution, which requires residence in a county, city, or town six months in order to render a person eligible to vote therein.

This office has repeatedly held that what constitutes residence within the

meaning of the Election Laws of Virginia for the purpose of voting is determined by the intention of the voter. It would seem from the facts assumed in your question that the prospective voter had, within the meaning of the election laws, been a resident of the county of Amelia up to and including the time of the recent primary, which was held on August 6.

It is my opinion, therefore, if said person definitely abandons any intention of returning to Amelia county as a resident and determines to make his permanent residence at West Point, he will not be eligible to vote until six months have elapsed after such change of intention on his part. I do not believe, in view of this, that he will be qualified to vote in the November election in West Point.

I note that the party in question has paid his poll taxes in Amelia county. If he should change his residence to West Point, it would be necessary for him, in order to vote next year, to secure a certificate of the payment of his poll taxes from the treasurer of Amelia county, in accordance with the provisions of section 115 of the election laws.

Yours sincerely,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence of voter.

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

HONORABLE E. T. HUMPHRIES,
Member House of Delegates,
Fentress, Virginia.

DEAR MR. HUMPHRIES:

I am in receipt of your letter of July 16, in which you raise the following questions:

"Has a person the right to vote in Norfolk county if he has moved to another county six months prior to date of election?"

"Has a person the right to vote in Norfolk county if he has moved to another county six months prior to date of election, but continues to own real estate in said county?"

I may say at the outset that the question of domicile is largely controlled by the intention of the person involved. A resident of Norfolk county, although temporarily living in another county, may retain his legal residence in Norfolk county if it is his bona fide intention to eventually return to Norfolk county to live permanently. If, however, a person has abandoned his residence in Norfolk county, with no intention of returning there to live, he has, of course, lost his legal residence in that county.

The question of legal residence is one that is so largely controlled by the facts in each particular case that it is difficult to do more than set out the general principles that apply.

In connection with the ownership of real estate in a county, that may be a factor to be considered, but it is not controlling. A person may own real estate in a county without having the intention to ever live there permanently. On the other hand, even if a person does not own real estate in a county, once having established his legal residence in that county, he may retain that legal residence provided he is only temporarily absent.

I trust that the above will give you the information you desire.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Voters—Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., May 29, 1936.

HONORABLE J. S. ELDER, *Chairman*,
Electoral Board,
Hopewell, Virginia.

DEAR MR. ELDER:

This is in reply to your letter of May 28, requesting the opinion of this office upon the question of the right of persons to vote in the city of Hopewell who are temporarily residing in some other county or city in Virginia, or in some other state.

The question of the right to vote in a particular city or county in Virginia is dependent upon whether or not the person offering to vote is a resident of such county or city within the meaning of the Election Laws of Virginia.

It is the general rule that where a person has once acquired a residence in a county or city, such residence continues until a new residence has been acquired elsewhere. In order to acquire a new residence, there must be both a change in the place of abode and a change of intention as to the place of residence; that is, the person must intend to make the place to which he changed his abode his permanent place of residence. If such person temporarily moves from the place in which he has acquired a residence, but still retains the intention of returning, then his legal residence within the meaning of the Election Laws for purposes of voting remains unchanged.

This question was considered very fully by the Supreme Court of Appeals of Virginia in the case of *Williams vs. Commonwealth*, 116 Va. 272, and I refer you to that case for a full discussion of the question.

Of course, it is impossible for this office to pass upon any individual case, as the answer is dependent upon the intention of the voter, and that question will have to be decided by the election judges, before whom a contest may be conducted if any particular person's vote is challenged.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence.

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

MR. R. E. DANIEL,
Chairman Electoral Board,
South Hill, Virginia.

MY DEAR MR. DANIEL:

I am in receipt of your letter of July 19, asking whether or not a resident of one precinct in a county may vote at a precinct other than that of which he is a resident.

Section 18 of the Constitution provides, among other things, that to be eligible to vote a person must be a resident of the State one year, of the city, county or town six months, and of the precinct in which he offers to vote thirty days, next preceding the election in which he offers to vote. This constitutional provision is clear and needs no comment.

The section further provides that removal from one precinct to another in the same county, city or town shall not deprive any person of his right to

vote in the precinct from which he has moved until the expiration of thirty days after such removal.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence—Duty of election officials in case of doubt.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 31, 1935.*

MR. W. A. CLARKE,
Judge of Election,
South Hill, Virginia.

MY DEAR MR. CLARKE:

I am in receipt of your letter of July 29, in which you state:

"A question has arisen in regards where certain voters live on border line of two precincts, Smith X Roads and South Hill. I am advised that these particular voters actually live in the Smith X Roads precinct, but are registered and have been voting in the South Hill precinct for a number of years.

"There has been some question as to the line between the two precincts. I wish to know if I, as judge of election of South Hill precinct, shall still permit these parties to vote in this precinct."

The question that you raise was recently passed on by me in a letter to Mr. R. E. Daniel, Chairman of the Electoral Board, South Hill, Virginia. I enclose a copy of my letter to Mr. Daniel.

It seems to me clear from section 18 of the Constitution that a person must vote in the precinct of which he is a resident.

I notice you state that there is some question as to the line between the two precincts. This, of course, is a matter of fact which I cannot pass on, but, if there is a question as to the line, I am of the opinion that those persons who live close to the line should be given the benefit of the doubt in passing on their right to vote in the precinct in which they have been voting in the past. However, in any case in which it is clear that a person is a resident of one precinct, I do not think he is qualified to vote in a precinct of which he is not a resident.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence—Challenging voter's qualifications.

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

MR. E. G. PEERMAN, *Registrar,*
Rustburg, Virginia.

MY DEAR MR. PEERMAN:

I have your letter of July 24, in which you ask a number of questions. All of them, however, relate to the right of a voter to vote at a precinct of which he is not a resident.

Section 18 of the Constitution provides that a person, to be eligible to

vote, shall have been a resident of the State one year, of the county, city or town six months and of the precinct in which he offers to vote thirty days, next preceding the election in which he offers to vote. The section further provides that a removal from one precinct to another in the same county shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

Assuming that the boundaries of the precincts of your county have been prescribed, I am of opinion that a person cannot vote in a precinct unless he has been a resident thereof for thirty days next preceding the election in which he offers to vote.

If a voter is not properly qualified, he may be challenged as provided in sections 174 and 175 of the Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence; Id.—form in which voter's name appears on tax and registration lists.

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

HONORABLE JOE W. PARSONS, *Clerk,*
Independence, Virginia.

MY DEAR MR. PARSONS:

I have your letter of September 12, in which you ask two questions. The first is:

"After a person has established his residence in one precinct by living the required time and by his intention, if he moves out of that precinct into another state, county or precinct, and he still claims the place where he established his residence as his residence, is it legal for the registrar to register a party in the precinct where he claims his citizenship even though he is not living in the precinct at the time he applies to register? Some of the registrars in this county are not advised as to their duties in this matter."

The question of legal residence is largely one of fact and is controlled in most cases by the intention of the person. If a person is temporarily living out of the precinct in which he had his legal residence, with the intention of eventually returning there, then he may retain his legal residence there. If, however, he has definitely abandoned the place of his former residence, with no intention of returning there permanently to live, then I am of opinion that he may not register and vote there.

Your second question is:

"Some of the judges have asked me if it is necessary that a voters' name should be on the tax list exactly as it is on the registration list. I have advised them that, in my opinion, a party is entitled to vote even though he may be registered in his given name and tax paid in his initials."

I agree with you that, if a particular person can definitely establish that he is the person who appears on the Treasurer's list as having paid his capitation taxes, irrespective of whether he may have registered in his given name and the Treasurer's list only shows his initials, he is entitled to vote.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence.

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

MR. J. W. DANCE, *Treasurer,*
Chesterfield Courthouse,
Virginia.

DEAR MR. DANCE:

I have your letter of June 29, in which you state:

"In this County are several persons, who moved here from other States, during the year 1933, after the first day of January of said year, and who now desire to vote in the coming Democratic Election which will be held on August 6, 1935.

"These people were not assessable with State Capitation Tax for the year 1933, having come into the State after January 1st, which is the beginning of the tax year, but have been properly assessed with said tax for the year 1935, which is not due until this fall, or about October 1st.

"Please advise if they can vote without the payment of a tax, by registering properly with the Precinct Registrar, and provided that they have been here in this State for one year preceding the November Election, which will be held Nov. 5th, 1935."

These persons are, of course, not assessable with the 1935 capitation tax.

Under the provisions of Section 20 of the Constitution, I am of the opinion that, if they have paid their 1934 capitation taxes within the time prescribed by law, they may register and vote. In your letter you speak of these persons coming into the State during 1933, but do not state whether they have paid their 1934 capitation taxes. If they came into the State after January 1, 1934, and meet the other requirements of the law, they may register and vote without the payment of any capitation taxes.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 21, 1935.*

HONORABLE JOE W. PARSONS, *Clerk,*
Circuit Court of Grayson County,
Independence, Virginia.

DEAR MR. PARSONS:

I have your letter of September 19, in reply to mine of the 13th, with regard to legal residence. You now state:

"What I want to know is this: There is a party who lived at Galax, Grayson county, Virginia, for more than a year and he is now living across the line in Carroll county, but wants to hold his citizenship in Grayson county, claiming Grayson county as his home. He never registered while in Grayson county, but now wants to register before the registrar of the Galax precinct in Grayson county. The registrar is undecided as to his duty in this matter and wants to know whether or not he should be entitled to register before him while temporarily living in Carroll county, Virginia."

I do not think that I can add much to my former letter for the reason, as stated in that letter, that the question of legal residence is so largely controlled by the intention of the person concerned. If the person whom you have in mind is temporarily living in Carroll county, with the present bona fide intention of eventually resuming his residence in Grayson county, then I am of opinion that he may register and vote in Grayson county. If, however, so far as he now knows, he will continue to live indefinitely in Carroll county and has abandoned his residence in Grayson county, with no present intention of eventually resuming his residence there, then I am of opinion that he may not register and vote in Grayson county.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence.

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

HONORABLE JOE W. PARSONS, *Clerk,*
Circuit Court of Grayson County,
Independence, Virginia.

DEAR MR. PARSONS:

I have your letter of October 1, in which you state:

"There is a young man who registered at Galax, Grayson county, Virginia, in June, 1935. Since that time, he has gone into business in Hillsville, Carroll county, Virginia, while really his home, his property, etc., are in Grayson county. He, not knowing that he would not be in Carroll county six months prior to the election, transferred to Hillsville and since he was transferred found out that he would not be entitled to vote in Hillsville on account of not being in Carroll county six months, and delivered the transfer back to the registrar in Grayson county. I have advised him that, since this transfer was granted through an error and his home really is in Grayson county and he claims Grayson county his home, he could deliver this transfer back to the registrar in Grayson county and the registrar could mark on his books that the transfer had been returned and that he would still be entitled to vote in Grayson county."

The question you present is more one of fact than of law. Legal residence, as you know, is largely controlled by the intention of the person involved. However, I will say that, if, when the young man to whom you refer asked for his transfer to Carroll county, he considered that county his legal residence, this would constitute a change of legal residence and deprive him of the right to vote in Grayson county.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 16, 1935.*

HON. A. H. CAVE, *Clerk,*
Circuit Court of Madison County,
Madison, Virginia.

MY DEAR MR. CAVE:

I am in receipt of your letter of September 14, in which you state:

"Dr. D. F. Weaver, Jr., a practicing physician, located at Madison about two years ago and qualified to vote at this precinct.

"He practiced in both Madison and Greene counties and about one year ago he opened an office in Greene county, but had his residence in Madison until about nine months ago when he went to Stanardsville to reside.

"I should like to have your opinion as to whether or not he may vote at Madison if he so desires."

You raise a question of legal residence, which is largely one of fact and controlled almost entirely by the intention of the voter. If when Dr. Weaver went to Stanardsville to reside he definitely abandoned his residence in Madison, with no intention of returning there to resume it, then I am of opinion that he may not vote in Madison. If, however, he is temporarily living in Stanardsville, with the *bona fide* intention of eventually returning to Madison to live, then I am of opinion that he may continue to vote in Madison.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Voters—Qualifications—Payment of poll tax by another.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 16 1936.*

HONORABLE J. R. K. COWAN,
Treasurer Montgomery County.

HONORABLE BENTLEY HITE,
Attorney for the Commonwealth,
Christiansburg, Virginia.

GENTLEMEN:

You have today jointly requested me, by telephone, to render an opinion upon the following questions:

1. Certain citizens of Montgomery County were assessed with capitation taxes for the year 1934, and/or for one or more of the years 1933 and 1932. The said taxes for one or more of said years were paid without their authority by some party other than the taxpayers themselves and were not "personally paid" within the meaning of the Virginia election laws. These persons, desiring to qualify themselves to vote in the 1936 elections, wish to "personally" pay said taxes which were paid in 1935 by others than themselves. Should the county treasurer accept such payment and place the names of such persons on the list of persons to be certified by the treasurer as those who have "personally paid" such taxes for the years in question?

In my opinion the treasurer should receive such "personal" payments and place said names upon the said list, unless the voter afterwards ratified the payment by the stranger. To construe the law otherwise would be to place it within the power of a stranger, by paying without authority the

capitation taxes of a voter for the current year, to disqualify and disfranchise such voter for a period of three years. This is obviously contrary to the purpose and intent of the law, as it would operate as a fraud upon the voter.

2. If, however, the tax in question was paid by a third party, *with the authority and consent of such voter*, but in such manner as not to constitute a "personal payment", or, if such payment has been ratified by him, in such cases the voter would be a party to the commission of the act which operates to disqualify him, and, in my opinion, should not be heard to complain of that which he authorized to be done, or thereafter ratified. In these cases the treasurer should not receive a second payment of the tax and the name of such a voter should not be included in said "Treasurer's List"

The distinction in the two cases above stated is clear. In the first case, the payment having been made without the authority of the voter, the voter may repudiate the payment and declare it void so far as he is concerned, and in such case the treasurer's books should be corrected to conform thereto. In the latter case, however, the tax having been paid with his authority, or such payment ratified and adopted by him, there is no further liability upon him for the tax, as same has been paid and discharged. Since there is no such outstanding and unpaid tax on the books of the treasurer, he is without authority to accept such a payment.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

P. S. In cases where the second payment is accepted by the treasurer, I suggest the treasurer's receipt should bear an endorsement to the effect that the said tax had previously been paid by someone other than the taxpayer and without his authority, and that such payment had been repudiated by the taxpayer.

A. P. S.

ELECTIONS—Voting on presentment of tax receipt where name not on treasurer's list.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 29, 1895.*

HON. CHARLES W. CRUSH,
Commonwealth's Attorney.
Christiansburg, Virginia.

DEAR MR. CRUSH:

Your letter of July 26, 1935, requests my opinion upon the following question:

"Can a person vote on a tax ticket who states to the Judges of Election that he personally paid his taxes, although his name does not appear on the treasurer's official voting list?"

I assume the list you refer to is the list which the law requires the treasurer to compile showing the names of all persons who have personally paid six months before election day all State capitation taxes assessed or assessable against them for the last three preceding years. (Code sec. 109; Va. Const. sec. 38.) These sections of the Constitution and Code require the treasurer to place on his list the names of *all* the persons who have personally paid their capitation taxes as required by the Constitution, and the same section of the Constitution and section 110 of the Code provide for thirty days' time in which any person whose name has been incorrectly omitted may apply to the Circuit Court, or judge thereof in vacation, to have his name entered on the list. The same section of the Constitution and section

111 of the Code provide further that a copy of the list, as corrected, shall be delivered to one of the election judges in each precinct by the clerk, and that said list "shall be conclusive evidence of the facts therein stated". Since the law requires the names of *all* persons who have personally paid the three required years taxes, the effect of this provision is to make the list conclusive evidence that there are no other persons who have so paid same. This same section of the Constitution also provides that "further evidence of the prepayment of the capitation taxes required by the Constitution, as a prerequisite to the right to register and vote may be prescribed by law".

From this language and the provisions above referred to the inference clearly follows that unless the general assembly has provided by law for other evidence of the payment of the tax, the treasurer's list is the only evidence on which a person may be permitted to vote.

This intention and construction of the law is confirmed by the fact that section 115 of the Code does prescribe that where a voter is transferred from one city or county to another, and all or part of the required taxes have been paid in the city or county of his former residence, the certificate of the treasurer wherein the respective taxes were paid that same were paid within the required time shall be sufficient evidence of their payment to entitle the holder of the certificate or certificates, to vote.

The law does not prescribe any other evidence of prepayment of the tax than the said treasurer's list except as above indicated.

Of course, if no taxes are assessable against a voter which the law requires to be paid six months in advance, such voter's name need not appear on the treasurer's list. This is true in the case of a youth becoming twenty-one years of age, and in the case of a person recently moving into the State.

I am of the opinion that no person (except a civil war veteran, his wife or widow, who are exempt from the poll tax requirement by section 22 of the Constitution) is entitled to vote in any primary or election unless his name appears upon the said treasurer's list, except a youth becoming twenty-one years of age, a person recently moving into the State as above stated, and a person part or all of whose required poll taxes were paid in a county of his or her former residence.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ESCHEATS—Necessity for appointing escheator where estate consists of personalty only.

CONVICTS—Payment of fine out of deceased convict's estate—procedure.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., April 27, 1936.

HONORABLE HERBERT G. SMITH,
Commonwealth's Attorney,
Newport News, Virginia.

DEAR MR. SMITH:

I am in receipt of your letter of April 23, in which you state that the corporation court of the city of Newport News has directed the payment of \$575.48, now on deposit with the First National Bank in your city to the credit of the chancery cause of *Virginia Michens Pope v. Katie Langston, Administratrix of the Estate of Walter Timberlake, deceased*, to the Commonwealth of Virginia as the sole distributee of Walter Timberlake. You also state that no escheator has been appointed for the city of Newport News, and that you desire to be advised as to what steps should be taken to have this money placed to the credit of the Commonwealth of Virginia.

I assume that the decree was entered pursuant to section 5275 of the Code, providing that, where there is no other distributee of an estate, the Commonwealth is the sole distributee.

Under the provisions of paragraph (d) of section 585(69) of the Code, this money may be paid into the treasury of Virginia.

I have examined chapter 27 of the Code, beginning with section 489, and am of the opinion that there is no necessity for the appointment of an escheator in the present matter, as escheators are only appointed in cases of the failure of heirs of lands, and there is no requirement for such appointment where the residuum of an estate consists only of personal property.

In the last paragraph of your letter, you state that the sheriff of the city of Newport News has in his hands about \$125.00 as administrator of the estate of a deceased convict; that there is an unpaid fine pending against the deceased, and that you desire to be advised as to how this money can legally be ordered paid to the clerk of the court to satisfy the fine and costs.

This money in the hands of the administrator should be paid out under the provisions of section 5390 of the Code. If the claims preferred by paragraph "First" of this section have been paid, and there are no debts due the United States, then the administrator should pay to the clerk of the court so much of the money in his hands, if he has that much, as will satisfy the fine and costs after, of course, having taken care, under the general provisions of the law, of the other charges provided therein.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

EXTRADITIONS—Power of governor to pardon and extradite person who has escaped from Virginia Penitentiary against whom no proceedings have been begun for escape.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., *January 10, 1936.*

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

DEAR GOVERNOR PEERY:

In response to your request for an opinion with reference to the application of the Governor of North Carolina for requisition of Arthur Rogers, alias George Roberts, the facts in the case appear to be these:

Arthur Rogers is now a convict serving a sentence of imprisonment in the State Penitentiary in Virginia. He previously escaped from the Virginia Penitentiary, and has also escaped on former occasions from the North Carolina Penitentiary. He is under indictment in North Carolina for several very serious offenses punishable by death. No formal charge or complaint has been made, or prosecution instituted, against him in Virginia for his escape from the penitentiary. The North Carolina authorities request that he be returned to North Carolina to stand trial in the criminal proceedings there pending against him, and to serve a sentence of about thirty years in the North Carolina penitentiary.

The following questions have been raised as to the propriety of granting this requisition:

1. Does the Governor have the power to pardon this convict?

Section 73 of the State Constitution expressly confers upon the Governor the power to grant pardons after conviction in all cases except when the prosecution has been carried on by the House of Delegates. In my opinion, the Governor has the power to pardon this convict.

2. Should the convict be granted an absolute pardon, does the Governor have the power to grant the requisition applied for?

Section 5061 of the Code provides that any person charged in another state with treason, felony, or other crime, who shall flee from justice and be found within this State, shall on demand of the executive authority of the state from which he fled, made in the manner prescribed by law, be delivered up to the authorities of the demanding state.

Section 5067 of the Code provides that no person under prosecution for any offense, alleged to be committed within this State, shall be delivered up to the executive authority of another state until such prosecution shall have been determined, and the person punished, if condemned.

From the facts as given to me, it appears that no criminal action, or prosecution of any kind, has been instituted against the convict, nor is there now pending any prosecution for any offense alleged to be committed within this State.

I am of the opinion, therefore, that there is nothing to prohibit the granting of the requisition applied for, should the convict be granted a pardon for the crime of which he has been convicted in Virginia.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEEBLE-MINDED PERSONS—Sterilization—Aliens.

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

DR. G. B. ARNOLD, *Superintendent,*
State Colony for Epileptics and Feeble-Minded,
Colony, Virginia.

DEAR DOCTOR ARNOLD:

Referring to your letter of July 19, after consideration, I am of opinion that in a proper case and after the proceeding prescribed by law you would have authority to proceed with the eugenic sterilization of an alien. The statute providing for this treatment was passed in exercise of the police power, and I do not believe that there are any constitutional difficulties in the way of this treatment.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEEBLE-MINDED PERSONS—Sterilization—Necessity for notice and how served.

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

DR. G. B. ARNOLD, *Superintendent,*
State Colony for Epileptics and Feeble-Minded,
Colony, Virginia.

DEAR DOCTOR ARNOLD:

I am in receipt of your letter of August 31, in which you state that you are having difficulty in getting officers to serve on parents of infants the notice prescribed in the fourth paragraph of section 1095i of the Code in con-

nection with sterilization proceedings. You ask whether it would be proper for you to proceed after a reasonable time, although the notice had not been served by the officer.

I am of the opinion that the serving of this notice on the parents, as provided for in section 1095i, is mandatory. The only suggestion that I can make, if you cannot get any action from the local officers, is that you have the notice served by one of your agents.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES—Commonwealth's Attorney—Proceedings to subject land for delinquent taxes.

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

HONORABLE WILLIAM M. SMITH,
*Attorney for the Commonwealth,
Cumberland, Virginia.*

DEAR MR. SMITH:

I have your letter of the 10th instant, in which you inquire whether or not in suits instituted by you pursuant to your duties as attorney for the commonwealth for the collection of delinquent taxes you are entitled, first, to the taxed attorney's fees and, second, to such commission as may be paid you pursuant to the order of the court as such commissioner in the sale of real estate in such suit.

It is my opinion that the taxed attorney's fees in civil suits occupy the same status as fees allowed commonwealth's attorneys in criminal cases and should be disposed of in the same way.

With reference to the compensation allowed by the court to the special commissioner, it is my opinion that the services rendered as special commissioner are not rendered in the capacity of commonwealth's attorney but as an officer of the court, and that the special commissioner, even though he be commonwealth's attorney, is entitled to personally retain such commissions. The court may, in its discretion, appoint as its officer to perform this duty the person who happens to be commonwealth's attorney, or it may appoint any other person deemed proper.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEES—Commonwealth's Attorneys—Examining title to property on which school board borrows from literary fund.

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

MR. F. F. JENKINS,
*Superintendent of Schools,
Franklin, Virginia.*

MY DEAR MR. JENKINS:

I am in receipt of your letter of December 20, in which you ask whether a county school board may pay a fee to an attorney for the Commonwealth for examining title to real estate in connection with an application by the county school board for a loan from the literary fund.

Section 641 of the Code provides that the title to real estate "shall be examined and approved by the Commonwealth's attorney of the county, or the city attorney of the city, or by other competent attorney for which such attorney shall be entitled to the usual compensation for examining the title, to be paid by the locality".

In my opinion, the statute is not as clear as it might be, but I am informed by Mr. Crosby, of the State Department of Education, that it is the uniform practice for a reasonable compensation to be paid by the various school boards to the attorneys for the Commonwealth for this service. Therefore, I think it would be proper to apply to this case the principle that, where there is doubt as to the true meaning of a statutory provision, great weight should be attached to an established administrative practice. Applying this principle, I am of opinion that the school board may pay the attorney for the Commonwealth a reasonable compensation for examining the title to real estate in connection with an application for a loan from the literary fund.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES—Commonwealth's Attorney's fees for prosecuting in trial justice's court person charged with felony, but convicted of misdemeanor.

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

MR. W. ANDREW SMITH, *Clerk,*
Trial Justice Court of Pulaski County,
Pulaski, Virginia.

MY DEAR MR. SMITH:

I have your letter of August 28, in which you ask the following question:

"Please advise me whether or not there should be taxed a fee for the attorney for the Commonwealth, when he appears before the Trial Justice and prosecutes a warrant charging the defendant with a felony, but which, during the course of the trial, or at the conclusion of the evidence, is reduced to a misdemeanor, whether on the motion of the attorney for the Commonwealth or by the decision of the Trial Justice, finding the defendant not guilty of the felony charged, but guilty of a misdemeanor."

I am of opinion that the fee of five dollars should be taxed against the defendant for the Commonwealth's attorney, in view of the provisions of section 3505 of the Code, providing that the Commonwealth's attorney shall be paid a fee of five dollars "for each person prosecuted by him at a preliminary hearing upon a charge of felony before any court or justice of his county".

Replying to your second question as to whether the arrest fee should be for a felony or for a misdemeanor, I am of opinion that it should be for a felony, inasmuch as the defendant was charged in the warrant with a felony.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES—Coroners—By whom expenses of inquest paid when deceased is a non-resident.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 12, 1935.*

DR. J. BURTON NOWLIN, *Coroner,*
811 Church Street,
Lynchburg, Virginia.

MY DEAR DR. NOWLIN:

I am in receipt of your letter of recent date, reading in part as follows:

"On August 10, 1935, Moorman B. Smallwood, a resident of Washington, D. C., overturned his car between Bedford and Lynchburg, and was brought to the Lynchburg Hospital, at which place he died. As Coroner I examined the body, and on the first of the month presented my bill to the City for payment. This was refused, as the Assistant City Attorney advised that the bill should be paid by the State after having been approved by the Judge of the Corporation Court, and not by the City.

"The Coroner's fee in similar cases where the deceased was a stranger has always been paid by the City.

"Who should pay this fee, the City or the State?"

Section 4806 of the Code provides that the coroner of the county or corporation where the dead body is shall view the body. Section 4814 provides that, if the deceased be a stranger, the expense of the coroner's proceedings shall be paid out of the State treasury and, if not a stranger, out of the treasury of the county or corporation of which the deceased was a resident at the time of his death.

If the deceased in this case was a resident of Washington, D. C., I am of opinion that he was a "stranger" within the meaning of section 4814 of the Code, and that your fee should be paid out of the State treasury.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES—Insanity commissions—Two hearings on same case.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *May 22, 1936.*

HONORABLE A. DUNSTON JOHNSTON,
Attorney for the Commonwealth,
Windsor, Virginia.

MY DEAR MR. JOHNSTON:

I am in receipt of your letter of May 20, in which you advise me that a commission, appointed in the manner provided for in section 1017 of the Code, adjudged a person to be insane, and that such person was placed in the county jail to await removal to the proper institution. On another day it appears that the same commission reversed its former decision and adjudged the man to be sane.

Your inquiry is whether the fees prescribed by section 1021 of the Code should be paid for both hearings.

I agree with you that the proceeding seems to have been somewhat irregular, inasmuch as the procedure to test the legality of a person being adjudged insane by such a commission is provided for in section 1029 of the Code.

As a practical matter the second hearing might be justified as a continu-

ance of the first hearing. Certainly I do not see how it could be construed to be an original hearing. Therefore, I am of opinion that legally only one set of fees should be allowed. Section 1021 does not provide for a per diem, but simply provides for a flat fee for the physicians and justice for their services.

Yours very truly,

ABRAM P. STAPLES,
Attorney General

FEES—Officers confiscating automobile under ABC law.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *May 26, 1936.*

MR. C. H. CRAFT, *Deputy Clerk,*
Gate City, Virginia.

MY DEAR MR. CRAFT:

You inquire as to fees to be allowed officers for the confiscation of automobiles when transporting alcoholic beverages in excess of one gallon.

The Alcoholic Beverage Control Act, as amended in 1936, provides for the confiscation of automobiles engaged in certain unlawful pursuits. No provision is made, however, for any special fees for officers participating in the arrests or proceedings.

It is my opinion that officers participating in and attending the trial and testifying are entitled to the witness fees specified in section 3512 and section 4957 of the Code of 1930, and section 4960 of the Code of Virginia, as amended by the Acts of the General Assembly of 1932.

These sections provide for the payment of attendance fees and mileage for witnesses for the Commonwealth. Section 4960 provides for compensation for officers who have to leave their jurisdiction in the performance of their duties in criminal cases, fixing the compensation at such as may be allowed by the court.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES—Officers making arrests and justices issuing warrants for violation of Motor Vehicle Code.

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

HONORABLE GEO. K. TAYLOR, JR.,
Attorney for the Commonwealth,
Amelia C. H., Virginia.

MY DEAR MR. TAYLOR:

I am in receipt of your letter of December 11, in which you inquire whether a sheriff or his deputies may be paid a fee in arrests for violations of the Motor Vehicle Code of Virginia.

Section 8 of this Code reads as follows:

"Every county, city, town or other political subdivision of the State shall also enforce the provisions of this act and of the motor vehicle laws of the State of Virginia through the agency of any constable, peace

or police officer, sheriff or deputy, provided that such officer shall be completely uniformed at the time of such enforcement or shall display his badge or other sign of authority, and with the further provision that all officers making arrests incident to the enforcement of this act and of the motor vehicle laws of this State shall be paid, fixed and determined salaries for their services, and shall have no interest in, nor be permitted by law to accept the benefit of any fine or fee resulting from the conviction of an offender against any provision of this act or of the motor vehicle laws of the State of Virginia."

It seems to me that the provision of this section that officers making arrests shall have no interest in nor be permitted by law to accept any fine or fee resulting from the conviction is plain, and I am of opinion that this provision includes a sheriff and his deputies.

As to your second question, there seems to be nothing in the act to prohibit the payment of the fee prescribed by law for the issuing of a warrant by a justice, and I am, therefore, of opinion that such fee may be collected.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES—Sheriff's compensation for guarding jury.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 21, 1936.*

MR. J. W. BAZZLE, *Sheriff,*
Harrisonburg, Virginia.

DEAR SIR:

I am in receipt of your letter of March 20, in which you inquire as to what compensation a sheriff is entitled for guarding a jury during the progress of a criminal trial, and as to what compensation he is entitled for court room attendance during a session of the circuit court.

Section 3503 of the Code provides:

" * * * For attending any circuit court engaged in the trial of civil or criminal cases, or both, or for attending the law and equity court, and chancery court of the city of Richmond; the law and chancery court of the city of Norfolk; the law and chancery court of the city of Roanoke; two dollars for each day's attendance, and the judge of any such court may allow any deputy, whose attendance he may deem advisable and require as an assistant to principal officer, such compensation as he may deem proper and just, not exceeding two dollars a day. The chancery court and law and equity court of the city of Richmond, however, shall make the allowance authorized by this section for one deputy in attendance upon the court as well as to the sheriff."

This covers the attendance of a sheriff and his deputy, or deputies, during sessions of circuit courts.

The fees of a sheriff and one deputy for guarding a jury during the progress of a criminal trial is \$1.00 per day each, as provided by section 3509 of the Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES—Sheriffs and constables—Maximum aggregate fees where same person serves as deputy sheriff and constable.

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

MR. FRANK L. ARMSTRONG,
Deputy Sheriff and Constable,
Staunton, Virginia.

DEAR MR. ARMSTRONG:

I have before me your letter of December 19, in which you state that you were appointed deputy sheriff of Augusta county in April, 1933; that in June of that year you were appointed constable for Riverheads District in the same county, and that you have given separate bonds to insure the faithful discharge of your duties with respect to each office. You then inquire whether the provisions of section 3504 of the Code, limiting payments to deputy sheriffs and to constables out of the State treasury to one-half of the statutory fees, where the allowance to such officers has already reached a maximum of \$250, would operate to fix a maximum for both offices or whether you would be entitled to charge full fees to the extent of \$250 in each office separately.

It is my opinion that you are entitled to charge full fees to the extent of \$250 for the discharge of all duties performed by you as deputy sheriff, and also full fees to a like extent for duties performed as constable.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES AND COSTS—Commonwealth's Attorney's fee in proceedings on forfeited recognizance.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 18, 1936.*

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

DEAR MR. COMBS:

I have your letter of January 15, enclosing correspondence between you and Mr. E. Peyton Turner, Attorney for the Commonwealth of Greenville County. The question on which you desire an opinion is presented in Mr. Turner's letter to you of January 6, from which I quote as follows:

"Under section 3505, the Attorney for the Commonwealth in every *scire facias* or other proceeding upon a forfeited recognizance where a judgment is awarded in behalf of the Commonwealth there shall be taxed in the costs an attorney's fee of \$10.00, and five per centum of the amount of the judgment, which when recovered shall be paid to the Attorney for the Commonwealth.

"I assume that this fee and commission are now to be taxed in the costs and one-half thereof paid to the county and one-half to the State. I take it that since Commonwealth's Attorneys are now paid a salary, they are not entitled to these fees and commissions. Will you kindly write me whether I correctly construe the statute?"

By chapter 364 of the Acts of 1934 (Acts 1934, page 733), the fee system as a method of compensating attorneys for the Commonwealth and certain

other officers is abolished, and these officers are placed on a salary basis. This Act further provides that all fees to which attorneys for the Commonwealth are entitled for the performance of official duties should be paid one-half into the county treasury and one-half into the State treasury.

In view of the above, I agree with your conclusion that the fees for the attorney for the Commonwealth provided for by section 3505 of the Code should be taxed as a part of the costs and one-half paid into the county treasury and one-half into the State treasury.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES AND COSTS—Justice's fee for issuing search warrant on complaint of Commonwealth's attorney or sheriff.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 29, 1936.*

MR. W. E. SCOTT,
*Trial Justice of Charlotte County,
Charlotte Court House, Virginia.*

MY DEAR MR. SCOTT:

I am in receipt of your letter of January 20, from which I quote as follows:

"Under the statute a justice's fee for issuing a search warrant is \$1.00. Please let me know if, in your opinion, this applies to search warrants issued on complaint of the Commonwealth's attorney, or the sheriff or one of his deputies, and, if so, by whom should the fee for search warrant be paid?"

I assume that the attorney for the Commonwealth or the sheriff would be acting in behalf of the Commonwealth in applying for a search warrant. If the warrant is issued by a justice of the peace, I am of opinion that the officer applying for same should not be called upon to pay the fee of the justice, but that the fee should be taxed as a part of the costs in any subsequent criminal proceeding and paid as other costs are paid.

If the warrant is issued by a trial justice, I am of opinion that the officer applying for same should not be called upon for the payment of any fee, but that the fee should be taxed as a part of the costs in any subsequent proceeding and collected from the defendant if he be found guilty. In this connection, I call your attention to the last clause of section 4988f of the Code, as amended in 1934, dealing with trial justices, which provides:

"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 would appear, therefore, that in no event should a fee be paid by the State for the issuing of a search warrant by a trial justice.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FERTILIZERS—Improper labeling—Confiscation.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 16, 1935.

HONORABLE G. W. KOINER, *Commissioner*,
Department of Agriculture and Immigration,
Richmond, Virginia.

DEAR MR. KOINER:

By your letter of November 9, you request the opinion of this office as to whether it is lawful for fertilizer dealers to sell, in this State, fertilizer in packages bearing representations of the non-acid forming quality of the goods. Also, as to whether fertilizers sold in packages so marked are subject to seizure by the Commissioner of the Department of Agriculture and Immigration.

As pointed out in your letter, the Virginia Code (Michie, 1930), section 1111, as amended, provides that "The following items and no other, shall be branded or stamped on, or affixed to, the packages in the following order, * * * ", and proceeds to enumerate items not including any statement as to the non-acid forming quality of the fertilizer. The practice to which you refer seems to come squarely within both the letter and the spirit of the statutory prohibition, and it is the opinion of this office that such practice violates the law.

Under section 1118 of the Code, also brought to our attention by your letter, it seems clear that fertilizers sold or offered for sale in packages bearing these representations may be seized and dealt with according to the provisions of that section.

Yours very truly,
ABRAM P. STAPLES,
Attorney General.

FINES—Civil liability for after serving term imposed for non-payment.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 19, 1936.

MISS ELIZABETH M. KATES, *Superintendent*,
State Industrial Farm for Women,
Goochland, Virginia.

DEAR MISS KATES:

I am in receipt of your letter of May 18, in which you ask my opinion as to whether the inmates of your institution, who have served full time for fine and costs, are relieved, by virtue of such service, of civil liability to the State for the payment of the fine and costs for which they were confined.

Prior to the enactment of chapter 112 of the Acts of 1936, page 187, the service of time for the non-payment of fine and costs did not relieve the inmates of your institution of civil liability. As amended, section 2095 of the Code contains the following provisions:

"Upon discharge from custody, as heretofore provided, the fine and costs, or costs, of every prisoner shall be discharged in full, and the person in whose custody he or she shall be at the time of his or her release shall certify the fact that the prisoner has served his or her sentence for the non-payment of fine and costs, or costs, to the clerk of the court, in the office of which the judgment is docketed, who shall file the said certificate with the papers of the case, and shall endorse the

fact of the discharge of the fine and costs, or costs, by virtue of such certificate, upon the margin of the judgment lien docketed where the judgment for said fine and costs, or costs, is docketed.

"Every person who heretofore shall have been confined according to the provisions of law at the time in force, and been discharged according to such law, shall be entitled to the same relief as is provided in this act for persons discharged after the same takes effect."

I may add that the amendment specifically provides that every person held to labor on the State Industrial Farm for Women shall be entitled to a credit on such fine and costs, or costs, of 75c for each day she shall work, and of 25c for each other day of confinement. It also specifically provides that no person shall be confined for a longer period than six calendar months, although the credit due shall not discharge the fine and costs, or costs, in full.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FINES—Disposition of—Prosecution before mayor for State offense.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 22, 1936.

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

Attention: Mr. C. E. Downs.

DEAR MR. COMBS:

I have before me a copy of a warrant issued by the mayor of the town of Grundy, Virginia, against C. Bascom Hurley, charging him with having driven a truck, while under the influence of intoxicating spirits, within the corporate limits of the town of Grundy on May 11, 1935, "against the Peace and dignity of the Commonwealth". This warrant commands the sergeant of the town of Grundy to apprehend the said Hurley and carry him before the mayor of said town to answer the said complaint, and to be further dealt with according to law.

I also have before me a letter addressed to you by Mr. A. H. Goff, clerk of the circuit court of Buchanan county, in which he states that he is enclosing you a copy of the warrant, "the style of which was Commonwealth of Virginia for the benefit of the *Town of Grundy vs. Bascom Hurley*". The copy omits the words, "for the benefit of the Town of Grundy".

I understand that a question has arisen as to whether the fine imposed upon Hurley should go into the Literary Fund of the State of Virginia or into the treasury of the town of Grundy. You then ask my opinion as to this controversy.

In my opinion, the fine imposed upon Hurley is one which was properly forwarded to your office to be placed to the credit of the Literary Fund.

The caption of the warrant reads: "STATE OF VIRGINIA, COUNTY OF BUCHANAN, to-wit". While the warrant charges that Hurley drove a truck, while under the influence of intoxicating spirits, within the corporate limits of the town of Grundy, it concludes: "against the Peace and dignity of the Commonwealth," and the sergeant of the town was directed to carry Hurley before the mayor to answer the complaint.

In his letter, Mr. Goff says that the prosecution was conducted under the provisions of section 4722 of the Code of Virginia. That section makes it a State offense to drive a truck while under the influence of intoxicants. Fines for every offense against the laws of the State of Virginia are segregated, by virtue of section 134 of the Code of Virginia, to the State Literary Fund.

As this fine has already been transmitted to your office, and it is only

a question of returning it to be turned over to the treasury of the town of Grundy, I am of the opinion that you should retain the fine and credit it to the State Literary Fund.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FINES—Disposition of fines imposed by trial justice.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 11, 1936.*

HONORABLE LEWIS JONES,

*Attorney for the Commonwealth,
Urbanna, Virginia.*

DEAR MR. JONES:

I have your letter of January 9, in which you state:

"We have a Trial Justice for Middlesex County, and the Mayor of the Town (Urbanna) desires the Trial Justice to hear and determine all cases. This has been done for the last year or so, and now the question arises as to whether or not the Town of Urbanna is entitled to the fees and the fines for cases heard by the Trial Justice for offenses arising in the Town. Section 4 of the Trial Justice Act found on page 75 of the Acts of Assembly of 1933 seems to cover the entire situation."

The disposition of these fees and fines seems to be controlled by section 4988f of the Code, this being a part of the new Trial Justice Act of 1934 (Acts 1934, page 466). The applicable portion of this section reads as follows:

" * * * 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 violation 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."

It would appear that fines assessed by the trial justice for violations of the ordinance of the town of Urbanna should be turned into the treasury of the town, but that fees other than those belonging to the issuing officers should be turned into the treasury of the county.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FINES—To whom paid—Violations of Motor Vehicle Code.

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

MR. DEANE HUNDLEY,
Trial Justice,
Dunnsville, Virginia.

MY DEAR MR. HUNDLEY:

Your letter of October 1, addressed to Mr. John Q. Rhodes, Jr., Director of the Division of Motor Vehicles, has been referred to me.

You state that some question has been raised as to whom fines collected for violations of the motor vehicle act should be paid, and that you have been paying them to the clerk of the circuit court.

I am of opinion that the practice you have adopted is in accordance with sections 2154 (169), 2556 and 4988f of the Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FUNDS—ABC Profits—Disposition of share of city whose charter is revoked or disused.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 14, 1935.*

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

DEAR MR. COMBS:

This is in reply to your letter of August 8, requesting my opinion as to the proper disposition to be made of certain checks issued from your office in the distribution of profits earned by the Alcoholic Beverage Control Board. The checks in question were issued in favor of certain towns in the State, and it has later developed that either the charters in these towns have been dissolved or they have ceased to function as towns.

It is my opinion that, where there are no town authorities or no finances kept separate and apart from the finances of the county, these checks should be cancelled and reissued to the treasurer of the county in which the town is located.

The legal effect of the situation above outlined is that the former town reverts and again becomes a part of the county in which it is situated.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FUNDS—Distribution of excess fees turned in by local officers.

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

HONORABLE E. R. COMBS, *Chairman,*
Compensation Board,
Richmond, Virginia.

DEAR MR. COMBS:

I am in receipt of your letter of July 1, and, inasmuch as you accurately

describe the statutes involved, for purposes of reply I quote your letter in full:

"Under provisions of chapter 352, section 4, page 708, of the Acts of 1914, one-half of any excess of commissions, fees, allowances, etc., paid into the State treasury by county and city officers was required to be paid by the State into the treasury of the particular county or city of the officer who paid same. This rate of distribution of excess fees, etc., as between the State and localities remained in force until the passage of chapter 198, page 350, of the Acts of 1926, section 5 of which chapter provides that two-thirds of any excess paid into the State treasury shall be paid by the State into the treasuries of the counties or cities of the officers paying same into the State treasury. Section 12, chapter 198, page 355, of the Acts of 1926, provides, however, that section 5 of said chapter shall not become effective as to any such offices or officers until the expiration of the terms of such offices. The terms of city officers having begun January 1, 1926, the provisions of section 5 of the Acts of 1926 did not become effective as to city officers until January 1, 1930.

"The audit of the accounts and records of the sergeant of the city of Richmond, made by the Auditor of Public Accounts for the period January 1, 1922, to May 31, 1935, shows that for each of the calendar years 1922 to 1934, inclusive, this officer owed the State excess of fees, commissions, etc., which excess fees, commissions, etc., were paid into the State treasury by this officer under date of June 27, 1935.

"Please advise me if, in returning to the city of Richmond its proportionate part of excess of fees paid in by the sergeant of said city on June 27, 1935, for the calendar years 1922 to 1934, inclusive, I should return for the calendar years 1922 to 1929, inclusive, only one-half of amounts relating to those particular years, and for the calendar years 1930 to 1934, inclusive, two-thirds of the amounts relating to those particular years, or, as this excess of fees, etc., for the calendar years 1922 to 1934, inclusive, was paid in after the passage of the law requiring two-thirds of any excess of fees, etc., to be paid to the localities, should I return to the city of Richmond two-thirds of the entire amount paid into the State treasury."

The two Acts under consideration provide for annual reports by the designated officers, and further provide the proportion of the annual excess fees to be turned into the treasury of the locality. I do not think the fact that the sergeant of the city of Richmond filed incorrect reports should affect the proportion of annual excess fees to be refunded to the locality, now that the proper amount of such fees has been determined for each year.

My conclusion is, therefore, that the amount to be returned to the city of Richmond for the period 1922 to 1929, inclusive, is controlled by chapter 352 of the Acts of 1914, and that the amount to be returned for the years 1930 to 1934, inclusive, is controlled by chapter 198 of the Acts of 1926.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FUNDS—Special funds for use of state institution—How kept and disbursed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 14, 1935.

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

DEAR MR. DOWNS:

This is in response to your request for my opinion upon the status of three certain funds of the Virginia Military Institute which you designate as

the McClung Fund, the State Cadet Fund, and the Student Reexamination Fee Fund. It is my opinion that the money constituting these funds should be paid into the State Treasury and that, when so paid, they will go into the special fund defined in the Appropriation Act as "special revenues collected or received for the use of said Virginia Military Institute". The last paragraph of section 42 of the Appropriation Act provides as follows:

"It is further provided, however, that any State institution may, with the written consent and approval of the Governor first obtained, spend, in addition to the amount herein appropriated, out of the special revenues of such institution, any additional special revenues paid into the State treasury to the credit of such institution, where later developments are believed to make such additional expenditure necessary."

It is my opinion that the three funds aforesaid come within the provisions above quoted and the Governor may, in writing, authorize their expenditure by the Virginia Military Institute.

If it be found necessary for the Institute to temporarily borrow the money with which to pay these funds into the treasury, the Governor may authorize same under the provisions of sections 37 and 38 of the Appropriation Act.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISHERIES—Compensation for livestock killed by dogs—Domesticated hares.

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

HONORABLE B. P. HARRISON,
Commonwealth's Attorney,
Winchester, Virginia.

DEAR MR. HARRISON:

This is in reply to your letter of July 9, requesting the opinion of this office upon the question whether or not Belgian hares held for breeding purposes and to market for food are livestock within the meaning of the provisions of section 2323-t of the Code.

Section 60, subsection (b), of the Game, Inland Fish and Dog Code of Virginia provides as follows:

"The word 'livestock' includes cattle, sheep, goats, swine and enclosed domesticated rabbits or hares."

It is my opinion that the hares referred to in your letter would come within this definition of livestock.

I also call your attention to section 32, subsection (b), of said Code, which provides that it is unlawful for any person to exercise the privilege of raising rabbits or hares, other than the native Virginia species, for the sale of their fur or carcass without procuring a permit from the Commission of Game and Inland Fisheries.

Of course, I have no knowledge whether such a permit was secured by the person referred to in your letter.

Under the provisions of section 74 of said Code, which is section 2323-t of the Michie Code, the right to compensation for livestock killed by dogs is measured by the assessed value placed upon the livestock for the purpose of taxation.

While it would seem a hardship for a person to be deprived of the right to compensation where the property in question is not assessed for taxation, nevertheless the statute does not seem to make provision for compensation in such a case.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISHERIES—Right to obtain resident license—Effect of paying Virginia capitation tax.

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

HONORABLE JOHN A. PETTY,
Clerk of the Court,
Clarendon, Virginia.

DEAR MR. PETTY:

This is in reply to your letter of the 5th instant, in which you inquire as to the right of a person living in Washington, who pays his poll tax in Arlington County, to secure a resident hunting and fishing license.

This question is controlled by the provisions of Section 22 of the Game, Inland Fish and Dog Law, and provides that any United States citizen, who has been a *bona fide* resident of the State for a period of six months, or any person who is a legal voter in Virginia, shall be entitled to such license.

The facts contained in your letter are not complete. It is well established in Virginia that a person may actually live outside of State and, if at the time he changed his place of living, he was a resident of Virginia, he may retain his residence in Virginia and vote in this State, if he has the intention of returning to Virginia as his permanent place of residence. The person you speak of may come within this classification, and the fact that he is living temporarily in Washington will not deprive him of the right to vote in Virginia, if he is otherwise qualified. You do not state whether the person you have in mind votes in Virginia or not. If he is a qualified Virginia voter, he is entitled to the license. After all, it is a question of fact.

Yours sincerely,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISHERIES—Transportation—Sale of rabbits.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 10, 1936.*

HONORABLE M. D. HART, *Executive Secretary,*
Commission of Game and Inland Fisheries,
Richmond, Virginia.

DEAR MR. HART:

In an interview yesterday, you corrected my impression as to the question presented in your letter of January 8. You request the opinion of this office as to whether rabbits lawfully killed by landowners in counties in which the rabbit season is closed may be shipped into counties in which the season is open, for sale in the latter.

Pursuant to authority granted by section 33, chapter 247, Acts 1930, the

Commission has passed Regulation No. 35, section 1(e) of which makes it unlawful to possess, sell, transport or ship any game except as specifically permitted by law.

The only provision of law relating to the shipment of game seems to be section 45-b of the Game, Inland Fish and Dog Code, which permits transportation of game "By any person properly licensed via freight, express, parcel post or airplane (*as a gift and not for market or sale, so stating on the shipping tag*) in or out of the county where taken to another county in this State or to another State *during the open season in the county where taken, * * * .*" (Italics supplied.)

From the foregoing section, it seems clear that the law does not specifically permit the shipment of rabbits, although lawfully killed, during the closed season in the county where taken, or the shipment of rabbits for sale even in an open season county.

It is, therefore, the opinion of this office that rabbits lawfully taken by landowners within a closed season county may not be shipped into counties in which the season is open for purposes of sale.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISHERIES—Trapping—Duty to mark traps—Duty not to injure dogs and animals of another.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 11, 1936.*

HONORABLE ROLAND D. COCK,
*Commonwealth's Attorney,
Elizabeth City County.
Hampton, Virginia.*

DEAR MR. COCK:

I have your letter of January 9 in which you request the opinion of this office on the following two questions:

1. Where a trapper sets his traps on the lands of another with the latter's oral permission, is it necessary for him to mark them as required by Virginia Code (Michie) 1930, section 3305, subsection 36?
2. Under this statute, is it the right of a landowner to set traps in the open where damage may result to animals—especially dogs?

In answer to both of these questions, I beg to call your attention to regulation No. 38 of the Commission of Game and Inland Fisheries which you will find at pages 23 and 24 of the enclosed pamphlet.

It is the opinion of this office that subdivision d of this regulation, making it unlawful "to set a trap upon the lands or waters of another without attaching thereto the name and address of the trapper", applies to persons trapping upon the land of another with the latter's consent. This seems especially clear in view of the fact that subdivision c expressly makes it unlawful "to go upon the lands or waters of another to trap without having obtained permission".

In answer to your second question, it seems clear that the statutory provision as to placing traps in the open was intended to apply only to persons trapping on the lands of another, and, in view of the juxtaposition of subdivisions c, d, e and f of the regulation, we do not believe that the regulation was intended to have so extreme an effect as to change the statute in this regard.

It is, therefore, the opinion of this office that the statute and regulation

impose no new duty upon landowners as to placing of traps on their own lands in such a manner as to endanger animals, and that the owner of any animal injured by such trap has only those rights which are given him by the rules of general law applicable to his particular case.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

HIGHWAYS—Prohibiting grazing of stock on—Validity of Highway Department regulation.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 14, 1936.*

HONORABLE F. W. SMITH,
Attorney for the Commonwealth,
Grundy, Virginia.

MY DEAR MR. SMITH:

This will acknowledge receipt of your letter of March 25, requesting an opinion as to the validity of a certain rule and regulation promulgated by the Department of Highways pursuant to the authority set forth in section 5 of chapter 403 of the Acts of 1922.

The regulation to which you refer was made and adopted on November 6, 1924, by the Highway Commission and is enumerated as section 14, article 2, and reads as follows:

"No person, firm or corporation shall pasture or graze, or cause to be pastured or grazed, or allow to run at large on any right of way or any road in the State highway system, any live stock, unless such animal or animals be securely tied or held by chain or rope, so as to prevent such animal from getting on the traveled portion of the highway; provided, however, this does not apply to State highways running through State and national forestry preserves."

The obvious purpose of this regulation is the protection of traffic on State highways. Livestock running at large on the highways is a great traffic risk and may cause serious accidents. The regulation comes within the general object of the statute.

The case of *Turner v. Commonwealth*, 149 Va. 468, held that the State Crop Pest Commission could make rules and regulations having the full force and effect of law. The case of *Reynolds v. Milk Commission*, 163 Va. 957, enunciated the same principle.

The statutory provisions respecting trespassing by one's cattle on adjoining lands and liability for damages done do not seem to deny the right of the State to protect the safety of travelers on the highways. The provision that the regulations shall not be in conflict with the laws of this State would probably be construed as relating to statutes or well established and clear general laws.

As the matter appears to me, I cannot see that the general law confers any affirmative right on a landowner to permit his cattle to run at large on the highways. The question is not free from difficulty, but I do not believe the situation would warrant this office in holding the regulation void.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

INSANE—Segregation of dangerous patients—Authority to place in criminal wards.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 17, 1936.*

HONORABLE JAMES W. PHILLIPS, *Director,*
Bureau Organization and Supervision,
Department of Public Welfare,
Richmond, Virginia.

DEAR MR. PHILLIPS:

I have before me your letter of February 14, in which you request my opinion as to the authority of the superintendent of a state hospital for the insane to place a dangerously insane person in a building or ward customarily used for the criminal insane.

I do not find that there is any statute classifying a hospital in divisions, or providing for any particular separation of the criminal insane from those who have not been convicted of crime.

It is my opinion that the superintendent has the authority to utilize the facilities at his disposal to the best advantage and that, if a person not a criminal is dangerously insane, the superintendent would have the authority to place him in such part of the hospital as is best adapted to prevent injury to other persons.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Detention of misdemeanants at State Farm for non-payment of fine and costs.

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

CAPTAIN R. R. PENN,
Superintendent State Farm,
State Farm, Virginia.

DEAR CAPTAIN PENN:

I am in receipt of your letter of November 25, in which you say:

"We are in doubt as to how long misdemeanants should be held at the State Farm for the non-payment of their fine and costs.

"Some misdemeanants are sentenced to the State convict road force, others are sentenced to jail, and a few are sentenced direct to the State Farm.

"We also have quite a few men whose commitments do not designate any specific place of confinement. A sample of such commitments is herewith enclosed.

"Kindly return this sample commitment with your reply."

Persons, upon conviction of a misdemeanor, may be sentenced to the State convict road force, to confinement in jail or to the State Farm, the method of punishment being optional with the judge, justice or trial justice before whom the persons prosecuted are tried. No female can be sentenced to the State convict road force (section 2094 of the Code).

Persons sentenced to the State convict road force are held under the provisions of section 2095 of the Code. Every person held to labor in the

State convict road force for the non-payment of fine and costs imposed upon him is entitled to seventy-five cents for each day he works, and to twenty-five cents for each day of his confinement, whether he labors or not, the maximum limit of time for which he may be held in the State convict road force being six months.

Where persons sentenced to work on the State convict road force are mentally or physically unfit for work on said road force, they may be transferred to the State Farm, and, in my opinion, such persons are then entitled to be held for a maximum of six months, with the credits above specified.

Persons sentenced to confinement in jail, and for any reason transferred to the State Farm, should be held subject to the provisions of section 4953 of the Code, the maximum confinement of each being limited to two months. While the law is not specific, it is my opinion that each person who works on the State Farm should be credited as provided above.

I have carefully examined the form of commitment enclosed with your letter. In my opinion, this form should be altered and corrected so as to show specifically the judgment of the trial justice (or of the court, where the commitment is by the court), in order to show whether the person convicted was sentenced to the convict road force or to confinement in jail. Otherwise, I do not see how you can reach a conclusion as to the character of the sentence imposed and the time for which he should be held for the non-payment of his fine and costs. If, instead of being sentenced to serve in the State convict road force or to confinement in jail, a person is sentenced directly to the State Farm, I am of the opinion that service on the State Farm should be considered in lieu of a sentence to confinement in jail, and that section 4953 of the Code applies to such a sentence, allowing, however, a credit upon his fine and costs in the amounts provided for by section 2095 of the Code.

You desire also my opinion as to how separate sentences of persons committed to the State Farm should run.

It is my opinion that such sentences should run consecutively—that is, you should consider each commitment separately and apply to each person the rules outlined above, and, upon the expiration of the first sentence, apply the same rules to the second and to each additional sentence imposed upon the same man.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Expenses of maintaining prisoners confined for violation of city ordinance—Payment by State.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., August 6, 1935.

HONORABLE GEORGE C. PEERY,

Governor of Virginia,

Richmond, Virginia.

DEAR GOVERNOR PEERY:

You request my opinion upon the questions raised by a letter addressed to you under date of July 25, 1935, by the Auditor of Public Accounts relating to the payment, out of the State Treasury to the Sergeant of the city of Richmond, of the costs of receiving, keeping and supporting in jail, prisoners committed for violation of ordinances of the city of Richmond.

I am advised by the Auditor that about twenty years ago an arrangement was effected between the late Justice Crutchfield, of the Richmond Police Court, and Honorable C. Lee Moore, then Auditor of Public Accounts, whereby all city jail prisoners were to be certified to the Auditor as State

prisoners, and the expense of their support in jail was to be paid out of the State Treasury, and the city authorities, in return therefor, would refrain from charging the State the witness fees for police officers in cases of violation of State laws. These fees, payable out of the State Treasury, would go to the city and not to the officer personally, under the local laws applicable to Richmond. This arrangement has been in effect ever since that time.

I am of the opinion, for the reasons hereinafter stated, that this arrangement or agreement was not authorized by law. However, I am informed by the Auditor of Public Accounts that it would be thoroughly impracticable, if not impossible, to recast the accounts over this period of time, to determine whether the city would be indebted to the State, or vice versa, or the amount of any such indebtedness.

The practical question now presented, therefore, is whether the practice which has been followed in the past, as above stated, may be continued in the future.

Section 3510 of the Code provides expressly that no payment shall be made out of the State Treasury on account of the keeping and supporting of a prisoner "committed to jail for a violation of the ordinance of any city or town who is in jail under *capias pro fine* issued for a failure to pay a fine imposed for violation of such ordinance". In this section, as contained in the Code of 1919, the word "or" was included between the word "town" and the word "who", so that the section read "*or who is in jail under capias pro fine, etc.*" The General Assembly of 1920 amended the section by adding a new paragraph at the end, and in some way this word "or" was omitted. I think it is clear that its omission was due to a clerical error.

But be this as it may, section 3510 does not authorize the payment of money, it merely fixes the rate of compensation the Sergeant is to receive. Under our Constitution a legislative act expressly appropriating money for a specific purpose is necessary before there is authority for its payment out of the State Treasury. (Constitution of Virginia, section 186). It has been the custom to pay for the care of these Richmond city prisoners out of the fund appropriated for criminal charges. (Acts of 1934, p. 651.) The act appropriating this money provides that out of same shall be paid the "cost of maintenance in local jails of persons charged with violation of State laws". The act does not appropriate money for similar costs where the prisoner is charged with violation of a city ordinance.

It is clear, therefore, that the General Assembly has made no appropriation to pay for the care and keeping of city prisoners.

Furthermore, the Richmond city Code (chapter 53, section 5) expressly provides that the Sergeant shall be paid by the city for the care and keeping of prisoners charged with city ordinance violations.

I am, therefore, of opinion that there is no authority in law for the practice which has prevailed in the past, and that same should be discontinued.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Retention of women at State Farm for non-payment of fine and costs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 21, 1935.

MISS ELIZABETH M. KATES, *Superintendent,*
State Industrial Farm for Women,
Goochland, Virginia.

DEAR MISS KATES:

I am in receipt of your letter of November 20, in which you say that you have talked with my assistant, Mr. Gibson, concerning the case of a

woman convicted of a misdemeanor and committed to the State Industrial Farm for Women for confinement for the non-payment of her fine and costs. You then ask for information as to the statutes providing the length of time a person may be confined in your institution for the non-payment of fine and costs.

On November 9, 1935, I wrote a letter to Honorable D. W. McNeil, Trial Justice of Rockbridge county, Virginia, in which I held that section 4953 of the Code, instead of section 2095 thereof, applied to the confinement of a woman for the non-payment of fine and costs imposed upon her.

Section 2094 of the Code provides that, "where a fine or imprisonment in jail either or both are imposed, and the minimum period required for the service of such jail sentence and the time for which the prisoner can be held to labor for the non-payment of the fine and costs is not less than sixty days, the defendant, if a male, * * * may be sentenced to the State convict road force to work out such term of imprisonment and the fine and costs" under the provisions of section 2095 of the Code, as amended. This section further provides that "no woman shall be sentenced to the convict road force".

Under the provisions of section 2095 of the Code, as amended, every person held to labor in the State convict road force for the non-payment of fine and costs imposed upon him shall be entitled to seventy-five cents for each day he works, and shall be entitled to twenty-five cents for each day of his confinement, whether he labors or not, the maximum limit of time for which he may be held in the State convict road force being six months.

A person sentenced to confinement in jail for the non-payment of fine and costs, but who is not sentenced to the State convict road force, is held in confinement under the provisions of section 4953 of the Code. That section, as amended, provides a scale of punishment according to the aggregate of the fine and costs imposed, but such confinement is limited to two months.

No female being amenable to a sentence to the State convict road force under the provisions of section 2094, she cannot be held under the provisions of section 2095. Therefore, she must be held under the provisions of section 4953.

In *May v. Dillard*, Sheriff, 134 Va. 707, the Supreme Court of Appeals expressly holds, in an opinion by Judge Burks, at page 711, that section 4953 of the Code, limiting the term of confinement of a person sentenced to jail for the non-payment of fine and costs, and not section 2095, applies to female prisoners.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Powers of in general.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL.

RICHMOND, VA., *March 27, 1936.*

MR. R. J. MATTHEWS,

*Justice of the Peace,
Passapatanzy, Virginia.*

MY DEAR MR. MATTHEWS:

I am in receipt of your letter of March 23, in which you ask if a justice of the peace may perform the following duties:

1. "Take and certify acknowledgments to deeds and other writings."

Yes, as prescribed in section 5205 of the Code.

2. "Take and certify depositions."

Yes, as prescribed in section 6225 of the Code.

3. "Administer and certify oaths of office."

To a limited extent. See sections 273, 274 and 2696 of the Code and other sections dealing with particular officers.

4. "Give permission, where crime is suspected, for embalming a dead body."

Yes, to the extent permitted by section 1727 of the Code.

5. "Review judgment of inspection of food."

This proceeding is provided for by sections 1164-1166 of the Code. I am of the opinion that it is in the nature of a civil proceeding, of which it is contemplated that trial justices shall have exclusive jurisdiction. Trial justices in counties now have "exclusive jurisdiction in all civil matters cognizable by justices of the peace of counties".

6. "Hold coroner's inquests."

Yes, as provided in section 4816 of the Code.

7. "Order sheep-killing and mad dogs to be killed."

I believe that a justice of the peace may order a mad dog to be killed, as provided in section 3305 (70) of the Code. This is a summary proceeding where a warrant is not necessary.

However, I am of opinion that a justice of the peace no longer has jurisdiction to order a sheep-killing dog to be killed, as provided in section 3305 (71). This proceeding is instituted by a warrant requiring the owner or custodian of the dog to appear at a time and place named in the warrant. Section 4988g of the Code provides that all warrants issued by a justice of the peace shall be returnable before a trial justice for action thereon, and I am, therefore, of opinion that a warrant issued under section 3305 (71) must be made returnable before a trial justice.

8. "Order dead animals or fowls to be burned or buried."

This procedure is covered by section 1554 of the Code. While this question is not altogether free from doubt, I am of the opinion that it is not a matter that is contemplated should be within the exclusive jurisdiction of a trial justice and that, therefore, a justice of the peace may order the dead animals or fowls to be cremated or buried as provided in this section.

9. "Can a justice of the peace do anything that a notary public can?"

Certainly a justice of the peace may perform many of the acts performed by a notary public. However, inasmuch as the duties of the two officers are contained in numerous sections of the Code, I cannot say without qualification that a justice of the peace may do everything that a notary public can.

10. "Take and certify affidavits."

Yes, as provided in section 274 of the Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Right to carry concealed weapons.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 6, 1936.*

MR. J. A. WARD,
Justice of the Peace,
Gloucester, Virginia.

MY DEAR MR. WARD:

I am in receipt of your letter of February 4, in which you ask if you as a justice of the peace in Gloucester county are permitted to carry a gun at all times in your county without a permit from the judge of the circuit court.

Section 4534 of the Code, prescribing punishment for carrying concealed weapons, provides that it shall not apply to a conservator of the peace.

By section 4789 of the Code, a justice of the peace is made a conservator of the peace.

I am, therefore, of the opinion that you may carry a pistol at all times in your county as long as you are a justice of the peace, without the necessity of securing a permit from the judge of the circuit court. See *Withers v. Commonwealth*, 109 Va. 837.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Warrants—Powers with respect to withdrawals of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 22, 1936.*

MR. J. CALLAWAY BROWN.
Trial Justice of Bedford County,
Bedford, Virginia.

MY DEAR MR. BROWN:

I am in receipt of your letter of June 16, asking if a justice of the peace still has authority under section 4849 of the Code to allow warrants to be withdrawn after they have been issued.

I am of opinion that, since the passage of the general Trial Justice Act, a justice of the peace so far as criminal warrants are concerned is simply an issuing officer and that, once the warrant is issued, he has no further jurisdiction except to grant bail. Section 4988g of the Code expressly provides that the warrants shall be made returnable before the trial justice "for action thereon".

My conclusion is, therefore, that a justice of the peace has no authority to allow warrants issued by him to be withdrawn.

Yours very truly,

ABRAM P. STAPLES,
Attorney General

LABOR—Regulating hours of in cities of less than 1,500 inhabitants.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 23, 1935.*

HONORABLE C. CARTER LEE,
*Attorney for the Commonwealth,
Rocky Mount, Virginia.*

DEAR MR. LEE:

I have your letter of December 20, in which you request the opinion of this office as to whether women may be employed or permitted to work more than ten hours a day in mercantile establishments in Rocky Mount, a town of fewer than 1,500 inhabitants.

I concur in your judgment that the only provision of law limiting hours of work for women is that contained in Virginia Code section 1808, which section expressly excepts from its operation "females whose full time is employed * * * in mercantile establishments in towns of less than 2,000 inhabitants, or in county districts".

It is the opinion of this office, therefore, that merchants in Rocky Mount are not prohibited from employing women for more than ten hours per day.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

LICENSES—Wholesale dealers—Right of cities and towns to require local license.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 16, 1935.*

HON. ALTON I. CROWELL,
*Attorney for the Commonwealth,
Pulaski, Virginia.*

MY DEAR MR. CROWELL:

I am in receipt of your letter of July 9, in which you ask the following question:

"Please advise me whether, in your opinion, a wholesale merchant, who has been duly licensed by the State, and duly licensed by the town in which his place of business is located, may, other than at his definite place of business, sell and deliver at the same time to licensed dealers and retailers, without the payment of *additional license taxes to cities and towns in which the sales and deliveries are made.*"

The question you ask is answered by section 192a of the Tax Code, which provides that cities and towns may impose a license tax on persons, firms and corporations, who or which shall sell and deliver at the same time in such cities and towns, other than at a definite place of business, goods, wares or merchandise, to licensed dealers or retailers. There are certain exceptions which are fully set out in the statute.

I do not think section 192b is applicable.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

LOTTERIES—What constitutes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 18, 1935.*

HONORABLE T. FREEMAN EPES,
*Attorney for the Commonwealth,
Blackstone, Virginia.*

DEAR MR. EPES:

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

"At some of the moving picture places in this county the practice is being indulged of offering a prize of \$5.00 to the person who might hold the lucky ticket drawn out of a box once a week, provided such person is in the house on the night of the drawing. In the event the person is not in the house whose name is first drawn, subsequent draws are made until the name of some one in the house is drawn. In other instances, if the person whose name is drawn the first time is not in the house, the money is carried over to the succeeding week where the person gets double money, and if on this night the person is not in the house it continues to be carried over in an accumulated pot until the money reaches quite a large sum.

"I would be glad if you will advise me if in your opinion this is in violation of the law. It appears to me to be in violation of section 4693 of the Code."

In my opinion the above facts present a case which comes clearly within the decision of our Supreme Court of Appeals in the case of *Maughs v. Porter*, 157 Va. 415, and constitute a lottery within the meaning of section 4693 of the Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

MAYORS—Authority to issue warrants for violation of State laws within corporate limits of town—Authority to hold preliminary hearing in felony cases.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 19, 1935.*

HONORABLE M. B. BOOKER,
*Attorney for the Commonwealth,
Halifax, Virginia.*

MY DEAR MR. BOOKER:

I have your letter of September 9, in which you ask the following question:

"Has the mayor of an incorporated town located in a county that has a trial justice the right to try warrants issued by him for the violation of State laws, such violation having been committed within the corporate limits of the town?"

You inform me that Halifax county has adopted the Trial Justice Act of 1934, as provided in section 4988p of the Code.

While the fourth numbered paragraph of section 4988g of the Code

gives to the mayor of an incorporated town authority to issue warrants, yet it is provided that these warrants shall be returnable before the trial justice for action thereon. I am of opinion, therefore, that, when this paragraph is considered with the third numbered paragraph of section 4988g, it is clear that the mayor does not have jurisdiction to try misdemeanants where the charge is a violation of State law.

You also ask if the mayor of an incorporated town has authority to hold the preliminary hearing on a warrant issued by him for a felony under the State law. It is my opinion, for the reasons stated above, that the mayor likewise has no authority to hold a preliminary hearing in such felony cases.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

**MILK LAW—Labeling of bottles and displaying card as to grade, etc., of milk—
Duty of distributor buying from producer owning two cows or less.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 27, 1936.*

HONORABLE W. P. PARSONS.
Commonwealth's Attorney,
Wytheville, Virginia.

DEAR MR. PARSONS:

I have your letter of March 19, in which you request the opinion of this office upon the following three questions, calling our attention to sections 1211(1) and 1211(s) of the Virginia Code (Michie 1930, 1934 Supplement):

(1) Is a restaurant owner, who serves milk and cream bought from a producer who does not own more than two cows, required to display the card of the Division of Dairy and Food as to the grade, etc., of such milk and cream?

(2) Where such owner buys most of his milk from a regular dairy, in labeled bottles, and displays the card of the Division, may he also buy milk from a person not having more than two cows, in unlabeled bottles, displaying no card as to this latter milk?

(3) Would the purpose for which the milk is used in either of the above cases make any difference; that is, whether it is sold or served direct to the customer or used for cooking purposes?

These questions will be dealt with in the order named.

(1) Code section 1211(1) provides in part as follows:

"Every grocery store, restaurant, cafe, soda fountain or similar establishment selling or serving milk or cream shall display in a place designated by the inspector a card furnished by the Division of Dairy and Food of the Department of Agriculture and Immigration, stating the grade of milk or cream, and whether same is raw or pasteurized."

The relevant portion of section 1211(s) is as follows:

"The provisions of sections 1211a to 1211v shall not apply to any person keeping two milch cows or less."

It will be noted that many of the provisions referred to in section 1211(s) define the duties of producers only, while others affect only the practices of distributors. From the language of the statute, as well as from its apparent purpose, it seems clear that section 1211(s) can be taken to affect the operation of only such provisions of the act as apply directly to producers, and will not affect the requirement that each distributor display the card mentioned in section 1211(1). It is therefore the opinion of this office that a

restaurant may not escape the necessity for displaying such a card by buying from a producer whose milk is not graded according to the statutory classification, and that the affect of the act is to permit such restaurant to sell only such milk as is capable of being described under one of the grades defined by law.

(2) What has been said in reply to your first question also answers your second.

(3) As to your third question, it seems clear from the explicit language of section 1211(1) that "selling" and "serving" milk and cream are placed on the same basis. It is believed, however, that nothing in this act should be construed to affect the use of milk and cream in cooking, the whole policy of the law—to protect the public against diseases commonly carried in milk—being inapplicable in such cases.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLES—School busses—Requirements as to safety glass.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 16, 1936.

DR. SIDNEY B. HALL,
*Superintendent Public Instruction,
State Board of Education,
Richmond, Virginia.*

MY DEAR DR. HALL:

I have your letter of May 12, requesting my opinion upon the question whether section 103 of the Motor Vehicle Code of Virginia requires school busses registered in the State of Virginia prior to January 1, 1936, to be equipped with safety glass.

My interpretation of the statute in this respect is that the first paragraph of subsection (c) of section 103 applies only to motor vehicles designed or used for the purpose of carrying persons for compensation or hire, or as a public conveyance to transport school children and others. The second paragraph of subsection (c) in no way changes the provisions of the first paragraph, but merely adds the additional provision that *all* motor vehicles operated on the highways of this State not registered prior to January 1, 1936, shall be equipped with safety glass. In my opinion such school busses must be so equipped.

With reference to the other questions raised in your letter as to whether a bus body from an old chassis, when transferred to a new chassis, would be required to be equipped with safety glass, the statute specifically provides that it shall be unlawful after January 1, 1936, for any person to operate on any highway a motor vehicle registered in this State and *manufactured or assembled after the said date* and designed or used for the purpose of carrying persons for compensation or hire, or as a public conveyance to transport school children and others, unless such vehicle be equipped with safety glass, provided such vehicle was not registered in this or any other State prior to January 1, 1935. I am of the opinion that, under the language of this statute, it would apply to the case under consideration in two respects. First, that the bus would be deemed to be registered in the State as of the date the new chassis was registered, and, second, it would be considered to be assembled in the State at the time the old body was transferred to the new chassis.

I, therefore, am of the opinion that in this instance the bus should be equipped with safety glass, as the statute requires.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NOTARIES—Territorial scope of commission.

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

MRS. BESSIE M. COOKE, *Notary Public,*
First National Bank Building,
Harrisonburg, Virginia.

DEAR MRS. COOKE:

Your letter of July 2 has been received in the absence of Senator Staples from his office.

Section 2850 of the Code provides that "Notaries in cities and in counties in which cities or parts thereof are located, shall have authority to act as such in each of said localities".

I am of the opinion, therefore, that, having been appointed a notary public for the city of Harrisonburg, you may act as such in the county of Rockingham.

Yours very truly,

W. W. MARTIN,
Assistant Attorney General.

NOTARIES—Scope of commission.

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

HONORABLE H. H. HOLT, *Clerk,*
Circuit Court Elizabeth City County,
Hampton, Virginia.

MY DEAR MR. HOLT:

I have your letter of October 8, in which you advise that Mr. W. J. Gandy has been commissioned notary public for the county of Elizabeth City and has also been commissioned notary public for Warwick county. You inquire whether he may take acknowledgments in the city of Newport News.

Section 2850 of the Code provides in part that:

"Notaries in cities and in counties in which cities or parts thereof are located shall have authority to act as such in each of said localities."

Under this provision, I am of opinion that Mr. Gandy may take acknowledgments in the city of Newport News.

With my best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—County school board member as member of board of health; county agent as member of school trustee electoral board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 18, 1935.*

HONORABLE C. C. COLLINS,
Attorney for the Commonwealth,
Covington, Virginia.

DEAR MR. COLLINS:

I beg to acknowledge your letter of October 17, in which you request the opinion of this office on the following two questions:

First: May a member of a county school board serve also as a member of the board of health?

Second: May a county agent serve as a member of the school trustee electoral board?

First: I assume that your first question refers to a member of the local board of health.

The Virginia Code (Michie, 1930), section 644(1) provides that no federal, State, or county officer (with certain exceptions not germane here) shall act as a member of the county school board.

While the question is not free from all doubt, it seems fairly clear that a member of a county board of health is a county officer. Under section 1493 of the Code, this board has charge of the sanitary affairs of the county, and control of the prevention and eradication of contagious and infectious diseases. It may provide for compulsory vaccination, and, with the consent of the board of supervisors, must fix the compensation of officers and agents employed in connection with the abatement of nuisances. In view of the nature of these powers and duties, involving as they plainly do the exercise of some of the functions peculiar to sovereign government, I think it clear that members of the local board of health must be classified as "officers", and not as mere employees.

It is, therefore, the opinion of this office that a member of the county board of health may not serve also as a member of the county school board.

Answering your second inquiry, I may say that the question of the status of the county agent is also difficult to determine, but, after consideration, I am of opinion that the county agent is an employee rather than an officer, and, therefore, he may serve as a member of the school trustee electoral board.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Division of motor vehicle agent as member of county school board—Federal relief officer as member of county school board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 24, 1936.*

DR. SIDNEY B. HALL,
*Superintendent of Public Instruction,
State Board of Education,
Richmond, Virginia.*

DEAR DR. HALL:

I am in receipt of your letter of March 21, in which you ask if the following persons are eligible for appointment on a county school board:

"1. A person serving as an agent of the State Division of Motor Vehicles, who sells automobile license tags."

I know of no statute which disqualifies such a person from appointment as a member of the school board.

"2. A person serving as a relief officer, who receives a salary for such work from the Federal government."

Members of the county school board are constitutional officers, and I am, therefore, of opinion that the second person you describe is not eligible

to appointment as a member of the board, under the provisions of section 290 of the Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Division superintendent acting as clerk of school board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 30, 1936.*

MR. C. V. SHOEMAKER,
*Superintendent of Schools,
Woodstock, Virginia.*

MY DEAR MR. SHOEMAKER:

I am in receipt of your letter of March 24, in which you ask if a division superintendent of schools may act as clerk of a county school board.

The statute (section 655 of the Code) provides that the clerk of the school board shall be selected annually "on the recommendation of the division superintendent". Upon a reading of the section as a whole, I must say that I do not think that it contemplates that the division superintendent shall be the clerk, and I have so expressed myself in the past.

However, I have been advised that in a comparatively large number of counties of the State, for purposes of economy and other reasons, the school boards have elected the division superintendents as clerks. While, as stated above, I do not think that the statute contemplates this, yet, inasmuch as it is not in terms prohibited, I do not think that I should hold that it is unlawful.

If this policy is approved by the majority of the school boards and by the Department of Public Instruction, I suggest that the statute be amended so as to remove all doubt on the subject.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility member of general assembly as trial justice and mayor.

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

HON. L. H. SHRADER,
*Member of the House of Delegates,
Amherst, Virginia.*

DEAR MR. SHRADER:

I have before me your letter in which you request my opinion upon the question of the eligibility of a person to hold at one and the same time the offices of Member of the General Assembly, Trial Justice of a county, and Mayor of a town.

Section 44 of the Constitution of Virginia contains this provision:

" * * * But no person holding a salaried office under the State government, and no judge of any court, attorney for the Commonwealth, sheriff, sergeant, assessors of taxes, commissioner of the revenue, collector of taxes, or clerk of any court, shall be a member of either

house of the general assembly during his continuance in office, and the election of any such person to either house of the general assembly, and his qualification as a member thereof, shall vacate any such office held by him * * * .”

The first question is whether a Trial Justice is embraced within the language—“judge of any court”—as used above. In *Walker v. Temple*, 130 Va. 370, it was held that the clerk of a circuit court, in admitting a will to probate or in taking a confession of judgment, is acting as a court. In this case Judge Burks said: “Wherever we have a plaintiff and a defendant and a cause of action, and a designated functionary to render judgment between them, we have a court.”

In 16 Ruling Case Law, p. 342, it is said that a justice of the peace is not liable for his official acts, and that:

“It is a principle lying at the foundation of all well ordered jurisprudence that every judge, whether of higher or lower degree, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free unbiased convictions, uninfluenced by any apprehension of consequences. * * * ”

Under the 1934 Virginia Trial Justices Act the Trial Justice is vested with many judicial powers, both in civil and criminal cases, and it is expressly provided that he “shall also be judge of the juvenile and domestic relations court in each county and city in his territory”. I see no escape from the conclusion that he is a judge of a Trial Justice’s Court, and is within the terms of the constitutional section above quoted.

The next question is whether the officer of mayor of a town may be held by a member of the general assembly. The Constitution contains no express provisions prohibiting it, and it would seem to be permissible unless the mayor also occupies the status, *ex officio*, of a judge of a court. Section 3011 of the Code confers on mayors of towns the “powers and authority of a justice in civil and criminal matters within such town”. However, the recent Trial Justices Act deprives the mayor of this jurisdiction, with the exception that in clause seventh of Section 4988-g it is provided that a council of a town may by resolution, “continue in the mayor or other trial officer thereof all 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”. If, pursuant to resolution of the town council the mayor is vested with the powers above enumerated, it would seem that the effect would be to make him a judge of the mayor’s court and bring him within the prohibition of the Constitution. If there has been no such judicial power conferred on the mayor, I know of no provision of law which would render a member of the general assembly ineligible to hold the office.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PHARMACY—Operation of branch store which is not a pharmacy under name of “_____ Drug Corporation, Store No. 2”.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 23, 1935.

HONORABLE Y. MELVIN HODGES,
South Hill, Virginia.

MY DEAR MR. HODGES:

I am in receipt of your letter of August 22, in which you make the following inquiry:

"There is a corporation in South Hill which operates under the name of 'Pettus Drug Corporation', where a registered pharmacist is in charge, and in all respects conforms to the practice of pharmacy under our laws. This corporation proposes to open and operate a branch store, to be designated as 'Pettus Drug Corporation, Store No. 2', in which drugs as defined by the statute of Virginia, will not be sold, nor prescriptions filled, nor will a registered pharmacist be in charge thereof, and the question arises as to whether or not the use of this name, which has in it the word 'drug', at a place of business where drugs are not compounded, nor sold, would be a violation of section 1682 of the Code of Virginia."

The second paragraph of section 1682 of the Code reads as follows:

"It shall be unlawful for any place of business which is not a pharmacy as defined in this chapter to have upon it or in it as a sign the words 'pharmacy', 'pharmacists', 'drug store', 'druggist', 'prescriptions filled' or any like words indicating that drugs are compounded or sold or prescriptions filled therein. Each day during which, or a part of which, such sign is allowed to remain upon or in such place of business shall constitute a separate offense under this section."

It seems to me that it would be reasonable for the public to assume that drugs were compounded or sold, or prescriptions filled, in a store designated as "Pettus Drug Corporation, Store No. 2". This assumption on the part of the public would be further justified by the fact that another store in the same town, designated as "Pettus Drug Corporation", sells drugs and fills prescriptions.

I note that you are inclined to the contrary view, and regret to find myself unable to agree with you, but I do not see how, under the situation described in the next preceding paragraph, the public could fail to think that the second store was also operating as a pharmacy.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC DEPOSITORIES—Federal Deposit Insurance.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 18, 1936.*

HONORABLE A. W. BOHANNAN,

Treasurer.

Surry, Virginia.

DEAR MR. BOHANNAN:

Mr. L. McCarthy Downs, Auditor of Public Accounts, has referred to me your letter to him of January 16, and has asked me to reply to it.

You inquire whether or not county or State funds deposited in a bank by separate county or State officers are protected by the Federal deposit insurance laws to the extent of \$5,000 for each separate deposit, or whether the protection only extends to the funds and treats the several deposits of the various county or State officers as one.

I have a ruling from the counsel for the Federal Deposit Insurance Corporation to the effect that, in determining the extent of the protection offered, all county funds are considered as one deposit, and, likewise, all State funds, regardless of the officer who may deposit same. In other words, the total amount of protection extended to the combined deposits of the clerk, treasurer, attorney for the Commonwealth, and sheriff would be \$5,000 if the funds are county funds, and, likewise, \$5,000 if the funds are State funds. How-

ever, the maximum amount of protection extended to any one bank account is \$5,000, although part may be county funds and part State funds.

I am advised further, however, that each bank is considered as a separate entity, and the depositor is offered \$5,000 protection in each bank. The question which you would be interested in determining would be, not the total amount of county or State funds on deposit in all of the banks which are used as depositories, but whether or not the aggregate county or State deposits in any one bank exceed \$5,000.

If there is any further information you desire on this subject, I shall be glad to advise you.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC DEPOSITORIES—Securities pledged—Where deposited.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 10, 1936.*

MR. W. A. HOWLETT,
*Deputy Treasurer of Carroll County,
Hillsville, Virginia.*

DEAR MR. HOWLETT:

I am in receipt of your letter of March 7, in which you state that the Citizens Bank of Carroll has deposited with the Riggs National Bank of Washington as escrow agent \$30,000 of U. S. bonds to protect county and State funds deposited with the Citizens Bank of Carroll. You inquire whether or not these bonds should be placed with a bank doing business in this State.

The deposit of bonds to which you refer to secure State and county funds is made pursuant to the provisions of paragraphs (d) and (e) of section 350 of the Tax Code of Virginia. Paragraph (e) of this section reads in part as follows:

"All securities pledged by any depository to protect money deposited with it under the provisions of this section shall be deposited in escrow with *some bank or trust company in this Commonwealth*, other than the depository, * * * ."

You will observe from the italicized portion of the above quotation that the escrow agent must be some bank or trust company in this Commonwealth.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Alcoholic Beverage Control Board—Estimate submitted to Governor as limitation on expenditures; for what period estimate must provide.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 31, 1935.*

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

GENTLEMEN:

Replying to your request for an opinion upon the construction of the statutory provisions heretofore referred to with reference to quarterly esti-

mates of expenditures which will be required in the operation of the Alcoholic Beverage Control system, I beg to advise you as follows:

Section 10k of the Reorganization Act as amended by Acts of 1928, p. 346, provides as follows:

" * * * No appropriation to any department, institution or other agency of the State government, except the general assembly and the judiciary, shall become available for expenditure until the agency shall submit to the director of the division of the budget quarterly estimates of the amount required for each activity to be carried on, and such estimates shall have been approved by the governor."

You inquire whether the foregoing provision would limit the authority of the Alcoholic Beverage Control Board to expend a sum in excess of the approved estimate in the event same should become necessary in the operation of the State Control system.

The appropriation, under which the Board is operating, is found in the Alcoholic Beverage Control Act (Acts 1934, p. 109, sec. 17) which contains this provision:

" * * * All monies so paid into the State treasury, less the net profits determined as provided in section sixteen of this act shall be set aside as and constitute a special fund for the payment of the salaries and remuneration of the members, officers, agents and employees of the Board, and all costs and expenses incurred in establishing and maintaining government stores and in the administration of the provisions of this act, * * * and are hereby specifically appropriated for such purposes, * * * ."

It is obvious that the general purpose of the Alcoholic Beverage Control Act is to vest in the Board the authority to conduct the system in such manner as the Board deems advisable, and the act does not confer on the Governor any power to curtail or restrict its operations. If the Governor had the power to limit the expenditures of the Board, the necessary result would be that the Governor, in this way, could limit the number of stores established, the amount of stock purchased and any other activity of the Board. This was clearly not contemplated by the act, which places the entire responsibility for the operation of the system upon the Board. Such responsibility necessarily carries with it the authority required to discharge that responsibility. The operation of State Beverage Stores is generally considered by the courts not to be the exercise of an essentially governmental function, and is thus distinguished from the activities of all the other departments of the State Government.

It is my opinion, therefore, that the authority of the Board to expend its revenues is not limited or restricted to such an estimate of the amount required as the Governor may approve.

You also inquire whether, under the hereinabove quoted provisions, the law requires an annual estimate divided into quarters or whether a separate estimate may be made at the beginning of each quarter.

It is my opinion that the requirements of the act will be met by either an annual estimate, divided into quarters, or by separate quarterly estimates.

This letter has no reference to the estimate required under the provisions of section 2577-a of the Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Treasurer's power to disburse to State institutions funds granted by Federal PWA.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 18, 1935.*

HONORABLE A. B. GATHRIGHT,
Treasurer of Virginia,
Richmond, Virginia.

DEAR MR. GATHRIGHT:

I have before me your letter of October 14, in which you request my opinion as to whether or not the treasurer can be authorized by the Governor, under the provisions of the last paragraph of section 42 of the 1934 Appropriation Act, to disburse funds for the Virginia School for the Deaf and Blind at Staunton, when said funds are to be received from a grant from the Federal Public Works Administration.

Section 9 of chapter 49 of the Acts of the Special Session of 1933 provides that funds received from loans procured from the Federal government shall be kept in separate bank accounts, and shall not be deposited in the State treasury. It might be that this language would be broad enough to cover grants, although it is my opinion that this is not a necessary construction of the provisions.

I am of the opinion that the amount of any such grant received by the above school may be treated as a special fund, and may be paid out by the treasurer with the written consent and approval of the Governor, as provided in the Appropriation Act above referred to.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Compatibility of officers—Employee of WPA as member of school board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 25, 1936.*

HONORABLE JAMES ASHBY, *Clerk.*
Stafford Circuit Court,
Stafford, Virginia.

DEAR MR. ASHBY:

This is in reply to your letter of June 20, in which you request my opinion upon the eligibility of a person temporarily employed by the Rehabilitation Department of the Works Progress Administration of the United States to serve as a member of the school board.

Section 644(1) of the Code provides that no Federal officer, or his deputy, shall be chosen or allowed to act as a member of a county school board, but the section contains a provision that it does not apply to clerks and Federal employees in Washington.

Your letter does not state the capacity in which the lady appointed to the Stafford county school board is employed by the WPA, but it would seem probable that she would be regarded not as a Federal officer, or deputy of such officer, but merely as an employee or clerk, and that such employment would not render her ineligible to serve as a member of the county school board.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Compatibility of offices—Justice of the peace as registrar.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 5, 1936.*

MR. LEO P. BLAIR.
*Secretary Electoral Board,
Portsmouth, Virginia.*

MY DEAR MR. BLAIR:

I have your letter of June 2, in which you inquire if it is permissible for a justice of the peace to be appointed to the position of registrar, in view of section 86 of the Code of Virginia.

The section to which you refer provides that:

“Such registrar shall not hold any other office by election or appointment during his term except that of precinct judge of election.”

I am of opinion, therefore, that the same person may not be a justice of the peace and a registrar at the same time.

Yours very truly,
ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Official bonds—Where filed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 10, 1936.*

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

DEAR MR. COMBS:

I am in receipt of your letter of June 5, in which you call my attention to chapter 299 of the Acts of Assembly 1936, and then ask:

“Please advise this office whether or not in your opinion under provisions of this Act it is necessary that the departments, institutions, and agencies of the Commonwealth file in the Comptroller's Office in addition to bonds of all officers and employees the bonds covering Workmen's Compensation insurance and bonds covering liability insurance on State owned automobiles and other property.”

The pertinent portion of the Act reads as follows:

“The bonds of all officers and employees of all departments, institutions and agencies of the Commonwealth, except the Division of Accounts and Control, shall be filed in the office of the State Comptroller, and that the bonds of all such officers and employees in the Division of Accounts and Control shall be filed in the office of the Secretary of the Commonwealth; provided, however, that nothing in this act shall be construed to apply to notaries public, nor to commissioners of the revenue, attorneys for the Commonwealth, clerks of courts, and treasurers of the counties and cities, nor to other similar officers of a purely local character.”

It seems to me that the purpose of the Act is to require the centralization of the official bonds of the officers and employees described conditioned

upon the faithful performance of their duties, and that it was not the intention of the Act to include the other bonds mentioned in your inquiry, nor is the language of the Act broad enough to include these other bonds.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PURCHASE AND PRINTING—Bids—Discretion of director.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 19, 1935.

HON. CHARLES A. OSBORNE, *Director,*
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. OSBORNE:

I am in receipt of your letter of October 30, relative to the printing of the catalog of the Virginia Military Institute.

I observe that the annual contract for the printing of "Pamphlet Work" was awarded to certain printers after competitive bids had been called for. I further note that Colonel William Couper, Executive Officer of the Virginia Military Institute, has secured a bid from Michie Company, Charlottesville, for the printing of the catalog which is less than the bid of the printers to whom printing of the "Pamphlet Work" was awarded. You also state that the Michie Company was requested to bid at the same time that the annual contracts were awarded this year, but did not do so. You desire to know if the printing of the V. M. I. catalog should now be given to one of the original bidders, even though the price is slightly higher than the price at which the Michie Company will now print it.

I observe that in calling for bids under date of June 7, 1935, the following paragraph was included:

"The right is reserved to ask for special prices on pamphlet work for the Colleges and Universities, or where the peculiar character or large volume of any particular piece of work may make it to the best interests of the Commonwealth."

Section 382 of the Code also provides that the work may be let out upon annual contracts or for separate items as the best interest of the Commonwealth may require, in all cases reserving the right to reject any and all bids.

In view of the quoted portion of the letter calling for bids and the provision of section 382 to which I have referred, I am of the opinion that you may, in your discretion, have the Michie Company do this work, or allow the printer to do it to whom the contract for the printing of the "Pamphlet Work" was originally awarded.

In view of the way in which the original bids were called for and the law to which I have referred, I am of opinion that your discretion in this matter is very broad, the primary consideration being "the best interest of the Commonwealth".

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PURCHASE AND PRINTING—Convict-made goods required to be purchased by State agencies.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 12 1935.*

HONORABLE CHARLES A. OSBORNE, *Director,*
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. OSBORNE:

In your letter of the 11th instant, you request the opinion of this office as to whether or not departments, institutions and agencies of the State are required to purchase canned fruits and vegetables produced at the State Farm, and generally as to the duty of State institutions to purchase articles produced at the State Farm.

Section 2073a of the Code expressly includes, within the enumeration of convict-made goods required to be purchased by State agencies, "products of the penitentiary and State Farm".

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Bonds—Issuance of for erection of building.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 24, 1936.*

HONORABLE RALPH L. LINCOLN,
Attorney for the Commonwealth,
Marion, Virginia.

DEAR MR. LINCOLN:

You request my opinion upon the authority of the school board of Smyth county to issue district bonds for the purpose of erecting a school house in a school district in said county.

In my opinion, the authority to issue such bonds is found in section 673 of the Code of Virginia (Michie, 1930). Under the provisions of this section, a referendum election is mandatorily required to be held only in the district or districts in which a schoolhouse is to be erected, where the school board decides that such building shall be erected at the expense of such school district or districts.

While section 653 of the Code abolishes school districts except for the purpose of representation on the school board of the county, said section contains an exception in the case of a levy of a district tax to provide interest and sinking fund for a district bond issue as provided in section 673.

Under the provisions of section 698a of the Michie 1934 Supplement to said Code (Acts 1934, p. 753), as well as under a recent act of the General Assembly adopted at the 1936 Session, in the Rich Valley and Marion magisterial districts in Smyth county, which, under the provisions of section 653, constitute separate school districts, the board of supervisors is authorized to levy a district tax not in excess of fifty cents on the one hundred dollars of the assessed value of the property in such magisterial district or school district for capital expenditures and for the payment of existing district indebtedness.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—City school board—Power to erect school building outside corporate limits.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 14, 1936.*

DR. SIDNEY B. HALL,
*Superintendent of Public Instruction,
Richmond, Virginia.*

MY DEAR DOCTOR HALL:

I am in receipt of your letter of April 3, inquiring if the school board of a city may purchase a lot beyond the corporate limits of the city for the purpose of erecting school buildings thereon.

Section 778 of the Code reads in part as follows:

"The official care and authority of the school board shall cover all territory included in the corporate limits of the city or town constituting a separate school district, and also shall cover all school property located without and contiguous to the corporate limits of such city or town, when the title to said property is vested either in the school board of such city, as a body corporate, or in the city. * * *"

By section 777 of the Code, the school board of a city is made a separate body corporate, with power to purchase and convey school property both real and personal.

In my opinion, these sections certainly by clear implication give the school board of a city authority to purchase school property located "without and contiguous to the corporate limits of such city".

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Election of and placing and assigning positions to teachers—By whom.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 1, 1936.*

HONORABLE LEE STANLEY, *Clerk,*
Circuit Court of Dickenson County,
Clintwood, Virginia.

MY DEAR MR. STANLEY:

I am in receipt of your letter of May 29, in which you ask for a construction of section 660 of the Code, as amended in 1936, dealing with the election and placing of school teachers.

The pertinent provisions of the section are as follows:

" * * * The school board shall employ teachers and place them in appropriate schools on recommendation of the division superintendent, and shall dismiss teachers when delinquent, inefficient, or otherwise unworthy. The division superintendent shall have authority to assign to their respective positions all teachers and principals employed by the board, and reassign them, provided no change or reassignment shall affect the salary of such teachers; and, provided further, that he shall make appropriate reports and explanations on the request of the board. * * *"

Unquestionably, the final authority for the election of teachers is in the school board itself.

As to the placing or assigning of teachers elected, you will observe that the first of the above quoted sentence says that the board shall "place them" and the next sentence provides that the division superintendent "shall have authority to assign to their respective positions all teachers" and shall have authority to "reassign them".

In my opinion, the second sentence to which I have referred qualifies the authority of the board in placing teachers and in effect gives this authority to the division superintendent of schools. The authority given to the division superintendent to "reassign" teachers lends strength to this view, especially when we consider that the statute further provides that the division superintendent shall make appropriate reports and explanations as to assignments on the request of the board. I presume the theory of the statute is that the division superintendent of schools, being a technically trained officer, is better qualified to decide to what positions the teachers shall be assigned.

I am informed by the Superintendent of Public Instruction that the existing practice generally all over the State is in accordance with the views I have expressed, and it seems to me that the statute may be properly construed so as to support this practice.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Election of teachers—Authority of superintendent to recommend only one person.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 9, 1936.*

HONORABLE E. H. RICHMOND,
*Attorney for the Commonwealth,
Gate City, Virginia.*

MY DEAR MR. RICHMOND:

I am in receipt of your letter of March 7, in which you call my attention to section 660 of the Code relating to the employment of teachers by the school board upon the recommendation of the division superintendent of schools. You ask if the division superintendent may "arbitrarily recommend only one to the school board", referring to a teacher for a particular school.

I am of opinion that the division superintendent does not have to recommend more than one; however, the board does not have to adopt the recommendation of the division superintendent unless it chooses so to do. This would mean that, if the board did not employ the teacher recommended for a place by the division superintendent, then that officer would necessarily have to make another recommendation.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Buildings—Use of for other than school purposes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 27, 1936.*

MR. H. M. PAINTER, *Superintendent,
Botetourt County Public Schools,
Fincastle, Virginia.*

MY DEAR MR. PAINTER:

I am in receipt of your letter of February 26, in which you ask to be ad-

vised "regarding the legality involved in the use of school buildings for political meetings".

It seems to me that section 716 of the Code specifically answers your question. This section reads as follows:

"The school board or any member thereof or the division superintendent subject to the approval of the board, may provide for, or permit, the use of schoolhouses out of school hours during the school term, or in vacation, for any legal assembly, or may permit the same to be used as voting places in any primary, regular or special election. The board shall adopt rules and regulations necessary to protect school property when used for such purposes."

I am of opinion that a political meeting is a legal assembly, and that a school building may be used for this purpose, if permission therefor has been obtained, under the provisions of section 716.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Insurance of school buildings—Discretion of board as to.

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

HONORABLE JOHN MARTIN,
Attorney-at-law,
Halifax, Virginia.

DEAR MR. MARTIN:

This is in reply to your letter of August 27, in which you request my opinion upon two questions therein set out.

Your first question is whether or not it is proper for the school board to have buildings under its care insured against fire in a Mutual Company.

I am enclosing herewith a copy of an opinion prepared by me some time ago upon this question.

Your second question is as follows:

"Would it be proper for the Board to insure against fire the larger and most valuable buildings but take out no insurance on the smaller buildings scattered about the County, that is, carry its own insurance on these smaller buildings by setting up a reserve each year to take care of any loss that may be occasioned them by fire?"

After an examination of the statutes and various authorities, I am unable to find that there is any obligation upon the school board to insure school buildings against fire. Certainly there is no express statutory obligation and the general law seems to be that the matter rests in the sound discretion of the school board. See *Clark School Township v. Home Insurance, etc., Company*, 51 N. E. 107, and *Dalzell v. Bourbon County Board of Education*, 235 S. W. 360.

Since the matter seems to rest in the discretion of the board, I am further of opinion that the board might exercise this same discretion in determining the amount of insurance, if any, which it desires to contract for with respect to the various school buildings under its control.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Mandatory nature of requirements as to specifications of buildings.

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

DR. SIDNEY B. HALL,
*Superintendent of Public Instruction,
Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of November 26.

You inquire whether you or the State Board of Education has the authority to waive the requirement contained in section 671 of the Code that all ceilings in school buildings "shall be at least twelve feet in height".

Section 609 of the Code provides that the State Board of Education may make all needful rules and regulations not inconsistent with law for the management and conduct of the schools.

Section 671 provides among other things that plans for the erection of any school building shall be approved by the State Superintendent. This section also contains various requirements in connection with school buildings, among others being that "all ceilings shall be at least twelve feet in height".

In view of the statutes to which I have referred, I can find no authority for you or the State Board of Education to waive the mandatory provision as to the height of ceilings in a new school building, the plans and specifications of which have been submitted to you for approval.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Power of Board of Supervisors to erect building with county funds.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *May 27, 1936.*

HONORABLE JOE W. PARSONS, *Clerk of the Court,
Independence, Virginia.*

DEAR MR. PARSONS:

I am in receipt of your letter of May 18, in which you ask if the Board of Supervisors of Grayson county have authority to use county funds for the erection of a new school building inside the town of Galax, the building to be used by children not only from the town of Galax, but from the Oldtown School District, in which district the town of Galax is geographically located.

Unquestionably I think, under the authority of section 698-a of the Code, the Board of Supervisors may make an appropriation from county funds available for this purpose.

You also inquire as to whether the board may levy in Oldtown District to assist in the erection of a new school building in the town of Galax.

Before answering this latter question, I shall be glad if you will advise me whether the proposed levy is to be used to pay the interest and create a sinking fund in connection with a bond issue. I refer you to section 673 of the Code which may answer your question, but, if you desire any further information from this office. I shall be glad if you will write me.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Increasing district levies in counties—Hearing.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 4, 1936.*

HON. A. D. LATANE, *Clerk,*
Circuit Court of Essex County,
Tappahannock, Virginia.

MY DEAR MR. LATANE:

I have your letter of March 3, which for purposes of reply I quote in full:

"I am requested by the board of supervisors of Essex county to ask that you give them a ruling in the matter of voting to increase a district levy for school purposes.

"1. Does a person who pays no school tax, but simply a head tax, have a right to vote for or against an increase of the levy?

"2. Should the board be governed in its decision by a majority vote, or be governed by the taxable values represented in the vote?

"This, of course, does not refer to any election, but simply a public hearing under the law giving due notice of the proposed increase."

I presume you refer to the hearing provided for in section 2577m(4) of the Code before any local tax levy is increased by the board of supervisors. If my assumption is correct, I call your attention to the fact that this section simply provides that the citizens of the locality interested shall be given an opportunity to be heard by the board, in order that the board may have the benefit of their views and in making its decision give such weight to these views as in its discretion may appear proper. The section does not contemplate that the interested citizens shall be allowed to vote in the matter at all.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Trustee Electoral Boards—Qualifications of members—Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 27, 1936.*

HONORABLE W. H. OVERBEY,
Trial Justice,
Rustburg, Virginia.

DEAR MR. OVERBEY:

I am in receipt of your letter of February 21, from which I quote as follows:

"Section 653 of the Code of Virginia, as amended by the Acts of 1932, require that the School Trustee Electoral Board shall be composed of three *resident* qualified voters. One of the members of the Electoral Board is a qualified voter in Campbell County, owns a house in Campbell County and up until recently has lived in said house. This winter he moved into the city of Lynchburg because of the cold weather and has been there several months and expects to stay until spring. As stated, he still pays his poll tax in Campbell County and considers Campbell County as his legal residence.

"Under this state of facts, would he be disqualified to serve on the Electoral Board?"

From the facts stated by you, it seems to me to be plain that the gentleman you have in mind has not abandoned his legal residence in Amherst county and, therefore, he is not disqualified to serve on the school trustee electoral board.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Trustee electoral board—Clerk of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 18, 1936.*

MR. W. D. COX,
*Division Superintendent of Schools,
Amherst, Virginia.*

MY DEAR MR. COX:

I am in receipt of your letter of March 16, in which you ask the following questions:

"Please inform me as to who is legally required to act as clerk of the school trustee electoral board under the present law, or, if under the present law this matter is not specifically mentioned, whether the school trustee electoral board may elect one of the members as clerk or some person who is not a member of the board as clerk. In particular, is it legal for the division superintendent of schools to act as clerk of the school trustee electoral board?"

The school trustee electoral board is provided for by section 653 of the Code. There is no provision in this section for a clerk of this board, I presume for the reason that the Legislature did not consider a clerk necessary, inasmuch as the board meets very infrequently for the single purpose of electing the county school board.

I know of no reason why the board could not designate one of its members to act as clerk, or some other person not a member of the board, nor do I know of any reason why it would be illegal for the board to designate the division superintendent of schools to act as its clerk. However, no compensation is provided by the statute for the person acting as clerk.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Compensation of members.

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

MR. J. J. FRAY,
*Division Superintendent of Schools,
Rustburg, Virginia.*

MY DEAR MR. FRAY:

I have your letter of July 19, in which you state:

"I am enclosing for the sake of explanation a clipping from the Lynchburg News of July 18, 1935. Will you please interpret for me section 653 of the Code of Virginia, which reads as follows:

"The county school board may in its discretion provide a per diem not exceeding five dollars per day for each member for each day he is in attendance upon meetings of the board, not to exceed twenty days in any one year, such per diem to be paid as other school expenses are paid."

"The representatives of the auditor's office who have audited our accounts have each year refused to say to how much compensation a school board member is entitled. We have interpreted the law to mean that a trustee cannot receive more than one hundred dollars annually, but that he is entitled to one hundred dollars provided he gives his services to the school board for a full year. No compensation for travel nor for work done by the members of the board on days on which they are not in session is allowed in this county."

Inasmuch as section 653 of the Code provides that the county school board may allow compensation not exceeding five dollars per day for each day the member is in attendance upon meetings of the board, I am of opinion that each member is only entitled to compensation for each day's attendance. In other words, if the member is only in attendance upon meetings of the board for fifteen days during the year, the maximum compensation which may be paid him is \$75.00. The provisions of the statute seem to be plain.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS BOARDS—Compensation of members—Allowance of mileage.

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

MR. W. E. GARBER,
*Division Superintendent of Schools,
King William, Virginia.*

MY DEAR MR. GARBER:

I have your letter of November 22, in which you state:

"The King William county school board would like very much to have your office interpret section 644(i) of the Code of Virginia dealing with compensation of board members.

"The county school board interprets this section to mean that, if the members of the board hold twelve or more meetings, not to exceed twenty, they are entitled to \$100 per year for their services. They would like to know wherein their interpretation is wrong."

Section 644i of the Code provides as follows:

"The county school board may in its discretion provide for a per diem not exceeding five dollars per day for each member for each day he is in attendance upon meetings of the board, not to exceed twenty (20) days in any one year."

I am of opinion that the proper construction of this section is that a member of the school board may be allowed a per diem of \$5 for each day he is in attendance upon meetings of the board, and that he is not to be allowed the per diem for twenty days unless he is actually in attendance upon meetings of the board for that number of days. In other words, I do not think it would be proper to allow a compensation of \$100 when a member is only in attendance upon meetings for fifteen days.

Answering your second question, I know of no provision for the allowance of mileage travelled by members of the school board in attendance upon meetings of the board.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Mileage to members for attending meetings.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 16, 1935.

HONORABLE R. C. HAYDON, *Division Superintendent,*
The County School Board of Prince William County,
Manassas, Virginia.

DEAR MR. HAYDON:

Acknowledgment is made of your letter of November 7, in which you request the opinion of this office as to the propriety of allowing to school board members mileage fees to cover their expenses in traveling to and from board meetings.

The only statutory provision for remuneration of school board members seems to be that set forth in Virginia Code (Michie, 1930), section 653, as amended. This section, so far as germane here, provides that "The county school board may in its discretion provide for a per diem not exceeding five dollars per day for each member for each day he is in attendance upon meetings of the board, not to exceed twenty days in any one year, such per diem to be paid as other school expenses are paid".

It is the opinion of this office, therefore, that a separate allowance for mileage in such cases is not authorized by law.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Prohibition against members having pecuniary interest in contracts.

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

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

DEAR MR. DOWNS:

I have your letter of October 3, in which you ask whether or not the chairman of a county school board may be appointed inspector of buildings at a salary to be paid out of the school funds of the county.

Your attention is called to section 708 of the Code, which provides that it is unlawful for any member of a school board to have pecuniary interest in any contract for building a public school house "except by permission of the State Board of Education evidenced by resolution spread on the minutes of said Board".

I doubt if the employment mentioned by you comes within the letter of the inhibition to which I have referred, but I should certainly say that it would be wise to secure the permission of the State Board of Education for

the employment mentioned. I cannot say, however, as a matter of law, that this employment is prohibited by statute.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Power of county school boards to charge for transportation in school buses.

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

DR. SIDNEY B. HALL,
*Superintendent of Public Instruction,
State Office Building,
Richmond, Virginia.*

MY DEAR DR. HALL:

I have your letter of August 28, which for purposes of reply I quote in full:

"There are several counties in the State which insist upon charging a fee to the parents of children who are transported by bus to school. I have, from time to time, taken the position that the local school board should not charge transportation fees to parents who are sending their children to the public free schools of the State.

"The law specifically says that the local authorities may consolidate schools and furnish transportation, or else provide schools within reach of the children so long as a certain attendance is maintained. In most instances throughout the State where school boards have consolidated schools, they furnish transportation free.

"I would appreciate it very much if you would examine the school laws of Virginia and give me your interpretation of the law with reference to the charging of transportation fees. I know that the State Board and I feel that it is illegal for this to be done; nevertheless, your ruling would be greatly appreciated at this time."

The authority of the school board to provide transportation for pupils is found in section 656 of the Code, as amended in 1932 (Acts 1932, p. 548). This section provides in part as follows:

"The school board shall have authority * * * to provide for the consolidation of schools and for the transportation of pupils whenever such procedure will contribute to the efficiency of the school system."

The section also states that the school board has authority "to provide" for erecting, furnishing and equipping the necessary school buildings, and "to provide" such school text books as may be necessary for indigent children.

It seems clear from a reading of the whole section that the word "provide" is used in the sense of furnishing, free of costs, to pupils or parents.

I am, therefore, of opinion that, where the authority is given to provide transportation for children, free transportation is meant and not transportation for which a charge is made. This view is strengthened by the thought that, if the board had authority to charge for transportation, it might be argued that it could charge such sums as would yield a profit, thus engaging in the transportation business. Obviously, the statute did not intend this.

Yours very truly,

ABRAM P. STAPLES,
Attorney General

SCHOOL BOARDS—Residence of members.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 23, 1935.

MR. E. E. GIVENS,
*Superintendent of Schools,
Martinsville, Virginia.*

MY DEAR MR. GIVENS:

I have your letter of August 20, in which you ask for an opinion in the following situation:

"A member of our school board is moving into his new home just outside of the corporate limits of Martinsville. He will continue to own property in the city and will continue to vote inside the city, and his children will continue to attend the city schools.

"Will it be legal for him to continue to act as a member of our school board? This man is a splendid board member and I hate to lose him. I feel that he will continue to serve if he can do so legally."

The first sentence of section 786 of the Code reads as follows:

"Every school trustee shall, at the time of his appointment, be a resident of the school district for which appointed, and if he shall cease to be a resident thereof, his office shall be deemed vacant."

In view of this plain provision, if a member of your school board has abandoned his residence in Martinsville, I am of opinion that his office is vacant.

The question of whether or not this member has abandoned his residence in Martinsville is more one of fact than of law. If he is temporarily residing out of the city, with the intention of retaining his domicile in the city and eventually returning there, then he is still a resident of Martinsville. If, however, he has permanently established his residence outside of the city, then he is no longer a resident thereof. The question of domicile is one so largely controlled by the intention of the person that it is extremely difficult to express an opinion on any particular case without knowing all of the facts.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Right to budget funds appropriated by City Council.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 18, 1935.

MR. F. F. MUSGROVE, *Clerk.*
*Buena Vista School Board,
Buena Vista, Virginia.*

MY DEAR MR. MUSGROVE:

I have your letter of October 24, in which you raise the following question:

"We operate our schools on a direct appropriation by the City Council, not by a certain tax levy as is the case in some cities. The School

Board has always budgeted the salaries and other school expense as outlined on the ANNUAL BUDGET FORM furnished by the State Board of Education. The question has arisen as to whether the City Council has a right to divide the appropriation, allowing a definite amount for the principal's salary, another amount for teachers' salaries, still another amount for fuel, other school expense, etc."

The cash appropriation may be made in lieu of the regular school levy provided by law. See section 698a of the Code, as amended in 1934.

However, in view of the provisions of section 136 of the Constitution, I am of opinion that the local school authorities have exclusive control over the apportionment and expenditure of the sum so appropriated. See *School Board v. Shockley*, 160 Va. 405, 413, 414.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Sale of real estate—Necessity for confirmation.

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

DR. SIDNEY B. HALL,
Superintendent Public Instruction.
Richmond, Virginia.

MY DEAR DR. HALL:

I am in receipt of your letter of December 10, enclosing one from Mr. C. K. Holsinger, Division Superintendent of Schools of Greenville County, in which he states that the Greenville county school board proposes to convey some real estate on which will be erected an armory, the consideration being less than \$500. He desires to know whether the sale has to be confirmed by the court.

Section 678 of the Code provides that school boards shall have the same power to sell, exchange and convey real estate that boards of supervisors have under section 2723. This latter section stipulates that sales of real estate made by boards of supervisors shall be approved by the circuit court of the county. However, section 678 gives school boards authority to sell property not exceeding \$500 in value, after advertising for not exceeding ten days or by appropriate hand bills posted at certain designated places in the county.

I am of opinion that the intent of the statute is to authorize school boards to sell property not exceeding \$500 in value, after giving the notice provided for, without the necessity of the sale being confirmed by the court. In other words, where the property exceeds \$500 in value, the procedure outlined in section 2723 controls, but, where it is less than \$500 in value, the procedure is governed by section 678.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Temporary loans.

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

DR. SIDNEY B. HALL,
*Superintendent Public Instruction,
Richmond, Virginia.*

DEAR DOCTOR HALL:

I have before me your letter of October 4, requesting my opinion upon the question whether, under the provisions of section 675 of the Code of Virginia, a school board may during any one year make a number of temporary loans, provided the total amount of same are not in excess of one-half of the amount produced by the school levy for the year in which the loan is negotiated, or one-half of the amount of the cash appropriation made for schools for the preceding year.

It is my opinion that the purpose and intent of this section is to authorize temporary loans provided the total amount does not exceed the above limitation, and that the language, "No additional temporary loan shall be made until all prior temporary loans shall have been paid", has reference to loans in a succeeding year, and forbids a temporary loan for one year until all temporary loans of the preceding year have been paid.

As there may be some possible doubt, however, about this construction of this language, I would suggest the amount of each new temporary loan be sufficient to discharge all prior temporary loans, and that the proceeds be used to pay same.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Temporary loans—Prohibition against new loans when old loans not paid in full.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 31, 1935.*

HONORABLE L. K. LEAKE,
*Treasurer of Goochland County,
East Leake, Virginia.*

MY DEAR MR. LEAKE:

I am in receipt of your letter of July 30, in which you state:

"The school board of this county has at the present time a loan due to the Bank of Goochland amounting to \$11,415.57, for money borrowed. The school board now proposes to purchase three school buses for about three thousand dollars total, giving in payment therefor three notes payable in ten equal monthly payments, the interest being added in the principal of each note.

"As the law does not permit the school board to make any loan until any previous loans shall have been paid in full, I will appreciate your opinion."

Section 675 of the Code authorizes school boards to make temporary loans not to exceed one-half of the amount produced by the county school levy or one-half of the amount of the cash appropriation made for schools, such loans to be repaid within one year and to be approved by the tax levying body.

If the temporary loans to which you refer as being due the Bank of Goochland is not equal to one-half of the county school levy or the cash appropriation made for schools, I am of opinion that an additional loan may be made provided the total of the two loans does not exceed the amount of loans authorized to be made by the statute.

The statute is not as clear as it might be, but I think the above is a reasonable construction to place thereon. Otherwise, the school board, with a borrowing capacity of say \$50,000, might make one loan of \$1,000 and thus be prevented from making any other loan during the year, however great the necessity thereof may be.

I am advised by the Superintendent of Public Instruction that this is the construction placed upon the statute by his office, and he also advises me that it is the construction adopted by my predecessor.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Arrests for offenses committed outside bailiwick; admitting to bail prisoners arrested under fugitive warrant.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 4, 1936.

MR. T. WILSON SEAY,
Sheriff of Henrico County,
Richmond, Virginia.

MY DEAR MR. SEAY:

I refer to our telephone conversation in which you asked me whether you, as sheriff of Henrico county, could make an arrest in your county in a misdemeanor case under an original warrant addressed to the sheriff of another county, where the person named in the warrant had come to your county.

I am of opinion that you have no such authority. Certainly none is given to you by any statute that I can find, and the weight of authority is to the contrary. See Clark's Criminal Procedure, section 8, page 38.

I am of opinion that the way in which you can make this arrest is on what is known as a "fugitive warrant", as prescribed in section 4825 of the Code.

You also ask me, if the arrest has been made by you, could the person named in the warrant be admitted to bail by a justice in Henrico county.

This last question is controlled by section 3847 of the Code, which prescribes how a person arrested under these circumstances may be admitted to bail by a justice in the county in which he was arrested. The section generally provides that such a person may be admitted to bail in the county in which he was arrested for his appearance before the court or justice having cognizance of the case.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Duty to attend trial justice court.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 6, 1936.

MR. CHARLES C. CURTIS,
*Sheriff of Elizabeth City County,
Hampton, Virginia.*

MY DEAR MR. CURTIS:

I am in receipt of your letter of May 4, in which you inquire whether there is any provision of law that requires your attendance as a court officer or bailiff at the sessions of the trial justice court of Elizabeth City county.

I have carefully examined the Trial Justice Act and can find no provision therein or in any other statute which would require your attendance upon the trial justice court in the capacity mentioned by you.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SLOT MACHINES—Forfeitures; destruction.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 20, 1936.

HONORABLE W. HILL BROWN, *Judge,*
Trial Justice Court,
Manassas, Virginia.

DEAR JUDGE BROWN:

I have your letter of March 17, in which you inquire whether or not it is your duty to order the destruction of certain slot machines seized by the sheriff of Prince William county in connection with cases where the operators of the machines have been found guilty of violation of section 4685 of the Code.

In my opinion, the answer to this question is dependent upon whether or not these machines were seized pursuant to search warrants issued and executed in accordance with the provisions of sections 4820-4822f of the Code. If they were so seized, then it is my opinion that, under the provisions of section 4822, their destruction is mandatory.

It is further my opinion that the money contained in said machines would be subject to forfeiture, and should be turned over to the State to be credited to the Literary Fund, as provided in section 134 of the Constitution.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SOCIAL SECURITY ACT—State law—Constitutionality of under State Constitution.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 31, 1936.

SENATOR JOHN S. BATTLE,
Senate Chamber,
Richmond, Virginia.

DEAR SENATOR BATTLE:

This is in response to your request for my opinion upon whether or

not Senate Bill No. 30, which provides for a tax upon employers to provide compensation for the unemployed, is in violation of sections 186 and 188 of the Constitution of Virginia.

Section 186 of the Constitution provides as follows:

“ * * * no such appropriation shall be made which is payable more than two years and six months after the end of the session of the General Assembly, at which the law is enacted authorizing the same; * * * .”

Sections 3 and 4 of the Bill provide for the payment and collection of taxes imposed upon employers, based upon the percentages of the total wages paid by such employers. The third clause of section 3 designates the rate of taxation during the calendar year 1938, and each succeeding calendar year thereafter.

Section 5 of the Bill appropriates the moneys received from such taxation, and directs its payment to the Secretary of the Treasury of the United States to the credit of the unemployment trust fund, to be held in trust for the State upon the terms and conditions provided in the Federal Social Security Act.

It is my opinion that the provisions for the appropriation made in section 5 must be construed as confined to the period of two years and six months following the end of the 1936 session of the General Assembly, and, therefore, that this provision should not be held to be in violation of the Constitution. Subsequently, appropriations of the funds derived from this taxation must be dealt with by succeeding sessions of the General Assembly.

I am further of opinion that the fact that this Bill does not, and cannot, appropriate the proceeds from the tax imposed after the expiration of the two-year and six months period does not affect the validity of the tax itself. If it were necessary to the validity of the tax that the proceeds therefrom should be appropriated in the future through the entire duration of the tax, practically all of the tax laws of the State would be invalid, as no attempt is ever made to appropriate the proceeds therefrom for a greater period than two years and six months.

I am of opinion, therefore, that the Bill does not violate the provisions of section 186 of the Constitution.

The next section concerning which your inquiry is made is section 188, which provides as follows:

“No other or greater amount of tax or revenue shall, at any time, be levied than may be required for the necessary expenses of the government or to pay the indebtedness of the State.”

Whether the Bill in question violates this section is dependent upon whether or not the purpose of the Bill, which is to provide compensation for the unemployed, is a legitimate governmental purpose so that the expenses of providing such compensation would be deemed a necessary expense of the government.

It is my opinion that the purpose of the Bill should be deemed to be a proper exercise of the police powers of the State, and that such purpose is within the same category as State hospitals for the insane, State Tuberculosis Hospitals, and other similar institutions. The object of the Bill is to promote the general welfare and prosperity of the people of Virginia, and in my opinion, is within the police power of the State. Similar government activities are found in the Department of Agriculture and in the Department of Labor, as well as the Department of Education, including institutions of higher learning.

In the case of *Shenandoah Lime Company v. Governor*, 115 Va. 865, it was held that an act of the General Assembly, providing for the acquisition and operation of lime grinding plants for the promotion of agriculture, had for its object a governmental purpose and was placed within the police power of the State, and that the appropriation of public funds for such purpose were not in violation of section 188 of the State Constitution.

It follows from the foregoing that it is my opinion that neither of the two sections above mentioned are contravened by the provisions of Senate Bill No. 30.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE COMMISSION ON CONSERVATION AND DEVELOPMENT—Power to convey pole line easement over parkway.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 28, 1935.*

HONORABLE R. E. BURSON, *Director,*
Division of Parks,

State Commission on Conservation and Development,
Richmond, Virginia.

DEAR MR. BURSON:

This is in reply to your request for an opinion upon the question of the authority of the State Commission on Conservation and Development to grant to a power company, or to a telephone company, an easement over the park lands held by the Commission in trust for the Commonwealth of Virginia.

This office had occasion some several months ago to investigate the question of the authority of a commission or State institution to convey property of the State, and the opinion was then expressed that, in the absence of express legislative authority, no State institution or commission may grant or convey any property of the State. I am of opinion that the same principle would apply to the granting of an easement of the kind to which you refer. While Section 585(34) provides that the commissioners shall constitute a body corporate and, as such, have power to convey real and personal property, there is no general power conferred to convey same except when authorized by the general assembly.

Since I can find no express authority in the statutes or acts authorizing a conveyance of this character, it is my opinion that the Commission does not possess the authority.

I am returning herewith the file which you left with me on the subject.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

STATE COMMISSION ON CONSERVATION AND DEVELOPMENT—Power to enter agreement with Federal agency for certain purposes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 24, 1936.*

HONORABLE F. C. PEDERSON,
State Forester,
University, Virginia.

DEAR MR. PEDERSON:

This is in response to your request for an opinion from this office as to whether section 526 of the Code, as amended by Acts of 1936, page 39, confers upon the State Commission on Conservation and Development ade-

quate authority to cooperate with the United States under the act of Congress, known as the Fulmer Act.

The Fulmer Act requires that a state, desiring to cooperate with the United States under its provisions, enter into a cooperative agreement, and prescribes certain requirements which must be contained in that agreement. Subject to the qualification hereinafter mentioned, I am of opinion that the recent Virginia legislation confers ample authority upon the State Commission on Conservation and Development to enter into a cooperative agreement of the type prescribed by the Fulmer Act. The qualification I refer to, however, relates to the lack of authority of the State Commission to obligate the State for expenditure of monies. The last paragraph of section 526, as amended, is as follows:

"In exercising the powers conferred by this section, the commission shall not obligate the State for any expenditure in excess of any funds either donated or appropriated to the commission for such purpose; one-fourth of the gross proceeds derived from any lands so acquired by the State conservation and development commission is hereby appropriated and shall be paid annually by the commission to the counties in which such lands are respectively located, and shall become a part of the general funds of such counties."

In view of the foregoing provisions, I am of opinion that any contract which the Commission should enter into with the United States under the Fulmer Act should contain an express provision that no obligation is thereby imposed upon the Commission or upon the State to expend any monies in excess of any funds either donated or appropriated to the Commission for the purposes embraced in the cooperative agreement.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE FARM—Commitment of persons convicted under section 1554h.

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

CAPTAIN R. R. PENN,
*Superintendent State Farm,
State Farm, Virginia.*

DEAR CAPTAIN PENNN:

I am in receipt of your letter of October 22, accompanied by your file covering the correspondence between you and Honorable John W. B. Deeds, Trial Justice, Pulaski, Virginia, in reference to the committal, by Judge Deeds, of Chester Dalton to the State Farm by virtue of his order of September 26, 1935.

While the warrant upon which Chester Dalton was arrested is not included in your file, Judge Deeds' order, committing Dalton to you for confinement, recites:

" * * * Chester Dalton has this day been convicted of exposing and communicating to others a contagious and infectious venereal disease, dangerous to the public health and is so demeaning and conducting himself as to be liable to infect others, and his punishment has been fixed at sixty days in jail * * * ."

In your letter of October 18 to Judge Deeds, you state that it is your interpretation of section 1554 (1554h) of the Code that, before a person may

be confined in a penal institution, it is necessary that he be convicted of some other misdemeanor offense than that contained in that section.

According to Judge Deeds' letter of October 21, he questions your interpretation of section 1554 (1554h), while, in his letter of October 3, he writes you that Dalton was convicted of a violation of section 1554 (1554h) of the Code and his punishment fixed at sixty days in jail.

I have examined the original Act covering section 1554 (1554h) of Michie's Code, which is contained in chapter 364, Acts 1920, page 548, and find that paragraph 7, page 550, makes it a misdemeanor for a person "to knowingly perform an act which exposes another person to infection with venereal disease".

Therefore, it is my opinion that Dalton, having been convicted of a misdemeanor, was properly and legally committed to the State Farm to serve the term of imprisonment imposed by Judge Deeds, and that it was not necessary, in order for Judge Deeds to commit him to the State Farm, for Dalton to have been convicted of some other misdemeanor previous to this conviction.

In my opinion, you should receive the prisoner Dalton. If in the future the State Farm is overtaxed by the committal of persons convicted of the same offense of which Dalton was convicted, the State Farm may be protected under the provisions of section 5054 of the Code by having the authorities mentioned in that section limit the number of persons it is authorized to receive.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

STREAMS—Tidal—Pollution of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.

RICHMOND, VA., April 24, 1936.

HONORABLE W. A. COX, *Director of the Port,*
State Port Authority of Virginia,
Law Building,
Norfolk, Virginia.

Re: File C-5147.

DEAR MR. COX:

I have your letter of April 18, requesting this office to refer you to any State laws governing the pollution of tidal streams.

The only statutory provision as to the pollution of such waters seems to be that contained in Virginia Code (Michie, 1930), section 3290, prohibiting the pollution of Lynnhaven River.

I might add that our statutes providing for the assignment of private oyster beds, conferring on the grantee the exclusive right to take oysters from the same, have been uniformly construed not to impose any restrictions upon the common right of others to use the waters in question for the disposition of waste, sewage, etc. *Darling vs. Newport News*, 123 Va. 14, 96 S. E. 607, aff'd 249 U. S. 540; *Hampton vs. Watson*, 119 Va. 95, 89 S. E. 81.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SUMMONS AND PROCESS—Misdemeanor cases—Power of Trial Justice to proceed by way of summons; fees and costs—Mileage—Officer transporting prisoner.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 22, 1936.*

MR. HAMILTON HAAS,
Trial Justice,
Harrisonburg, Virginia.

MY DEAR MR. HAAS:

I am in receipt of your letter of June 10.

I am in considerable doubt as to your authority to proceed by way of summons in misdemeanor cases. I do not believe that section 3508 of the Code can be said to give you this authority. Please refer to sections 4881 to 4892 of the Code, which provide for the issuance of summonses in misdemeanor cases by the courts. It seems to me, however, that these sections clearly apply only to courts of record.

I note your last question, which relates to the mileage to be allowed an officer when carrying a prisoner to jail.

As I stated in my letter of May 27, this office has heretofore ruled that the officer making the arrest and transporting the prisoner under a warrant issued by the trial justice is entitled to the allowance for mileage provided in section 3508 of the Code. In other words, the officer is entitled to mileage for himself for the entire number of miles traveled in going and returning.

As to the mileage allowed the officer for carrying the prisoner, the section says that the officer is entitled to mileage "for each mile traveled of the prisoner in carrying him to jail, where the distance is over ten miles * * *". It seems to me that a reasonable construction to put on this language is that, if the distance is eleven miles, as you suggest, that is, over ten miles, the officer is entitled to mileage of the prisoner for the total distance of eleven miles. You will observe that the statute does not say for each mile in excess of ten, but "for each mile traveled * * * where the distance is over ten miles". It seems to me clear that the construction I place upon this statute is required by the language of the statute itself.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SUNDAYS—Marriage—Validity of license issued and ceremony performed on Sunday.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 6, 1936.*

DR. W. A. PLECKER,
State Registrar,
Bureau of Vital Statistics,
Richmond, Virginia.

DEAR DR. PLECKER:

I have your letter of February 4, in which you request the opinion of this office "as to whether it is illegal for a marriage to be performed on Sunday, and, if not, whether the certificate should be signed by the minister as of the day following"; also "as to whether the issuing of licenses by clerks on Sunday is legal", and, if so, whether such licenses should be dated as of Sunday.

I know of no principle of law, and am unable to find any statute, under

which the considerations indicated would affect the validity of a marriage. It is, therefore, the opinion of this office that, at least so far as concerns the validity of the marriage in question, a license may legally be issued and ceremonies validly performed on Sunday, and the date of both license and certificate are immaterial.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Exemption of Federal Resettlement Administration from recordation tax.

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

HONORABLE WALKER C. COTTRELL, *Clerk,*
Circuit Court City of Richmond,
Richmond, Virginia.

DEAR MR. COTTRELL:

I am in receipt of your letter of December 12, in which you ask whether deeds of trust or mortgages taken by the Federal Resettlement Administration to secure loans made by it on behalf of the United States are subject to the State recordation tax prescribed by section 121 of the Tax Code of Virginia.

From the facts stated in your letter and the enclosures contained therein, the Resettlement Administration is a direct agency of the United States Government and created by an executive order of the President of the United States. The money is loaned for the purpose of financing in whole or in part the purchase of farm lands and necessary equipment by farmers, farm tenants, croppers, or farm laborers, from funds made available by a direct appropriation of Congress. The Resettlement Administration is not a corporation, and it appears that the loans are not made for the purpose of deriving a profit, but solely as a relief measure, for the only persons eligible to receive them are those who are without other means of securing credit.

Under our law, the tax in this case is to be paid by the person offering the deed of trust or mortgage for recordation, and, as the Resettlement Administration would offer such deeds of trust and mortgages for recordation, I am of opinion that the effect of the imposition of such a tax would be to tax the United States; this a State may not do where the government is engaged in a purely governmental function, and I am, therefore, of opinion that the tax should not be assessed.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Exemption of HOLC from writ tax.

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

HONORABLE WILMER L. O'FLAHERTY, *State Counsel,*
Home Owners' Loan Corporation,
Richmond Trust Building,
Richmond, Virginia.

MY DEAR MR. O'FLAHERTY:

I have your letter of December 14, in which you inquire whether the State writ tax should be paid to the clerk of the State court "in a case

where the Home Owners' Loan Corporation is suing a citizen of this State for a deficiency judgment in connection with a loan made by the borrower and the property has been sold and there is a deficit".

As you state, this office has heretofore ruled that a Federal Land Bank is not subject to this writ tax.

I have examined the statute prescribing what taxes may be assessed against the Home Owners' Loan Corporation (section 1463, sub-section (c), title 12, of the U. S. Code, Annotated) and find that it is substantially similar to the corresponding statute dealing with the taxation of Federal land banks.

I am, therefore, of opinion that in such a case as you present the Home Owners' Loan Corporation is not subject to the writ tax.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Exemption of State Hospital from documentary stamp and recordation tax—Fees of clerks.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 6, 1935.*

DR. J. S. DEJARNETTE, *Superintendent,*
Western State Hospital,
Staunton, Virginia.

MY DEAR DR. DEJARNETTE:

I have your letter of December 5, in which you ask several questions.

You first desire to know whether the Federal documentary stamp tax should be imposed on a deed conveying real estate to the Western State Hospital.

The Western State Hospital is an institution wholly owned by the State and operated in the exercise of a governmental function. Article 94 of Regulations 71, promulgated by the U. S. Treasury Department, provides that deeds conveying to a State real estate purchased by it are not subject to tax. I am, therefore, of opinion that it is not necessary to affix Federal documentary stamps to the deed you describe.

You next inquire if a deed of trust given to secure the balance due on account of real estate sold by the Western State Hospital is subject to the State recordation tax.

Inasmuch as the State recordation tax is a revenue measure imposed for State purposes, I am of opinion that this deed of trust is not subject to the recordation tax. If the tax were paid, it would simply result in the State paying taxes to itself.

You then ask if the clerk's fee for the recordation of the deed of trust should be paid.

I am of opinion that this fee should be paid since it is the compensation of the clerk for services actually rendered.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Intangible personalty taxable by State only.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 18, 1935.*

HON. W. A. SEMONES,
Town Treasurer,
Hillsville, Virginia.

MY DEAR MR. SEMONES:

I am in receipt of your letter of November 16, inquiring if the Town of Hillsville has a right to tax bonds and notes and other evidence of debt and money within the city limits of the town.

Section 8 of the Tax Code segregates intangible personal property for State taxation only. Therefore, I am of opinion that the Town of Hillsville has no power to levy a tax on the intangible personal property mentioned by you.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Liens—License tax as creating lien.

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

HONORABLE SAMUEL R. BUXTON,
City Attorney,
Newport News, Virginia.

MY DEAR MR. BUXTON:

I have your letter of September 30 addressed to Mr. C. H. Morrissett, which was referred to this office for reply. In this you state:

“Levy was made by the City Treasurer upon the personal property of a corporation for unpaid license tax. The corporation then makes an assignment to a trustee for the benefit of its creditors.

“Will you kindly advise whether under the general law and especially under section 429 of the Tax Code the city is entitled to priority as against liens of creditors existing prior to the time of the levy?”

As you know, taxes are not a lien upon any particular property unless made so by statute. So far as I know, license taxes are not made a lien upon property by statute.

The effect of section 429 of the Tax Code, as amended, is to put State and local taxes ahead of general creditors only in a general distribution of the assets of a person or corporation.

In view of the above, I am of opinion that under general law a city is not entitled to priority for license taxes as against liens of creditors existing prior to the time of the levy for such taxes.

Yours very truly,

W. W. MARTIN,
Assistant Attorney General.

TAXATION—Light and power companies—Licensing of to do mercantile business.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 8, 1936.*

HONORABLE CHARLES F. HARRISON,
*Attorney for the Commonwealth,
Leesburg, Virginia.*

DEAR MR. HARRISON:

I am in receipt of your letter of February 6, in which you ask this question:

"Is the Virginia Public Service Company, which is engaged in supplying current in Leesburg and other places and sells electric fixtures and other articles of merchandise in their office in Leesburg by retail, amenable to the payment of a retail merchant's license both to Leesburg and the State of Virginia?"

Section 229 of the Tax Code of Virginia expressly makes the franchise tax on water or heat, light and power companies based upon gross receipts in lieu of the annual State merchant's license tax required under section 188 of the Tax Code. I am, therefore, of opinion, that the Virginia Public Service Company is not subject to the State merchant's license tax on account of its mercantile business.

There is nothing in section 229 which exempts a power company from a local merchant's license tax on account of its mercantile business. In fact, the section especially provides that a city or town may impose a license tax upon such a corporation for the privilege of doing business therein, based upon its gross receipts, and states that "from the amount of any such license tax there shall be deducted any sum or sums paid by such corporation to such city or town as a merchant's license tax". I am of opinion that the section contemplates that a city or town may impose a license tax on the mercantile business of a power company.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Pro rata reduction of assessment for year during which land is conveyed to State instrumentality.

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

DR. SIDNEY B. HALL,
*Superintendent of Public Instruction,
Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of December 23, enclosing one from Mr. J. Gordon Bohannon, Acting City Attorney for the City of Petersburg. The question on which you desire an opinion is brought out in the first paragraph of Mr. Bohannon's letter, reading as follows:

"You will recall that the Virginia State College for Negroes had a deed of trust on the property of T. Frank Smith, No. 214 North Sycamore Street, this City. This property was sold and, while I have not

examined the records, I am informed that the property was purchased by the College and conveyed by deed recorded in October, 1933. The City of Petersburg is claiming that the taxes on this property for the year 1933, which, of course, accrued as of January 1st of that year, should be paid. Now it appears that some question has been raised as to whether these taxes are due, and I am in receipt of a letter from an attorney in the City who was the Trustee under the deed in which he raises some question as to whether the tax should be paid, the tax bill having been referred to him."

It seems from the above that the title to the property was in Mr. Smith as of January 1, 1933, this being the date on which the tax liability accrued. I am of opinion, therefore, that the property was properly assessed for taxation for 1933. However, I call your attention to section 278 of the Tax Code. Inasmuch as the property was acquired by the State through the Virginia State College for Negroes in October, 1933, I am of opinion that this section of the Tax Code is applicable, and that it would be proper to prorate the 1933 tax by reducing it in such proportion as the time it was owned by the College bears to the entire year. For example, if the property was acquired by the College on October 1, I am of the opinion that only three-fourths of the tax is now due and payable.

For 1934 and subsequent years, as long as the property is owned by the Virginia State College for Negroes, I am of opinion that it is not subject to local taxation, being exempt by paragraph (a) of section 435 of the Tax Code of Virginia.

Mr. Bohannon's letter is herewith returned.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Real estate—Effect of statutes releasing penalties and liens.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 20, 1936.*

MR. C. W. EASTMAN, *Clerk,*
Middlesex County Circuit Court,
Saluda, Virginia.

DEAR MR. EASTMAN:

I am in receipt of your letter of June 18, from which for purposes of reply I quote as follows:

"Under Acts of Assembly of 1936, Chapter 55, an Act to authorize Boards of Supervisors to release taxes, where the Board of Supervisors by resolution adopt this act, and a taxpayer appears at the Clerk's Office to pay all of his delinquent land taxes, and upon an examination of the records, the Clerk finds that he is delinquent for land taxes for say, the years 1910 and 1911. Should the Clerk collect these taxes of 1910 and 1911, along with the other delinquent taxes which have accrued since 1916? The Acts of 1934, Chapter 279, provide that the Commonwealth has no longer a lien for delinquent land taxes prior to January 1, 1916. In other words, is the Act of 1936 applicable to these tracts of land which were delinquent prior to 1916, and does the taxpayer have to pay all delinquent land taxes prior to 1916, as well as those since that date?"

First let me call your attention to the fact that chapter 55 of the Acts of 1936 does not give to boards of supervisors the authority to release taxes, but gives to the board authority to release penalties, interest and costs accrued on real estate taxes for the year 1935 and prior years, upon the condition that all taxes for these years be paid.

Chapter 279 of the Acts of 1934 releases the lien upon real estate for taxes and levies payable to the Commonwealth, or its political subdivisions, for the years prior to 1916. However, the Act of 1934 does not release the taxes.

Upon a consideration of these two acts, I am of the opinion that when a person now offers to pay the taxes on a parcel of real estate in accordance with the provisions of chapter 55 of the Acts of 1936, he should pay and the clerk should collect all delinquent taxes on said real estate assessed against the taxpayer. While the lien on the real estate for the taxes has been released, neither of the acts referred to has the effect of releasing the personal liability for the taxes themselves.

If the real estate assessed with taxes prior to the year 1916 has been conveyed to a third party, of course, there is no personal liability on the third party to pay the taxes on such real estate, inasmuch as he was not originally assessed with the taxes, and the lien for the taxes has been released. The personal liability is on the party owning the land at the time the taxes were assessed.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Resale of real estate again listed as delinquent after once having been sold.

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

HONORABLE P. W. ACKISS,
*Attorney for the Commonwealth,
Virginia Beach, Virginia.*

MY DEAR MR. ACKISS:

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

"Mr. Kellam, the Treasurer of Princess Anne county, has recently raised the point that, in accordance with section 387 of the Code of Virginia, he files a list of real estate which is delinquent for the non-payment of taxes, and that, in accordance with section 2460 of the Code of Virginia, it is provided that all of the real estate embraced in said list of delinquent real estate as filed by the Treasurer under section 387 shall be sold.

"Is it your opinion that, regardless of whether or not real estate which has been returned delinquent for the year 1933 has been sold, it should be again sold in accordance with section 2460? It is my contention that, up until section 2460 was amended, only real estate returned delinquent that was not heretofore sold had to be sold in accordance with said section."

When you speak of real estate returned delinquent for the year 1933 I assume that you mean returned delinquent in 1933 for 1932 taxes. This real estate was sold to the Commonwealth before the 1934 amendment to section 2460 of the Code. Under these facts, I agree with your view that this real estate, which has already been sold to the Commonwealth, should not be sold again under the provisions of section 2460, as amended.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation tax on deed from Federal Bank to individual.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

HENRY R. MILLER, JR., *Esquire*,
Department of Taxation,
Richmond, Virginia.

RICHMOND, VA., *March 9, 1936.*

MY DEAR MR. MILLER:

I have your letter of March 6, relative to the claim of The Federal Land Bank of Baltimore for exemption from the State recordation tax imposed upon the recordation of a deed of release from the bank to an individual, such deed of release being given upon the payment in full to the bank of a mortgage held by it.

Manifestly, the person primarily interested in the recordation of a deed of release is the person to whom the deed is delivered and not the maker of the deed, and, therefore, the person to whom the deed is delivered would ordinarily present the deed for recordation and pay the tax. I, therefore, do not think that the fact that the deed is offered for recordation by a tax-exempt corporation, rather than by the person primarily interested in the recordation, should serve to deprive the State of the tax.

I note that the attorney for The Federal Land Bank argues that the bank is required to "release of record its mortgage when it is paid in full", this requirement being said to be contained in section 22 of the Farm Loan Act, which reads in part as follows:

" * * * Whenever any such mortgage is paid in full, said registrar shall cause the same to be cancelled and delivered to the proper land bank, which shall promptly satisfy and discharge the lien of record and transmit such cancelled mortgage to the original maker thereof, or his heirs, administrators, executors, or assigns. (July 17, 1916, c. 245, section 22, 39 Stat. 378)."

I agree with you that there is doubt that the phrase "of record" in the statute modifies the words "satisfy and discharge" rather than the words "the lien". In any event, a marginal release is as valid a release "of record" as the recordation of a deed of release.

Virginia has made, by section 6456 of the Code, special provision for a marginal release of a mortgage which release will not be subject to any recordation tax at all. This method of releasing "of record" the mortgage is available to The Federal Land Bank and would satisfy the requirements of section 22 of the Farm Loan Act, even as interpreted by the attorney for the bank.

When this is taken into consideration, together with what I have written above, I am of opinion that the recordation tax should be collected upon the recordation of a deed of release from The Federal Land Bank to an individual, irrespective of who offers the deed for recordation.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation tax—Exemption of deeds to United States.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *June 10, 1936.*

MR. C. H. CRAFT, *Deputy Clerk*,
Gate City, Virginia.

MY DEAR MR. CRAFT:

I am in receipt of your letter of June 5, in which you ask whether the

State recordation tax should be imposed for the recordation of deeds conveying land in your county to the United States government.

Assuming that the land is acquired by the government for public purposes, I am of opinion that the recordation tax should not be assessed. See note to section 122 of the Tax Code of Virginia.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Trust estates—Assessment against beneficiary of life estate.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., March 4, 1936.

MR. C. G. BURTON, *Chairman,*
Board of Supervisors of Powhatan County,
Beltona, Virginia.

MY DEAR MR. BURTON:

I have your letter of March 3, in which you inquire, first:

"If a man dies and leaves his estate in trust, for the benefit of his wife, i. e., all of the income from same during her life, and at her death to be divided among certain heirs, does this make the property immune from taxes during her life, and uncollectable at her death during the time which she lived? There are quite a number of large tracts of land in this county left in this manner, from which we appear to be unable to collect any taxes at all. The most of it is timbered land. Very little personal property, and very little land suitable for tenants."

Taxes on real estate are assessed against the life tenant while the life tenant is living. It is well settled that the interest of remaindermen in real estate cannot be sold for taxes on such real estate assessed against the life tenant. See *Commonwealth v. Wilson*, 141 Va. 116, and section 2488 of the Code. Of course, real estate taxes assessed against a life tenant may be collected out of any property that the life tenant has, or his interest in the real estate may be sold.

You also ask whether a member of the board of supervisors may be interested in sales or contracts to supply the county with "such things as they may need".

I am of opinion that such contracts are prohibited by section 2707 of the Code.

You further desire to know if a member of the school board may be interested in contracts to supply the schools with "such things as they may need".

I am of opinion that such contracts are prohibited by section 708 of the Code, except by permission of the State Board of Education evidenced by resolution spread on the minutes of said board, to which section I call your attention. There are certain other exceptions in the section, and I suggest that you examine it for them.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Taxability of bonds of State educational institution in hands of private persons.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 27, 1936.*

DR. SIDNEY B. HALL,
*Superintendent of Public Instruction,
State Office Building,
Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of February 11, in which you ask whether bonds issued by certain named State educational institutions under the provisions of chapter 49 of the Acts of the Extra Session of 1933 (Acts 1933, page 83) are subject to the State property tax imposed by section 69 of the Tax Code.

I assume, of course, that you have in mind the tax liability of these bonds where they are owned by an individual or corporation whose property is otherwise subject to taxation by the State.

The act itself provides that bonds of these institutions issued thereunder shall in no way be considered an indebtedness or obligation of the State. Therefore, these bonds can certainly be said not to have the exemption provided by the second clause of paragraph (a) of section 183 of the Constitution.

The act further provides that these bonds shall be exempt from taxation "so far as may be permitted under the Constitution of Virginia". I have carefully examined the Constitution, especially section 183, and can find no provision therein which in my opinion exempts these bonds from taxation. It has been suggested that paragraph (d) of section 183 might afford an exemption, but this paragraph is in terms limited to property "owned" by incorporated institutions of learning not conducted for profit.

While it may be true that tax exemptions which favor public bodies are to be liberally construed, yet the exemption given is limited, as above stated, to property "owned" by the educational institution and, however liberal a construction is placed on this provision, I do not see how it could be interpreted to mean a debt owed by the educational institution to a private individual or corporation.

I may say that I have conferred with Honorable C. H. Morrissett, State Tax Commissioner, and he concurs with the views I am expressing herein; in fact, Mr. Morrissett advises me that he has already so ruled.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Taxability of business of photography where plates are developed in another state.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 23, 1936.*

HONORABLE C. H. MORRISSETT,
*State Tax Commissioner,
Richmond, Virginia.*

DEAR MR. MORRISSETT:

I am in receipt of a copy of your letter of March 19 to Honorable Jno. M. Hart, Commissioner of the Revenue for the City of Roanoke. You also

enclose Judge Hart's letter to you of March 18, in which he asks your opinion as to whether a State license as a photographer is assessable under these facts:

"Several men have come here from Washington, D. C., and are canvassing the city for the taking of photographs. When they obtain a written order the person desiring his photograph pays 50 cents down and promises to pay 50 cents when the photo is delivered. He goes to some designated place, where these canvassers have set up their instruments and plate or film is made. This is sent to Washington to be developed."

Judge Hart has also requested that you obtain an opinion from this office.

It appears that the persons engaged in this business claim that to impose a license on them would constitute a violation of the Commerce Clause of the United States Constitution.

You have expressed the opinion that "the taking of the photographs in the city is not under the protection of the Interstate Commerce Clause of the United States Constitution" and that these men are subject to the State photographers' license tax.

You have also informed me that the State Tax Department for years has construed section 193 of the Tax Code as imposing a State photographers' license under similar circumstances.

I concur in your view.

Section 193 of the Tax Code does not define a photographer, but Webster's New International Dictionary (Second Edition, 1935, Unabridged) says that a photographer is:

"One who practices or is skilled in photography * * * one who makes a business of taking photographs."

The same authority defines photography as:

"The act or process of producing images on sensitized surfaces by the action of light * * *."

The men mentioned by Judge Hart are, in my opinion, in the light of the above, clearly engaged in the business of photography as a local business in Roanoke, and are, therefore, photographers in Roanoke. I do not see that the fact that the plates produced by acting as a photographer in Virginia are later sent to Washington to be developed and printed in any way prevents Virginia from imposing a license tax for the privilege of engaging in a purely local business.

I observe in Judge Hart's letter to you it is stated that a court in Roanoke has held that a person engaged in a similar business is not subject to a local license under a local ordinance.

For obvious reasons, the opinion expressed herein as to the State license is not intended in any way to pass upon the merits of that decision. I presume that, if the local authorities are of opinion that the decision is erroneous, appropriate steps will be taken to have it reviewed.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Treasurers—Duty to collect delinquent taxes.

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

HONORABLE W. EARLE CRANK,
*Attorney for the Commonwealth,
Louisa, Virginia.*

DEAR MR. CRANK:

I am in receipt of your letter of June 29, in which you ask the following question:

"What is the County Treasurer required to do under the provisions of section 372 of the Tax Code with reference to the taxes which are not paid on or before December 5th of each year; that is to say, is he only required to collect such tax bills as people might come to the office and pay to him or is he required to make an effort to collect them, and if so, should he or his deputy call on each taxpayer in person in an effort to collect the taxes?"

Your question seems to be specifically answered by the last paragraph of section 372 of the Tax Code which reads as follows:

"It shall be the duty of the treasurer, after the fifth day of December, to call upon each person chargeable with taxes and levies who has not paid the same prior to that time, or upon the agent, if any, of such person resident within the county or corporation for payment thereof; and upon failure or refusal of such person or agent to pay the same he shall proceed to collect them by distress or otherwise. Should it come to the knowledge of the treasurer that any such person or persons owing such taxes or levies is moving or contemplates moving from the county or corporation prior to the fifth day of December, he shall have power to collect the same by distress or otherwise at any time after such said bills shall have come into his hands; but it shall not be necessary for the treasurer of the county of Henrico to designate or to go to any place other than the county courthouse in the city of Richmond in order to receive the taxes and levies to be paid to such treasurer."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TRADE-MARKS—Registration—Similarity of products—Family name.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 16, 1935.*

HONORABLE PETER SAUNDERS,

*Secretary of the Commonwealth,
Richmond, Virginia.*

In re: Application of the Hershey Creamery Company of Hershey, Pennsylvania, for registration in the office of the Secretary of the Commonwealth of the label and trade-mark of said company.

DEAR SIR:

On April 22, 1935, the Hershey Creamery Company filed its written application for registration of its trade-mark or label, in which the class of article designated was confined to ice cream. Being in doubt as to the propriety of accepting said registration, you have referred the matter to this office for an opinion on the question. The doubt as to the propriety of such registration arises from the fact that on the 6th day of March, 1935, there was filed and registered with you an application of the Hershey Chocolate Corporation, of Hershey, Pennsylvania, to which was attached copies of the trade-marks and labels used on the packages in which Hershey Milk Chocolate and Hershey's Almond Milk Chocolate are customarily marketed and sold. On the reverse side of the Hershey Milk Chocolate package appears a trade-mark of Hershey's Breakfast Cocoa. This last mentioned application designates the class of articles covered by the registration as follows: "Food Products."

Subsequently, having been notified of the doubt entertained by the Secretary of the Commonwealth of the propriety of permitting the registration of the Hershey Creamery Company, its application was amended so as to include the following articles: "Ice Cream, Frozen Confections (consisting of ice cream with a coating of chocolate mounted on a wooden stick; frozen

fruit juices with or without a coating of chocolate) Milk, and Butter." Attached to this application are copies of the Trade-marks and labels used on containers in which ice cream and milk are marketed by the Hershey Creamery Company.

The appearance of the packages attached to the application of the Hershey Creamery Company is entirely different in color, size, and shape from those attached to the application of the Hershey Chocolate Corporation; the only similarity being that each contains the word "Hershey's". The Hershey Chocolate Corporation's package is dark brown in color, while the Hershey Creamery Company's packages are bright, consisting of a mixture of colors of green, red, yellow, orange, dark blue, light blue, and various streaks of color of a light hue. The type used in the printing of the word "Hershey's" on the packages used by both companies is in plain type and each closely resembles the other in style and size. It appears from statements of the respective counsel that the Hershey Chocolate Corporation began its business in the year 1903, while the Hershey Creamery Company is an out-growth of a business established in 1907 and reorganized in 1927.

On June 5, 1935, I wrote to the Hershey Chocolate Corporation, of Hershey, Pennsylvania, advising it of the aforesaid application of the Hershey Creamery Company and inquired if it desired to file objection thereto. Shortly thereafter said Corporation, by its attorney, presented to this office a formal written objection to the registration of the Hershey Creamery Company's trade-mark and label. Counsel for both the applicant and the objector have filed briefs in support of their respective positions.

The ground of the objection to the registration of the trade-mark and label is that the applicant's trade-mark and label offered for registration would probably be mistaken for the trade-mark and label of the objector. Section 3 of the Act of April 30, 1903, dealing with such registrations, provides that the secretary of the Commonwealth shall not record any label or trade-mark that would probably be mistaken for any label or trade-mark previously filed by any other person or corporation.

While the application of the objector, the Hershey Chocolate Corporation, undertakes to embrace within the scope of its registration *all food products*, it is my opinion that the effect of the registration is limited to those articles specifically mentioned on the labels attached to the application, namely, milk chocolate, almond milk chocolate, and cocoa. The statute provides that the applicant shall specify the class of merchandise and descriptions of the goods to which it has been, or is intended to be appropriated. In my opinion, the use of the words "food products" is not sufficiently specific and is lacking in that detail necessary to make it apply to any articles other than those specifically embraced within the application as a whole, treating the labels or wrappers as a part thereof.

It appears from the briefs submitted to this office by the respective parties that both the business of the applicant and that of the objector were founded by persons with the family name of "Hershey". It is well settled that a personal name cannot be exclusively appropriated by one person as against others of the same name who have a right to use it. *Howe Scale Company vs. Wycokoff*, 198 U. S. 118.

It is my opinion, therefore, that the test of the propriety of registering the application of the Hershey Creamery Company is, in its final analysis, dependent upon whether or not the articles sought to be embraced within its application, if marketed under the name "Hershey's", and in the respective packages and labels attached to the application, would probably be mistaken as a product of the Hershey Chocolate Corporation. The application in dispute embraces frozen confections *with a chocolate covering*, while the Hershey Chocolate Corporation's registration covers chocolate confections not of the frozen variety. It is my opinion that the name "Hershey's" applied to the chocolate confections described in the application of the Hershey Creamery Company would probably be mistaken as a product of the Hershey Chocolate Corporation, and that in its present form the application should not be registered.

I am further of the opinion, however, that, if the application of the Hershey Creamery Company is amended by eliminating therefrom all

chocolate confections, and confining it to milk, butter, ice cream, and frozen confections not covered with a chocolate coating, there will not be a sufficient probability of confusing the two companies' products to justify a rejection of the application, since this will restrict the effect of the registration to articles of an entirely separate and distinct nature. This conclusion is strengthened by the fact that in each of these companies their founders have the same family name, and each is entitled to the use of the word "Hershey's" within proper limitations.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TREASURERS—County—Authority of deputy to sign checks.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 28, 1935.*

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

DEAR MR. DOWNS:

I have before me your letter of December 23, requesting my opinion upon whether the deputy of a county treasurer in Virginia is authorized to sign checks on the county's bank account. I presume you mean by the foregoing, whether or not his signature alone is sufficient to authorize the bank to pay a check drawn and so signed.

Section 350 of the Tax Code requires a county treasurer to deposit, in banks authorized under the provisions of said section, all money received by him for the account of either the Commonwealth or his county. Subsection (j) of said section provides as follows:

"Money deposited under the provisions of this section shall be disbursed only upon checks signed by the county treasurer * * * ."

I know of no other provision of the law in conflict with this, and it would seem clear that a bank is authorized to pay a check drawn on county funds deposited pursuant to section 350 of the Tax Code only when such checks are signed by the treasurer.

Subsection (j) provides that the board of supervisors may require that the checks be countersigned, and it may appoint some person for that purpose. It is my opinion that the board could designate a deputy treasurer to countersign checks along with the treasurer, if it should so desire.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TREASURERS—County—Authority to deduct from warrants taxes due from payee.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 21, 1936.*

HONORABLE C. V. SHOEMAKER, *Superintendent,*
Shenandoah County Public Schools,
Woodstock, Virginia.

DEAR MR. SHOEMAKER:

Replying to your letter of February 20, in which you inquire as to the

authority of a county treasurer to deduct from warrants drawn by the school board upon the treasurer any taxes due or past due to the county from the person in whose favor the warrant is drawn, you are referred to section 356 of the Tax Code. This section, referring to the county treasurer, contains the following provision:

“ * * * He shall receive in payment of the county levy any county warrant drawn in favor of any taxpayer, whether such warrant has been entered in the treasurer's book or not, but if the warrant has been transferred, it shall be subject to any county levy owing by the taxpayer in whose favor the same was issued. * * * ”

I have just had a talk with Mr. Downs, the State Auditor of Public Accounts, and he tells me that it is customary in a large number of the counties in the State to follow the practice of deducting such taxes.

In view of this construction which has been placed upon the language by county treasurers generally, I am of opinion that such a construction is proper and that the county treasurer may follow the instructions of the Auditor as indicated in your letter. I believe the taxes referred to, however, are confined to such taxes as come within the terms “county levy”. This would not include poll taxes, but would include county taxes on tangible personal property and on real estate.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TREASURERS—County—Duty as to delinquent tax list—Remedy.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 16, 1935.*

HONORABLE W. EARLE CRANK,
Attorney for the Commonwealth,
Louisa, Virginia.

DEAR MR. CRANK:

You inquire as to the remedy for compelling a county treasurer to file the list required by section 394 of the Tax Code.

It is my opinion that the most appropriate remedy in a case of this kind is by a writ of mandamus to compel the treasurer to perform the duties imposed upon him by that section.

You also request my opinion as to the date a county treasurer is required to render to the board of supervisors a list of delinquent taxes for the year 1934.

Under the provisions of sections 387, 388 and 389 of the Tax Code, it is my opinion that the list to which you refer should be submitted at the first meeting of the board of supervisors after July 1, 1935.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TREASURERS—Right of county treasurer, who represents surety company, to collect commission on his own bond.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 9, 1935.*

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

DEAR MR. DOWNS:

I am in receipt of your letter of October 11, in which you ask whether a county treasurer who represents a bonding company should be allowed to receive a commission on the official bond given by such treasurer.

The treasurer's bond is to be approved by the judge, court or clerk before whom he qualifies and the premium thereon is to be paid in the proportion of one-third by the State and the remaining two-thirds by the county.

I have been unable to find any statute which in terms prohibits the treasurer from receiving this commission. However, the bond of the treasurer of a county handling many thousands of dollars of State and county funds is a matter of vital importance, and, therefore, I am constrained to say that, in my opinion, it would be inimical to the interests of the county and State, which pay the premium, for the treasurer to have a personal interest of this nature in the surety on his bond.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Jurisdiction—Issuance of warrants.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 23, 1936.*

MR. D. FRANK WHITE,
Justice of the Peace,
Parksley, Virginia.

DEAR MR. WHITE:

I am in receipt of your letter of April 22, in which you ask the following questions:

"Will you please advise me as to whether the trial justice of this county, under the Trial Justice Act and the amendments thereto, has the legal right to issue warrants of any kind, when they are not duly elected or appointed justices of the peace?"

I am of opinion that trial justices have the power to issue warrants, this authority being specifically given them by the fourth paragraph of section 4988g of the Code of Virginia (1934 Supplement to Michie's Code of 1930) in the following words:

"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, to be returnable before him, as is now or may hereafter be vested in civil and police justices of cities, as prescribed by section thirty-one hundred and two of the Code of Virginia within the territory for which such trial justice is appointed; * * *."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Jurisdiction—Attachments of real property.

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

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

MY DEAR MR. WALTON:

I have your letter of July 19, in which you state the following case:

"I have pending before me three attachments against real estate owned by a non-resident, the amount involved in each being not in excess of \$1,000.00.

"In your opinions relating to Trial Justices and Justices of the Peace, which were published several months ago, questions 25 and 26 seem to relate to this subject and determine that the trial justice has the right to try and decide attachment cases where amount of plaintiff's claim is not in excess of \$1,000.00. Under the provisions of the Virginia Code there seems to be no distinction in attachments against real and personal property as to the jurisdictional amount of the trial justice. Neither do the sections of the Code relating to attachments seem to make any distinction as to attachments against real and personal property except that section 6405 provides that the personal property shall be first sold.

"In the several attachment cases pending before me I have entered judgment in rem against the real estate. Does the jurisdiction of the trial justice in these matters authorize him to proceed under section 6405 and order the sale of the real estate? If this be true, as the trial justice court is not a court of record and only the papers in civil suits are filed in the clerk's office, would there be adequate record of the same in the clerk's office?"

Section 3102 of the Code which is incorporated in the Trial Justice Act by section 4988g of the Code, provides that the proceeding in attachment cases shall conform to the provisions of chapter 269 of the Code.

I call your attention to section 6415 in chapter 269, which provides that, if an attachment be levied on real estate, "the justice shall take no further cognizance of it, but it shall be removed by him, together with all papers and proceedings in the case, into any court to which an attachment issued by a justice for a claim exceeding twenty dollars (exclusive of interest) might have been returnable, to be further proceeded with in said court as if it had been originally cognizable therein".

If you substitute in this section 6415 the present jurisdictional amount of \$1,000 instead of \$20, it seems to me that your question is answered by this section.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Jurisdiction in cases of trespass by animals.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 16, 1935.*

HONORABLE EDWIN P. COX, *Judge,*
Circuit Court of Nottoway County,
Nottoway, Virginia.

DEAR JUDGE COX:

I am in receipt of your letter of July 15, in which you inquire whether

trial justices or justices of the peace have jurisdiction in cases of damages for trespass by animals provided in section 3541 of the Code, as amended by Acts 1934, page 22. The last sentence of this section reads as follows:

"And it shall be the duty of such owner or tenant of said lands so trespassed upon, within three days after the taking up and impounding said animal or animals, unless the damages be otherwise settled, to apply to a justice of the peace of the district in which said land is situated for a warrant for the amount of damages so claimed by him, and said justice shall issue the same, to be made returnable at as early date, not less than three days, as shall be deemed best for him; and upon the hearing of the case shall give such judgment as is deemed just and right."

It is clear that the section contemplates that the warrant shall be issued and the case tried in the county where the land is situated. While the section does not state where and on whom the warrant should be served, it appears to me that the only reasonable construction to be placed on the statute is that it contemplates that the warrant may be served on the owner of the trespassing animal, even though such owner be in another county. This certainly carries out the real intent of the statute and, of course, such intent should be reached if possible.

Section 4988 of the Code provides that a trial justice shall have jurisdiction in all civil matters now cognizable by a justice of the peace, but it further provides that a justice of the peace may still issue warrants in civil and criminal cases under general law.

While section 3541 is not as specific as it might have been, my conclusion is that a warrant may be issued by the justice of the peace of the district in the county in which the land is situated, and that it may be served on the owner of the trespassing animal, even though such owner lives in another county.

In view, however, of section 4988, the warrant should be made returnable before the trial justice of the county in which the land is situated.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**TRIAL JUSTICES—Juvenile and Domestic Relations cases—Filing of records.
Fees and Costs—Fee of clerk where costs only are assessed.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 4, 1936.

HONORABLE C. R. WARREN,
Trial Justice,
Chatham, Virginia.

MY DEAR MR. WARREN:

I am in receipt of your letter of May 27, in which you ask first:

"Am I to return papers in juvenile and domestic relations cases to the clerk's office? I am acquainted with the statute as to the suppression of these cases as much as possible, and since these cases become a public record when they go to the clerk's office, I am uncertain about it."

Section 1953g of the Code provides that the records of the juvenile and domestic relations court shall be under the control of the justice and shall not be removed or examined by any person without his consent, except by persons authorized by law to make such examinations.

The trial justice act of 1934 provides in section 4988n that the trial justice shall be the judge of the juvenile and domestic relations court in each county

and city in his territory. In other words, while the trial justice acts as judge of the juvenile and domestic relations court, it seems to me that the statutes contemplate that he is so acting in a capacity separate from that of the office of trial justice. I, therefore, do not think that section 4988k, dealing with the disposition of papers connected with the proceeding before the trial justice, supersedes the provisions of section 1953g, to which I have referred. It follows then that, in my opinion, you are not required to return papers in juvenile and domestic relations cases to the clerk's office except where there may be an appeal.

Your next question is:

"There are frequently cases in which there is no fine assessed, just the costs. This frequently happens in my juvenile and domestic relations court in which I use the probation system when possible, but there are other instances in which there is only costs taxed. In these cases please inform me how much costs am I to collect for the clerk. If I understand the law, the clerk is allowed \$1.00 for paying fine to State and .25 for filing warrant. Is this correct, and would I be right in collecting only .25 for the clerk in cases where there is no fine?"

I am of opinion that in cases where no fine is imposed it is only necessary that you tax for the clerk 25 cents fee provided in section 2552 of the Code. The clerk's fee of \$1 specified in section 2566 of the Code is only applicable where fines are imposed.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Power to summon witnesses from other counties.

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

HONORABLE JAMES M. SETTLE, *Clerk,*
Washington, Virginia.

MY DEAR MR. SETTLE:

Replying to your letter of November 27, asking if trial justices have jurisdiction in summoning witnesses before their courts from any counties in the Commonwealth in both civil and criminal proceedings, I beg to advise that I am of opinion that they have such power. See sections 3102, 3105, 4988g and 6021 of the Code of Virginia.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Reports as to fees.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 4, 1936.

MR. D. W. McNEIL,
Trial Justice of Rockbridge County,
Lexington, Virginia.

DEAR MR. McNEIL:

I have your letter of January 1, asking if trial justices as at present constituted are required to make the report provided for in section 3516 of

the Code. I presume you refer to the report prescribed in the second numbered paragraph of this section.

I am of opinion that trial justices functioning under the new law are not required to make this report, inasmuch as these officers are paid salaries and are not compensated by fees in any way. This section seems to relate primarily to officers whose compensation is in the form of fees and commissions:

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Reports—Special justice for South Norfolk.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 16, 1936.*

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

DEAR MR. DOWNS:

I am in receipt of your letter of March 13, in which you inquire if the trial justice for the city of South Norfolk should make a monthly report to the clerk of the circuit court of Norfolk county, and also whether those cases coming before the trial justice of that city which are required to be recorded in a court of record should be recorded in the circuit court of Norfolk county.

The trial justice of South Norfolk is provided for by section 14 of the charter of that city, as amended in 1934. Acts 1934, page 148. The provisions in this section relating to the jurisdiction and duties of the trial justice are rather incomplete, but it is provided that he shall exercise all powers and authority of a justice of the peace of the State of Virginia in civil and criminal matters within the corporate limits of South Norfolk. The effect of the section seems to be to create a special justice of the peace for the city of South Norfolk and designate him as a trial justice.

I am, therefore, of opinion that it is reasonable to construe the section so as to require this trial justice to make the reports and to file the papers that were formerly required of justices of the peace under general law. See sections 2550, 6024 and 6030 of the Code. As stated, this special charter provision is not specific as to these matters, but I am of opinion that the above is a reasonable construction to place upon it.

As you know, the general Trial Justice Act was amended in material respects by the last session of the General Assembly, but I have not had an opportunity to examine the act as it finally passed and cannot say now whether there is anything contained therein which would affect the situation in South Norfolk.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

UNIFORM SMALL LOAN LAW—Precedence of over local ordinances.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 23, 1935.*

HONORABLE GEORGE E. BENDALL,
Attorney for the Commonwealth,
Danville, Virginia.

MY DEAR MR. BENDALL:

I have your letter of August 17, in which you state that you have a client

who anticipates becoming engaged in the money-lending business and not operating as an industrial bank or under the uniform small loan act.

You call my attention to a tax ordinance of the city of Danville, and ask whether your client could operate under this tax ordinance by engaging in the money-lending business and charging ten per cent per month on loans.

I agree with you that this tax ordinance does not authorize your client to engage in the business you describe, for the reason that the ordinance is superseded by the State uniform small loan law and particularly the first section thereof. See Code 1930, section 4168(38).

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

V. P. I.—Power to participate in Federal game conservation program.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 6, 1936.*

HONORABLE J. H. BRADFORD, *Director,*
Division of the Budget,
Richmond, Virginia.

DEAR MR. BRADFORD:

In an interview last Friday, you referred to this office a letter from Dr. Julian A. Burruss, President of the Virginia Polytechnic Institute, dated December 28, in which Dr. Burruss stated that his institution wishes to participate in a game and wild life conservation project being carried on by the United States Biological Survey. The purpose of this project is stated to be "to instruct them (farmers) as to how they may make the development and conservation of wild life an economic asset on their farms". Dr. Burruss further states that the Virginia Polytechnic Institute, including the college division, agricultural experiment station, and agricultural extension division, will be required to furnish "staff, quarters, supplies, publication channels, stenographic help, and other facilities and help as may be agreed upon" to the extent of at least \$6,000 annually. He adds that the requirements thus placed on the various divisions of his institution can be met out of appropriations as budgeted for the current fiscal year. You request the opinion of this office as to the propriety of such a use of the appropriations in question.

Section 1 of chapter 353, Acts 1914, provides that monies appropriated from the general fund for application to county demonstration work shall be used only for the purposes named in that chapter. Section 2 of the chapter provides that such funds may be applied to the expenses of persons engaged in county demonstration work for the purpose of instructing farmers in "everything for the advancement of the agricultural interests of the State".

Under chapter 226, Acts of 1906, the Virginia State agricultural experiment station is authorized to conduct all such research or experiments as bear directly on the agricultural industry of the State.

Section 1588 of Acts 1902-3-4, p. 526, provides that the curriculum of the institute shall embrace such branches of learning "as relate to agricultural and mechanical arts".

It is the opinion of this office that, in view of the expressed purpose of this project—i. e., to instruct farmers as to making the conservation of wild life an economic asset to their farms—the contribution of the services, etc., as proposed will involve no unauthorized application of funds appropriated to the three named branches of the institute.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

WILLS—Construction—Restriction against sale of real estate to other than white persons as applied to sales to corporations.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 6, 1935.*

MR. S. T. GODBEY,
*Division Superintendent of Schools,
Covington, Virginia.*

MY DEAR MR. GODBEY:

I am in receipt of your letter of December 4, in which you state in part:

"The Alleghany County School Board is trying to purchase a parcel of land adjoining the town of Covington for the purpose of erecting a white graded school building. It so happens that this tract of land is a portion of the M. M. McAlister estate with all titles clear with full directions for its disposal contained in the will of Mr. McAlister. One provision of his will contains the clause that this land cannot be sold to anyone except members of the white race for a period of fifty years."

You ask my opinion as to whether this restriction would affect the validity of a title which the school board might acquire.

The clause of Mr. McAlister's will which you quote is somewhat ambiguous, but I should say that it was his intention that the land should not get into the hands of colored people for a period of fifty years. If the restriction were literally construed, it would mean that the land could not be conveyed to a corporation, whatever its nature, not even to a church.

When we take into consideration that wills should be construed to carry out the real intent of the testator, and the further rule that restrictions on alienation should be strictly construed, I feel reasonably safe in saying that I am of opinion that the clause to which you refer does not prohibit the conveyance of the real estate to the Alleghany County School Board for the purpose of erecting thereon a school building for the use of white pupils.

I note that Mr. C. C. Collins, Attorney for the Commonwealth, agrees with this view.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

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